

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1986

Volume I

*Summary records
of the meetings
of the thirty-eighth session
5 May-11 July 1986*

UNITED NATIONS



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NOTE

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

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

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

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

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

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This volume contains the summary records of the meetings of the thirty-eighth session of the Commission (A/CN.4/SR.1940-A/CN.4/SR.1989), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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OFFICERS

Chairman: Mr. Doudou THIAM
First Vice-Chairman: Mr. Julio BARBOZA
Second Vice-Chairman: Mr. Alexander YANKOV
Chairman of the Drafting Committee: Mr. Willem RIPHAGEN
Rapporteur: Mr. Motoo OGISO

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

AGENDA

The Commission adopted the following agenda at its 1941st meeting, held on 6 May 1986:

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

ABBREVIATIONS

ASEAN	Association of South-East Asian Nations
EEC	European Economic Community
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ITU	International Telecommunication Union
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
UNDP	United Nations Development Programme
UNIDROIT	International Institute for the Unification of Private Law
World Bank	International Bank for Reconstruction and Development

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I.C.J. Reports ICJ, *Reports of Judgments, Advisory Opinions and Orders*

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

MULTILATERAL CONVENTIONS

cited in the present volume

Source

HUMAN RIGHTS

- Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948) United Nations, *Treaty Series*, vol. 78, p. 277.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968) *Ibid.*, vol. 754, p. 73.
- International Convention on the Suppression and Punishment of the Crime of *Apartheid* (New York, 30 November 1973) *Ibid.*, vol. 1015, p. 243.

PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS

- Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947) *Ibid.*, vol. 33, p. 261.
- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) *Ibid.*, vol. 500, p. 95.
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) *Ibid.*, vol. 596, p. 261.
- Convention on Special Missions (New York, 8 December 1969) United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973) United Nations, *Treaty Series*, vol. 1035, p. 167.
- Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

LAW OF TREATIES

- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.
- Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978) United Nations, *Juridical Yearbook 1978* (Sales No. E.80.V.1), p. 106.

LAW OF THE SEA

- Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 516, p. 205.
- Convention on the High Seas (Geneva, 29 April 1958) *Ibid.*, vol. 450, p. 11.

Source

- Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958) *Ibid.*, vol. 559, p. 285.
- Convention on the Continental Shelf (Geneva, 29 April 1958) *Ibid.*, vol. 499, p. 311.
- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

CHECK-LIST OF DOCUMENTS OF THE THIRTY-EIGHTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/395	Provisional agenda	Mimeographed. For the agenda as adopted, see p. ix above.
A/CN.4/396 [and Corr.1]	Eighth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	Reproduced in <i>Yearbook ... 1986</i> , vol. II (Part One).
A/CN.4/397 [and Corr.1 and 2] and Add.1 [and Add.1/Corr.1]	Seventh report on State responsibility, by Mr. Willem Riphagen, Special Rapporteur	<i>Idem</i>
A/CN.4/398 [and Corr.1-3]	Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	<i>Idem</i>
A/CN.4/399 and Add.1 and 2	Second report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	<i>Idem</i>
A/CN.4/400	Seventh report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Idem</i>
A/CN.4/401	Third report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	<i>Idem</i>
A/CN.4/402 [and Corr.1, 2 and 4]	Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem</i>
A/CN.4/L.398	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly	Mimeographed.
A/CN.4/L.399 [and Corr.1]	Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee: titles of parts II and III of the draft; articles 2 to 6 and 20 to 28	See summary records of the 1968th meeting, 1969th meeting (paras. 68 <i>et seq.</i>), 1970th and 1971st meetings, and 1972nd meeting (paras. 1-21).
A/CN.4/L.400	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Titles and texts adopted by the Drafting Committee: titles of the four parts of the draft; articles 28 to 33	See summary record of the 1980th meeting, paras. 52 <i>et seq.</i>
[A/CN.4/L.401]		[Not used.]
A/CN.4/L.402	Draft report of the International Law Commission on the work of its thirty-eighth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10)</i> . The final text appears in <i>Yearbook ... 1986</i> , vol. II (Part Two).
A/CN.4/L.403 and Add.1 and 2 [and Add.2/Corr.1]	<i>Idem</i> : chapter II (Jurisdictional immunities of States and their property)	<i>Idem</i>
A/CN.4/L.404 and Add.1	<i>Idem</i> : chapter III (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem</i>
A/CN.4/L.405 and Add.1	<i>Idem</i> : chapter IV (State responsibility)	<i>Idem</i>
A/CN.4/L.406 and Add.1	<i>Idem</i> : chapter V (Draft Code of Offences against the Peace and Security of Mankind)	<i>Idem</i>
A/CN.4/L.407 and Add.1	<i>Idem</i> : chapter VI (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i>
A/CN.4/L.408 and Add.1	<i>Idem</i> : chapter VII (The law of the non-navigational uses of international watercourses)	<i>Idem</i>
A/CN.4/L.409	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem</i>
A/CN.4/SR.1940-A/CN.4/SR.1989	Provisional summary records of the 1940th to 1989th meetings	Mimeographed. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE THIRTY-EIGHTH SESSION

Held at Geneva from 5 May to 11 July 1986

1940th MEETING

Monday, 5 May 1986, at 3.15 p.m.

Outgoing Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclata Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Opening of the session

1. The OUTGOING CHAIRMAN declared open the thirty-eighth session of the International Law Commission.

Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN welcomed the members of the Commission and said that he would briefly review developments since the previous session.

3. As decided by the Commission, he had represented it at the fortieth session of the General Assembly. Item 138 of the agenda, concerning the report of the International Law Commission on the work of its thirty-seventh session, and item 133, concerning the draft Code of Offences against the Peace and Security of Mankind, had been allocated to the Sixth Committee, which had considered them together, although representatives had been free to make separate statements on the draft code of offences.

4. At the invitation of the Chairman of the Sixth Committee, he had, on 28 October 1985, introduced the Commission's report on its thirty-seventh session (A/40/10),¹ including its consideration of the draft code of offences,² and had summarized the main points examined by the Commission under the different items on its agenda, indicating the points that particularly called for comments by representatives of Governments.³ The debate in the Sixth Committee had continued from 28 October to 12 November 1985, and at the invitation

of the Chairman he had made a brief concluding statement.⁴

5. The summary records of the debate in the Sixth Committee, the report of that Committee⁵ and the resolutions adopted by the General Assembly on 11 December 1985 on the two items considered⁶ had been made available to members of the Commission. A topical summary of the Sixth Committee's debate (A/CN.4/L.398) had been prepared by the Secretariat, pursuant to paragraph 9 of General Assembly resolution 40/75, as an aid to the work of the Commission. Those documents fully explained how the Commission's report on its previous session had been received by the General Assembly and what was expected of the Commission at its present session.

6. By and large the Sixth Committee's response to the Commission's work had been positive and appreciative. As to the substantive items on the Commission's agenda, it was expected that the Commission would complete in 1986, that was to say before the expiry of its current members' term of office, its first reading of the drafts on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and on the jurisdictional immunities of States and their property, despite the strong views of some representatives regarding the need for more intensive reflection on the topic of State immunities without any time constraint.

7. On the draft code of offences, despite reservations on the usefulness of consideration of the topic by the Commission at the present time and criticism of certain provisions, the Sixth Committee had approved the Commission's general approach and stressed the need for making further progress quickly. Some concrete suggestions had also been made concerning the content of the introduction to the code and the place of general principles therein, the desirability and scope of a definition of such an offence, and the list of offences to be included.

8. On the topic of State responsibility, the progress made had been appreciated. Some representatives had emphasized the urgency of considering the topic of the law of the non-navigational uses of international water-courses.

9. All those views and concrete suggestions had been comprehensively dealt with in the topical summary (A/CN.4/L.398) and had been noted by the special rapporteurs in their reports to be considered by the Commission at the present session.

⁴ *Ibid.*, 36th meeting, paras. 34-35.

⁵ *Official Records of the General Assembly, Fortieth Session, Annexes*, agenda item 138, document A/40/961.

⁶ Resolution 40/69 on the draft Code of Offences against the Peace and Security of Mankind, and resolution 40/75 on the report of the International Law Commission on the work of its thirty-seventh session.

¹ *Yearbook ... 1985*, vol. II (Part Two).

² See *Yearbook ... 1985*, vol. I, pp. 4 *et seq.*, 1879th to 1889th meetings.

³ See *Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 23rd meeting, paras. 2-57.

10. As to the organizational and procedural aspects of the Commission's work, its approach had been endorsed by the General Assembly, although some concrete suggestions had also been put forward on how the work could be made more effective and realistic. Among other things, the Commission's concern about the effective continuation of the International Law Seminar had been fully shared by the Sixth Committee, and concrete suggestions had been made.

11. Since 1985 had been the fortieth anniversary of the United Nations, some statements had been made calling for increased effectiveness of international law against a background of statistical analysis of acceptance of the conventions adopted since 1945 and acceptance of the compulsory jurisdiction of the ICJ. Those statements were summarized in the topical summary (*ibid.*, paras. 16-20 and 25-28).

12. The general response of the Sixth Committee and the General Assembly to the Commission's work in 1985 had thus been positive. No doubt the Commission would reflect on the concrete suggestions made.

13. With regard to representation at the sessions of regional organizations, and as decided by the Commission, Mr. El Rasheed Mohamed Ahmed had attended the meetings of the Asian-African Legal Consultative Committee held at Arusha from 3 to 10 February 1986; Sir Ian Sinclair had attended the meetings of the European Committee on Legal Co-operation held at Strasbourg from 2 to 6 December 1985; and he himself had attended the meetings of the Inter-American Juridical Committee held at Rio de Janeiro from 12 to 17 January 1986.

14. He had received a letter from the Secretary-General of the Inter-American Juridical Committee informing him that the Committee would be represented at the present session by Mr. Seymour J. Rubin, as an observer. He had also received an invitation from the President of the ICJ to attend the ceremony commemorating the fortieth anniversary of the Court on 29 April 1986, in his capacity as Chairman of the Commission. After consulting the Legal Counsel to the United Nations, he had accepted that invitation and attended the ceremony. In his statement, the President of the ICJ had referred extensively to the cordial relations between the Court and the Commission.

15. Lastly, he wished to draw attention to three other matters. The first was the adoption of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations⁷ by the plenipotentiary conference held at Vienna from 18 February to 21 March 1986; the draft of that Convention had, of course, been prepared by the Commission. The conference had also adopted, among others, two resolutions paying tribute to its Expert Consultant, Mr. Paul Reuter, and to the Commission.⁸

16. The second matter was a communication he had received, as Chairman of the Commission, from Mr. Viacheslav A. Ustinov, Under-Secretary-General for Political and Security Council Affairs, enclosing copies of General Assembly resolutions 40/3 and 40/10 concerning 1986 being declared the International Year of Peace. He had replied on 21 January 1986, saying that

the text of those two resolutions would be circulated to members of the Commission and that the Chairman elected for the present session would keep the Secretary-General informed of the Commission's activities relating to the International Year of Peace. The Commission would no doubt give its urgent attention to that matter during the present session.

17. The third matter was the financial stringency besetting the United Nations and its effect on the duration of the Commission's present session. The time available to the Sixth Committee for consideration of the Commission's report on its thirty-eighth session might also be reduced if the forty-first session of the General Assembly was to be shortened. Members had already received communications on that subject from the Secretary of the Commission and no doubt the Commission would take the matter up when it dealt with the organization of work of the present session.

Organization of work of the session

[Agenda item 1]

18. The OUTGOING CHAIRMAN said that the African members of the Commission would need some time for consultation before proposing a candidate for the office of chairman.

The meeting rose at 3.50 p.m.

1941st MEETING

Tuesday, 6 May 1986, at 10.15 a.m.

Outgoing Chairman: Mr. Satya Pal JAGOTA

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Pirezada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Election of officers

Mr. Thiam was elected Chairman by acclamation.

Mr. Thiam took the Chair.

1. The CHAIRMAN paid tribute to his predecessor and thanked the members of the Commission for the confidence they had placed in him by electing him Chairman.

2. The thirty-eighth session, the last one before the renewal of the membership of the Commission, might well be shortened. The Commission would therefore have to redouble its efforts and make the best possible use of the time available so as to move ahead, as was its

⁷ A/CONF.129/15.

⁸ See the Final Act of the Conference (A/CONF.129/14), annex.

duty, in considering the items on the agenda and, at the same time, take stock of its activities.

Mr. Barboza was elected First Vice-Chairman by acclamation.

Mr. Yankov was elected Second Vice-Chairman by acclamation.

Mr. Riphagen was elected Chairman of the Drafting Committee by acclamation.

Mr. Ogiso was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/395)

3. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/395), on the understanding that such a course would not in any way prejudice the order in which the topics were to be considered or the time to be allocated to them.

The provisional agenda (A/CN.4/395) was adopted.

Organization of work of the session (continued)

[Agenda item 1]

4. The CHAIRMAN suggested that the meeting should be suspended to enable the Enlarged Bureau, consisting of the officers of the Commission, the special rapporteurs and former chairmen of the Commission, to meet and consider the organization of work of the session.

It was so agreed.

The meeting was suspended at 10.55 a.m. and resumed at 12.30 p.m.

5. The CHAIRMAN said the Enlarged Bureau had recommended that the Commission should consider the items on the agenda in the following order:

- | | |
|--|-----------------|
| 1. Jurisdictional immunities of States and their property (item 3)..... | 10 working days |
| 2. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 4)..... | 5 working days |
| 3. State responsibility (item 2)..... | 5 working days |
| 4. Draft Code of Offences against the Peace and Security of Mankind (item 5)..... | 10 working days |

The Commission would then allocate 10 days for the following three topics:

The law of the non-navigational uses of international watercourses (item 6);

International liability for injurious consequences arising out of acts not prohibited by international law (item 7);

Relations between States and international organizations (second part of the topic) (item 8).

6. The Enlarged Bureau had borne in mind that the Commission would, as from Wednesday, 7 May, have 46 working days, which included 5 days for the adoption of the report. The Commission would keep one day in reserve, to be used as appropriate. Naturally, the allocation of working time would be flexible and open to changes as the need arose.

7. Mr. CALERO RODRIGUES said that it seemed excessive to allocate 10 working days to the topic of jurisdictional immunities of States and their property, since most of the work outstanding on the topic was to be done by the Drafting Committee and the Commission itself had only draft articles 25 to 28 left to consider. Similarly, he had doubts as to the justification for allocating five days to the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. On the other hand, more time should be allowed for the consideration of other important topics, in particular the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law.

8. Mr. SUCHARITKUL explained that, in the Enlarged Bureau, he had requested approximately 10 working days for the topic of jurisdictional immunities of States and their property so that the Commission could deal not only with the four articles in part V of the draft (Miscellaneous provisions), but also with articles 2 to 5 of part I (Introduction), to which the Commission had considered it would have to revert.

9. Sir Ian SINCLAIR suggested that, since the Commission would be working under pressure at the present session, members other than special rapporteurs should consider speaking for not more than 15 or 20 minutes on any one topic. The various topics had already been discussed at length at previous sessions and members had no need to repeat their views.

10. The CHAIRMAN suggested that the Commission should adopt the recommendations of the Enlarged Bureau concerning the work schedule, on the understanding that it would be free to alter the schedule in the light of circumstances.

It was so agreed.

Drafting Committee

11. The CHAIRMAN said the Enlarged Bureau had recommended that the Drafting Committee should consist of the following members: Mr. Riphagen (Chairman), Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Huang, Mr. Laclata Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Ushakov and Mr. Yankov, with Mr. Ogiso, Rapporteur of the Commission, as an ex-officio member.

The recommendation of the Enlarged Bureau was approved.

12. The CHAIRMAN informed members that, for staffing reasons, the Commission would have to meet on Mondays in the morning instead of the afternoon as had been the custom. In addition, he suggested that the Drafting Committee should meet on Mondays, Tuesdays, Wednesdays and Thursdays in the afternoon, except in the event of a meeting of the Planning Group.

It was so agreed.

The meeting rose at 12.55 p.m.

1942nd MEETING

Wednesday, 7 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclela Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitul, Mr. Tomuschat, Mr. Ushakov.

Jurisdictional immunities of States and their property (A/CN.4/388,¹ A/CN.4/396,² A/CN.4/L.398, sect. E, ILC(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his eighth report on the topic (A/CN.4/396).
2. Mr. SUCHARITKUL (Special Rapporteur) said that his eighth report brought together all the draft articles so far submitted to the Commission, some of which had been adopted on first reading.
3. Taking stock of the Commission's consideration of the 28 articles constituting the five parts of the draft

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (a) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (a) and commentary thereto: *ibid.*, p. 100; paragraph 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (c) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (d) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (e) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (h) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (i) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (k) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (l) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.* (m) articles 19 and 20 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1985*, vol. II (Part Two), pp. 60 *et seq.*

Part IV of the draft: (n) articles 21, 22, 23 and 24: *ibid.*, pp. 53-54, footnotes 191 to 194; revised texts: *ibid.*, pp. 57-58, footnote 206.

already submitted, he recalled that, in part I (Introduction), the Commission had provisionally adopted article 1, part of article 2 and part of article 3.

4. With regard to paragraph 1 of article 2, the Commission had provisionally adopted the definitions of the terms "court", in subparagraph (a), and "commercial contract", in subparagraph (g). The definitions proposed in subparagraphs (b), (c) and (d) had been withdrawn. For subparagraph (e), he proposed in his eighth report (A/CN.4/396, para. 34) a new definition of the term "State property", modelled on article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.⁴

5. Paragraph 2 of article 2 was pending, and he proposed that it should be referred to the Drafting Committee together with the new text of paragraph 1 (e). The provisions of article 2 to be referred to the Drafting Committee, therefore, read as follows:

Article 2. Use of terms

1. For the purposes of the present articles:

...
(e) "State property" means property, rights and interests which are owned, operated or otherwise used by a State according to its internal law;

...
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 meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

6. Turning to article 3, paragraph 2 of which had been provisionally adopted, he had submitted in his eighth report (*ibid.*) a slightly revised and updated version of paragraph 1 as originally proposed. The main changes related to point (iv) of subparagraph (a) and point (v) of subparagraph (b). The new text proposed for paragraph 1 read as follows:

Article 3. Interpretative provisions

1. In the context of the present articles, unless otherwise provided:

(a) The expression "State" includes:

- (i) the sovereign or head of State;
- (ii) the central Government and its various organs or departments;
- (iii) political subdivisions of a State in the exercise of its governmental authority; and
- (iv) agencies or instrumentalities acting as organs of a State in the exercise of its governmental authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central Government;

(b) the expression "judicial functions" includes:

- (i) adjudication of litigation or dispute settlement;
- (ii) determination of questions of law and of fact;
- (iii) administration of justice in all its aspects;
- (iv) order of interim and enforcement measures at all stages of legal proceedings; and
- (v) such other administrative and executive functions as are normally exercised in connection with, in the course of, or pursuant to a legal proceeding by the judicial, administrative or police authorities of a State.

7. Article 4 dealt with immunities provided for in other instruments. Its purpose was to fill certain gaps between the instruments mentioned therein and the

⁴ A/CONF.117/14.

draft articles. The original text of article 4, revised and updated in the eighth report (*ibid.*), read as follows:

Article 4. Jurisdictional immunities not within the scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to:

- (i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,
- (ii) consular missions under the Vienna Convention on Consular Relations of 1963,
- (iii) special missions under the Convention on Special Missions of 1969,
- (iv) the representation of States under the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975,
- (v) permanent missions or delegations of States to international organizations in general,
- (vi) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973,

shall not affect:

(a) the legal status and extent of jurisdictional immunities recognized and accorded to such missions and representation of States or internationally protected persons under the above-mentioned conventions;

(b) the application to such missions or representation of States or international organizations, or internationally protected persons, of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

(c) the application of any of the rules set forth in the present articles to States and international organizations non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

8. Article 5 was the usual provision on non-retroactivity. He had slightly revised (*ibid.*) the original text, which now read as follows:

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby.

9. In part II of the draft (General principles), all the articles had been provisionally adopted, although article 6 had later been referred back to the Drafting Committee. In part III of the draft (Exceptions to State immunity), the Commission had provisionally adopted articles 12 to 20; only article 11 had been referred to the Drafting Committee. As for part IV of the draft (State immunity in respect of property from enforcement measures), the Commission had discussed articles 21 to 24 at the previous session and referred them to the Drafting Committee.

10. There remained part V of the draft (Miscellaneous provisions) consisting of articles 25 to 28, which he had introduced at the previous session, but which the Commission had been unable to discuss due to lack of time. Those articles read as follows:

Article 25. Immunities of personal sovereigns and other heads of State

1. A personal sovereign or head of State is immune from the criminal and civil jurisdiction of a court of another State during his

office. He need not be accorded immunity from its civil and administrative jurisdiction:

(a) in a proceeding relating to private immovable property situated in the territory of the State of the forum, unless he holds it on behalf of the State for governmental purposes; or

(b) in a proceeding relating to succession to movable or immovable property in which he is involved as executor, administrator, heir or legatee as a private person; or

(c) in a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions.

2. No measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence.

Article 26. Service of process and judgment in default of appearance

1. Service of process by any writ or other document instituting proceedings against a State may be effected in accordance with any special arrangement or international convention binding on the forum State and the State concerned or transmitted by registered mail requiring a signed receipt or through diplomatic channels addressed and dispatched to the head of the Ministry of Foreign Affairs of the State concerned.

2. Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process with the procedure set out in paragraph 1.

3. No judgment in default of appearance shall be rendered against a State except on proof of compliance with paragraph 1 above and of the expiry of a period of time which is to be reasonably extended.

4. A copy of any judgment rendered against a State in default of appearance shall be transmitted to the State concerned through one of the channels as in the case of service of process, and any time for applying to have the judgment set aside shall begin to run after the date on which the copy of the judgment is received by the State concerned.

Article 27. Procedural privileges

1. A State is not required to comply with an order by a court of another State compelling it to perform a specific act or interdicting it to refrain from specified action.

2. No fine or penalty shall be imposed on a State by a court of another State by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which the State is a party.

3. A State is not required to provide security for costs in any proceedings to which it is a party before a court of another State.

Article 28. Restriction and extension of immunities and privileges

A State may restrict or extend with respect to another State the immunities and privileges provided for in the present articles to the extent that appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or the necessity for subsequent readjustments required by treaty, convention or other international agreement applicable between them.

11. The provisions of article 25 were necessary to cover the whole field of State immunity. It should be borne in mind that the privileges and immunities set forth in such instruments as the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations were in fact immunities of the State. It was the State that controlled their application; it was the State that was represented by the officials enjoying the immunities; and it was the State that could waive those immunities. The privileges and immunities belonged ultimately to the State represented by the officials enjoying them.

12. There were two types of immunity: immunity *ratione personae* and immunity *ratione materiae*. The first

did not survive the mission of the official concerned; it applied only during his term of office. The second covered all acts performed in the course of official functions and survived the term of office of the official concerned. It could be invoked long after the termination of office. The position was similar in regard to personal sovereigns and other heads of State. It was worth recalling that the immunities of diplomats had preceded those of sovereigns and that the immunities of sovereigns had preceded those of States.

13. In practice, there had been few cases of a personal sovereign being prosecuted after the termination of his reign. The reason was, of course, the long tenure of personal sovereigns. The cases which had occurred related to ex-sovereigns or to the wives of deceased sovereigns. In Italian judicial practice, an interesting distinction had been drawn, for reigning sovereigns, between acts performed as head of State and acts performed in a private capacity.

14. It would therefore be useful to retain in the draft articles a provision along the lines of article 25, remembering that a number of countries still had sovereigns bearing the title of Emperor or King, although in some cases they were assimilated to other heads of State. It was interesting to note that the relevant legislative instrument in the United States of America was entitled the *Foreign Sovereign Immunities Act*.

15. The remaining provisions of part V of the draft were article 26, which dealt with an important procedural matter; article 27 on procedural privileges; and article 28, which was a residual article necessary to allow some measure of flexibility in the development of State practice.

16. He had also submitted in his eighth report the final two parts of the draft articles—part VI (Settlement of disputes) and part VII (Final provisions)—not so that they could be discussed at the present session, but because, at the conclusion of its work on the topic, the Commission would no doubt wish to include provisions of that kind in the draft.

17. The CHAIRMAN suggested that the Commission should begin its work by considering draft articles 25 to 28, and invited members to express their views.

ARTICLE 25 (Immunities of personal sovereigns and other heads of State)

ARTICLE 26 (Service of process and judgment in default of appearance)

ARTICLE 27 (Procedural privileges) and

ARTICLE 28 (Restriction and extension of immunities and privileges)

18. Mr. RIPHAGEN pointed out that article 28 was not of a purely procedural nature. As he saw it, it was the most important article in the whole draft. It affected the legal quality of all the other articles, since its provisions would have the effect of turning all the rules in the draft into what was known as “soft law” by enabling a State to restrict without any limitation the immunities and privileges provided for in the draft articles “for

reasons of reciprocity, or conformity with the standard practice of” another State.

19. It had been his understanding that, if a State refused to grant another State the immunities and privileges provided for in the draft articles, it would be committing an internationally wrongful act. Now article 28 appeared to say that such was not the case. In discussions in the Sixth Committee of the General Assembly, the Netherlands Government had expressed doubts as to whether it would be possible to arrive at a sharp distinction between cases of immunity and cases of non-immunity.⁵ In fact, such a distinction had not proved possible at the regional level for the countries covered by the 1972 European Convention on State Immunity,⁶ for article 24 of that Convention left a considerable grey area in that matter. The position would be even more difficult on a world-wide scale.

20. In the 1972 European Convention, provision had been made for a hard core of immunities relating to *acta jure imperii*, to which immunity always applied. There was no such provision in the proposed article 28, the provisions of which would apply in all cases. He would therefore be grateful to the Special Rapporteur for clarification on that point, in order to determine whether the provisions of the draft articles were to be regarded as “soft law”.

21. Mr. KOROMA asked the Special Rapporteur whether it was necessary, in draft article 25, to use the adjective “personal” before “sovereigns”. He was not aware of any sovereign that was not personal. He also wished to know whether the family of a sovereign accompanying him on an official visit would be covered by article 25. Lastly, since there were several female sovereigns, he suggested the adoption of more neutral language; for example by replacing the words “during his office” by “when in office”.

22. Mr. SUCHARITKUL (Special Rapporteur) explained that State immunity was relative in character in that it could be waived at any time, at any stage of judicial proceedings, for any representative and in respect of any property or activity. The rules on State immunity were not *jus cogens* rules.

23. State immunity was also relative with regard to the practice of States, which were free to extend it beyond what was required by international law. He mentioned, in that connection, the English practice concerning the Sultan of Johore.⁷ Article 28 left the door open for the granting of more extensive immunities by virtue of State practice which could eventually become a rule of law. It would assist some countries in working out regional practice beyond the requirements of customary international law.

24. He fully agreed that there was a hard core of immunities covering *acta jure imperii*, that was to say acts

⁵ See *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 48th meeting, para. 48.

⁶ Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

⁷ See *Sultan of Johore v. Abubakar, Tunku Aris Bendahara and others* (1952) (*The All England Law Reports*, 1952, vol. 1, p. 1261).

performed in the exercise of governmental functions. Any failure to grant immunity in respect of such acts constituted an internationally wrongful act giving rise to State responsibility and reparation. That point was made clear by preceding articles. Article 28 referred to the so-called “grey area”, in respect of which it left room for flexibility. The article was not intended to go any further.

25. Mr. McCAFFREY said that he had understood draft article 28 as covering the question of reciprocity. It reflected normal present-day State practice. States did accept that the denial of immunity did not entail international responsibility. The remedy for such a denial was not reprisals, but reciprocal denial of immunity.

26. Historically, State immunity had been granted originally as a matter of courtesy or *comitas gentium*. In the United States of America, in *The Schooner “Exchange” v. McFaddon and others* (1812),⁸ Chief Justice Marshall had ruled that the jurisdiction of the sovereign within his territory was not susceptible of limitation: the jurisdiction of a State within its territory was absolute and could be limited only by the State itself. Immunity granted to a foreign State was a revocable privilege extended on grounds of courtesy, goodwill and convenience.

27. The provisions of draft article 28 were thus in line with State practice. As to the difficulty of drawing a clear distinction between cases of immunity and cases of non-immunity, he pointed out that United States legislation had not even attempted to do so. It had laid down only broad standards, leaving it to the courts to interpret them.

28. He found draft article 25 acceptable, but in view of the provisions of draft article 3, paragraph 1 (a) (i), defining “State” as including “the sovereign or head of State”, it might not be necessary to have a separate article 25.

29. Sir Ian SINCLAIR said he agreed that, since draft article 3, paragraph 1 (a) (i), defined “State” as including the sovereign or head of State, the whole draft would apply to a personal sovereign or head of State as well as to the State itself. It was probably desirable, however, to have a separate provision on the sovereign or head of State and in principle he would support draft article 25. But he had doubts on two points.

30. The first was the limitation of the provisions in paragraph 1 (a) to immovable property, although the question of movables might be covered to some extent by paragraph 1 (c). The second concerned a question which had arisen in practice, namely that of the members of the household of a sovereign. In the United Kingdom, the view had been taken that immunity was personal and did not extend to the immediate family of the sovereign.

31. With regard to draft article 28, he endorsed many of the points made by Mr. Riphagen. An article of that kind was desirable for the purpose of flexibility, but it should not be made too flexible. Otherwise, it might be

used to cut away the bedrock of immunity which all countries recognized as covering *acta jure imperii*. That immunity must not be reduced even on the basis of reciprocity. Lastly, article 28 would be useful when it came to the question of extension of privileges and immunities beyond what was required under international law.

32. Mr. ARANGIO-RUIZ said that, in order to be methodical, he would prefer the Commission to examine part V of the draft article by article. As to draft article 28, the only one calling for comments on his part at the present stage, although he shared the doubts expressed by Sir Ian Sinclair concerning draft article 25, he doubted the wisdom of establishing a rule that would expressly restrict the scope of the uniform legal régime. As the Commission’s task was to establish by way of codification a minimum uniform régime applicable to relations between States, even though it would not be a régime assimilable to the problematic *jus cogens*, it would be inadvisable to provide expressly for the possibility of encroaching on that minimum uniform régime.

33. The possibility for States to derogate by agreement from the uniform régime would anyway be ensured by the general rules of the law of treaties.

34. Mr. REUTER said that on the whole he had no serious objections to the four draft articles under consideration, although he had a few doubts on some points, but the French version did not follow the English text closely enough and certain free translations sometimes really changed the effect of a provision. For instance, paragraph 1 of draft article 25 referred to immunity being “accorded”, whereas the French text spoke of immunity being recognized; and in paragraph 1 of draft article 27 the expression “specific act” was rendered as *obligation précise de faire ou de ne pas faire*, the meaning of which was problematical.

35. With regard to draft article 25, he associated himself with the previous speakers. He was not certain of the exact scope of the words “sovereign or head of State”, which needed clarification. He also had some doubt about paragraph 1 (a), which seemed rather general, since even in the case of immovable property owned by the State, immunity from jurisdiction could not be invoked in a dispute about the actual determination of title to the property. Whether that should perhaps be indicated in the commentary was another problem. Paragraph 2 of article 25 gave the impression that immunity from execution was not so wide as immunity from jurisdiction, and it would be advisable for the Special Rapporteur to give further details on that point.

36. Draft article 26, which was very important, caused him a little anxiety, since if a person summoned to appear in court did not wish to do so, it was sufficient for him to refuse service of any notice. The very flexible rule in paragraph 1 of article 26 might involve some dangers and, for safety’s sake, it might be better simply to say that process must always be served through diplomatic channels.

37. In the case of draft article 27, he understood the Special Rapporteur’s intention to exempt States from

⁸ W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, vol. VII, 3rd ed. (New York, 1911), p. 116, at p. 136.

the obligation to comply with any decision other than one requiring payment. The provision was, in some sort, a transposition of the rules to be found in the internal law of certain countries under which the public authorities could not be required to perform any act other than payment. The provision should not be interpreted as protecting the State from the obligation to pay. There remained a drafting problem in paragraph 1 of the French text, since the obligation *de faire ou de ne pas faire* generally excluded payment.

38. In connection with draft article 28, it had been suggested that the draft could be classed as *jus cogens*; but those words should not even have been mentioned, since, rightly or wrongly, they terrified certain States. In any case, it was certain that nothing in the draft articles was *jus cogens*. Article 28 raised two questions: the question of reciprocity—on which it should only be said that the provisions applied without prejudice to the rules applicable to reciprocity—and the more delicate question of other treaties. Certain general conventions permitted bilateral agreements between States parties to them only if such agreements followed certain lines. That was true of the 1963 Vienna Convention on Consular Relations. In the present case, should the immunities or conversely the exceptions to them be extended? He had no objection to the solution proposed by the Special Rapporteur, but if other members of the Commission objected it would be better not to deal with that question but to refer to the provisions of the law of treaties, which was sufficiently obscure to permit any solution. It was subject to that reservation that he approved of draft article 28.

39. Chief AKINJIDE said that he had no basic objection to the four draft articles under consideration, all of which should, in his view, be retained subject to certain drafting changes. He agreed that, to remove all doubt, the words “movable and” should be added before “immovable” in paragraph 1 (a) of draft article 25. Articles 26 and 27 would go a long way towards solving many of the problems encountered by missions abroad, particularly those of the developing countries. Draft article 28, which he viewed from the economic rather than the diplomatic or political angle, would also allay many of the fears expressed concerning article 19.

40. Mr. RIPHAGEN, referring to draft article 25, in connection with the question of immunity from jurisdiction accorded to members of the families of sovereigns and heads of State, drew the Commission's attention to the many problems that could arise as regards legal relationships outside the patrimonial ones dealt with in the exceptions to immunity in paragraph 1 of the article.

41. Sir Ian SINCLAIR said that the only major problem concerning draft article 26 related to paragraph 1, which specified three methods by which service might be effected. While there was no problem about the first and third of those methods, the second method, whereby a writ or other document could be “transmitted by registered mail requiring a signed receipt”, did present difficulties. There had been instances when the receipt of a writ initiating proceedings had created enormous problems in foreign ministries, particularly for people who were not lawyers and where there might not have been immediate access to a lawyer. If the second

option were retained, therefore, the kind of receipt required and the person who signed it should be specified more clearly.

42. Paragraph 1 of draft article 27 struck him as being a little odd. The Commission had already come to the view that it might be wiser to refer to measures of constraint, which would include what, in the United Kingdom, were known as interlocutory injunctions or, in other words, orders “interdicting [a State] to refrain from specified action”. There was also in English law what was termed an order for specific performance, which was presumably what the Special Rapporteur had had in mind when using the phrase “compelling it to perform a specific act”. Since it was obviously not possible, in a set of international draft articles, to use language that was relevant to only one legal system, he wondered whether paragraph 1 was really necessary and whether the point about injunctions and orders for specific performance could not, instead, be covered in the commentary to article 22.

43. Mr. OGISO said he agreed that, in draft article 25, a more specific reference should be made to the family of the personal sovereign. That point could be dealt with in the Drafting Committee.

44. He also agreed that draft article 28 was too flexible. In particular, he had some difficulty with the phrase “or conformity with the standard practice of that other State”. While he accepted the principle of reciprocity, he thought that, if the standard practice of any State could be invoked as a ground for restricting or extending immunities, it would complicate matters and make the future convention too flexible. That point, too, might require consideration by the Drafting Committee.

45. Mr. PIRZADA said that he was in favour of retaining draft article 25, provided that paragraph 1 (a) (i) of draft article 3, which included the sovereign or head of State under the definition of “State”, was deleted. The retention of article 25 was desirable in the light not only of past practice, but of the jurisprudence of certain countries. For instance, while the Supreme Court of India had held, in a decided case, that the sovereign was synonymous with the State, the Supreme Court of Pakistan had dissented from that view, holding in *A. M. Qureshi v. Union of Soviet Socialist Republics* (1981)⁹ that the State and the sovereign were different legal persons and should be treated separately. In any set of draft articles on the immunities of States, therefore, both sovereigns and heads of State should be covered.

46. With regard to drafting, he suggested that throughout article 25 the word “personal”, before “sovereign”, should be deleted. In paragraph 1 (a), the proposal to add the words “movable and” could be met by simply deleting the word “immovable”, so that the phrase would read “relating to private property”. He was not sure whether the term “commercial activity” should be retained in paragraph 1 (c), especially as it had been replaced in earlier articles by the term “com-

⁹ *International Legal Materials* (Washington, D.C.), vol. XX (1981), p. 1060.

mercial contract". He too considered that some reference should be made to orders for specific performance and interlocutory injunctions, as indeed also to Mareva injunctions, all of which were known to India and Pakistan.

47. He agreed that draft article 28 was too flexible and that it required further consideration. For the time being, his inclination would be to retain those parts that related to reciprocity or conformity with the standard practice of the other State.

48. Mr. TOMUSCHAT said that, as he read it, draft article 25 covered the private activities of a personal sovereign or head of State so long as those activities were not of a professional or commercial nature. Where a sovereign or head of State acted in his official capacity, his acts would be attributed to the State, and it was the State as such that would have to be sued. Article 25, therefore, applied only in cases where the plaintiff sued the head of State or sovereign in his personal capacity, and the basis of the action would have to be some personal activity of the sovereign or head of State.

49. As to whether article 25 should be extended to other persons, he had noted that article 1 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents referred not only to a head of State, but also to a head of Government or Minister for Foreign Affairs. Draft article 25, however, rested on a traditional basis and it would perhaps be unwise to enlarge its scope *ratione materiae* to other persons.

50. He shared Sir Ian Sinclair's doubts about paragraph 1 of draft article 26. The words "may be" were perhaps too loose and should be replaced by the words "may only be" or "shall be".

51. Draft article 27 required some adjustment, because the wording of paragraph 1 was inconsistent with the draft articles on enforcement measures.

52. He also shared the doubts expressed with regard to draft article 28. In his view, the model to be followed was article 47, paragraph 2 (a), of the 1961 Vienna Convention on Diplomatic Relations, under which reciprocity was specifically confined to what could be termed "grey areas".

53. Mr. LACLETA MUÑOZ said he thought that draft article 25 was necessary because it dealt not with the immunities accorded to the head of State as an organ of the State (draft article 3, para. 1 (a) (i)), but with the immunities he enjoyed *ratione personae*. Moreover, if it were decided to delete article 25 as being superfluous in view of the provisions of article 3, paragraph 1 (a), there would no longer be any mention anywhere of the principle of the immunity of the sovereign or head of State from criminal jurisdiction, since that principle did not follow from any other provision of the draft.

54. As to the field of application of article 25, he did not think it should be extended to cover heads of Government or prime ministers. For although, even in customary law, the head of State enjoyed personal immunity of a very special type, the same was not true of

the other representatives of the State. Subject to a few drafting changes, article 25 was thus quite satisfactory.

55. Draft article 28 raised more problems. If the success of the work on jurisdictional immunities depended on that article, he could of course bring himself to accept it; but he would much prefer the Commission to leave it aside for the time being and study the possibility of amending its formulation. In his view the article should be confined to mentioning the legitimate principle of reciprocity and should refer, for the rest, to the relevant provisions of the 1969 Vienna Convention on the Law of Treaties.

56. Mr. REUTER said that the comments by Mr. Lacleta Muñoz on criminal jurisdiction had made him wonder whether, if national courts had to try crimes against humanity, sovereigns and heads of State would enjoy immunity. That aspect of the question should be dealt with, if only in the commentary.

The meeting rose at 1 p.m.

1943rd MEETING

Monday, 12 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov.

Jurisdictional immunities of States and their property (continued) (A/CN.4/388,¹ A/CN.4/396,² A/CN.4/ L.398, sect. E, ILC(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur³ (continued)

ARTICLE 25 (Immunities of personal sovereigns and other heads of State)

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (a) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (a) and commentary thereto: *ibid.*, p. 100; paragraph 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (c) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (d) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

ARTICLE 26 (Service of process and judgment in default of appearance)

ARTICLE 27 (Procedural privileges) *and*

ARTICLE 28 (Restriction and extension of immunities and privileges)⁴ (*continued*)

1. Mr. MALEK said that draft article 25 was very important, in that it tended to supplement the codification conventions which were not concerned specifically with the immunities dealt with in the draft articles under consideration. That was why, at the Commission's previous session, he had wondered why the immunities dealt with in article 25 were, so to speak, concealed in a part of the draft entitled "Miscellaneous provisions".⁵ The difficulties referred to in that connection in the Special Rapporteur's seventh report (A/CN.4/388, para. 118) could be overcome by amending the title of part V to show that it was concerned with immunities not dealt with in earlier parts, namely the immunities of heads of State, including, of course, sovereigns.

2. It was good that draft article 25, taking account of both theoretical and practical considerations, dealt specifically with the immunities of sovereigns. The existing codification conventions did not appear to do so. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, for example, referred in article 1, paragraph 1 (*a*), only to a "Head of State", a term which covered "any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned". The title of draft article 25 could be taken to mean that the person of the head of State and that of the sovereign were two distinct entities, each with his own immunities. It would be preferable to use the words "Immunities of sovereigns or other heads of State". Although the expressions "personal sovereign or head of State" and "property of a personal sovereign or head of State", used in paragraphs 1 and 2, respectively, could be formulated differently, it was desirable to leave them as they were. The Commission would contribute greatly to reducing

or even preventing tragedies by taking care not to offend the susceptibilities of States and respecting their individual characteristics.

3. The Special Rapporteur was aware of all the theoretical and practical difficulties of the topic for which he was responsible and was endeavouring to cope with them by proposing solutions which he regarded as legally sound and politically desirable. Draft article 28 was a basic proposal which the Special Rapporteur believed might meet with general approval by reason of his conception of the rule of immunity in the light of practice. He had repeatedly stated that, on the basis of practice, it was possible to identify a principle of immunity that had never been considered as an absolute principle, or as being *jus cogens*, or as reflecting a peremptory norm. The Commission had consistently endeavoured to limit the scope of that principle, its affirmation of which was subject to many exceptions.

4. It was easy to maintain and defend the proposition set out in draft article 28. But, as that article was conceived and explained in the seventh report (*ibid.*, paras. 135-136), was it not intended basically to provide for optional application of the rule of immunity in all cases where it would normally be applicable? If such was in fact the case, article 28 would introduce into the draft an element of progressive development of international law.

5. Mr. FLITAN reminded the Commission that, at its previous session, a number of members had expressed reservations on draft article 25. Yet the Special Rapporteur had still not convinced all members of the need for that provision. It did not concern all persons exercising responsibilities for the State, such as the prime minister, the minister for foreign affairs, and the general secretary of the communist party in some States, who at times performed functions more important than those of the head of State himself. Had not the meeting between the General Secretary of the Communist Party of the Soviet Union and the President of the United States of America been described as a "summit"? The scope of draft article 25 should therefore not be limited to personal sovereigns and heads of State *stricto sensu*. The matter was more complex than the proposed article implied.

6. He would be inclined to delete draft article 25 and retain draft article 3. If, despite his arguments, draft article 25 was to be retained, a number of drafting amendments would be called for. Was the word "office" in the first sentence of paragraph 1 the most appropriate word? Was it correct to refer in that sentence to "criminal and civil jurisdiction" and, in the second sentence, to "civil and administrative jurisdiction"? In the second sentence of paragraph 1 of the French text, the idea of recognition should be replaced by that of attribution. In addition, movable property should be referred to in paragraph 1 (*a*).

7. With regard to draft article 26, he shared the view of those members of the Commission who had proposed that only one of the various ways of serving process mentioned in paragraph 1 should be retained, namely notification addressed to the Ministry of Foreign Affairs of the State concerned. In paragraph 3, concerning

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*; (*m*) articles 19 and 20 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1985*, vol. II (Part Two), pp. 60 *et seq.*

Part IV of the draft: (*n*) articles 21, 22, 23 and 24: *ibid.*, pp. 53-54, footnotes 191 to 194; revised texts: *ibid.*, pp. 57-58, footnote 206.

⁴ For the texts, see 1942nd meeting, para. 10.

⁵ See *Yearbook ... 1985*, vol. I, p. 264, 1921st meeting, para. 38.

judgments rendered in default, it would be well to prescribe a minimum period.

8. Draft article 27 presented only drafting problems, as already noted by several members of the Commission.

9. Draft article 28, however, raised a number of difficult points and was unacceptable as it stood. In his eighth report (A/CN.4/396, paras. 6 and 58-59), the Special Rapporteur had quite rightly raised a cry of alarm about the urgent need for a convention on jurisdictional immunities of States and their property. In its current form, however, article 28 actually called the whole draft into question, even though the exceptions provided for in articles 12 to 20 had already given rise to strong objections. Why, then, raise a cry of alarm? In his own view, it was essential to guarantee in a convention minimum privileges and immunities on to which a number of exceptions would be grafted. However, if States were permitted to encroach unilaterally on that minimum guarantee, what would be the use of a convention?

10. In conclusion, he pointed out that, in the Manila Declaration on the Peaceful Settlement of International Disputes,⁶ the General Assembly had called on States to "include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes ..." (sect. I, para. 9). The draft articles on jurisdictional immunities should therefore contain one part devoted to that matter.

11. Mr. RAZAFINDRALAMBO said that he approved of the idea of a special article on the immunities of personal sovereigns and other heads of State, although draft article 3, paragraph 1 (a) (i), already assimilated them to the State itself. Moreover, it was that assimilation of principle that explained why paragraph 1 (a) of draft article 25, which was the counterpart of paragraph 1 (a) of article 15, referred only to a proceeding relating to private immovable property and did not appear to be extendible to private movable property. It was noteworthy that paragraph 1 (b) and (c) of draft article 25 corresponded to paragraph 1 (b) of article 15, just as paragraph 1 (c) reiterated the principle on which the exception to immunity provided for in article 12 was based.

12. Draft article 26 presented no difficulty in so far as the proceeding was instituted against the State itself. The most common method of service in such cases was to notify the minister for foreign affairs, as the legal representative of the Government at the international level. But, in addition to the three methods provided for in paragraph 1, consideration might be given to service by a process server, which was common in proceedings of the French type. In cases where the plaintiff was an entity having separate legal personality, or a subdivision of the State, the writ or summons, particularly if issued by a judicial authority, should be delivered by a process server.

13. The extension of the period of time provided for in paragraph 3 of draft article 26 raised a difficult problem, since it was important to avoid any uncertainty and prevent the judge from using discretionary powers. It was necessary, therefore, to stipulate the applicable time-limits and provide, for example, that the rules for the computation and extension of time-limits would be those in effect in the court of the forum State. Those comments also applied to paragraph 4, which dealt with the time-limit for applying to have a judgment set aside.

14. Draft article 27, paragraph 1, should be brought into line with the general principle of administrative law that a court could not issue any injunction against a State in the case of a dispute concerning action *ultra vires*.

15. He understood the misgivings caused by draft article 28. In the present state of international relations, there could be abuses of restriction of the immunities and privileges of some States at the discretion of the author State. It would be advisable, therefore, to include a provision regulating the power of restriction and extension of immunities and privileges. But, to make it clear that the list of reasons which could be invoked in support of a limitation of immunities and privileges was not merely indicative, it might be wise to use more restrictive wording, stipulating for example that "No State may restrict or extend with respect to another State the immunities and privileges recognized in the present articles, except in so far as ...".

16. In conclusion, he congratulated the Special Rapporteur for having successfully performed the task entrusted to him by submitting a last report (A/CN.4/396) which, like his previous reports, demonstrated his mastery of the topic.

17. Mr. JAGOTA said that the main point to be decided in regard to article 25 was whether it was necessary and desirable to include it in the draft. The Special Rapporteur had concluded that the article "appeared absolutely necessary for historical and practical reasons" (A/CN.4/396, para. 41), but had confined it to the immunities of heads of State *ratione personae*, which subsisted during their tenure of office, with certain recognized exceptions. Since the wording of draft article 25 was apparently based on article 31 of the 1961 Vienna Convention on Diplomatic Relations and other similar provisions, the immunities of sovereigns and heads of State *ratione materiae* would presumably be covered by other articles on State immunity. That distinction perhaps explained why the Special Rapporteur had decided to draft article 25 and to include the sovereign or head of State in the definition of "State" in draft article 3, paragraph 1 (a) (i).

18. There remained the question whether the personal immunities of the sovereign or head of State, which were limited in scope, could not be covered by customary international law or comity of nations, either by making an appropriate amendment to draft article 4 or by adding a provision to clarify the position. If, however, it were decided to retain draft article 25—and he was not altogether opposed to its retention—some further points would have to be considered.

⁶ General Assembly resolution 37/10 of 15 November 1982, annex.

19. The first question was whether the exception provided for in article 25, paragraph 1 (a), should be restricted to "private immovable property situated in the territory of the State of the forum" or whether it should also cover private movable property. His own view was that paragraph 1 (a) should be retained as drafted because the fact that movable property of a sovereign or head of State which fell under paragraph 1 (b) or 1 (c) would not enjoy immunity should provide an adequate safeguard. The same would apply to an ambassador under article 31, paragraph 1 (a), of the 1961 Vienna Convention.

20. Another point which could be considered by the Drafting Committee was whether the words "commercial activity", in paragraph 1 (c), should be replaced by "commercial contracts", which appeared in article 12 and elsewhere in the draft. The matter should not cause much difficulty, since the words "commercial activity" appeared in article 31, paragraph 1 (c), of the 1961 Vienna Convention.

21. The Drafting Committee should also consider the scope and meaning of the terms "sovereign" and "head of State", in connection with which attention had already been drawn to article 1 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, in which "head of State" had been defined in rather broad terms. It would also be necessary to consider whether the terms in question covered members of the family of the sovereign or head of State, his staff and private servants, and whether separate provisions were needed on the inviolability of his person and residence, or whether paragraph 2 of draft article 25 would suffice. Was it also necessary to specify that a sovereign or head of State was not obliged to give evidence as a witness? All those points were covered in the 1961 Vienna Convention.

22. He agreed that, for the sake of clarity and conformity with draft article 3, paragraph 1 (a) (i), the word "personal" should be deleted from the expression "personal sovereign" throughout article 25.

23. In connection with an observation made by Mr. Pirzada at the previous meeting, he pointed out that section 86 of India's Code of Civil Procedure, as amended,⁷ provided expressly for suits against a foreign State, that provision being taken to cover the ruler of a foreign State. The word "ruler", rather than "sovereign", was used in Indian law, and was defined in section 87A, subsection (1) (b), of the Code of Civil Procedure as the person who was for the time being recognized by the central Government as the head of State.

24. Turning to draft article 26, concerning service of process, he suggested that paragraph 1 should be redrafted to provide for recourse in the first instance to diplomatic channels, save where special arrangements or binding international conventions provided otherwise. In the absence of such diplomatic channels or other agreements or conventions, service could be ef-

fectured by registered mail requiring a signed receipt and addressed to the head of the Ministry of Foreign Affairs of the State concerned.

25. The last part of paragraph 3 of article 26, reading "and of the expiry of a period of time which is to be reasonably extended", would be improved if reference were made to a specific period. A period of two months, for example, could be specified, as suggested in the Special Rapporteur's seventh report (A/CN.4/388, para. 127), or any other appropriate period.

26. Paragraph 1 of draft article 27, which was based on the original text of draft article 22, could perhaps be reviewed by the Drafting Committee in the light of the revised draft article 22 which the Special Rapporteur had submitted to the Commission at its previous session.⁸ The scope of paragraph 3 of article 27 should also be reviewed, to determine when costs should be payable.

27. It had been said that draft article 28 was unduly flexible and that it constituted "soft law". He therefore considered that the questions of the restricted and extended application of the draft articles should be separated and dealt with in two different paragraphs. The question of restricted application could not, of course, arise in the case of the rule or principle of State immunity laid down in article 6 and, to make that quite clear, he suggested that the phrase "without prejudice to the provisions of article 6" be included in the paragraph on restricted application. The extended application of the draft articles would, however, be much wider in scope and need not be made subject to article 6.

28. Lastly, to ensure that any action by way of reciprocity was not disproportionate, he suggested that the phrase "to the extent that appears to it to be appropriate" should be deleted, as suggested by Mr. Razafindralambo, or amended.

29. Mr. USHAKOV said that draft article 25 was not only unnecessary, but dangerous, since it derogated from well-established rules and conventions, some of which had been originated by the Commission and a number of which had entered into force. In the 1969 Convention on Special Missions, for example, article 21 dealt with the status of the head of State and persons of high rank, and it was the status of the latter that he wished to stress particularly. Paragraph 1 of article 21 of the 1969 Convention also referred to the facilities, privileges and immunities accorded by international law, while article 31 concerned the immunity from jurisdiction accorded to representatives of the sending State, including heads of State, when leading a special mission. The 1969 Convention thus regulated the matters covered by draft article 25. But they were also dealt with in the 1975 Vienna Convention on the Representation of States, from the standpoint of the privileges and immunities accorded to representatives of States in their relations with international organizations of a universal character. Article 50 of the 1975 Vienna Convention dealt with the status of the head of State and persons of high rank who were heads or members of delegations. It was stipulated in paragraph 1 of that article that:

⁷ India, *The Code of Civil Procedure, 1908 (As modified up to the 1st May 1977)*, pp. 32-33.

⁸ *Yearbook ... 1985*, vol. II (Part Two), p. 57, footnote 206.

1. The Head of State or any member of a collegial body performing the functions of Head of State under the constitution of the State concerned ... shall enjoy ... in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law to Heads of State.

Clearly, therefore, there already existed rules applicable to immunities and privileges accorded to heads of State and other persons of high rank in the territory of a receiving State.

30. In addition to being unnecessary, draft article 25 raised difficulties. Did the personal sovereign or head of State enjoy immunity from criminal and civil jurisdiction only "during his office"? Did a former head of State leading a special mission or delegation not have immunity? As to the immunity from criminal jurisdiction mentioned in paragraph 1, he wondered what crimes were contemplated: crimes committed by the head of State in his own country—which would be subject to internal law—or crimes committed in the territory of the forum State? In the case of crimes against the peace and security of mankind, one of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,⁹ namely Principle III, read:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

31. In the circumstances, he held to his view that draft article 25 was unnecessary and dangerous, since it ran counter to well-established rules. Moreover, he did not see why draft articles on State immunities should deal with the immunities of persons representing the State, which was a matter covered by other conventions, including the 1961 Vienna Convention on Diplomatic Relations.

32. Draft article 26 was in flagrant contradiction with article 9 as provisionally adopted and should be completely recast. It was difficult to see how the mere fact of "service of process by any writ or other document instituting proceedings against a State" could impose obligations on that State. But that was what followed from draft article 26, particularly from paragraph 3, which provided that a court could render judgment in default of appearance against a State on proof of compliance with paragraph 1. A court of one State could take decisions about another State only exceptionally, when that State could not invoke immunity, that was to say in the cases mentioned in paragraph 1 of article 9. There could be no question of making a general rule of what was only an exception; and since the rule was that States enjoyed immunity, service of process could not produce any effects for them. Hence he did not understand the purpose of paragraph 1 of draft article 26 and asked that the article should be reconsidered by the Commission in the light of article 9.

33. Draft articles 26 and 27, which dealt with judicial procedure, raised a number of difficulties, particularly in regard to terminology. The terms used in the original

English text related solely to the judicial procedure of the United Kingdom and were thus too specific. That applied, for example, to the expression "by way of committal" in article 27, paragraph 2, which had no real equivalent in the other languages.

34. In the title of draft article 27 it would be more correct to refer to "procedural immunities" than to "procedural privileges". In paragraph 1 of the English text, the terms "specific act" and "specified action" were too vague: their scope should be defined. Either the text of the paragraph could be reformulated, or the meaning to be given to the terms used therein could be defined in article 2 of the draft. It was stated in paragraph 2 that "No fine or penalty shall be imposed on a State by a court of another State by way of committal ...". Since a penalty could never be imposed on a State, it might be asked whether it was the representative of the State in court who was referred to and whether he should not be expressly mentioned. He also thought there was some contradiction between paragraphs 1 and 2. For as it was worded paragraph 2 suggested that, contrary to what followed from paragraph 1, the courts could impose an obligation on a State. Nevertheless, subject to changes in terminology, he was prepared to accept paragraph 2 in principle. Paragraph 3 raised no problems for him.

35. Turning to draft article 28, he observed that the restriction of immunities and privileges resulting from a treaty, convention or other international agreement between States need not be considered. For as the Commission had implicitly recognized by provisionally adopting article 8, the general rule of the immunity of States and their property was not a peremptory norm, so that States could always derogate from it, in particular by international agreements. The expression "for reasons of reciprocity" was quite out of place. For while the extension of immunities was a positive measure which a State could decide to take in favour of another State for reasons of reciprocity, the same did not apply to restriction of immunities, which was a negative measure taken unilaterally.

36. The wording of draft article 28 should therefore be amended to establish a very clear distinction between measures to extend immunities and measures to restrict them, which were in fact countermeasures, and to introduce the idea of non-discrimination, as did article 47 of the 1961 Vienna Convention. That article, which would be a useful guide, provided in paragraph 2 only that:

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

(a) Where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;

(b) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Article 47 left aside the question whether such measures were lawful or constituted an internationally wrongful act engaging the responsibility of the State or States concerned.

37. Mr. BOUTROS GHALI said that, if the Commission decided to retain draft article 25, it should extend the application of that article to heads of Government so as to conform to current practice.

⁹ *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127.

38. Since the postal service in a large part of the world was very unreliable, it would be better not to mention registered mail in draft article 26, paragraph 1, and to provide only for service of process through diplomatic channels.

39. In draft article 28, a distinction should be made between measures restricting immunities and measures extending them. That distinction could be made according to the nature of the measures taken (measures of restriction or measures of extension), or according to how the measures were adopted (measures taken unilaterally or measures taken under international agreements).

40. Mr. CALERO RODRIGUES said that he shared the doubts of other speakers about the utility of article 25, and especially about the question whether an article on sovereigns and heads of State had any place in draft articles on State immunity. There were only two possibilities. Either the immunities of the sovereign or head of State derived from his position as an organ of the State, in which case the provisions of draft article 3, paragraph 1 (a) (i), would suffice; or his immunities were personal immunities, in which case it was difficult to see why they should be mentioned in the draft.

41. The existence of such personal immunities was undeniable and several international conventions expressly recognized them. But if the draft articles were to deal with them, it would be necessary to codify the applicable rules, including those dealing with the family and servants of a sovereign or head of State. Clearly, it would be inappropriate for the draft articles to go into such details.

42. It had been suggested that the reference to the sovereign or head of State should be deleted from draft article 3 and that suggestion was a reasonable one. In fact, the reference was unnecessary, because the head of State was an organ of the central Government.

43. If the majority of the Commission wished to retain draft article 25, the drafting should be improved. For example, the adjective "personal" before "sovereigns" should be deleted. He felt strongly, however, that the article should be deleted entirely. It would then be necessary to amend draft article 4 so as to include a reference to sovereigns and heads of State as persons to whom the present articles did not apply—an exclusion which would not affect their status and rights under international law.

44. With regard to draft article 26, he agreed with Mr. Boutros Ghali that the reference to service by registered mail should be deleted. It was important that a State be notified of a proceeding against it in another State, and that should be done through diplomatic channels. Process could be served through diplomatic channels even if the two countries concerned did not have direct diplomatic relations.

45. As to draft article 27, he had no objection to Mr. Ushakov's suggestion that the title "Procedural privileges" be replaced by "Procedural immunities", but he did not agree that article 27 would affect the rule in article 9. Article 27 dealt with practical procedural matters and set out certain advantages which it was

perfectly appropriate to extend to foreign States. For example, a State could never be required to provide security for costs; hence the provisions of paragraph 3. Similarly, a foreign State should be exempted from the fines and penalties normally applicable in case of failure to produce documents for the purposes of a proceeding; hence the provisions of paragraph 2. Paragraph 1, however, was couched in unduly broad terms and could make proceedings meaningless. He was not at all convinced by the explanations on that point given by the Special Rapporteur in his seventh report (A/CN.4/388, para. 131).

46. Draft article 28 dealt with the restriction and extension of immunities and privileges. No difficulty arose in regard to extension; there would be no objection to a State extending to another State greater immunities and privileges than those specified in the draft articles. Restriction of immunities and privileges would cause no difficulty either if it was effected by agreement between the States concerned. Obviously, two States could agree between themselves to apply a more restrictive system than that set out in the draft articles.

47. A different situation arose in the event of action by way of reprisal or reciprocity. A provision might permit of two different interpretations: restrictive and extensive. The fact that one State applied a restrictive interpretation could lead the other to do the same in relations between them. That was more a matter of countermeasures than a matter of reciprocity. The reasoning would be the same in the event of restriction of immunities and privileges for reasons of "conformity with the standard practice" of the other State.

48. On the presentation of draft article 28, he agreed with those members who had urged that restriction and extension should be treated separately. He also agreed with Mr. Tomuschat (1942nd meeting) that article 47 of the 1961 Vienna Convention on Diplomatic Relations could serve as a model when redrafting article 28.

49. In conclusion, he suggested that draft articles 26 to 28 should be referred to the Drafting Committee with any changes suggested by the Special Rapporteur in the light of the debate. As to draft article 25, the Commission should first decide whether it wished to retain the article; if so, it could also be referred to the Drafting Committee.

50. Mr. BALANDA said he did not think that draft article 25 served any useful purpose. The Commission should confine itself to the jurisdictional immunities of States without going into immunities accorded to heads of State or personal sovereigns. If the majority of the members of the Commission thought it necessary to retain the article, however, he would prefer its field of application to be extended to heads of Government, in conformity with present practice, for instance, in OAU. He would also like the first sentence of paragraph 1 to mention immunity from administrative jurisdiction expressly, as did the second sentence.

51. As to the terminology used in article 25, he suggested that, in paragraph 1 (a), (b) and (c), the word "proceeding" should be rendered in French by *action*

en justice, which was the term used in the 1961 Vienna Convention on Diplomatic Relations.

52. In draft article 26, the Commission should avoid using too specific terms which might not correspond to the judicial procedure of all countries. The title of the article should be redrafted, since the expression *actes introductifs d'instance* was too restrictive.

53. In paragraph 1, on service of process, although postal services might be unreliable, he thought it advisable to retain the reference to registered mail requiring a signed receipt in addition to service through diplomatic channels, which should be addressed not to the minister, but to the Ministry of Foreign Affairs. For unlike a *note verbale* addressed to the Ministry of Foreign Affairs, a registered letter provided proof that process had been served on the addressee on a particular date, which made it possible to calculate time-limits.

54. The text of paragraph 2 should be redrafted, for it was not correct to say that "Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process ...".

55. Paragraph 3 provided that the period allowed a State for appearance was to be reasonably extended. But in internal law such time-limits took various forms: number of clear days, date fixed in advance, etc. If it was specified that the period should be extended, the draft article might be in conflict with the code of civil procedure of some particular country, which might provide that the time-limit was so many clear days or up to a fixed date. Hence the text should not go into details, but should be confined to a reference to the codes of civil procedure of States. With regard to the time-limit referred to in paragraph 4, he reminded the Commission that it had been proposed at the previous session that the period should be two months.

56. As to draft article 28, if States were allowed to restrict the very limited immunities provided for in the other articles, the whole of the draft on jurisdictional immunities, to which the Commission had already devoted so much effort, would become meaningless. Furthermore, a rule of non-discrimination should be expressly stated in the draft article.

57. Lastly, with regard to the possibility of including provisions on the settlement of disputes in the draft, he noted that the conventions and draft articles prepared by the Commission did not all contain such provisions. In the case of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, for example, Mr. Yankov, the Special Rapporteur, had not considered it necessary to provide machinery for the settlement of disputes. The Commission would therefore have to take a very definite line on that question and adhere to it. It could either choose to include provisions on the settlement of disputes in all the drafts it prepared or decide once and for all not to include such provisions. If the former course were adopted, of the draft articles proposed for part VI only draft article 32 could be retained.

The meeting rose at 1.10 p.m.

1944th MEETING

Tuesday, 13 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov

Jurisdictional immunities of States and their property
(continued) (A/CN.4/388,¹ A/CN.4/396,² A/CN.4/L.398, sect. E, ILC(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur³ (continued)

ARTICLE 25 (Immunities of personal sovereigns and other heads of State)

ARTICLE 26 (Service of process and judgment in default of appearance)

ARTICLE 27 (Procedural privileges) and

ARTICLE 28 (Restriction and extension of immunities and privileges)⁴ (concluded)

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (a) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (a) and commentary thereto: *ibid.*, p. 100; paragraph 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (c) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (d) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (e) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (h) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (i) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (k) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (l) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*; (m) articles 19 and 20 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1985*, vol. II (Part Two), pp. 60 *et seq.*

Part IV of the draft: (n) articles 21, 22, 23 and 24: *ibid.*, pp. 53-54, footnotes 191 to 194; revised texts: *ibid.*, pp. 57-58, footnote 206.

⁴ For the texts, see 1942nd meeting, para. 10.

1. Mr. McAFFREY said that he had some comments to offer on draft articles 26 and 27, on which he had not spoken in his earlier statement (1942nd meeting).

2. Draft article 26, on service of process, was necessary in order to provide guidance as to how to serve process on foreign States. Usually, there was some hesitation as to whether process was to be served on the minister for foreign affairs or on the embassy of the foreign State concerned. In the United States of America a private lawyer often did not know how to effect service on a foreign State and attempts had been made to serve process on the embassy of the State concerned. Since 1976, however, the *Foreign Sovereign Immunities Act*⁵ of that date had required (sect. 1608) that service be made in other ways, very similar to those set out in paragraph 1 of draft article 26.

3. He found the text of article 26 generally acceptable, but supported the suggestion by Mr. Tomuschat (*ibid.*) that, in paragraph 1, the word "may" should be replaced by "shall" in order to make it clear that the methods of service specified were the required ones. Otherwise, litigants might try to resort to other methods. He suggested that the methods indicated in paragraph 1 should be listed in hierarchical order. It would thus be clearly shown that the first method to use was "any special arrangement" between the forum State and the other State concerned; if there was no such arrangement, the method should be in accordance with "any international convention" binding on both States; finally, if no such instrument existed, service should be effected by registered mail or through diplomatic channels.

4. The use of registered mail or diplomatic channels raised the question of determining to whom the process should be addressed and dispatched. His own understanding was that it should be addressed to the head of the Ministry of Foreign Affairs. It should not simply be addressed to that ministry, because any clerk could then sign the receipt—an operation which would constitute effective service.

5. When service was effected by registered mail or through diplomatic channels, it would be advisable to require the summons and other papers in the case to be translated into the official language of the foreign State concerned. If that were not done, it might take some time for the foreign State to find out what the suit was about. Meanwhile the receipt would have been signed and service validly effected. He agreed with Mr. Razafindralambo (1943rd meeting) that the documents should be dispatched by a clerk of the court of the forum State rather than by a private litigant, in order to make clear the official nature of the documents.

6. Doubts had been expressed about the advisability of allowing service by registered mail because of the unreliability of the post in some countries. He saw no objection to dispatch by registered mail: so long as the

papers were addressed to the head of the Ministry of Foreign Affairs and a signed receipt was required, no problem would arise. If the document did not reach its destination, or if it reached its destination but the receipt was not returned to the sender by the post office, the position would be that service had not been effected. Of course, registered mail must always be viewed as a subsidiary means of service, to be used failing other methods.

7. Turning to draft article 27, he noted that paragraph 1 concerned what was known in his country's legal system as injunctive relief. Such relief could be of two kinds: an affirmative order to perform certain acts, or a negative order to refrain from certain conduct. It was worth noting that, even in litigation between private individuals, United States courts were very hesitant to order affirmative relief.

8. Like Mr. Ushakov (*ibid.*), he thought that paragraph 1 needed clarification, for it was couched in unduly general terms. As far as affirmative orders were concerned, there were certain forms of relief against a foreign State that could be sought from a court. For example, a foreign State could be ordered to comply with an arbitration agreement. It should also be possible to order a foreign State to perform a contract, for example for the delivery of goods—the alternative being payment of compensation. A negative order might be an order not to remove property or assets from the territory of the forum State.

9. As to the wording of paragraph 1, he suggested that a saving clause be introduced concerning orders relating to property, to cover the situation dealt with in draft article 22. It could take the form of an opening proviso such as: "Without prejudice to orders relating to property". He further suggested that the words "other than the payment of money" be inserted after the words "to perform a specific act". That addition would make it clear that the court of the forum State had the power to order payment of money in a suit against a foreign State.

10. Paragraph 2 of draft article 27 was a difficult provision. Some forms of sanction would appear to be possible against a foreign State. Criminal sanctions would always be excluded, of course, and as he understood it, that was the purpose of the words "by way of committal". On the purely civil plane, however, if a defendant State refused to comply with an order to produce certain documents or evidence, the sanction was usually that the court would assume the truth of the allegation made by the plaintiff in the case. Such was United States court practice in private litigation, and a rule of that kind could apply to a foreign State.

11. Lastly, with regard to paragraph 3, he agreed that, where a foreign State was the plaintiff in a case, security could be required from it for costs that might be payable in the event of that State losing the case.

12. Mr. MAHIOU said that draft articles 25 to 28 might seem innocuous at first sight, but they raised a number of problems which had come to light during the discussion.

⁵ *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97; reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 55 *et seq.*

13. In the case of draft article 25, the question was whether a text on the jurisdictional immunities of States should include provisions on the immunities *ratione personae* of personal sovereigns and heads of State. Admittedly it was possible to take the view that such provisions would usefully supplement the diplomatic conventions in force, that it would be wise to set out State practice under the rules of customary international law, and that it was essential to try to distinguish State property from the private property of personal sovereigns and heads of State, since the legal rules applicable were not the same in both cases. But other arguments militated against adopting provisions of that kind. Since the draft articles were concerned with the jurisdictional immunities of the State as a legal person and not the immunities of its representatives as natural persons, immunities *ratione personae*, which were already governed by the diplomatic conventions in force, might be regarded as having no place in the draft.

14. Again, the various problems raised by the formulation of article 25 were an argument for deleting it. If it was decided to retain the article, its scope—which some members believed should extend to heads of Government, and even to ministers or the family of a personal sovereign or head of State—and the definition of the terms “personal sovereign” and “head of State” were bound to raise difficulties. There were several categories of personal sovereigns and heads of State. Some monarchs represented the State without really exercising any power, whereas others were sovereign as well as head of State and even head of Government; the same was true of heads of State who often, particularly in Africa, were also head of Government and sometimes held a number of ministerial posts. In many socialist countries and third world countries, however, the person holding the highest office of the State performed none of those functions and that complicated matters even more.

15. It must be borne in mind that personal sovereigns and heads of State were in a special situation, even under internal law. They had gradually become unaccountable not only politically—for political responsibility was usually assumed by the head of Government—but also legally, since in many countries they enjoyed immunity from the jurisdiction of the national courts. When he travelled abroad officially, a head of State or a sovereign enjoyed the immunities of a head of mission under the diplomatic conventions in force and the relevant rules of customary international law. But what would happen if, during a private or incognito visit abroad, or in the use of property owned abroad, a sovereign or a head of State caused damage? Would it be possible to institute proceedings against him? Could he invoke his status as head of State or sovereign to claim immunity from jurisdiction? Or would he have to answer for the consequences of his acts like anyone else?

16. Those questions were closely linked with the jurisdictional immunities of States, since it would often be necessary to determine what private property of the personal sovereign or head of State was being used for State purposes and thus enjoyed the immunities and privileges the Commission was in the process of defining, and what property was being used exclusively for

personal purposes, so that legal proceedings could be instituted in respect of it.

17. It was from that angle that the question of the immunities *ratione personae* of personal sovereigns and heads of State should be considered. The object was not to fill any gaps by defining the immunities enjoyed by personal sovereigns and heads of State, but simply to take into account the immunities accorded to them under the diplomatic conventions and other rules of international law; and it should be stipulated that a personal sovereign or head of State enjoyed immunity from jurisdiction in respect of all property, even private property, that he used for State purposes, which must be distinguished from property used strictly for personal purposes.

18. For those reasons, therefore, it would be better to delete draft article 25, although the issues it dealt with should not be left aside. The best course would be simply to insert in draft article 4, in a new subparagraph (d), a reference to the immunities and privileges of personal sovereigns and heads of State recognized under the diplomatic conventions and other rules of international law in force. Similarly, a further provision could be inserted in article 15, establishing that the private property of a personal sovereign or head of State used for governmental purposes, including State missions, enjoyed immunity from jurisdiction, as did State property.

19. The question of methods of service of process, dealt with in draft article 26, paragraph 1, should be considered from two different viewpoints: that of the State and that of a private individual acting against the State. For the defendant State, which must be officially notified of the proceedings instituted against it, notification through diplomatic channels was obviously the most appropriate method. A private individual, however, often had to show proof—for example, for purposes of compensation—that process had been served; in that case, a registered letter requiring a signed receipt was very useful, since it provided such proof. Article 26, paragraph 1, should therefore specify that service of process should be effected through diplomatic channels or, when necessary, by registered mail requiring a signed receipt.

20. The provision in paragraph 2 seemed at first sight to be obvious. Nevertheless, it must be recognized that the State's appearance in court did not wipe out any irregularity in the service of process. The State should therefore be able to invoke irregularity, particularly when the date of service of process was taken into account in calculating the time-limit for introducing a counter-claim. Allowing the State to object would obviously have no effect on the merits of the case, nor would it change the consequences of the State's appearance in court.

21. Draft article 27, paragraph 1, was useful, but was drafted in such vague terms that it might well give rise to different interpretations. The State was sovereign, so certain obligations could not be imposed on it. But since personal appearance was often mandatory in criminal proceedings, it was necessary to ensure that, when a State was summoned to appear in such proceedings, no

coercive measures could be taken against its representative to compel him to appear. The problem was essentially one of drafting and could be resolved by the Drafting Committee.

22. Separate provision should be made in draft article 28 for restriction or extension of immunities and privileges required as a result of a treaty, convention or any other international agreement. Distinctions should also be drawn, on the one hand, between measures taken unilaterally, or countermeasures, and measures taken by agreement, and on the other hand, between measures to extend immunities and privileges and measures to restrict them. Those three categories of measures should be dealt with separately, so that article 28 would not call into question the privileges and immunities accorded to States under international law.

23. Sir Ian SINCLAIR said that the problem with regard to draft article 25 was that the text proposed by the Special Rapporteur embodied a provision of substance. The article attempted to provide a substantive answer to the question of the extent of the immunities enjoyed by a personal sovereign or head of State in respect of acts performed in a personal capacity. In drafting that article, the Special Rapporteur had drawn heavily on article 31 of the 1961 Vienna Convention on Diplomatic Relations, equating a sovereign or head of State with an ambassador. That approach was a fairly logical one and the same solution was to be found in the United Kingdom *State Immunity Act 1978*.⁶

24. The question arose, however, whether an article of that kind was necessary in the draft. His own feeling was that article 25 was not absolutely essential, since it dealt with a form of personal diplomatic immunity, whereas the draft related to the immunities of the State. The debate had shown that any attempt to draft a provision of substance along the lines of article 25 would lead to serious difficulties. It would raise the controversial question of the treatment to be extended to a head of Government and a minister for foreign affairs. Inevitably, also, the question of the members of the household and private servants of a sovereign or head of State would have to be dealt with, as it was in the existing diplomatic conventions.

25. It had been suggested that the problem should be dealt with in article 4, the purpose of which was to preserve immunities under existing conventions. In that draft article, a reference had been added by the Special Rapporteur to "internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973". That Convention mentioned the minister for foreign affairs, the prime minister and other dignitaries, but unfortunately it did not deal with immunity from civil jurisdiction.

26. His own feeling was that article 4 was perhaps not the right place to deal with the problem. In draft article 3, paragraph 1 (a) (i), the expression "State" was defined as including "the sovereign or head of State",

which meant the sovereign or head of State acting in a public capacity. What was needed to solve the problem was a reservation safeguarding the situation under the rules of customary law governing acts performed in a private capacity or relating to private property. He therefore suggested that article 25 should be converted into a procedural or safeguard provision, which might read as follows:

"The present articles are without prejudice to the extent of immunity, whether immunity from jurisdiction or immunity from measures of constraint against private property, enjoyed by a personal sovereign or head of State under international law in respect of acts performed in his personal capacity."

27. With regard to draft article 26, and more particularly to the methods of service of process mentioned in paragraph 1, he did not believe that the use of registered mail was appropriate. The diplomatic channel provided a method whereby the individual litigant could ensure that the process reached the appropriate body in the foreign State. The litigant might well be unaware of the exact ministry or department to which the document should be directed, and recourse to the diplomatic channel would guarantee that the papers reached the correct destination.

28. On draft article 28, he did not have much to add to his earlier comments (1942nd meeting) except to stress the triangular relationship involved. It was necessary to consider the interests of the private litigant, the forum State and the foreign State—all three of which should be safeguarded. It had been suggested by Mr. Ushakov (1943rd meeting) that article 47 of the 1961 Vienna Convention on Diplomatic Relations should be used as a model in redrafting article 28. That suggestion was an attractive one, but it must be remembered that the relationship in article 47 of the 1961 Vienna Convention was a bilateral one, involving only the sending State and the receiving State. It would also be necessary to clarify the concept of "more favourable treatment" used in paragraph 2 (b) of article 47.

29. Lastly, he agreed with Mr. Riphagen (1942nd meeting) on the need to safeguard an assured minimum or "hard core" of immunities, which could not be restricted. Those immunities applied to acts performed in the exercise of governmental authority. He also agreed with the suggestion that extension and restriction of immunities should receive separate treatment.

30. Mr. DÍAZ GONZÁLEZ said that it was extremely difficult to study the draft articles on jurisdictional immunities on the basis of the translation into Spanish and other languages. To grasp the meaning of the various provisions, the reader had to refer back to the English text in every case. It was not simply a matter of translation, however. The problem went deeper. It originated in the fact that the text had been conceived with one single legal system in mind, namely the common-law system. The legal concepts and terms used belonged exclusively to that system, so that a literal translation of the draft articles made no sense.

31. The term "proceeding", for example, had been translated literally into Spanish as *procedimiento*, a term which signified all the formalities necessary to

⁶ United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715; reproduced in United Nations, *Materials on Jurisdictional Immunities ...*, pp. 41 *et seq.*

bring a case before the courts, whereas the correct terms would be *proceso*, *litigio* or *demanda*. A further example was the Spanish translation of the title of draft article 26, "Service of process and judgment in default of appearance", which had been rendered as *Citación y fallo en rebeldía*. A State could not, by definition, be *rebelde* (rebellious). The proper expression was *fallo por ausencia o en contumacia*. Again, in article 26, paragraph 1, the term *mandamiento* for "writ" meant the commandments of God and was obviously incorrect. In that instance the text should refer to *notificación* or *mandato*.

32. It was impossible to work on the English text alone. The countries which would be signing the convention on the jurisdictional immunities of States and their property were not all English-speaking, nor, by any means, were they all common-law countries. The Spanish-speaking countries, with a population of 300 million in all, along with the French-speaking countries, the USSR, China and others, had legal systems and structures completely different from the one on which the draft articles were based. He would have comments and suggestions to make in the Drafting Committee on the way in which the provisions of the English text were to be translated, or rather transposed, into Spanish.

33. In the circumstances it was impossible to make any comments on the various draft articles, but he would none the less point out that, as observed by Mr. Ushakov (1943rd meeting) and Mr. Mahiou, draft article 25 was pointless, since it dealt with issues already covered not only by articles 4 and 13 of the draft, but also by the diplomatic conventions in force.

34. Mr. ARANGIO-RUIZ said that draft article 25 really had no place in a text defining the jurisdictional immunities of States and their property. When a head of State acted as an organ of the State, the only question that arose was whether, in that instance, the State enjoyed immunity. If so, the head of State also enjoyed immunity. On the other hand, matters pertaining to the activities of a head of State as a private person should not be dealt with in the draft articles. Those matters should continue to be covered either by the rules of customary international law or, less commonly, by international conventions. Probably the best course, as suggested by Sir Ian Sinclair, would be to delete article 25 and state specifically that the draft articles on jurisdictional immunities of States and their property did not cover the immunities *ratione personae* of personal sovereigns and heads of State or of persons connected with them. It would even be necessary to go a little further and mention other persons holding high office in the State.

35. Mr. FRANCIS said that he would confine his remarks to article 25, which should not be deleted from the draft. States came and went, but the institution of head of State would always remain. In dealing with the problem of sovereigns and other heads of State, the Commission should bear in mind the relevant provisions of earlier conventions and the rules of customary international law. The 1969 Convention on Special Missions made provision for the head of State on special mission. The 1975 Vienna Convention on the Representation of

States dealt with the "Status of the Head of State and persons of high rank" in its article 50.

36. It should be noted that the head of State did not enjoy immunities only when he was on public business in a foreign country. Even if he went abroad in a private capacity, comity dictated that notice be given of his journey, so that he could be treated with respect and given diplomatic protection.

37. An effort should be made to arrive at a satisfactory solution. One suggestion had been to deal with the matter in article 4, another to transfer it to article 15. For his part, he favoured the idea of a separate article put forward by Sir Ian Sinclair. The commentary to that article could deal with the question of members of the family and household of the head of State.

38. As he saw it, the draft articles should be the last word on the subject. Admittedly there were difficulties, but the Commission should be bold enough to face them. He therefore urged that the provisions of article 25 should be retained in some form, since their omission would leave an undesirable gap in the draft.

39. The CHAIRMAN, speaking as a member of the Commission, expressed doubt about the need for draft article 25, which in his view was rather confusing. For while the draft articles under consideration dealt as a whole with the jurisdictional immunities of States and their organs, draft article 25 was more concerned with the protection of individuals in the performance of their political or diplomatic functions. That was a quite separate question—even though there were some points of convergence—which was already dealt with in a number of diplomatic conventions.

40. The text of article 25 itself also raised problems relating to the different constitutional systems of countries, as Mr. Ushakov (1943rd meeting) and Mr. Mahiou, among others, had observed. Given the confusion, duplication and constitutional difficulties created by the article, it might be preferable not to retain it, especially as it appeared impossible to state without reservation that a head of State had immunity from criminal jurisdiction. For it must be borne in mind that the Commission also had before it the draft Code of Offences against the Peace and Security of Mankind, which was basically concerned with heads of State and Government who might be found guilty of committing such offences in the performance of their functions. Hence, if draft article 25 was to be retained, the Commission should consider including a reservation on that possibility.

41. In regard to draft article 28, he had difficulty with the fact that the Special Rapporteur had placed the restriction and extension of immunities on an equal footing. Just as it seemed desirable to extend immunities, it seemed difficult to restrict them *ad infinitum*, at the risk of bringing international life to a standstill. The best course would be to draft two separate provisions, one restrictive, relating to limitations, and the other non-restrictive, relating to extensions.

42. Turning to questions of procedure and terminology, he drew the Special Rapporteur's attention to

paragraph 2 of draft article 25, which referred to measures of attachment or execution and might give the impression that only those two measures came into question. Garnishment, preventive attachment and sequestration should not be overlooked, however. A broader formulation would therefore be required, since all measures of execution could not be listed in the draft article.

43. With regard to the service procedures enumerated in paragraph 1 of draft article 26, he observed that registered mail did not always reach the addressee in developing countries. It would therefore be well to find a procedure which could be used in all situations. In paragraphs 3 and 4, the use of the words "of appearance" after "judgment in default" seemed to suggest that judgment could be rendered in default only if the State failed to appear, though there were certainly other forms of default. He urged the Special Rapporteur not to refer to procedures that were too closely linked to a particular legal system and suggested that, on that point, reference should simply be made to the procedure of the forum State.

44. In draft article 27, it was regrettable that paragraph 1 made no distinction between rules of substance and rules of procedure, despite the fact that the article was entitled "Procedural privileges". He, too, doubted the suitability of the terms used in paragraph 2. In view of the difficulty of finding satisfactory wording, perhaps States should simply be called upon to comply with any procedures in which they were concerned. The United States of America had ways of making States comply with judgments of a court, including the imposition of fines. To suggest that States could refuse to comply with any measure imposed on them by a court was to encourage them in a regrettable course. The provision should therefore be drafted in such a way that States would not consider themselves authorized to take excessive liberties.

45. Mr. REUTER said that, while he had listened carefully to the arguments of members of the Commission who were anxious to define a "hard core" of immunities from which no derogation would be permitted, he found their viewpoint entirely fanciful, since the draft articles brought into play two opposing concepts: governmental authority and administration, the former constituting the hard core in question. But that distinction was not so easy to make. Some States would take the view that a given treaty extended immunities, while others would maintain the opposite. Hence draft article 28 was, after all, more satisfactory as it stood.

46. Referring to the comments made by Mr. Díaz González concerning the inconsistency between the Spanish and English texts, he recalled having made the same observation (1942nd meeting) in regard to the French text. There, however, it was not so much a problem of translation as of substance. Should reference be made to internal legal systems or should rules of international law be developed? Reference could be made to six or seven internal systems on the basis of the official languages, but even within a single linguistic community, differences in interpretation arose. For example, in two common-law countries—the United States of

America and the United Kingdom—the concept of trust had different meanings.

47. He therefore suggested that the provision devoted to definitions should include definitions of the terms used by the Special Rapporteur, because they most accurately reflected his thinking. Those definitions would be independent of any particular internal legal system and would be developed solely for the purposes of a rule of international law. For example, the term "service of process" used in the draft articles signified the act whereby, in each legal system, an individual was notified that proceedings had been instituted against him. By giving definitions of that type, the Commission would simplify translation into the various official languages, although it would also increase the work of the Special Rapporteur. Technical terms could then be included in two glossaries: one of a given internal legal system and the other of public international law. Without that second glossary, the Commission would continually be in difficulties.

48. Mr. SUCHARITKUL (Special Rapporteur), summing up the debate, noted that the complaints regarding terminology, which recurred each year, were, in the present case, due to the highly complex nature of the topic. There should not be much danger of confusion, however, since the members of the Commission were all experts in their respective countries' legal systems and the Drafting Committee would also be in a position to clarify matters further. He, too, as Special Rapporteur, was responsible for trying to dispel any doubts that arose in connection with the English and other language versions, but it should be remembered that English was not his mother tongue, nor was his country's legal system based on the common law.

49. At a time of general apprehension about the licence allowed to the advanced countries to seize the property of foreign States, and the spate of lawsuits thus arising, it was necessary to maintain a balance. In Western society, the emphasis was perhaps on the individuals who made up the State and without whom there would be no State; in African and Asian society, on the other hand, if States did not have political and economic independence, the individual had no chance of subsisting.

50. Draft article 25 posed a problem of substance concerning the personal immunities of sovereigns and heads of State. As one who had been accredited by, but not always to, a sovereign, he could not accept the suggestion that he had favoured the sovereign over the head of State. It was his view that the Commission could not ignore a part of international law which it had set out to progressively develop and codify. The Commission had completed a series of conventions dealing with various aspects of State immunities, such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the 1975 Vienna Convention on the Representation of States. It had now turned its attention to State immunities in general, irrespective of how those

immunities were termed. After all, as had frequently been recognized in European case-law, the immunities of diplomats were State immunities and, as such, could be waived by the State even where personal immunities were concerned; the same applied to the immunities of a sovereign.

51. It was not possible, however, to cover all the intricate rules of customary international law that governed the immunities enjoyed by sovereigns and heads of State in their personal capacity, and the Commission might wish to propose that the matter be dealt with as another, separate topic. In that connection, he would cite by way of example the case of Malaysia—a member State of ASEAN—which had 13 sovereigns from among whom a king (or, under Indian law, “foreign ruler”) was elected by rotation every four years. The Commission should not overlook such cases or lay itself open to a charge of having ignored the status of heads of State. Whatever the shortcomings of international practice in the matter, some reference to it should be made.

52. He approved of Sir Ian Sinclair’s suggested wording (para. 26 above) to the effect that the present articles were without prejudice to the extent of the immunities enjoyed by the sovereign or head of State in his private capacity and also in respect of his private property. Two further provisions should perhaps be added, however: first, that in their public capacity sovereigns and heads of States enjoyed the immunities prescribed in the articles; and secondly, that in their private capacity they enjoyed immunity from civil and criminal jurisdiction during their tenure of office, in accordance with, or as customary under, international law. A *renvoi* to customary international law could then be made. He was prepared to submit a new version of article 25 along those lines to the Drafting Committee, after which the article could be referred back to the Commission to decide whether or not to retain it. His own view was that there was room in the draft for an article on the status of the sovereign or head of State. The question whether it should also cover heads of Government should be discussed briefly in the commentary, which might thus provide the Commission with a basis for further study. He did not think that the content of draft article 25 could be adequately reflected in draft articles 3 or 4.

53. The difficulties concerning terminology were even more apparent in draft article 26, which went more deeply into procedures. The remarks made by Mr. Mahiou and Mr. McCaffrey had, however, done much to clarify matters. It should be noted that the article, which was concerned with how to serve process, dealt solely with cases in which proceedings had already been instituted, but the question of immunity had yet to be decided. He agreed with Mr. Tomuschat (1942nd meeting) that the provision in paragraph 1 of article 26 would be more positive if the word “may” were replaced by the word “shall”. He also agreed that provision should be made for recourse to be had, in the first instance, to any special arrangement that existed; then to diplomatic channels; and lastly, if the Commission so wished, to the use of registered mail. That third means of service was still the practice in some countries, and the Commission should try to follow existing State practice rather than ignore it and impose new procedures.

54. With regard to draft article 27, he thought that the title “Procedural immunities” suggested by Mr. Ushakov (1943rd meeting) would sound rather strange, in English at least. “Sovereign immunity” was bad enough, and he had tried to have that term changed in article 236 of the 1982 United Nations Convention on the Law of the Sea, but without success. English legislation preferred the term “State immunity”. There again, a problem of terminology was involved.

55. In paragraph 1 of draft article 27, he had tried to distance himself from the common-law system and to paraphrase, in a way that was perhaps not altogether intelligible, what in common law was known as specific performance. However, he fully subscribed to the clarifications provided in that connection by Mr. Razafindralambo (*ibid*), Mr. McCaffrey and Mr. Mahiou.

56. As to draft article 28, he agreed with Sir Ian Sinclair that immunities should always be accorded for acts performed in the exercise of governmental functions. He also considered that a reference to article 47 of the 1961 Vienna Convention on Diplomatic Relations, as suggested by Mr. Tomuschat (1942nd meeting) and Mr. Ushakov (1943rd meeting), would be useful.

57. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 25, 26, 27 and 28 to the Drafting Committee.

It was so agreed.⁷

The meeting rose at 1 p.m.

⁷ For consideration of the texts proposed by the Drafting Committee, see 1969th meeting, paras. 68-108 (new articles 24, 25, 26 and 27); and 1969th meeting, paras. 109-113, 1970th meeting, paras. 1-45, 1971st meeting, paras. 2-27 and 68-84, and 1972nd meeting, paras. 1-16 (article 28).

1945th MEETING

Wednesday, 14 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/388,¹ A/CN.4/396,² A/CN.4/
L.398, sect. E, ILC(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR¹ (continued)

ARTICLE 2 (Use of terms), paras. 1 (e) and 2

ARTICLE 3 (Interpretative provisions), para. 1

ARTICLE 4 (Jurisdictional immunities not within the
scope of the present articles) and

ARTICLE 5 (Non-retroactivity of the present articles)⁴

1. The CHAIRMAN invited comments on the provisions of part I of the draft articles still to be examined, namely article 2, paragraphs 1 (e) and 2, article 3, paragraph 1, and articles 4 and 5.

2. Mr. TOMUSCHAT, referring to paragraph 1 (e) of draft article 2, said that it would be advisable to spell out exactly what was meant by the word "interests", since it was not clear what it covered. Also, it was important to use terms that were easy to translate into other languages, including those that were not official languages of the United Nations. In German, for example, an "interest" was a broad notion comprising political interests that were, of course, irrelevant in the context of the draft articles. Possibly the expression "legally protected interest", which appeared in another article, could be used instead.

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (a) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (a) and commentary thereto: *ibid.*, p. 100; paragraph 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (c) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (d) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (e) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (h) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (i) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (k) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (l) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*; (m) articles 19 and 20 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1985*, vol. II (Part Two), pp. 60 *et seq.*

Part IV of the draft: (n) articles 21, 22, 23 and 24: *ibid.*, pp. 53-54, footnotes 191 to 194; revised texts: *ibid.*, pp. 57-58, footnote 206.

⁴ For the texts, see 1942nd meeting, paras. 5-8.

3. Paragraph 2 of article 2 seemed to state a truism. The draft articles could not alter the meaning ascribed to a term in the internal law of any State or by the rules of any international organization. The aim of the Commission was to frame autonomous concepts and, although the terms used would initially be expressed in English, French and Spanish, such terms did not have to be construed in accordance with the English, French, Spanish or any other national legal system. The position would perhaps be clearer if the order of the provisions of paragraph 2 were reversed, along the following lines:

"2. The use of terms within any national legal system or by any international organization does not determine the meaning of such terms under the present convention."

4. He also had doubts about the definition of the expression "State" in draft article 3, paragraph 1 (a). In his view, a clear distinction should be drawn between entities and juridical persons, on the one hand, and State organs, on the other. Those entities should be specified, as in part 1 of the draft articles on State responsibility,⁵ which dealt, in articles 5, 6 and 7 respectively, with the State, territorial governmental entities, and other entities endowed with elements of governmental authority. On that basis, paragraph 1 (a) (i) and (ii) of draft article 3 could be redrafted to read:

"(a) the expression 'State' includes:

- (i) the central State with all its organs and departments, including in particular the sovereign or head of State;
- (ii) political subdivisions of a State with all their organs and departments;"

5. There was a lacuna in draft article 3, paragraph 1 (b), in the definition of the term "judicial functions": as in the definition of "court" laid down in draft article 2, paragraph 1 (a), no mention was made of the judge. Moreover, all the judicial functions listed in paragraph 1 (b) of draft article 3 could also be performed by administrative agencies. If the Commission did not mention the judicial institution, with its special characteristics, it might fall short of recognized international standards as laid down in article 14 of the International Covenant on Civil and Political Rights,⁶ under which a court, and hence the judge, was defined as a "competent, independent and impartial" institution "established by law". Admittedly, article 14 of the Covenant set an ideal, and the draft articles would perhaps be concerned with immunity from proceedings before an institution that did not fully live up to that standard, but it was none the less essential to refer to the core element constituted by the specific institution which the judge represented.

6. He was not certain whether draft article 4 was really necessary but, in any event, the drafting required further consideration. Not all States were parties to the various conventions prepared by the Commission and adopted at plenipotentiary conferences, for customary rules of international law still remained in force between some States. It should therefore be made clear that, in

⁵ See *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁶ United Nations, *Treaty Series*, vol. 999, p. 171.

addition to the recognized diplomatic and consular immunities, the draft articles did not prejudge the immunities arising out of customary rules of international law.

7. Mr. FLITAN said that the definition of "State property" contained in draft article 2, paragraph 1 (e), raised a number of problems stemming from the use of the words "according to its internal law". Many situations could arise where the applicable law would be determined by rules relating to the solution of conflicts of laws. In one case the *lex rei sitae* might be applied, and in another the *lex patriae*. In a case of succession, for example, under some legal systems, if there was no successor, property would revert to the State of which the owner was a national, while under other systems, such property would be considered as *res nullius* and would revert to the State on whose territory it was situated. For that reason, it was not possible to affirm in the introduction to the draft articles that the term "State property" was in all cases dependent on internal law. He therefore proposed that that definition should be deleted from article 2.

8. Again, the term "interests", referred to by Mr. Tomuschat, was used in many articles of the draft, including article 15, and although its exact connotation might be difficult to understand, a detailed study of that concept would entail a review of a number of articles which had already been provisionally adopted by the Commission. Furthermore, paragraph 1 (e) should be brought into line with draft article 21, since the Special Rapporteur's definition of "State property" had been made chiefly in the light of part IV, which dealt with immunity of States from enforcement in respect of their property. The terms used by the Special Rapporteur in article 21 reflected the same concern as he had endeavoured to express in paragraph 1 (e) by providing for the case of a State which was not the owner of the property, but operated or used it.

9. Draft article 2, paragraph 2, raised problems of a purely drafting nature. There was a lack of symmetry between the words "in the internal law of any State" and "by the rules of any international organization" which should be remedied.

10. In draft article 3, paragraph 1 (b) (ii), there was no need for an explicit reference to "determination of questions of law and of fact". There again, such questions were settled differently under different legal systems. In some countries, questions of fact never went as far as the appeal court, which alone was empowered to decide on points of law, whereas in others, the supreme court might be called upon to deal with questions of fact as well as of law. Consequently, he did not see the advantage of having a separate provision on that point.

11. Mr. RIPHAGEN said that he shared Mr. Flitan's views regarding draft article 2. It was impossible to refer to the internal law of the State concerned, since, in the normal course of events, the operation or use of property was automatically governed by the *lex rei sitae*. The interests or rights of ownership of property of one State on the territory of another State would not be deter-

mined in accordance with the internal law of the owning State.

12. The problem regarding draft article 3, paragraph 1 (a) (i), should be dealt with at the same time as that raised by draft article 25, since there were limits to how far the State could be assimilated to the personal sovereign or head of State. Paragraph 1 (a) (iv) was not very well drafted. In other draft articles, reference was made to State bodies which did not exercise the governmental authority of the State and had no powers outside the territory of their State under the general rules of public international law. Consequently, by excluding from the definition of the term "State" those bodies which did not exercise governmental authority, it was possible to become involved in a vicious circle.

13. It was also difficult to understand what was meant by the term "legal proceeding" in paragraph 1 (b) (v). The Special Rapporteur had probably intended to emphasize the link that must exist with legal proceedings *par excellence* before the courts; but then what were those courts? Even if it was just a matter of drafting, the Commission should give it due consideration. The same observations could be made of draft article 4 (vi), which referred to "internationally protected persons under the Convention ... of 1973". In that connection, the Commission should not overlook draft article 25 and should aim for clarity.

14. Mr. MAHIU said that he shared the views expressed by Mr. Flitan and Mr. Riphagen regarding the difficulties to which draft article 2, paragraph 1 (e), might give rise because of the reference to internal law. While it was understandable that recognition of a title to property should be subject to the internal law of the State deemed to be the owner of the property, that would appear to be more difficult in the case of operation or use of property situated in the territory of another State, since such operation or use must conform to the legislation prevailing in that State. Indeed, it was difficult to see how the internal law of one State could interfere with the internal law of the forum State in the case of commercial interests, for example. Mr. Flitan's proposal to delete the reference to internal law, a reference which raised more problems than it solved, was therefore sound.

15. Draft article 3 raised a drafting problem. He could see no logic in the subdivisions of paragraph 1 (a). In drawing up that empirical list, the Special Rapporteur had apparently sought simply to indicate the persons, organs and organizations which might represent the State and against which a proceeding could be instituted. Might it not be possible to use simpler formulations, yet follow a more logical structure? In that regard, he suggested differentiating between, first, the central State, in the shape of the usual official organs representing it (sovereign, head of State, ministers), then other entities with legal personality and political status such as federated States, administrative bodies such as the public authorities and other political or administrative subdivisions with legal personality distinct from that of the State but which, for the purposes of the draft articles, would be considered as "States", and finally, on a third level, all essentially administrative

bodies which, though having no legal personality separate from that of the State or one of its subdivisions, nevertheless participated in one way or another in the exercise of governmental authority, so that they could be considered as States. From the drafting point of view, he would prefer to delete from paragraph 1 (a) (iv) the term “instrumentalities”, which had little meaning. He would submit more specific proposals on those three levels of subdivisions to the Drafting Committee.

16. As to article 3, paragraph 1 (b) (iii), the words “administration of justice in all its aspects” covered all aspects of judicial functions and should really appear at the beginning of subparagraph (b). Actually, it would be sufficient to state that “the expression ‘judicial functions’ includes the administration of justice in all its aspects”. He nevertheless appreciated the fact that it might be desirable to mention a number of acts, either because of their importance, or because they were referred to in the draft articles. The introductory clause of paragraph 1 (b) could then be followed by the word “including” and a list of the acts in question, thereby simplifying the drafting.

17. Lastly, draft article 4 should be formulated in conjunction with draft article 28, because of the linkage between the draft articles under consideration and a number of existing conventions.

18. Sir Ian SINCLAIR said he understood full well the disquiet that some members might feel at the use of a general word such as “interests” in the context of the definition of State property laid down in draft article 2, paragraph 1 (e). In terms of international conventions, however, it was not unusual to adopt such a formulation to cover the totality of rights, in the strict sense, and the other interests, in a broader sense, that were protected by law in relation to property. Indeed, Mr. Tomuschat would recall that, in the Federal Republic of Germany, there was an arbitral commission on property, rights and interests under the Bonn Conventions of 1952⁷ which had already developed a considerable body of jurisprudence. In his view, therefore, the three elements—property, rights and interests—should be retained, perhaps with an explanation in the commentary of what was meant by interests. Certainly, under the law in the United Kingdom, there might be an interest in relation to the foreclosure of a mortgage which, strictly speaking, was neither property in itself nor a right in property, but an equitable interest falling short of a right. Unless such interests were covered by the draft, the phrase “property and rights” was likely to be the subject of very narrow interpretations in the years ahead.

19. He agreed entirely with Mr. Flitan that the words “according to its internal law”, in the same subparagraph, could give rise to very considerable problems. The property, rights and interests which a State might assert in connection with proceedings before a court of another State might depend on a transaction

that was governed not by the internal law of the forum State, but, for instance, by a contract governed by another system of law. If any reference were to be made to the law concerned, it should perhaps be to the “applicable law”, but he wondered whether it was in fact advisable to refer at all to the system of law under which property rights and interests arose. It was a point that would require close consideration, particularly since, as drafted, paragraph 1 (e) of article 2 also seemed to be in contradiction with paragraph 2 of that article.

20. As to draft article 3, he would prefer to maintain the distinction in paragraph 1 (a) (i) and (ii) between the sovereign or head of State—though with the addition of the words “acting in his public capacity”—and the central Government and its various organs or departments, if only to take account of the fact that some sovereigns and heads of State did not really form part of the central Government and its various organs and departments but occupied an essentially symbolic position.

21. While he could basically accept the comments regarding paragraph 1 (a) (iii), that text might none the less give rise to a problem. If the words “in the exercise of its governmental authority” were deleted, leaving simply “political subdivisions of a State”, the question would arise whether immunity could be claimed by subdivisions such as municipalities. He understood that there was some jurisprudence in that connection to which the Special Rapporteur might wish to draw the Commission’s attention.

22. He agreed in principle with the concept set out in paragraph 1 (a) (iv), although there were some drafting problems. Specifically, he would suggest that the words “agencies or instrumentalities acting as organs of a State” should be replaced by “entities acting ...”.

23. The definition of “judicial functions” in paragraph 1 (b) of article 3 could be made much shorter and more concise. Basically, it was only necessary to cover adjudication of litigation by an impartial and independent court, and the administration of justice in all its aspects by such a court. There was no need for a specific reference to the determination of questions of law and of fact, something which should be left entirely to the law of the State concerned. In some countries, only a court of law could determine questions of fact, courts of appeal being competent to determine questions of law. A general definition of judicial functions that covered adjudication of litigation by an impartial and independent court would inevitably cover the determination of any question of law or fact by whatever court was competent according to the law of the State concerned.

24. Paragraph 1 (b) (iv) was also unnecessary, and paragraph 1 (b) (v) was superfluous. The latter could create problems by confusing certain functions exercised under the authority of a court, for instance the functions of the *parquet*, with the functions of the court itself, which were limited to adjudication and the administration of justice in all its aspects.

25. Draft article 4 was necessary in principle but its drafting called for careful examination. One point that would have to be determined, for example, was whether

⁷ See Annex to the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on 26 May 1952 (as amended by Schedule IV to the Protocol signed at Paris on 23 October 1954) (United Nations, *Treaty Series*, vol. 332, p. 316).

to include observer delegations in item (v). Item (vi) was not necessary because the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents was designed to protect such persons but did not confer jurisdictional immunities upon them. He would, however, welcome the Special Rapporteur's views on that point.

26. Mr. USHAKOV said that his observations would be of a preliminary character, since the draft articles called for further reflection. He wondered, first of all, whether it was necessary to define the term "State property" in article 2, given the fact that it did not occur as such in any of the draft articles. The only reference was to "its property" after a mention of the word "State". Consequently, the term "property" called for another definition. As he had pointed out earlier,⁸ the best approach would be to use the definition worked out by the Commission itself and adopted by States in article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,⁹ which stated:

For the purposes of the articles in the present Part, "State property of the predecessor State" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

In the case of the definition under consideration, the date from which the property was owned by the State—the date on which the legal proceeding was instituted, for example—should also be indicated. The question whether or not particular property belonged to the State could be determined only by the internal law of the State concerned, since an individual buying property could be acting on his own behalf or on behalf of the State. For all the necessary explanations in that regard, it was essential to refer to the commentary to article 8 of the draft articles¹⁰ that were the basis for the 1983 Vienna Convention.

27. Again, he did not understand the reason for the reference to the operation and use of property. A State could use property on the territory of another State without necessarily owning it. The important thing in the case in point was the property belonging to the State in accordance with its internal law. In the body of the draft, the Drafting Committee had placed a number of explanations in square brackets, indicating that the definition of "State property" would make them redundant. His own view was that it would be better to delete the square brackets and retain the explanations.

28. Draft article 3 was odd. In his view, the term "State" should mean the State. Instead of defining the State, the Special Rapporteur had sought in article 3 to define the component parts of the State, namely its organs. For what purpose? Each State was equipped with its own organs, which varied from one country to another. In part 1 of the draft articles on State responsibility,¹¹ the Commission had, in article 5, defined "attribution to the State of the conduct of its organs" by referring to the internal law of that State:

⁸ See *Yearbook ... 1985*, vol. I, p. 257, 1920th meeting, para. 10.

⁹ A/CONF.117/14.

¹⁰ *Yearbook ... 1981*, vol. II (Part Two), pp. 25-26.

¹¹ See footnote 5 above.

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

29. As worded, draft article 3 gave the impression that States were obliged to have a sovereign or head of State. However, in the Soviet Union, for example, the State was headed by a collegiate body, the Presidium of the Supreme Soviet, although the Chairman of the Presidium naturally had a role to play in international relations. Was it to be understood that the central Government was also to be assimilated to the State? Not at all. Any attempt to define what was meant by "State" must take account of the fact that it comprised a socio-political entity endowed with a territory, a population, an administration exercising governmental authority, and sovereignty. Article 3 listed organs which could not exist in some States or could have completely different designations, depending on the country. It was even possible to conceive of States without any organs, States in which, for example, decisions were taken by the people by referendum. It would seem extremely risky and unnecessary to define the concept of the State, for the same reason that the term "international organization" had never actually been defined: it had been deemed sufficient to describe such an organization as an intergovernmental organization. The attempt to arrive at a definition of "State" was pointless when paragraph 3 of article 7 as provisionally adopted explained that a proceeding against an organ of the State was a proceeding against that State. The Commission could simply stipulate that an organ of the State meant an organ considered as such under the internal law of the State concerned.

30. The "judicial functions" referred to in draft article 3, paragraph 1 (b), should also be defined by the internal law of each State. It was inconceivable that a given definition of "judicial functions" should be imposed on States, since such a definition might well be acceptable to one State but not to another.

31. It was questionable whether article 4 was necessary but, if the Commission decided to retain it, it should be redrafted. In principle, article 5 had a place in the draft. However, he was surprised to note that it was concerned with relations between States, whereas the draft dealt with jurisdictional immunities of States and their property. Consequently, that text too should be redrafted.

32. Mr. McCAFFREY agreed that it might be better to speak in draft article 2, paragraph 1 (e), of "legally protected interests", rather than "interests", so as to avoid any difficulties of transposition between languages and between legal systems. However, since the word "interest" was used in article 15, which had already been provisionally adopted, the matter could perhaps be left for the time being and the Commission could revert to it on second reading. It might also be preferable to delete the word "otherwise" from the expression "owned, operated or otherwise used", given the recognized distinction made in most legal systems between ownership and use of property. Alternatively, the provision could be couched in more general terms, along the following lines:

“(e) ‘State property’ means all property belonging to a State, in particular rights and interests which are owned, operated or used by a State.”

33. He too was inclined to agree that the words “according to its internal law” could be deleted. If they were retained, a problem could arise regarding any real property situated in the forum State for, as was universally recognized, the forum State alone had the right, and indeed the power, to determine ownership of real property situated within its borders. In the circumstances, it was not possible, in his view, to refer only to the internal law of the State where such a State was a defendant in proceedings. Furthermore, under the legal system of the United States of America, any such reference to internal law would exclude the rules of private international law. He also tended to agree that the terms of paragraph 2 of draft article 2 should be reversed, as suggested by Mr. Tomuschat.

34. As to draft article 3 and the definition of “State” as including its various organs and instrumentalities, it might be appropriate to discriminate between those organs and instrumentalities in matters of jurisdiction and execution of judgments. In that regard, Mr. Mahiou had made a useful suggestion to establish a hierarchy so as to distinguish between the organs of the State itself, in other words the central Government, on the one hand, and entities with a separate personality, on the other. Perhaps Mr. Mahiou would propose a suitable form of language in the Drafting Committee. Similarly attractive was the suggestion by Mr. Tomuschat for a definition along the lines of that to be found in part 1 of the draft articles on State responsibility.¹²

35. Clearly, the formulation of paragraph 1 (a) (i) had to be reconciled with whatever decision the Commission took with regard to draft article 25. Careful consideration should be given to the suggestion by Sir Ian Sinclair (para. 20 above) to insert the words “acting in his public capacity” after the words “the sovereign or head of State”. Introduction of those words would none the less lead to difficulties with regard to the application of article 12, concerning commercial contracts.

36. According to paragraph 1 (a) (iii), the political subdivisions of a State were included in the expression “State”. The position was the same in the United States *Foreign Sovereign Immunities Act of 1976*. There was some ambiguity, however, regarding the meaning of the word “its” in the expression “in the exercise of its governmental authority”; presumably that word meant “of the State”. Moreover, that proviso could come into conflict with provisions which allowed jurisdiction over a foreign State acting in a *jure gestionis* capacity.

37. With regard to paragraph 1 (a) (iv), the words “acting as organs” and the phrase “in the exercise of its governmental authority” could be deleted, so that the text would simply read:

“(iv) agencies or instrumentalities of a State, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central Government;”

38. In connection with paragraph 1 (b), on the interpretation of the expression “judicial functions”, Mr. Mahiou was right to say that item (iii) covered the essentials and that the remaining items of the subparagraph, if retained, should serve as mere examples. His own suggestion would be to adopt Sir Ian Sinclair’s proposal to insert the words “by an impartial and independent court” after the words “adjudication of litigation or dispute settlement”, which formed the present subparagraph (b) (i). Subparagraph (b) (ii) to (v) should be deleted, since they would only create uncertainty and confusion.

39. In draft article 4, the word “any” should be inserted before the words “jurisdictional immunities” in the introductory phrase. Not all the conventions listed in article 4 were in force and not all of them were unanimously accepted as expressing rules of international law. Insertion of the word “any” would have the effect of not prejudging whether any of the immunities specified in the various instruments listed was actually enjoyed or not.

40. Lastly, article 5, on non-retroactivity, had a place in the draft, for the practice of States varied considerably in the matter.

41. Mr. ARANGIO-RUIZ said that, in draft article 2, paragraph 1 (e), it had to be made clear what was meant by “interests”, particularly since it was difficult to link the idea of purely material interests, which were in some sense over and above the law, with the idea of operation or use. It was unnecessary to refer in the same subparagraph to any “internal law” whatever. It should be left to the competent court to determine whether the applicable law was the internal law of the plaintiff State, the law of the forum or the *lex rei sitae* if the property in question was located in another State. Since the subject-matter would be governed by an international convention, the plaintiff State could, in the event of a genuine dispute, obviously challenge before an arbitral tribunal the rules actually decided on.

42. Paragraph 2 of article 2 had to be redrafted because, as it stood, it might imply that internal law took precedence over international law—something that was inadmissible.

43. In draft article 3, the Special Rapporteur had been a little too generous in drawing up the list of entities which were an integral part of the State. The reference to the sovereign or head of State and to the various organs or departments of the central Government was superfluous, for they obviously formed part of the State. Mention should be made only of entities about which there might be some doubt, such as political subdivisions. It was often difficult to determine the difference between political subdivisions and administrative subdivisions because the borderline between the two was not very clear. The most delicate problem, however, was that of entities which had no territorial seat and which could not be classified either as political subdivisions or as administrative subdivisions.

44. The term “judicial functions” in article 3, paragraph 1 (b), was clear enough not to have to be interpreted.

¹² See footnote 5 above.

45. Draft article 4 dealt with matters that were governed not only by international conventions, but also, to some extent, by rules of customary international law. It should therefore be considered in detail.

46. Mr. OGISO said that he supported the idea of deleting the words “according to its internal law” in draft article 2, paragraph 1 (e), for the reasons advanced by the members who were of that view.

47. As to draft article 3, paragraph 1 (b), he saw no need for a definition of “judicial functions”, a term that appeared only once in the text of the draft articles, namely in draft article 2, paragraph 1 (a), defining the term “court”. Any attempt to draft a definition of “judicial functions” would involve difficulties because of the differences existing between various national legal systems and national practices.

48. It would, on the other hand, be useful to include a precise definition of “judicial measures of constraint”, since the discussions in the Drafting Committee on draft articles 21, 22 and 23 had shown that that term had a slightly different meaning from “measures of enforcement”. In that connection, the question arose whether consent by a State to judicial measures of constraint should be interpreted as automatically including interim measures for pre-judgment attachment. Measures of that kind were often ordered by a court for the purpose of preserving assets for possible attachment when final judgment was rendered. The power of courts in that respect was open to abuse and consideration should therefore be given to the question whether consent to enforcement should automatically be interpreted as including interim measures. Accordingly, he urged the Special Rapporteur to consider introducing a definition of “judicial measures of constraint” into the draft and deleting the definition of “judicial functions”.

49. Mr. BALANDA, referring to draft articles 2 and 3, said that the Commission had already provisionally defined the term “court” and also had to define the term “judicial functions”, making sure that the two definitions were in accord with each other.

50. In draft article 3, paragraph 1 (b) (iii), the definition of the term “judicial functions” included the “administration of justice in all its aspects”, a very general wording that was entirely satisfactory. If the Commission decided to retain it, however, it would on second reading of draft article 2 have to change the definition of the word “court”, which was much too restrictive and was not consistent with the interpretation of the term “judicial functions” in article 3, paragraph 1 (b) (iii). “Justice in all its aspects” was not administered solely by organs empowered to exercise judicial functions. In some legal systems there were, for example, administrative courts which also took part in the administration of justice. It would therefore be more accurate to refer to “jurisdictional functions” rather than to “judicial functions”.

51. Again, it would not be wise to specify, as one member had proposed, that the administration of justice should be ensured by an impartial and independent body. The public prosecutor’s department, for example, was not an impartial and independent body. In-

roduction of those two adjectives, which were usually used to characterize judges, who had to rule according to the dictates of their conscience without orders or guidelines from the executive, would limit the scope of the word “court” and the words “judicial functions” when the aim should be to expand it.

52. As to draft article 2, paragraph 1 (e), the “interests” referred to in article 15 did not have to be mentioned in the definition of State property. Some members had questioned whether it was appropriate to refer in paragraph 1 (e) to “internal law”; yet without an exhaustive definition of “State property”, it was difficult to see how the Commission could avoid referring to “internal law”. Reference had to be made to some legal system, and the system could only be internal law. The words “according to its internal law” could none the less be replaced by the words “under internal law”, which might refer both to the internal law of the State which invoked immunity and to that of the forum State. A reference to internal law would, moreover, not exclude the rules of private international law, most of which were rules of internal law with an element of extraneity.

53. In draft article 3, paragraph 1 (a), the State was regarded solely as a legal person. Consequently, the “sovereign or head of State” should not be included in the enumeration. As to paragraph 1 (a) (iii), it would be necessary, in order to take account of the different types of State organization, to replace the words “political subdivisions” by “politico-administrative subdivisions” and refer to the internal law of each State by adding the words “according to internal law”. The expression “governmental authority” was also quite inappropriate, for, in most countries, the central Government alone exercised governmental authority and did not share it with political subdivisions, which thus had no possibility of action at the international level. In paragraph 1 (a) (iv), it was not at all clear what was meant by the term “instrumentalities”, which could therefore be deleted, as could the words “and whether or not forming part of the operational machinery of the central Government”. It was pointless to go into such great detail.

54. Draft article 4 spoke of jurisdictional immunities “accorded or extended to”, but the word “accorded” was inappropriate. The future convention could only extend immunities and it was States that would accord them under the provisions of the convention.

55. Lastly, the principle of non-retroactivity was firmly established; hence draft article 5 could be deleted without adversely affecting the draft as a whole.

56. Mr. REUTER, referring to the overall style of the draft articles, said that the Special Rapporteur had chosen to use the descriptive method by first stating an abstract principle and then giving a number of examples. Although he had no criticism of that method, which was entirely defensible, some provisions should none the less be formulated in greater detail. Most of the problems to which attention had been drawn thus far were, moreover, of a drafting nature.

57. With regard to draft article 2, paragraph 1 (e), the desire to clarify the meaning of the words "property, rights and interests" was understandable, but it was doubtful whether any efforts in that direction would prove productive. The article dealt with elements of a patrimonial nature and it was probably that notion that should be retained.

58. In draft article 3, paragraph 1 (b) (ii), it would be preferable to say "determination with the force of *res judicata*". Furthermore, it would be necessary to make the French translation of the word "functions" uniform, for while the expression "judicial functions" had been correctly rendered as *fonctions judiciaires* in the introductory clause of paragraph 1 (b), the term "administrative ... functions", in paragraph 1 (b) (v), had been translated not as *fonctions administratives*, but as *pouvoirs administratifs*

59. He had no objection to a list of international legal instruments in draft article 4, but it was somewhat strange to place conventions which were being implemented on the same footing as others which, although quite old, still had not entered into force. Moreover, item (v), in its present form, did not refer to any convention at all. Since the relevant convention was the one mentioned in item (iv), the two items should be merged.

60. Such relatively minor drafting problems could be resolved easily, but other matters were more important. With regard to draft article 2, for example, he would point out that the text on which the Commission was working was intended to state rules of international law: therefore the Commission could not confine itself to adopting paragraph 1 (e) and paragraph 2. Many other definitions would have to be included in that article.

61. While it was true that the law referred to in paragraph 1 (e) of article 2 was usually the internal law of the State invoking immunity from jurisdiction for property in respect of which it had a patrimonial right, that was not always the case. The internal law of the forum State, the *lex rei sitae* and, in some cases, even international law might well be involved. Some international instruments directly determined the attribution of a patrimonial right. Hence it would be unwise to refer expressly to internal law.

62. Draft article 3, entitled "Interpretative provisions", was not supposed to have the same purpose as draft article 2, entitled "Use of terms"; but the way in which article 3, paragraph 1 (a), was drafted suggested that it was intended to define the term "State". It would therefore be necessary to amend the introductory clause of paragraph 1 (a) and say: "The provisions of the present articles applicable to the State also apply to ...". The list of the entities in question would then follow.

63. Finally, draft article 3 called for certain more general observations. For a long time, the rule of State immunity had been nearly absolute. Gradually, however, a large number of States had come to make a distinction between acts *jure imperii* and acts *jure gestionis*. Some countries had considered that entities which were not really the State did not enjoy any im-

munity. The draft articles that the Commission was endeavouring to formulate should be designed to enable such entities to benefit from jurisdictional immunities when they exercised authority similar to that of the State. In considering the use of terms and the way in which some terms had been translated, however, he could not help wondering whether the Commission was actually following that course. The words "governmental authority", for example, had been incorrectly translated into French as *autorité souveraine*. Municipalities were not sovereign, but, like the State, they had public or governmental authority and, in exercising such authority, they must benefit from the same immunities as the State.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

64. Mr. YANKOV, speaking on behalf of Mr. Barboza, Chairman of the Planning Group, proposed that the membership of the Group should be as follows: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Mahiou, Mr. Malek, Mr. Ogiso, Mr. Reuter, Mr. Roukounas, Sir Ian Sinclair and Mr. Tomuschat. The Group was open-ended and other members of the Commission would be welcome to attend its meetings.

It was so agreed.

The meeting rose at 1.10 p.m.

1946th MEETING

Thursday, 15 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/388,¹ A/CN.4/396,² A/CN.4/
L.398, sect. E, ILC(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)

ARTICLE 2 (Use of terms), paras. 1 (e) and 2

ARTICLE 3 (Interpretative provisions), para. 1

ARTICLE 4 (Jurisdictional immunities not within the
scope of the present articles) and

ARTICLE 5 (Non-retroactivity of the present articles)⁴
(continued)

1. Mr. BOUTROS GHALI said that the text being elaborated by the Commission was destined to become a convention of public international law, which would be translated into perhaps 50 languages. Many of the countries which would accede to it had legal systems that were not based on the common law or on Roman law. Thus the jurists, judges and other persons in different countries who would have to analyse, interpret and apply the provisions of the future convention might not have a full knowledge of the common law or of Roman law. It was therefore essential to define the expressions used in the draft articles precisely.

2. Mr. FRANCIS said that he concurred with the Special Rapporteur's remark in his eighth report (A/CN.4/396, para. 36, *in fine*) that:

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (a) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (a) and commentary thereto: *ibid.*, p. 100; paragraph 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (c) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (d) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (e) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (h) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (i) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (k) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (l) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*; (m) articles 19 and 20 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1985*, vol. II (Part Two) pp. 60 *et seq.*

Part IV of the draft: (n) articles 21, 22, 23 and 24: *ibid.*, pp. 53-54, footnotes 191 to 194; revised texts: *ibid.*, pp. 57-58, footnote 206.

⁴ For the texts, see 1942nd meeting, paras. 5-8.

The notion of "State property" has to be expanded to cover not only the relation to the State through ownership, but also the connection through operation and use, for it has become more and more apparent that the test of the nature of the use is a valid one for upholding or rejecting immunity in respect of property in use by the State.

3. At the same time, the Commission should bear in mind its own precedents, in particular the definition of "State property" in article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.⁵ Unless the text of paragraph 1 (e) of draft article 2 was brought into line with those precedents, confusion would result. There could, of course, be some difference between the concept of State property for the purposes of immunity and the same concept for the purposes of succession of States. Thus the definition in paragraph 1 (e) of draft article 2 differed from that in article 8 of the 1983 Vienna Convention; in particular, the words "operated or otherwise used" had been introduced after the word "owned". Paragraph 1 (e) also had to be read together with paragraph 2 of the same article, which safeguarded the meaning ascribed to the term "State property" in the internal law of any State or by the rules of any international organization.

4. He firmly believed that the concept of State property must be based on the sure foundation of the internal law of the State concerned. There was, however, some room for flexibility, for example when property was in dispute. That point could be illustrated by the example of a gift sent by the head of one State to the head of another State. If accepted, the gift became the property of the recipient; but if it was returned, it did not necessarily become once again the property of the donor State. In some countries, the law specified that the gift should go to charity.

5. He urged that paragraph 1 (e) of article 2 be referred to the Drafting Committee as it stood, except for the unnecessary word "otherwise" before "used by a State", which should be deleted, as suggested by Mr. McCaffrey (1945th meeting).

6. In regard to draft article 3, he agreed that the term "State", as a term of art used in international law and, more broadly, in international relations, did not require definition. Items (i) to (iv) of paragraph 1 (a) went into too much detail. The Commission should also consider bringing the language into line with article 21 of the 1969 Convention on Special Missions and article 50 of the 1975 Vienna Convention on the Representation of States, both of which dealt with the status of the head of State and persons of high rank. The provisions of items (ii) and (iv), if reduced to bare essentials, could be combined to produce an adequate reformulation of paragraph 1 (a).

7. It might be possible to dispense with paragraph 1 (b) if the question of quasi-judicial functions were covered elsewhere. If it were not, some elements of item (v) would have to be retained and the rest of paragraph 1 (b) could be transferred to the commentary.

⁵ A/CONF.117/14.

8. In draft article 4, he suggested that the provisions of subparagraphs (a), (b) and (c) should be made into separate paragraphs.

9. Mr. YANKOV said it was evident that the present topic involved to a much greater degree than other topics the relationship between international law and internal law. Jurisdiction was, of course, one of the most important attributes of the State and the question of immunity and the rules of international law thereon could affect State sovereignty.

10. He had doubts about the words "according to its internal law" in paragraph 1 (e) of draft article 2, which were unduly restrictive and at the same time somewhat confusing. In many instances, the applicable law would not be the law of the foreign State concerned; the exercise of property rights, for example, would normally be governed by the *lex situs*. It was therefore necessary to reconsider those words. In addition, the unnecessary word "otherwise" before "used by a State" should be deleted, as suggested by Mr. McCaffrey (1945th meeting).

11. In draft article 3, he found most of the provisions of paragraph 1 (a) either unnecessary or likely to create confusion. For example, it was difficult to conceive of a State otherwise than as including "the central Government and its various organs or departments" (item (ii)). In the case of a federal State, referred to in item (iii), it was obvious that no foreign court could challenge the legal personality of the State's political subdivisions. It would therefore seem wise not to include any definition of the expression "State", which would only create more problems than it was intended to solve.

12. Paragraph 1 (b), dealing with the expression "judicial functions", should not create any problems of substance but was couched in language that was not very clear. The formula "administration of justice in all its aspects" in item (iii) was very broad and certainly covered the contents of other items, in particular items (i) and (ii). Perhaps the best course would be to confine the wording of paragraph 1 (b) to essentials, leaving out most of the details contained in the various items of the subparagraph.

13. In draft article 4, he was not satisfied with the enumerative method used and did not find the listing of conventions in items (i) to (vi) helpful. He would be inclined to delete the article because the absence of its provisions would not detract materially from the draft. The position in regard to immunities provided for by existing conventions would be the same whether article 4 was included or not.

14. Mr. RAZAFINDRALAMBO said that what was defined in paragraph 1 (e) of draft article 2 was not "State property" as might be inferred from the inverted commas in which those words appeared, but merely "property". In his view the terms "property, rights and interests", which were used several times in article 15, expressed perfectly clear concepts and could not be interpreted in different ways. He did not see why the expression "otherwise" should be deleted. A State could certainly use property in different capacities, for example as owner, as possessor or as a mere user.

15. In the same subparagraph, the reference to "internal law" had rightly been contested by several members of the Commission. The ownership and possession of property was not necessarily governed by internal law, whether that of the plaintiff State or that of the forum State. In the case of movable property, for example, the law applicable was the *lex situs*. Hence the words "according to its internal law" should be replaced by "under the appropriate rules of law"; that formula had the merit of covering all the rules applicable to all kinds of property, rights and interests.

16. With regard to paragraph 2 of article 2, Mr. Tomuschat's proposal (1945th meeting) that the wording should be amended to emphasize the primacy of international law over internal law was interesting.

17. Draft article 3, paragraph 1 (a), raised the question whether it was necessary to include a separate reference to the sovereign or head of State and whether they could not be mentioned in item (ii) together with the central Government. It had been proposed that the list of elements forming an integral part of the State should be shortened, retaining only the central Government, political subdivisions, State organs and para-State organs. The last two elements were assimilated to the State for the purposes of jurisdictional immunities only on condition that they were acting in the exercise of the sovereign authority of the State, which excluded the decentralized bodies. But it was not sufficient for them to have prerogatives of governmental authority. The proposed criterion was for distinguishing administrative acts from purely private acts; it was not a criterion for the exercise of the sovereign authority of the State.

18. In the French text of paragraph 1 (b), the word "functions" had been translated first as *fonctions* and later as *pouvoirs*. Although the term "judicial functions" seemed entirely appropriate, what they included should be specified, since they played a key part in the definition of the term "court". Paragraph 1 (b) should be simplified by retaining only the essential elements, namely the function of judging, that was to say adjudication of litigation, and also the function of prosecution, particularly in criminal cases. It would indeed be inconceivable for a State enjoying immunity from criminal jurisdiction not to be exempted from appearance before an entity assuming the functions of criminal prosecution, such as the public prosecutor or the head of his department. Hence it could not be said that judicial functions were "the functions exercised by an impartial and independent court". That would unduly restrict the extent of the immunity of States from criminal jurisdiction and even from administrative jurisdiction.

19. Moreover, under some legal systems, measures of execution could be ordered by an authority other than a judge. If the draft articles gave the term "court" too narrow a meaning and if the expression "judicial functions" was interpreted too vaguely, a State might have difficulty, under such a system of law, in obtaining recognition of its immunity from measures of execution.

20. On the question whether draft articles 4 and 5 should be retained or deleted, he had no fixed opinion and would accept the view of the Commission.

21. Mr. CALERO RODRIGUES said that most of the provisions under discussion were useful, although it was doubtful whether all of them were absolutely necessary. In any case, much redrafting would be required.

22. As to the definition of "State property" in paragraph 1 (e) of draft article 2, the main need was to adjust the language to that of articles 15 and 22 and possibly article 21 if it were retained. In the form in which it was likely to emerge from the Drafting Committee, article 22 would refer to State property as property which was owned by a State or was in its possession or control, or in which the State had a legally protected interest.

23. The language used in paragraph 1 (e) was not consonant with the general principles of the law of property in many countries. For example, the Civil Code of Brazil drew a distinction between property or ownership, and possession, use and other rights. The term "interests" was difficult to understand in the context. The important point was the relationship between a thing and a person. Ownership conferred the widest range of rights; possession was one of the elements of ownership, and the possessor could be someone other than the owner. There were also other rights, such as that of use, which could be shared by several persons. The word "operated" had no precise legal meaning and the corresponding words used in French and Spanish were likewise unsuitable.

24. He was also dissatisfied with the concluding words "according to its internal law". Rights over immovable property were usually governed by the law of the country in which the property was situated—*lex situs*—whereas title to intellectual property was often established by international conventions, that was to say by international law. It would therefore be preferable to delete the reference to internal law in paragraph 1 (e).

25. He agreed with Mr. Boutros Ghali that definitions were often necessary because the future convention would be used under a variety of different legal systems by persons not necessarily familiar with the terminology employed by the Commission. For a definition to meet that situation, however, it must serve to resolve ambiguities, which paragraph 1 (e) did not. The Commission should re-examine the definition carefully, and in articles 15, 21 and 22 refer simply to "State property". Alternatively, article 22, and perhaps article 15, could state what was meant by State property and then the definition in paragraph 1 (e) of article 2 could be deleted. Nothing but confusion would result from using language in article 2 which differed from that used in articles 15 and 22. He therefore suggested that the Drafting Committee should be invited to examine paragraph 1 (e) of article 2 together with articles 15, 21 and 22.

26. In draft article 3, paragraph 1 (a) needed redrafting, and the items in that subparagraph should be rearranged in a more logical order, as suggested by Mr. Mahiou (1945th meeting). There appeared to be no need for a separate reference to the "sovereign or head

of State"; whatever his functions might be, the head of State was part of the Government. Moreover, there was another article in the draft (art. 25) dealing with the immunities of a sovereign or head of State when not performing official functions.

27. With regard to paragraph 1 (b) of article 3, dealing with the expression "judicial functions", he agreed that the formula "administration of justice in all its aspects", in item (iii), covered all the content of the other four items. It was necessary to retain the essential elements of item (v), because in many countries judgments were not executed by court officials, so that their enforcement was not part of the administration of justice. The text of item (v) should, however, be made much shorter.

28. He had serious doubts about draft article 4. As drafted, it did not seem very useful. Too many examples were given and the one in item (vi) was clearly out of place, since there was no reference to immunities in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

29. He saw no need for draft article 5. The principle of non-retroactivity was already covered by a rule of international law stated in article 28 of the 1969 Vienna Convention on the Law of Treaties. Thus the rule of non-retroactivity was a general rule of the law of treaties and would apply regardless of whether article 5 was included in the draft or not.

30. Mr. LACLETA MUÑOZ, referring to draft article 2, paragraph 1 (e), said that the wording used to define the expression "State property" and that used in draft articles 21 and 22 should be concordant.

31. As it stood, paragraph 1 (e) had certain defects. First, it was difficult to see how rights could be "owned" by a State. The sentence could be drafted less clumsily, at least in Spanish. It might read: *Se entiende por "bienes de Estado" los bienes que son propiedad de un Estado así como los derechos e intereses que éste puede usar o disfrutar* ("State property means property owned by a State and rights and interests which that State is entitled to exercise or enjoy"). The term "otherwise" was also not satisfactory: the adverb "lawfully" would be more correct. The expression "according to its internal law" was obviously too restrictive. It could be replaced by the words "according to the applicable law; or, if the adverb "lawfully" was included, the word "law" need not be qualified and it would be possible simply to say "in accordance with a legal system". Thus amended, paragraph 1 (e) would read as follows:

"State property means property owned by a State in accordance with a legal system and rights and interests which that State is lawfully entitled to exercise or enjoy."

32. Paragraph 2 of article 2 was satisfactory. Its drafting could in no way call into question the primacy of international law over internal law.

33. In draft article 3, paragraph 1 (a), the head of State should perhaps be mentioned as the highest representative of the State, but the words "in his public capacity" should be added. The 1969 Convention on

Special Missions had been much criticized for mentioning only the head of the mission, without referring to the mission itself. The Commission should not commit the opposite error by omitting all reference to the head of State from the draft articles on jurisdictional immunities.

34. In paragraph 1 (a) (ii), it would be preferable to replace the expression "central Government", which implied that there were other types of government, by the words "Government of the State". In paragraph 1 (a) (iii), the phrase "in the exercise of its governmental authority" had been translated into Spanish as *en el ejercicio del poder público*. Although that phrase did not express the concept of sovereignty, it was perfectly acceptable, since governmental authority could only derive from the sovereignty of the State.

35. In the list of the constituent elements of "judicial functions" in paragraph 1 (b), "administration of justice in all its aspects", which clearly included all judicial functions, should come first. Paragraph 1 (b) (v) was nevertheless useful and should be retained.

36. As international conventions were never acceded to by all States, it would be no use enumerating all the relevant conventions in draft article 4; and above all, conventions which were being effectively applied should not be put on the same footing as those which had not yet entered into force. The first part of the text should therefore be reformulated. For example, it might read: "The fact that the present articles do not apply to jurisdictional immunities provided for in ...". After listing a certain number of conventions, the text would continue "relating to diplomatic missions, consular missions ...". Finally, draft article 5 was not really indispensable.

37. Mr. JAGOTA said that, since the various aspects of State property had been elaborated in articles 15, 16, 18, 19 and 21 to 24 of the draft, he saw no need to retain the definition of "State property" in draft article 2, paragraph 1 (e). If that definition were to be retained, however, it would be preferable not to delete the phrase "according to its internal law", in order to be consistent with article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.⁶ A body of State practice would also emerge and help to promote consistency in the law. Depending on the decision taken on those two points, the Drafting Committee might also wish to consider whether paragraph 2 of article 2 was necessary.

38. The interpretative provisions of draft article 3 were more flexible than the terms defined in draft article 2, which was both an advantage and a disadvantage. The first term dealt with in article 3 was "State", which had never been defined in any convention except when qualified by an adjective, as in "sending State", "receiving State" or "host State". If it were now decided to adopt such a provision, the question of its precise scope would arise and, specifically, whether it would cover entities that might not enjoy full sovereignty, such as those formerly known as protectorates or associated States. Such entities had treaty-making

capacity and complete autonomy in internal matters, but might not be Members of the United Nations. That was not just a theoretical possibility, as was clear from article 305 of the 1982 United Nations Convention on the Law of the Sea. His own view was that it would be preferable not to define the term "State" in too much detail. The entities in question would be covered by the word "includes" in paragraph 1 (a) of article 3, and the matter could be left to State practice. Possibly a suitable reference could be included in the commentary.

39. He was not sure whether the definition of "judicial functions" in paragraph 1 (b) of draft article 3 was necessary, but would not oppose its retention. A number of drafting changes would, however, be required. In particular, he would suggest for the Drafting Committee's consideration that a new clause relating to judicial measures of constraint be added to paragraph 1 (b) or that an appropriate reference to such measures be made in the commentary.

40. It would be useful to retain draft article 4, although its drafting too required consideration, as did that of draft article 5, particularly the opening clause.

41. Mr. USHAKOV proposed that paragraph 1 (e) of draft article 2 be amended to read:

" 'State property' means property, rights and interests which, at the time of the act that gave rise to proceedings in a court of another State, belonged to the State according to its internal law."

Among State property, he distinguished between property situated in the territory of the State claiming ownership, which raised no problem; property situated in international territory, whether on the high seas or in outer space, for example, which did not concern the Commission in the present instance; and property situated in the territory of another State. Article 15 as provisionally adopted by the Commission provided that, in the case of a dispute concerning ownership by a State of property situated in the territory of another State, the competent court of the latter State could exercise jurisdiction. The applicable law, in his view, was that of the former State.

42. Supposing that an action was brought against an agency of Aeroflot in Switzerland which had an account with a Swiss bank, if the competent Swiss court ordered a drawing on that account and the ambassador of the Soviet Union claimed that the money deposited in the account did not belong to the Aeroflot agency but to the Soviet State, the court would have to refer to Soviet law to determine whether Aeroflot was or was not, under that law, a legal person separate from the Soviet State. If it was a separate legal person, the court would be justified in ordering the drawing. Another example would be that of a Soviet ambassador in Switzerland who was given a gift of great value. On being dispossessed of the gift in question by the Soviet Government, the ambassador could apply to the Swiss courts, asserting that he had received the gift in his personal capacity. There again, the Swiss court would have to refer to Soviet law to determine whether, under that law, a Soviet ambassador was entitled to retain, for his personal use, gifts of a certain value which he had received.

⁶ A/CONF.117/14.

43. In conclusion, he observed that, in the French text of paragraph 1 (e) of article 2, the word *biens* was used in two different senses. He suggested that the paragraph should refer to *propriété d'un Etat* rather than to *biens d'un Etat*, but feared that the word *propriété* might not be accepted legal terminology.

44. Mr. DÍAZ GONZÁLEZ said that many of the doubts he felt about paragraph 1 (e) of draft article 2 had already been referred to by Mr. Calero Rodrigues and Mr. Lacleta Muñoz. He shared their views and, in particular, endorsed the comments made by Mr. Lacleta Muñoz about the drafting problems that arose in Spanish. The fact remained, however, that one could not speak of ownership of rights. Since, in any case, a State could exercise its rights and manage its interests only within the limits imposed on it by law, he suggested that, in paragraph 1 (e), the words "according to its internal law" should be replaced by "according to law". It would then be for the Drafting Committee to find the best form of words, having regard to the diversity of legal systems and official languages.

45. In draft article 3, paragraph 1 (a) (i), he thought it would be sufficient to refer to the head of State, an expression which covered the notion of "sovereign". He supported the proposal made at the previous meeting by Mr. Mahiou regarding the subdivisions of paragraph 1 (b). In paragraph 1 (b) (iv), he would prefer the words *fases del proceso judicial* (stages of legal proceedings) to the words *fases de los procedimientos judiciales*.

46. He had doubts about the usefulness of draft article 4, which in his opinion should be redrafted so as to distinguish between conventions that had entered into force and those that were not yet being applied, as proposed by Mr. Calero Rodrigues. Perhaps the reference to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents should be retained.

47. Draft article 5 also seemed unnecessary, in so far as no legal instrument had ever been retroactive unless otherwise expressly so provided.

48. Mr. McCaffrey, referring to a point raised by Mr. Ushakov in connection with draft article 2, paragraph 1 (e), noted that many members of the Commission favoured the replacement of the reference to internal law by a reference to the law of the forum and considered that the forum State should apply its rules of private international law in making determinations. Courts throughout the world had decided that an autonomous body of rules of private international law was needed to decide the matters in question because the whole issue in a case could turn on who owned the property and whether a State could, by claiming an ownership interest, trigger an automatic reference to its internal law that would be unfair to the other party to the action.

49. Supposing, for instance, that a member of the staff of the Embassy of the United States of America in Moscow had a claim in respect of a right or interest in housing, should that claim be determined in accordance with United States law? Or, supposing that a patent had been granted to a company which had then been na-

tionalized, what law should apply in determining who owned the patent: the law of the forum State or the law of the State claiming ownership of the patent? In decided cases on the latter point, the law of the forum State had been applied. The universal rule was that the *lex situs* governed questions of ownership of real property. Obviously that must be so; it would be futile for a United States court to seek to pronounce on questions of title to property located in Switzerland when it could not enforce its decision. In the circumstances, the only solution was to omit from paragraph 1 (e) of article 2 all reference either to internal law or to the law of the forum.

The meeting rose at 1 p.m.

1947th MEETING

Friday, 16 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jagota, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Co-operation with other bodies

[Agenda item 10]

1. The CHAIRMAN informed the Commission that a letter had been received from the Director of Legal Affairs of the Council of Europe, inviting the Commission to be represented at a meeting of the European Committee on Legal Co-operation to be held from 26 to 30 May at Strasbourg. He understood that the Commission had in the past declined invitations to attend meetings held during its sessions. If there were no objections, therefore, he would take it that members agreed that the Secretary of the Commission should be asked to reply to the effect that, as the Commission was in session, it would unfortunately be unable to be represented at the meeting.

It was so agreed.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/388,¹ A/CN.4/396,² A/CN.4/L.398, sect. E, ILC(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur³ (concluded)

ARTICLE 2 (Use of terms), paras. 1 (e) and 2

ARTICLE 3 (Interpretative provisions), para. 1

ARTICLE 4 (Jurisdictional immunities not within the scope of the present articles) and

ARTICLE 5 (Non-retroactivity of the present articles)⁴ (concluded)

2. Mr. KOROMA said that the basic issue in draft article 2, paragraph 1 (e), was not solely one of definition, but also involved certain categories of rights and interests in property which, it had been suggested, did not exist under some legal systems. None the less, although the definition in question might seem to have been influenced mainly by the common law, it did cover all the different categories of States rights in property. With a view to arriving at a universally acceptable formulation and to allaying the fears expressed about the word "interests", he would suggest that article 2, paragraph 1 (e), be reworded in the light of draft article 22.

3. The reference to internal law required further examination, since it would mean that different solutions would be required according to the property concerned. A reference to the applicable law would not solve the problem, since that law might depend on extraneous factors. In the circumstances, he was inclined to agree that the reference to internal law should be deleted from the definition of State property.

4. Draft article 3, paragraph 1, should be retained, although he agreed that subparagraph (a) (iv), referring

to agencies or instrumentalities, should come before subparagraph (a) (iii), referring to the political subdivisions of a State. In addition, the means whereby the various organs, ministries, departments, political subdivisions, agencies and instrumentalities would claim jurisdictional immunity should be made clear. For instance, would such bodies claim immunity themselves or would they act through the central Government?

5. He agreed that the scope of the definition of "judicial functions" in paragraph 1 (b) should be enlarged to cover judicial powers and administrative functions. In some countries, including his own, the comptroller of customs was empowered by statute in certain circumstances to confiscate property without reference to a court. Such acts, which should be covered by the definition, would presumably come under administrative powers.

6. Draft articles 4 and 5 were useful and should be retained. The former placed jurisdictional immunities of the State in their proper perspective, while a provision such as the latter, although it stated a general principle of law, was included in most contemporary multilateral instruments.

7. Mr. HUANG, referring to draft article 2, paragraph 1, said that when elaborating definitions the aim should be simplicity and lucidity, in order to ensure correct interpretation and application. An effort should also be made to avoid repetition and wording that would create divergencies and complications.

8. The main purpose of defining "State property", in paragraph 1 (e), was to determine which State property would or would not enjoy immunity, rather than to determine how the local courts should exercise jurisdiction over State property that fell within the scope of the exceptions provided for in the draft articles. On that basis, he was inclined to favour retention of the words "according to its internal law". Moreover, during the Commission's deliberations on the definition of "State property" in connection with its work on the draft articles on succession of States in respect of matters other than treaties,⁵ some members had expressed the view that the reference to the internal law of the predecessor State was correct, because it was that law which determined what constituted the State's property. Hence problems of application of private international law and of the law applicable to the property concerned should be left aside entirely when elaborating the definition of "State property". Again, the definition of State property imported concepts which, as had already been pointed out, involved contradictions or were repetitious or inconsistent with substantive articles. In that connection, he noted that the Special Rapporteur, in his eighth report (A/CN.4/396, para. 36, *in fine*), had rightly stated that "the test of the nature of use is a valid one for upholding or rejecting immunity in respect of property in use by the State".

9. With regard to the definition or interpretation of the term "State", in draft article 3, paragraph 1 (a), he

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (a) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (a) and commentary thereto: *ibid.*, p. 100; paragraph 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (c) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (d) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (e) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (h) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (i) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (k) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (l) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*; (m) articles 19 and 20 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1985*, vol. II (Part Two) pp. 60 *et seq.*

Part IV of the draft: (n) articles 21, 22, 23 and 24: *ibid.*, pp. 53-54, footnotes 191 to 194; revised texts: *ibid.*, pp. 57-58, footnote 206.

⁴ For the texts, see 1942nd meeting, paras. 5-8.

⁵ Later "Draft articles on succession of States in respect of State property, archives and debts"; see paragraph (8) of the commentary to article 8 of the draft (*Yearbook ... 1981*, vol. II (Part Two), p. 25).

agreed with Mr. Jagota (1946th meeting), who had pointed out that no definition of that term had been included in any convention drafted by the Commission, and with Mr. Malek, who had referred, by way of example, to the draft Declaration on the Rights and Duties of States.⁶ Even in the case of State immunity, the laws of some countries differed as to the treatment of sovereigns and heads of State and as to the legal status of agencies and instrumentalities of States. Moreover, if the expression “the sovereign or head of State” was qualified by the words “in his official capacity”, difficulties could arise in the application of article 12 of the draft, which went to show that it was far more difficult to draft an international convention than to draw up domestic legislation. The whole question of whether a definition of the State was required should therefore be approached with caution.

10. In principle, he was inclined to favour the retention of draft article 4, but it should be worded in such a way as not to affect the conventions to which it referred. The question of the applicability of general international law or customary international law should be avoided where State immunity was concerned. Otherwise, use might be made of a formula such as the last paragraph of the preamble to the 1961 Vienna Convention on Diplomatic Relations.

11. Referring to draft articles 25 to 28,⁷ which had been discussed during his absence, he noted that many members had questioned the need for article 25. In diplomatic practice, sovereigns and other heads of State, both on their official and on their personal visits abroad, were accorded full immunities, privileges and facilities in accordance with international law and custom. He wondered whether full account had been taken of current law and practice in the provisions of article 25. Among the questions which required very careful consideration were the number of actual examples that could be cited as a basis for restricting the immunities of personal sovereigns and other heads of State and what the practical effect of such an article would be. It had been suggested that a solution would be to reword the article in very brief terms, but there remained the problem of the exact choice of words. The question whether restriction of the immunities of sovereigns and other heads of State was governed by a rule of general international law should also be considered.

12. Service of process by any writ or other document instituting proceedings against a State, which was regulated by draft article 26, constituted an exercise of judicial powers and had usually been regarded as an act violating national sovereignty if performed without the consent of the State concerned. International conventions, such as the 1972 European Convention on State Immunity,⁸ and the internal legislation of countries, such as that of the United Kingdom,⁹ showed that service of process was generally effected through

diplomatic channels, and in his view that procedure was appropriate.

13. In principle, he favoured a flexible form of wording for draft article 28 and considered that the restriction and the extension of immunities should be dealt with separately. The phrase “to the extent that appears to it to be appropriate” would not, in his view, help to reduce disagreements between States over jurisdiction and immunities, both of which were subject to the principle of the sovereign equality of States. He therefore suggested that that phrase should be deleted and that the following sentence should be added to the article: “Such restriction shall not contradict the general principles and practice of State immunity.” Alternatively, the provision could be made subject to article 6, provided that that article was adequately drafted.

14. Mr. FRANCIS said he still believed that any departure from the definition of State property in draft article 2, paragraph 1 (e), would be undesirable. He had noted from the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts¹⁰ that the plenipotentiary conference had not departed in any essential way from the draft articles prepared by the Commission. The Commission should therefore be very careful before it departed from a standard that it had set and that had subsequently been confirmed by a plenipotentiary conference. The members of the Commission came and went, but the Commission as an institution lived on, and its continued integrity would depend on the extent to which its members were prepared to abide by tried and tested concepts and on their recognition of the need for continuity, particularly in regard to such basic and long-standing concepts as “State property” and all its essential elements.

15. Chief AKINJIDE, expressing strong support for the retention of the phrase “according to its internal law” in draft article 2, paragraph 1 (e), said that the “property, rights and interests ... owned, operated or otherwise used by a State” were generally regulated by the internal law of that State. That was certainly so in his own country, where the relevant provisions had even been entrenched in the Constitution. Even if the phrase in question were deleted, States would not be prevented from taking legislative measures to control such matters internally. Also, it should be borne in mind that, if the legislative bodies of various countries decided that the convention to be adopted was not in their interests, they might not sign or ratify it. In the circumstances, therefore, the words “according to its internal law” would help to make the future convention acceptable.

16. Sir Ian SINCLAIR said that the problem of defining State property was a difficult one, as was apparent from two decided cases. In the first, *Krajina v. The Tass Agency and another* (1949),¹¹ the question had been whether the Tass Agency was a separate agency or an instrument or department of the Soviet State, and it had been decided by reference to the internal constitutional law of the Soviet Union. That was a clear example of the cases in which internal law would operate to determine

⁶ *Yearbook ... 1949*, pp. 287-288, document A/925, part II.

⁷ For the texts, see 1942nd meeting, para. 10.

⁸ See 1942nd meeting, footnote 6.

⁹ See section 12 (1) of the *State Immunity Act 1978* (see 1944th meeting, footnote 6).

¹⁰ A/CONF.117/14.

¹¹ *The All England Law Reports, 1949*, vol. 2, p. 274.

whether a particular agency or instrumentality was a separate entity or a department of the State.

17. In another case, more directly related to property—the *Dollfus Mieg* litigation¹² in the United Kingdom—gold bars had been seized by France, the United Kingdom and the United States of America in Germany at the end of the Second World War, because title to the bars was undetermined, and they had been deposited with the Bank of England under a contract of bailment. Proceedings had subsequently been brought by a private individual asserting title to some of the gold bars and the three Governments had pleaded immunity on the basis that they had a right to immediate possession or control under the contract of bailment, which was governed by English law. In other words, they had relied on the local law to determine that the property was in their possession or control and thus to entitle them to immunity. If a definition of State property was now included in the draft articles, it would preclude the possibility of a Government relying on local law to assert its right to immunity. In his view, that could not be right.

18. Although he did not wish to undermine the integrity of the Commission, he maintained that it could not use the experience gained in previous codification work if that experience was not relevant to the work in hand. In his view, therefore, it would be simplest to do without any definition of the property of a State, which was in any event already covered by the related concepts of property in the possession or control of a State or property in which a State had a right or interest.

19. Mr. KOROMA said that, given the division of opinion in the Commission, it would be futile to try to agree on the definition of “State property” in paragraph 1 (e) of draft article 2. He did not think any harm would be done to the draft as a whole if it were deleted, and in any case a definition of the term was to be found elsewhere in the draft.

20. The CHAIRMAN, speaking as a member of the Commission, noted that some members regarded paragraph 1 (e) of draft article 2 as useful, some objected to it and some held the intermediate opinion that the definition of the term “State property” should not be limited by a reference to internal law. In any event, the term should be given a definition that was valid from the standpoint of international law. The Commission had provided such a definition in article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,¹³ and it would be unfortunate now to ascribe a different meaning to the term. It might be advisable to adopt Mr. Ushakov’s proposal (1946th meeting) to use the expression “property of a State”.

21. The Commission must decide whether the words “according to its internal law” were to be retained. Of course, internal law came into play in some cases:

¹² See *Dollfus Mieg et Cie S.A. v. Bank of England* (1950) (United Kingdom, *The Law Reports, Chancery Division*, 1950, p. 333) and *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England* (1952) (*The All England Law Reports*, 1952, vol. 1, p. 572).

¹³ A/CONF.117/14.

Mr. Ushakov and Sir Ian Sinclair had given excellent examples. But the wording in question did not meet all cases, particularly where the rights and interests could not be localized. Consequently, if the definition of “State property” was limited by a reference to internal law, those rights and interests would be left out of account. If the Commission wished to retain paragraph 1 (e), therefore, it should find an expression which covered both internal and international law.

22. With regard to draft article 3, paragraph 1 (a), he wondered whether it was necessary to define the word “State”. Mr. Jagota (*ibid.*) had pointed out that there were many instruments which did not define that term, including the draft Declaration on the Rights and Duties of States¹⁴ and the 1961 Convention on the Reduction of Statelessness.¹⁵ In the case in question, however, it might be better to do so, since once adopted, the convention would have specific applications, such as the execution of judgments rendered against States or State organs. For those reasons, he shared the view of those members of the Commission who advocated the inclusion of a definition, subject to improvement of the wording.

23. If the definition of the expression “judicial functions” in paragraph 1 (b) of draft article 3 was to be retained, the words “administration of justice in all its aspects” might suffice, possibly with a short list of examples. The two components of subparagraph (b) (i), “adjudication of litigation”—for which he would prefer the words *décision contentieuse* in French—and “dispute settlement”, were not really different, since the second component partly covered the first, so that there would be some risk of confusion if both were retained.

24. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion, observed that, during the Commission’s discussion of the topic some seven years previously, Sir Francis Vallat had urged that the decision on the question of definitions should be deferred. The Commission had heeded that advice, but had later found it necessary to adopt definitions for the terms “court” and “commercial contract”. He himself had drafted a number of other definitions *ex abundanti cautela*, but had later withdrawn them in the light of the discussion. The only definition now under consideration was that of “State property” in paragraph 1 (e) of draft article 2.

25. He stressed the important difference in kind between the definitions in draft article 2 and the “interpretative provisions” in draft article 3. The latter article did not deal with questions of definition or terminology. Paragraph 1 (a) of article 3 accordingly began with the words: “the expression ‘State’ includes”. That presentation made it clear that there was no intention of defining the term “State” in article 3.

26. Unfortunately, in the French translation of article 2, paragraph 1 (a), the original English words “‘court’ means any organ of a State ...” had been rendered as *L’expression “tribunal” s’entend de tout organe d’un*

¹⁴ See footnote 6 above.

¹⁵ United Nations, *Treaty Series*, vol. 989, p. 175.

Etat The fact that the word *expression* was used in the French text had led to some misunderstanding. He therefore wished to reiterate that article 3 contained only interpretative provisions and did not purport to define any terms as used in the draft articles.

27. It had been suggested that the words "State property" should be replaced by "property of a State" (*biens d'un Etat*). That suggestion merited consideration, especially as there were several references in the draft to the property of a State and few, if any, to "State property".

28. As to the wording of the definition in article 2, paragraph 1 (e), the reference to internal law raised the problem of determining which State's law was meant. That problem had not arisen in the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,¹⁶ article 8 of which referred to "property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State". The judicial precedents of various countries showed that immunity was usually granted on the basis of the internal law of the foreign State concerned. In the United Kingdom, for instance, in *Krajina v. Tass Agency and another* (1949),¹⁷ immunity had been granted on the basis of a document presented by the Soviet Embassy certifying that the Tass News Agency was a State agency of the Soviet Union. That fact that the competent court would have to refer to internal law did not, of course, preclude it from referring also to private international law. That might be necessary if the title to the property was contested; the court would then have to apply the rules of private international law to determine the law governing that title.

29. He would be inclined to favour a rather simpler definition, along the following lines:

" 'property of a State' means property, rights and interests owned by the State."

That definition could be supplemented by introducing into article 3 an interpretative provision explaining that the formula was intended to include property possessed or used by a State, and property in which it had a legally protected interest. But if that point was covered in article 22, it would not be necessary to introduce such an interpretative provision. Indeed, if the Commission so wished, he might even agree to the deletion of the definition in paragraph 1 (e) of article 2.

30. Referring to the interpretative provision on the expression "State" in draft article 3, paragraph 1 (a), he drew attention to the terms of article 7, paragraph 3, according to which

... 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 agencies or instrumentalities in respect of an act performed in the exercise of governmental authority ...

Since that provision dealt with practically all the points he had wished to cover in paragraph 1 (a) of draft article 3, he would have no objection to the latter sub-

paragraph being deleted. The similarity of coverage was illustrated further by the Commission's commentary to article 7, adopted at the thirty-fourth session in 1982.¹⁸ The question of proceedings against political subdivisions of another State was dealt with at length in paragraphs (9) to (12) of that commentary, which made abundant use of case-law. Paragraphs (13) to (15) dealt with proceedings against organs, agencies or instrumentalities of another State.

31. The interpretative provision in draft article 3, paragraph 1 (b), concerning the expression "judicial functions" had been added at a later stage in the discussion on article 3, in response to suggestions by Sir Francis Vallat and Mr. Ushakov that the draft articles should cover immunity in general, rather than immunity from court jurisdiction in the narrow sense. Subparagraph (b) (v) was especially relevant because, in many countries, measures for the execution or enforcement of judicial decisions were within the competence of non-judicial authorities.

32. It had been suggested that draft article 4 might be deleted. He believed that it was necessary in order to safeguard the position regarding immunities that were outside the scope of the draft articles but were provided for in existing conventions. The 1961 Vienna Convention on Diplomatic Relations did not mention the immunities of diplomatic missions as such, but referred to the immunities of the members of a diplomatic mission and to the inviolability of the embassy. The practice varied in different countries. As late as 1985, it had been ruled in Italy that a foreign embassy was not a juridical person. Where the ambassador himself was concerned, the usual distinction was drawn between acts performed in his private capacity and acts performed in his public capacity. Recently, the concept of *ambasciatore pro tempore* had been introduced, as a legal entity created by Italian law.

33. He believed that article 5 was also necessary in the draft; its wording could be left to the Drafting Committee.

34. In conclusion, he proposed that the outstanding provisions of draft articles 2 and 3 (including Mr. Ogiso's proposal for a new definition), and draft articles 4 and 5 should be referred to the Drafting Committee.

35. Sir Ian SINCLAIR proposed that the draft articles under discussion should be referred to the Drafting Committee for consideration in the light of the summing-up by the Special Rapporteur, bearing in mind the Special Rapporteur's willingness to accept the deletion of the definition of "State property" in paragraph 1 (e) of draft article 2, and of the interpretative provision relating to the expression "State" in paragraph 1 (a) of draft article 3.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 2, paragraphs 1 (e) and 2, draft article 3, paragraph 1, and draft articles 4 and 5 to the Drafting Committee, which would consider them in the light of

¹⁶ A/CONF.117/14.

¹⁷ See footnote 11 above.

¹⁸ See footnote 3 (f) above.

the comments made by the Special Rapporteur and then propose to the Commission the necessary deletions or amendments.

*It was so agreed.*¹⁹

The meeting rose at 11.35 a.m.

¹⁹ For consideration of draft articles 2, 3, 4 and 5 proposed by the Drafting Committee, see 1968th meeting, paras. 5-48.

1948th MEETING

Tuesday, 20 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/390,¹ A/CN.4/400,² A/CN.4/L.398, sect. D, ILC (XXXVIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
ARTICLES 36, 37, 39 AND 41 TO 43

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 36, 37, 39 and 41 to 43 as revised by him in his seventh report (A/CN.4/400). The articles read:

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*;

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*;

Article 12 (new commentary to paragraph 2) and articles 18 and 21 to 27, and commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session: *Yearbook ... 1985*, vol. II (Part Two), pp. 39 *et seq.*;

Articles 36, 37 and 39 to 43, referred to the Drafting Committee by the Commission at its thirty-seventh session: *ibid.*, pp. 30 *et seq.*, footnotes 123, 128, 130, 131, 133, 135 and 138.

Article 36. Inviolability of the diplomatic bag

1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other mechanical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than official correspondence, documents or articles intended for official use, referred to in article 25, they may request that the bag be returned to its place of origin.

Article 37. Exemption from customs duties, dues and taxes

The receiving State or, as appropriate, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the free entry, transit or exit of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and other related charges, other than charges for storage, cartage and other specific services rendered.

Article 39. Protective measures in case of force majeure

1. The receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag and shall immediately notify the sending State in cases of illness, accident or other events preventing the diplomatic courier from delivering the diplomatic bag to its destination, or in circumstances preventing the captain of a ship or aircraft from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State.

2. If, as a consequence of *force majeure*, the diplomatic courier or the diplomatic bag is compelled to pass through the territory of a State which was not initially foreseen as a transit State, that State shall accord to the diplomatic courier and the diplomatic bag inviolability and protection and shall extend to the diplomatic courier and the diplomatic bag the necessary facilities to continue their journey to their destination or to return to the sending State.

Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations

1. The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under these articles shall not be affected either by the non-recognition of the sending State or of its Government by the host State or the transit State or by the non-existence of diplomatic or consular relations between them.

2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the host State or the transit State shall not by itself imply recognition by the sending State of the host State or the transit State, or of their Governments, nor shall it imply recognition by the host State or the transit State of the sending State or of its Government.

Article 42. Relation of the present articles to other conventions and international agreements

1. The present articles shall complement the provisions on the courier and the bag in the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975.

2. The provisions of the present articles are without prejudice to other international agreements in force as between States Parties to them.

3. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and from modifying the provisions thereof, provided that such modifications are in conformity with article 6 of the present articles.

Article 43. Optional declaration of exceptions to applicability in regard to designated types of couriers and bags

1. A State may, when signing, ratifying or acceding to the present articles, or at any time thereafter, designate by written declaration those types of couriers and bags to which it wishes the provisions to apply.

2. A State which has made a declaration under paragraph 1 of this article may at any time withdraw it; the withdrawal must be in writing.

3. A State which has made a declaration under paragraph 1 of this article shall not be entitled to invoke the provisions relating to any of the excepted types of couriers and bags as against another State Party which has accepted the applicability of those provisions.

2. Mr. YANKOV (Special Rapporteur) said that the main purpose of his seventh report (A/CN.4/400) was to set out the present status of the draft articles on the topic and to facilitate completion of the first reading of the whole of the draft at the present session.

3. The entire set of 43 draft articles had been considered by the Commission, and articles 1 to 27 had already been adopted on first reading. The remaining seven articles, namely articles 36, 37 and 39 to 43, although referred to the Drafting Committee, had not yet been considered by the Committee and he had thought it useful to make some changes in the light of the Commission's own discussion and of the comments and suggestions made in the Sixth Committee of the General Assembly. He was therefore introducing six revised articles in order to provide the Commission with an opportunity to improve on the texts it had already considered. The seventh report provided a brief analytical survey of the comments made by representatives in the Sixth Committee on the articles in question.

4. With regard to articles 1 to 27, adopted on first reading, only one point had given rise to certain objections. It related to the scope of the draft, and more particularly the unresolved question whether, under article 2, the draft should apply to couriers and bags employed for the official communications of international organizations and recognized national liberation movements. On first reading, the Commission had decided to retain the present formulation for article 2, without prejudice to its final decision on the applicability of the draft articles to such bodies.

5. Draft article 36 had given rise to considerable discussion in the Sixth Committee (see A/CN.4/L.398, paras. 317-336), with some representatives endorsing the article and others expressing reservations. The discussion had centred largely on the principle, embodied in paragraph 1, of complete inviolability and exemption from examination through electronic or other devices. With regard to paragraph 2, the discussion had focused on whether a suspect bag should simply be returned to its place of origin or whether the procedure specified in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations should apply.

6. The revised draft article 36 which he had now submitted was a compromise formula which set forth in paragraph 1 the well-established principle of complete inviolability of the diplomatic bag, but allowed some flexibility in respect of application. In that regard, he had taken into account the views expressed both in the

Commission and in the Sixth Committee and the proposed text specified that the competent authorities of the receiving State or the transit State could request that a suspect bag be returned to its place of origin. The stipulation that the bag should not be opened or detained was in keeping with article 27 of the 1961 Vienna Convention on Diplomatic Relations, article 28 of the 1969 Convention on Special Missions and article 27 of the 1975 Vienna Convention on the Representation of States.

7. On the other hand, he had not deemed it advisable to introduce the procedure under article 35, paragraph 3, of the 1963 Vienna Convention, whereby it was possible to request that a suspect bag be opened in the presence of an authorized representative of the sending State. No provision of that kind existed in the three other diplomatic conventions. Moreover, an examination of existing bilateral consular conventions showed that some 50 of them deviated expressly from the terms of article 35, paragraph 3, of the 1963 Vienna Convention and provided simply for the return of a suspect bag to its place of origin. It was worth stressing that that practice had been well established in bilateral consular conventions well before 1963.

8. As to the actual wording of draft article 36, he had accepted a number of suggestions for simplifying it by deleting certain expressions which had been criticized as too categorical. The words "at all times" in paragraph 1 had thus been deleted, as had the words "any kind of" before "examination". The only change in paragraph 2 was that the reference to article 32 had been replaced by a reference to article 25, which was the new number of the article in question.

9. The main objection to the earlier version of draft article 37 in the Commission and in the Sixth Committee had taken the form of a proposal that it should be confined to fiscal matters, namely exemption from customs duties, dues and taxes; the question of customs inspection would thus fall under the provisions of article 36. The drafting had been improved by inserting the word "free" before "entry".

10. Revised draft article 39 combined the substance of former draft article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag) and former draft article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event), in response to suggestions in the Commission and the Sixth Committee. The reformulation largely involved problems of drafting. The reference to a "fortuitous event" had been deleted and was covered by the general concept of *force majeure*. Also, a specific reference had been inserted in paragraph 1 to "illness, accident or other events".

11. In the case of draft article 41, he had eliminated the expression "receiving State" from paragraph 1 in the passage "non-recognition of the sending State or of its Government by the receiving State, the host State or the transit State". It had been pointed out that, where the two States concerned did not have diplomatic relations, it would be inappropriate to speak of a "receiving State". Of course, he had originally used the term "receiving State" on the basis of the definition con-

tained in paragraph 1 (4) of article 3 of the draft. The need for legal protection of the diplomatic courier and the diplomatic bag in the exceptional circumstances of non-recognition of States or Governments or the absence of diplomatic or consular relations was obvious, especially in the case of official communications with delegations to international conferences, special missions or permanent missions to international organizations.

12. With regard to draft article 42, there had been general recognition of the importance of including a provision on the relationship between the draft articles and the four conventions codifying diplomatic and consular law.⁴ The case could be considered as one of "application of successive treaties relating to the same subject-matter" under article 30 of the 1969 Vienna Convention on the Law of Treaties. Paragraph 1 of draft article 42 reflected the idea that the draft must be considered as *lex specialis* to supplement the existing conventions in matters pertaining to the status of the diplomatic courier and the diplomatic bag, and paragraph 2 introduced an element of flexibility by preserving the full effect of other international agreements in force. Paragraph 3 made provision for the possibility of concluding future international agreements on the status of the courier and the bag or modifying that status, subject to the proviso that any modifications were "in conformity with article 6 of the present articles". Article 6 dealt with non-discrimination and reciprocity. Hence the modification must not be "incompatible with the object and purpose of the present articles" and must "not affect the enjoyment of the rights or the performance of the obligations of third States", as explicitly stated in paragraph 2 (b) of article 6.

13. As to draft article 43, it should be noted that flexibility in the application of the provisions on various types of couriers and bags resulted in a plurality of régimes which reflected the existing legal situation in the light of the four codification conventions. There had been 146 ratifications of the 1961 Vienna Convention on Diplomatic Relations, whereas the 1963 Vienna Convention on Consular Relations had only some 100 States parties. The 1969 Convention on Special Missions had only just entered into force after having obtained the requisite number of ratifications, and the most recent diplomatic convention, namely the 1975 Vienna Convention on the Representation of States, was not yet in force. The status of the diplomatic courier did not differ materially under the four conventions, but in the case of the diplomatic bag two régimes were applicable: on the one hand, the régime of the 1961 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention, and, on the other hand, the régime of the 1963 Vienna Convention.

14. Accordingly, the purpose of draft article 43 was to reflect the existing legal situation and, at the same time,

⁴ 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations, 1969 Convention on Special Missions and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (referred to as "1975 Vienna Convention on the Representation of States").

to provide certain options in connection with the application of the draft articles. The option chosen by a State would, of course, be determined by the fact that it was a party to one or other of the relevant conventions. Naturally, the wording of article 43 took account of the comments made during the discussions in the Commission and the Sixth Committee. At the Commission's previous session, Sir Ian Sinclair had made a proposal to deal with draft article 43 by inserting two new paragraphs in draft article 36.⁵ That proposal had attracted some support in the Commission but he would prefer to keep the two issues separate, so that article 36 covered the question of inviolability and article 43 related to the optional declaration of exceptions to applicability in regard to designated types of couriers and bags.

15. Lastly, some general remarks were called for. The first related to the question of headings. In his earlier reports he had proposed that the draft articles should be divided into four parts: part I (General provisions), comprising articles 1 to 6; part II (Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag), comprising articles 7 to 23; part III (Status of the diplomatic bag—including the diplomatic bag not accompanied by diplomatic courier), comprising articles 24 to 30; and part IV (Miscellaneous provisions—including obligations of the transit State and third States in cases of *force majeure*, facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag in cases of non-recognition of the sending State by the host State or a transit State or non-existence of diplomatic or consular relations between them, provisions on the relationship between the present articles and other conventions and international agreements, and some other provisions relating to final clauses), comprising articles 31 to 43. Of course, those headings had no legal significance and were merely intended to facilitate the reading of the draft. The Drafting Committee, at an early stage of its work on the draft articles, had decided that the question of headings should be left aside until completion of the first reading.

16. As pointed out in his seventh report (A/CN.4/400, para. 4), he had not thought it appropriate at the present stage to submit any proposals for articles on final clauses and on the settlement of disputes, since any proposals would largely depend upon the final form to be given to the draft, namely that of an independent convention or of an instrument to be attached to the existing conventions as a protocol or other subordinate instrument.

17. He expressed the hope that it would be possible to complete the first reading of all the draft articles at the present session and thanked the Secretariat for its valuable assistance in his work.

18. Mr. RIPHAGEN pointed out that, in view of the deletion from paragraph 1 of draft article 41 of the reference to the "receiving State", it would be useful to insert a definition of "host State" in article 3.

⁵ See *Yearbook ... 1985*, vol. I, p. 179, 1906th meeting, para. 7.

19. In regard to draft article 42, he failed to see how the proviso in paragraph 3 could apply. He could not imagine a situation in which the type of modification envisaged could possibly conflict with the object and purpose of the future convention, or again how it could affect the enjoyment of the rights or the performance of the obligations of third States as stipulated in paragraph 2 (b) of article 6, to which paragraph 3 of article 42 referred.

20. Mr. USHAKOV said that article 36 was perhaps the key provision of the entire draft submitted by the Special Rapporteur. The first clause of paragraph 1 did not give rise to any problems, since it reproduced a provision that appeared in international conventions and bilateral agreements and reflected established practice. The same was true of the principle that the diplomatic bag must be neither opened nor detained, a principle that was well established in international law, leaving aside the 1963 Vienna Convention on Consular Relations. It was quite clear that the word "directly" referred to the idea of the opening of the bag, while the words "through electronic or other mechanical devices" applied to exemption of the bag from examination. Those words, which were, in his opinion, essential, introduced a new element in international law and should apply only to the previous phrase, namely "shall be exempt from examination". It was obvious that, in order to avoid any escalation of measures and counter-measures by receiving States and sending States using the latest electronic technology, the bag had to be absolutely inviolable.

21. Paragraph 2 of article 36 gave rise to problems because it bore no relation to paragraph 1, stating as it did that the bag had to be returned to its place of origin "if the competent authorities of the receiving State or the transit State have serious reason to believe ...". Paragraph 3 of article 35 (Freedom of communication) of the 1963 Vienna Convention stated:

3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

Why had the Special Rapporteur not provided, in draft article 36, paragraph 2, that the bag could be opened in the presence of an authorized representative of the sending State? Return of the diplomatic bag should be envisaged only in cases where the sending State refused a request for the bag to be opened.

22. Again, he wondered why the Special Rapporteur had included a reference to the transit State in paragraph 2, something that went far beyond the terms in the 1963 Vienna Convention. It was all the more unnecessary in that the transit State's sole concern should be to ensure that the contents of the bag did not remain in its territory and that its own postal service or transport companies should be responsible for carrying the bag through its territory. In its present form, paragraph 2 was unprecedented and was not based on any firm foundations.

23. The new paragraph 3 proposed for draft article 36 by Sir Ian Sinclair at the previous session⁶ was superfluous, for, as the Commission had already decided, any State might restrict the scope of the articles and declare that they would not apply to the consular bag, for example (in such a case, the 1963 Vienna Convention would be applicable).

The meeting rose at 11.25 a.m.

⁶ See footnote 5 above.

1949th MEETING

Wednesday, 21 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)
(A/CN.4/390,¹ A/CN.4/400,² A/CN.4/L.398, sect. D, ILC(XXXVIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs duties, dues and taxes)

ARTICLE 39 (Protective measures in case of *force majeure*)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*;

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*;

Article 12 (new commentary to paragraph 2) and articles 18 and 21 to 27, and commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session: *Yearbook ... 1985*, vol. II (Part Two), pp. 39 *et seq.*;

Articles 36, 37 and 39 to 43, referred to the Drafting Committee by the Commission at its thirty-seventh session: *ibid.*, pp. 30 *et seq.*, footnotes 123, 128, 130, 131, 133, 135 and 138.

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Optional declaration of exceptions to applicability in regard to designated types of couriers and bags)⁴ (*continued*)

1. Mr. FLITAN said that he approved of the substance of draft article 36, paragraph 1. In stating the essential principle of the inviolability of the diplomatic bag, that paragraph reproduced and satisfactorily developed the provisions relating to the diplomatic courier that had already been codified. In particular, he supported the change introduced by the Special Rapporteur into the first clause of the paragraph, which now provided that the diplomatic bag was inviolable "wherever it may be".

2. It was also useful to specify, as the Special Rapporteur had done in the last part of paragraph 1, that the bag was exempt from examination "directly or through electronic or other mechanical devices". For it was obvious that, given the rate of technical progress, the confidential nature of the contents of the bag might be violated by electronic or mechanical means. Moreover, if that kind of examination were permitted, the developing countries, which were less well equipped than the developed countries, would be at a disadvantage. With regard to the drafting, in order to remove all ambiguity, the word "indirectly" might be inserted after the word "directly".

3. By providing in paragraph 2 of article 36 that the authorities of the receiving State or the transit State—which were not mentioned either in the 1961 Vienna Convention on Diplomatic Relations or in the 1963 Vienna Convention on Consular Relations—might request that the diplomatic bag be returned to its place of origin, the Special Rapporteur was proposing to apply to the bag a new régime different from those provided for in the four codification conventions. But as the majority of the members of the Commission had recognized, the object of the draft articles under consideration was to supplement the relevant provisions of those conventions, not to change the status of the diplomatic bag established by those provisions, either by strengthening or by relaxing the principle of inviolability of the bag. Paragraph 2 of draft article 36, which departed from the relevant provisions of the four codification conventions, was, moreover, incompatible with paragraph 2 of draft article 42, which provided that "the provisions of the present articles are without prejudice to other international agreements in force as between States parties to them".

4. The same applied to draft article 43, which also purported to establish a régime different from those provided for in the codification conventions. For any State party to the 1961 Vienna Convention and to the 1963 Vienna Convention that made a declaration under article 43, as proposed, for the purpose of applying to the diplomatic bag the régime applicable to the consular bag would be contravening the provisions of the 1961 Vienna Convention. In addition, the plurality of régimes would be a source of complications and confusion in practice.

5. Being opposed to any provision that would impair the principle of the inviolability of the diplomatic bag, he could not accept either paragraph 2 of draft article 36, which would allow the receiving State or the transit State to return the diplomatic bag to its place of origin, or draft article 43, by virtue of which a State could unilaterally decide to apply to the diplomatic bag the régime applicable to the consular bag, which would be contrary not only to the 1961 Vienna Convention, but also to customary international law.

6. In draft article 37, the last phrase "other than charges for storage, cartage and other specific services rendered" was not entirely satisfactory. The word *camionnage* ("cartage") in the French text was too restrictive, for the diplomatic bag need not necessarily be carried by lorry (*camion*); other means of transport could be used. Furthermore, the phrase "other specific services rendered" was too imprecise. It would therefore be preferable to use the wording of article 35, paragraph 1, of the 1969 Convention on Special Missions: "other than charges for storage, cartage [*transport*] and similar services".

7. The term "host State" used in draft article 41 should be defined in article 3.

8. Mr. MALEK drew attention to the provision in paragraph 1 of draft article 36 that the diplomatic bag was exempt from examination by electronic or mechanical devices. As he had already had occasion to say in regard to article 19,⁵ under which the diplomatic courier was exempt from personal examination by those means, such exemption should not be permitted, even for a diplomatic agent. Since electronic and mechanical devices were proving quite effective in preventing acts of sabotage against civil aircraft, examination of the diplomatic bag and personal examination of the courier by such means should be permitted. It was, indeed, to be feared that exemption of the diplomatic bag from examination of that kind might lead to abuses.

9. He did not see why draft article 42 was necessary, but had no objection to it being retained if the Special Rapporteur considered that it was justified.

10. Since the whole of the draft was about to be adopted on first reading, he wished to pay tribute to the Special Rapporteur, who, by his deep knowledge of the subject, his skill, his patience, his industry and, above all, his political sense and ability to reconcile divergent views, had enabled the Commission to elaborate a document regrouping and supplementing the provisions on the status of the diplomatic courier and the diplomatic bag hitherto dispersed in the relevant codification conventions.

11. Sir Ian SINCLAIR said that, in draft article 36, the main aim was to produce uniform rules governing all types of courier and all types of bag. Unfortunately, the existing codification conventions offered only one solution for the treatment of a diplomatic bag, providing simply that it should not be opened or detained. Article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, however, provided a more flexi-

⁴ For the texts, see 1948th meeting, para. 1.

⁵ Originally draft article 24; see *Yearbook ... 1984*, vol. I, pp. 85-86, 1829th meeting, para. 14.

ble solution, since it permitted a receiving State that had serious grounds for believing that the bag contained prohibited articles to request that it be opened in the presence of a representative of the sending State and, if that request were refused, to require that the bag be returned to its place of origin. In his view, that provision was not a modification of the rule laid down in the other conventions, but a supplement which related to the consular bag alone.

12. If a uniform rule was to be established, it was almost inevitable that one or other of the four codification conventions would have to be supplemented. The text submitted by the Special Rapporteur departed slightly in a number of respects from the wording of some of those conventions. For example, paragraph 1 of draft article 36, which imposed an absolute prohibition on the examination of the bag by electronic or mechanical means, took a position on a highly controversial and delicate issue that was not specifically covered by any of the existing conventions. In principle, the United Kingdom Government did not believe that examination of the diplomatic bag by electronic or mechanical means was likely in all cases to reveal that the bag contained, or might contain, prohibited articles. On the other hand, it wished to reserve the right to subject the bag to such forms of screening in exceptional circumstances if its authorities did have good reason to suspect that the bag contained prohibited articles.

13. He therefore considered that, if paragraph 1 was to lay down a uniform rule, that rule should be limited to the proposition that the diplomatic bag should not be opened or detained. Admittedly, that would leave unsettled the question whether examination by electronic or mechanical devices was permissible, but State practice had not shown sufficient elements of consensus to justify laying down a rule that would prohibit absolutely the use of such devices in all circumstances, particularly when the receiving State had serious grounds for suspecting that the bag contained prohibited articles.

14. He maintained his objection to the words “directly or” in paragraph 1 of article 36: surely the receiving State or transit State was entitled to satisfy itself by external examination that what it was confronted with was a diplomatic bag and not something else. For those reasons, he proposed that paragraph 1 should end with the words “opened or detained”. He would not object to retention of the reference to inviolability of the bag if that were the wish of the majority.

15. Something along the lines of paragraph 2 of article 36 was essential, in his view, to balance the rights of the sending State and those of the receiving State, particularly in the light of recent flagrant abuses of privileges accorded the diplomatic bag. He noted that, although a number of representatives in the Sixth Committee of the General Assembly had supported the revised draft article 36 which he had proposed at the previous session⁶ and which the Special Rapporteur mentioned in his seventh report (A/CN.4/400, para. 36), the majority had been concerned that it might lead to a variety of differing régimes or different types of bag, which it would be difficult for customs officers

to deal with. So he would not insist on his proposal, although he continued to believe that it had considerable merits. If it were not adopted, an effort should be made, in keeping with the wishes of the majority in the Sixth Committee, to lay down a uniform rule which should preserve a correct balance between the rights of the sending State and the right of the receiving State to protect its own security against abuses of privileges accorded the bag.

16. He was prepared to accept paragraph 2 as a basis for consideration by the Drafting Committee. One question that required attention was whether the transit State—as well as the receiving State—had the right to request that the bag be returned to its place of origin. His own feeling was that such a right should perhaps be confined to the receiving State, since if the transit State had serious grounds for suspecting that the bag contained prohibited articles it would no doubt warn the receiving State. According to the present text, however, if such suspicions existed they could not be verified by the use of electronic or mechanical devices, which might well show that, despite the suspicions, the bag did not contain prohibited articles. Thus paragraph 2 could operate in such a way that bags would be returned to their place of origin more often than might otherwise be the case. That was another reason for deleting from paragraph 1 the absolute prohibition on the use of electronic or mechanical devices.

17. Another solution would be to provide in paragraph 2 for an intermediate step, whereby the authorities of the receiving State could request that the bag be opened in the presence of a representative of the sending State and could require that it be returned to its place of origin only if that request were refused. In his view, paragraph 2 as drafted did not involve a derogation from the existing conventions, which simply stated the general principle that the diplomatic bag must not be opened or detained. That was not a rule of *ius cogens*, since clearly a State could consent to one of its bags being opened in the presence of its representative if it so wished.

18. He was grateful to the Special Rapporteur for deleting the reference in draft article 41 to non-recognition of the sending State or of its Government by the receiving State, but wondered whether the article was necessary at all. It added nothing to the relevant provisions of the codification conventions so far as the obligations of host States in such circumstances were concerned and could cause confusion. His own preference, therefore, would be to delete article 41 and rely on the provisions of the existing codification conventions.

19. Paragraph 3 of draft article 42 could be deleted, since it was already covered by article 6, paragraph 2 (b).

20. He continued to believe that a provision along the lines of draft article 43 was essential, if only because of the enormous differences between the various types of courier and bag and the number of ratifications by States of the various codification conventions. Admittedly, the result might be a certain plurality of régimes,

⁶ See 1948th meeting, footnote 5.

but that was the price that might have to be paid to get the draft articles off the ground.

21. Mr. SUCHARITKUL said that he particularly welcomed the deletion from draft article 36 of the words "at all times", because the notion of inviolability as applied to the diplomatic bag was more relative than absolute, just as the inviolability of diplomatic and consular premises was not absolute. If an embassy caught fire, the local fire brigade could not be prevented from entering it; and if the local authorities requested permission to send in a team of experts to investigate a bomb threat to an embassy, it would be hard to do anything but consent. Inviolability, therefore, was necessarily qualified by consent and there was no question of a rule of *jus cogens*.

22. A number of points of detail had to be considered, however. It was necessary to establish that a bag was really a diplomatic bag, since such a bag could take a variety of forms, ranging from a pouch to a container and even a ship or train. It was also necessary to determine exactly what was meant by the words "opened" and "examination". The purpose of protecting communications between diplomatic and consular posts was not merely to facilitate the free flow of information but, above all, to ensure its confidentiality. On that basis, he had no objection to the use of the word "inviolability", provided that it was qualified by reference to functional necessity and the contents of the bag. It would be no violation of a diplomatic bag to subject it to examination by a mechanical device for the purpose of detecting explosives. In that connection, he fully agreed that it was necessary to specify in more detail the types of examination involved.

23. Paragraph 2 of draft article 36 was a step in the right direction. It might be possible to borrow from more up-to-date rules and full use should be made of the possibility of securing consent to open the bag whenever there were reasonable and serious grounds for believing that it contained something other than official correspondence or documents, or articles intended for official use. The sending State should be free to give or withhold its consent, in accordance with the need to respect freedom of communication and to ensure confidentiality.

24. In draft article 39, it would suffice to provide for reasonable and appropriate rather than absolute measures. He invited the Special Rapporteur to reconsider the need for draft article 41.

25. Draft article 42 and draft article 43, which was essential, could be examined by the Drafting Committee in due course.

26. Mr. LACLETA MUÑOZ, referring to draft article 36, said that the principle of inviolability must be correctly interpreted. The provision in article 29 of the 1961 Vienna Convention on Diplomatic Relations that "The person of a diplomatic agent shall be inviolable" did not mean that the receiving State must remain passive whatever happened and, for example, allow the diplomatic agent to commit an offence in the presence of a representative of the authorities. In other words, in the case of a diplomatic agent, as in that of a diplomatic bag, the principle of inviolability had certain limits,

especially as, under the terms of article 25 of the draft, the diplomatic bag might contain, besides official correspondence and documents, "articles intended exclusively for official use". That meant not only the articles referred to in article 36, paragraph 1 (a), of the 1961 Vienna Convention, but all kinds of articles for official use. That was an extremely important change, for the diplomatic bag would henceforth be not only a means of communication, but also a means of transport and could take the form of an enormous container, a lorry, etc. Hence, while respecting the principle of the inviolability of the diplomatic bag, it was important to ensure that a privileged means of transport could not be improperly used.

27. Although he was not in favour of providing expressly for the possibility of examining the diplomatic bag by electronic or mechanical means, since he believed that the use of such means might violate the confidential nature of the contents of the bag, he was firmly convinced of the need to include in the draft a provision such as paragraph 2 of draft article 36. It might be expressly provided in that paragraph that, in the event of serious suspicion, the receiving State could ask for the diplomatic bag to be opened or examined under a procedure agreed upon with the sending State, or even ask that it be returned to its place of origin. Such a provision would not be contrary to article 27, paragraph 3, of the 1961 Vienna Convention, which simply stated: "The diplomatic bag shall not be opened or detained." For it would stipulate not that the receiving State could open the diplomatic bag, but merely that it could request the sending State to have the bag opened. If the sending State refused to grant that request, the receiving State could always request that the diplomatic bag be returned to its place of origin. Yet paragraph 2 of draft article 36 said nothing about the consequences of a refusal by the sending State to return the diplomatic bag to its place of origin. That was a gap which the Special Rapporteur should try to fill.

28. Draft article 37 raised no problems and called for no particular comments except that the word "free" before the word "entry" was perhaps unnecessary.

29. Draft article 39 was acceptable. There might be some doubt, however, about what was meant by the words "to ensure the integrity and safety of the diplomatic bag". What had to be ensured was, in fact, its inviolability.

30. The term "host State" used in draft article 41 should be defined in article 3. It would be sufficient to specify that the definition adopted applied to the term "host State" as used in article 41. It would be impossible to delete that article, which reproduced universally accepted rules of customary international law.

31. He had no objection to draft article 42, although paragraph 3 did not seem absolutely necessary. The only problems raised by draft article 43 related to the wording and would therefore be dealt with in the Drafting Committee.

32. Mr. OGISO commended the Special Rapporteur for his efforts to find compromise solutions in view of the division of opinion on a number of articles, especially draft article 36.

33. The wording now proposed for paragraph 1 of draft article 36 differed in a number of ways from the original text: the words “unless otherwise agreed”, at the beginning of the second phrase, and the words “any kind of”, before the word “examination”, had been deleted. As had been suggested, the last phrase of paragraph 1, “and shall be exempt from examination directly or through electronic or other mechanical devices”, could be deleted. The paragraph would thus end with the words “it shall not be opened or detained”. Should agreement not be reached on that shortened formulation, he would suggest the following rewording:

“1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and, unless otherwise agreed, shall be exempt from examination through electronic or other mechanical devices.”

He had thus introduced two changes into the paragraph. The first was the proviso “unless otherwise agreed”, which covered not only general agreements, but also *ad hoc* agreements, and made it clear that the consent of the sending State was required for examination. The second change was the deletion of the words “directly or” before the words “through electronic or other mechanical devices”, which did not involve any change of substance.

34. With regard to paragraph 2, he agreed with those members who found its provisions much too drastic. Provision should be made for some kind of intermediate step, and he supported Sir Ian Sinclair’s proposal that the competent authorities of the receiving State should be able to request that the bag be opened in the presence of a representative of the sending State. But if that proposal was not acceptable to members who were opposed to the application of the consular régime to all diplomatic bags, he would suggest that the proposed intermediate step should take the form of examination by means of electronic or mechanical devices with the consent of the sending State. If the sending State refused that examination, the receiving State or the transit State could then request that the bag be returned to its place of origin. He hoped that that formula would make it possible to reach a compromise on paragraph 2.

35. He found some discrepancy between the statement in paragraph 1 that the diplomatic bag “shall not be opened or detained” and the weaker wording in paragraph 2 to the effect that the competent authorities of the receiving State or the transit State “may request” that the bag be returned to its place of origin, although he appreciated that the Special Rapporteur had adopted that language in an effort to reconcile the conflicting preferences based on article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations and on article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. His own suggestion would be to adopt stronger language in paragraph 2, stating, as in the 1963 Vienna Convention, that “the bag shall be returned to its place of origin”. If the Special Rapporteur was unable to accept that proposal, he urged him to include in the commentary to article 36 a statement to the effect that, in the circumstances envisaged

in paragraph 2, the sending State would have to have the bag sent back.

36. In regard to draft article 41 and the deletion from both paragraphs of the reference to the receiving State, he agreed with Mr. Riphagen (1948th meeting) that much would depend on the definition of the term “host State”. There were situations in which a reference to the receiving State was still desirable. For example, two States which had no diplomatic relations might wish to establish such relations and, to that end, one of them might send a special mission to the other, which would then be a receiving State. The special mission would wish to make use of a diplomatic courier and diplomatic bag and the appropriate facilities, privileges and immunities would be required in that receiving State, which would not be a host State in the ordinary sense of the term. He therefore suggested that references to both the receiving State and the host State should be included.

37. On article 43 he had only drafting comments. Since the optional declaration to which that article referred related to exceptions, he suggested that, in paragraph 1, the concluding words “to which it wishes the provisions to apply” should be replaced by “to which it does not wish the provisions to apply”. A negative formula of that kind was used in article 298 of the 1982 United Nations Convention on the Law of the Sea, which the Special Rapporteur had referred to in his sixth report (A/CN.4/390, para. 62) as a model for draft article 43.

38. Mr. ILLUECA, referring to the important comments made on draft article 36, particularly in regard to the drafting of paragraph 1, noted that some members believed the paragraph should be limited to the opening clause, providing: “The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination”. In view of the recent trend in international relations, however, the Commission must be realistic and take account of the tendency of certain highly developed States to legalize intervention by the authorities in telephonic, telegraphic and other means of communication. In view of that tendency, the Commission would be justified in establishing, in the revised draft article, not only a basic principle prohibiting the opening of the bag, but also its exemption from examination. It was essential to specify that the bag could not be subjected to any examination.

39. An examination of national legislation on surveillance and inspection devices showed that a terminology was used which could be adopted by the Special Rapporteur. Perhaps the last phrase of paragraph 1 could be amended as follows: “or through electronic, mechanical or other surveillance devices”. He did not think that the word “directly” would cause confusion, since it obviously referred to examination of the contents of the bag, not of its external appearance.

40. Draft article 41 referred to the different roles of States, which, according to Mr. Riphagen (1948th meeting), ought to be defined. It was true that article 3 contained a certain number of definitions, but in the present instance the various roles of States should be considered in the light of the explanations given by the

Special Rapporteur in his seventh report (A/CN.4/400, para. 54), which referred to States in whose territory there were international conferences, special missions or permanent missions accredited to international organizations. He therefore proposed that the problem be solved by specifying in draft article 41 that a "host State" meant a State in whose territory an international conference was held or the headquarters of an international organization was established. It would then be unnecessary to include an additional definition in article 3. The situations in question were such as arose under the United Nations system, when conferences or international organizations met or had their headquarters in a given State where delegations to those conferences or organizations had difficulties because the Government of that State unilaterally adopted measures to regulate international relations. Draft article 41 was therefore justified and the explanations given by the Special Rapporteur were clear and convincing.

41. Chief AKINJIDE said that he would speak mainly on draft article 36 and the inviolability of the diplomatic bag. On that issue, he endorsed the main thrust of the arguments put forward by certain other members, in particular Mr. Malek, Mr. Ogiso and Sir Ian Sinclair.

42. It was essential to view the whole problem in the light of present-day practical situations. Instances of abuse of the diplomatic bag had occurred in recent years, and four main kinds of such abuse could be mentioned. The first was the illicit traffic in heroin, cocaine and other harmful drugs between Latin America and the United States of America and between the Middle East and Europe. The second was the use of the diplomatic bag for currency smuggling. The third was the use of the diplomatic bag to carry weapons intended not for the protection of a diplomatic mission, but for delivery to subversive elements. A case of that kind had recently occurred in London. Lastly, there had actually been cases of a live person being concealed in a container that was claimed to be a diplomatic bag. One such case had occurred in Rome some years previously and another more recently in the United Kingdom. Consequently, he could not accept the idea of absolute inviolability of the diplomatic bag.

43. It was necessary to reconcile three competing sets of interests: the security and other interests of the receiving State, the similar interests of the transit State and the interests of the sending State in the inviolability of the diplomatic bag. Accordingly, article 36 should state the inviolability of the bag, but at the same time deal with the cases in which there were good reasons to believe that drugs, weapons or other prohibited articles were being carried in it.

44. A Government which behaved in a reckless and illegal manner did not deserve the protection of international law for its diplomatic bag. Diplomatic law was predicated on reciprocity, and if a State chose to act in a lawless manner, it could not claim the protection of that law. For those reasons, he supported the suggestions for rewording draft article 36 made by Sir Ian Sinclair, Mr. Sucharitkul and other members of the Commission.

45. He did not agree, however, with Mr. Sucharitkul's distinction between the diplomatic bag and its contents. Paragraph 1 (2) of article 3, which defined "diplomatic bag" as meaning "the packages containing official correspondence, documents or articles ...", showed that the bag and its contents could not be treated separately.

46. He had no points of substance to raise on draft articles 37 and 39. He was not satisfied with draft article 41, but appreciated that its presence in the draft might be necessary in order to make the future convention more acceptable to States.

The meeting rose at 1.05 p.m.

1950th MEETING

Thursday, 22 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Carero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
(A/CN.4/390,¹ A/CN.4/400,² A/CN.4/L.398, sect. D, ILC(XXXVIII)/Conf.Room Doc. 3)

(Agenda item 4)

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs duties, dues and taxes)

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*;

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*;

Article 12 (new commentary to paragraph 2) and articles 18 and 21 to 27, and commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session: *Yearbook ... 1985*, vol. II (Part Two), pp. 39 *et seq.*;

Articles 36, 37 and 39 to 43, referred to the Drafting Committee by the Commission at its thirty-seventh session: *ibid.*, pp. 30 *et seq.*, footnotes 123, 128, 130, 131, 133, 135 and 138.

ARTICLE 39 (Protective measures in case of *force majeure*)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Optional declaration of exceptions to applicability in regard to designated types of couriers and bags)⁴ (*continued*)

1. Mr. BALANDA said that draft article 36 was in some sense the Gordian knot among the articles presented in the Special Rapporteur's seventh report (A/CN.4/400). It was an original text designed to meet particular situations. Paragraph 1 included a number of provisions employed in conventions already elaborated by the Commission. The formulation "wherever it may be" had its counterpart in article 33 of the 1963 Vienna Convention on Consular Relations and afforded better protection of the bag, particularly in the case of fortuitous events requiring deviation of the bag from its normal itinerary. Again, the prohibition on opening and detaining the bag was in keeping with the provisions of article 35, paragraph 3, of the 1963 Vienna Convention and met with unanimous approval in the Commission. The Special Rapporteur had rightly added the stipulation of exemption from examination, thereby strengthening the idea of the indispensable security of the bag.

2. At a previous meeting, the question had arisen whether the most important factor was the contents or the bag itself. Clearly, both the contents and the bag were important, for protection of one was impossible without protection of the other. The word "directly", in paragraph 1 of draft article 36, had prompted one member to suggest that the bag ought, in some circumstances, to be examined simply for the purpose of determining that it was in actual fact a diplomatic bag. An examination of that kind, however, would be dangerous. Other provisions of the draft relating to the external visible marks required to identify the character of the bag already met that concern. Accordingly, a stipulation that the bag could be examined "directly" was unacceptable. Mr. Flitan (1949th meeting) had suggested that the word "indirectly" should be added after the word "directly", a suggestion that merited consideration, for electronic and mechanical devices constituted indirect means of examination. The reference to such devices reflected the desire to guarantee the confidentiality of the contents of the bag and, by mentioning them, the Special Rapporteur was of course seeking to place all States on an equal footing. Nevertheless, if such methods of examination were accepted, developing countries that did not possess them would not be in a position to determine whether or not the contents were in keeping with the rules. For all that, the situation in question involved a bag carried by a diplomatic courier; if the bag was dispatched by post, what could be done to ensure that it was not checked or inspected? Again, Chief Akinjide (*ibid.*) had said that a balance had to be maintained between the legitimate interests of sending,

receiving and transit States and had pointed out that the bag might be wrongfully used for drug or currency trafficking, for example.

3. Draft article 36, paragraph 2, introduced an exception to take account not only of the interests of States other than the sending State, but also of the security factor. The wording should be brought into line with article 35, paragraph 3, of the 1963 Vienna Convention, which provided for the possibility of the bag being opened in the presence of an authorized representative of the sending State and, in the event of refusal of the receiving State's request, for return of the bag to its place of origin. In that connection, it might be quite easy to return the bag to its place of origin when it was accompanied; but if it was not, and it had been sent by mail, for example, it would be better, for practical reasons, to stipulate simply that the bag would be sent back to the sending State.

4. He agreed in general with the comments made on article 37, which definitely belonged in the draft. He nevertheless had some doubts about the use of the word *camionnage* (cartage) in the French text and thought it preferable to use the word *transport*, as in article 36, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. The word *camionnage* was more restrictive; tolls to be paid on motorways, for example, might be more easily acceptable as "charges for transport". The French text of article 37 should, moreover, be brought into line with all the other articles, which spoke of the diplomatic bag in the singular.

5. Draft article 39 was entirely justified, but paragraph 1 should take account both of the status of the diplomatic courier and of the status of the diplomatic bag. For the time being, paragraph 1 dealt solely with the status of the courier and should therefore be remodelled along the lines of paragraph 2, which was better balanced.

6. Draft article 41 was also useful and the present wording was an improvement over the previous text. The words "non-existence of diplomatic or consular relations" at the end of paragraph 1 were none the less too restrictive, because they did not take account of the case of suspension of diplomatic relations and applied only to severance or absence of diplomatic relations. Unless further details could be provided in the commentary, it would be necessary to find a more suitable term than "non-existence". He would be submitting proposals to the Drafting Committee in connection with the wording of paragraph 2, which should be shortened and improved.

7. The purpose of draft article 42 was to complement the provisions of the codification conventions relating to the diplomatic courier and the diplomatic bag, but he preferred the text submitted by the Special Rapporteur in his sixth report (A/CN.4/390, para. 61), which was clearer. Under paragraph 3 of the present text, States would be free to conclude international agreements relating to the diplomatic courier and diplomatic bag, and it should therefore be made quite clear that the parties to an agreement of that kind could enjoy such freedom only if they agreed on provisions that were

⁴ For the texts, see 1948th meeting, para. 1.

compatible with the articles formulated by the Commission.

8. Draft article 43, paragraph 1, could be improved by deleting the words "or at any time thereafter", for they added nothing to the paragraph. Indeed, he had serious reservations about the substance of the article and did not think that the flexibility it allowed would lead to the requisite harmonization. If States were allowed to conclude international agreements in that regard, a plurality of legal régimes could emerge in connection with one and the same subject-matter, namely the status of the diplomatic courier and the diplomatic bag. Article 43 thus weakened the overall structure of the draft, which sought to harmonize the various régimes provided for in a number of different conventions. It was a problem the Commission would do well to avoid.

9. Mr. FRANCIS suggested, for the consideration of the Drafting Committee, that draft article 36 should be rearranged in three paragraphs. The first would be confined to a statement of the general rule relating to the status of the diplomatic bag, namely that it was inviolable and was not to be opened or detained; the second would contain in a modified form the remaining substance of the present paragraph 1; and the third would consist of an amended version of the present paragraph 2.

10. In that form, the second paragraph would deal with the problem regarding the use of electronic and other mechanical devices. Very early in the consideration of the present topic, the Commission had had occasion to discuss the impact of such technical developments, at a time when the Special Rapporteur had as yet submitted only a draft outline of the topic. As he recalled, Mr. Reuter had then raised the question of the use of electronic devices and of the possibility, for example, of a diplomatic bag being screened by means of devices such as those employed in airports.⁵ Clearly, in such a situation the examiners would do more than just look at the diplomatic bag: the confidentiality of communications could be endangered. Developing countries were bound to experience a great deal of concern, because they did not have the means to obtain such technical devices and hence could not apply reciprocity of treatment to the diplomatic bags of other States. It was important to remember that, at the present time, the vast majority of diplomatic bags from developing countries were not accompanied by a courier. Hence some regulatory provisions on the use of electronic and other mechanical devices were essential in order to make the draft articles acceptable.

11. The Drafting Committee should also give careful consideration to Mr. Ogiso's proposal (1949th meeting, para. 34) to insert the proviso "unless otherwise agreed" in paragraph 1, so as to introduce an element of flexibility. It was worth noting that the Special Rapporteur himself had included the proviso "unless otherwise agreed by the States concerned" in paragraph 1 of the earlier version of draft article 36 contained in his sixth report (A/CN.4/390, para. 42).

12. The provisions of paragraph 2 as now proposed by the Special Rapporteur departed from those of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, for they appeared to give the receiving State discretion to return the diplomatic bag, thereby opening the door to possible abuse. An official of the receiving State might thus return the diplomatic bag without even consulting the sending State. In view of the abuses to which Chief Akinjide (1949th meeting) had drawn attention, it was clear that a provision along the lines of article 35, paragraph 3, of the 1963 Vienna Convention was required. The commentary should also indicate that, if the receiving State had suspicions about the diplomatic bag, the sending State could voluntarily allow the bag to be inspected and screened.

13. He agreed with Mr. Riphagen (1948th meeting) that paragraph 2 (b) of article 6 fully covered the substance of draft article 42, paragraph 3. It was true that article 6 dealt with non-discrimination, but the set of draft articles had to be read as a whole. Accordingly, paragraph 3 of article 42 could be deleted.

14. Mr. McCAFFREY said that he still had doubts about the viability of harmonizing the rules which governed all types of diplomatic couriers and bags, especially when the vast majority of States had not accepted the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, in other words two of the four international conventions on which the effort to achieve harmonization was based.

15. Draft article 36 sought to take into account the diversity of current State practice, and the text involved some departures from the letter of the 1961 Vienna Convention on Diplomatic Relations. It was necessary to bear in mind that some States imposed limitations as to the size, weight and quantity of diplomatic bags and that those limitations were accepted by other States. Some States reserved the right, in exceptional circumstances, to carry out remote screening of diplomatic bags. Clearly, the Commission would have to keep those facts in mind: it could not formulate provisions in a vacuum.

16. As to the wording of article 36, an effort should be made to avoid the use of the terms "inviolability" in the title and "inviolable" in paragraph 1. Their meaning was not very clear in the context and article 36 would go beyond the provisions of the existing codification conventions if they were used. In any case, as emphasized by Mr. Lacleta Muñoz (1949th meeting), "inviolability" was not an absolute, but a relative concept. He agreed with the suggestion to delete the words "directly or" in paragraph 1, but the best course would be to delete the whole of the last part of the paragraph, starting with the words "and shall be exempt from ...". It was not advisable to refer expressly to screening through "electronic or other mechanical devices". He tended to sympathize with Mr. Malek's view (*ibid.*) that the diplomatic bag should be subject to the same measures as the diplomatic courier, at least under exceptional circumstances. Again, one should not forget the unaccompanied bag, which many airlines would not accept for carriage without some form of screening.

⁵ See *Yearbook ... 1984*, vol. I, pp. 86-87, 1829th meeting, para. 22.

17. He appreciated the Special Rapporteur's efforts to strike a balance between the provisions of paragraph 2 and those of paragraph 1. On the whole, paragraph 2 was acceptable, but some arrangement should be made for cases in which a request by the receiving State or the transit State for the bag to be opened was refused. In the 1963 Vienna Convention on Consular Relations, article 35, paragraph 3, stated expressly that, if the request to open the bag was refused by the sending State, "the bag shall be returned to its place of origin". There was no reason to omit such a provision, which already existed in the 1963 Vienna Convention and was not inconsistent with the régime established for the diplomatic bag in article 27, paragraph 3, of the 1961 Vienna Convention. He also believed it essential to refer to the transit State, as was done in paragraph 2. The transit State might have obligations under international agreements regarding control of narcotic drugs or other contraband, or it might simply wish to protect itself if it had reliable information that a diplomatic bag contained dangerous materials.

18. The combination of former draft articles 39 and 40 in a new draft article 39 was welcome, for it simplified the drafting. Nevertheless, in the case envisaged in paragraph 1, the receiving State or transit State was required to take "the appropriate measures" to ensure the integrity and safety of the diplomatic bag, whereas in the case envisaged in paragraph 2, when the diplomatic courier or the diplomatic bag was compelled to pass through the territory of a State not initially foreseen as a transit State, "that State shall accord" inviolability and protection to the courier and bag. Greater obligations thus appeared to be placed on that State than on an intended transit State. The Drafting Committee should consider adjusting that anomaly.

19. Draft article 41 was unnecessary: as he had pointed out in the past,⁶ its provisions were likely to create confusion. Draft article 42 was very difficult in that it tried to cover four different régimes in one instrument—an instrument containing some provisions that were broader and others that were narrower than those of the existing codification conventions. Doubts had rightly been cast on the exact meaning of the words "shall complement" in paragraph 1, and he shared the concern expressed by Mr. Riphagen (1948th meeting) and Sir Ian Sinclair (1949th meeting) about paragraph 2. Paragraph 3 could be dispensed with altogether, for any measure extended to another State which was more favourable than the present articles could not be interpreted as incompatible with the object and purpose of the present articles. The situation would thus be covered by paragraph 2 (b) of article 6.

20. Lastly, article 43 must be retained in order for the draft to have a chance of acceptance. The provisions of the article would not necessarily lead to a multiplicity of régimes, and certainly not more than the four régimes now in existence. They might even reduce the overall number, for example where a State declared that it would apply the present articles to all couriers and bags other than those covered by the 1961 Vienna Conven-

tion. In that case, the effect of article 43 would be to replace the four previous régimes by only two régimes.

21. Mr. HUANG said that article 36 was the key article of the draft. It had two objectives: first to safeguard the principle of the freedom of diplomatic communications, which was well established in the codification conventions and was adhered to by States in practice; and secondly, to prevent possible abuse of the diplomatic bag, abuse which could not be ignored, even though it was not common.

22. It had been suggested that the first two clauses of paragraph 1 should be couched in the language of the corresponding provisions of the 1961 Vienna Convention on Diplomatic Relations. The difference was slight and he could accept either version. Consideration could, however, also be given to the following reformulation, which was in keeping with the spirit of the 1961 Vienna Convention:

"1. The diplomatic bag, in so far as its contents are concerned, shall be inviolable wherever it may be; it shall not be opened or detained."

The third clause of paragraph 1, concerning the exemption of the bag from examination through electronic or other mechanical devices, should be maintained, since it was possible for the confidentiality of the contents of the bag to be infringed by such examinations. Retention of that provision would ensure that developing countries without the requisite technology were not placed at a disadvantage. It was true that the word "directly" appeared to refer to the possibility of opening the bag, and he too thought it should be deleted. There was some merit in the suggestion that the receiving State should, with a view to safeguarding its own security, be allowed to use electronic examination in special circumstances, but such a course should by no means become routine procedure. Moreover, the special circumstances in question should be specified in paragraph 2 of the article.

23. The purpose of paragraph 2 of article 36 was to prevent abuse of the diplomatic bag. The revised text departed somewhat from the régime for consular bags. Thus the Special Rapporteur had pointed out (1948th meeting) that, in the event of serious doubts concerning the contents of the bag, it was preferable to stipulate that the bag be returned to the sending State than that it might be opened.

24. Nevertheless, it would be going too far to allow the receiving State or transit State to decide at its own discretion to return the bag to its place of origin. If paragraph 2 was to be retained in its revised form, some restrictions should be placed on the receiving State's right to return the bag. For example, any doubts about the contents of the bag should be based on sufficient evidence. Moreover, the receiving State should engage in consultations with the sending State to seek an appropriate solution. The sending State could also produce, on a voluntary basis, a written certificate or guarantee or, as an exceptional measure, accept electronic examination of the bag. Also, the possibility of the sending State agreeing to let the bag be completely or partly opened in the presence of its representative should not be ruled out. Only when the consultations failed to bring about a solution could the receiving State

⁶ See *Yearbook ... 1985*, vol. I, p. 201, 1909th meeting, para. 28.

demand that the bag be returned to its place of origin. Actually, even if paragraph 2 were drafted along those lines, problems would still arise. Legally speaking, it was extremely difficult to formulate a set of unified rules that would merge the two régimes on the diplomatic and the consular bag.

25. Mr. JAGOTA complimented the Special Rapporteur on his efforts to improve draft article 36 in the light of the discussion which had taken place in the Sixth Committee of the General Assembly (see A/CN.4/L.398, paras. 317-336). It was important to remember that the diplomatic courier and the diplomatic bag were defined in a very broad manner in article 3 of the draft. Under the terms of article 3, no distinction would be drawn between the diplomatic bag and the consular bag and the adoption of a uniform set of provisions would necessarily have an impact on the existing codification conventions.

26. The terms of article 36 were crucial to the whole draft and had to be read in conjunction with those of draft article 43, which would enable a State to apply the present articles to one or more categories of diplomatic couriers and diplomatic bags at its discretion. The article was an attempt to combine the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations—reflected in paragraph 1—with those of the 1963 Vienna Convention on Consular Relations. Indeed, paragraph 2 repeated the provisions of article 35, paragraph 3, of the 1963 Vienna Convention in a modified form.

27. The provisions of paragraph 1 were broader than the corresponding ones of the 1961 Vienna Convention in that they specifically exempted the diplomatic bag from examination through electronic or other mechanical devices. On the other hand, paragraph 2 omitted the stipulation in article 35, paragraph 3, of the 1963 Vienna Convention that a request could be made for the bag to be opened by an authorized representative of the sending State.

28. Should the proposed formulation be acceptable to many States, little use would be made of the provisions of article 43. His own view was that, subject to drafting changes, the substance of both paragraphs of article 36 was likely to prove workable. Reliance should be placed on State practice and on good faith to reduce abuses to a minimum. It was also necessary to remember that, if a State indulged in excessive abuses, the remedy of severance of diplomatic relations was always available. The inclusion in paragraph 2 of the words “serious reason” gave every State an opportunity to protect itself against abuse. Whenever it had serious grounds to believe that a diplomatic bag contained something other than official correspondence or the other official material referred to in article 25, a State could request that the bag be returned to its place of origin.

29. He supported Mr. Riphagen’s proposal (1948th meeting) that article 3, paragraph 1, should contain a definition of “host State” if the reference to the receiving State was deleted from draft article 41. The host State should be defined in terms of the seat of an international organization, or the site of an international conference or meeting. Again, some thought

should be given to cases in which diplomatic relations did exist between two countries, but a change of government required recognition of the new Government. In that instance, it would be necessary to retain the reference to “receiving State” unless the term “host State” could be defined so as to cover the situation.

30. He was in broad agreement with the provisions of draft article 42, paragraph 1, but paragraph 2 could be deleted. It could create difficulties because it conflicted with paragraph 1 and detracted from the value of the draft articles as a whole. The provisions of the draft articles should prevail over pre-existing agreements. Paragraph 3 should also be deleted, as the substance was already covered by paragraph 2 (b) of article 6.

31. Lastly, a more suitable expression would have to be found to replace the word “excepted” in draft article 43, paragraph 3.

32. Mr. TOMUSCHAT said that draft article 36 struck a reasonable balance between all the interests involved. The word “inviolable” was not really necessary, but he would certainly not interpret it as excluding some kind of external check of the diplomatic bag, either to identify it as a diplomatic bag or in cases, implicitly permitted under paragraph 2, in which there was *prima facie* evidence of abuse. Again, paragraph 1 did not prohibit such visual control measures for, as he understood it, to examine the diplomatic bag “directly” meant to open it and look at the contents. He therefore disagreed with Mr. Balanda in that regard. The use of machines to ascertain the contents of a pouch or bag would in any event be forbidden. The prohibition was not absolute, for there seemed to be no intention of preventing airlines and the competent authorities of States from carrying out the normal security checks. In acceding to the future convention, therefore, Governments would not be entering into an undertaking to instruct airlines to let diplomatic bags pass unchecked. Indeed, were any such obligation to be inferred, airlines would simply refuse to carry luggage that had not undergone the controls required for all other luggage.

33. He did not share the view of the representatives in the Sixth Committee of the General Assembly who had challenged paragraph 2 of draft article 36 on the ground that freedom of communication might be hampered by arbitrary measures (see A/CN.4/L.398, para. 327). Diplomatic relations rested mainly on the principle of reciprocity, to which article 6 of the draft made express reference. Any State that committed excesses would soon be confronted with the adverse effects of its own practices. The Special Rapporteur had been right to propose a uniform régime, since it would greatly simplify the procedures for handling the diplomatic bag. The commentary should, however, explain that the receiving State would not be justified in returning the diplomatic bag if the sending State agreed to open it to dispel any suspicions as to improper use. The rule stated in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations should be deemed to form an implicit part of article 36. That, too, could be explained in the commentary, or alternatively article 36 could be aligned with article 35 of the 1963 Vienna Convention.

34. The title of draft article 39 should be re-examined, since the situations covered by paragraph 1 did not come under the heading of *force majeure*. Also, the rule in paragraph 1 was too broad: the receiving State or transit State might be totally unaware of cases in which a courier was ill, for example. Possibly, therefore, the expression "as necessary and appropriate" or some similar formulation could be inserted before the words "immediately notify".

35. As to draft article 41, he had never heard any proposition to the effect that the granting of facilities, immunities and privileges to a diplomatic courier implied recognition of the sending State. Hence there was no need for a disclaimer in respect of a non-existent claim.

36. He approved of draft article 42. As he understood it, the intention was that the present articles were always to be applied in conjunction with one of the four codification conventions. In some instances, that would result in a modification of the existing régime. In his opinion, there were no contradictions or inconsistencies. More specifically, article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations and draft article 36 could easily be reconciled: the rule that the bag should be neither opened nor detained would simply be supplemented in situations that had not been fully taken into consideration by the authors of the 1961 Vienna Convention. He none the less agreed that paragraph 3 of draft article 42 could be deleted altogether.

37. Draft article 43 posed certain problems. In his view, it would more than suffice to stipulate that the present articles, being designed to complement the four basic conventions, should be applicable only in conjunction with those four conventions—in other words, if and to the extent that both States involved were parties to one of those conventions. Such a provision would be entirely in keeping with the ancillary nature of the draft articles. On the other hand, there was no real need for an optional clause of the type proposed, since it would only lead to complications.

38. Mr. CALERO RODRIGUES said he did not think that the Commission was making the best use of the limited time available to it by engaging in the same debate as it had held at the previous session, particularly since most of the suggestions pertained to drafting matters. He was taking the floor simply because most of the other members had spoken and he did not wish to be thought remiss.

39. The only possible conclusion to be drawn from the discussion was that the draft articles should be referred to the Drafting Committee. The Commission could not solve the few problems of substance, for instance whether there should be exemption from examination of the diplomatic bag by electronic or mechanical means. It was divided on that issue, as it had been at its previous session, and it would presumably endeavour to reach a compromise. However, paragraph 2 of draft article 36 confirmed a trend that had emerged at the previous session, namely that, when a State had serious doubts about the contents of the bag, it should be allowed not only to request that the bag be returned to its place of

origin, but also to open the bag if the sending State agreed.

40. The new version of draft article 37 was an improvement on the previous text (A/CN.4/390, para. 46) and took account of the concern expressed by several speakers, including himself.

41. The combination of former draft articles 39 and 40 was useful, and draft article 41 had likewise been improved because it was now confined to relations between the sending State and the host State or transit State. It would be difficult to imagine cases in which a sending State and a receiving State had no diplomatic relations or did not recognize each other. As for draft article 42, the Special Rapporteur had wisely reverted to the original text submitted in his fourth report,⁷ which took account of the views generally expressed in the Commission and in the Sixth Committee of the General Assembly.

42. It had been pointed out that draft article 43, on optional declarations of exceptions, referred to exceptions in the title but not in the body of the article itself. There, too, the matter could be settled in the Drafting Committee. Some members had expressed doubts about a declaration of that kind on the ground that it would not promote uniformity. Yet the system of the diplomatic bag was simply a system of relations between two countries, the sending State and the receiving State. If, for pragmatic reasons, it was necessary to accept such declarations, he was ready to do so. Admittedly a single régime would be preferable, but what purpose would it serve if countries did not accede to the convention? The final instrument might well be doomed to remain inoperative for the sake of legal purity, just as other instruments had been.

43. Mr. KOROMA said that the draft articles would secure universal approval only if they sought to reflect the divergent interests of the sending State, the receiving State and, where applicable, the transit State. In draft article 36, the Special Rapporteur had largely succeeded in finding a compromise solution. The article said nothing new. The reference to the concept of inviolability was merely a restatement of conventional law and was entirely appropriate, bearing in mind the desire for uniformity in that branch of the law. It did not confer a sacrosanct character on the diplomatic bag or its contents, but merely signified that the bag should be protected at all times in the interests of safeguarding the confidentiality of its contents. The provision that the bag should not be opened or detained was likewise a restatement of existing law. On the other hand, the reference to electronic or mechanical devices was a more contentious issue, and not just between the developed and developing countries, for the essence of the matter was one of confidentiality. It was necessary to take account of the interests of both the sending State and the receiving State, and that had to a large extent been achieved in the formulation proposed by the Special Rapporteur. There was, however, some inadequacy in the language employed that could well give rise to doubts.

⁷ *Yearbook ... 1983*, vol. II (Part One), p. 134, document A/CN.4/374 and Add.1-4, para. 403.

44. Paragraph 2 of article 36 introduced a new element with the reference to the transit State and called for a very subjective test which would be difficult to apply and could result in strained relations between sending and receiving States. Again, while he recognized that the transit State was under an obligation to the receiving State to ensure that its territory was not used for unlawful purposes, he considered that paragraph 2 was not in keeping with paragraph 1. If it was accepted that the diplomatic bag was inviolable, could not be opened or detained and was exempt from examination through electronic or mechanical devices, where could evidence be found to indicate that the bag contained something other than official correspondence or material? Both paragraphs of the article should be re-examined with a view to making the wording more precise and dealing with those concerns.

45. He had some misgivings about the reference in draft article 37 to the "free entry" of the bag. He understood what the Special Rapporteur had in mind, but would recommend for consideration a formulation similar to that in article 36, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations.

46. Mr. Tomuschat's concern about the title of draft article 39 was justified, for the title did not reflect the content of the article. Accordingly, it should either be amended along the lines suggested by Mr. Tomuschat or be replaced by "Appropriate measures in circumstances preventing the delivery of the diplomatic bag".

47. The basic proposition in draft article 41 had never been questioned and, although the article might seem to state the obvious, there would be no harm in keeping it. Draft article 42, however, raised some doubts. The Special Rapporteur had explained that the intention was to complement similar provisions in other conventions, but the provisions varied from convention to convention and the question arose whether the article would promote the desired uniformity. It would be better to have an autonomous provision rather than to leave open the option of choosing which provision should apply to which bag.

48. Mr. RAZAFINDRALAMBO said that he fully agreed with the deletion in the revised text of draft article 36, paragraph 1, of the words "all the times" and the phrase "in the territory of the receiving State or the transit State". They were unnecessary, as were the words "unless otherwise agreed by the States concerned ...", which allowed the possibility of derogating from the principle of inviolability, thereby placing too much emphasis on the relative nature of that principle. The residual right of States to decide by way of agreement to apply a different régime had, moreover, been provided for in article 6, paragraph 2 (b). In the last part of draft article 36, paragraph 1, which was of the utmost importance, the Commission might, in order to avoid any ambiguity, decide to add the word "indirectly"; the end of the paragraph would then read "... shall be exempt from examination directly or indirectly through electronic or other mechanical devices".

49. If, in view of the international situation, the Commission decided to retain the reference to the "transit State" in article 36, paragraph 2, despite the doubts ex-

pressed in that regard, it should be made clear that, when a transit State had serious reason to believe that a diplomatic bag passing through its territory contained something other than official documents or articles intended for official use, that State must notify the receiving State and the sending State.

50. Apart from such drafting problems, which could be settled by the Drafting Committee, article 36 struck the right balance between the principle of the inviolability of the diplomatic bag and the need to guarantee the security of the receiving State and the transit State, and was therefore fully satisfactory.

51. The deletion, in draft article 37, of the words "customs inspection" was entirely appropriate, but the same was not true of the other changes proposed by the Special Rapporteur. The word "free", which modified "entry, transit or exit", added absolutely nothing. The words "and related charges" used in the earlier version were simpler and clearer than the words "and other related charges", which had been used in the new version and might imply that national, regional or municipal dues and taxes were also related charges, which was not at all true. It would also be better to speak of "charges for ... transport", rather than "charges for ... cartage".

52. The title of draft article 39 was too restrictive. As Mr. Tomuschat had pointed out, the situations and circumstances referred to in paragraph 1 were not necessarily cases of *force majeure*. The entire article would, moreover, have to be changed considerably in order to establish a clearer distinction between the two ideas dealt with in paragraphs 1 and 2. As to draft article 41, he agreed with the deletion of the term "receiving State" and considered that the term "host State" should be defined in article 3. Draft article 42, which now merely listed the relevant diplomatic conventions, did not call for any comment.

53. The phrase "or at any time thereafter" in draft article 43 could well give rise to doubts about the exact content of the obligations a State would assume *vis-à-vis* the other States parties when it ratified or acceded to the future convention. *A priori*, he was therefore not in favour of retaining it. The last phrase of article 43, paragraph 2, was self-evident. It went without saying that, if the withdrawal of a declaration made in writing was to be brought to the attention of the other States concerned, it also had to be made in writing.

The meeting rose at 1 p.m.

1951st MEETING

Friday, 23 May 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Carero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr.

Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)
(A/CN.4/390,¹ A/CN.4/400,² A/CN.4/L.398, sect. D, ILC(XXXVIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur³ (concluded)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs duties, dues and taxes)

ARTICLE 39 (Protective measures in case of *force majeure*)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Optional declaration of exceptions to applicability in regard to designated types of couriers and bags)⁴ (concluded)

1. Mr. ROUKOUNAS said that the draft articles which the Commission was preparing on the basis of the excellent reports of the Special Rapporteur, especially the provisions on such controversial matters as the scope of the principle of the inviolability of the diplomatic bag, would serve as a work of reference.

2. In their comments on draft article 36, several members of the Commission had rightly referred to the principle of good faith, which should be mentioned in the commentary to that article.

3. In article 36, paragraph 1, on which opinion was far from unanimous, the Commission might simply state the principle of inviolability of the diplomatic bag, without going into details of the kinds of examination from which it was exempt, and emphasize that the ex-

emption was justified by the need to protect the confidential nature of its contents. The paragraph might thus be amended to read:

“1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination affecting the confidential character of its contents.”

4. Article 36, paragraph 2, offered a realistic solution. In particular, it was right that the transit State, which should not be regarded simply as a post office box, should also be able to take action in the case covered by that paragraph. But the receiving State and the transit State should be able to request the sending State to open the bag on the spot, before initiating the procedure for its return.

5. Although the Special Rapporteur had improved the wording of draft article 41, that article was still unnecessary. Provisions on the non-recognition of States had their place in a convention such as the 1975 Vienna Convention on the Representation of States, but not in draft articles on the status of the diplomatic courier and the diplomatic bag. Two paragraphs on the subject was certainly excessive. Besides, to cover it completely the Commission would also have to deal with the case in which the transit State was not recognized by the host State.

6. As shown by the new wording of draft article 43, the idea of allowing some flexibility in the application of the present articles, so that they could be accepted by the largest possible number of States, was gaining support. But unfortunately, by giving States full freedom, the words “or at any time thereafter” in paragraph 1 might lead to what was known as “uncertainty of the law”. Such wording did, of course, appear in article 298, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea and in article X, section 39, of the Convention on the Privileges and Immunities of the Specialized Agencies. In the first case, however, the article in question could not serve as a model because its subject-matter was entirely different; and in the second, the effect of the wording used was to broaden the scope of privileges and immunities recognized in other instruments, whereas in the draft articles under consideration the wording in question was used in a restrictive context. It should therefore be deleted.

7. In view of the links between draft article 43 and draft article 36, the latter provision did not appear to allow as much flexibility in the application of the principle of inviolability as, for example, article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Thus, if a State party to the 1963 Vienna Convention agreed to apply to the consular bag the régime provided for in the draft articles, it would have less room for manoeuvre than under that Convention. That was a point that should be taken into consideration.

8. Mr. DÍAZ GONZÁLEZ said that, in the Spanish text of draft article 36, paragraph 1, the words “wherever it may be” should be rendered as *dondequiera que esté* or *dondequiera que se encuentre*, rather than *allí donde se encuentre*. In the last clause of

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*;

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*;

Article 12 (new commentary to paragraph 2) and articles 18 and 21 to 27, and commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session: *Yearbook ... 1985*, vol. II (Part Two), pp. 39 *et seq.*;

Articles 36, 37 and 39 to 43, referred to the Drafting Committee by the Commission at its thirty-seventh session: *ibid.*, pp. 30 *et seq.*, footnotes 123, 128, 130, 131, 133, 135 and 138.

⁴ For the texts, see 1948th meeting, para. 1.

paragraph 1, the word “indirectly” should be added after the words “directly or”, as proposed by several members of the Commission. But it must be understood that, if the receiving State or the transit State had “serious reason to believe that the bag contains something other than official correspondence, documents or articles intended for official use ...”, as provided in paragraph 2, that would be because it had already carried out an examination, either directly or indirectly, for example by using dogs trained to detect the presence of drugs.

9. The purpose of paragraph 1 was not so much to state the principle of the inviolability of the diplomatic bag as to safeguard freedom of communication between the State and its missions abroad and to protect the confidential character of the contents of the diplomatic bag. It was difficult to see how a diplomatic bag accompanied by a diplomatic courier could be exempt from the X-ray examination carried out at airports to prevent acts of terrorism, when the hand luggage of heads of mission and even of ambassadors was subjected to that examination, which could not be regarded as a violation of the bag. It would therefore be necessary to find balanced wording that would ensure respect for the confidential nature of communications between a State and its missions, while at the same time guaranteeing the security of the receiving State and also of means of transport.

10. On article 36, paragraph 2, he shared the view of many other members of the Commission that it should be provided that the receiving State could request that the bag be opened in the presence of a member of the mission of the sending State. The words “to its place of origin” should be replaced by “to the sending State”, since the place of origin of the bag might be in a transit State.

11. Draft article 42 was unnecessary because it would have no effect. The instrument which the Commission was preparing was intended only to complement, not to replace, the relevant articles of the codification conventions, and it was very probable that many States would prefer to continue applying the provisions of those conventions, which were sufficiently explicit. Moreover, paragraph 2 of article 42 provided that the present articles were “without prejudice to other international agreements in force as between States Parties to them”. That was self-evident: only the States which concluded international agreements could decide not to apply them or to terminate them.

12. The draft articles on the diplomatic courier and the diplomatic bag could not in any sense become a *Magna Carta* and it would be presumptuous of the Commission to provide, in article 42, paragraph 3, that States could conclude international agreements on the topic or modify the provisions of the present articles only if such modifications were in conformity with article 6 of the draft. In fact, States were free to conclude any agreement they wished, provided that it was not contrary to the rules of *jus cogens* or in conflict with the international legal order.

13. The CHAIRMAN, speaking as a member of the Commission, said that it was not enough to state the

principle of the inviolability of the diplomatic bag *in abstracto*. It was also necessary to take account of the fact that, since the diplomatic bag was sometimes used for wrongful purposes, States tended more and more to apply that principle restrictively in practice. The Commission should therefore be realistic; for although the bag had to be protected, it should not be protected everywhere and at all times.

14. The principle of the inviolability of the diplomatic bag was stated forcefully in draft article 36, paragraph 1, but the exceptions to that principle provided for in paragraph 2 were not stated forcefully enough. That paragraph did not mention the State from whose territory the diplomatic mission of a foreign State dispatched a diplomatic bag; but if there was any doubt about its contents, should that State not be able to refuse to allow the bag to be sent to its destination? The position of that State, which was in fact the State of origin of the bag, did not seem to have been taken into account in the draft articles, since according to the definition in article 3, paragraph 1 (3), the term “sending State” applied only to a State “dispatching a diplomatic bag to or from its missions, consular posts or delegations”. It should also be expressly provided that the receiving State or the transit State could request that the bag be examined.

15. Article 36 should be redrafted so as to achieve a better balance between paragraph 1, which stated the principle of the inviolability of the diplomatic bag, and paragraph 2, which listed the exceptions to that principle.

16. Mr. YANKOV (Special Rapporteur), summing up the debate, said that the revised texts of draft articles 36, 37, 39 and 41 to 43 represented an attempt to expedite completion of the first reading of the draft articles. The approach to draft article 36 was based on the comprehensive and uniform character of the bag, and the main object of that article was to provide equal status and equal legal protection, having regard to the inviolability of all types of bag. On the other hand, the purpose of draft articles 42 and 43 was to provide a measure of flexibility with a view to wider acceptance of the draft articles by States.

17. The two elements of draft article 36—invulnerability of the bag and remedies against abuses—had to be considered in the light of the interests of sending, receiving and transit States. Accordingly, the provision in paragraph 1 that “The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained ...” meant that no act, including examination of the bag, which might prejudice the confidential nature of its contents should be carried out. Inviolability inevitably required that the bag should not be opened or detained. While it was true that the 1961 Vienna Convention on Diplomatic Relations made no mention of inviolability in article 27, paragraph 3, the word “invulnerable” was used both in article 27, paragraph 2, and in article 24 of that Convention. In his view, therefore, the word “invulnerable” was quite proper in the context of the legal protection of the diplomatic bag. Moreover, “invulnerable” did not mean “untouchable”, and Mr. Sucharitkul (1949th meeting) had rightly spoken of the

relativity of the concept. Inviolability, in the context of the draft articles, meant the proper legal protection of the contents of the diplomatic bag as defined in article 3, paragraph 1 (2).

18. The reference to direct examination of the diplomatic bag in the last clause of draft article 36, paragraph 1, meant any kind of direct examination by physical contact, other than by electronic or mechanical devices, which might be prejudicial to confidentiality. The addition of the word “indirectly” had been suggested; he was not quite certain whether that would be appropriate, but the suggestion could be considered in the Drafting Committee. As to the reference to “electronic or other mechanical devices”, the draft articles were bound to take account of technological developments.

19. Mr. Roukounas had referred to the principle of good faith: had that always been the rule in international relations the world would be a far better place, but sometimes the norm was bad faith. Unfortunately there was no guarantee that routine examination by screening might not be prejudicial to the diplomatic bag.

20. The purpose of article 36, paragraph 2, was to ensure that all bags received uniform treatment, having due regard to the legitimate interests of the sending, receiving and transit States. That paragraph was broadly in keeping with State practice: in cases of doubt, both parties generally preferred not to open the bag, but to return it to its place of origin. It had none the less been suggested that paragraph 2 should provide for the possibility of requesting that the bag be opened or screened. The disadvantage of that suggestion was that it would mean reverting to the formula of the 1963 Vienna Convention on Consular Relations, which would then apply to all types of diplomatic bag.

21. He agreed that, in draft article 37, it would be preferable to bring the French text into line with the codification conventions and translate the word “cartage” by *transport*, rather than *camionnage*. At the end of the article, the words “other specific services rendered” should be replaced by “similar services rendered”.

22. It had rightly been pointed out that the reference to *force majeure* in the title of draft article 39 applied only to paragraph 2 and not to paragraph 1. He therefore suggested that the title should be amended to read “Protective measures in circumstances preventing delivery of the diplomatic bag or in case of *force majeure*”, which would cover both paragraphs. The expressions “appropriate measures” and “necessary facilities”, which appeared in paragraphs 1 and 2 respectively, had also been questioned. In his view, both expressions were appropriate in their context; but in paragraph 2, the words “to the extent practicable” could perhaps be inserted before the word “extend”.

23. The usefulness of draft article 41, or at least of paragraph 2 of that article, had been questioned by some members. Although he did not feel very strongly on the matter, he thought there were certain elements worth preserving in article 41. It certainly served a pur-

pose, since it dealt with a situation that was not very rare: for example, the United States of America—where the Headquarters of the United Nations was situated—did not have diplomatic relations with all of the 159 Member States of the Organization.

24. Mr. Riphagen (1948th meeting) had suggested that a definition of the term “host State” should be reintroduced into the draft. Such a definition had, of course, been included in the original text of draft article 3,⁵ but had been deleted following the adoption of a broader definition of the term “receiving State”, which included the host State.⁶ That being so, he suggested that the Commission should not go back on its decision, but should insert into the text of paragraph 2 of draft article 41 a form of words to explain that a host State was a State which had in its territory the sending State’s mission to an international organization or delegation to an international conference.

25. Mr. Balanda (1950th meeting) had asked whether it would not be appropriate to refer in article 41 to the suspension of diplomatic relations as well as to their non-existence. But the term “non-existence” could well cover both severance and suspension, since for the time being relations would be non-existent. It would be very difficult to deal with the problems of suspension and severance of diplomatic relations in the text of the article. The best course would be to explain in the commentary that the term “non-existence” was meant to cover those situations.

26. The disclaimer provision in paragraph 2 had been criticized by Mr. Tomuschat (*ibid.*) as unnecessary. But the point was one on which Governments were very sensitive and it was desirable to specify that the granting of certain facilities and immunities did not of itself imply recognition. The provision in paragraph 2 was perhaps not one that would solve many problems, but it would certainly not do any harm.

27. The opening words of draft article 42, “The present articles shall complement the provisions ...”, introduced the concept of complementarity, which had both vertical and horizontal aspects. Vertically, the draft articles would serve to give more precise meaning and practical value to the provisions of the diplomatic conventions relating to the diplomatic courier and the diplomatic bag. Horizontally, the draft articles would add new elements to the existing law on the subject. Ever since he had submitted his preliminary report on the topic,⁷ he had expressed the view that the draft articles should not be considered in isolation from the four codification conventions. The relationship between the draft articles and other conventions or international agreements, dealt with in draft article 42, had to be considered *ratione materiae* on two main levels: first, in respect of the four codification conventions adopted

⁵ See paragraph 1 (6) of draft article 3 submitted at the Commission’s thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), pp. 160-161, footnote 680).

⁶ See paragraph (13) of the commentary to article 3, provisionally adopted by the Commission at its thirty-fifth session (*Yearbook ... 1983*, vol. II (Part Two), p. 56).

⁷ *Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335; see especially section III.

under the auspices of the United Nations, which were the subject-matter of paragraph 1; and secondly, in respect of bilateral consular or other agreements, which were the subject-matter of paragraph 2.

28. The relationship could also be considered *ratione temporis*, in respect of future international agreements relating to the status of the diplomatic courier and the diplomatic bag: that was the subject-matter of paragraph 3. Mr. Francis, Mr. Jagota, Mr. Tomuschat and Mr. McCaffrey (*ibid.*), as well as several other members, had expressed doubts about the usefulness of that paragraph on the ground that its content was already covered by article 6, paragraph 2 (b). But paragraph 2 (b) of article 6 covered the general principle of reciprocity, whereas paragraph 3 of draft article 42 related to future agreements in the field of diplomatic law.

29. The purpose of draft article 43 was to introduce a certain flexibility in order to secure wider acceptance of the draft articles. That practical purpose was served by giving States more options, corresponding to the position each State took in regard to the four codification conventions. During the discussion, the provisions of article 43 had been criticized on the ground that they would open the door to a multiplicity of régimes. The fact was that the multiplicity of régimes already existed under the four codification conventions, which, in particular, established two different régimes for the diplomatic bag. All that article 43 did was to take account of the existing situation by giving States an opportunity to choose the field of application of the régime established by the draft articles. Mr. Tomuschat thought that article 43 created a complicated situation, but in fact the situation was complicated already.

30. He would not dwell on the drafting points made during the discussion, except to say that the Drafting Committee would certainly give careful consideration to Mr. Ogiso's suggestion (1949th meeting, para. 38) that the concluding words of article 43, paragraph 1, "to which it wishes the provisions to apply", should be replaced by the negative formulation "to which it does not wish the provisions to apply".

31. He proposed that the draft articles be referred to the Drafting Committee for consideration in the light of the comments and suggestions made during the discussion.

32. Mr. KOROMA said that he wished to clarify a point concerning draft article 36 and the notion of inviolability. Reference had been made to the incident at Stansted Airport in the United Kingdom, where a crate alleged to have been a diplomatic bag had been found to contain a man. One reason why the crate had been opened by the British authorities was that it did not meet the requirements for a diplomatic bag; in particular, it did not bear the visible external marks required under article 24. Thus the true position was that the crate opened by the British authorities had not been a diplomatic bag at all. It was undesirable to perpetuate the myth that there had been an attempt to carry a human being in a diplomatic bag.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer to the Drafting Committee the revised texts of draft articles 36, 37, 39 and 41 to 43 submitted by the Special Rapporteur, for consideration in the light of the comments and suggestions made during the discussion.

*It was so agreed.*⁸

The meeting rose at 11.25 a.m.

⁸ For consideration of the texts proposed by the Drafting Committee (new articles 28 to 33), see 1980th meeting, paras. 52-109.

1952nd MEETING

Monday, 26 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Carero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Yankov.

State responsibility (A/CN.4/389,¹ A/CN.4/397 and Add.1,² A/CN.4/L.398, sect. C, ILC(XXXVIII)/Conf.Room Doc.2)

[Agenda item 2]

"Implementation" (mise en œuvre) of international responsibility and the settlement of disputes (part 3 of the draft articles)³

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur

SEVENTH REPORT OF THE SPECIAL RAPporteur *and*
ARTICLES 1 TO 5 AND ANNEX

1. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the topic (A/CN.4/397 and Add.1), as well as the articles of part 3 of the draft, which read as follows:

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Article 1

A State which wishes to invoke article 6 of part 2 of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Article 2

1. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of part 2 of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

2. If the obligations the performance of which is to be suspended are stipulated in a multilateral treaty, the notification prescribed in paragraph 1 shall be communicated to all States parties to that multilateral treaty.

3. The fact that a State has not previously made the notification prescribed in article 1 shall not prevent it from making the notification prescribed in the present article in answer to another State claiming performance of the obligations covered by that notification.

Article 3

1. If objection has been raised against measures taken or intended to be taken under article 8 or article 9 of part 2 of the present articles, by the State alleged to have committed the internationally wrongful act or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

Article 4

If, under paragraph 1 of article 3, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of article 12 (b) of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(b) Any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(c) Any one of the parties to a dispute concerning the application or the interpretation of articles 9 to 13 of part 2 of the present articles may set in motion the procedure specified in the annex to part 3 of the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Article 5

No reservations are allowed to the provisions of part 3 of the present articles, except a reservation excluding the application of article 4 (c) to disputes concerning measures taken or intended to be taken under article 9 of part 2 of the present articles by an alleged injured State, where the right allegedly infringed by such a measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes.

Annex

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (c) of part 3 of the present articles, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties to the dispute shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Conciliation Commission acting under this annex has competence shall be decided by the Commission.

5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

2. Mr. RIPHAGEN (Special Rapporteur) said that, at the present stage, the Commission was called upon to consider only section I of his seventh report (A/CN.4/397 and Add.1), relating to part 3 of the draft

articles. Members would note that section II was concerned with the preparation of the second reading of part 1 of the draft articles.

3. Initially, it would be helpful to recall the scope of the task the Commission had taken up in 1963, namely that of codifying the rules of State responsibility as so-called "secondary" rules, irrespective of the source and content of the so-called "primary" rules, in other words the rules of international law governing the conduct of States in their mutual relations. At that time, there had been two underlying assumptions: first, that the source and content of the "primary" rules were in principle irrelevant so far as the legal consequences of failure to observe the primary rules were concerned; and, secondly, that the "secondary" rules, namely the legal consequences of a breach, were in principle independent of the machinery of implementation and actual enforcement thereof.

4. Both those assumptions were in fact untenable. It simply did not make sense to add "secondary" rules to "primary" rules if such "secondary" rules were nothing more than new rules of conduct of States in their mutual relations. Surely such an approach would deprive the "primary" rules of their binding character by making non-observance of those rules a mere condition for other rules of conduct. Similarly, to ignore the content and source of the "primary" rules in the determination of the legal consequences of a breach would be tantamount to neglecting their relative force, both intrinsically and in relation to the actual "primary" rules of conduct.

5. In short, there was an interrelationship between source, conduct, machinery of implementation and the force thereof. Those elements constituted a closed system and the system to be established would depend on a factor of chance, on whether States wished to establish the system bilaterally, regionally or on a world-wide basis. It would also depend on the perceived necessity for the system, in view of the factual interdependence of situations in a particular field. The rules of State responsibility could never be more than residual rules; whatever rules might be enunciated in the draft, States remained free to create "soft law", just as the international community remained free to establish rules of *jus cogens*.

6. Draft articles 6 to 15 of part 2 of the draft, which the Commission had referred to the Drafting Committee,⁴ enumerated a number of reactions to an internationally wrongful act alleged to have been committed, reactions ranging from a demand for reparation in its broad sense, to measures by way of reciprocity and measures by way of reprisal, to "additional rights and obligations" (arts. 14 and 15). Those reactions could involve an increasing number of States and the justification for them lay in the veracity of the allegation that an internationally wrongful act had been committed and in the degree to which the conduct in question disrupted the system.

7. The reaction could in turn lead to counter-reaction, thereby entailing a danger of escalation, for which the

only remedy was some form of organization or extra-national power as a substitute for unilateral national power. In establishing a legal system or subsystem between themselves, States sometimes did provide for such an organization, the existence of which reflected on the legitimacy of the unilateral reaction to what was alleged to be an internationally wrongful act. In part 2 of the draft articles, article 10, paragraph 1, article 11, paragraph 2, article 14, paragraph 3, and article 15 mirrored that idea. Article 7, article 9, paragraph 2, article 10, paragraph 2, and articles 12 and 13 endeavoured, by means of substantive provisions or the concept of proportionality, to prevent escalation. The substantive rule of proportionality in its broad sense, however, was open to divergent interpretations and might not strictly apply in cases falling under articles 14 and 15 of part 2. In other words, the substantive rule could not replace the organization.

8. It was for those reasons that part 3 of the draft proposed a minimum of organizational arrangements in connection with the substantive rules of State responsibility. In that regard, he had drawn on the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, the 1982 United Nations Convention on the Law of the Sea and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Accordingly, draft articles 1 to 5 and the annex of part 3 adopted the wording of those conventions.

9. Mr. MALEK said that most codification conventions contained provisions concerning the settlement of disputes or had optional protocols in that regard, such as the four Geneva Conventions of 1958 on the law of the sea, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions. In view of the particular subject-matter, the Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 1958)⁵ also included provisions establishing a procedure for the compulsory settlement of disputes that might arise between the parties in specific cases. Again, provisions of that kind were to be found in the 1969 Vienna Convention on the Law of Treaties, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1982 United Nations Convention on the Law of the Sea. Admittedly, the procedure for the settlement of disputes established in the latter Convention was compulsory for all the States parties, but the other settlement procedures, including the procedure in the Vienna Convention on the Law of Treaties, could, through the system of reservations and objections thereto, be rendered wholly or partly inapplicable in relations between two or more States parties.

10. It would be useful to have some information on the status of the Vienna Convention on the Law of Treaties, on which the Special Rapporteur had based the draft articles under consideration. It was his own understanding that, as of June 1985, the Convention

⁴ See footnote 3 above, *in fine*.

⁵ United Nations, *Treaty Series*, vol. 559, p. 285.

had been binding on only 46 States and, apparently, not all of them had agreed to the relevant dispute-settlement procedure. Some 10 States had formulated reservations or objections thereto, thereby making application of the procedure wholly or partly inapplicable in their mutual relations.

11. If the Commission wished to strengthen the means of settling disputes, it would probably have to follow the Special Rapporteur's reasoning and make such means compulsory for each and every State party. In the case of the convention that would emerge from the draft articles, there could be no justification for acceptance of a reservation whereby the State making it would not be bound by some or all of the provisions on the settlement of disputes.

12. The draft articles provided that disputes concerning the application or interpretation of the provisions relating to *jus cogens* and to international crimes could be submitted to the ICJ. Recourse to arbitration did not appear to be envisaged, although the Special Rapporteur had drawn attention in his reports to the obvious relationship between the concept of an international crime and the concept of *jus cogens*, as enunciated in the Vienna Convention on the Law of Treaties, under which the States parties to a dispute concerning that concept could agree by common consent to submit the dispute to arbitration. What was the Special Rapporteur's opinion on that point?

13. In draft article 4, the Special Rapporteur also provided for a specific conciliation procedure in the case of a dispute concerning the application or interpretation of the rules defining the rights of so-called injured States. Such an arrangement seemed necessary in a convention on State responsibility, although the fact of the matter was that, unfortunately, submission of disputes to the ICJ, to arbitration or even to conciliation was not a common means of settlement at the present time. States were very reluctant to submit to the authority of a third party or even to a conciliation commission, which by its very nature was intended not to settle disputes, but simply to make it easier for the parties concerned to do so.

14. The General Assembly had always been mindful of that fact. Since the early 1960s, it had endeavoured to find a solution by trying to encourage States to submit to the inquiry procedure, a means of settlement that might be more readily acceptable. Thus, in resolution 1967 (XVIII) of 16 December 1963 on the question of methods of fact-finding, the General Assembly had called for a study of such methods. He had then prepared that study,⁶ and the conclusions had not been very encouraging. The study had shown that the League of Nations had encouraged States to conclude conciliation treaties *inter se* and that, to that end, it had adopted, on 26 September 1928, the General Act for the pacific settlement of international disputes. A fairly large number of bilateral conciliation treaties had been concluded in the framework of the League, but they had rarely been applied.

15. The United Nations had also fostered the conciliation procedure. In 1949, it had restored the efficacy of the 1928 General Act and, in order to promote the use of inquiry and conciliation procedures, had established the Panel for Inquiry and Conciliation.⁷ The panel, however, had never been used. The period since the establishment of the United Nations had been marked by very limited use of inquiry and conciliation bodies set up by the parties themselves. A wide variety of procedures was available to States, which could submit disputes to standing bodies, to *ad hoc* conciliation bodies or to the panel established by the General Assembly in 1949.

16. The failure to submit disputes to bodies set up by the parties themselves indicated that States were not very enthusiastic about inquiry or conciliation procedures that might be instituted in bodies other than those of the United Nations or regional organizations. The above-mentioned study had clearly shown that States had always preferred to submit disputes to the principal organs of world or regional organizations, which could be explained by the fact that, in any dispute, one party always regarded itself as the injured party and therefore, in order to win public support, preferred to submit the dispute to such bodies rather than to local commissions or to some other body, whose conclusions would not carry as much weight in the eyes of the public.

17. A convention on State responsibility must inevitably include provisions on the settlement of disputes and the proposals by the Special Rapporteur were made precisely for that purpose. Since parts 2 and 3 of the draft articles were about to be adopted on first reading, he wished to pay tribute to the Special Rapporteur as the main author of very complex parts of a draft on a topic whose codification would have seemed an impossible undertaking at the beginning of the twentieth century. The Special Rapporteur had always demonstrated authority akin to and indeed rivalling that of Mr. Ago, his predecessor in the study of the topic of State responsibility.

18. Mr. FLITAN said that he wished to comment on three matters of principle. First, draft article 4, subparagraphs (a) and (b), were intended to make the jurisdiction of the ICJ compulsory, even though it was all too well known that States were divided on that issue, for some considered that the submission of a dispute to the Court had to be agreed to by all the parties concerned, whereas others took the view that any party to a dispute was entitled to submit it to the Court. In that connection, he referred to Article 36, paragraph 3, and Article 92 of the Charter of the United Nations and to Article 36, paragraph 1, of the Statute of the ICJ. During the elaboration of the present draft articles, members had frequently and rightly pointed out that State responsibility was the very essence of international law. In view of the importance of the topic, it would therefore be a serious matter for the draft to set forth the principle of the compulsory jurisdiction of the ICJ. In all likelihood, States which did not accept the com-

⁶ *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/5694.

⁷ See General Assembly resolutions 268 A (III) and 268 D (III) of 28 April 1949.

pulsory jurisdiction of the Court would not become parties to the future convention, while support for the idea of compulsory jurisdiction would, in a way, be tantamount to trying to amend the Statute of the Court and hence the Charter itself. He did not think the Commission would willingly accept the fact that a large number of States would not accede to such an important instrument as the future convention.

19. Secondly, draft article 3, paragraph 1, referred to Article 33 of the Charter, which mentioned various means of settling disputes. At the previous session, when it had discussed the proposals for part 3 of the draft set out by the Special Rapporteur in his sixth report (A/CN.4/389, sect. II), the Commission had been consulted, without any specific text before it, about the principle that was now embodied in article 3, and the idea had been expressed that recourse to Article 33 of the Charter was essential at every stage in a dispute. Having studied the draft articles submitted in part 3, he considered that they must include a general text setting forth the principle that, at the first sign of a dispute, States were required to seek a solution through the means indicated in Article 33 of the Charter.

20. Thirdly, draft article 2, paragraph 1, referred to a period of 3 months and draft article 4 to a period of 12 months, but no details were given about the periods of time applicable "in cases of special urgency". As a general rule, disputes had to be settled as rapidly as possible, even though some time might be required to shed light on particular aspects of a dispute. He therefore had reservations and doubts about the advisability of establishing a dispute-settlement procedure that could well take as long as two years.

21. Sir Ian SINCLAIR said that part 3 of the draft articles seemed to relate essentially to disputes concerning the interpretation and application of the provisions of part 2. Nevertheless, part 3 should also apply to the provisions of part 1. The essence of any dispute concerning the provisions of part 1 or part 2 would be whether the alleged author State had in fact committed an internationally wrongful act, something which entailed determining whether a wrongful act had been committed and, if so, whether the act was attributable to the alleged author State.

22. Accordingly, he would be grateful if the Special Rapporteur would clarify whether, from the rather narrow construction in part 3 of a series of draft articles predicated on the proposition that a dispute would arise with regard to one of the articles of part 2, doubts might not be cast on the applicability of part 3 to the articles contained in part 1.

23. Mr. RIPHAGEN (Special Rapporteur) said he did not think that the articles of part 3 were constructed as narrowly as Sir Ian Sinclair had suggested. They were intended to provide some sort of machinery to deal with the situation when a State that considered it had been injured took certain steps as a reaction to the alleged wrongful act. The purpose was to avoid the danger of escalation when measures of reciprocity or reprisal or other similar steps were taken. In the absence of such machinery, a very difficult situation would emerge.

24. The three parts of the draft were interdependent. When it was alleged that a State had committed an internationally wrongful act, it was of course necessary to determine whether the act in question was indeed wrongful and then ascertain whether it was attributable to the alleged author State. Only when those questions had been answered would the provisions of part 2 of the draft come into play. Application of the provisions of part 3 would in turn be dependent upon those of part 2 of the draft. Consequently, the articles of part 3 were also intended to apply to disputes in connection with the articles of part 1.

25. Mr. ARANGIO-RUIZ said he fully agreed with Sir Ian Sinclair that the provisions of part 3 of the draft would have to cover not only the articles of part 2 but also those of part 1. Draft article 1 of part 3 began with the words "A State which wishes to invoke article 6 of part 2 ...". The reason for that reference to an article in part 2 was probably that the subject involved was notification, a phase which preceded any third-party settlement procedure and indeed any bilateral negotiations or mediation. In fact, the claimant State's argument would be put forward on the basis of any one of the articles in part 2 or even in part 1, according to the case. For example, there might be an exchange between the two States concerned on the determination of the wrongful nature of the act and on any circumstances precluding responsibility that might be invoked by the alleged author State. However, he would discuss article 1 of part 3 *ex professo* at a later stage.

26. For the time being, he would confine himself to the provisions of part 3 that mentioned the ICJ. As the representative of his country, Italy, he had fought in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for recognition of the role of the ICJ in the settlement of disputes. Together with a small group of other States, Italy had submitted a special document on the subject, but the results had been disappointing and only a passing reference to judicial settlement had been included in the Declaration adopted by the General Assembly in 1970.⁸ The way in which the ICJ had been treated in 1970 could be explained by the fact that, at the time, a number of countries had considered the Court to be a very conservative body. The Court's composition, however, had now changed considerably and should prove more acceptable to a larger number of Members of the United Nations.

27. In those circumstances, the Commission should always make an effort to promote settlement of legal disputes by the Court. In opposing any idea of compulsory jurisdiction, Mr. Flitan had forgotten that the competence of the Court was also envisaged in the so-called optional clause, that was to say in Article 36, paragraph 2, of the Statute of the Court, and not only in Article 36, paragraph 1, of the Statute and Article 92 of the Charter of the United Nations. Nor would it be appropriate to consider only Article 36, paragraph 3, of

⁸ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex).

the Charter, since that provision merely directed the Security Council to "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice". It was simply a question there of recommending to the parties resort to judicial settlement by agreement.

28. The members of the Commission, as independent lawyers acting in their personal capacity, should do all they could to enhance the role of the ICJ. They should not be discouraged by earlier setbacks and should draft provisions on the settlement of disputes which they believed were reasonable; it would then be for the Sixth Committee of the General Assembly and ultimately for individual States to take the final decision.

29. Mr. YANKOV, referring to draft article 4, subparagraph (a), asked why the Special Rapporteur had omitted the phrase "unless the parties by common consent agree to submit the dispute to arbitration", particularly since the provision in question was modelled on article 66, subparagraph (a), of the 1969 Vienna Convention on the Law of Treaties, which provided that a dispute could be submitted either to the ICJ or to arbitration.

30. Sir Ian SINCLAIR, referring to Mr. Arangio-Ruiz's comments, said that he, too, had been a member of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States when it had drawn up the principle relating to the peaceful settlement of disputes and that he had been very concerned at the limited extent of agreement reached on the content of that principle at the time.

31. In formulating part 3 of the draft articles it was necessary to bear in mind that any dispute as to whether article 6 of part 2 of the draft could properly be invoked would have its roots in an earlier dispute concerning the interpretation or application of part 1 of the draft. A whole series of such disputes could arise, concerning, for example, whether there had been an internationally wrongful act, whether the act was attributable to a State, whether local remedies had been exhausted, or whether there had been any circumstances precluding wrongfulness. In practice, there would first have been a series of diplomatic exchanges, with the alleged injured State drawing the attention of the author State to the fact that it regarded a given act committed by or on behalf of the author State as an internationally wrongful act. That in turn would probably have been denied by the author State on the ground, for instance, that the act was not attributable to it or that there had been circumstances precluding wrongfulness or that, on the facts, no internationally wrongful act had been committed.

32. Consequently, although such underlying disputes would inevitably come within the ambit of the procedure for peaceful settlement set forth in part 3, he was somewhat concerned that it might appear that the whole complex of varying types of disputes was being placed within the strait-jacket of a dispute as to whether an alleged injured State was entitled to invoke article 6 of part 2. The problem might, however, be one of formulation rather than substance.

33. Mr. ARANGIO-RUIZ said it was the reference made in draft article 1 of part 3 to article 6 of part 2 that had apparently given rise to the difference of opinion between Sir Ian Sinclair and the Special Rapporteur. As he himself saw it, part 3 comprised two groups of articles, one constituting part 3 proper, since it dealt with the procedures provided for in Article 33 of the Charter of the United Nations, and the other consisting of articles 1 and 2, which would be better placed in part 2, since they related to the way in which mutual relations changed when one State made a notification to another State.

34. At the Commission's previous session,⁹ he had deplored the fact that draft articles 6 *et seq.* of part 2 contained no provisions concerning intermediate procedures that could be used between the time when a State unilaterally found that it had suffered injury as a result of an act contrary to international law committed by another State and the time when it took countermeasures: hence the provisions on prior notification included in part 3. Of course, a State might not have the opportunity to give a notification because the situation might require the adoption of urgent measures. A distinction must nevertheless be made between the two types of provisions contained in part 3, for some of them would be more appropriate in part 2.

35. Mr. RIPHAGEN (Special Rapporteur) said that the Commission's discussion so far had served to pinpoint the interrelationship between the different parts of the draft. It was difficult, indeed unnecessary, to try to make very sharp distinctions inasmuch as the final instrument would, of course, have to be considered as a whole. Some rearrangement was obviously necessary and that could be done in the Drafting Committee. It might also be advisable in that connection to reconsider chapter V of part 1 of the draft (Circumstances precluding wrongfulness).

36. In his oral introduction, he had deliberately referred to articles 6 to 15 of part 2 of the draft because of the obvious link between parts 2 and 3. It was also clear that any dispute covered by the settlement procedure in part 3 would give rise to a host of problems falling under part 1. Obviously, it was not possible at the present stage to establish a comprehensive system for the compulsory settlement of disputes, but it was possible to provide that, once a dispute had reached the point of countermeasures, an attempt should be made to put an end to the escalation.

37. With regard to the compulsory jurisdiction of the ICJ, it was important to remember that novel concepts such as *jus cogens* and international crimes also called for a progressive attitude in the matter of settlement of disputes. Furthermore, under the present draft, the compulsory jurisdiction of the Court was confined to questions of *jus cogens*: the Court would be required only to decide whether there was a rule of *jus cogens* applicable to the breach in question, not to award a sum of money to one State or another.

⁹ *Yearbook ... 1985*, vol. I, pp. 150-151, 1900th meeting, paras. 25-28.

38. As to Mr. Yankov's question, the parties to a dispute were always free to submit the dispute to arbitration if they wished. In that connection, he drew attention to paragraph 1 of draft article 3 of part 3, which provided that, in the event of a dispute concerning the application of countermeasures, "the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations". Again, draft article 4 provided for further procedures if, "under paragraph 1 of article 3, no solution has been reached within a period of 12 months following the date on which the objection was raised ...". A variety of possible procedures for the settlement of disputes, including negotiation, conciliation and arbitration, was therefore available to States.

The meeting rose at 11.40 a.m.

1953rd MEETING

Tuesday, 27 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, M. Arangio-Ruiz, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Yankov.

State responsibility (continued) (A/CN.4/389,¹ A/CN.4/397 and Add.1,² A/CN.4/L.398, sect. C, ILC(XXXVIII)/Conf.Room Doc.2)

[Agenda item 2]

"Implementation" (mise en œuvre) of international responsibility and the settlement of disputes (part 3 of the draft article)³ (continued)

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR and
ARTICLES 1 TO 5 AND ANNEX⁴ (continued)

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

⁴ For the texts, see 1952nd meeting, para. 1.

1. Mr. McCaffrey said that, although the draft articles in part 3 were inspired by the corresponding provisions of the 1969 Vienna Convention on the Law of Treaties, the 1982 United Nations Convention on the Law of the Sea and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, they were intended to serve a different purpose. That purpose was to prevent or retard the escalation of disputes in international relations.

2. The provisions of part 3 seemed satisfactory; they were a necessary component of the draft articles on State responsibility and formed a logical and integral part thereof. They dealt with methods of breaking the vicious circle of action and reaction, a very vivid account of which was given by the Special Rapporteur in paragraph (4) of his general commentary (A/CN.4/397 and Add.1, sect. I.B). It remained to be seen whether States would, in practice, accept the restrictions on their freedom of action that would result from the provisions of part 3, and he understood the concern expressed by Mr. Flitan (1952nd meeting), particularly with regard to the compulsory jurisdiction of the ICJ.

3. It should be remembered, however, that the draft articles provided for recourse to the ICJ in respect of two specific issues only: rules of *jus cogens* and international crimes, which were dealt with in draft articles 12 and 14 of part 2, respectively. The provision on compulsory jurisdiction of the ICJ in respect of rules of *jus cogens* (draft article 4 (a)) had, of course, been modelled on the corresponding provision of the 1969 Vienna Convention (art. 66 (a)). As to international crimes, he remained doubtful about the concept itself, but if a reference to it were to be retained in the draft articles, it must clearly be accompanied by a provision on the settlement of disputes.

4. The ICJ was undoubtedly a proper forum for deciding matters relating to international crimes, but they could equally well be dealt with under Chapter VII of the Charter of the United Nations. Article 36, paragraph 3, of the Charter had been mentioned during the discussion, but that provision was intended to safeguard the possibility of "legal disputes" being referred by the parties to the ICJ. Of course, it was difficult to draw a clear line of demarcation between legal and political disputes, and some disputes were of a mixed legal and political character.

5. Consideration should be given to defining more clearly the questions to be decided by the ICJ; perhaps its jurisdiction should be limited to determining whether a rule of *jus cogens* or an international crime was involved in a dispute. In any case, he was not entirely clear about the relationship between subparagraphs (a) and (b) of draft article 4 of part 3 and paragraph 3 of draft article 14 of part 2. He would appreciate an explanation from the Special Rapporteur on that point.

6. It was to be hoped that the articles in part 3 could be formulated in a way that would prove acceptable to States. The difficulty of achieving that result was illustrated by GATT. Under that Agreement, panels could be constituted to settle certain types of trade disputes; but even in that area, where extremely flexible

standards were applied, comparatively little success had been achieved with the dispute-settlement machinery. The contracting parties to GATT did not always resort to that machinery, although the disputes which arose related to matters such as subsidies, which did not affect the vital interests of States.

7. None the less, there was an undeniable inter-relationship between substantive rules—both primary and secondary—and procedural rules. In regard to ordinary internationally wrongful acts, therefore, some sort of implementation machinery was necessary, and the Special Rapporteur's approach was broadly acceptable. He was, however, concerned that the time-limits specified could make the procedures very lengthy; but that objection could easily be met by shortening the time-limits.

8. It had been mentioned that the provisions of part 3 appeared to relate to disputes concerning part 2. Any dispute, however, would manifest itself in terms of a State claiming to be an "injured State", so that the procedures set out in part 3 would cover not only questions relating to part 2, but also questions relating to part 1 and even to primary rules going beyond the draft articles altogether.

9. The fundamental question was at what stage the settlement procedure should be engaged: whether at the initial stage of the diplomatic exchanges or later, but before actual measures, including suspension of obligations, were taken in response to the alleged internationally wrongful act. The Special Rapporteur had opted for the latter formula, in order to prevent the escalation of the dispute.

10. He did not favour referring the articles in part 3 to the Drafting Committee at the current stage, because of its backlog of work on the topic of State responsibility, not to mention other topics, and because the present session was the last of the quinquennium of the current membership of the Commission. If the majority of members favoured referral to the Drafting Committee, however, he would not oppose it.

11. Mr. REUTER said that the text of the draft articles on State responsibility, on which the Commission had been working for 23 years, was somewhat abstract, but very sober. It consisted of only 56 articles—whereas the 1982 United Nations Convention on the Law of the Sea, for example, contained hundreds—and it passed over in silence or dealt only very briefly with diplomatic protection, injury, causal links and the multiplicity of acts and offenders—all of which were duly discussed in every textbook or other work on State responsibility.

12. The spare and austere style of the draft articles—like Cistercian architecture—which quite rightly only stated general principles without going into detail, was explained by a number of choices that had been made at the outset. For when the Commission had begun to study the topic of State responsibility it had decided, first, to distinguish between primary rules and secondary rules and to deal only with the latter and, secondly, to leave aside the question of injury, or at least to refer to it only in part 2 of the draft—in which it was only briefly mentioned—because a wrongful act

necessarily caused injury, if only moral injury. Behind that affirmation, however, loomed the problem of the consequences of breaches of multilateral conventions—a very difficult problem which made it necessary to deal with such sensitive concepts as "rights" as opposed to "interests".

13. But although the draft articles passed over a certain number of questions, they took account of two new concepts, namely *jus cogens* and the international crime, which were undeniably of great moral significance, though their legal content was difficult to define. The Special Rapporteur had taken infinite precautions in dealing with the concept of *jus cogens*. He had been even more careful than the authors of the 1969 Vienna Convention on the Law of Treaties, for he had indirectly recognized that there was no rule of *jus cogens* defining what *jus cogens* was and that any concrete rule—any "primary" rule of *jus cogens*—could itself define its effects and conditions of application. The concept of an international crime was also treated with great reserve and the Special Rapporteur had refrained from specifying what an international crime was.

14. No other approach was possible, moreover, for as the Special Rapporteur himself had pointed out (1952nd meeting) the distinction made between primary rules and secondary rules was entirely theoretical. Since those two elements were closely linked, it was impossible to make the content of the rules dealing specifically with responsibility very dense. The Commission could, of course, go more deeply into such questions as injury and the implementation of responsibility, but that would take it too far.

15. The lessons of the past could not be ignored and it should not be forgotten that all legal systems, including Roman law, had begun with rules applicable to particular cases, without establishing any general régime of responsibility. Moreover, there was still no general régime of responsibility in the various common-law systems now in force. The Special Rapporteur had therefore been right to confine himself to stating very general principles and not to try to deal with specific problems relating to the intermediate classifications.

16. In connection with the 35 articles of part 1 of the draft adopted on first reading, the Special Rapporteur had expressed doubts about the need for detailed consideration of problems relating to the time factor. As everyone knew, in trying to deal with the problem of retroactivity or, more generally, with the application of rules in time, terms inevitably had to be used that were real pitfalls and were untranslatable because they had no equivalent in other languages. It must not be forgotten that the texts which the Commission prepared were intended to be applied and, above all, understood. If the Commission decided to deal in depth with all aspects of the topic of State responsibility, it would end up with a draft of more than 250 articles, which an intergovernmental conference would probably find it very difficult to handle.

17. For all those reasons, the draft articles on State responsibility could only take the form of abstract pro-

visions drafted in a spare style that was, surprisingly enough, perfectly suited to the topic.

18. Commenting on draft articles 1 to 5 of part 3, he observed that the use of the word "wishes" in the first sentence of article 1 seemed inappropriate: the State had to take a definite position and decide whether or not it would invoke article 6 of part 2. It would therefore be preferable to say "A State which decides to invoke article 6 ...".

19. Draft article 1 did not specify any time-limit for notification, so that a State could notify its intention to invoke article 6 of part 2 at any time. There was no prescription. In general, moreover, no attempt appeared to have been made to deal with the question of prescription, in regard either to international crimes or to delicts. That approach was not in itself open to criticism, but the concept of an international crime could have been consolidated by providing that, although delicts were subject to prescription, international crimes were not.

20. In draft articles 1 and 2, the Special Rapporteur appeared to have established a two-stage notification system. Thus a State which had invoked article 6 of part 2 would have to wait at least three months before it could notify its decision to invoke article 8 or article 9 of part 2. Although it was well to set a time-limit for application of the measures by way of reciprocity or reprisal provided for in articles 8 and 9, it was hard to see why States should be prevented from notifying at once their intention to invoke those two articles.

21. In draft article 2, paragraph 1, it would be more accurate to say that the claimant State must notify its intention "to suspend the performance of some of its obligations ...". In paragraph 3, the word "another" was not really necessary.

22. Article 8 of part 2 was not referred to in draft article 4, subparagraph (c), and he would like to know the reason for that omission. Could it be explained by the fact that the State against which measures by way of reciprocity were taken under article 8 either agreed to those measures, in which case there was no dispute, or did not agree to them, in which case it would maintain that such measures were disproportionate to the internationally wrongful act of which it was accused, or that they were really measures of reprisal? The Special Rapporteur should provide further explanations on that point.

23. Draft article 5 was acceptable, although it might be asked whether a general provision on reservations should not be included. The Commission should specify whether, in accordance with tradition, it intended to leave it to a future diplomatic conference to decide whether or not reservations to the draft articles would be allowed, or whether it intended to take a position on that question itself.

24. With regard to the annex, he noted that the machinery proposed by the Special Rapporteur differed in some respects from that provided for in the annex to the Vienna Convention on the Law of Treaties. Since questions relating to responsibility and questions relating to the law of treaties were often linked, it might

be better to follow that Convention very closely, so that problems involving the law of treaties and problems involving State responsibility could be submitted to one and the same conciliation commission.

25. Although he understood Mr. McCaffrey's reluctance, he thought the time had come to refer the draft articles to the Drafting Committee. That action would show not so much that the Commission had completed its work on the topic, as that the Special Rapporteur had prepared an excellent text which was far enough advanced to be considered by the Drafting Committee.

26. Mr. CALERO RODRIGUES commended the Special Rapporteur for the draft articles of part 3. The general commentary which introduced those articles (A/CN.4/397 and Add.1, sect. I.B) was very useful and should meet with no objection. Clearly, articles on implementation and the settlement of disputes were necessary, in order to provide some form of organization for the application of the measures specified in part 2 of the draft. The articles in part 3 would show how the consequences of an internationally wrongful act would be brought about.

27. He had some doubts, however, as to whether the time was ripe for taking up the articles of part 3. It would be preferable to wait until the Commission's work on part 2 was more advanced; only 16 articles had so far been presented by the Special Rapporteur for part 2, which, in his own view, should be as extensive as part 1. In particular, the provisions dealing with international crimes would need to be developed much further.

28. It would therefore not be advisable to begin an in-depth examination of the articles in part 3 before the Commission had a clear idea of the content of part 2. He accordingly shared Mr. McCaffrey's view that the articles in part 3 should not be referred to the Drafting Committee at the present stage. He thought the Commission had a general tendency to refer articles to the Drafting Committee too soon, and in the present instance there was more reason than usual to refrain from doing so. Nevertheless, if the majority of the Commission wished to refer the articles to the Drafting Committee, he would not oppose it.

29. Draft articles 1 and 2 of part 3 made provision for a notification procedure which took account of the present state of international law. Since that law was incomplete, it was necessary to make provision for some organization in the matter. If a State considered that it had been injured by what it alleged to be an internationally wrongful act, it would have to make a notification to invoke the provisions of article 6 of part 2. A second notification would be necessary under article 2 of part 3 if the injured State wished to suspend the performance of its obligations towards the author State pursuant to the provisions of article 8 or article 9 of part 2.

30. It might be objected that the proposed procedure would create bureaucratic obstacles to the injured State's reaction. It should be remembered, however, that the position was very different from that obtaining under a system of private law, where the injured party

could sue the author of the wrongful act directly in the ordinary courts. Where a State claimed to be injured by an internationally wrongful act committed by another State, it was necessary to enter into negotiations. The reaction of the injured State had to be graduated; it could not take all the measures immediately. Of course, in a case of special urgency the two notifications could follow each other very closely.

31. On the question of limitations and time-limits, provision should be made for the case of an injured State which was unaware that an internationally wrongful act had been committed. His own suggestion would be that time-limits and periods of limitation should run from the time when the injured State became aware of the facts.

32. Draft article 3 of part 3 dealt with the settlement of disputes. Paragraph 1 provided that Article 33 of the Charter of the United Nations could be invoked in the event of objection being raised against measures taken under articles 8 or 9 of part 2. In fact, the obligation under the Charter to have recourse to Article 33 applied before the second notification relating to the measures provided for in articles 8 or 9 of part 2 was made. The provisions of Article 33 of the Charter were, of course, somewhat vague, reflecting as they did the state of international relations. States were reluctant to agree to be bound by third-party procedures for the settlement of disputes; hence the provisions of draft article 3, which introduced a settlement system into the draft, were necessary.

33. Draft article 4 dealt with more concrete matters and provided for compulsory jurisdiction of the ICJ to determine whether a rule of *jus cogens* or an international crime was involved in a dispute. It was possible that States might not be prepared to accept that formula, but he agreed with Mr. Arangio-Ruiz (1952nd meeting) that the Commission should propose it. Moreover, since compulsory jurisdiction of the ICJ was specified for only two very specific cases, States might be prepared to consider it.

34. He was not convinced of the usefulness of draft article 5, on reservations.

35. Sir Ian SINCLAIR said that, in formulating part 3 of the draft articles, the Commission should take account of both part 1 and part 2, in order to ascertain the extent to which the provisions on settlement of disputes could be applied to the draft as a whole. As a result of the way in which the draft articles of part 1 had been formulated, it might well be that any instance before which a dispute covered by part 3 was brought would be bound to refer back to the original question whether there had been a breach of an international obligation of the State. In other words, it would have to consider not only the secondary rules in part 1, but also whether there had been a breach of a primary obligation. That was part of the problem with which the Commission was faced; for in its work on State responsibility it had sought, perhaps not always with success, to construct secondary rules applicable to the whole field of State responsibility, without touching upon the primary rules that might result in an initial breach of an international obligation.

36. Article 2 of part 2 of the draft contained a general saving clause which, as the Special Rapporteur had explained in his sixth report (A/CN.4/389, commentary to article 2),⁵ was intended to save subsystems that might already be written into an existing treaty or convention concluded between a small group of States. In such cases, the subsystems generally contained special provisions governing the legal consequences of an internationally wrongful act and procedures for the peaceful settlement of any disputes arising therefrom. He took it that, in the context of part 3, any peaceful settlement procedures provided for under existing subsystems were excluded. Part 3, when read in conjunction with article 2 of part 2, did not make that absolutely clear, however. If his understanding was correct, the provisions of part 3 were residual, in that such subsystems would operate with their own in-built mechanisms for the peaceful settlement of disputes.

37. With regard to draft articles 1 and 2 of part 3, he shared the doubts voiced concerning the need for a double notification system. As the former legal adviser to a Ministry of Foreign Affairs, he recollected that when a Government was confronted with a situation in which it believed that it was an injured State and that another State had committed an internationally wrongful act, the first step was to deliver a note of protest together with a reservation of all rights. If negotiation and settlement did not ensue, the next stage, under draft article 2, was for the alleged injured State to consider whether it wished to take countermeasures. That did not seem to fit in very easily with what actually happened in practice, for it was by no means clear that the note of protest and reservation of rights would constitute a notification under draft article 1. Nor did the subsequent notification relating to articles 8 or 9 of part 2 seem to fit very easily into the pattern of what happened in practice. Draft articles 1 and 2 of part 3 would therefore require careful consideration. He was not opposed to the principle of notification: the question was what should be the nature of the notification, and how rigid should be the strait-jacket imposed by articles 1 and 2.

38. He had no objection in principle to paragraph 1 of draft article 3. Paragraph 2, however, if what was at issue was residual rules, might lead to a situation in which the two States concerned—the alleged author State and the alleged injured State—were bound by modalities for the peaceful settlement of disputes between them, perhaps by way of optional clause declarations. What troubled him slightly was the placement of paragraph 2, for such declarations could apply as much to the procedure set out in draft article 4 as to the generalized statement in paragraph 2 of draft article 3. For instance, the United Kingdom Government had made an optional clause declaration under Article 36, paragraph 2, of the Statute of the ICJ, from which disputes that the parties had agreed to settle by some other peaceful means were excluded. It might be thought that conciliation, as provided for in draft article 4, subparagraph (c), could be a peaceful means of settlement within the meaning of the reservation to the

⁵ See also *Yearbook ... 1985*, vol. I, p. 86, 1890th meeting, para. 5.

United Kingdom's acceptance of the optional clause, but nobody would wish to prevent States that were mutually bound by optional clause declarations from invoking such declarations in order to bring a dispute before the ICJ. The placement of paragraph 2 of draft article 3 would therefore require careful consideration.

39. His initial feeling was that paragraph 2 of draft article 3 should perhaps also qualify draft article 4, since there might be circumstances in which the injured State wished to short-circuit the more complicated procedures by immediately invoking the jurisdiction of the ICJ on the basis of a mutually binding optional clause declaration. The Court would then be able to consider whether there had been a breach of a primary obligation. That, in fact, was what was at the root of such disputes, rather than the interpretation or application of the secondary rules. The ultimate aim was to arrive at a system that would provide a means of peaceful settlement of the underlying dispute, which was concerned with whether there had been an initial breach of an international obligation and, if so, what the remedy should be. That, too, would require close examination in relation to the content of both part 2 and part 1 of the draft.

40. He would not oppose referral of the draft articles to the Drafting Committee, but he rather doubted that it would be able to work on them effectively until it had made much more progress on part 2 and had perhaps also taken a further look at part 1 by way of second reading.

41. Mr. KOROMA said that, with regard to the question of dual notification, Mr. Reuter and Sir Ian Sinclair might wish to consider the *Minquiers and Ecrehos* case.⁶ In that case, between France and the United Kingdom, the United Kingdom had submitted a primary notification to the French authorities, which had had the desired effect.

The meeting rose at 11.35 a.m.

⁶ Judgment of 17 November 1953, *I.C.J. Reports 1953*, p. 47.

1954th MEETING

Wednesday, 28 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Yankov.

State responsibility (continued) (A/CN.4/389,¹ A/CN.4/397 and Add.1,² A/CN.4/L.398, sect. C, ILC(XXXVIII)/Conf.Room Doc.2)

[Agenda item 2]

"Implementation" (mise en œuvre) of international responsibility and the settlement of disputes (part 3 of the draft articles)³ (continued)

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur (continued)

SEVENTH REPORT OF THE SPECIAL RAPporteur and
ARTICLES 1 TO 5 AND ANNEX⁴ (continued)

1. Mr. SUCHARITKUL congratulated the Special Rapporteur on his sixth and seventh reports (A/CN.4/389 and A/CN.4/397 and Add.1), which would enable the Commission not only to complete the first reading of practically the whole set of draft articles, but also to make some preparations for the second reading of the articles of part 1 of the draft. The drafting of part 1 had been likened by Mr. Reuter to the construction of a cathedral and the articles in that part were indeed an impressive structure, one that none the less needed particularly solid foundations. The Special Rapporteur's earlier reports had helped to prepare the way in that regard.

2. The Commission had been working on the topic of State responsibility for many years and it was worth recalling that the first Special Rapporteur, Mr. García Amador, in his first report submitted in 1956, had referred to such matters as diplomatic protection and the treatment of aliens.⁵ Those were the days of writers such as Eagleton and Borchard, when the traditional law of State responsibility as then taught in schools of law dealt with such practical questions as the minimum standard of treatment for aliens and the methods of obtaining compensation for property confiscated or expropriated in a foreign country. But it should be remembered what in fact constituted diplomatic protection of aliens. A State, in order to ensure the protection of its nationals in another State, might send in its troops, sometimes even without the knowledge of its ambassador who had been assigned precisely that task of protection. The case was not so much one of counter-measures as one of self-help. War in those days had still been legitimate and countries and resorted to blockades to claim payment of debts. Unfortunately, the countries that now formed the third world had experienced the

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

⁴ For the texts, see 1952nd meeting, para. I.

⁵ *Yearbook ... 1956*, vol. II, p. 199, document A/CN.4/96, chap. VI.

whole problem of diplomatic protection from the opposite side. Happily, international law had changed and the concept of international responsibility had broadened. War had been made illegal and peacetime blockades were unlawful.

3. He supported the Special Rapporteur's general approach in formulating part 3 of the draft. Articles 1 and 2 made provision for a cooling-off period that was intended to prevent the injured State from invoking article 6 of part 2 and from adopting countermeasures without advising the author State. The notification required in draft article 1 constituted a first step in the process of bilateral negotiations between the two States concerned, and it should not be forgotten that most problems in international relations had in fact been settled by negotiation.

4. Draft article 2, paragraph 1, contained a sufficient element of flexibility by imposing a waiting period of at least three months before the claimant State could invoke article 8 or article 9 of part 2, and an exception was made for "cases of special urgency". As to the question of invoking articles 8 or 9, it was important to remember that, under draft article 12 (a) of part 2, the provisions of articles 8 and 9 did not apply to the suspension of the performance of the obligations of the receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff. In that regard, the Special Rapporteur could perhaps examine the question whether there were other primary rules that deserved similar treatment. The underlying reasons for the provision of article 12 (a) lay, of course, in the incident at the Embassy of the United States of America in Tehran in 1980.

5. Draft article 3 was fundamental, dealing as it did with the emergence of the real dispute. In principle, he agreed with the formulation and the reference to the means of settlement indicated in Article 33 of the Charter of the United Nations, which was very broad. It spoke specifically of "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements" and also mentioned "other peaceful means" of the choice of the parties to the dispute. The Commission would recall that the 1948 Pact of Bogotá⁶ referred to good offices, a means of settlement which, of course, was not precluded by Article 33 of the Charter.

6. The existence of regional subsystems was important. For example, article 13 of the ASEAN Treaty of Amity and Co-operation (1976)⁷ required the States parties to refrain from the threat or use of force and to settle disputes among themselves through friendly negotiations. For the purpose of settling disputes through regional processes, the Treaty had set up a High Council comprising a representative at ministerial level from each of the high contracting parties "to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony". Article

15 of the Treaty stated that the High Council could recommend "appropriate means of settlement such as good offices, mediation, inquiry or conciliation" and could "offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation". Article 16 specified that high contracting parties which were not parties to the dispute were not precluded from offering all possible assistance to settle the dispute, adding: "Parties to the dispute should be well disposed towards such offers of assistance".

7. Draft article 4 (a) of part 3 provided for the jurisdiction of the ICJ in the event of a dispute concerning the application or interpretation of article 12 (b) of part 2, namely the article on *jus cogens*. Article 4 was modelled in that respect on article 66 of the 1969 Vienna Convention on the Law of Treaties and on article 66 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. In his opinion, disputes of that kind should be referred to the ICJ. Naturally, the Court had its limitations, one being the absence of compulsory jurisdiction. Another was that many States had made reservations in accepting its jurisdiction. The most serious problem, however, was the quality of the law. For the parties to a dispute to accept third-party adjudication, they must have confidence in the law to be applied, a consideration that was equally true in the case of arbitration and judicial settlement. Recently, a trend had emerged among African and Mediterranean countries to submit disputes to the Court, and improvements in the quality of international law partly explained such a welcome development. The Commission, for its part, had made an important contribution towards improving the law and its work was likely to bring about wider resort to judicial settlement.

8. Draft article 4 (b) provided for the jurisdiction of the ICJ in the event of a dispute concerning the additional rights and obligations referred to in article 14 of part 2, which dealt with international crimes, a very difficult problem on which opinions still varied. In his view, matters pertaining to international crimes should come under the jurisdiction of an international criminal court.

9. Draft article 5 was acceptable, and the best course would be to refer the articles of part 3 to the Drafting Committee.

10. Mr. LACLETA MUÑOZ commended the Special Rapporteur on his seventh report (A/CN.4/397 and Add.1), which contained the final articles of a draft which, five years previously, the members of the Commission had thought it would be difficult, if not impossible, to complete before their term of office expired. Draft articles 1 and 2 of part 3 related to the means of enforcing international responsibility, while draft articles 3, 4 and 5 and the annex dealt with the settlement of disputes.

11. He fully endorsed the comments made by the Special Rapporteur in paragraphs (1) to (6) of his general commentary (*ibid.*, sect. I.B). The development of the primary rules of international law since the Second World War had not been paralleled by any

⁶ American Treaty on Pacific Settlement (United Nations, *Treaty Series*, vol. 30, p. 55).

⁷ See M. Haas, ed., *Basic Documents of Asian Regional Organizations*, vol. VI (Dobbs Ferry (N.Y.), Oceana Publications, 1979), p. 321.

development of rules of implementation and, above all, rules on the settlement of disputes. In that connection, the Charter of the United Nations and that Organization itself had not produced the results expected of them. The free choice of means of settlement in accordance with the rather vague obligation to settle disputes peacefully, as provided for in Article 33 of the Charter, had not been very effective. Again, States had not, as could and should have been expected, availed themselves of Article 36, paragraph 3, of the Charter. In other words, in terms of form, modern-day international society had not achieved the degree of "organization" mentioned by the Special Rapporteur in paragraph (5) of his general commentary and that explained the need for the chapter of the draft on the settlement of disputes. Admittedly, in one way or another sovereign States, particularly the most powerful, had been able to ensure that their rights were respected and to obtain compensation for injuries caused by wrongful acts, despite the lack of a general and compulsory procedure for the settlement of disputes and the absence of independent authorities for the enforcement of judgments. If a distinction was to be made between international crimes and international delicts, however, such a procedure was necessary in order to maintain international peace and security; otherwise, a further source of conflict would emerge.

12. For that reason, the Commission's task was not simply to engage in codification. International law had no rules imposing obligations on States with regard to the settlement of disputes. In the present instance, the Commission must develop international law. In that connection, however, its main and most effective contribution lay not in elaborating drafts intended primarily to develop international law, but in working out links for insertion in what were essentially codification drafts. He therefore welcomed the fact that the draft articles laid the foundations for compulsory third-party settlement of disputes through the unilateral submission of disputes to the ICJ, a procedure that was indispensable in the case of disputes relating to international crimes and disputes involving rules of *jus cogens*. The draft articles took account of the principle of free choice of means, not only because they expressly provided for a period of 12 months during which States had to try to find a solution to their disputes through means of their own choice, but also because the principle of freedom of choice did not prevent States from deciding, even before a dispute arose, what means of settlement they would use, either under a bilateral convention or a multilateral treaty. Nothing in the principle of freedom of choice was contrary to the principles of the sovereignty or sovereign equality of States.

13. The reference in draft article 1 of part 3 to article 6 of part 2 might appear to restrict the scope of part 3 to disputes concerning secondary rules, but it would not have that effect in practice. In the event of a dispute concerning the rights of the claimant State and the obligations of the alleged author State, the question of the wrongfulness of the act and the attribution of responsibility for it could not fail to arise. The problem was one of drafting, as was the use in draft articles 1 and 2 of the word "wishes", which should be replaced by the word "intends", or quite simply "invokes". The

two notifications referred to in articles 1 and 2 would often be made at the same time, and paragraph (2) of the commentary to article 2 also spoke of the possibility of a third notification. There, too another drafting problem had to be solved. Similarly, further consideration would have to be given to article 2, paragraph 3, which did not correspond with the explanations given in the commentary and should go into greater detail, particularly with regard to notifications.

14. Draft articles 3 and 4 might be merged. It first had to be seen exactly what role was played, according to article 3, paragraph 2, by the "provisions in force binding ... States with regard to the settlement of disputes". Nothing should be allowed to prevent disputes from being unilaterally submitted to the ICJ, as provided for in article 4, subparagraphs (a) and (b). If articles 3 and 4 were merged, the terms of article 3, paragraph 2, would also have to apply to the provisions of article 4.

15. The arguments in support of draft article 5 that were contained in paragraph (2) of the commentary to the article were satisfactory in the light of article 3, paragraph 2, but the Commission might leave it to the future diplomatic conference to settle that question.

16. He had no objection to referring the articles to the Drafting Committee. Indeed, he was very much in favour of doing so, for the fact that the term of office of the current members of the Commission was about to expire must not act as an obstacle to the work on the topic.

17. Mr. OGISO said that the draft articles under discussion were one of the most important parts of the work on State responsibility and in all likelihood the key to whether States would wish to associate themselves with the draft as a whole at any future diplomatic conference.

18. Account must be taken of contemporary State practice and, from a general point of view, it should first be said that the prescribed periods of time to move from the first step, in the form of notification, to the final point of the dispute-settlement procedure were much too long, for they would prevent the claimant State from taking any measures of reprisal for 15 months or more. Admittedly, draft article 2, paragraph 1, made an exception "in cases of special urgency", but an additional procedure should be specified for such cases. Secondly, under article 2, the claimant State could resort to the dispute-settlement procedure only after making the second notification invoking countermeasures provided for in articles 8 or 8 of part 2 of the draft. Nevertheless, the dispute-settlement procedure, and in particular the conciliation procedure, could be set in motion even before the claimant State invoked countermeasures, and indeed even without such measures. Thirdly, he wholeheartedly welcomed the Special Rapporteur's approach with regard to the compulsory third-party dispute-settlement procedure.

19. Draft article 1 indicated from the outset that the claim, in the form of notification, made by the injured State against the author State must act as the starting-point of part 3, an approach that was acceptable because an issue of international responsibility could not be raised unless the injured State made such a claim

at one stage or another. On the other hand, he failed to see why article 1 referred only to article 6 of part 2. Article 7 of part 2, which was concerned with the treatment of aliens, was closely linked with article 6 and therefore the first part of article 1 of part 3 should be amended to read: "A State which wishes to invoke article 6 or article 7 of part 2 of the present articles must notify..."

20. On the matter of notification, the practice of States should not be lost from sight. When a State claimed to have been injured by another State, a whole series of communications, more particularly inquiries as to the facts, would be exchanged and many of the communications would be made before actual notification of the claim. He would like to know whether such communications were precluded and hoped that the commentary would mention the obligation of the alleged author State to co-operate in good faith with inquiries regarding the facts. As to the minimum content of the notification required under article 1, a reference to "the relevant facts" should be inserted at the end of the paragraph, because there would inevitably be a considerable divergence of views between the two States about the alleged wrongful act.

21. Draft article 2 involved two major problems. It stipulated a second notification of the alleged injured State's intention to suspend the performance of its own obligations towards the alleged author State by invoking articles 8 or 9 of part 2. Thus the claimant State would be able to set in motion the procedure for the settlement of disputes only by taking countermeasures. Some States, particularly smaller States, might prefer to resolve a dispute without resort to countermeasures. He wished to know whether, in that instance, the procedure set forth in part 3 could be used. As he saw it, it would be in the interests of smaller States for disputes to come under the conciliation procedure provided for in draft article 4, subparagraph (c), without any need to resort to countermeasures.

22. The second problem lay in the phrase "except in cases of special urgency", in article 2, paragraph 1. He would be grateful for an explanation of the meaning of the phrase. From the commentary to article 2, it would seem that the formula applied only in relation to the three-month period which had to elapse between the first and second notifications. Nevertheless, the exception concerning cases of special urgency should also apply to the 12-month period required under article 4 for the completion of a specific settlement procedure under Article 33 of the Charter of the United Nations. With that approach, the 12-month period could, in the interests of the claimant State, be either waived or shortened in the event of an emergency. Perhaps the draft could provide for the injured State to apply to the ICJ for provisional measures in order to decide whether the particular case fell within the category of cases of special urgency.

23. If the claimant State was to be allowed to set in motion the conciliation procedure provided for in article 4, subparagraph (c), the same possibility should apply to article 3 as well. He agreed that priority should be given to resorting to mechanisms for the settlement of disputes under regional or bilateral subsystems when all

the parties concerned belonged to such subsystems, but article 3 should make that point clear. In addition, where the parties concerned had sought a solution through a bilateral or regional mechanism, the procedural requirement in article 4 of a 12-month period for specific settlement efforts under Article 33 of the Charter should be relaxed somewhat.

24. Draft article 4 was based on the régime provided for in article 66 of the 1969 Vienna Convention on the Law of Treaties and other corresponding provisions of the 1982 United Nations Convention on the Law of the Sea and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Actually, the compulsory machinery for the settlement of disputes would become operational only when a particular number of States had accepted the draft, and the Commission had to bear in mind that it must prepare a set of draft articles which could be adopted as a whole at a diplomatic conference. From that point of view, the Special Rapporteur had done well to adopt a régime already embodied in existing multilateral conventions. Accordingly, the language used in article 4 should follow as closely as possible the corresponding provisions in those conventions.

25. Article 66, subparagraph (a), of the 1969 Vienna Convention provided for the jurisdiction of the ICJ in respect of disputes concerning *jus cogens* and contained the following proviso: "unless the parties by common consent agree to submit the dispute to arbitration". Article 66, paragraph 3, of the 1986 Vienna Convention contained a similar provision. The Special Rapporteur (1952nd meeting) had affirmed that the possibility of submitting a dispute to arbitration was not precluded, something that should be stated specifically in article 4 itself. In his opinion, it was not advisable to refer to the rules of *jus cogens* in the draft articles, in view of their vague character. If, however, the majority of members preferred to retain article 12, subparagraph (b), of part 2, he could agree provided that, as stated in article 4, subparagraph (a), of part 3, the decision on the content of *jus cogens* was made by the ICJ.

26. The proposed procedure with regard to international crimes could not be determined until concrete work had been done on the draft Code of Offences against the Peace and Security of Mankind. He merely wished to point out that, if an international criminal court was to be established, that court should also have jurisdiction to decide what would be the additional rights and obligations referred to in article 4, subparagraph (b).

27. As for the scope of part 3 of the draft, he saw no reason to confine the reference in article 4, subparagraph (c), to "articles 9 to 13 of part 2" and suggested that it be amended to read: "articles 6 to 13 of part 2".

28. Draft article 5 was acceptable in principle, save for the exception to the general prohibition of reservations in respect of part 3. From the text of article 5, it would seem that recourse to measures of reprisal was restricted and that compulsory third-party conciliation would not be set in motion when the parties concerned had made a

reservation concerning article 4, subparagraph (c), even if the claimant State had actually taken measures of reprisal. He was inclined to take the opposite view. Measures of reprisal should indeed be subject to very strict rules but, in cases of urgency, such measures should be possible, provided they did not preclude the compulsory conciliation mechanism referred to in article 4, subparagraph (c). In that connection, it would be desirable to tighten the condition that reprisals should not be manifestly disproportional to the seriousness of the internationally wrongful act, as stipulated in article 9, paragraph 2, of part 2.

29. Mr. HUANG, emphasizing the importance of part 3 as a component of the draft articles on State responsibility as a whole, said that the notification procedure specified in draft articles 1 and 2 could, of course, be used as a response to an internationally wrongful act. In practice, however, as Sir Ian Sinclair had pointed out (1953rd meeting), in the event of a wrongful act the injured State would first lodge a protest with the author State and reserve all its rights. Only when the injured State took certain measures or embarked on the process of bilateral negotiations with the author State would the issue of dispute-settlement arise. The question was how to reflect that process in the draft.

30. There seemed to be a certain lack of balance in articles 1 and 2 inasmuch as they embodied specific provisions regarding the obligations of the injured State but not the obligations of the author State. The escalation of disputes might be due just as much to the lack of procedures for the injured State to take action, or to its inappropriate reaction, as to the author State's persistent violation of the primary rules. It was therefore essential to lay down secondary or tertiary rules whereby, in the event of the violation of a primary rule of international law, the author State would be under an obligation, for instance, to discontinue its wrongful act forthwith, to make the necessary reparation to the injured State, to settle the matter in a manner appropriate to and at the request of the injured State or, in the event of disagreement, to hold consultations with the injured State with a view to arriving at a solution.

31. He agreed in principle with the reference made in draft article 3 to Article 33 of the Charter of the United Nations. However, while the procedures for dispute-settlement provided for under Article 33 of the Charter could be divided into two broad categories—direct settlement of disputes between the parties and third-party intervention—part 3 of the draft seemed to place the emphasis on third-party settlement of disputes. It was apparent from international practice that, in disputes involving major interests and particularly those concerning State responsibility, the parties tended to engage first in direct negotiations in order to reach a solution. Hence consideration should perhaps be given to requiring the parties to a dispute, under article 3, first to engage in direct negotiations in an endeavour to settle the dispute.

32. The Special Rapporteur had pointed out (1952nd meeting) in connection with draft article 4 that, since the article dealt with novel legal concepts such as *jus cogens* and international crimes, arrangements should be made in part 3, for instance, for the referral of disputes in-

volving those concepts to the ICJ. The idea was a good one, but it posed a number of legal and practical problems. In particular, the proposal in article 4 that the compulsory jurisdiction of the ICJ should be confined to issues concerning the interpretation and application of *jus cogens* would prove difficult to put into practice because part 3 concerned primary as well as secondary rules. That was particularly true of article 4, subparagraph (b), which dealt with international crimes. Admittedly, the ICJ did play a more positive role in certain areas and he trusted that it would continue to do so in regard to the peaceful settlement of international disputes, but it had to be recognized that States were generally cautious in agreeing to the compulsory jurisdiction of the Court. Few States had unconditionally accepted its compulsory jurisdiction, and some had done so only subject to reservations on important issues. Consequently, caution was required in regard to a procedure for compulsory jurisdiction on such important matters as *jus cogens* and international crimes.

33. While he understood the intention behind draft article 5, international practice showed that it was not for lack of international procedures for peaceful settlement that disputes occurred and escalated. In his view, compulsory third-party settlement of disputes, though useful, was not always an entirely effective procedure. Furthermore, the compulsory judicial procedure provided for in the 1982 United Nations Convention on the Law of the Sea differed somewhat from the procedure stipulated in the draft articles under consideration, since the former consisted of concrete rules in a specific field, whereas the latter related to all the main areas of international law. The question whether a procedure for compulsory third-party settlement of disputes should be stipulated or whether a measure of flexibility was needed should therefore be the subject of careful consideration.

34. Mr. DÍAZ GONZÁLEZ said that the consideration of parts 2 and 3 of the draft articles had taken considerably less time than the consideration of part 1, which had gone on for more than 20 years. The reason might well be that the Commission had got into the habit of rapidly referring draft articles to the Drafting Committee without discussing them at length in plenary and, when the articles were referred back to it later, the Commission usually did not have time to examine them in detail.

35. The ideal situation was, obviously, that the provisions adopted by the Commission should be applied, and it was apparent from the seventh report (A/CN.4/397 and Add.1) that the Special Rapporteur had, quite logically, tried to establish in part 3 a procedure to guarantee respect for the rules enunciated in parts 1 and 2. Unfortunately, a statement of the principle of the compulsory jurisdiction of the ICJ would in practice make for inequality among States because some States would be compelled to appear before the Court while others would have the means to avoid doing so. Any State that was to be brought before the ICJ could, under the terms of the Charter of the United Nations, refer the dispute to which it was a party to the Security Council and, if that State had the veto, it had only to use it in order to evade the Court's jurisdiction.

36. One member of the Commission had pointed out that OAS also had a procedure for the settlement of disputes whereby the States parties to a dispute could submit it to the OAS Permanent Council. The situation was, however, not at all comparable, for no State member of the OAS Permanent Council had the veto.

37. Furthermore, a draft establishing a procedure for compulsory settlement of disputes by the ICJ would be going further than the Charter itself, which took precedence over any other international agreement. Admittedly, Article 33 of the Charter probably raised more problems than it solved, but it expressly stated that the parties to a dispute had to seek a solution by, *inter alia*, negotiation, inquiry or mediation, or other peaceful means of their own choice. In no sense did it make the jurisdiction of the ICJ compulsory. Since many States could not agree to recognize the compulsory jurisdiction of the ICJ, it was to be feared that, if the Commission decided to retain the provisions of part 3 of the draft in their present form, the future convention would be doomed to failure.

38. Presumably the Commission did not want the texts it elaborated to remain a dead letter. It had to be realistic and, accordingly, it should not proceed with part 3 as it was now formulated. Personally, he would have no objection if the provisions of part 3 were referred to the Drafting Committee, but he thought that the Commission would be wiser to wait until the Sixth Committee of the General Assembly had first taken a decision on them.

39. Mr. YANKOV said that, as the Commission was approaching the completion of the initial stage of its work on State responsibility, general considerations regarding the viability of the end-product naturally sprang to mind. He was not casting doubts on the Commission's work, since the issues involved stemmed from such basic principles of international law as the sovereign equality of States, *pacta sunt servanda*, and the peaceful settlement of disputes, all of which were embodied in the Charter of the United Nations. The Commission, as a body of experts, should none the less take into account the end-user of its product. In his view, there could be no valid legal system on State responsibility without a set of appropriate rules for the settlement of disputes. It was therefore very important to ensure that the system of "implementation" (*mise en œuvre*) was at once as comprehensive and as flexible as possible.

40. The 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea had been mentioned on numerous occasions. While those Conventions did supply certain background material, their provisions were quite different from the propositions contained in the draft articles now before the Commission. In particular, reservations were permitted under the 1969 Vienna Convention and its article 66, on which draft article 4 was modelled, contained an express reference to arbitration procedure by providing for the compulsory jurisdiction of the ICJ "unless the parties by common consent agree to submit the dispute to arbitration". The explanation given by the Special Rapporteur in that connection (1952nd meeting) and his commentary had not

altogether convinced him of the reasons for the difference between the 1969 Vienna Convention and draft articles 3 and 4. His own view was that arbitration and consent to arbitration were provided as yet another judicial or quasi-judicial means of settlement of disputes, the aim being to secure greater flexibility and thus make the third-party settlement procedure more acceptable to a wider range of States without challenging the procedure available through the ICJ.

41. The differences with regard to the dispute-settlement procedure in the 1982 Convention on the Law of the Sea were far more significant, as was apparent from, for example, its article 287, which allowed a choice of procedure, and articles 297 and 298, concerning limitations on and optional exceptions to compulsory procedures entailing binding decisions. Reference had also been made to the "package deal" approach adopted in the case of the 1982 Convention. The Commission, however, should not be misled by such references, for the package deal had applied solely to political issues, not to the settlement of disputes. Accordingly, he would counsel restraint in considering the possible application, *mutatis mutandis*, of the provisions of the 1982 Convention on the Law of the Sea on settlement of disputes.

42. As to draft articles 1 and 2, a greater degree of flexibility should be introduced to take account of the nature of the matters that could be the subject of a dispute-settlement procedure. He, too, agreed that the words "special urgency" in article 2, paragraph 1, required clarification: he had found no key in the commentary to the legal implications of those words.

43. The scope of the reference in draft article 3 to the application of the optional procedures provided for in Article 33 of the Charter of the United Nations should be expanded, and the compulsory conciliation procedure under draft article 4, subparagraph (c), should be extended to cover the application or interpretation of articles 6 and 7 of part 2 as well.

44. Draft article 5 was crucial to the draft as a whole and should perhaps therefore be dealt with by the future diplomatic conference.

45. Lastly, he suggested that the draft articles before the Commission and the commentaries thereto should be expanded.

The meeting rose at 1 p.m.

1955th MEETING

Thursday, 29 May 1986, at 10 a.m

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclata Muñoz, Mr. Malek,

Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Yankov.

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

[Agenda item 1]

1. The CHAIRMAN informed members that the General Assembly, by its decision 40/472 of 9 May 1986, had decided to reduce the length of the thirty-eighth session of the International Law Commission to 10 weeks. The session would thus end on 11 July 1986.

State responsibility (*continued*) (A/CN.4/389,¹ A/CN.4/397 and Add.1,² A/CN.4/L.398, sect. C, ILC(XXXVIII)/Conf.Room Doc.2)

[Agenda item 2]

"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles)³ (*continued*)

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

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 5 AND ANNEX⁴ (*continued*)

2. Mr. ARANGIO-RUIZ said he did not think that the provisions of part 3 of the draft formed an organic whole corresponding to the provisions on the settlement of disputes contained in various conventions. Hence they could not be characterized as arbitration clauses in the broad sense.

3. Draft articles 1 to 4 of part 3 contained two types of provision which served different purposes and consequently should not be placed together in the draft. Articles 1 and 2 dealt with the notifications which the allegedly injured State had to make to the State alleged to have committed the internationally wrongful act or, in more general terms, with the exchanges which had to take place between the two parties as a result of the internationally wrongful act, between the time when the injured State learned that a wrongful act had been committed and the time when it had to take measures in response. Articles 1 and 2 thus related to the conse-

quences of an internationally wrongful act, as dealt with in draft articles 6 to 9 of part 2. Only draft articles 3 and 4 really belonged in part 3. The problem was not merely one of drafting. The Commission had to take a decision on a basic aspect of the consequences of a wrongful act and on the requirements for the application of articles 6 to 9 of part 2.

4. As Mr. Reuter had rightly pointed out (1953rd meeting), the injured or allegedly injured State could not simply express wishes; but nor could it simply "invoke" article 6 or articles 8 and 9 of part 2. It had to draw the attention of the alleged author State to the wrongful act which had been or was in the process of being committed, by requiring that State, in accordance with article 6 of part 2, to discontinue the act, to re-establish the situation as it had existed before the act, or to pay compensation, etc.

5. Article 65 of the 1969 Vienna Convention on the Law of Treaties was not an appropriate model for draft articles 1 and 2 of part 3 because, under paragraph 1 of that article, a party would not invoke articles, but facts or situations, and because the aim of the party which made the notification was to bring about a change in the existing legal situation, which would automatically take place if no objection was raised. The same was not true of the draft articles on State responsibility, for, under article 6 of part 2, a State which claimed to be injured could only make a request to the State alleged to have committed the wrongful act. It would not, at that stage, inform the alleged author State of the measures it intended to take. There was thus no reason why it should notify that State of its intention to make what was, in fact, no more than a simple request. The notification provided for in article 1 of part 3 was therefore unnecessary; the Commission need only add to article 6 of part 2 a new paragraph stating that the request referred to in paragraph 1 must be accompanied by an indication of the alleged act and of the primary rules of international law which had not been observed.

6. In order to take a position on draft article 2 of part 3, it was necessary to consider how the State alleged to have committed the wrongful act could react to the request of the injured State. If it stated that it was prepared to comply with that request or at least to hold talks with the injured State, and if it gave the injured State good reason to believe that an amicable settlement could be reached, the injured State would have no need to send the notification referred to in article 2 of part 3 or to consider the possibility of taking the measures provided for in articles 8 and 9 of part 2.

7. But the author State could also either refuse to take cognizance of the injured State's request or reject it with some explanation of the reasons. In the first case, unless the attitude of the author State was justified by a misunderstanding, communication problems or a crisis in the author State, the injured State should be able to notify the author State of its intention to take the measures provided for in article 8 or article 9 of part 2, as appropriate, before the expiry of the period of three months provided for in article 2 of part 3. Moreover, the implementation of such measures should be able to take place quite soon after the notification was received. There again, however, it was not clear why the provision

* Resumed from the 1941st meeting.

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

⁴ For the texts, see 1952nd meeting, para. 1.

that the injured State must notify the author State of its intention to suspend the performance of its obligations towards that State, in accordance with article 8 or article 9 of part 2, could not be included in articles 8 and 9 themselves, rather than in article 2 of part 3.

8. In the second case, if the author State responded to the request of the injured State by denying either the facts or the legal grounds invoked, negotiations between the two parties would be initiated. If the negotiations did not proceed satisfactorily and the author State rejected all proposals by the injured State regarding recourse to the means provided for in Article 33 of the Charter of the United Nations to settle their dispute, the injured State should be able to apply the measures referred to in article 8 of part 2, after having so notified the author State. But in that case, that notification would be the first notification to envisage, since the one provided for in article 1 of part 3 would not have been made, and the injured State would not have to wait long before taking action.

9. If the measures provided for in article 8 of part 2 could not be applied, the injured State would have to notify the author State of its intention to apply article 9 of part 2. Even in that case, that would be the one and only notification that the injured State would have to make to the author State. The injured State might also apply article 8 unsuccessfully. It would then have to inform the author State that it intended to apply the provisions of article 9. That would be the only case in which the injured State would have to make two notifications to the author State: first to inform it of its intention to take the measures provided for in article 8, and secondly to inform it that it intended to apply the provisions of article 9.

10. All the provisions relating to the procedure to be followed in those different cases were in fact an integral part of the system of measures and countermeasures governed by articles 6 to 9 of part 2 and thus had no place in articles 1 and 2 of part 3. The inclusion of those provisions in articles 6 to 9 of part 2 would not only be more logical, it would also make it possible to take account of the fact that a dispute requiring the application of the provisions of Chapter VI of the Charter could arise at a later stage than that envisaged in draft article 3, paragraph 1, of part 3.

11. Draft articles 3 and 4 called for only a few comments. With regard to draft article 3, it could in his view be expressly stated, either in the text of the article or in the commentary thereto, which of the means of settlement referred to in Article 33 of the Charter were the most appropriate.

12. As for draft article 4, and particularly subparagraphs (a) and (b), which rightly provided for the compulsory jurisdiction of the ICJ, if the Commission did not refer part 3 of the draft to the Drafting Committee at the present session, it would be able to reconsider that article at its next session, after its membership had been renewed, in the light of the comments that would be made in the Sixth Committee at the forty-first session of the General Assembly.

13. Another reason why the Commission should be cautious was that, if it decided to refer part 3 of the

draft to the Drafting Committee after less than one week of discussion, the jurists and diplomats who followed the Commission's work might think it had dealt rather too hastily with the very sensitive problems that arose. Moreover, at the Commission's next session, its newly elected members should be able to consider the whole set of draft articles, which still needed much improvement.

14. There were in particular a certain number of gaps in part 2, which had been prematurely referred to the Drafting Committee, as well as in part 1, which, for example, did not attempt to classify primary rules or breaches of those rules. Nor did it deal with aggravating and extenuating circumstances, although that was an important question. Lastly, and most important of all, there was no explanation of how a distinction should be drawn between crimes and delicts. Taken as a whole, the draft was badly balanced, part 1 being much more detailed than parts 2 and 3. The Commission did bear some responsibility for the gaps and shortcomings to be found in the draft; for if it was not entirely satisfactory that was no fault of the Special Rapporteur, who in a relatively short time had carried out a more difficult task than that entrusted to his predecessors.

15. Mr. JAGOTA noted that, as indicated by the Special Rapporteur in paragraph (7) of his general commentary (A/CN.4/397 and Add.1, sect. I.B), the provisions of part 3 of the draft were residual and subject to the overriding provisions of the Charter of the United Nations concerning the maintenance of international peace and security. It was against that background that draft articles 1 to 5 had been formulated.

16. The idea behind draft article 1, with its reference to article 6 of part 2, was relatively new. The only other place where such a reference appeared was in draft article 10 of part 2; and, according to paragraph (2) of the commentary to article 10 (A/CN.4/389, sect. I), it signified that international procedures for the peaceful settlement of disputes had to be exhausted before article 9 of part 2 was applied and reprisals taken. But, as articles 1 to 5 of part 3 were residual, such procedures would in any event have been exhausted before article 9 of part 2 was invoked.

17. Under draft article 2 of part 3, if action was not taken within three months, it could only be taken under articles 8 and 9 of part 2, and required a second notification on the part of the claimant State. There was therefore a gap between the two notifications and that point required examination. He wondered what the position would be if the other party objected when notification was given under article 1 of part 3 and a dispute arose as to the obligations of the author State under article 6 of part 2. The draft was silent on that point, which required further consideration with specific reference to the possible consequences.

18. He presumed that the reference in draft article 3 to articles 8 and 9 of part 2 extended by inference to articles 10, 11, 12 and 13 of part 2, which had a direct bearing on articles 8 and 9. In particular, the reference to Article 33 of the Charter should not be confined to disputes concerning articles 8 and 9. Also, it was not clear why a reference was made in draft article 4, sub-

paragraph (c), to articles 9 to 13 of part 2 but not to article 8 of part 2. The exact relationship between draft articles 3 and 4 required clarification.

19. Subparagraphs (a), (b) and (c) of draft article 4 should perhaps be made into separate articles. The words "within a period of twelve months", in the introductory clause, might be replaced by some more flexible formula such as "within a reasonable period of time", to take account of occasions when a first attempt at conciliation failed. He had no difficulty with the concept of compulsory conciliation, or with the annex on that subject.

20. He would like to know why, in article 4, subparagraph (b), no reference had been made to article 19 of part 1 (International crimes and international delicts), although the Special Rapporteur had stated in his sixth report (*ibid.*, para. 32) that he proposed to include such a reference. The Special Rapporteur had likewise given no reason for not referring in the same provision to article 15 of part 2, on the act of aggression, in which connection he had made the following statement in his sixth report:

... Whether and to what extent the ICJ—one of the principal organs of the United Nations—has a role to play in the process is a matter of interpretation and application of the Charter itself. (*Ibid.*, para. 34.)

In his own view, that was not necessarily so. It was, however, a matter that would require careful consideration and, as already pointed out, one that was directly relevant to the draft Code of Offences against the Peace and Security of Mankind.

21. With regard to draft article 5, he doubted whether the draft articles would have much value if a reservation could be made relating to a treaty concluded before their entry into force. It would perhaps be better to provide simply that reservations would be allowed in the case of disputes arising after their entry into force. Article 5 called for further reflection, however.

22. Mr. TOMUSCHAT said that the Special Rapporteur had pursued an almost revolutionary objective in the new draft articles on State responsibility, since draft article 4, subparagraph (c), established a rule whereby, for the first time, any of the parties to a dispute concerning the consequences of an internationally wrongful act could unilaterally set in motion the compulsory conciliation procedure outlined in the annex to the draft. There were, of course, precedents for that, and the Special Rapporteur had referred in particular to the 1969 Vienna Convention on the Law of Treaties. But the relevant rules of that Convention were far more limited and related solely to the invalidity, termination, withdrawal from or suspension of the operation of treaties, whereas the intention in the present draft was to cover all cases relating to the breach of an international obligation.

23. The result would be a metamorphosis in international law; for hitherto the bulk of international transactions had been designed to ensure respect for the obligations incumbent upon States, and enforcement—a major weakness of international law—would now acquire a much more stable foundation. The question was, however, whether the measures envisaged would prove acceptable to States and it was

important not to lose sight of the inherent political limitations on what could reasonably be achieved.

24. As to the distinction between primary and secondary rules, there had always been doubt about the viability of the concept and it was particularly apparent in the case of the proposed procedural rules. He wondered whether it was really possible to treat all international obligations alike, placing an obligation to consult another Government on the same footing as a substantive obligation in the field of trade or the duties laid down in Article 2 of the Charter of the United Nations and concretized in the General Assembly Declaration of 24 October 1970.⁵ The formalities to be imposed on States were certainly justified when rights and obligations of that importance were at stake; but there were also duties in daily routine, where a swift response in kind would often do more to restore a lawful situation than long-drawn-out legal proceedings.

25. The draft articles under discussion could be simplified considerably and made more precise. Specifically, it should be made clear whether the rights of an injured State listed in draft article 6 of part 2 arose *ipso jure* or whether they required a formal request on the part of the injured State to come into existence. He would also like to know why no reference had been made in part 3 to article 7 of part 2.

26. Draft article 2, paragraph 3, was difficult to understand because of the vague reference to "another State"; but that was perhaps only a question of drafting.

27. He saw a major problem in the parallelism between draft article 3 of part 3 and draft article 10 of part 2. Article 10 imposed an obligation to resort in the first instance to methods of peaceful settlement of disputes, and drew a distinction between reciprocity and reprisals by exempting measures of reciprocity from any procedural requirement. No such distinction was made between measures of reciprocity and reprisal in draft article 3.

28. He had some difficulty in understanding the rule proposed in draft article 4. In his view, the similarities with the Vienna Convention on the Law of Treaties were more apparent than real. Under article 66 (a) of that Convention, the ICJ was simply required to determine whether a treaty was void because it conflicted with a peremptory norm of general international law that had existed when the treaty was concluded or had emerged subsequently. Under the present draft articles, however, disputes relating to *jus cogens* or international crimes could be referred to the ICJ in their entirety and with all the legal implications. Thus the scope of the Court's jurisdiction would be wider under the draft than under the Vienna Convention. He had no objection to such an extension of the Court's powers, but the Commission should be fully aware of the steps it was contemplating.

29. While States rarely violated peremptory norms of international law in treaties concluded between them, unilateral violations were frequent. There were many

⁵ See 1952nd meeting, footnote 8.

examples to show that disputes concerning the interpretation and application of such norms were a part of daily life. It could, of course, be argued that draft article 4, subparagraph (a), did not refer to peremptory norms in general, but only in so far as article 12, subparagraph (b), of part 2 was concerned. But that was precisely what he had difficulty in accepting. If, for purely political reasons, State A arrested and held in custody a number of citizens of State B, that would be a violation of a rule of *jus cogens*. If State B then arrested an equal number of citizens of State A to secure the release of its own citizens, on his reading of article 4, subparagraph (a), State A could bring a complaint before the ICJ on the ground that the arrest of its citizens was in violation of article 12, subparagraph (b), of part 2, but State B, the victim of the unlawful act by State A which had started the cycle of wrongful conduct, would not be entitled to submit its case to the Court. Such an imbalance was unwarranted and could, moreover, place the ICJ in a very embarrassing position.

30. Similar objections applied to draft article 4, subparagraph (b). There again, the original wrongful act, even if it were an international crime, would fall outside the scope of the proceedings, which would focus exclusively on the additional rights and obligations flowing from the commission of an international crime.

31. While draft article 5 could be dealt with by a diplomatic conference, he agreed that the rule of non-retroactivity was rather too restrictive. The whole draft would have little effect if the rule stated in article 5 were framed in the manner proposed.

32. Mr. KOROMA said that the articles of part 3 of the draft would enhance the international legal order and serve to strengthen the rule of law among nations.

33. Article 1 had a place in the draft inasmuch as it provided for a cooling-off period and would put an alleged author State on notice to desist from acts contrary to international law. He agreed, however, that for the sake of clarity the article should refer not only to part 2 of the draft, but also to part 1, and perhaps to the general principles of international law. Provision should be made in the article for what the common law termed an "anticipatory breach", whereby an alleged author State would also be put on notice if it carried out certain identifiable acts that fell short of wrongfulness, but would, if consummated, eventually lead to a breach of an international obligation. He was not entirely convinced that the notification provided for in draft article 1 should be coupled with an indication of the measures required to be taken and the reasons therefor. His own view was that it would suffice in some cases, at least initially, merely to call the attention of the alleged author State to the act in question. It would also be advisable to tone down the provision.

34. He wondered whether draft article 2, paragraph 2, might not have the opposite of the desired effect. It was possible, for instance, that the parties to a multilateral treaty might decide on such a massive response to a breach of its provisions that they would unwittingly defeat the object and purpose of the treaty. He

therefore considered that the paragraph required further examination.

35. With regard to draft article 4, he considered that all cases of an alleged international crime or breach of a rule of *jus cogens* should be referred to the ICJ, which, as the supreme judicial organ, was competent to determine such issues. In regard to the legal consequences of aggression, notwithstanding the provisions of the Charter of the United Nations and of the Definition of Aggression adopted by the General Assembly in 1974,⁶ the impression should not be created that the ICJ was not competent to decide whether aggression had been committed. The Commission should therefore make it quite clear that, in certain cases, the Court could determine the legal consequences of such issues.

36. It should also be made quite clear in the commentary or elsewhere that Article 33 of the Charter of the United Nations applied to the whole of part 3 of the draft.

37. Mr. BALANDA said that the inclusion of provisions on the settlement of disputes in the body of the draft articles indicated a change in the Commission's working methods and a development of international law as to substance; for the 1958 Geneva Conventions on the law of the sea, the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations had all consigned such provisions to optional protocols. He agreed with Mr. Ogiso (1954th meeting) that the new structure chosen by the Special Rapporteur might discourage States from acceding to the instrument to be adopted or encourage them to formulate reservations.

38. The viability and effectiveness of the draft depended on the sincerity of States. The international community had been a virtually helpless witness to repeated violations of the Charter of the United Nations. The recent bombardment of three front-line States by the South African army was but one example. There was nothing to prevent the international community from adopting resolutions, but such texts were worthless if it was so difficult to implement them. If States could violate the Charter with impunity, was there any certainty that they would be politically committed enough to respect the Commission's work? He was quite sceptical on that point, but such scepticism should not be taken to mean that he thought the Commission had wasted its time in following the course it had adopted. Nevertheless, in view of the nature of the main actors on the international scene, namely States, the viability and effectiveness of the Commission's draft would depend on the realism it reflected.

39. He agreed that the scope of draft article 1 should be expanded and that it should not refer only to article 6 of part 2 of the draft. The words "must notify" required the addition of a time element, and further details should be provided on means of notification, since in the absence of diplomatic relations the customary diplomatic channels could not be used.

⁶ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

40. Mr. Reuter (1953rd meeting) had suggested that it might be necessary to set a time-limit for notification of an internationally wrongful act. He did not think that idea should be adopted, since a State might, for tactical reasons, refrain from taking any measure at all following an internationally wrongful act and wait until just the right time to assert its rights. That applied particularly to the interests of developing countries.

41. Paragraph (2) of the commentary to draft article 1 did not quite correspond with the second sentence of the article. In that connection, Mr. Koroma had asked whether a State must always indicate in its notification its reasons for requiring that a particular measure be taken. What would happen if the State did not give reasons for the measures it was requiring? That was a point on which the Commission should be realistic, for what counted was not so much the reasons invoked as the notification itself. The reasons were only secondary. Moreover, the second sentence of article 1, which stated that "The notification shall indicate the measures required to be taken and the reasons therefor", should be brought into line with the second sentence of draft article 2, paragraph 1, which read: "The notification shall indicate the measures intended to be taken."

42. The Commission had already adopted the principle of *restitutio in integrum*, but the words "establish a situation which comes as close as possible ..." in paragraph (1) of the commentary to article 1 did not take sufficient account of the obligation to make full reparation.

43. He agreed with Mr. Ogiso and Mr. Yankov (1954th meeting) that it would be better to explain the meaning of the words "special urgency" in draft article 2, paragraph 1, than to leave it to the State concerned to decide unilaterally whether a case was urgent. The period of three months prescribed in that paragraph raised the problem of proof. How could it be established that a State had in fact received a notification sent to it? Either the commentary would have to refer to the internal law of States or the relevant provisions would have to contain further particulars.

44. Had the Special Rapporteur meant to create an interval between the application of article 1 and that of article 2? In other words, when a State claimed to have been injured, did it have to require measures of reparation from the author State before it could take countermeasures, or did it have to take countermeasures and then require measures of reparation? In his own view, those were two quite separate things and there was no chronological link between them. Moreover, the Special Rapporteur appeared to have answered that question in paragraphs (1) and (2) of the commentary to article 2.

45. The scope of draft article 3 should not be limited to the case in which objection had been raised against measures taken or intended to be taken under article 8 or article 9 of part 2. The process of negotiation should start, in accordance with Article 33 of the Charter of the United Nations, as soon as a State raised an objection.

46. In draft article 4, the words "a period of twelve months" should be replaced by "a reasonable period". Subparagraphs (a) and (b) provided only for the sub-

mission of a dispute to the ICJ. But he did not think that cases involving a breach of a peremptory norm of general international law could automatically be referred to the Court: first because it was not yet known exactly what was meant by a "peremptory norm of general international law", and secondly because a very heavy responsibility would be placed upon the Court, and States did not seem prepared to leave it to the Court to rule, in each case, on whether a peremptory norm had been breached before it ruled on the merits of the case.

47. He approved of the idea of submitting disputes involving international crimes to the ICJ, particularly in the light of the comments made during the consideration of article 19 of part 1 of the draft. The Court was in a good position to hear such cases: nevertheless he had some doubts about extending its jurisdiction under draft article 4, subparagraph (c). Further consideration should be given to the procedures provided for in Article 33 of the Charter and in the 1969 Vienna Convention on the Law of Treaties, which gave States a choice of means for the peaceful settlement of disputes, without forcing them, as did the present draft articles—or at least article 12, subparagraph (b), of part 2—to submit disputes to the ICJ. Greater flexibility should be allowed, as the Special Rapporteur himself had indicated in paragraph (7) of his general commentary (A/CN.4/397 and Add.1, sect. I.B). As an introduction to the provisions of part 3, a separate article should state the basic principle of it being left to States themselves to seek the most appropriate means of settling their disputes. Only when they had not been able to find appropriate means would the provisions of part 3 come into play.

48. In draft article 4, subparagraph (c), the Special Rapporteur had proposed two parallel régimes: a conciliation procedure for the interpretation of articles 9 to 13 of part 2 and compulsory submission of disputes to the ICJ in the cases referred to in article 12, subparagraph (b), of part 2. A dispute might, however, concern both matters of substance and matters of interpretation. Would States, in such a case, be bound to submit both to conciliation and to the Court? That was a difficult question to answer. The Court was, of course, a prestigious and competent body, but in proposing recourse to it, the difficulty of enforcing its judgments must not be overlooked. There might be a temptation to invoke Article 94 of the Charter, but in view of the division of the international community's interests, as reflected in the Security Council, he did not think that, even by using Article 94, a judgment of the Court could be given any effect whatever. The draft articles, as they stood, did not make it possible to force the parties to a dispute to be bound by a judgment of the Court.

49. He was in favour of the annex, but, although it was based on the relevant provisions of existing conventions, he was not sure that, after a list of conciliators had been drawn up, the Secretary-General of the United Nations should be able to appoint conciliators who were not on that list.

50. Since it was customary to refer draft articles considered in plenary to the Drafting Committee, he would

agree to that course of action; but he thought that, before doing so, it would be wise to wait until comments had been made by the Sixth Committee of the General Assembly.

51. Mr. FRANCIS said that he had three preliminary observations to make. First, he agreed with Sir Ian Sinclair (1953rd meeting) and Mr. Jagota on the residuary nature of the draft articles in part 3. Secondly, he wished to draw attention to an important point made by the Special Rapporteur in earlier reports, namely that, when a breach of an international obligation took place, there arose a new legal relationship between the two States concerned with respect to the breach itself. Lastly, it should be borne in mind that the breach did not necessarily destroy the original legal relationship, because the subject-matter of that relationship might subsist or the obligation remain possible of fulfilment.

52. Draft article 1 called for a notification by the State which invoked article 6 of part 2. Article 6 constituted the first link in the chain of the new legal relationship to which he had just referred. It contained the essential ingredients of that relationship, in particular the need to discontinue the internationally wrongful act, to re-establish the pre-existing situation and, if that was not possible, to pay compensation. The stipulations of article 6 of part 2 rendered absolutely necessary the requirement of notification specified in article 1 of part 3.

53. Draft article 1 related to a bilateral situation, but he believed that it should be adjusted so as to impose upon the claimant State the requirement to notify not only the alleged author State, but also the other States parties in the case of a multilateral relationship, even where suspension of the performance of obligations was not contemplated. The fact that all the parties to a multilateral treaty would be notified of the allegation that an internationally wrongful act had been committed could create a climate favourable to peaceful settlement.

54. As observed by Mr. Huang (1954th meeting), article 1 emphasized the obligations of the claimant State. But the rights of the claimant State had their counterpart in corresponding obligations of the author State, and he therefore suggested that an additional paragraph should be introduced into article 1, setting out the obligations of the author State.

55. He was in general agreement with the main thrust of draft article 2 and welcomed the remarks of other members on the time factor. It had been suggested that a definition or explanation should be given, perhaps in the commentary to the article, of the exception provided for in paragraph 1 for "cases of special urgency". The formula "except in cases of special urgency" was used in article 65, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, but was not defined in that Convention. It would therefore seem inadvisable to attempt any explanation of that formula in the commentary to draft article 2; besides, it would not in any case be possible to cover all the situations that might arise.

56. He had no comments on draft article 3, which seemed ready for referral to the Drafting Committee.

57. On draft article 4, he agreed with those members who thought that the Commission should play its part in the progressive development of international law and promote recourse to the ICJ. The subjects of dispute mentioned in subparagraphs (a) and (b) offered scope for fruitful use of the jurisdiction of the Court. The rules of *jus cogens*, referred to in subparagraph (a), now constituted a living juridical reality which had to be taken into account, especially as there were conflicting views on the scope of *jus cogens*.

58. Of the various means of settlement of disputes by third-party procedures, arbitration did not appear to him to be the best to deal with the issue of *jus cogens* and its jurisprudential development. The Special Rapporteur had been well advised to give a role to the ICJ, the principal judicial organ of the United Nations, in the matters dealt with in subparagraphs (a) and (b) of article 4. Moreover, adjudication by the ICJ would produce a more consistent development of the law on the controversial topic of *jus cogens*.

59. Reference had been made during the discussion to the conflicting views in the international community on compulsory jurisdiction of the ICJ. There were encouraging signs of increasing interest in the Court on the part of States which had previously not submitted cases to it. His own view was that the subject should be dealt with by leaving entirely open the question of reservations, dealt with in draft article 5 of part 3.

60. Mr. Reuter (1953rd meeting) had drawn attention to certain gaps in part 3, in particular on the question of damage. He himself would like to know whether the Special Rapporteur would consider including in part 3 a provision relating to article 35 of part 1 (Reservation as to compensation for damage), particularly regarding the settlement of disputes arising out of claims for damage.

61. He agreed that the draft articles of part 3 should be referred to the Drafting Committee. The Commission had been dealing with the topic of State responsibility for more than 20 years and it should have the views of the Sixth Committee of the General Assembly on all the articles considered so far. Those views would be of great assistance to the Commission with its new membership at the next session.

62. Mr. JACOVIDES said that State responsibility was a difficult topic, both in its scope and in its content, and full of pitfalls. That was the main reason why the Commission had taken so long to reach the present advanced stage in its work. At the same time, it was too important a topic to be left unfinished, and with the admirable seventh report submitted by the Special Rapporteur (A/CN.4/397 and Add.1) the end of the road was in sight. While much work still remained to be done before a comprehensive draft convention could be submitted to an international law-making conference, the basic structure had now been built. Many elements of progressive development had been introduced and the scope of the topic had been appropriately widened from the narrow area of State responsibility for injury to aliens to its present much broader dimensions, in keeping with the requirements of present-day international law.

63. He found the Special Rapporteur's approach judiciously balanced, and was in general agreement with it. Both the Special Rapporteur and the Drafting Committee, however, would undoubtedly profit from the useful suggestions made during the debate. For instance, in draft article 1, the formula "A State which wishes to invoke" should be amended to read: "A State which intends [or proposes] to invoke". On a more substantive point, careful consideration should be given to the comments made by Sir Ian Sinclair (1953rd meeting) and Mr. Ogiso (1954th meeting) on draft articles 1 and 2 concerning the steps that preceded formal notification and the time factor involved.

64. He saw no objection to the general reference in draft article 3 to the means of dispute settlement indicated in Article 33 of the Charter of the United Nations. Although that provision of the Charter was very general, in the absence of any realistic alternative it was appropriate to rely on it in the present instance.

65. An important distinction was made in draft article 4 between, on the one hand, issues involving *jus cogens* and international crimes, dealt with respectively in articles 12 and 14 of part 2 of the draft, for which recourse to the ICJ was prescribed, and, on the other hand, disputes concerning the interpretation or application of articles 9 to 13 of part 2, for which the compulsory conciliation procedure set out in the annex was applicable. That distinction raised a broad issue of legal philosophy and approach. As a matter of principle, he would prefer all disputes arising out of the future convention on State responsibility to be settled by an effective, comprehensive, expeditious and viable procedure entailing a binding decision. The disputes could be submitted to the ICJ itself or to another such body, such as an international criminal court for disputes involving international crimes. He was, of course, fully aware of the practical limitations of such a position of principle in the present state of development of the international community.

66. It was right that the ICJ, being the main judicial organ of the United Nations, should be entrusted with the settlement of disputes concerning breaching of *jus cogens* and international crimes. That would serve to enhance the authority and jurisdiction of the Court and would be a response to the appeal by the President of the Court on 29 April 1986, on the occasion of its fortieth anniversary, that States should "explore and exploit all the possibilities afforded ... for ... judicial settlement", in the hope that the Court would become "the habitual forum where Governments, as a matter of course, solved international disputes". It would also serve the important purpose of authoritatively giving some concrete form, in specific cases, to the concepts of *jus cogens* and international crime.

67. As pointed out by the Special Rapporteur in paragraph (3) of the commentary to draft article 4, disputes concerning the additional legal consequences of aggression, dealt with in draft article 15 of part 2, should be resolved in the first instance in accordance with the relevant provisions of the Charter of the United Nations. But there was nothing to prevent the appropriate organ of the United Nations—primarily the Security Council or the General Assembly—from refer-

ring the legal aspects of the alleged aggression to the ICJ for a ruling, in the form of an advisory opinion or otherwise. He could think of at least one current situation in which that procedure would be most appropriate and he was glad to note that the same point had been made by Mr. Koroma.

68. On the question of reservations, he was inclined to accept the provisions of draft article 5, but he saw some merit in the suggestion made by other members that the key provision on reservations should be left to the future diplomatic conference.

69. As to the annex, he noted that its content had been adapted from the corresponding provisions of the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea. He had participated in the elaboration of those two Conventions and found the model eminently suitable.

70. In conclusion, he supported the suggestion that the draft articles of part 3 be referred to the Drafting Committee.

The meeting rose at 1.05 p.m.

1956th MEETING

Friday, 30 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Laclata Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Yankov.

State responsibility (continued) (A/CN.4/389,¹ A/CN.4/397 and Add.1,² A/CN.4/L.398, sect. C, ILC(XXXVIII)/Conf.Room Doc.2)

[Agenda item 2]

"Implementation" (mise en œuvre) of international responsibility and the settlement of disputes (part 3 of the draft articles)³ (concluded)

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

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

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR *and*
ARTICLES 1 TO 5 AND ANNEX⁴ (*concluded*)

1. Mr. RAZAFINDRALAMBO said that part 3 of the draft established machinery that would apply to cases in which no other procedure for the peaceful settlement of disputes had been provided for by the parties. It thus contained rules of a residual nature that were simply intended to make up for the absence in conventions concluded by the States concerned of provisions on the settlement of disputes. Hence it should meet the concerns of members of the Commission who had questioned whether the Special Rapporteur had not implicitly ruled out the application, in matters pertaining to State responsibility, of the settlement procedures contained in various international instruments in force.

2. There was a very close link between parts 2 and 3 of the draft and the Special Rapporteur himself (1952nd meeting) had drawn attention to the interrelationship between the substantive and the procedural provisions. Since part 2 dealt with the legal consequences of an internationally wrongful act, it was logical to infer that the three parts of the draft formed a coherent whole. That point had not been brought out clearly in the draft articles of part 3, for none of them referred expressly to any provision of part 1, but it must be borne in mind when the time came to weigh up the facts in a dispute submitted to the settlement procedure.

3. On the basis of the 1969 Vienna Convention on the Law of Treaties, the draft articles attached importance to compulsory conciliation and assigned a major role to judicial settlement. Although States might unanimously agree to submit to compulsory conciliation, the same was not true of the compulsory and exclusive judicial settlement procedure advocated by the Special Rapporteur, particularly since he appeared to rule out arbitration, which had during the elaboration of the Convention on the Law of Treaties none the less been regarded as a reasonable alternative to the compulsory jurisdiction of the ICJ.

4. The importance attached to the ICJ could well give rise to serious problems and prevent many States from ratifying the future convention. Even though the Court's membership, decisions and procedures had changed considerably in the past 10 years, States which had recently gained independence had not forgotten the Court's recantation in the *South West Africa* case. However, some of the Court's recent decisions showed that it was making genuine efforts to promote the progressive development of international law. Nevertheless, precisely because of the provisions on the compulsory jurisdiction of the ICJ contained in the 1969 Vienna Convention, the developing countries had not so far acceded to that Convention in large numbers. Therefore, many States were unlikely to be very enthusiastic about giving the Court exclusive jurisdiction to settle disputes concerning *jus cogens* and international crimes.

5. As to the notifications stipulated in draft articles 1 and 2 of part 3, the second notification was necessary only if the alleged injured State wanted to take measures by way of reciprocity under article 8 of part 2 or measures by way of reprisal under article 9 of part 2. Although the second notification might be desirable before measures of reprisal were taken, since it would allow some time for further thought, it was not so necessary in the case of a countermeasure by way of reciprocity, which must, in order to be effective, be taken forthwith and naturally had to be proportional to the wrongful act committed by the author State. He shared Mr. Ogiso's opinion (1954th meeting) on all those points.

6. With regard to draft article 1, Mr. Reuter (1953rd meeting) had rightly raised the question of prescription. Personally, he did not think that a State could base itself on article 1 in order to make a claim without any time restriction. The stability of international relations would be jeopardized by imprescriptibility. The criminal action provided for in the draft Code of Offences against the Peace and Security of Mankind should not be dissociated from the "civil" action provided for in the draft under consideration. "Civil" action must follow the same course as criminal action. If that analysis was correct, the problem of prescription should be dealt with in the code of offences, which should establish different periods of prescription for international crimes and for international delicts and enunciate the principle of the indivisibility of criminal action and "civil" action. He would be making some comments on the wording of articles 1 and 2 in the Drafting Committee.

7. Draft articles 3 and 4 related to the implementation of the procedure for the peaceful settlement of disputes. Unlike article 66, subparagraph (a), of the 1969 Vienna Convention, however, draft article 4, subparagraph (a), did not provide that a dispute concerning *jus cogens* could be submitted to arbitration. In that connection, the Special Rapporteur (1952nd meeting) had said that paragraph 1 of draft article 3 already allowed resort to arbitration, but that was not a satisfactory explanation. The reference in that paragraph to Article 33 of the Charter of the United Nations, which related to general means of settlement, including judicial settlement, had not prevented draft article 4 from expressly providing for the jurisdiction of the ICJ; yet article 4 said nothing about arbitration. He would be grateful for further details on that point, as well as on the absence of references in article 4, subparagraph (b), to article 15 of part 2, concerning aggression, and article 19 of part 1, concerning international crimes. As the Special Rapporteur himself had implied, article 19 should be mentioned in the part relating to the settlement of disputes. Again, draft article 4, subparagraph (c), did not refer to article 8 of part 2.

8. Draft article 5 ruled out the possibility of reservations, which was logical in view of the inseparable nature of the provisions dealing with the legal consequences of an internationally wrongful act and the settlement of disputes. Like Mr. Lacleza Muñoz (1954th meeting), he was of the opinion that a general provision on reservations could be included in the final provisions

⁴ For the texts, see 1952nd meeting, para. 1.

of the draft if the draft was to be submitted to a conference of plenipotentiaries, in which case the Commission should leave it to the conference to decide on the matter.

9. The proposed annex differed from the annex to the 1969 Vienna Convention in that it provided that the conciliation commission would decide on its own competence and that the conciliation fees and expenses would be borne by the parties; those provisions were based on the 1982 United Nations Convention on the Law of the Sea, which, in turn, was based on regulations on conciliation and arbitration in respect of international trade law disputes. There again, the conference of plenipotentiaries would have to decide whether those innovations should be maintained.

10. Since there was, in his view, no reason not to follow the Commission's usual practice, the articles of part 3 could be referred to the Drafting Committee.

11. Mr. ROUKOUNAS said that the adoption of provisions relating to third-party settlement of disputes implied that the body which would be called upon to make a ruling would be empowered not only to establish that a wrongful act had been committed, but also to decide on reparation. It should be remembered, however, that the Commission had not planned to discuss what indications it intended to give to the third party that would deal with a claim for compensation. What weight should it attach to the damage caused by an internationally wrongful act? The absence of provisions on that question in part 1 of the draft was reflected in part 2.

12. According to the 1969 Vienna Convention on the Law of Treaties, an international judicial body to which a dispute was submitted could be requested to consider only one aspect of the dispute. Admittedly, the Commission did not know of any cases in which the relevant provisions of that Convention had been applied, but it could reasonably doubt the practical value of such a solution as far as State responsibility was concerned. At present, it was difficult to envisage any kind of pre-judicial application, as was found in internal law and in some particular systems of international relations. In the case of the topic under consideration, could a dividing line be drawn between the possibility of submitting a dispute to the ICJ under article 4 of part 3 of the draft and the possibility of initiating the conciliation procedure provided for in the annex? How were the roles to be assigned?

13. During the discussion, reference had been made to the choice of means of dispute settlement. The list of means given in Article 33 of the Charter of the United Nations was not exhaustive. In choosing one of the appropriate means of settlement, however, the parties were always required to arrive at a peaceful settlement of their dispute. The main obligation in any peaceful dispute-settlement procedure was to arrive at a result, while freedom of choice referred to the means of doing so: freedom of choice was not an end in itself. If the parties could not agree on one of the means of settlement listed in Article 33 of the Charter or in any other international instrument, part 3 of the draft afforded them other options: first, to prevent the dispute from going on indefinitely, and secondly, to avoid the risks of

escalation. Problems nevertheless arose with regard to the way in which the third party would proceed and with regard to the assignment of jurisdiction within a coherent system.

14. He agreed with Mr. Ogiso (1954th meeting) that further clarification was needed with regard to the content of article 6 of part 2 of the draft as referred to in draft article 1 of part 3, because article 6, paragraph 1 (c), contained a reservation concerning a matter that was dealt with in article 7 of part 2. The purpose of the reservation, however, was not to exclude that matter from the scope of article 6 but to allow article 7 to deal with it in detail. Consequently, the reference to article 6 of part 2 in article 1 of part 3 also applied to article 7 of part 2.

15. Again, the injured State should not be required to make several notifications. Draft article 2, paragraph 3, was based on article 65, paragraph 5, of the 1969 Vienna Convention, but in its present form it appeared to refer to a notification that had never existed. Perhaps it was simply a drafting problem, but in his opinion there should be as few notifications as possible.

16. Although article 66 of the 1969 Vienna Convention spoke of a "solution", the formula "If, under paragraph 1 of article 3, no solution ...", in draft article 4, should be improved. In the case of a solution as to substance, the proposed 12-month period would be rather short, but, in the case of a procedural solution, such a period would be too long. It was not enough to use the wording of the relevant article of the Vienna Convention.

17. Draft article 4 gave some space to international crimes, dealt with in article 19 of part 1, but subparagraph (b) focused on the additional rights and obligations referred to in article 14 of part 2, which applied to a number of situations and mentioned not only the rights and obligations of the directly injured State, but also those of "every other State". Should not part 3 of the draft explain exactly what was meant by the words "every other State"? It would also be helpful to know why acts of aggression had been excluded from the procedure provided for in draft article 4. In the light of article 15 of part 2, it had to be determined whether an international crime or an aggravating circumstance was the decisive element to be taken into account in deciding whether or not the question of aggression should be included in the draft.

18. Mr. BARBOZA said that, like Mr. Reuter (1953rd meeting), he noted that the draft articles did not refer to such concepts as injury, fault and diplomatic protection and that they thus reflected recent changes in the international community. Mr. Sucharitkul (1954th meeting) had painted a picture of society in the past, when foreign investors had been afforded protection with the help of coercion or even the use of force. Latin America was one of the regions that had been most affected by that problem and it had taken the Drago Doctrine, Carlos Calvo and the operation of the inter-American system to counteract the practices of the investor countries.

19. The fact that account had not been taken of the concept of injury was a good sign, for the draft articles

now focused on breaches of international obligations, not on injuries suffered by private individuals. The inclusion of some new concepts, such as that of international crimes, had none the less given rise to new problems which still had to be solved in dealing both with State responsibility and with the draft Code of Offences against the Peace and Security of Mankind.

20. In his view, part 3 of the draft was necessary, since measures of execution, which had to be subject to a minimum number of procedural rules, would make it possible to break the vicious circle of any reprisals and counter-reprisals that might be taken. The example of the 1969 Vienna Convention on the Law of Treaties showed that, in a similar situation, a solution of the same kind had been sought. An optional protocol would, however, not be appropriate because part 3 of the draft did not establish very onerous obligations for a State that intended to take one of the measures provided for, whereas the same was not true in the case of conventions accompanied by a protocol establishing that any question of interpretation or implementation would be unilaterally submitted to the jurisdiction of the ICJ. In the present instance, the aim was simply to make measures of execution subject to two procedural steps and to a conciliation procedure.

21. The measures of execution in question were measures by way of reciprocity and measures by way of reprisal, and the procedural steps consisted of two notifications. Once the notifications were made, a conciliation procedure would be set in motion in almost every case. It would simply require the parties to meet, and the conciliation commission would merely make recommendations that States were free to follow if they so wished. There was nothing compulsory about the submission of disputes to the means of settlement provided for in Article 33 of the Charter of the United Nations because, according to draft article 4, if none of those means was used within a period of 12 months, the parties could submit their dispute to conciliation, as provided for in the annex. In only two cases could a party unilaterally submit a dispute to the ICJ: in the infrequent case of reprisals consisting of the suspension of the performance of obligations imposed by a peremptory norm of international law, when the procedure would be justified by the fundamental interest of the international community in protecting the obligation violated; and in the case of a dispute concerning the rights and obligations referred to in article 14 of part 2, one that would probably never arise, but one that would be such an affront to the conscience of the international community that the submission of the dispute to the ICJ would not pose any problems.

22. None of the provisions prohibited measures by way of reciprocity or by way of reprisal once the second notification had been made, unless the States concerned had means of peaceful settlement available to them, as was to be inferred from article 10 of part 2 and the commentary thereto (A/CN.4/389, sect. I). The alleged injured State could thus take the appropriate measure and wait for the results of the procedures instituted, including the recommendations of the conciliation commission, which it would be able to follow if it so wished, while maintaining the measure taken.

23. Those provisions did not establish obligations that States would find it difficult to fulfil and they should be included in the body of the draft rather than in an optional protocol, particularly since States would encounter no obstacle to the adoption of measures by way of reciprocity or by way of reprisal. The provisions would, moreover, help to improve the current situation by regulating a hitherto entirely arbitrary matter. It might nevertheless be possible to find wording that would strike a better balance between all the interests at stake.

24. It was regrettable that the members of the Commission had always been short of time in discussing the draft articles. Indeed, as far as he was concerned, the discussion of part 2 and perhaps even of part 1 was still not complete. The Commission should try to find new working methods so that it could consider such important questions in greater depth. Fortunately, it would probably have an opportunity to revert to certain points on second reading. For the time being, however, in view of the relatively short time devoted to the consideration of parts 2 and 3 of the draft, which the Commission should be able to study in greater detail, it would be better to await the reactions of Governments in the Sixth Committee of the General Assembly before referring the draft articles of part 3 to the Drafting Committee.

25. Mr. ILLUECA said that the question of State responsibility, with its fascinating and complex political and legal implications, was of the utmost importance because it encompassed virtually all aspects of international law, whose unity was demonstrated in the draft articles, for which the Special Rapporteur deserved to be highly commended. Several members of the Commission had none the less drawn attention to problems which might call for the elaboration of further draft articles if they were to be solved. In that connection, the analysis of the difficult situations that the Commission was examining had to be borne in mind and the Commission had to agree on terminology that would be widely understood.

26. The time-limits imposed by the current budget restrictions meant that members had fewer opportunities to state their views and it was increasingly clear that the Commission had to revise its working methods in order to maintain its effectiveness and prestige. His remarks would necessarily be brief, but fortunately the views of the Latin-American and Spanish-speaking members of the Commission had already been made known to some extent.

27. With regard to the implementation of international responsibility, it was essential for the draft articles to provide for the right of the injured State to *restitutio in integrum*, in other words to re-establishment of the situation as it had existed before the wrongful act. Where that was not possible, the draft must provide for the right of the injured State to require the author State to pay not only a sum of money corresponding to the value of re-establishment of the pre-existing situation, but also a sum which would represent compensation for injury and which could in no way be regarded as being covered by *restitutio in integrum* or by the payment of a sum of money as a substitute for re-establishment of the situation.

28. Undoubtedly, the Special Rapporteur had in the draft articles enabled the Commission to benefit from the experience he had gained at the United Nations Conference on the Law of Treaties and in the course of the elaboration of the United Nations Convention on the Law of the Sea. Nevertheless, owing to the complex issues involved, the Commission would have to spend more time on revising the draft articles, co-ordinating all three parts and completing the rules for the smooth functioning of the dispute-settlement machinery, which had to be in keeping with the letter and spirit of the Charter of the United Nations.

29. It would therefore be better not to refer part 3 of the draft to the Drafting Committee at the present time. Member States should be given an opportunity to examine the draft articles and explain their views in the Sixth Committee of the General Assembly. In the mean time, the Commission's membership would be renewed and, with its new members' contributions, it would be able to complete the draft convention, which should in due course be submitted to a conference of plenipotentiaries.

30. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur, who had done an enormous amount of work in record time, had enabled the Commission to begin to see the light at the end of the tunnel it had entered when it had embarked on the topic of State responsibility.

31. As it now stood, part 3 of the draft appeared to restrict the implementation of responsibility to part 2; but part 1 also gave rise to problems concerning implementation, if only because it was necessary to establish the wrongfulness of an act and to decide whether or not there were circumstances precluding wrongfulness and whether a convention that had been violated had been valid to begin with. A State could deny that an act which it had committed was wrongful by invoking a plea of *force majeure* or self-defence, for example. He was therefore somewhat concerned that part 3 made no reference to part 1 and he would like further explanations in that regard.

32. In addition, the machinery for the settlement of disputes applied only to measures or countermeasures taken by the alleged injured State. The fact was that a dispute could arise even if no measure was taken. How would such a dispute then be settled? It was a serious problem and, in order to safeguard the rights of the injured State, every possible aspect of the dispute-settlement procedure had to be taken into account.

33. The provisions (art. 4, subparas. (a) and (b)) referring to articles 12 and 14 of part 2 gave the ICJ jurisdiction in the case of disputes relating to questions covered by those articles, which was obviously the ideal solution. Nevertheless, had the Commission resolved the problem of jurisdiction in cases of a breach of *jus cogens* and international crimes, which were not always easy to distinguish, since an international crime could be a violation of a rule of *jus cogens*? It was still an open question whether an international crime involved universal jurisdiction and the jurisdiction of an international court. According to the principle of universal jurisdiction, every State was entitled to try the

perpetrator of an international crime whom it had arrested on its territory. How, in the light of that principle, could such proceedings be said to come within the jurisdiction of the ICJ? Would the forum State have to suspend the proceedings on the ground that the dispute had been submitted to the ICJ? Even if the forum State agreed to that course of action, what would happen in the ICJ?

34. All those questions should be considered in greater detail. In that connection, Mr. Razafindralambo had spoken of the principle of the indivisibility of criminal and civil action. In the entirely plausible case of a crime committed by an agent of a sending State which entailed the responsibility of that State, the latter would be able to invoke article 14 of part 2 in order to prevent its agent from being tried in the injured State and have the case brought before the ICJ.

35. To take the discussion a step further, another problem to be borne in mind was that of international liability for injurious consequences arising out of acts not prohibited by international law. The consequences of an internationally wrongful act and of activities not prohibited by international law were comparable and the procedure for the implementation of responsibility should therefore be much the same in both cases.

36. He would have no objection to the draft articles of part 3 being referred to the Drafting Committee, but thought the Special Rapporteur should let the Commission know what he intended to do in that regard. There were, however, still many unresolved questions to be discussed and the Commission would have to revert to them later.

37. Mr. RIPHAGEN (Special Rapporteur), summing up the discussion, said that to some extent it had duplicated the discussion at the previous session on his outline for part 3 of the draft (A/CN.4/389, sect. II). An appeal had now been issued for realism. No doubt the Commission had to be realistic, yet as a body of independent international lawyers assigned the task not only of codifying, but also of progressively developing international law, it should approach its work with an element of idealism. The Commission was not called upon merely to follow the remarks made in the Sixth Committee of the General Assembly and to abide by the will of States; it had to work towards the progressive development of international law and, to that end, realism should not be taken too far. In any case, Governments had the last word as to the fate of the Commission's drafts.

38. A second general remark was required in connection with the scope of the entire draft. The topic of State responsibility was only a part of a total legal system and the provisions of part 3 thus had to be limited to special problems arising from State responsibility. In any attempt to apply the provisions of part 2, it was impossible to get away from the application of the provisions of part 1. Again, in any attempt to apply the provisions of part 1, it was impossible to get away from the application of primary rules which were not found in the draft articles at all. If the interpretation and application of the primary rules were not subject to a compulsory dispute-settlement procedure, the Commission's draft

on State responsibility could not make them so. It could not bring all cases governed by international law under a compulsory dispute-settlement procedure, desirable as that might be. Hence, the scope of the articles of part 3 must be confined to a specific situation. They served to impose compulsory dispute-settlement procedures precisely for a situation in which there was a danger of escalation, in other words when countermeasures and counter-countermeasures were being taken or threatened and there was a risk of a deterioration in relations.

39. Some analogy could be drawn between that situation and the invalidity of treaties. The relations between States were, of course, based on the assumption that the treaties between them were valid and, in the event of a claim to the contrary, it was necessary to deal first with the issue of validity. The two situations were not identical, but there was some similarity with the problem of countermeasures.

40. Another analogy was to be found in the procedures laid down in the 1982 United Nations Convention on the Law of the Sea with regard to the exclusive economic zone when different States had rights in the same area of the sea. The drafters of that Convention had been well aware that the substantive provisions on the subject were liable to lead to conflict and, from the very beginning, they had established a link between the substantive provisions and the dispute-settlement procedures. Also, no reservations had been allowed regarding the dispute-settlement procedures in the 1982 Convention. All those points had formed the subject of a "package deal". It was clear that part 2 of the present draft contained provisions which could give rise to conflict, for example between the duty to perform an international obligation and the right to take action against an internationally wrongful act committed by another State.

41. Admittedly, the 1982 Convention did provide for exceptions to dispute-settlement procedures entailing binding decisions, but in the instances covered by those exceptions arrangements were made for compulsory conciliation instead. The case was not at all comparable to that of the draft articles of part 3, where the jurisdiction of the ICJ related only to a particular legal question. There could be no objection to making a proposal for compulsory settlement procedures on the basis of the freedom of choice open to States in regard to modes of settlement. It was in no sense contrary to the principle of sovereignty for a State to give its consent to such dispute-settlement procedures, and indeed to give it in advance. That point was recognized in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁵ In that Declaration, the second principle, which provided that States must settle their international disputes by peaceful means, listed all the means mentioned in Article 33, paragraph 1, of the Charter and spoke of "... judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice". Application of part 2 of the draft was not possible

without part 1 and the primary rules involved. It was for that reason that the rules in part 3 were residual in character, except for those which referred to *jus cogens*, international crimes and the application of the Charter.

42. Another general point made in the course of the discussion concerned the arrangement of the draft articles. Clearly, the various provisions were interrelated and a variety of arrangements was possible. Part 3 was in a sense part of part 2 and chapter V of part 1 was in a sense part of part 2. The question was primarily one of drafting and possibly more a matter to be taken up in second reading, when the Commission would be able to set out the articles in logical order.

43. Reference had also been made to the question of statutory limitation, or "prescription", in other words loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of the internationally wrongful act. In his preliminary report on the content, forms and degrees of international responsibility,⁶ he had suggested that the Commission should discuss that question and had put forward the idea of including in part 2 at most an article along the lines of article 45 of the 1969 Vienna Convention on the Law of Treaties. The idea had not met with any response at the time, but the matter could well be examined at a later stage. Indeed, in his preliminary report, he had indicated that the point should be covered in part 3.⁷ Another possible solution was to deal with the question as a matter of estoppel in article 9 or perhaps article 8 of part 2. Perhaps a decision could be taken by the Drafting Committee, which already had before it articles 6 to 16 of part 2.⁸

44. As to the relationship between the various procedures, the ideal situation was, of course, that everything should be dealt with in one comprehensive procedure: the facts of the case, the legal issues, including the question of whether or not a breach had been committed, and the consequences of a breach. Such a "wholesale" approach, however, was not possible with regard to State responsibility. A separation of procedures was therefore proposed in part 3, draft article 4 of which had been taken more or less from the Vienna Convention on the Law of Treaties. Under article 4, subparagraph (a), the compulsory jurisdiction of the ICJ applied to the legal question of the existence of a rule of *jus cogens*. It would be for the Court to decide whether the alleged rule of *jus cogens* constituted, in the words of article 53 of the Vienna Convention, "a norm accepted and recognized by the international community of States as a whole" as a rule of *jus cogens*. In view of the novel character of *jus cogens*, only a world-wide authority like the ICJ could be assigned the task of determining the existence of such a rule. The Court's role was thus a limited one under article 4, subparagraph (a). The position was similar with regard to international crimes, in respect of which article 4, subparagraph (b), provided for the jurisdiction of the ICJ; but there again the Court's jurisdiction was of a limited character.

⁶ *Yearbook ... 1980*, vol. II (Part One), p. 129, document A/CN.4/330, para. 101.

⁷ *Ibid.*

⁸ See footnote 3 above, *in fine*.

⁵ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

45. Another general point made during the discussion concerned steps taken prior to the procedures established in part 3. State A might, for instance, warn State B that, if it persisted in a certain line of conduct, it would be committing a breach of an international obligation, whereupon State B might inform State A that, as nothing had actually happened yet, State A was interfering in its internal affairs. There were, however, diplomatic channels through which action could be taken to deal with such matters and prevent the situation from deteriorating. He did not think it necessary to spell that out in the draft: in the first place, to do so might mean entering the field of the application of primary rules, and secondly, such diplomatic exchanges would not have any specific legal effect.

46. It had rightly been pointed out that there might be some overlap between, on the one hand, the topic of State responsibility, and, on the other hand, the draft Code of Offences against the Peace and Security of Mankind and the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The link between the latter topic and the topic of the law of the non-navigational uses of international watercourses was, however, infinitely closer than that between the draft code of offences and the present draft articles. In that connection, members would note that the reference in article 4 of part 3 to the ICJ was solely in relation to the consequences of an international crime in so far as the relationship between States was concerned. Also, the article referred to *jus cogens* solely within the context of article 12, subparagraph (b), of part 2, which meant that only when one State considered that another had, by a measure of reciprocity or reprisal, overstepped the bounds set by the rules of *jus cogens* could the procedure before the ICJ be engaged. Although there was a possible link between the topics in question, nothing could be done to avoid an accumulation of procedures until it was known how those topics evolved.

47. It had also been noted that he had not followed the pattern of the Vienna Convention on the Law of Treaties exactly, for the possibility of referring disputes concerning *jus cogens* to arbitration was excluded under the terms of the draft. As he had explained in an earlier report, the reason was that, given its bilateral and *ad hoc* character, arbitration was not a very suitable procedure for *jus cogens* cases which involved *erga omnes* obligations. The phrase "unless the parties by common consent agree to submit the dispute to arbitration", in article 66, subparagraph (a), of the Vienna Convention, was to his mind purely a matter of verbal compromise. Under draft article 3, paragraph 1, of part 3, the parties were of course free to make such a submission. It was, however, perhaps unnecessary to remind them of the fact, unless the intention was to pay lip-service to the idea of freedom of the parties.

48. It had been suggested that consideration should be given to the relationship between part 3 and article 14, paragraph 3, of part 2, concerning possible procedures in cases of international crimes. In his view, the question whether a State could legitimately go further than the countermeasures provided for in part 2 of the draft on the ground that the wrongful act involved an interna-

tional crime was something that could be dealt with by the ICJ. In such a case, the Court would then also consider whether the State in question had taken due account of the provisions of article 14, paragraph 3.

49. Draft articles 1, 3 and 4 of part 3 referred only to certain articles of part 2 not because he considered that other articles of part 2 were irrelevant but because he had not thought it necessary to enumerate them all. Similarly, there was no need to make express mention of article 19 of part 1 in article 4, subparagraph (b), which already contained an explicit reference to article 14 of part 2 and thus an implicit reference to article 19.

50. As to drafting matters, he had no strong feelings about the words "wishes to", in draft article 1, which were simply meant to signify intention. The words "another State", which appeared in draft article 2, paragraph 3, and had been mentioned by Mr. Reuter (1953rd meeting), had been inserted to cater for situations that might arise under the terms of article 11 of part 2 and in which a third State could become involved in a countermeasure. Sir Ian Sinclair (*ibid.*) had suggested that the residual character of the rules in articles 1 to 4 should be spelt out more clearly in the articles themselves and that point was perhaps worth examining in the Drafting Committee.

51. The notifications provided for in articles 1 and 2 had found both supporters and critics. The first notification, under article 1, was useful in the sense that the State which had allegedly committed an internationally wrongful act should be asked specifically either to desist, to make reparation, or to take measures to prevent a repetition of the act. The reference to "reasons therefor" indicated that the notification should state the facts and the rules involved. Such a notification would give the alleged author State—which might not even be aware of the situation—at least some time to look into the matter and decide what its reaction should be. The second notification, under article 2, was of an entirely different nature; obviously, the alleged author State was entitled to be notified of any countermeasures the other State intended to take. The two notifications could also be made together, but only in cases of special urgency. To his mind, a simple protest note reserving all rights was not a notification at all.

52. The term "special urgency", in article 2, paragraph 1, had also been the subject of criticism. It was extremely difficult to define the term, but an example was afforded by article 10 of part 2, since unilateral interim measures of protection taken by a State were usually very urgent. Furthermore, under the procedure envisaged, it would be possible to control the application of article 2 and to ensure that a State was not unduly hasty in resorting to measures of reciprocity or reprisal.

53. Mr. Calero Rodrigues (*ibid.*) had correctly pointed out that the obligations under Article 33 of the Charter of the United Nations existed before any dispute arose; it was certainly not the intention in draft article 3, paragraph 1, to allow an *a contrario* reasoning whereby, if no countermeasure was intended, there was no need to settle the dispute. Whether or not that should be spelt out expressly was again a question of drafting.

54. A number of members took the view that the 12-month period before which the procedures laid down in draft article 4 would take effect was too long. Nevertheless, the effect of article 4, read in conjunction with article 2, paragraph 1, was that, even if countermeasures were taken, the possibilities for a peaceful solution to the dispute as provided for in Article 33 of the Charter should be explored. That, of course, would require a considerable amount of time and, in his view, article 4 was sufficiently flexible to permit a practical solution. The compulsory jurisdiction of the ICJ, as provided for in article 4, subparagraphs (a) and (b), had also been criticized, but the Court would exercise jurisdiction over a very limited field. It was also important to remember that *jus cogens* was an important element in all treaty relations; as such it was relevant to the international community as a whole and should therefore be dealt with by the judicial organ of that community.

55. As Mr. Reuter had noted, the annex to part 3 differed somewhat from the annex to the Vienna Convention on the Law of Treaties. In the first place, paragraphs 3 and 4 of the former did not figure in the annex to the Vienna Convention. It was not, however, a substantive point and could be discussed in the Drafting Committee. The second difference lay in the cost of the conciliation proceedings. It was clear that the parties, not the United Nations, would have to meet those costs. That point, too, could be examined later.

56. Mr. Sucharitkul (1954th meeting) had referred to article 12 of part 2, which dealt with *jus cogens* and the position in regard to diplomatic immunities, and had asked whether other similar rules existed. For his own part, he had been unable to find any, but possibly other instances might be found and made known to the Drafting Committee. Mr. Sucharitkul had also pointed out that Article 33 of the Charter mentioned resort to regional agencies or arrangements, such as ASEAN, as a means of settling a dispute. That point was covered by the reference in draft article 3, paragraph 1, to Article 33 of the Charter.

57. Mr. Ogiso (*ibid.*) would like part 3 to be far more comprehensive; but it was not possible to establish a system for compulsory settlement of disputes that would cover each and every case. In particular, he had understood Mr. Ogiso to say in connection with draft article 5 that, in the event of reprisals, the dispute must always be submitted to conciliation. There again, it was extremely doubtful that States would be willing to accept such an idea.

58. He believed he had covered most of the main issues raised during the discussion and apologized for not having been able to deal with the more detailed points, owing to lack of time. The Commission might wish, as an expression of its overall agreement with the approach adopted, to refer draft articles 1 to 5 of part 3 to the Drafting Committee, although there would not, of course, be time for it to deal with them at the present session.

59. After an exchange of views in which Mr. FRANCIS, Mr. BARBOZA, Mr. DÍAZ GONZÁLEZ, Sir Ian SINCLAIR and Mr. JACOVIDES took part, the

CHAIRMAN suggested that the Commission should refer part 3 of the draft articles on State responsibility to the Drafting Committee.

It was so agreed.

The meeting rose at 1.10 p.m.

1957th MEETING

Monday, 2 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam.

Draft Code of Offences against the Peace and Security of Mankind¹ (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report (A/CN.4/398) containing a set of draft articles which read:

CHAPTER I. INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes under international law defined in the present Code constitute offences against the peace and security of mankind.

Article 2. Characterization

The characterization of an act as an offence against the peace and security of mankind, under international law, is independent of the internal order. The fact that an act or omission is or is not prosecuted under internal law does not affect this characterization.

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

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

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

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and penalty

Any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment.

Article 4. Universal offence

1. An offence against the peace and security of mankind is a universal offence. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

2. The provision in paragraph 1 above does not prejudice the question of the existence of an international criminal jurisdiction.

Article 5. Non-applicability of statutory limitations

No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature.

Article 6. Jurisdictional guarantees

Any person charged with an offence against the peace and security of mankind is entitled to the guarantees extended to all human beings and particularly to a fair trial on the law and facts.

Article 7. Non-retroactivity

1. No person shall be convicted of an act or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. The above provision does not, however, preclude the trial or punishment of a person guilty of an act or omission which, at the time of commission, was criminal according to the general principles of international law.

Article 8. Exceptions to the principle of responsibility

Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. As a consequence:

(a) The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal responsibility;

(b) Coercion, state of necessity or *force majeure* do not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(c) The order of a Government or of a superior does not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(d) An error of law or of fact does not relieve the perpetrator of criminal responsibility unless, in the circumstances in which it was committed, it was unavoidable for him;

(e) In any case, none of the exceptions in subparagraphs (b), (c) and (d) eliminates the offence if:

(i) the fact invoked in his defence by the perpetrator is a breach of a peremptory rule of international law;

(ii) the fact invoked in his defence by the perpetrator originated in a fault on his part;

(iii) the interest sacrificed is higher than the interest protected.

Article 9. Responsibility of the superior

The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was going to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.

CHAPTER II. OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 10. Categories of offences against the peace and security of mankind

Offences against the peace and security of mankind comprise three categories: crimes against peace, crimes against humanity and war crimes or [crimes committed on the occasion of an armed conflict].

PART I. CRIMES AGAINST PEACE

Article 11. Acts constituting crimes against peace

The following constitute crimes against peace:

1. The commission by the authorities of a State of an act of aggression.

(a) Definition of aggression

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

(ii) *Explanatory note.* In this definition, the term "State":

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

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

(b) Acts constituting aggression

Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression, without this enumeration being exhaustive:

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

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

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

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

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

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

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

(c) Scope of this definition

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

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

2. Recourse by the authorities of a State to the threat of aggression against another State.

3. Interference by the authorities of a State in the internal or external affairs of another State, including:

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

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

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

(a) *Definition of terrorist acts*

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

(b) *Terrorist acts*

The following constitute terrorist acts:

- (i) any act causing death or grievous bodily harm or loss of freedom to a head of State, persons exercising the prerogatives of the head of State, the hereditary or designated successors to a head of State, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;
- (ii) acts calculated to destroy or damage public property or property devoted to a public purpose;
- (iii) any act calculated to endanger the lives of members of the public through fear of a common danger, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity;
- (iv) the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

5. A breach of obligations incumbent on a State under a treaty which is designed to ensure international peace and security, particularly by means of:

- (i) prohibition of armaments, disarmament, or restrictions or limitations on armaments;
- (ii) restrictions on military preparations or on strategic structures or any other restrictions of the same kind.

6. A breach of obligations incumbent on a State under a treaty prohibiting the deployment or testing of weapons, particularly nuclear weapons, in certain territories or in space.

7. The forcible establishment or maintenance of colonial domination.

8. The recruitment, organization, equipment and training of mercenaries or the provision to them of means of undermining the independence or security of States or of obstructing national liberation struggles.

A mercenary is any person who:

- (i) is specially recruited locally or abroad in order to fight in an armed conflict;
- (ii) does, in fact, take a direct part in the hostilities;
- (iii) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (iv) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (v) is not a member of the armed forces of a party to the conflict;
- (vi) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

PART II. CRIMES AGAINST HUMANITY

Article 12. Acts constituting crimes against humanity

The following constitute crimes against humanity:

1. Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

- (i) killing members of the group;
- (ii) causing serious bodily or mental harm to members of the group;
- (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) imposing measures intended to prevent births within the group;
- (v) forcibly transferring children from one group to another group.

2. FIRST ALTERNATIVE

Apartheid, in other words the acts defined in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and, in general, the institution of any system of government based on racial, ethnic or religious discrimination.

2. SECOND ALTERNATIVE

Apartheid, which includes similar policies and practices of racial segregation and discrimination to those practised in southern Africa, and shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

- (a) denial to a member or members of a racial group or groups of the right to life and liberty of person:
 - (i) by murder of members of a racial group or groups;
 - (ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
 - (iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, and the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

3. Inhuman acts which include, but are not limited to, murder, extermination, enslavement, deportation or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds.

4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

PART III. WAR CRIMES

Article 13. Definition of war crimes

FIRST ALTERNATIVE

(a) Any serious violation of the laws or customs of war constitutes a war crime.

(b) Within the meaning of the present Code, the term "war" means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 8 June 1977 to those Conventions.

SECOND ALTERNATIVE

(a) *Definition of war crimes*

Any serious violation of the conventions, rules and customs applicable to international or non-international armed conflicts constitutes a war crime.

(b) *Acts constituting war crimes*

The following acts, in particular, constitute war crimes:

- (i) serious attacks on persons and property, including intentional homicide, torture, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, and the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;
- (ii) the unlawful use of weapons, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction (in particular first use of nuclear weapons).

PART IV. OTHER OFFENCES

Article 14

The following also constitute offences against the peace and security of mankind:

A. FIRST ALTERNATIVE

Conspiracy [complot] to commit an offence against the peace and security of mankind.

A. SECOND ALTERNATIVE

Participation in an agreement with a view to the commission of an offence against the peace and security of mankind.

B. (a) Complicity in the commission of an offence against the peace and security of mankind.

(b) Complicity means any act of participation prior to or subsequent to the offence, intended either to provoke or facilitate it or to obstruct the prosecution of the perpetrators.

C. Attempts to commit any of the offences defined in the present Code.

2. Mr. THIAM (Special Rapporteur) said that his fourth report (A/CN.4/398), which covered the whole of the topic, consisted of five parts devoted, respectively, to crimes against humanity, war crimes, other offences, general principles, and the draft articles.

3. Originally, as in the Charter and Judgment of the Nürnberg Tribunal,⁴ the concept of a "crime against humanity" had been linked with war crimes, but it had subsequently developed into an absolutely autonomous

concept. It was none the less a very wide concept, charged with moral and philosophical considerations, and difficult to encapsulate in a definition. The meaning of the word "humanity" changed, depending on the way in which the problem was viewed. It might, for example, designate the whole of the human community, culture and humanism, human dignity, or the individual as the custodian of fundamental human rights and the basic ethical values of human society.

4. The answer to the question whether a "crime against humanity" must necessarily be a mass crime depended on the meaning given to the term. In that regard, major differences were to be found among writers. Some considered that it was precisely the values inherent in the human being that had to be protected and that the mass nature of the crime should not be taken into account in the definition, whereas others took the view that a crime against humanity implied the mass element.

5. The decided cases, too, were far from being consistent. The Constance Tribunal, ruling in application of Law No. 10 of the Allied Control Council for Germany, had declared that "the legal good protected by that Law is the individual with his moral value as a human being, possessing all the rights that all civilized peoples clearly recognize he possesses" (*ibid.*, para. 14). The same idea was found in a decision of the Supreme Court of the British Zone, which stated that "Law No. 10 is based on the idea that, within the sphere of civilized nations, there are certain standards of human conduct ... which are so essential for the coexistence of mankind and the existence of any individual that no State ... has the right to abandon them" (*ibid.*) and concluded that any serious breach of those standards should be regarded as a crime against humanity, even if it was not a mass crime. The United States Military Tribunals, on the other hand, had held that the mass element formed an integral part of a crime against humanity and that the definition should not cover isolated cases of atrocities or cruelty (*ibid.*, para. 45).

6. The Legal Committee of the United Nations War Crimes Commission, for its part, had stated that "Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime ... into a crime against humanity ..." (*Ibid.*, para. 33.)

7. The International Law Commission seemed, at the present stage, to consider that the mass nature was a necessary element of the crime, since article 19 of part 1 of the draft articles on State responsibility⁵ provided, in paragraph 3 (c), that:

... an international crime may result, *inter alia*, from:

...

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being ...;

8. The definition of the word "crime" also caused difficulty. In internal law, whether offences were divided into two categories (correctional and criminal offences)

⁴ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7).

⁵ *Yearbook ... 1976*, vol. II (Part Two), p. 95.

or into three (petty, correctional and criminal offences), the word “crime” always related to the most serious offences.

9. In international law, however, the word *crime*, in the phrase *crime contre la paix et la sécurité de l’humanité* (“offence against the peace and security of mankind”), had originally been a generic expression synonymous with “offence”. In the Charters of the Nürnberg and Tokyo International Military Tribunals, as well as in Law No. 10 of the Allied Control Council, the word “crime” covered all offences, from the most petty to the most serious. In that connection, reference might be made to a decision of the Supreme Court of the British Zone, made on appeal against a judgment which, by reason of the light penalty imposed, had wrongly described the act as an “offence against humanity”. The Court had declared that the word “crime” in the expression “crime against humanity” was a general term covering acts of different degrees of gravity (*ibid.*, para. 18).

10. Later, the Commission had decided that the term “crime” should apply only to the most serious offences.⁶

11. As to the various categories of crimes against humanity, the distinction made between genocide and other inhuman acts in the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954 was entirely justified. For unlike other inhuman acts, the purpose of genocide was necessarily to destroy a human group, in whole or in part. Hence, because of the specific nature of genocide, a separate paragraph should be devoted to it. It would also be useful to retain the words “national, ethnic, racial or religious” used in the 1954 draft code, for they expressed notions which, although they might overlap, were not identical. A national group, for example, often comprised several different ethnic groups, and a racial group was not to be confused with an ethnic group. The ethnic bond was essentially cultural, based on cultural values and characterized by a way of life, a way of thinking and the same view of life, whereas the racial element related more to common physical traits.

12. Since 1954, new offences condemned by the whole of the international community had emerged to add to those listed in article 2, paragraph (11), of the 1954 draft code; one of them was *apartheid*, a specific crime that was based on a system of government and should therefore be the subject of a separate paragraph.

13. The same applied to serious damage to the environment, a matter to which he proposed to devote a separate paragraph drafted along the lines of article 19, paragraph 3 (d), of part 1 of the draft articles on State responsibility, which sought simply to enunciate a primary rule, since specific questions relating to the environment were already governed by various international conventions.

14. The concept of a “war crime” raised problems of terminology, substance and method. In regard to terminology, the term “war” was perhaps no longer appropriate, since war, formerly a right and a manifesta-

tion of sovereignty, had become a wrongful act. Unfortunately, the prohibition of war had not made it disappear. The Commission therefore had a choice: it could retain the term “war”, altering the definition and explaining that it should be taken to mean any armed conflict, whether international or not; or it could replace the term “war” by the expression “armed conflict”, which was used by some writers and appeared in various international instruments.

15. The problems of substance lay in the fact that it was not always easy to distinguish between a “war crime” and a “crime against humanity”: one and the same act could be both. That dual characterization was not without advantages, however, since characterization as a crime against humanity made it possible to punish acts that could not be classed as war crimes. Nevertheless, the two offences differed in scope. A war crime could be committed only in time of war, between the belligerents, whereas a crime against humanity could be committed in time of peace or war. Moreover, a war crime could be committed only against foreigners, whereas a crime against humanity could be committed against fellow nationals.

16. The last kind of problem related to the method to be adopted. Should the Commission make an exhaustive or only an indicative list of war crimes, or should it simply draft a general definition? In 1919, the Preliminary Peace Conference, which had been responsible for drawing up the list of violations of the laws and customs of war by the German and allied forces during the 1914-1918 War, had made a list of 32 crimes. In 1945, that list had been slightly expanded, but it had still not been exhaustive. The Charter of the Nürnberg Tribunal spoke of “violations of the laws or customs of war”, which “shall include, but not be limited to, murder, ill-treatment ...” (art. 6 (b)). Law No. 10 of the Allied Control Council had referred to “violations of the laws or customs of war, including but not limited to murder, ill-treatment ...” (art. 11, para. 1 (b)). In the 1954 draft code, the Commission had opted for a very general definition: “Acts in violation of the laws or customs of war” (art. 2, para. (12)).

17. The problem thus remained unsolved. To enable the Commission to make a choice, he had prepared two versions of draft article 13. The first alternative contained a general definition only, whereas the second combined a general definition with a non-exhaustive list of war crimes. In order to take account of the comments made at the Commission’s thirty-sixth session,⁷ he had mentioned “first use of nuclear weapons” in subparagraph (b) (ii) of the second alternative, but had placed those words in brackets. Since a political decision was involved, he thought the Commission could do no more than propose various solutions. It was for the international community, in other words the General Assembly, to decide whether or not use of weapons of that type should be expressly mentioned.

18. With regard to “other offences”, the 1954 draft code referred to such concepts as conspiracy, complicity and attempts, but did not analyse or define them.

⁶ *Yearbook ... 1983*, vol. II (Part Two), pp. 13-14, paras. 47-48.

⁷ *Yearbook ... 1984*, vol. II (Part Two), p. 16, para. 57.

19. In internal law, the content of complicity varied in scope depending on the legislation concerned. Under French law, for example, complicity had a limited content. As a general rule, a charge of complicity could not be brought for acts committed after the principal offence. Concealment was thus an offence distinct from complicity. The laws of many other countries also limited complicity to acts committed prior to or concomitantly with the principal act. In other legal systems, such as that of the Soviet Union, and in common law, however, complicity had a broader content and included acts committed after the principal act.

20. In international law, complicity could have either a limited or an extended meaning. The Charters of the International Military Tribunals gave complicity a limited content by distinguishing it from certain related concepts. Thus both the Charter of the Nürnberg Tribunal and the Charter of the International Military Tribunal for the Far East distinguished between accomplices and leaders, organizers and instigators. Law No. 10 of the Allied Control Council established several categories of perpetrators, within which the accessory was separated from the person who "ordered or abetted" the crime, the person who "took a consenting part therein" and the person who, with respect to certain crimes, held "a high political, civil or military ... position ... or held a high position in the financial, industrial or economic life ..." (art. II, para. 2 (b), (c) and (f)).

21. On reading those texts, it might be asked what constituted complicity. But their drafters had been prompted more by concern for efficiency than by concern for legal exactitude. Their aim had been to let no wrongful act go unpunished. In addition to that narrow concept of complicity, there was a much broader one that extended complicity to superiors, members of groups or organizations and, in some cases, even to concealment.

22. At the end of the Second World War, domestic legislation had extended the concept of complicity so that it was possible to prosecute superiors in rank who had organized, directed, ordered or tolerated the criminal acts of their subordinates. Under the new laws, the responsibility of the superior was presumed failing disproof.

23. The same presumption was to be found in judicial decisions. In the *Yamashita* case (A/CN.4/398, para. 109), the United States Supreme Court had rejected an application for habeas corpus made by the Japanese General Yamashita, who had let his troops commit very serious crimes, concluding that: "The question then is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result." The Court had answered that question in the affirmative. The commanding officer had to produce proof that it had been impossible for him to prevent the commission of the crime

in question. Similarly, in the *Hostage* case (*ibid.*, para. 111), the United States Military Tribunal had decided that a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which he knew or ought to have known about. That precedent had even been extended to heads of State and Government.

24. Complicity had sometimes also been extended to include concealment. In the *Funk* case (*ibid.*, para. 113), the accused, in his capacity as Minister of Economics and President of the Reichsbank, had concluded an agreement under which the SS had delivered to the Reichsbank the jewellery, articles of gold and banknotes taken from Jews who had been exterminated. The Nürnberg Tribunal had been of the opinion that Funk "either knew what was being received [by the Reichsbank] or was deliberately closing his eyes to what was being done". The judgment in the *Pohl* case (*ibid.*, para. 114) had been even more explicit. The United States Military Tribunal had stated: "The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates does not exculpate him. This was a broad criminal program, requiring the co-operation of many persons, and Pohl's part was to conserve and account for the loot. Having knowledge of the illegal purposes of the action and of the crimes which accompanied it, his active participation even in the after-phases of the action makes him *particeps criminis* in the whole affair." Complicity had even been extended to include membership in an organization, which Law No. 10 of the Allied Control Council had made an autonomous offence (art. II, para. 2 (e)).

25. If the concept of extended complicity was to be accepted, it might be asked what its limits should be. The last paragraph of article 6 of the Nürnberg Charter referred in particular to "accomplices participating in the formulation or execution of a common plan or conspiracy" and provided that persons who had participated in such a plan were "responsible for all acts performed by any persons in execution of such plan". That provision raised an extremely important problem because it was based on the concept of "conspiracy". A special feature of that common-law concept was that it covered two distinct types of responsibility: the individual responsibility of a person who had taken part in a common plan and who could be held to have committed a particular act, and the collective responsibility of all those who had participated in that plan, whether they had committed any act or not. The members of the Nürnberg Tribunal had, of course, been unable to agree on the very specific nature of that concept and the Tribunal had finally decided that it was not applicable in all cases. It had been of the opinion that the wording of the last paragraph of article 6 did

not add a new and separate crime to those already listed [but was simply] designed to establish the responsibility of persons participating in a common plan.⁸

It had even gone so far as to set aside the charge of conspiracy in the case of war crimes and crimes against humanity, retaining it only for crimes against peace. In

⁸ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal*, ..., p. 72.

other words, it had simply equated conspiracy with *complot* and had made it a crime of responsible government officials, for a crime against peace could be committed only by such officials.

26. That area was one in which most actions were undertaken or executed jointly and in which the role of each person was very difficult to determine. Did a concern for efficiency justify the recognition of collective responsibility? That was for the Commission to decide. He had proposed two alternatives for section A of draft article 14, the first of which referred to conspiracy in the sense of *complot*, and the second to conspiracy in the sense of "participation in an agreement".

27. The Commission would also have to define the content of the term "attempt", determine whether it included preparatory acts and specify what was meant by the words "commencement of execution".

28. The general principles in part IV of the report could be classified according to whether they related to the nature of the offence, the nature of the offender, the application of criminal law in time, the application of criminal law in space, or the determination and scope of responsibility.

29. The principles relating to the nature of the offence did not require any explanation. The offence in question was a crime under international law. With regard to the principles relating to the international offender, the first question that arose was who could be an offender. Since the Commission had decided to confine itself to offences committed by individuals for the time being, he had assumed, without prejudice to the criminal responsibility of the State, that the offender was an individual; and as to the principles relating to the person of the offender, he had provided in draft article 6 that the offender was entitled to the rights and guarantees extended by the relevant international instruments to all human beings appearing before a criminal court to answer for an offence.

30. The application of criminal law in time brought two concepts into play: that of non-retroactivity of the criminal law and that of prescription. In regard to non-retroactivity, the problem that arose was whether the rule *nullum crimen sine lege, nulla poena sine lege* was applicable in international law. In his opinion it was, for in that maxim it was not the form, but the substance that must be considered. The word *lex* was used in a very wide sense and covered both written law and custom as well as the general principles of law. The fact that that rule was not expressly formulated in the common-law countries, which were so respectful of human rights, did not make them ignore its substance. Moreover, various international instruments, including the European Convention on Human Rights,⁹ stated that rule, though specifying that it did not prejudice the trial of persons who had violated the general principles of law recognized by civilized nations. Thus the concept extended to the whole of law and not only to written law.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

31. As to prescription, a certain number of conventions provided that offences against the peace and security of mankind were imprescriptible. It should also be remembered that, in internal law, prescription was neither a general nor an absolute rule. Indeed, many countries did not recognize prescription, and in those which did it was subject to exceptions. Lastly, it was often regarded as a rule of procedure and not as a substantive rule.

32. The application of criminal law in space brought several principles into play: the principle of the territoriality of criminal law, which gave competence to a judge of the place where the crime was committed; the principle of the personality of criminal law, which gave competence either to a judge of the offender's nationality or to a judge of the victim's nationality; and the principle of universal competence, which gave competence to a court of the place of arrest regardless of where the offence was committed. Lastly, there might be a system giving competence to an international court.

33. Since the question of creating an international criminal jurisdiction was far from settled, it would be preferable, without prejudging that issue, to adopt for the time being the system of universal competence rather than to combine several systems, as had been done after the Second World War. A proliferation of jurisdictions would thus be avoided.

34. The last category of principles related to the determination and scope of responsibility. The question of the scope of responsibility need not be dealt with in the draft code, since it was linked with that of the application of the penalty, and the Commission had not yet decided whether the draft code should include provisions on penalties.

35. The principle on which the determination of responsibility was based was that every wrongful act entailed the responsibility of its author. That principle was subject to various exceptions, however, also known as "justifying facts"; for it sometimes happened that certain circumstances removed the criminal character of a wrongful act. That applied to coercion, state of necessity, *force majeure*, error, superior order, the official position of the offender, self-defence and reprisals.

36. In spite of the differences between them, the exceptions of coercion, necessity and *force majeure* were subject to the same basic conditions. For the exception to apply, there must in each of the three cases be a grave and imminent peril; the author must not have contributed to the emergence of that peril; and there must be no disproportion between the interest sacrificed and the interest protected.

37. As to error, it could be of two kinds: error of law and error of fact. In the first case, the error took the form of misrepresentation of a rule of law, and in the second, misrepresentation of a material fact. While it was certainly difficult to accept error of law in internal law—since no one was considered to be ignorant of the law—in international law the question might arise whether an error of law could not be considered as a justifying fact, for the rules of international law were not always precise and had not evolved in all areas, particularly where the law of war was concerned.

38. In his fourth report (*ibid.*, para. 208), he had given two examples of cases decided by international tribunals which seemed to show that error of law was admitted in certain circumstances. The error must, however, have been unavoidable, and that was a question of fact for the judge to determine. He must consider all the circumstances of law and of fact surrounding the commission of the allegedly wrongful act to determine whether the error was really unavoidable, which was very rarely accepted. Moreover, it seemed that it must first be established that the author of the act had examined his conscience with considerable rigour and that, in spite of that effort, he had been unable to perceive that he was committing an error.

39. Generally speaking, there was a category of offences regarding which error was not conceivable, namely crimes against humanity. By definition, those crimes had a racial, political or religious motive, so that the intention was an integral part of the crime itself. Hence it was unthinkable that error or, for that matter, coercion or state of necessity could be invoked in the case of crimes against humanity.

40. Error of fact had also been admitted in certain circumstances, when it had been established that the error had been committed without any possibility of the representation of a determined fact being challenged, and that it had not been possible for the offender to act otherwise.

41. The problem of the superior order should be very carefully examined because it was the most frequently invoked defence, especially before military tribunals and even at the highest level, as in the case of the former ministers of the Führer. It was natural to invoke an order from a superior in attempting to exonerate oneself, since military discipline required a soldier to be obedient. When a wrongful order was given there were several possibilities: the accused might have obeyed it with full knowledge of its wrongfulness and he would then clearly be liable to prosecution for complicity; but he might also have obeyed the order under coercion or by error. The question thus arose whether a superior order was really an exception, since in some cases it merged with coercion, and in others with error.

42. In the case of coercion, it was obvious that anyone who received a manifestly wrongful order and was not free to choose whether to obey it or not could invoke coercion and, if all the necessary conditions were satisfied, could be found not guilty. Hence the autonomy of the exception known as "superior order" could be called into question. The Nürnberg Tribunal had referred to it in the following terms:

... The true test [for criminal responsibility], which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.¹⁰

It might therefore be asked whether the notion of superior order should be retained. The 1954 draft code provided in article 4:

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does

not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

It must therefore be asked whether it was the order or the coercion accompanying it that constituted the justifying fact.

43. Referring to the relationship between superior order and error, he said that, if the order was not manifestly wrongful, the offender might have carried it out in good faith without knowing that it was wrongful. So if it was accepted that an error had been committed following a previous error, which was the justifying fact? Was it the order or the error?

44. In spite of the duplication involved in the defence of superior order—with that of coercion and that of error—he had devoted a paragraph to it because, according to all the manuals of international law, superior order was the justifying fact. Nevertheless, an examination of the facts showed that a superior order was not in itself a justifying fact. Obeying an order was just as normal as the order itself, in the interests of the proper functioning of an army, for instance. The problem lay, none the less, in the degree of autonomy of the notion of a superior order.

45. As to the official position of the author of the act, it was generally accepted that it could not serve as a justifying fact.

46. He had mentioned reprisals only because, in 1954, the previous Special Rapporteur had strongly defended them, on condition that they were carried out in conformity with international treaties and customary international law. Subsequently, the Commission had come to consider that armed reprisals were contrary to international law. In peacetime they were regarded as aggression, and in wartime as a violation of the laws and customs of war. If the Commission wished to mention reprisals in the code of offences, it would have to specify that, in principle, they were not admissible under contemporary international law.

47. He had not devoted a separate article to self-defence either, because it was provided for in the Charter of the United Nations; he had confined himself to mentioning it in the context of a general principle.

48. On examining the three categories of crimes—offences against the peace and security of mankind, crimes against humanity and war crimes—it would be seen that the exceptions did not apply to each of them in the same way. That was one of the reasons why he had preferred to take up general principles after the Commission had agreed on the definitions of those crimes. It could indeed be seen, first, that crimes against humanity were not subject to any exception, because their motive was racism and the author of such a crime could not invoke an exception since the motive itself was punishable; secondly, that only one exception was admissible in the case of crimes against peace, namely self-defence; and thirdly that, by contrast, war crimes could obviously be committed under coercion, by error or in a state of necessity. The exceptions themselves could, however, be subject to exceptions. He had in mind the case of an intelligence agent, for example, who assumed

¹⁰ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal*. ..., p. 42.

special responsibilities and could not invoke coercion under the same conditions as a simple soldier. Having accepted the responsibilities imposed by his duties, the intelligence agent must endure, as a counterpart, coercion which went beyond what was humanly acceptable.

49. The scope of responsibility fell within a different domain, but if the Commission thought he should deal with it in the draft code he was quite willing to do so. For the time being, however, he had preferred to keep to primary rules.

50. Referring to the draft articles submitted in part V of his report, he said that the question whether offences against the peace and security of mankind should be defined or not had been debated at length in the Commission and in the Sixth Committee of the General Assembly, and he had thought it necessary to submit new definitions, on which it would be for the Commission to pronounce.

51. In the definition of aggression, he had taken account of the criticism voiced at the previous session¹¹ and had deleted all reference to a political organ. In particular, he had deleted everything relating to the Security Council, and the article he proposed took account of the complete independence of the judge in that sphere, into which no political consideration entered.

52. In defining the offences, he had tried not to depart from the existing definitions, especially those in existing conventions, although he had sometimes had to add to the relevant texts new elements connected with the evolution of the situation. He had in mind, in particular, the hijacking of aircraft and acts committed against persons enjoying international protection. He had also endeavoured not to be constrained by individual cases when formulating general principles.

53. Mr. CALERO RODRIGUES said that, since the Special Rapporteur's fourth report (A/CN.4/398) was so comprehensive, the question arose how best to discuss the rich material it contained. The best course would probably be for the Commission to divide the subject-matter for the purposes of debate and he would like to know the Special Rapporteur's views on how that should be done.

54. Sir Ian SINCLAIR said that, in view of the wide range of subjects dealt with in the Special Rapporteur's excellent fourth report, the time available was not sufficient for a discussion in depth of its whole content. He would therefore like to know whether the Special Rapporteur had any suggestions on how to structure the debate. One possibility would be for the Commission to concentrate at the present stage on the general principles in part IV of the report and perhaps also the "other offences" in part III. Part I (crimes against humanity) and part II (war crimes) could be left over until the next session.

55. Mr. FRANCIS said that, in the light of the Commission's debates at previous sessions on some substantive aspects of the topic, and of the strategic role of the general principles in the whole draft, he would suggest that the discussion begin with the general principles.

Certain selected substantive issues could be discussed at the same time.

56. Mr. THIAM (Special Rapporteur) said that he had no objection to the Commission beginning by examining the general principles. He had always said that the final draft would include an introduction and general principles, but that to achieve that result he had to proceed inversely. Now that he was in a position to submit the whole of the draft, however, it mattered little whether consideration of it began with the general principles or with the "other offences".

57. Mr. BALANDA said that, in his view, the Commission could not usefully discuss the general principles until it had completed its consideration of the proposed list of offences, since the principles applied to the offences. The Commission should also be able to pronounce on the whole of the fourth report of the Special Rapporteur and not postpone its decision on part of it until the following session.

58. Mr. CALERO RODRIGUES said that he tended to agree with Mr. Balanda, whose view corresponded to the original scheme of the Special Rapporteur. For his own part, he had no preference as to whether the general principles should be discussed first or second, but he firmly maintained that both the general principles and the first three parts of the report should be dealt with at the present session. Every effort should be made to complete the first stage of the work in the current week, so as to have a full week in which to deal with the second stage.

59. Mr. DÍAZ GONZÁLEZ said it was with the agreement of the Commission itself that the Special Rapporteur had dealt with the offences before taking up the general principles, and he had done so for important reasons. It was necessary to take account not only of the viewpoint which the Special Rapporteur had adopted on the topic, but also of three other entirely valid arguments, namely: the importance of the topic in itself; the importance which the General Assembly had attached to it by considering it separately from the report of the Commission in the Sixth Committee; and the fact that the fourth report of the Special Rapporteur was complete and dealt with matters of substance. The Commission should forget that it would have less time than usual to send the General Assembly a thorough study of the draft code and should endeavour to examine the whole of the fourth report. It should follow the recommendations of the Special Rapporteur and examine the offences before concentrating its attention on the general principles, even if it had to give less time to the other items on its agenda.

60. Mr. FRANCIS explained that he had not proposed that the Commission should discuss the general principles alone, but that it should discuss them together with selected areas of the fourth report. He reminded the Commission that, at the previous session, 16 members had urged the need to include general principles in the draft.

61. The CHAIRMAN asked Mr. Francis whether he wished the Commission to devote the next two weeks to discussing the general principles, together with selected

¹¹ *Yearbook ... 1985*, vol. II (Part Two), p. 16, para. 83.

areas of the fourth report of the Special Rapporteur, and which areas he had in mind.

62. Mr. FRANCIS said that it would be for the Special Rapporteur to select the areas to be discussed with the general principles.

63. Mr. McCAFFREY said that the fourth report of the Special Rapporteur was indeed very comprehensive and his own first reaction had been that, in the time available, it would not be possible to deal in depth with all its aspects. He was inclined to agree that the Commission should proceed to a general discussion of the whole report, devoting, as Mr. Calero Rodrigues had suggested, one week to the general principles and one week to the substantive issues. He had no preference as to which the Commission discussed first. Clearly, the Commission could not make an exhaustive study of the fourth report at the present session. The general discussion it was about to hold should therefore not preclude the possibility of an examination in depth at a later session.

64. Mr. JACOVIDES stressed that the Commission should not hold over any part of the fourth report of the Special Rapporteur until the following session. It should divide the available time in such a way as to devote one week to certain aspects of the report and the other week to the remainder.

65. Sir Ian SINCLAIR said that the order in which the various parts of the fourth report were taken up was not very important. His own marginal preference would be to begin with the general principles, now that the Commission had the whole draft before it. As suggested, however, the general debate could be divided into two parts. During the current week the Commission could deal with parts I, II and III of the report; the following week it could deal with part IV, illustrated by examples taken from the other parts. The Commission would thus be able, at its next session, to examine in greater detail the formulation of the draft articles submitted by the Special Rapporteur.

66. Chief AKINJIDE said that he supported the suggestions made by Sir Ian Sinclair, which appeared to meet with general agreement.

67. Mr. THIAM (Special Rapporteur) proposed that the Commission should first consider war crimes and the "other offences" before passing on, if there was time, to a study of the general principles.

68. Mr. DÍAZ GONZÁLEZ said that he fully agreed with the Special Rapporteur, who had, moreover, never suggested that the Commission should make a detailed examination of each article. The essential need was to study the general trends of the fourth report.

69. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to examine the Special Rapporteur's fourth report (A/CN.4/398) in two stages in a general debate, and not article by article. Parts I, II and III would be examined first, and then part IV, on general principles.

It was so agreed.

The meeting rose at 1 p.m.

1958th MEETING

Tuesday, 3 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacobides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat.

Draft Code of Offences against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I (Crimes against humanity)

PART II (War crimes) *and*

PART III (Other offences)

1. Mr. MALEK congratulated the Special Rapporteur on his fourth report (A/CN.4/398), his brilliant oral introduction and, in particular, the efforts he had made to put an end to the long-standing controversy concerning how much priority should be given to the consideration of the general principles of criminal law that might be included in the draft code.

2. He intended to make some comments on crimes against humanity and war crimes, and more particularly on the definitions thereof, and reserved the right to speak at a later stage on other questions discussed in the report. On a point of detail, he would like the Special Rapporteur to explain why the report dealt with the various questions under consideration in the same order as in the 1954 draft code. In part I, on crimes against humanity, the Special Rapporteur noted (*ibid.*, para. 3) that that term had first appeared in the London Agreement of 8 August 1945 establishing the Nürnberg International Military Tribunal and explained (*ibid.*, para. 5) that crimes against humanity had been defined as offences separate from war crimes in the Nürnberg Charter, in Law No. 10 of the Allied Control Council and in the Charter of the International Military Tribunal for the Far East. In all those instruments, the three categories of crimes appeared in the same order: crimes against peace, war crimes and crimes against

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

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

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

humanity. In 1950, the Commission had followed that order in formulating the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.⁴ The 1954 draft code enumerated the acts constituting offences against the peace and security of mankind without indicating the category in which they fell. The enumeration did not seem to be based on any particular criterion, not even on the seriousness of the act. The Special Rapporteur had therefore been right to propose draft article 10, which drew a distinction between those three categories of offences.

3. Two alternative definitions of war crimes, one general and the other both general and enumerative, were now being proposed to the Commission (draft article 13). In the 1954 draft code, the Commission had spoken of war crimes simply as “acts in violation of the laws or customs of war” (art. 2, para. (12)). Murder and killing were to be defined as acts in violation of criminal law. The Commission had been of the opinion that it was not possible to draw up an exhaustive list of acts constituting violations of the laws and customs of war. Naturally, it had not been unaware of the four Geneva Conventions of 1949, which appeared to list all serious war crimes, but, in its draft, it had wanted all violations of the laws and customs of war, not just serious acts or acts of some gravity, to be categorized as offences. At the present stage in its work, the Commission had taken extreme gravity as the criterion for characterizing an offence against the peace and security of mankind.⁵

4. In his view, the definition of war crimes had to take full account of the four Geneva Conventions of 12 August 1949⁶ and reproduce the relevant provisions. In that connection, he recalled that the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) had replaced the relevant Conventions of 22 August 1864, 6 July 1906 and 27 July 1929; that the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) had replaced Hague Convention X of 18 October 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906; that the Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III) had replaced the Convention of 27 July 1929 and was complementary to Chapter II of the Regulations annexed to Hague Convention II of 29 July 1899 and Hague Convention IV of 18 October 1907 respecting the Laws and Customs of War on Land; and that the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) had supplemented Sections II and III of those Regulations.⁷

5. The list of grave violations referred to in the four Geneva Conventions included many of what were com-

monly known as “war crimes”. In any case, it appeared to cover all the war crimes referred to in the Charter of the Nürnberg Tribunal and in Law No. 10 of the Allied Control Council. War crimes, or at least the most serious, were thus defined by the four Geneva Conventions, which, by 1966, had had binding force for 108 States.

6. In the light of those considerations, he proposed that war crimes should be defined in the following way:

“The following, *inter alia*, shall be regarded as war crimes, in other words as [serious] offences committed in violation of the laws and customs of war:

“(a) any of the following acts, if committed against persons or property protected by the laws and customs of war relative to the amelioration of the condition of the wounded and sick in armed forces in the field and to the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

“(b) any of the following acts, if committed against persons or property protected by the laws and customs of war relative to the treatment of prisoners of war: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed by the laws and customs of war;

“(c) any of the following acts, if committed against persons or property protected by the laws and customs of war relative to the protection of civilian persons in time of war: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer, unlawful confinement, compelling a protected person to serve in the forces of the hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed by the laws and customs of war, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

Consideration might also be given to the possibility of drafting a subparagraph (d) which would refer to the use of nuclear weapons, as mentioned in subparagraph (b) (ii) of the second alternative of draft article 13 (Definition of war crimes) submitted by the Special Rapporteur.

7. Subparagraph (a) of his proposal was based on the enumeration of grave breaches contained in article 50 of Geneva Convention I and in article 51 of Geneva Convention II, which were identical. Subparagraphs (b) and (c) were based on the enumeration of grave breaches contained in article 130 of Geneva Convention III and in article 147 of Geneva Convention IV. The proposed definition thus covered all the acts listed as breaches in the four Geneva Conventions and,

⁴ *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127.

⁵ See 1957th meeting, footnote 6.

⁶ United Nations, *Treaty Series*, vol. 75.

⁷ For the Hague Conventions, see J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1918).

in so doing, implicitly incorporated the law established by those Conventions, the law whereby the provisions on the acts in question would be interpreted and applied.

8. Obviously, opinions might differ about the type of definition that would be appropriate for war crimes and about whether the definition should cover only serious war crimes. Perhaps the wording used in the 1954 draft code would be enough. If it were deemed unnecessary to formulate new definitions, a text simply referring to definitions already recognized in international law might also be enough. It could none the less be argued that there was no point in stating rules or, in the present case, formulating definitions by way of *renvoi* and that it would be better to produce precise and comprehensive definitions. It could even be maintained that the definition of war crimes to be included in the draft code should be designed not to make any distinction between serious crimes and non-serious or less serious crimes. The very fact that an act was regarded as a war crime would mean that it was a serious offence.

9. His proposed definition would obviate such problems, since an illustrative list of specific serious acts was grafted into a general definition that might well not expressly take account of the criterion of seriousness. Hence, the general wording of the first part meant that the definition could reflect the development of international law in that field, while the enumeration gave useful indications on the degree of seriousness, which would play a decisive role in the determination of acts covered by the draft code. The definition he was proposing was, on the whole, identical to that contained in the Charter of the Nürnberg Tribunal, which drew no distinction between serious and non-serious offences. The Commission should bear in mind that the latter definition had been intended to apply to "major war criminals". His own definition applied to all the cases listed in the Nürnberg definition, which had been confirmed by General Assembly resolutions 3 (I), 95 (I) and 170 (II). The list had, moreover, already been universally accepted, since it was based on the Geneva Conventions, which were binding on a very large number of States.

10. With regard to acts constituting crimes against humanity, he proposed the following definition:

"The following shall be regarded as crimes against humanity:

"(a) in general:

inhuman acts, such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities;

"(b) in particular:

"(1) genocide,* namely the following acts committed by the authorities of a State or by private individuals with intent to destroy, in whole or

in part, a national, ethnic, racial or religious group as such:

"(i) killing members of the group;

"(ii) causing serious bodily or mental harm to members of the group;

"(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

"(iv) imposing measures intended to prevent births within the group;

"(v) forcibly transferring children of the group to another group;

"(2) *apartheid*, namely [followed by the text of the definition contained in article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, which was reproduced as the second alternative of the definition of *apartheid* contained in paragraph 2 of draft article 12 submitted by the Special Rapporteur]."

11. The text he was proposing defined crimes against humanity in general and the crimes of genocide and *apartheid*, which were special cases or cases of special gravity. Subparagraph (a) was not identical to the corresponding provision proposed by the Special Rapporteur (art. 12, para. 3), since it was based on the definition contained in the Charter of the Nürnberg Tribunal and developed subsequently by the Commission in the 1954 draft code. Like the two definitions on which it was based, it was both general and enumerative, but not exhaustive. It stated in general terms the characteristics of a crime against humanity and, by way of illustration, listed specific and typical acts falling within the overall category of such crimes. The acts in question, as the Special Rapporteur pointed out in his fourth report (A/CN.4/398, para. 80), could constitute crimes against humanity even if they were committed against fellow countrymen. In the definition appearing in the Charter of the Nürnberg Tribunal (art. 6, para. (c)), the formulation "on political, racial or religious grounds" seemed to relate solely to "persecutions", whereas his own definition was applicable to all the acts concerned. Like the definition in the 1954 draft code and the one proposed by the Special Rapporteur, it removed any doubts in that regard. The feature of crimes against humanity was that they took the form of "persecutions" of a group as such or the form of "murder", "extermination", "enslavement" or "deportation" of any civilian population. The motive for such crimes was that the victims belonged to a particular religion, a particular race, and so on.

12. The proposed definition characterized inhuman acts committed on social, political, racial, religious or cultural grounds as crimes against humanity. Accordingly, although it was identical to the one suggested by the Special Rapporteur, it differed from the definition contained in the Charter of the Nürnberg Tribunal, in which crimes against humanity included inhuman acts committed only on political, racial or religious grounds. It retained the motives listed by the Commission in the 1954 draft code, which implied that there were some inhuman acts which could be committed other than on

* Definition based on articles II and IV of the Convention on the Prevention and Punishment of the Crime of Genocide.

political, racial or religious grounds but still aroused condemnation by the conscience of mankind.

13. His proposed definition, like the one in the 1954 draft code, on which it was based, contained no provision similar to the provision in the Charter of the Nürnberg Tribunal (art. 6, para. (c)) whereby crimes against humanity were regarded as such whether or not they were committed "in violation of the domestic law of the country where perpetrated". Immediately after the Second World War, crimes against peace and war crimes had already been recognized as international crimes, but doubt had still remained with regard to crimes against humanity. In the Charter of the Nürnberg Tribunal, the definition of crimes against humanity was closely bound up with warfare. It characterized crimes against humanity only as inhuman acts committed in connection with crimes against peace or war crimes. Yet legal thinking and the jurists who had examined and clarified the concept of crimes against humanity had been virtually unanimous, since the Nürnberg Tribunal, in recognizing that such crimes should be detached from warfare and should no longer be regarded as a category of offences incidental to crimes against peace and war crimes. Indeed, the Commission had done so in the 1954 draft code. Moreover, that idea had been embodied in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—which came into force in 1951—in which article I stated that genocide "whether committed in time of peace or in time of war" was a crime under international law that the contracting parties undertook to prevent and to punish. It would be useful to mention that idea in the commentary to the definition of crimes against humanity.

14. Subparagraph (b) (1) of his proposed definition of crimes against humanity reproduced in substance the definition of the crime of genocide contained in article II of the 1948 Convention, which was, by and large, also reproduced in the 1954 draft code and in the draft now before the Commission. Subparagraph (b) (2) reproduced the definition of the crime of *apartheid* contained in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*. The opening words of subparagraph (b) underscored the specific character of the crimes defined therein and brought out the fact that they fell within the general category of crimes against humanity. As the Special Rapporteur noted (A/CN.4/398, para. 54), for reasons that were based "on the specific nature of the crime of genocide, the latter should be assigned a separate place among crimes against humanity".

15. In connection with the perpetrators of the crime of genocide, his own definition simply stated, as did article IV of the 1948 Convention, that the crime could be committed either by the authorities of a State, namely Governments or officials, or by private individuals. Unlike subparagraph (a), it did not specify that, in the case of private individuals, it was necessary to establish that they had acted at the instigation or with the toleration of the authorities of a State, for such a condition would call for a change in the 1948 Convention and would be superfluous in view of the nature, scope and dimensions of the crime of genocide. How was it possible to conceive that such a crime could be committed by

individuals without an order from or the toleration of the authorities of a State? On the other hand, independently of, or even against the will of, a State, individuals could commit other inhuman acts capable of being characterized as crimes against humanity. It was in order to prevent all inhuman acts committed by individuals from being regarded as crimes under international law that the Commission had deemed it necessary to indicate, in the 1954 draft code, that an inhuman act committed by an individual constituted a crime under international law only if the individual had acted at the instigation or with the toleration of the authorities of a State (art. 2, para. (11)), a useful clarification that the Commission should retain in any definition of a crime against humanity in general.

16. In his fourth report (A/CN.4/398, para. 23), the Special Rapporteur raised the question of the mass nature of crimes against humanity, in other words the number of perpetrators and the number of victims. The Commission should come to a decision on that point and should not, as it had done in 1954, leave it in abeyance. Regrettably, in draft article 12, dealing with genocide, *apartheid* and inhuman acts, and then serious damage to the environment, the definitions of those crimes did not indicate their constituent elements, although the Special Rapporteur had emphasized in his introductory statement (1957th meeting) the provisional nature of the definitions.

17. In short, crimes against humanity, crimes against peace and war crimes, as the essential subject of punitive international law, should be viewed only in the context of the international agreements in which they were clearly identified, agreements which acted as the point of departure for the development of that law. Only through the three concepts of a crime against peace, a war crime and a crime against humanity was it possible to grasp the meaning of the various offences enumerated in the draft code, and more particularly the most odious offence in the modern world, namely international terrorism.

18. He reserved the right to speak again on other aspects of the fourth report, more particularly the parts on other offences and on general principles.

19. Mr. FLITAN congratulated the Special Rapporteur on his clear and comprehensive fourth report (A/CN.4/398), which contained a wealth of ideas. Part I traced the slow development of the concept of a crime against humanity, which had for a long time been linked with war crimes before it had become autonomous. Needless to say, at the present stage the question had to be treated separately, as the Commission had already agreed. With regard to the "twinning" of crimes against humanity and war crimes, he wondered whether the Commission should not consider concurrent offences that merged war crimes and crimes against humanity, although it might be better to do so in connection with the part of the report concerning general principles.

20. It was clear that the definition of the expression "offences against the peace and security of mankind" should cover only the most serious acts. As Mr. Malek had said, the Commission should decide in connection

with the exact meaning of the term "crime against humanity" whether or not such a crime had to be of a mass nature. In doing so, it would have to be logical and hence should not forget article 19 of part 1 of the draft articles on State responsibility.

21. In the case of crimes against humanity, the first crime on the Special Rapporteur's list was genocide, although it was not expressly mentioned in the 1954 draft code. Without wishing to go further into the exact meaning of "genocide", he thought that the Commission should bear in mind and keep to the existing Convention on the subject. The second crime against humanity, namely *apartheid*, must obviously appear in the list, since it was a very serious offence with consequences for the peace and security of the whole of mankind, not just of those living in the region concerned.

22. In draft article 12, genocide, *apartheid* and serious breaches of international obligations of essential importance for the safeguarding and preservation of the human environment were treated separately from "inhuman acts", which formed the subject of paragraph 3. Yet the former three crimes were also inhuman acts. Consequently, paragraph 3 should speak of "other inhuman acts". Similarly, account should be taken of international instruments which had emerged since 1954, more particularly the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, of 10 December 1976,⁸ before speaking of other serious breaches causing harm to the environment.

23. With reference to war crimes, the Special Rapporteur had, on the problem of terminology, explained (*ibid.*, paras. 69-76) why the concept of war in the traditional sense had been shattered and why a more modern meaning had to be used in the draft by speaking of armed conflicts in the actual definition, if it was not possible to alter the expression "war crimes" used in the title. With regard to the substantive issues, he endorsed the conclusions drawn by the Special Rapporteur (*ibid.*, para. 80). On the question of methodology, the Special Rapporteur described (*ibid.*, paras. 81-88) how difficult it was to draw up an exhaustive list of each and every war crime and to work out the most concise definition possible. In view of those factors, the definition contained in subparagraph (b) of the second alternative of draft article 13 was satisfactory. If the Commission chose the enumerative method, it would necessarily have to mention the use of nuclear weapons among other war crimes. It should take a decision on that point as a body consisting of jurists, acting without regard for any political consideration. As in the case of the Convention of 10 December 1976, it would also have to take account of the Declaration on the Prevention of Nuclear Catastrophe.⁹

24. With regard to part III of the fourth report, the Commission should adopt the extended meaning of complicity in international law (*ibid.*, paras. 106-112). It was essential not only to take action against complicity

by leaders, but also to extend the notion of complicity to concealment, in the light of the two cases mentioned by the Special Rapporteur (*ibid.*, paras. 113-114), and also to membership of an organization and participation in the execution of a common plan (*ibid.*, paras. 115-117). All those matters had to be dealt with in the draft code. In that regard, it would be noted that conspiracy to commit genocide, for example, fell under the Convention on the Prevention and Punishment of the Crime of Genocide.

25. On the subject of attempt, the Special Rapporteur illustrated (*ibid.*, paras. 133-141) the various interpretations of that concept in internal law. There, too, the Commission had to come to a decision, make a choice between the various solutions afforded by internal law and determine the yardstick for attempt. In any event, attempt should not fall outside the scope of the draft code. In some systems of internal law, attempt was not punishable for insufficiently serious offences; but the draft code related to the most serious offences, and accordingly attempt must necessarily be penalized. The matter should be dealt with not in the commentary, but in the actual text of the draft article, on the basis perhaps of the 1954 draft code, so that it would also be possible to mention preparatory acts.

Co-operation with other bodies

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

26. The CHAIRMAN invited Mr. Sen, Observer for the Asian-African Legal Consultative Committee, to address the Commission.

27. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) recalled that, at the Commission's previous session,¹⁰ he had given an account of the Committee's growth and activities and had outlined the gradual shift in the emphasis of its work programme from that of an advisory body on legal issues to one which now covered major areas of international co-operation, including such matters as protection of the environment and the refugee problem. In the process, the Committee had established close links with the United Nations and such co-operation had become the subject of an annual review by the General Assembly since the latter's adoption of resolution 36/38.

28. In the context of that co-operation, the Committee's secretariat had prepared for the fortieth anniversary of the United Nations a paper on the strengthening of the role of the General Assembly by improving its functional modalities.¹¹ As a follow-up, the Committee had established a working group to identify areas in which concrete steps were required in the immediate future; the group was expected to finalize its recommendations in the forthcoming week, with a view to presenting them to the General Assembly at its forty-first ses-

⁸ United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), p. 125.

⁹ General Assembly resolution 36/100 of 9 December 1981.

¹⁰ See *Yearbook ... 1985*, vol. I, pp. 166-167, 1903rd meeting, paras. 12 *et seq.*

¹¹ A/40/726.

sion. Moreover, in 1983, the Committee had made some suggestions for rationalizing the work and functions of the Sixth Committee of the General Assembly, including the modalities for consideration of the work of the Commission.

29. Also in connection with the fortieth anniversary of the United Nations, the Committee had submitted to the General Assembly a document on a possible wider role for the ICJ.¹² It had recommended recourse to the Court by agreement between States parties and use of the Chamber procedure under the new Rules of the Court, in preference to recourse to arbitration.

30. The Committee had, of course, maintained its traditional links with the Commission, links that dated back to 1961 when the Chairman of the Commission at that time had attended the fourth session of the Committee. The co-operation between the two bodies had grown in the context of a provision in the Committee's statute that required it to consider at each of its sessions the work done in the Commission. Many eminent members of the Commission had been active participants and even leaders of their countries' delegations at the Committee's annual sessions, a continuing link between the members of the two bodies over the years that had been extremely fruitful for the work of both the Committee and the Commission.

31. The Committee's deliberations at its regular sessions enabled the representatives of its member States to become better acquainted with the Commission's work, which was invariably included in its agenda; moreover, the programme initiated by the Committee since 1982 had helped to create wider interest in the Commission's work among the developing countries and to facilitate their participation in the Sixth Committee's debates on the Commission's report. Consequently, it was most gratifying that the Commission continued to be represented at each of the Committee's annual sessions and that the Commission had requested Mr. El Rasheed Mohamed Ahmed to attend the Committee's twenty-fifth session, held at Arusha in February 1986.

32. The Arusha session had been an important landmark in the Committee's growth. The participants had discussed a number of issues in the field of international law and other areas of international co-operation. As in previous years, the agenda had included the law of the sea, a branch of law that had first been taken up by the Committee in 1970 and had remained a priority topic throughout the Third United Nations Conference on the Law of the Sea. The Committee had gradually emerged as a useful forum for a continuing dialogue and inter-regional consultations on some of the major aspects of the subject. Since the adoption of the United Nations Convention on the Law of the Sea in 1982, the Committee had been asked to study selected matters relating to practical application of the Convention: delimitation of the exclusive economic zone and the continental shelf, the right of transit for land-locked States, determination of the allowable catch in the exclusive economic zone and questions relating to the Preparatory Commission for the International Sea-Bed Authority. A study had also been requested on the question of historic bays and

historic waters, with special reference to the Gulf of Sirte. In regard to the question of delimitation, the Committee's secretariat had been requested to monitor developments by examining the general principles of international law, State practice and judicial decisions, and in connection with the right of access of land-locked States, to examine the bilateral, subregional or regional agreements concerning the exercise of freedom of transit in the region. It had also been asked to prepare a further study on the determination of the allowable catch and was instructed to provide assistance, if so requested, to interested Governments in the conduct of negotiations between land-locked States and neighbouring coastal States on the exploitation of the living resources of the exclusive economic zone.

33. Another important topic discussed at the Arusha session was the concept of a peace zone in international law and its framework. The Committee's study in that regard was aimed at focusing attention on the efforts made within the United Nations on such matters as the elimination of foreign military bases in Asia, Africa and Latin America, the Declaration of the Indian Ocean as a zone of peace,¹³ the initiatives to declare the Mediterranean as a zone of peace and also matters concerning the nuclear-free zones in Latin America, Africa, the Middle East, South Asia and the South Pacific. Reference had also been made to the Treaty of Tlatelolco.¹⁴

34. Another topic discussed at the same session was the status and treatment of refugees, particularly in the context of the applicability of the principle of burden-sharing and the doctrine of State responsibility. The subject of refugees had been considered by the Committee in its early years and, in 1966, it had adopted a set of principles known as the Bangkok Principles. The topic had been reintroduced at the request of the United Nations High Commissioner for Refugees for the purpose of supplementing the Bangkok Principles in the light of new developments. A set of principles, primarily on the question of burden-sharing, would be considered by the Committee at its next session. Some member Governments had also called for a study of the doctrine of State responsibility in the context of refugee problems and of matters concerning safety zones for displaced persons in the country of origin.

35. Other questions dealt with at the same session had included mutual co-operation on judicial assistance, the debt burden of developing countries, environmental protection and the nuclear-free zone in Africa, and the framework for joint ventures in the industrial sector. As usual, the report of the Commission had been before the Committee. Two of the topics dealt with by the Commission at its thirty-seventh session were of particular concern to the Committee's member countries, namely jurisdictional immunities of States, and international watercourses, both of which had been taken up as substantive items on the Committee's agenda.

36. The question of the jurisdictional immunities of States had first been considered at a meeting of the Legal Advisers of the Committee's member States in

¹² General Assembly resolution 2832 (XXVI) of 16 December 1971.

¹⁴ Treaty for the Prohibition of Nuclear Weapons in Latin America (United Nations, *Treaty Series*, vol. 634, p. 281).

¹³ A/40/682.

November 1983 in the light of the concern about the interpretation and application of the United States *Foreign Sovereign Immunities Act of 1976*.¹⁵ At the time, the Legal Advisers had taken the view that the Committee should await the final outcome of the work of the Commission before making any recommendation. At its 1985 session, however, the Committee had decided to examine the matter at the earliest possible opportunity. The two main concerns of its member Governments were, first, the extent to which a country's courts could exercise jurisdiction over foreign Governments or governmental agencies in respect of transactions which were to be performed chiefly outside the country, and secondly, the question whether the term "commercial transaction" could be taken to include cases in which the purpose of the transaction was directly bound up with the exercise of governmental functions.

37. 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. At some stage, it might prove necessary for Governments to decide on a firm policy and enact legislation or issue rules on the matter, instead of leaving it to the judicial branch to decide in each case. In that respect, the Commission's work would be of immense assistance, regardless of whether a convention ultimately emerged from the draft articles, which were, by and large, a balanced compromise formula and afforded a sound basis for those engaged in drafting national legislation.

38. The Committee had taken up the topic of international watercourses as early as 1967, but had suspended work on it in 1973, because it had been included in the Commission's agenda. At its 1983 session, the Committee had decided to place the item on its agenda again, but even then the majority of the members had thought it better to await the final recommendations of the Commission. He therefore sincerely hoped that the Commission would complete its work on the topic in the near future.

39. Since he would shortly be relinquishing his duties as Secretary-General of the Committee, he wished to express his gratitude to the Chairman, previous chairmen, officers and members of the Commission, and to the Secretary of the Commission, for all the co-operation extended to the Committee for so many years. It had been for him a unique and most rewarding experience to promote the continuing and close co-operation between the two bodies and he hoped that the relationship between the Commission and the Committee would continue to grow and prosper.

40. The CHAIRMAN thanked Mr. Sen for the interesting information he had provided on the role and activities of the Asian-African Legal Consultative Committee and on the outcome of the Committee's session at Arusha. The initiatives by the Committee to strengthen still further the ties of co-operation with the United Nations were most gratifying. The active collaboration between the Committee and the Commission

on such matters as the jurisdictional immunities of States and the situation of refugees viewed from the standpoint of the doctrine of State responsibility could not fail to be beneficial to the progressive development and codification of international law.

41. Sir Ian SINCLAIR said that he had had the privilege of attending two sessions of the Asian-African Legal Consultative Committee as the Observer for the United Kingdom Government. As someone familiar with its work, he could testify to the thoroughness and ability with which the Committee considered the topics that came before it. Mr. Sen had played a paramount role in the Committee's achievements and he wished to pay a warm and sincere tribute to him on the occasion of his retirement from the office of Secretary-General. At the same time, he wished the Committee itself every success in its work on issues which were so closely related to the topics on the Commission's own agenda.

42. Mr. SUCHARITKUL said that he was one of the longest-standing members of the Asian-African Legal Consultative Committee and could affirm that the devoted work of Mr. Sen had played a very important part in the extraordinary growth of the Committee, from a body with a very small membership in the early years to one that was now a very great undertaking.

43. Chief AKINJIDE said that he wished to join in the tributes paid to Mr. Sen, with whom he had been privileged to work for four years. It was interesting to note that the Asian-African Legal Consultative Committee was considering the grave question of the debt burden of the developing countries. Asia and Africa included some of the poorest nations in the world, but also some of the richest. It was to be hoped that a more equitable distribution of wealth would be achieved some day. He expressed the hope that the Committee's work would help in finding an acceptable solution to the very serious problem of the debt burden of the developing countries.

The meeting rose at 12.40 p.m.

1959th MEETING

Wednesday, 4 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat.

¹⁵ See 1944th meeting, footnote 5.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

PART I (Crimes against humanity)

PART II (War crimes) and

PART III (Other offences) (continued)

1. Mr. FRANCIS congratulated the Special Rapporteur on his fourth report (A/CN.4/398). He noted that, in his oral introduction (1957th meeting), the Special Rapporteur had said that the draft articles did not indicate that the list of acts specified as aggression in the Definition of Aggression adopted by the General Assembly⁴ was not exhaustive and that the Security Council might determine that other acts constituted aggression under the provisions of the Charter of the United Nations. Since article 4 of the Definition was quite explicit on both those points, they should be reflected in the draft so as to avoid any suggestion that the Commission was in any way proposing an amendment to the Definition.

2. He agreed with the Special Rapporteur's assertions in his report that crimes against humanity could be committed independently of any armed conflict (A/CN.4/398, para. 11) and that the term "humanity" meant the human race as a whole and in its various individual and collective manifestations (*ibid.*, para. 15), which implied that attacks on individuals could, in certain circumstances, constitute crimes against humanity.

3. With regard to the mass element of crimes against humanity, he noted that paragraph 3 (c) of article 19 of part I of the draft articles on State responsibility referred to "a serious breach on a widespread scale of an international obligation". That was in reference to States, however, whereas in the draft code the Commission was, for the time being, concerned with acts by individuals and must be careful not to over-extend the notion of the mass element.

4. In the Convention on the Prevention and Punishment of the Crime of Genocide, that crime was defined in article II as an act committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". But the report indicated (*ibid.*, paras. 35-42) that certain single acts committed simultaneously in different locations by different persons, or by one individual at different times, could be construed as genocide if they constituted a pattern of acts directed against a specific group. Moreover, the report stated

(*ibid.*, para. 44) that the Supreme Court of the British Zone had held that the mass element was not essential to the legal definition of a crime against humanity, which could consist of a single isolated act.

5. A similar view could be taken with regard to *apartheid*. It was true that paragraph 3 (c) of article 19 of part I of the draft articles on State responsibility defined *apartheid* as a serious breach of an international obligation on a widespread scale. But since the main object of *apartheid* was the repression of a particular group, any single act of *apartheid* by an individual within the framework of that general object should also be regarded as an offence against the peace and security of mankind. The draft code should make provision for such single instances.

6. In the 1954 draft code, a distinction was drawn in article 2 between acts falling under the heading of genocide, listed in paragraph (10), and other inhuman acts such as murder, extermination, enslavement and deportation, listed in paragraph (11). In his view, that distinction had been made, first, to preserve the identity of the Convention on genocide as an instrument in itself, without impairing its content; secondly, to draw as much as possible on Principle VI (c) (Crimes against humanity) of the Nürnberg Principles;⁵ and thirdly, to cover as many of the core elements of *apartheid* as possible. The Special Rapporteur considered (*ibid.*, para. 54) that the crime of genocide should be assigned a separate place among crimes against humanity.

7. During the Commission's general discussion, it had been suggested that slavery should also be included in the draft code. There were many reasons for that. For instance, article 19 of part I of the draft articles on State responsibility referred to slavery, in paragraph 3 (c); Principle VI (c) qualified enslavement as a crime against humanity; and article 2, paragraph (11), of the 1954 draft code listed enslavement as an inhuman act. Slavery was therefore recognized as a reality.

8. He agreed that offences involving serious damage to the environment and the offences of complicity, conspiracy and attempt should be included in the draft code.

9. Mr. SUCHARITKUL, commenting on the meaning of the word *humanité* and the word *crime* in the expression *crime contre la paix et la sécurité de l'humanité* (offence against the peace and security of mankind), said that the Special Rapporteur noted in his fourth report (A/CN.4/398, para. 12) three meanings given to the word *humanité*: that of culture, that of philanthropy and that of human dignity. But there was a fourth meaning: the word *humanité* also meant the "human race" or, in other words, "man" as a biological phenomenon whose integrity had to be safeguarded. Any criminal act against any member of the human race constituted a crime against humanity, and the principle of respect for human integrity should be established in the draft code.

10. The word *crime* might cause difficulties. The Special Rapporteur pointed out (*ibid.*, para. 16) that, in internal law, it referred to the most serious offences,

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

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

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

⁴ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

⁵ See 1958th meeting, footnote 4.

both in the three-tier division (petty, correctional and criminal offences) and in the two-tier division (correctional and criminal offences). However, the method of classifying offences differed from one legal system to another, and in common-law systems, for example, the term "crime", which had much the same meaning as "criminal offence", designated offences of differing degrees of seriousness (misdemeanours, felonies, etc.). Moreover, in international criminal law, at least where extradition was concerned, the word "offence" (*délit*) was more or less synonymous with the word "crime"; it was practically a generic term. The terms "crimes" and "delicts" used in the expression "international crimes and international delicts" in article 19 of part 1 of the draft articles on State responsibility were rather surprising, since in internal law the distinction between a "crime" and a "delict" made sense only with respect to the two-tier division of offences; but article 19 was drafted from the viewpoint of international law, in which the terms "international crime" and "international delict" were two entirely separate concepts.

11. He agreed with the order in which the Special Rapporteur had classified offences against the peace and security of mankind. With regard to crimes against peace, which came first, it might well be asked whether, in the light of recent events such as the seizure by terrorists of the Italian cruise ship *Achille Lauro* (October 1985), it should not be expressly mentioned that terrorist acts included "piracy on the high seas" or "the seizure of ships". The latter expression would probably be preferable to the former, because it avoided the term "piracy", which had been defined in article 101 (a) of the 1982 United Nations Convention on the Law of the Sea as an act "committed for private ends".

12. He saw no reason why the category of crimes against humanity should not include genocide, *apartheid* and inhuman acts, which were all serious offences. He was also in favour of the Special Rapporteur's method of combining definitions with limitative and non-limitative enumerations, as appropriate.

13. Although it was difficult to assess the extent of damage to the environment, he agreed in principle that it could endanger the peace and security of mankind.

14. In the term "war crimes", the word "war", which was already used in the sense of non-international armed conflict in such expressions as "civil war" and "revolutionary war", should not cause any difficulty.

15. As to the "other offences", he approved of the way in which the Special Rapporteur had analysed the concept of complicity, dealing with the complicity of leaders, complicity and concealment, and complicity and membership in a group or organization. He would revert to the question of other offences which might involve the attribution of responsibility at a later stage in the discussion, when he would comment on the general principles. In the mean time, he would only draw the Commission's attention to the fact that, in common-law systems, a conspiracy was not necessarily criminal.

16. Mr. CALERO RODRIGUES congratulated the Special Rapporteur on his fourth report (A/CN.4/398), which he considered one of the best ever submitted to the Commission.

17. Generally speaking, he had always maintained that, as a legal instrument, the code of offences against the peace and security of mankind should expressly identify the offences, the penalties and the competent tribunal, for a list of offences alone would be useful only for political purposes. It would certainly be difficult to achieve that object, because it was doubtful whether States would be prepared to accept an international criminal jurisdiction and it would be difficult for national courts to apply an international code, given the differences between legal systems and the penalties they prescribed. The English title of the code should be changed from "Code of Offences" to "Code of Crimes", to show that it was concerned with only the most serious offences against the peace and security of mankind. Also, since it was to be a criminal code and one of the few instruments of true international criminal law, every crime should be defined precisely as an act, rather than as a situation. That was what the Special Rapporteur had tried to do, and he had largely succeeded in drafting the code as an instrument of criminal law.

18. He agreed with Mr. Sucharitkul on the usefulness of the three-tier division of offences adopted by the Special Rapporteur, although he was not sure that it needed to be stated explicitly in an article of the code. That division would nevertheless be useful, since, in any criminal code, crimes were listed according to their nature, and the original concept of offences against the peace and security of mankind had been arrived at only gradually. Such a classification would therefore be helpful in drafting the code.

19. In his report (*ibid.*, para. 74), the Special Rapporteur raised the question whether the term "war" should not be replaced by the term "armed conflict". "War crimes" were a clearly defined and well-known category of crimes in international law and were traditionally defined as violations of the "laws and customs of war"—a concept currently applied in general to "armed conflicts", as shown by the 1977 Additional Protocols⁶ to the 1949 Geneva Conventions. Consequently, war crimes could be committed in armed conflicts, whether or not such conflicts were regarded as wars in the traditional legal sense. While that should be made clear in the code, there was no need to forgo the traditional denomination "war crimes". After all, what had changed was not the concept of war crimes, but the concept of war.

20. With regard to methodology, the Special Rapporteur raised the question (*ibid.*, para. 81) whether the best way of indicating what constituted a war crime was by a general definition or by an enumeration. A general definition would seem preferable. In the 1954 draft code, war crimes were defined generally as "acts in violation of the laws or customs of war" (art. 2, para. (12)). That was the basic idea, but the code should make it clear that only the most serious acts were to be regarded as war crimes. That idea was already contained

⁶ Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

in the 1949 Geneva Conventions, which drew a distinction between “breaches” and “grave breaches”. The grave breaches could be said to constitute war crimes. No reference should be made in the code to any particular international instrument, since an enumeration of the acts constituting war crimes on the basis of existing conventions would automatically exclude from the scope of the code any new laws or prohibitions relating to the conduct of war. The use of a general definition such as “grave breaches”, on the other hand, would maintain a degree of flexibility and automatically include new prohibitions.

21. Historically, the concept of “crimes against humanity” had developed from that of war crimes, but it had subsequently acquired an independent character. He agreed with the Special Rapporteur (A/CN.4/398, para. 11) that: “Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any such conflict.” The definition of such crimes was not easy. If “war crimes” were violations of the laws and customs of war, it might be tempting to define crimes against humanity as violations of the laws of humanity. But what were those laws? No matter how appalling conduct contrary to those laws might be, it would seem impossible to transfer to the sphere of international law the idea that such crimes were to be punished internationally. The definition of crimes against humanity should be sought in the concept of *lèse-humanité*, which he understood as meaning acts that were not only abhorrent in themselves, but constituted a threat to the security of humanity in the widest sense of the term. An isolated act of cruelty might be simply repulsive to the human conscience and, as such, should be punished under internal law; but the same act might be indicative of a wider design which could indeed jeopardize the security of mankind.

22. Genocide was a typical example of a crime against humanity. It was not necessary to destroy a national, ethnic, racial or religious group in its entirety; the intention to destroy the group “in whole or in part” was enough. Even causing serious mental harm to members of the group was an act of genocide, as was killing some of its members, whether in a cruel or a “civilized” way. Genocide was so typically a crime against humanity that, in 1948, Georges Scelle had equated the two ideas. *Apartheid*, as defined in the 1973 Convention, also fell into that category. The Convention defined as crimes “acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them” (art. II).

23. Those two well-defined crimes, genocide and *apartheid*, provided the elements which could be generalized to establish what constituted a crime against humanity. The solution suggested by the Special Rapporteur in his report (A/CN.4/398, paras. 60-63) and in draft article 12, paragraph 3, provided a sound basis, but needed some refinement.

24. While the definition of serious damage to the environment as a crime against humanity set out in the report (*ibid.*, para. 66) was generally acceptable, further

clarification was needed. The question when a breach of an obligation of essential importance constituted a crime against humanity called for very careful consideration if it was not to give rise to a wider and unacceptable interpretation.

25. Acts of terrorism might be better dealt with as crimes against humanity than as crimes against peace, since they did not affect peace as such, but could threaten the security of mankind as a whole.

The meeting rose at 11.15 a.m.

1960th MEETING

Thursday, 5 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat.

Draft Code of Offences against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I (Crimes against humanity)

PART II (War crimes) *and*

PART III (Other offences) (*continued*)

1. Mr. CALERO RODRIGUES, continuing the statement he had begun at the previous meeting, said that the thorough analysis of the concepts of complicity, conspiracy and attempt in part III of the fourth report (A/CN.4/398) had led the Special Rapporteur to suggest in draft article 14 three separate offences: first, conspiracy (*complot*), which, in the second alternative proposed by the Special Rapporteur, was defined as “participation in an agreement with a view to the commis-

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

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

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

sion of an offence against the peace and security of mankind"; secondly, complicity, defined as "any act of participation prior to or subsequent to the offence, intended either to provoke or facilitate it or to obstruct the prosecution of the perpetrators"; and thirdly, "attempts to commit any of the offences defined in the present Code".

2. Conspiracy, as understood in the common-law countries, was close to but not similar to *complot*. It was, as the Special Rapporteur indicated (*ibid.*, para. 121), an agreement to commit a criminal act and was punishable even if the act had not been committed and even if there had been no commencement of execution. It was very difficult to apply the concept of conspiracy in international law and, indeed, in any system of law outside the common law. It was significant that the Nürnberg Tribunal had accepted the charge of conspiracy only for crimes against peace and had considered that it did not "add a new and separate crime to those already listed".⁴ The Tribunal had not applied the notion of conspiracy either to war crimes or to crimes against humanity. The Special Rapporteur himself had suggested as the second alternative of section A of draft article 14, as an alternative to conspiracy, "participation in an agreement" to commit an offence. Personally, he would favour the adoption of that formula, but without singling out conspiracy as such: the idea of participation could be included in the concept of complicity, which would be broadened in order to cover it.

3. With regard to complicity as defined in draft article 14, section B, he noted the various elements of complicity indicated by the Special Rapporteur (*ibid.*, para. 131), such as instigation, aiding, abetting, order and consent, and suggested that a reference to them should be included in the commentary. The notion of participation subsequent to the offence, which was embodied in article 14, section B (b), in connection with complicity, would prove difficult to introduce into international law. It was unknown to many national criminal codes. Hence he would accept a broad definition of complicity, provided it excluded complicity *ex post facto*.

4. In the matter of attempt, the Special Rapporteur made some interesting comments on the "path of the crime" (*ibid.*, para. 134), which comprised four successive stages: the project phase, the preparatory phase, the commencement of execution and, lastly, the actual commission of the crime. Attempt was thus already a part of the commission of a crime. It involved acts actually linked to the commission, and not just to the preparation of a crime. As stated in article 14 of the Brazilian Criminal Code:⁵

The crime is:

I—completed, when all the elements of its legal definition are present;

II—attempted, when, the execution having commenced, the crime is not completed due to circumstances beyond the will of the perpetrator.

5. Since attempt was not a separate offence, but the commencement of execution and therefore part of the

crime, it was difficult to see how it belonged among "other offences", as suggested by the Special Rapporteur. For his own part, he had serious doubts about the need to devote a part of the code to "other offences". Attempt was part of the crime, and complicity was a matter of attribution of responsibility to different persons. In both cases, there was only one crime. He therefore suggested that the provisions on attempt and complicity should be included in the general principles, and that conspiracy as such should be excluded from the draft and covered by the broad concept of complicity.

6. Lastly, the examples taken by the Special Rapporteur from the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, paras. 131 and 145) were not convincing. Article III of the Convention stated:

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

It was understandable that the Convention on genocide should make those references to attempt and to complicity, for it did not contain any general provisions. The formula used in article III was the only way of stating that complicity in genocide and attempts to commit genocide were punishable.

7. Sir Ian SINCLAIR said that crimes against humanity, the subject-matter of part I of the report (A/CN.4/398), constituted a category whose content was particularly difficult to determine. The concept had originally been closely linked with that of war crimes and with crimes against peace. The Commission itself, in its formulation of the Nürnberg Principles in 1950,⁶ had defined crimes against humanity by reference to such acts as murder, extermination, enslavement and deportation and had specifically required that "such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime" (Principle VI (c)).

8. He none the less agreed with the Special Rapporteur (A/CN.4/398, para. 11) that the concept of crimes against humanity had now become effectively autonomous in law and was no longer indissolubly linked with war crimes or crimes against peace. It was also true, as the Special Rapporteur said (*ibid.*), that the content of the concept had to be defined, since the area was one which lent itself to inflated language.

9. On the question of terminology and the meaning of "crime" in the expression "crimes against humanity", he would point out that the differentiation of criminal offences according to their seriousness was a feature of most internal law systems. Nevertheless, the way in which the differentiation was made depended on the particular legal system involved. Since reference had been made in the course of the debate to the distinction between the English terms "felony" and "misde-

⁴ See 1957th meeting, footnote 8.

⁵ Amended by Law No. 7,209 of 11 July 1984; see Brazil, *Coleção das Leis de 1984*, vol. V (Brasília, 1984), p. 41.

⁶ See 1958th meeting, footnote 4.

meanour”, he drew attention to the fact that that distinction had been abolished in English law in 1967 and had been replaced by a parallel distinction between arrestable and non-arrestable offences—the former being very serious offences for which the alleged offender could be arrested without a warrant. Members should therefore avoid transposing to the draft code the distinctions drawn in their own national legal systems, since they were bound up with the historical development of the internal law concerned.

10. A key issue with regard to crimes against humanity was whether they must of necessity be mass crimes. In the 1954 draft code, the Commission had considered that a certain mass element was an essential feature of crimes against humanity, as was apparent from article 2, paragraph (10), which referred to acts committed with intent to destroy “a national, ethnic, racial or religious group as such”. Similarly, article 2, paragraph (11), spoke of “inhuman acts ... committed against any civilian population”. Those references to a “group” and a “civilian population” showed that something more than acts directed against an individual was required.

11. Since the concept of crimes against humanity was being treated as an autonomous concept detached from war crimes and crimes against peace it was important for its content to be related not to acts directed against an individual, but to multiple acts directed against a group or a people. Otherwise, the result would be to create confusion between common crimes and crimes against humanity. In many societies, individual crimes were sometimes motivated by racial or religious hatred: they had to be prosecuted under the ordinary criminal law of the State concerned and the proven motivation could be reflected in the severity of the penalty. For those reasons, he was firmly of the view taken by the Legal Committee of the United Nations War Crimes Commission that isolated offences against individuals “did not fall within the notion of crimes against humanity” (*ibid.*, para. 33).

12. The crime of genocide should certainly be included in the draft code and it was desirable to keep as close as possible to the relevant provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. On the other hand, he would prefer not to use the actual term “genocide”, but simply list the various acts which constituted that crime. He also thought it better to retain the separate notion of “inhuman acts” set forth in article 2, paragraph (11), of the 1954 draft code.

13. As for singling out *apartheid* as a separate crime against humanity, he had some reservations regarding the formulation to be used. Clearly, certain acts committed in pursuance of the policy of *apartheid* were so inhuman as to warrant mention in the draft code, but there was some problem of overlapping. Some of the acts committed in pursuance of the policy of *apartheid* could well constitute “inhuman acts” or even acts of genocide.

14. Accordingly, he suggested that the Commission should elaborate a definition of acts constituting genocide, followed by a definition of the more general

concept of “inhuman acts”; then, without prejudice to the generality of those definitions, it would single out as separate crimes against humanity certain acts that were peculiar to the policy of *apartheid* and might not otherwise be covered by the definition of genocide and that of inhuman acts.

15. The 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* had not been widely ratified outside the continent of Africa and it was therefore necessary to elaborate provisions that were more widely acceptable. In that regard, careful consideration should be given to the second alternative submitted by the Special Rapporteur for the definition of the crime of *apartheid* in draft article 12, paragraph 2, so as to extract certain elements that were inherent in the practice of *apartheid* and distinguishable from “inhuman acts”. His own preliminary view was that the Commission might initially concentrate on some of the elements suggested in subparagraphs (c) and (d) of the second alternative, which set out some of the more significant features of *apartheid*.

16. Unfortunately, the denial of basic human rights and freedoms to members of a racial group or groups was not a unique feature of the one country that practised *apartheid*. A formulation should therefore be found to indicate that racial segregation practised on such a scale and as a deliberate policy, as was the case with *apartheid*, constituted a specific crime against humanity. The task would not be easy, but it would not be made any easier by using a form of language open to the criticism that it applied equally well to policies practised in other countries.

17. Despite his great concern for the preservation of the human environment, he had serious reservations about including breaches of relevant international obligations in the list of crimes against humanity. In that connection, it was pointless to invoke article 19 of part I of the draft articles on State responsibility, which was concerned exclusively with establishing an aggravated degree of international responsibility for what the Commission had unfortunately termed “international crimes”. The “international crimes” in question were simply internationally wrongful acts for which the author State had an aggravated international responsibility. They had nothing to do with international crimes proper, for which individuals incurred criminal liability. An individual could not possibly commit a breach of an international obligation regarding the environment that was incumbent upon a State; he could do so only in circumstances such that the act of the individual could be imputed to the State.

18. Again, it was disturbing that terrorist acts were included in the draft code only under the heading of crimes against peace. The only acts covered in draft article 11, paragraph 4, were those committed pursuant to a policy of State-sponsored or State-directed terrorism, doubtless an important aspect of terrorism; but terrorist acts, even where it could not be established that they were State-sponsored or State-directed, constituted crimes against humanity. Consequently, they should be included among the crimes in that category. Terrorism would thus figure in two categories, namely crimes

against peace and crimes against humanity, and the category invoked for the purpose of applying the code would depend on whether or not the act was State-sponsored or State-directed.

19. On the subject of war crimes, he agreed with Mr. Calero Rodrigues (1959th meeting) that it was desirable to retain the familiar expression "war crimes", yet clarify that it also covered crimes committed in the course of an armed conflict which did not constitute a "war" in the strict sense of the word. As to the choice between a general or a detailed definition, he would prefer a detailed definition along the lines suggested by Mr. Malek (1958th meeting, para. 6). A detailed definition need not, of course, be exhaustive: a general formula could be adopted, followed by an illustrative enumeration. It was essential, however, to confine war crimes to "grave breaches" of the laws and customs of war and hence to cover only the most serious offences capable of being classified as offences against the peace and security of mankind.

20. He disagreed with Mr. Flitan's suggestion (1958th meeting) that the use of nuclear weapons should be included among war crimes. The Commission had already discussed that question at previous sessions. Certainly, everyone hoped that disarmament negotiations would result in an agreement whereby the threat of the use of nuclear weapons would be reduced, if not eliminated entirely. Nevertheless, he could not agree that the use, or *a fortiori* the first use, of nuclear weapons should be characterized as a war crime. The solution to that problem could only be sought through disarmament negotiations leading to a balanced reduction or elimination of such weapons. The Commission had to be realistic about a problem which, as the Special Rapporteur recognized (1957th meeting), was essentially political. It should not be diverted from its task by proposals which stood no chance of achieving consensus in the Commission, and still less in the General Assembly.

21. On the question of "other offences", it was plain that the Commission could not accept a solution derived from a particular legal system. Moreover, he did not believe that the wider notions of complicity and conspiracy could apply equally to all the crimes in the draft code. A distinction might have to be drawn between, on the one hand, crimes against peace and crimes against humanity, for which the broader notions of complicity and conspiracy might be appropriate if the list of crimes was carefully limited, and, on the other hand, war crimes, to which less extensive notions of complicity and conspiracy could apply.

22. In that connection, it was significant that, notwithstanding the very broad terms of its Charter, the Nürnberg Tribunal had limited to crimes against peace the application of the notion of "accomplices participating in the formulation or execution of a common plan or conspiracy" (article 6, last paragraph, of the Charter). In that context, article III of the Convention on genocide included "conspiracy to commit genocide", "complicity in genocide" and "attempt to commit genocide" as punishable acts. Indeed, it went further by declaring that "direct and public incitement to commit genocide" was punishable. All that would have to be taken into account, so as to avoid anything

which might seem to limit the scope of the Convention on genocide.

23. He welcomed the careful conclusions reached by the Special Rapporteur on the matter (A/CN.4/398, para. 131), with perhaps the reservation that the extended notions of complicity and conspiracy should apply to crimes against peace and possibly to crimes against humanity, depending upon the list of crimes to be included under those headings, but not necessarily to war crimes, for which a more limited concept of complicity seemed in principle to be required.

24. Very careful consideration would have to be given to the various crimes to be included under each of the three headings before determining what degree of participation in each particular crime—whether by way of complicity or otherwise—would be appropriate. The mental element would be crucial. In the list of offences suggested by the Special Rapporteur, more emphasis would have to be placed on the requirement that the perpetrator of the offence must have had criminal intent or must at least have acted recklessly or in wilful disregard of the consequences of his act or omission. The necessary *mens rea* could be presumed in certain cases because of the nature of the particular offence, but that would not be so in other instances. Finally, he reserved the right to speak on part IV of the report at a later stage.

25. Mr. BALANDA congratulated the Special Rapporteur on his excellent fourth report (A/CN.4/398) and said that he would make some general comments before dealing with the report itself.

26. With reference to Mr. Sucharitkul's point at the previous meeting about the importance of the use of terms in international law, autonomy was something that international law necessarily had to acquire because it did not have its own terminology. It had to borrow terms and therefore had in some way to keep them at a distance. Almost inevitably, the Commission would have to define certain concepts in the draft code on the basis of terms used in internal law, or rather in different systems of internal law. Hence those concepts should be given a specific content because they did not reflect the same concerns as those expressed in the internal law of States. For example, the concept of "conspiracy" was not always easy to understand because, in some States, it included intent, while in others it included acts committed concomitantly with, prior to and after the principal offence.

27. Secondly, when the General Assembly had invited the Commission to study the present topic, it had been prompted by concerns caused by the Second World War. Consequently, the Commission could not simply submit a list of punishable acts without prescribing penalties and, needless to say, without machinery for enforcement, in which connection there could either be an international tribunal or each State could be left to find the best way of enforcing the penalties. Nevertheless, the time had not yet come for a decision on the matter. The important thing was to take deterrent measures so that anyone who committed an act covered by the code would know that he would be liable to punishment.

28. Thirdly, the Special Rapporteur had done an enormous amount of research on comparative law, but unfortunately had not taken account of the African, Latin-American and Asian legal systems in dealing with "other offences". Yet the third world countries, whether they followed the common-law system or the written-law system, had all established their own means of combating crime. The Special Rapporteur should therefore broaden his study by focusing on the law of those countries, which would not fail to give him ideas to help complete his work.

29. In his view, the question of offences that were linked to another offence through criminal participation should be dealt with as part of the general principles, in connection with which the Commission would have to decide whether or not the theory of criminal participation should be recognized.

30. As to the report itself, he agreed with the Special Rapporteur that there should be three categories of offences and that account should be taken only of the most serious acts. With regard to crimes against humanity, the Special Rapporteur rightly suggested that the original context of the 1954 draft code should be left aside in order to do away with the historical background and select only acts designed to destroy individual human beings and, ultimately, the entire human race. How then should a crime against humanity be defined, having regard to the definition proposed for an offence against the peace and security of mankind? Referring to subparagraphs (b) and (c) of the first alternative of draft article 3 submitted in the third report (A/CN.4/387, chap. III), he pointed out that "safeguarding the right of self-determination of peoples" and "safeguarding the human being" were virtually the same thing, and therefore the exact difference between offences against the peace and security of mankind and crimes against humanity was not very clear. Just as some elements of the definitions in question were bound to overlap, so some war crimes could also be crimes against humanity. Because of such overlapping, a clear distinction could not be drawn between those concepts.

31. The Special Rapporteur had also been right to exclude the mass element from the definition of a crime against humanity, even though it had been included in article 19 of part 1 of the draft articles on State responsibility, adopted by the Commission on first reading. In view of the particular conception of crimes against humanity as acts endangering the human race as such, there was no need to decide whether isolated or mass acts were involved. If the Commission's concern was for efficiency, it would, in order to punish any act harmful to the human race, have to include any isolated act that would affect the human race through a single individual or several members of a group. Consequently, when it came to consider article 19 on second reading, the Commission would, in the light of the relationship between the topic of State responsibility and the draft code, have to delete the words "on a widespread scale", which had been provisionally retained in paragraph 3 (c).

32. The Special Rapporteur had also drawn attention in his fourth report (A/CN.4/398, para. 25), in connection with crimes against humanity, to the importance of motive, which would shed some light on that category

of crimes. Although he himself did not deny that intent to exterminate human beings by reason of their race, ethnic group or nationality did play a role, he did not think that intent could be a constituent element of a crime against humanity unless it was linked to a material element.

33. The act and the motive had to be taken into account. With regard to the ethnic, racial or national factors behind ill-treatment and persecution of persons belonging to a particular community, he had some doubts about the distinction drawn by the Special Rapporteur between the ethnic bond and the racial element (*ibid.*, para. 58). He was not an anthropologist, an ethnologist or a sociologist, but it seemed to be apparent from the research work done by experts in the field that the ethnic bond was not without a physiological element. The Commission therefore had to take greater care not to place undue restrictions on certain concepts.

34. Genocide was a generic category of crimes that had to be dealt with separately from other categories of inhuman acts, for which a kind of illustrative definition must be worked out by distinguishing between the intent and the consequences of such acts. In order to be consistent, the Commission must take account not only of physical assaults on the human being, but also of acts which endangered his spiritual and mental health. Slavery should, accordingly, be regarded as an inhuman act, for it set no store on human life. It belittled the individual and turned him into some kind of merchandise or object intended for another individual's use. Rather than speak of slavery *stricto sensu*, however, perhaps the Commission should try to find a more general term to encompass all situations in which human beings were placed in a degrading position. He had in mind, for example, the traffic in women and children, which was an affront to human dignity, and even drug trafficking, which was an affront to the mental integrity of mankind.

35. Despite the political problems associated with weapons of mass destruction, the members of the Commission could not remain indifferent to the manufacture, possession and use of such weapons, since they were ultimately intended for the destruction of the human race. The question that arose was whether the acts of manufacturing, possessing and/or using such weapons should be punished.

36. He wondered whether terrorism had a proper place in a definition that enumerated inhuman acts, particularly since it was already covered by the definition of an offence against the peace and security of mankind proposed in the third report (A/CN.4/387, paras. 124 *et seq.*). Terrorism should definitely be condemned, but it was more a security problem than a serious threat to the human race.

37. On the subject of *apartheid*, it had been said that a number of States had not ratified the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*. The African States, for their part, had not hesitated to condemn the acts involved in that odious crime, which affected them directly and was the result of a system to which the Commission could not remain indifferent. Nevertheless, rather than speak of

apartheid, the Commission might list some of the practices and policies adopted in the context of the *apartheid* system.

38. Because of its relationship to development, serious damage to the environment gave rise to apprehension, doubts or reservations. It was sometimes surprising to see, in some parts of the world, the cause and effect relationship between the impact on the ecosystem of certain agricultural and industrialization policies and population movements and declining birth rates. Nevertheless, account must be taken only of serious damage to the environment.

39. He agreed with the Special Rapporteur's approach of moving away from the spatial and temporal context in dealing with war crimes. The Special Rapporteur had also been right to note in his fourth report (A/CN.4/398, paras. 78-80) that some crimes against humanity could, in time of war, become war crimes.

40. As he had already indicated, it would be preferable to deal with "other offences" in part IV, relating to general principles. Quite apart from the acts to which it related, criminal participation should be covered in the draft code, which would otherwise be incomplete. Complicity should also be kept in mind, but the concept had to be broadened in view of the differences that had come to light as a result of the comparative study carried out by the Special Rapporteur. There again, the autonomy of the draft code had to be affirmed. In the case of collective responsibility, the Special Rapporteur pointed out that, in criminal law, an individual must have taken part in a wrongful act in order to become liable to punishment, and that collective responsibility might be regarded as a set of responsibilities. By agreeing to become a member of a group or an association, an individual became a link in a chain and, as such, incurred individual responsibility, which, together with that of the other members of the group or association, constituted collective responsibility.

41. Mr. REUTER, after commending the Special Rapporteur on his quite remarkable fourth report (A/CN.4/398), said that he would make some general comments on questions of methodology and then move on to the problem of nuclear weapons and explain why he was not in favour of including any provisions in that regard in the draft articles.

42. As to methodology, if the Commission intended, as it had always done so far, to prepare a text leading to a convention acceptable to the largest possible number of States, it would have to lower its sights and take care not to prepare too lengthy a set of articles. In other words, the draft could not include all the provisions the Commission would like it to contain. A choice, possibly painful for some, had to be made.

43. The provisions the Commission had to draft were provisions of criminal law and they had to be as precise as possible. A number of cases would inevitably call for vague formulations simply as conjurations—which indeed were not always pointless—but, generally speaking, efforts had to be made to prepare draft articles that would genuinely be of a legal nature.

44. For example, one provision that would have to be made clearer was draft article 11, paragraph 3 (b), which specified that "exerting pressure ... of an economic or political nature against another State ..." was a crime against peace. As it now stood, paragraph 3 (b), although it stated an entirely correct idea, was not satisfactory and could not be included in a legal instrument. In the modern-day world, States, whether producers or consumers of petroleum, mainframe computers, etc., were subjected to pressure of all kinds and, although the developing countries' concerns were entirely understandable, it was no less true that, when they were in a position to do so, they too exerted pressure of the kind referred to in paragraph 3 (b).

45. Similarly, the concept of "colonial domination" used in article 11, paragraph 7, would have to be clarified. Colonization as practised in the past by the European countries had undeniably been responsible for many crimes, but it was now an outdated form of domination. If the Commission wanted its work to serve some purpose, it had to decide exactly what that term meant and formulate a precise definition that would take account of the new forms of colonization that might take in the future.

46. The question of the seriousness of offences had been discussed at length, and all the offences listed in the draft articles were serious in terms of object and purpose, but to varying degrees. Thus, if the Commission attempted—and it would be no easy task—to identify forms of aggression other than aggression by armed force, and if it succeeded in doing so, aggression by armed force, which was particularly serious, would still be, as everyone had always agreed, the offence against the peace and security of mankind *par excellence*.

47. With regard to penalties for such offences, the Special Rapporteur had stipulated in draft article 4 that an offence against the peace and security of mankind was a universal offence. In other words, any State would be entitled to punish such an offence. That in itself was an innovation, because it was highly unlikely at the present time that a State would decide to try the perpetrator of an offence which had no connection with its territory, its nationals or its government services.

48. Article 4 also stipulated that every State had the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory and, despite his justifiable reservations, the Special Rapporteur had not ruled out the solution of establishing an international jurisdiction. However, if the Commission decided to adopt that solution and to provide for the establishment of an international jurisdiction, the existence of such a body could well dissuade countries from accepting the code. In order to avoid that problem, it might be necessary to restrict the competence of such a jurisdiction to certain offences and therefore distinguish between offences on the basis of their degree of seriousness.

49. He had doubts about the intermediate solution of making it an obligation for States to try or extradite the perpetrators of offences against the peace and security of mankind arrested in their territory—a solution which seemed to appeal to most members of the Commission.

There was no certainty that Governments and States would be prepared to accept those two obligations, particularly in the case of terrorism. In most instances, terrorist acts were disinterested acts committed by idealists whose aim was to alert public opinion and draw attention to the existence of unbearable situations. Moreover, in the modern-day world, where everything was based on the delicate balance of terror, countries possessing nuclear weapons themselves practised their own brand of terrorism. States did take measures against terrorism in their territory and even at the regional level, but it was not at all certain that they would be prepared, for the reasons he had just mentioned, to try or hand over terrorists. Again, from the standpoint of judicial institutions, a State could not try the perpetrator of an act which had been committed outside its territory.

50. One might well ask, therefore, whether it was really wise to enunciate general rules that would be applicable to all the offences under consideration. It would be better to adopt a pragmatic approach, to examine each offence individually and to study not only the obligations to be imposed on States and the rights to be made available to them in each case, but also other offences.

51. The Special Rapporteur had incorporated conventions in the draft articles and reproduced treaty provisions. In that connection, it had been asked whether it was appropriate for the draft code to reproduce the text of conventions which had not entered into force or had been ratified by only a small number of States. In his opinion, the Commission should display great flexibility and settle the matter on a case-by-case basis. Conventions which had been ratified by only a small number of States but to which no State had actually formulated reservations could be cited. On the other hand, the Commission would be taking a risk if it reproduced the provisions of conventions to which States had formulated express reservations. He would be quite unable to agree that the Commission should characterize as conventions of the international community instruments such as Additional Protocol 1⁷ to the 1949 Geneva Conventions, which had been the subject of major reservations by some States. If the Commission intended to invoke some of the general principles of humanitarian law, it must first be certain that the principles were widely recognized.

52. He would, however, have no objection if the draft articles contained provisions taken from the draft international convention against the recruitment, use, financing and training of mercenaries,⁸ the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.

53. The Special Rapporteur had distinguished three categories of offences; but there was a kind of relationship, an interdependence, between those categories which the Commission could not overlook and which made it impossible to draw a clear-cut distinction.

⁷ See 1959th meeting, footnote 6.

⁸ See *Official Records of the General Assembly, Fortieth Session, Supplement No. 43 (A/40/43)*, chap. V.

54. The Commission would also have to decide whether the draft code should apply only to offences by individuals committed on account of the State or also to offences by individuals having no link with the State. If it adopted the latter solution, which was of course more liberal, it might, because of certain definitions of inhuman treatment, for example, have to study two difficult questions, namely the protection of national minorities and, more generally, the protection of human rights. Such problems provided an indication of the magnitude of the task facing the Commission.

55. Perhaps the most tragic aspect of nuclear weapons was not so much the destruction they caused—it was even conceivable, in view of rapid scientific and technological progress, that selective “clean” nuclear weapons would be developed—as the fact that they created a new world in which the real bordered on the imaginary and psychological and other elements that were difficult to understand had to be taken into account. It had even been said that such a world was beyond the law and that, on nuclear issues, it was impossible to reason on the basis of the traditional categories of law. If that was actually true, it would be necessary to outlaw the manufacture, possession and use of, and trade in, nuclear weapons and all new types of weapons.

56. Nevertheless, he was not in favour of including provisions on nuclear weapons in a set of draft articles, for two reasons.

57. The first reason was technical. In order to formulate a provision that would be something more than a pious wish, the Commission would be compelled to study in detail a number of extremely technical questions and, for example, determine the period of time between the first use of the weapon and the response thereto and decide how that period of time was to be measured. Did it begin when the weapon was launched or when it reached its target? Conceivably, the response would be made before the weapon of which a State made first use had achieved the purpose for which it was intended. Clearly, the Commission was in no position to carry out a study of that kind.

58. The second reason was political. He was convinced that Governments and States which had unilaterally undertaken not to make first use of nuclear weapons had done so for the purpose of drawing the world's attention to the seriousness of that offence and encouraging negotiations on the matter.

59. The proposal to outlaw the “first use of nuclear weapons” and the various other proposals made in that regard would all have the effect of altering the balance of forces; but peace depended on that precarious balance, and hence extreme caution was called for. He would not go into the question of deterrence, but would point out that, faced with countries much more powerful than they were in every respect, many States considered, rightly or wrongly, that the inclusion of such a formulation in the draft articles would in effect mean that an aggressor had a choice of weapons.

60. The prohibition of the use of nuclear weapons was a very sensitive issue and was better left alone, par-

ticularly since countries had been observing a relative truce in that regard since 1945. At present, the most serious problem of mankind was aggression. It was true that, since the end of the Second World War, not one country had admitted to being the aggressor, but that did not mean that there had been no aggression. What measures had the international community taken to come to the aid of countries subjected to aggression? For example, what had it done to support Lebanon, a country which had been the victim of aggression a number of times and was now in the course of being destroyed? The international community's passive attitude should prompt the Commission to be cautious. He fully understood that others might have a different point of view on that issue, but reaffirmed that he was not in favour of the idea of including in a set of draft articles provisions concerning the use of nuclear or other weapons.

The meeting rose at 1 p.m.

1961st MEETING

Friday, 6 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

PART I (Crimes against humanity)

PART II (War crimes) and

PART III (Other offences) (continued)

1. Mr. ILLUECA said that the elaboration of a draft code of offences against the peace and security of

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

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

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

mankind was a difficult task which would take a long time, but the Commission should be encouraged to go forward by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which the General Assembly had adopted by consensus at its fortieth session,⁴ and by resolution 40/148 of 13 December 1985, in which the General Assembly had reaffirmed that the prosecution and punishment of war crimes and crimes against peace and humanity constituted a universal commitment for all States, and had set out the measures to be taken against Nazi, Fascist and neo-Fascist activities and all other forms of totalitarian ideologies and practices based on racial intolerance, hatred and terror.

2. If the code was to be an effective instrument and satisfy the aspirations of all peoples, it would have to define the different offences it covered, provide for the attribution of responsibility both to States and to private individuals, deal with the penalties to which those committing the offences were liable and provide for the establishment of an international criminal jurisdiction.

3. In draft article 10, on the categories of offences against the peace and security of mankind, the Special Rapporteur had faithfully followed the classification adopted in article 6 of the Charter of the Nürnberg Tribunal, paragraphs (a), (b) and (c) of which referred respectively to crimes against peace, war crimes and crimes against humanity; in article II of Law No. 10 of the Allied Control Council; in article 5 of the Charter of the Tokyo Tribunal; and in Principle VI of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.

4. In article 10, the Special Rapporteur had also offered a choice between the expressions "war crimes" and "crimes committed on the occasion of an armed conflict", with an alternative of draft article 13 corresponding to each of those expressions. Yet there seemed to be a very clear difference between "war" and "armed conflict", for although both involved hostile relations, they did not have the same legal consequences.

5. On that point it might be noted that, during the past 40 years, a number of events had upset the rules of international law forming the "law of war". The hostilities in Korea from 1950 to 1953, the fighting in Indochina from 1946 to 1954 and the Suez crisis in 1956 were three examples of armed conflicts that were not classified as wars. In none of those conflicts had there ever been a general recognition of a state of war. On the contrary, in referring to the hostilities in the Suez Canal zone, the United Kingdom authorities had spoken of a "state of conflict", declaring expressly that: "Her Majesty's Government do not regard their present action as constituting a war. ... There is not a state of war, but there is a state of conflict."⁵

⁴ General Assembly resolution 40/34 of 29 November 1985, annex.

⁵ United Kingdom, *Parliamentary Debates* (Hansard), 5th series, vol. 558, *House of Commons*, session 1955-56 (London, 1956), debate of 1 November 1956, col. 1719.

6. Some people believed that the authors of the Charter of the United Nations had foreseen the occurrence of conflicts which were not really wars. Article 39 of the Charter did not mention war, but dealt only with measures which the Security Council could take in the event of "any threat to the peace, breach of the peace, or act of aggression" in order "to maintain or restore international peace and security". In resolution 378 A (V) of 17 November 1950 on the duties of States in the event of the outbreak of hostilities, the General Assembly had made an even clearer distinction between the outbreak of war and the opening of hostilities, since it had declared that States had a duty to avoid war even after the opening of hostilities.

7. The 1949 Geneva Conventions stipulated that their provisions applied in the case of war or any other armed conflict. The 1977 Additional Protocols to those Conventions extended the scope of the expression "armed conflict" by making a distinction between international armed conflicts and non-international armed conflicts. That new concept responded to the "necessity of applying basic humanitarian principles in all armed conflicts", a necessity which the General Assembly had recognized in resolutions 2444 (XXIII) of 19 December 1968 and 2597 (XXIV) of 16 December 1969. The expression "armed conflict" was also used in articles 44 and 45 of the 1961 Vienna Convention on Diplomatic Relations.

8. The main arguments which had been advanced for introducing the concept of non-war hostilities into legal terminology included: (a) the desire of States not to be accused of a breach of the obligation not to go to war which they had assumed by acceding to such treaties as the Kellogg-Briand Pact;⁶ (b) concern that States not parties to a conflict should not declare themselves neutral and impede the conduct of hostilities by adopting restrictive neutrality rules; (c) the wish to localize the conflict and prevent it from degenerating into generalized war.

9. Thus it was clear that there was a strong current of opinion in favour of the distinction between war proper, which was between States, and armed conflicts or breaches of the peace, which were not confined to hostilities between States and in which non-State entities might be involved. To solve the problem posed by the Special Rapporteur (A/CN.4/398, para. 74), it was not sufficient to replace the term "war" by "armed conflict". It was necessary to mention war proper, as well as international armed conflicts and non-international armed conflicts. The Commission might therefore consider amending the last part of draft article 10 to read "... and war crimes or crimes committed on the occasion of an armed conflict or other hostile relations".

10. For draft article 13 he recommended the adoption of a mixed formula, namely a statement of the elements characterizing a war crime and a non-exhaustive list of acts or omissions which constituted war crimes, without altering the general definition. The definition of war

crimes proposed by the Special Rapporteur in the second alternative could be amplified to read:

"Any serious violation of the conventions, rules and customs applicable to war proper, international or non-international armed conflicts and other hostile relations constitutes a war crime."

11. The provisions on crimes against peace, which would subsequently have to be made more specific, were imbued with great wisdom, and the mixed method of definition and enumeration adopted by the Special Rapporteur was entirely appropriate, especially in the case of aggression. In that connection, the provision in draft article 11, paragraph 1 (b), that the acts in question qualified as acts of aggression "regardless of a declaration of war" was of great importance.

12. Article 11, paragraph 3 (b), provided that "exerting pressure ... of an economic or political nature against another State ..." constituted aggression. In that regard it should be noted that, in resolution 2184 (XXI) of 12 December 1966, the General Assembly had condemned as crimes against humanity the violation of the economic and political rights of indigenous populations.

13. With regard to the place to be accorded to international terrorism in the draft code, several opinions had been expressed during the debate. It had been said that international terrorism should be classed both as a crime against peace and as a crime against humanity, but it had also been said that it should perhaps be classed only as a crime against humanity. For his part, he thought the Special Rapporteur had been right to include terrorism in the list of crimes against peace, for it was linked with other crimes against peace such as colonial domination. Moreover, that was a fact that the General Assembly had recognized in resolution 40/61 of 9 December 1985 on measures to prevent international terrorism. In that resolution, which had been adopted by consensus, the General Assembly had unequivocally condemned as criminal all acts, methods and practices of terrorism, and had urged all States, as well as relevant United Nations organs,

to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations ... that may give rise to international terrorism and may endanger international peace and security;

14. Under the terms of draft article 11, paragraph 5 (i),

A breach of obligations incumbent on a State under a treaty which is designed to ensure international peace and security, particularly by means of:

(i) prohibition of armaments, disarmament, or restrictions or limitations on armaments;

constituted a crime against peace. There was a whole series of General Assembly resolutions relating to the prohibition of different types of weapons. At its fortieth session, for example, the General Assembly had adopted, in December 1985, resolution 40/92 A on the prohibition of chemical and bacteriological weapons and, most important, resolution 40/151 F, which made it the Commission's duty to mention nuclear weapons expressly in draft article 11, paragraph 6, since in that resolution and in the draft Convention on the Prohibi-

⁶ General Treaty for Renunciation of War as an Instrument of National Policy, of 27 August 1928 (League of Nations, *Treaty Series*, vol. XCIV, p. 57).

tion of the Use of Nuclear Weapons annexed thereto, it was stated that the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity.

15. That affirmation raised a related question: in what category of crimes should the use of nuclear weapons be placed? He thought the Special Rapporteur should take account of the fact that, in the last two documents he had mentioned, that crime was qualified not as a crime against peace but as a crime against humanity.

16. Resolution 40/87 of 12 December 1985 on the prevention of an arms race in outer space, in which the General Assembly reaffirmed that States should refrain from stationing nuclear weapons in outer space, also showed the Commission the course it should follow.

17. With regard to draft article 11, paragraph 8, which provided that "the recruitment, organization ... of mercenaries" constituted a crime against peace, he pointed out that, in resolution 40/74 of 11 December 1985, the General Assembly had recognized that

the activities of mercenaries are contrary to fundamental principles of international law, such as non-interference in the internal affairs of States, territorial integrity and independence, and seriously impede the process of self-determination of peoples struggling against colonialism, racism and *apartheid* and all forms of foreign domination, and that they had a pernicious impact on international peace and security.

18. Referring to crimes against humanity, he welcomed the way in which the Special Rapporteur had dealt with genocide and *apartheid* in draft article 12. Genocide, which presupposed an accumulation of acts and a set of conditions, could not be committed by individuals alone. It was therefore necessary to provide for the responsibility, both civil and criminal, of the State. *Apartheid* had been condemned by the General Assembly as a crime against humanity in resolution 2202 A (XXI) of 16 December 1966.

19. The General Assembly, to which the Commission was answerable and to which it had to render an account of its work, had thus adopted numerous resolutions directly relating to the question of offences against the peace and security of mankind. In view of the importance in international law and the moral weight of General Assembly resolutions, many of which had been adopted by consensus and which, in numerous universities, were studied in the same way as the sources of international law referred to in Article 38 of the Statute of the ICJ, it might be advisable to consider asking the Secretariat to undertake a study of those resolutions and, more generally, of all the relevant resolutions and conventions adopted both inside and outside the United Nations system. Such a practical study could greatly facilitate the Commission's task.

20. The provisions relating to "other offences" in part IV of the draft code required meticulous study, because some of the offences proposed might be a source of error or injustice. That applied in particular to "conspiracy" or "agreement", an idea that was to be found in article 6 (a) of the Charter of the Nürnberg Tribunal, which defined a crime against peace as:

... planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

Agreement to commit war crimes and crimes against humanity during the period from January 1933 to April 1945 had also been the first of the charges brought against the Nazi war criminals. But the question was whether the draft code should include a notion that was linked with very special circumstances and had been used for a very specific purpose, namely prosecution of the Nazis. In taking up that notion, the Commission would be entering the sphere of politics and should be extremely cautious. It was well known, for example, that the objectives defined in a country by a political party, whatever it might be, could be considered legitimate by the nationals of that country yet constitute a threat to other countries. It was also well known that, whenever there was a conflict, the victors were heroes and the vanquished were criminals.

21. The Commission should therefore exercise the greatest caution, for the provisions on "other offences" were the very type of provisions which could be used to start a witch-hunt and commit all kinds of injustice.

22. Mr. OGISO, after congratulating the Special Rapporteur on his work, said that the decisions of the Nürnberg and Tokyo Tribunals, referred to in the fourth report (A/CN.4/398), had some bearing on the subject-matter of the topic but were none the less of limited value as precedents for the Commission's work. First, those tribunals had not been international criminal courts in the true sense, but rather courts consisting of representatives of the Allied Powers only; and secondly, they had been under a political obligation to punish as many influential leaders as possible, rather than apply the existing law of nations. Article II of Law No. 10 of the Allied Control Council, referred to in the report in the context of complicity (*ibid.*, para. 101), had provided that any person was deemed to have committed a crime if he had belonged to an organization or group connected with the commission of the crime, thereby regarding membership of a group as an autonomous offence. That approach represented a considerable departure from the usual thinking regarding criminal law in general. Another example was to be found in the comment of Judge Biddle (*ibid.*, para. 161) that "the question ... was not whether it was lawful but whether it was just to try ...".

23. Referring to parts I and II of the report, he welcomed the Special Rapporteur's division of offences against the peace and security of mankind into three categories. The Special Rapporteur was right to state (*ibid.*, para. 19) that the word "crime" should cover only the most serious offences. In that connection, at the previous session,⁷ he had himself expressed concern about the notion of "most serious offences", because of its necessarily subjective nature, and had pointed out that the establishment of an international criminal court was essential in order to ensure that the application and interpretation of the rules relating to the "most serious offences" were as objective as possible. In addition, it

⁷ See *Yearbook ... 1985*, vol. I, p. 43, 1884th meeting, para. 15.

was desirable, if not necessary, to develop a set of criteria to be applied by the court in considering cases involving such crimes.

24. There were two key elements as far as crimes against humanity were concerned. First, there was a mass element, meaning: (a) that the crime must have been committed against a group or number of people within a group, so that the consequences of the criminal act were often of a widespread nature; (b) that the act itself must have been organized and executed systematically. Without the mass element, the draft code could be misinterpreted as applying to an isolated offender. Equally important was the second element, that of intent. Even when the number of victims was large, the act could not be classed as a crime against humanity if the intent of the author had not been to destroy a national, ethnic, racial or religious group as such. Those two elements would help to make judgments more objective. Objectivity was important, since the degree of seriousness of an act could be interpreted differently depending on a person's national background. For example, the mass destruction of the civilian populations of Hiroshima and Nagasaki by atomic bombs had at the time been described by the United States of America as necessary to minimize United States losses in the event of a landing in Japan. In other words, the suffering of the civilian populations of those two cities had been regarded by the United States as less serious than the hypothetical loss of its own soldiers' lives. Conversely, the Japanese view had been that the act had been unjustified.

25. He endorsed the Special Rapporteur's view that genocide should be given an autonomous place as a crime against humanity, for the draft code would be without prejudice to existing conventions. He had no objection to *apartheid* being treated in the same way. Moreover, while he had some doubts as to the precise legal definition of inhuman acts *per se*, he could accept the idea of giving them a separate place as crimes against humanity, provided they were defined to include murder, extermination, enslavement, deportation and persecutions, and also incorporated the mass element and the element of intent. With regard to serious damage to the environment, article 19 of part 1 of the draft articles on State responsibility provided that such acts were international crimes, thereby placing the author State under additional obligations as legal consequences of its act. However, the question of State responsibility was one thing, and the criminal responsibility of the individual for offences against the peace and security of mankind was another. Moreover, the criminal responsibility of the individual should be regarded as being incurred only when the author of serious damage to the environment had acted with intent.

26. He was inclined to agree that the term "war crime" could be used to denote serious violations of humanitarian laws and customs as applied to armed conflicts in general. The risk of confusion between a war crime and a crime against humanity might be avoided, as suggested by the Special Rapporteur (*ibid.*, paras. 79-80), by categorizing an inhuman act committed in time of war as a war crime, while the same act

committed in time of peace would be categorized as a crime against humanity.

27. On the question of methodology, he supported the idea of an enumeration. The mere formulation of a code of criminal offences would be not only useless, but also harmful if it was not accompanied by an implementation procedure. It was a matter of general principle, as pointed out by other members. Furthermore, it was essential to show as clearly as possible which acts were liable to punishment as war crimes under the code and to indicate the laws and customs of war under which those acts were punishable. In view of the practical difficulties involved, the enumeration would have to be illustrative rather than exhaustive. In that connection, Mr. Calero Rodrigues (1959th meeting) had wondered how new war crimes could be dealt with. A possible solution would be to attach a list of crimes to the future convention as an additional protocol, which could be revised by a simple amendment procedure to take account of new crimes.

28. The question of nuclear weapons could pose an additional problem. His initial reaction was that the use of nuclear weapons should be treated as a war crime if a convention prohibiting their use was concluded and entered into force. The relevant provision in the code might read:

"The use, production or stockpiling of weapons of mass destruction shall be regarded as a war crime when and to the extent that they are prohibited by international agreement."

29. As to the question of other offences, the concept of complicity, as utilized in the Charters of the Nürnberg and Tokyo Tribunals to encompass leaders, organizers, instigators and accomplices, had been based on the political desire to "let no act go unpunished", rather than on a concern for legal exactitude or rationality, as the Special Rapporteur noted (A/CN.4/398, para. 104). The Commission should avoid extending the application of positive law unnecessarily and thereby casting doubts on individuals who had not committed explicit violations under international law. One of the basic principles of criminal law should be the presumption of innocence. In that connection, the Special Rapporteur seemed (*ibid.*, paras. 106-112) to be in favour of an automatic extension of complicity to military commanders, based on an assumption of responsibility attaching to them simply by virtue of their position of command. In determining the responsibility of a military commander, it should first be ascertained whether the commander had known of the criminal acts committed by his subordinates and, if so, whether he could have prevented such acts or could have exercised control over his subordinates for that purpose. In the *Yamashita* case (*ibid.*, para. 109), the United States Supreme Court did not appear to have assumed that General Yamashita was automatically responsible because of his position as military commander in the area. Rather, it had assumed his complicity because he had permitted his subordinates to commit extensive atrocities when he had been in a position to know of their criminal acts and prevent them. Consequently, the case could provide a precedent for automatic incrimination of military commanders only

when they permitted their subordinates to commit criminal acts.

30. The legal content of the concept of conspiracy differed from one legal system to another. Moreover, the Judgment of the Nürnberg Tribunal made for a narrow definition of conspiracy applying only to crimes against peace, something which was not in line with the broader concept stated in the Nürnberg Charter. As the Special Rapporteur stated (*ibid.*, para. 121):

... Contrary to the general principle of criminal law under which an individual is responsible only for his own acts, for acts which may be ascribed to him personally, conspiracy attaches collective criminal responsibility to all those who have participated in the agreement.

Personally, he thought that individual responsibility should, as far as possible, be treated as a general principle in the case of war crimes. He therefore had doubts about the Special Rapporteur's conclusion (*ibid.*, para. 126) that conspiracy became a general theory of criminal participation.

31. Again he had considerable doubts as to the advisability of including concepts such as complicity and conspiracy in the draft code, because they were vague and were open to different interpretations, depending on the internal law of the country concerned. If the Commission wished to include them in the code, however, they should be applied more restrictively, the concept of conspiracy being used only for crimes against peace and for the crime of genocide, as already provided in article III of the 1948 Convention on genocide.

32. The concept of attempt should be interpreted as the commencement of execution of an act regarded as an offence under the code, when the act had either failed or been halted because of circumstances beyond the control of the would-be perpetrator. Mere preparation should not be interpreted as a criminal act, as pointed out by the Special Rapporteur (*ibid.*, para. 144). The borderline between attempt and preparation was fairly clear if attempt was regarded as he had suggested.

33. Mr. TOMUSCHAT congratulated the Special Rapporteur on his fourth report (A/CN.4/398) and said that the draft code, along with the draft articles on State responsibility, was not only the most politically sensitive topic currently before the Commission, it was also one that raised considerable difficulties at the purely legal level. In suggesting a set of rules that would entail the most serious consequences for individual human beings, the Commission bore a heavy responsibility. Typical inter-State law that did not strike a fair balance between all the interests involved would simply be ignored; but the code would cover individuals, who would not be in a position to dismiss measures of prosecution merely because they deemed them to be unfair. In proceeding from the perceived need to impose penal sanctions in cases of grave violations of civilized values, the Commission should not lose sight of the fact that every trial began with a charge against a person who was presumed innocent until proved guilty. Defining offences too loosely would considerably increase the risk of individuals having to stand trial even though they had observed the law. Generally speaking, therefore, the

draft code should be limited to a hard core of offences identifiable in law as well as in fact.

34. In regard to crimes against humanity, the basic question was whether such a specific category was really needed. All the acts mentioned in draft article 12, paragraph 3, were punishable under the laws of any civilized nation. They none the less had to be included in the code because it was precisely when a country suddenly repudiated the standards of civilized human conduct that international sanctions became necessary. Many States had passed through periods of political anarchy, when the rule of law had broken down and human life had been at the mercy of arbitrary Governments. Contrary to the hopes expressed in 1945, instances of genocide still occurred. Clearly, it was essential for the draft code to stipulate that genocide was an offence.

35. The second question was whether the draft code should relate only to crimes which had been perpetrated under the authority of the State or with the toleration of the public authorities, or whether it should also encompass common crimes. In the case of crimes against humanity, the Commission could largely avoid taking a stand. Basically, there was no need to incorporate common crimes which were regarded as reprehensible by all States and were effectively prosecuted by all civilized Governments. Drug trafficking, for example, could safely be left out of the draft code, and terrorism remained a borderline case.

36. There was also the question whether offences already punishable under existing treaties, such as the Convention on the Prevention and Punishment of the Crime of Genocide, should be made part and parcel of the draft code. In his opinion, it made sense to reiterate the prohibition on genocide inasmuch as it was the Commission's goal to round off the code by establishing an international criminal court competent to adjudicate all the offences covered by the code. As was well known, plans to establish an international penal tribunal within the framework of the Convention on genocide had not been pursued, so that only the courts of the country in which the alleged criminal acts had been committed had jurisdiction. That limitation meant that no prosecution of the culprits by the authorities of another State was legally possible.

37. The wording of draft article 12, paragraph 1, was satisfactory, for it was taken almost verbatim from article II of the Convention on genocide, with the exception of subparagraph (v), which should also be brought fully into line with that Convention.

38. *Apartheid*, as the ICJ had stated in its advisory opinion of 21 June 1971 on Namibia,⁸ could not be reconciled with the prohibition of discrimination contained in Article 1, paragraph 3, of the Charter of the United Nations. It was also prohibited under article 19 of part 1 of the draft articles on State responsibility. However, the Commission was now dealing with the criminal responsibility of the individual and the ques-

⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 57, para. 129.

tion was whether a rule had already developed making participation in the policy of *apartheid*, as practised by the Government of South Africa, a criminal act punishable under international law. In fact, not a single Western State had so far ratified the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, the reason being that the scope of the crime had been drafted in such broad terms that practically every South African could be liable to the sanctions prescribed in the Convention. Accordingly, the rules on participation called for the most careful scrutiny. In short, to establish that acts of *apartheid* were criminal offences would go beyond codification and amount to an innovative decision which, while possibly justifiable in that it purported to strike at political leaders, would none the less make little sense if it meant declaring that an entire people was criminal. As to the actual wording of the provision, he would prefer the second alternative of draft article 12, paragraph 2. A criminal code should be self-contained and not confine itself to *renvois* to texts which were unfamiliar to ordinary individuals.

39. Paragraph 3 of article 12 was too broad. The 1954 draft code had stated that the acts in question must have been carried out by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities. Without that qualification, many common crimes would fall within the purview of the code. It should be borne in mind that the code was needed only when there was connivance on the part of the authorities of the State concerned. He also had doubts regarding the meaning of the term “persecutions”. In some States, specific groups were subjected almost daily to political or religious persecution. In order to be consistent, the Commission would have to extend to political or religious persecution the rules applicable to the crime of *apartheid*. In any event, further clarification was required.

40. Mr. Calero Rodrigues (1959th meeting) was right to say that paragraph 4 of draft article 12 was still couched entirely in terms of inter-State relations and, as it stood, could not possibly form a basis for criminal prosecution. No one knew what the obligations of essential importance for the safeguarding and preservation of the human environment were. It would also be necessary to clarify whether the element of intent was required or whether mere negligence would suffice for an act to be considered a violation of such obligations.

41. In regard to part II of the report, he endorsed the Special Rapporteur’s idea of retaining the traditional term “war crimes”, which had a firmly established place in international law. It was, of course, universally agreed that war crimes had to be construed as encompassing all crimes committed on the occasion of armed conflicts. The suggestion by Mr. Illueca that the expression should also cover other hostile relations none the less went much too far. Similarly, the concept of war as formulated by the Special Rapporteur, namely “any armed conflict pitting State entities against non-State entities” (A/CN.4/398, para. 76), was too broad. Clearly, the entities concerned had to have certain specific characteristics, which were carefully set out in the 1977 Additional Protocol I (*ibid.*, para. 75).

42. He would caution against the use of the expression “customs of war”, even though it figured in earlier texts drafted by the Commission. He drew attention in that respect to Hague Convention IV of 1907, the well-known annex to which was entitled “Regulations respecting the Laws and Customs of War on Land” and thus related to a legally consolidated body of rules, rather than mere practices. Accordingly, to avoid any misunderstanding, the appropriate reference throughout the draft code should be to the “rules of war” or “laws of war”.

43. Quite clearly, the draft code should cover only “grave breaches” within the meaning of the four Geneva Conventions of 1949. Not every violation of the rules of war was serious enough to warrant international repression. Consequently, for the sake of clarity, the relevant articles of the Geneva Conventions should be reproduced, but on the understanding that they were simply meant to provide examples, thereby leaving the door open for developments in the future.

44. The humanitarian law of the Geneva Conventions and the rules of warfare of the Hague Conventions had once been clearly differentiated. The 1977 Additional Protocols had partly done away with that distinction, but the rules limiting the use of specific weapons still constituted a separate category. He therefore suggested the insertion in the draft code of an additional article containing all the prohibitions that were generally agreed upon and were contained in such instruments as the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,¹⁰ the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,¹¹ and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.¹²

45. It was, of course, highly desirable to do away with nuclear weapons, but that aim could not be achieved simply by declaring that their use was a war crime. Pressure should be brought to bear upon the nuclear States to break the dreadful spiral of the arms race, which had already brought mankind to the brink of self-destruction. The draft code could not rid the world of nuclear weapons; diplomatic efforts were the sole means available to achieve that result. It was not enough to seek guarantees to the effect that such weapons would not be used; it was equally important to halt their production and to destroy existing stockpiles on the basis of agreements on mutually verifiable disarmament.

46. With reference to the “other offences”, he too thought that the rules on participation and attempt came under the heading of general principles. Again, Sir Ian Sinclair (1960th meeting) had rightly suggested that,

⁹ See 1958th meeting, footnote 7.

¹⁰ League of Nations, *Treaty Series*, vol. XCIV, p. 65.

¹¹ United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 118.

¹² United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), p. 113.

after completion of the list of crimes, a careful examination should be made on a crime-by-crime basis to determine whether complicity was conceivable and, if so, whether it should be made a punishable offence. That inductive approach was preferable to a deductive approach, in view of the novelty of the questions which arose.

47. Generally speaking, an attempt to commit a crime should not in itself be a punishable offence. It should be remembered that the Special Rapporteur had placed a broad spectrum of acts in the category of crimes against peace. If, for instance, a major international crisis was averted through the efforts of the Security Council, the international community should rejoice and not immediately call for the application of a code of offences. On the other hand, crimes against humanity were normally mass phenomena, even if the actual victim was one single person. Even there, the act would have to "reveal a consistent pattern of gross and reliably attested violations"¹³ for it to be considered by the international bodies competent to deal with violations of human rights. In order for justice to be done, however, it would always be sufficient to prosecute the persons who had actually ordered one of the crimes listed in the draft code.

48. To sum up, it would be better if the rules on complicity and attempt were drafted only after the catalogue of crimes had been drawn up.

49. Mr. BOUTROS GHALI, after conveying to the Special Rapporteur his regret at being unable to be present during his oral introduction of his fourth report (A/CN.4/398), said that, like Mr. Balanda at the previous meeting, he had already drawn the attention of members to the importance that should be attached to research into comparative law on the conflicts which had broken out since the Second World War in Africa, Latin America and Asia and which were not mentioned in the report. A number of countries in those regions had been the setting for conflicts, serious violations of the law and even genocide. Hence it was not third world nationalism which prompted him to press the issue, but the facts themselves. Mr. Reuter (1960th meeting) had said that subversive activity, terrorism, had been the weapon of the poor States, which had resorted to it even in conflicts between one another. For that reason, the Secretariat should conduct research on the *travaux préparatoires* of the OAU Charter,¹⁴ more particularly the discussions that had given rise to article III, paragraph 5, of that Charter, which unreservedly condemned political assassination as well as subversive activities waged by one State against another, on the Declaration of Brazzaville of 19 December 1960, concerning subversive activities, and on the work which had preceded the adoption of the Declaration on the Problem of Subversion at the second ordinary session of the Assembly of Heads of State and Government of OAU, held in Accra in October 1965.¹⁵ Such research was war-

ranted by the need to scrutinize the steps undertaken for the peaceful settlement of conflicts and to establish whether such conflicts revealed an element of aggression or the threat of aggression.

50. Again, the draft code failed to mention press and radio campaigns that were waged before the outbreak of a conflict and were a major element in subversive activities. OAU had issued numerous appeals urging one State or another to put an end to agitation over the air-waves. He had no pre-set idea about the most appropriate draft article in which to cover that type of activity, which might well relate to the provisions on aggression, on the threat of aggression or on terrorism. The crux of the matter was that it should be included in the draft code, as should the other aspect of indirect aggression represented by manipulation of political refugees by one State to the detriment of another, a course of conduct which was all too easy in Africa inasmuch as Africa had five million refugees. In that connection, he recalled the experience long ago of the committee established in 1942 by the Governing Board of the Pan-American Union to combat subversion in Latin America.¹⁶ Yet another subject of research should be the new forms of terrorism and counter-terrorism. In particular, he had in mind hostage-taking, which came under the heading of subversive activity. The draft code was of interest to the third world, since the major armed conflicts nowadays took place in some of those countries, and he wished to add that the ravages of terrorism were very often passed over in silence in the third world itself.

51. Mr. THIAM (Special Rapporteur) said that the Commission's aim was to work out a criminal code and thus consider legal problems, not to conduct a study of political sociology on the way in which States acted to combat subversion, a study that could lead the Commission to stray from the proper path into byways.

52. At the conference to establish OAU, subversion had indeed been one of the first items to engage the attention of the participants. Nevertheless, after considering the matter, he had come to the view that it was not one offence in itself, for it covered a range of very different acts, such as terrorism, political assassination, and civil war fomented from abroad by pitting one part of the population against another. A distinction had to be made between subversion and criminal acts.

53. If he had drawn on the experience of the third world countries, his report would have taken on the dimensions of a book or a treatise, something which seemed all the more pointless in that genocide, for instance, was defined everywhere in the same terms, as was *apartheid*. Why single out the law of the third world countries when it was, generally speaking, based on either the common-law or the civil-law system? He was ready to go further into the matter if the Commission urged him to do so, but he did not think that it would be of any advantage to the draft. Moreover, it should be

¹³ Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970, entitled "Procedure for dealing with communications relating to violations of human rights and fundamental freedoms", para. 1.

¹⁴ United Nations, *Treaty Series*, vol. 479, p. 39.

¹⁵ OAU, resolution AHG/Res.27 (II).

¹⁶ See resolution XVII adopted by the Third Meeting of Consultation of Ministers of Foreign Affairs of the American Republics (Rio de Janeiro, 15-28 January 1942), *The International Conferences of American States, Second Supplement, 1942-1954* (Washington (D.C.), 1958), pp. 25-27.

remembered that the General Assembly had attached a high degree of priority to the draft code and that he was therefore compelled to keep to a certain time-limit.

54. Mr. ROUKOUNAS congratulated the Special Rapporteur on submitting a report (A/CN.4/398) containing a wealth of ideas and suggestions that opened the way to an examination of all the problems posed by offences against the peace and security of mankind. The report confirmed the general trend towards the elaboration of a code which drew distinctions between three categories of crimes, a trend initiated by the Commission as early as 1950. The Commission would now have to clarify the legal parameters of those distinctions. The overlapping between categories and the existence of "inter-category" offences did not signify that the distinctions were no longer of any value. In the case of crimes against peace, the draft code related to persons acting in conjunction, for it was hardly conceivable that one individual alone could prepare and launch aggression. Crimes against humanity constituted a category of offences resulting from mass atrocities committed against civilians, and the substance thereof was to be found in their sheer scale. War crimes necessarily entailed an armed conflict and the idea that the criminal acts affected protected persons and property. Thus the crime itself and its legal consequences could unquestionably vary from one category to the other; but in deciding whether a particular offence should be included in the draft code, the Commission would have to refrain from holding to the tripartite division.

55. Over and above the question of the various categories of offences was the question of a basic choice. At its third session, in 1951, the Commission had discussed the expression "offences against the peace and security of mankind" and had taken the view that its study should be confined "to offences which contain a political element" and which endangered or disturbed the maintenance of international peace and security.¹⁷ Because of that political element, it had at that time expressly ruled out such matters as piracy, traffic in dangerous drugs, traffic in women and children, and slavery. Yet the Commission must take account of present-day needs and it was free to determine the substance of the political element on the basis of which it would proceed to evaluate a particular offence.

56. The offences had to be examined separately, in terms of the needs of the international community of today. Apart from *apartheid*, which he had no objection to mentioning in the draft code, acts of racial discrimination, enslavement, terrorism and grave injury to the dignity of man did occur and they had to be taken into account. Was there any need to allude to the *obiter dictum* of the ICJ in the *Barcelona Traction* case,¹⁸ which had involved acts that were today outlawed? So-called "new" offences should therefore be scrutinized in terms of their intrinsic features before they were placed in one category or another.

57. Even with the help of a computer, the Special Rapporteur would not be able to perform his task if he had to look into all the relevant instruments concerning war crimes and crimes against humanity. For that reason, the Special Rapporteur had directed his work towards texts that seemed best to reflect the law now in force and the present needs of the international community. For his own part, he shared Mr. Malek's idea (1958th meeting) that it was necessary to avoid legislating by *renvoi*. It was essential, without insisting too much on the deterrent and preventive nature of the draft code, to establish precise standards of conduct, particularly since the code would include a general part, so as to ensure the autonomy of the concepts discussed in the course of recent meetings, and possibly leave it to national legislators to determine the rules for penalizing the offences. Hence the Commission should work out detailed standards and not simply rely on such expressions as *apartheid*, colonial domination and aggression.

58. Mr. Reuter (1960th meeting) had cautioned against the temptation of drawing for codification purposes on texts which had not been ratified to any great extent; yet the Commission and even the ICJ sometimes referred to relevant instruments, regardless of the number of ratifications, and even to instruments which had not yet entered into force. Consequently, the Special Rapporteur had quite rightly reproduced provisions from instruments that did not lend themselves to controversy. The question of treaties in force would be more delicate, since the Commission would have to guard against weakening them by extracting definitions contained in such treaties and then altering them. In other words, it would have to refrain from providing, for one and the same concept, a definition different from the one appearing in the relevant instrument in force.

59. As to the relationship between war crimes and grave breaches, the substance of which was clarified in the four Geneva Conventions of 1949 and Additional Protocol I of 1977, the expression "grave breaches" was not purely and simply another term for war crimes, which after the Second World War had acquired very serious connotations. In 1949 and even in 1977, care had been taken to distinguish war crimes from grave breaches, so that accused persons could benefit from all the procedural guarantees in the Geneva Conventions. Nevertheless, the exact meaning of those expressions was not entirely clear. It was customary for grave breaches to be encompassed by war crimes, but the opposite was also true and the relationship between the two concepts was therefore ill-defined. For that reason, he suggested that any mention of "grave breaches" should be accompanied by the words "within the meaning of the Geneva Conventions", particularly since they were alluded to only in those Conventions and in Additional Protocol I.

60. In such matters as participation and omission, or failure to act, the first thing was to determine whether they should be included in the draft code. The Commission was not required to elaborate a code of uniform international criminal law: if it did decide to mention such matters it would have to free itself as far as possible of systems of internal criminal law and thereby assert the

¹⁷ *Yearbook ... 1951*, vol. II, p. 134, document A/1858, para. 58 (a).

¹⁸ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 32, para. 34.

autonomy of the draft. In connection with the question of an offence by failure to act, which had set a precedent and was covered by article 86, paragraph 2, of Additional Protocol I of 1977, on which the Special Rapporteur had drawn, it was worth noting that the proceedings of the Thirteenth International Congress on Criminal Law, held in Cairo in October 1984, called for caution and stated the need to make failure to act a criminal norm for a specific legally determined activity. The same was true of conspiracy, which was not an offence of participation properly speaking, but an offence that could be attributed to each participant in acts, even though they were distant acts, the important point being the element of intent. There, too, the Commission should free itself of municipal law.

61. Article 19 of part 1 of the draft articles on State responsibility was not yet in force, but three conventions were already applicable in regard to serious damage to the environment, namely the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques¹⁹ (art. 1), Additional Protocol I of 1977²⁰ (art. 35, para. 3) and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons²¹ (fourth preambular paragraph). All those instruments placed a prohibition on acts causing widespread, long-lasting or severe damage to the natural environment. The understandings annexed to the 1976 Convention indicated the meaning of the terms "widespread", "long-lasting" and "severe".²² Perhaps an examination of those instruments would make for a more restrictive approach to the matter.

62. Mr. McCaffrey said that he had some general points to make before going on to deal with parts I, II and III of the fourth report of the Special Rapporteur (A/CN.4/398).

63. The first general point concerned the purpose of the entire project. The question in his mind was whether the draft was a practical or a political exercise. In other words, was the aim to produce an instrument for deterrence or to afford an opportunity for diatribe? He agreed with Mr. Calero Rodrigues (1959th meeting), Mr. Balanda (1960th meeting) and other members that, if the draft was to be taken seriously, it must consist of more than a mere list of offences. In that connection, he was attracted by the suggestion by Mr. Calero Rodrigues that the draft code should also provide for means of implementation, by way of an international court, and even penalties, although the penalties would be difficult to determine. One thing was certain, namely that the inclusion of highly controversial concepts—especially without broad support for including them—would doom the project to oblivion. The Commission had to be realistic and avoid producing a draft

that bore the seeds of its own destruction. He therefore endorsed Mr. Tomuschat's comment that it was desirable to concentrate on the hard core of clearly understood offences.

64. The second general point concerned the basis for the work in hand. The Commission had always tended to take the 1954 draft code as the starting-point, with a view to supplementing it. It was essential to remember that the 1954 draft code had been approved by only a very narrow majority of 6 votes to 5, at a time when the Commission had consisted of 15 members. Similarly, it should not be forgotten that the General Assembly had quietly shelved the 1954 draft. Accordingly, the Commission should exercise caution and not rely too heavily on that text.

65. Another problem was the use of international conventions and other sources, for it was essential to distinguish clearly, as stressed by Mr. Roukounas, between instruments which commanded wide acceptance and those which did not.

66. Again, there was the question of the weight to be attached to General Assembly resolutions. It was worth recalling that, at the 1945 San Francisco Conference which had adopted the Charter of the United Nations, only one State had voted to confer binding effect on General Assembly resolutions. A vote in favour of a draft resolution in the General Assembly did not mark the intention to make law; it was simply a reflection of political considerations.

67. Like Mr. Reuter (1960th meeting), he had doubts about the ultimate usefulness of the tripartite classification of offences in draft article 10 into crimes against humanity, crimes against peace and war crimes. At the present stage, however, he would not oppose it, since it was probably useful as scaffolding which could be discarded later.

The meeting rose at 1 p.m.

1962nd MEETING

Monday, 9 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

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

¹⁹ See 1958th meeting, footnote 8.

²⁰ See 1959th meeting, footnote 6.

²¹ See footnote 12 above.

²² See the Report of the Conference of the Committee on Disarmament on its 1976 session, vol. 1 (*Official Records of the General Assembly, Thirty-first Session, Supplement No. 27 (A/31/27)*), annex I, understanding relating to article 1.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf. Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

PART I (Crimes against humanity)

PART II (War crimes) and

PART III (Other offences) (continued)

1. Mr. McCAFFREY, continuing his general remarks, said that more attention could profitably be paid to the role of specific criminal intent (*mens rea*) in the offences covered by the draft articles. That element was, of course, present by definition in the case of some offences for which a certain "purpose" was required, but it had not been specified in connection with others. For some of them at least, the element of criminal intent should be clearly stated as part of the definition of the offence.

2. As to the procedure for dealing with the topic, it was his understanding that the Commission would now engage in a general discussion and that it might begin its consideration of one or more draft articles at its next session. For the time being, therefore, he would not comment on specific articles, except incidentally. Moreover, although the fourth report of the Special Rapporteur (A/CN.4/398) did not cover crimes against peace, which had been discussed at the previous session, it did contain draft article 11, which appeared to be a rewording of the article originally proposed on that subject. Other members had made observations in that regard and, to assist the Special Rapporteur in his future work, he wished to reiterate certain points which he had made at the previous session.⁴

3. The first related to the definition of aggression in draft article 11, paragraph 1, and to the threat of aggression dealt with in paragraph 2. According to those provisions, the Security Council would not be responsible for determining whether there had been aggression or a threat of aggression and the problem thus arose of how that shift in responsibility was to be effected. It was necessary to bear in mind in that connection the Definition of Aggression,⁵ as well as the lack of any implementation mechanism in the draft articles, which meant that it would fall to the national courts to adjudge the matter. He doubted whether removing the determination from the Security Council was appropriate.

4. He also recalled his comments at the previous session on the subject of interference in the internal or ex-

ternal affairs of another State, covered by paragraph 3 of draft article 11, and on certain breaches of treaty obligations, mentioned in paragraphs 5 and 6. It was doubtful whether such acts rose to the level of offences against the peace and security of mankind. The same was true of the use in paragraph 7 of the antiquated term "colonial domination", which might be interpreted as excluding certain modern-day practices, such as subjecting a people against its will to alien subjugation and domination.

5. With regard to terrorism, he too considered that it could more logically be included in the category of crimes against humanity, rather than among crimes against peace.

6. The nature of crimes against humanity was very difficult to define. It was now agreed that they constituted a separate category and that very fact signified that even greater care was needed in defining them in the draft, since offences not committed in the context of an armed conflict would no longer be automatically excluded.

7. In a very broad sense, every serious human rights violation was a crime against "humanity", yet not every violation of that kind could qualify as a crime against humanity for the purposes of the draft. For a crime to be included in the draft it had to meet two requirements, one being exceptional seriousness, and the other not so much the mass nature of the act as the fact that it was part of an overall design, of a systematic pattern of conduct. The second requirement was particularly important in order to distinguish the offence from a common crime.

8. As to genocide, it was necessary to follow closely the terms of the 1948 Genocide Convention, although some aspects thereof called for further study, such as the exact meaning of the expression "causing serious ... mental harm" (art. II). Another problem arose from article IX of the Convention, which provided for the compulsory jurisdiction of the ICJ. The Commission would have to consider whether it was possible to ignore that article, which some States viewed as an integral part of the Convention.

9. He was still concerned that the Commission's approach to *apartheid* was more political than legal. Many aspects of *apartheid* as practised in South Africa undoubtedly fell under other categories of offences, but it was certainly a political exercise to define a general crime by reference to a situation that existed in only one country and, moreover, to use that country's name for it. The result could well be that similar practices occurring in other countries were not qualified as offences under the code and hence that the code would not, as the international community wished, play the requisite deterrent role. He therefore urged the Commission to identify the various aspects of the system known as *apartheid* and indicate clearly whether they were to be regarded in each instance as offences against the peace and security of mankind.

10. The question of serious damage to the environment was an enigma. The problem arose of whether only the extent of the damage was relevant or whether, in addition, some criminal intent (*mens rea*), or at least

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

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

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

⁴ See *Yearbook ... 1985*, vol. I, pp. 54-55, 1885th meeting, paras. 45-55.

⁵ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

a reckless disregard for the safety of the environment, was required. The whole subject demanded detailed further study and it was hardly sufficient to invoke article 19 of part I of the draft articles on State responsibility in that connection. Not only was that article highly controversial, but it related to the international responsibility of States and not to the criminal liability of individuals.

11. He agreed that the term "war crimes" should be retained, but on the understanding that it applied to all armed conflicts. The definition of such crimes in draft article 13 was broad enough to encompass both international and non-international armed conflicts. In regard to methodology, it would indeed be useful to include an illustrative list of war crimes such as that proposed by Mr. Malek (1958th meeting, para. 6). However, the list should in no way freeze the development of the category of war crimes and only grave breaches should qualify as war crimes under the draft code.

12. The Special Rapporteur had included a reference in draft article 13 to the "first use of nuclear weapons", but had placed it in parentheses to show that a political decision, one which should be left to the General Assembly, was involved. It was well known that the questions of the development, stockpiling, testing and deployment of nuclear weapons were highly controversial and essentially political. It was worth recalling in that regard that the General Assembly, in the annex to resolution 40/151 F of 16 December 1985, had referred not to the first use, but to "any use" of nuclear weapons.

13. It was an eminently political matter and fell outside the domain of law. As Mr. Tomuschat (1961st meeting) had pointed out, nuclear weapons would not be eliminated simply by declaring their use criminal. Any such action would render more difficult the negotiations that could alone solve the problem.

14. The "other offences" dealt with in part III of the report would be more appropriate in part IV, on general principles, but it might be convenient to deal with them separately for the time being. Care should none the less be taken to examine the extent to which such concepts as complicity and attempt were applicable to each offence once it was defined in the code. He agreed with Sir Ian Sinclair (1960th meeting) that the extended concept of complicity might be inappropriate in the case of war crimes.

15. Like other members of the Commission, he did not believe it necessary to retain the concept of conspiracy in the draft. For crimes against peace and most crimes against humanity, the extended concept of complicity was sufficient to meet all needs. In the matter of attempt, it was doubtful whether a plan that never came to fruition could qualify as an offence against the peace and security of mankind.

16. Lastly, he reiterated his doubts regarding the prospects for the present topic, which was highly political. Nevertheless, the Commission's work on it was attracting increasing scholarly attention and would at least make a useful contribution to the legal literature on the subject.

17. Mr. JACOVIDES said that he would comment not only on parts I, II and III of the fourth report of the Special Rapporteur (A/CN.4/398), but also on parts IV and V. The topic was of the utmost importance and the elaboration of a code "could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations", as stated by the General Assembly in resolution 40/69. Accordingly, the Assembly had urged the Commission to "fulfil its task on the basis of early elaboration of draft articles". The Commission would soon be reaching that stage in its work and thus fulfilling its mandate.

18. He wished to stress from the outset that, for the pragmatic reasons which he had given at the previous session,⁶ his willingness to accept that the scope of the draft code should for the time being be restricted to individuals was without prejudice to his position regarding the responsibility of States as well.

19. He also agreed with other members that, for the draft code to be complete, it had to include three elements, namely crimes, penalties and jurisdiction, even though all three elements might not be politically achievable in the present circumstances.

20. The term "offences", in the title of the draft code, should be replaced by "crimes", thereby aligning the English text with the Spanish and the French. The discussion had revealed that the draft code dealt only with "crimes", as distinct from "delicts" in the sense of article 19 of part I of the draft articles on State responsibility, and only with the most serious of such crimes. The word "crimes" in the title would be more accurate legally and would carry more weight politically.

21. Like other members, he deemed it essential to concentrate on the hard core of clearly understood and legally definable crimes. Any attempt to cover too much ground would make the Commission's efforts ineffectual. There could, of course, be differences of opinion as to what was legally definable and clearly understood. Admittedly, the code the Commission was drafting was not an all-embracing international criminal code, but a code of offences against the peace and security of mankind. Nevertheless, enslavement and trafficking in narcotic drugs could qualify as crimes against humanity.

22. The issue had also been raised of the basis for the content of the draft code. Existing conventions should doubtless be relied upon, especially those which commanded general acceptance by States, such as the 1948 Genocide Convention. But other sources of law could be used, including less widely accepted conventions and United Nations resolutions which were declaratory of existing law. He had in mind, for example, the Definition of Aggression, which the General Assembly had adopted by consensus in 1974,⁷ and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁸

⁶ See *Yearbook ... 1985*, vol. 1, p. 13, 1880th meeting, para. 8.

⁷ See footnote 5 above.

⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

23. Mr. Balanda (1960th meeting) and Mr. Boutros Ghali (1961st meeting) had been right to point out the need to pay close attention to issues of concern to the third world and to rely on legal sources in those countries. With the radical transformation in the composition of international society and the increase in the membership of the United Nations from 51 States in 1945 to 159 at the present time, a very great contribution had been made by the newly independent States to the progressive development and codification of international law. Accordingly, due account should be taken of the special concerns, practices and legal thinking of the third world, not only for the present topic but for all the items before the Commission.

24. The basic structure of the fourth report, namely the division into "crimes against humanity", "war crimes", "other offences" and "general principles", was logical and constituted a sound basis for the Commission's work, although that format might need to be revised at a later stage.

25. The category of crimes against humanity undoubtedly included the crime of genocide as defined in article II of the 1948 Genocide Convention: "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The classic example lay in the acts committed by the Nazi régime before and during the Second World War, but others could be cited. Particularly interesting in that regard was the observation by the Special Rapporteur that "a national group often comprises several different ethnic groups" and that "States which are perfectly homogeneous from an ethnic point of view are rare" (A/CN.4/398, para. 57). If every ethnic group were able to go its own way and secede from an established State, the present nation State system would collapse into utter chaos.

26. *Apartheid*, as defined in the 1973 Convention, was unquestionably a crime against humanity. Though a specific phenomenon, *apartheid* had features common to situations in other parts of the world. In Cyprus, for example, an attempt was being made under the pressure of foreign occupation to establish an undemocratic and unworkable system of government based on ethnic discrimination and separatism, accompanied by denial of the fundamental freedoms of movement, residence and property. That attempt had been made possible by illegal foreign invasion and occupation and by the failure so far of the international community to implement its unanimously adopted and legally binding resolutions.

27. The 1954 draft code contained in article 2, paragraph (11), an illustrative list of inhuman acts, thereby leaving the door open for additional cases as the law developed. The list could thus be expanded to cover such crimes as enslavement and trafficking in women and children. The Special Rapporteur had pointed out that the relevant criteria for determining whether inhuman acts constituted crimes against humanity were "the principles of the law of nations, the usages established among civilized peoples, the laws of humanity and the dictates of the public conscience" (*ibid.*, para. 63). Naturally, those same basic considerations were relevant in determining whether a rule of international law constituted *jus cogens*.

28. On the matter of damage to the environment, much more reflection was necessary before the Commission could take a position as to how far a breach of international obligations that was an "international crime" under article 19, paragraph 3, of part 1 of the draft articles on State responsibility could properly be regarded as a crime against humanity under the code of offences against the peace and security of mankind. One of the relevant factors in that connection would be the presence of the element of criminal intent (*mens rea*).

29. Terrorism would indeed be more appropriately included in the category of crimes against humanity than among crimes against peace. Consideration could also be given to Sir Ian Sinclair's suggestion (1960th meeting) that international terrorism should fall under both categories.

30. He wished to reiterate his suggestion that international drug trafficking be included among crimes against humanity, whether under "inhuman acts" or independently.

31. The first problem regarding war crimes was that of terminology, and more specifically the use of the term "war". War had been prohibited by the Kellogg-Briand Pact of 1928⁹ and, more significantly, by the Charter of the United Nations. As stated by the Special Rapporteur, however, "although war is today a wrongful act, it is an enduring phenomenon" (A/CN.4/398, para. 70). In fact, the broader term "armed conflict" was now commonly used, but the formula "war crimes" had a certain standing in international law and it should therefore be maintained, on the clear understanding that, in the Special Rapporteur's words, the term "war" was used "in the material sense of armed conflict, not in the formal and traditional sense of inter-State relations" (*ibid.*, para. 76).

32. As an illustration of war crimes committed in an armed conflict, he drew attention to the 1976 report of the European Commission of Human Rights,¹⁰ which, after a quasi-judicial inquiry following an application by the Government of Cyprus, had found that, in the course of the 1974 invasion of Cyprus, the Turkish Army had been guilty of murder, rape, looting and other such crimes—in addition to the massive violations of human rights suffered by the population as a result of the continuing Turkish occupation.

33. With regard to substance, war crimes and crimes against humanity were distinct categories, but they could well overlap. That aspect of the matter was well analysed in the report (*ibid.*, paras. 78-80).

34. As for methodology, a general definition of war crimes was preferable. Not all violations of the laws and customs of war constituted war crimes, but only "grave breaches" within the meaning of the 1949 Geneva Conventions. As the law developed, additional categories of war crimes could emerge.

⁹ See 1961st meeting, footnote 6.

¹⁰ Council of Europe, European Commission of Human Rights, Applications Nos. 6780/74 and 6950/75, *Cyprus v. Turkey*, Report of the Commission (adopted on 10 July 1976), vols. I and II (mimeographed).

35. On the much debated question of the legality of nuclear weapons, he naturally shared the general desire for them to be eliminated. If and when a general treaty was concluded to prohibit the use of such weapons, violation of that treaty would constitute a war crime. In the absence of such a universal treaty, however, the Commission could not declare the use of nuclear weapons to be a war crime. Such a provision would be futile and might even be detrimental to the draft code as a whole. He would therefore reserve his position on that point.

36. Turning to part III of the report, concerning "other offences", he wished merely to note the interesting analysis made by the Special Rapporteur of the issues of complicity, conspiracy and attempt in the various national legal systems and in international law.

37. Part IV of the report dealt with general principles under five headings, the first being the juridical nature of the offence. No one could deny, as emphasized by the Special Rapporteur, that offences against the peace and security of mankind

... are crimes under international law, defined directly by the Nürnberg Charter independently of national law. Hence the fact that an act may or may not be punishable under internal law does not concern international law, which has its own criteria, concepts, definitions and characterizations. (*Ibid.*, para. 147.)

38. In regard to the second heading, the nature of the offender, it had been agreed that, as a compromise and without prejudice to the criminal responsibility of States, the Commission would for the time being deal only with the criminal responsibility of the individual, and the Special Rapporteur set out the logical consequences of that position (*ibid.*, paras. 148-149).

39. As to the third heading, the application of criminal law in time, the issue of the non-retroactivity of criminal law was controversial, but the problem was not insoluble. In fact, that rule was not limited to formulated law; it related also to natural law and to overriding considerations of justice, the decisive factor being that the concept of justice should prevail over the letter of the law. In the words of Hans Kelsen: "in case two postulates of justice are in conflict with each other, the higher one prevails".¹¹ He therefore entirely agreed with the Special Rapporteur's conclusion that

... the rule *nullum crimen sine lege, nulla poena sine lege* is applicable in international law; but the word "law" must be understood in its broadest sense, which includes not only conventional law, but also custom and the general principles of law. (*Ibid.*, para. 163.)

40. The fourth heading was that of the application of criminal law in space. Unless and until the code established a competent international court of criminal jurisdiction, he shared the conviction expressed by the Special Rapporteur on that matter (*ibid.*, para. 176).

41. In connection with the fifth heading, which related to the determination and scope of responsibility and covered justifying facts, extenuating circumstances and exculpatory pleas, he would merely observe that the Special Rapporteur had dealt with them with his usual clarity and objectivity.

42. Before concluding, he had some remarks to make on the draft articles in part V of the report. In the first place, the heading "Offences against the peace and security of mankind" should be placed at the very beginning of the draft, in other words before chapter I, so as to cover all the draft articles and not just those in chapter II.

43. In part II of chapter I, concerning general principles, draft article 8, subparagraph (e), contained a reference to "a peremptory rule of international law". In view of the importance of the doctrine of *jus cogens*, he would suggest that that reference be erected into a more general and more widely applicable provision.

44. In the light of his earlier comments on the use of the term "war crimes", he suggested that the square brackets around the phrase "crimes committed on the occasion of an armed conflict" in draft article 10 be removed.

45. With regard to draft article 11, paragraph 1, he reiterated the importance of preserving the fine balance achieved through compromise in General Assembly resolution 3314 (XXIX), whereby the Definition of Aggression was adopted. The wording proposed in article 11 now left matters of interpretation and evidence to the judge rather than to the political organ, namely the Security Council, and he therefore reserved his position on that point.

46. In regard to article 11, paragraph 4, on terrorism, he wished to draw the Commission's attention to General Assembly resolution 40/61 on measures to prevent international terrorism, unanimously adopted on 9 December 1985, and to Security Council resolution 579 (1985) on hostage-taking, unanimously adopted on 18 December 1985. He would none the less accept the Special Rapporteur's treatment of the important subject of terrorism based on the definition in the 1937 Convention for the Prevention and Punishment of Terrorism,¹² with the addition of certain new forms of terrorism such as the seizure of aircraft and violence against diplomats. Consideration might also be given to including a reference to the seizure of ships, so as to cover incidents such as that of the *Achille Lauro*.

47. It was quite right that the draft code should cover the forcible establishment or maintenance of colonial domination, as well as mercenarism, which were dealt with in draft article 11, paragraphs 7 and 8.

48. As to draft article 12, on crimes against humanity, he endorsed paragraph 1, which was based on the definition embodied in the 1948 Genocide Convention. In the case of *apartheid*, he preferred the definition proposed in the first alternative of paragraph 2, because it was simpler. If a definition formulated along the lines suggested by Sir Ian Sinclair (1960th meeting, para. 15) proved generally acceptable, it would be a welcome development; otherwise, he could accept either of the two alternatives proposed by the Special Rapporteur.

49. Lastly, in draft article 13, if the second alternative for the definition of war crimes was adopted, appropriate reference should also be made to the

¹¹ "Will the judgment in the Nuremberg trial constitute a precedent in international law?", *The International Law Quarterly* (London), vol. 1 (1947), p. 165.

¹² League of Nations, document C.546.M.383.1937.V.

systematic destruction of cultural property to achieve a political objective in situations of armed conflict.

50. Mr. ARANGIO-RUIZ said that, before dwelling on the important problem of implementation, which he would discuss in the second part of his statement, he wished to make a few comments on points arising from the Special Rapporteur's excellent fourth report (A/CN.4/398).

51. To begin with, the Commission had acted wisely in retaining the tripartite division of crimes against peace, war crimes and crimes against humanity contained in article 6 of the Charter of the Nürnberg International Military Tribunal. It was hardly necessary to reiterate the generally shared views about overlapping, which was not peculiar to those three categories of crimes. It was found in every field of law and even between one field and another, just as it occurred, for instance, between the present topic and those of State responsibility and of international liability for injurious consequences arising out of acts not prohibited by international law. For his part, he agreed with members who had pointed out that terrorism should be placed under two headings. Overlapping was also possible between war crimes and crimes against humanity and, in that connection, the Special Rapporteur had made some interesting comments on the advantages of dual characterization (*ibid.*, para. 79).

52. He himself had drawn attention¹³ to a case of overlapping of crimes of that type, a case in which his own country had been the immediate victim between 1922 and 1943/1944, but one which had ultimately affected the rest of the world. A régime had been established by force, contrary to the principle of self-determination, and the human rights of the Italian people had been violated. The case had tended to escape attention because it had not been followed up by trials of the Nürnberg and Tokyo type; but the international relevance of the crime—which had been a crime both against humanity and against peace—had emerged in the light of the concept of conspiracy embodied in the Charter of the Nürnberg Tribunal and also the concepts of *apartheid* and colonialism.

53. Whatever the value of the analogy with colonialism and *apartheid*, the establishment of a régime in utter disregard of the principle of self-determination of peoples and at the cost of systematic suppression of human rights and fundamental freedoms unquestionably constituted a crime against humanity as well as an important step towards the perpetration of crimes against peace. He hoped that the Special Rapporteur would take that point into account in his future work.

54. He was not entirely in agreement with Mr. Calero Rodrigues's criticism (1959th meeting) of the term "offences" in the English title of the draft code, for it helped to convey the idea that the aggravation of certain otherwise common crimes made them crimes against humanity.

55. With reference to aggression, he agreed with members who favoured a "mixed" definition including

a non-exhaustive list. Careful consideration should also be given to the definitions of indirect aggression contained in a number of universal and regional instruments. One example was to be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹⁴ the ninth and tenth preambular paragraphs of which, dealing with the prohibition of the use of force, contained a definition of indirect aggression.

56. The question of economic measures posed some problems. In that regard, a distinction should be drawn between economic measures amounting in quality and dimension to aggression, and economic measures qualifying as "countermeasures" under the draft articles on State responsibility.

57. He could not entirely agree with Mr. Roukounas (1961st meeting) that aggression was inconceivable as a crime by an individual. There were cases in which "one man, one man alone", to use the words of Winston Churchill during the Second World War, was the culprit. Of course, one man alone could not wage a war and other persons would certainly be rightly held liable under the heading of complicity or conspiracy.

58. On the subject of crimes against humanity, he shared the doubts expressed by other members regarding the general concept of "humanity". Common crimes included some examples of inhumanity and, conversely, crimes against humanity included some examples of common crimes.

59. The list of crimes against humanity should not omit slavery or enslavement, or drug trafficking. In the case of the crime of *apartheid*, he preferred the definition given in the second alternative of paragraph 2 of draft article 12, for it was essential that the condemnation of South Africa's policy should be combined with the necessary legal precision.

60. On the question of damage to the environment, it was plain that a distinction had to be made between State responsibility and criminality, in other words between cases of mere legal liability of a State and cases which reached the level of a criminal act.

61. As far as war crimes were concerned, he entirely agreed that the general term "war crimes" should be retained, on the understanding that it covered conflicts other than wars. Similarly, he supported the suggestion by Mr. Malek (1958th meeting) for the inclusion of a list that was not exhaustive, thereby making it possible to add a reference to the use of nuclear weapons once they became the subject of prohibition, as well as to the use of other weapons of mass destruction.

62. On the other hand, he did not favour Mr. Tomuschat's suggestion (1961st meeting) that the reference to the "customs of war" should be deleted. Such a deletion could well mistakenly imply that the rules of warfare, or of armed conflict, had all been codified.

63. The "other offences" would be better placed in the draft code in the part on general principles. Account

¹³ See *Yearbook ... 1985*, vol. I, p. 66, 1887th meeting, paras. 35-36.

¹⁴ See footnote 8 above.

must be taken, however, of the problem of overlapping and particularly of the tendency of criminal activities to spread and escalate in terms of gravity and the number of participants.

64. He agreed that it was necessary to be precise in the definitions to be given in the code, to bring out the concept of criminal intent (*mens rea*) and to avoid any idea of collective responsibility. In international law, collective responsibility was conceivable only in wartime, when an entire military and economic machine was involved in armed action and destruction. Once hostilities were over and a country was occupied, and individuals were apprehended and brought to trial, the only crimes to be dealt with were crimes by individuals, even if they had been committed within the framework of some delinquent association or of participation in a criminal agreement.

65. Although the question of implementation had been left aside by the Commission at its previous session, the issue had been referred to in the Sixth Committee at the fortieth session of the General Assembly as essential for the effective and proper application of the code, particularly with regard to crimes against peace and crimes against humanity (see A/CN.4/L.398, paras. 111-115). In his view, implementation was also a vital and central issue because the solution adopted would, in many respects, condition the choices the Commission was called upon to make in connection with penalties, as well as the definition and classification of the offences themselves. The comments by some members of the Commission seemed to indicate that the implementation of the code should be ensured by an international criminal court, and he fully agreed with them. Indeed, it was the only really satisfactory solution. But he very much doubted whether it would be practicable in the short or medium terms.

66. Indeed, the idea of an international criminal court was really the product of an unjustified analogy between the situation prevailing in 1945 and current international realities. The situation prevailing in 1945 had been unique, as far as the States to which the accused parties belonged had been concerned. One of them had, in term of general international law, been reduced to the legal status of an occupied territory—if not four occupied territories—subject to the temporary, but none the less overwhelming, primacy of the law of the occupying Powers. Anything more than a superficial study of the 1945 proceedings revealed quite clearly the lack of a general international legal umbrella. Technically, the Nürnberg trials had taken place not under the aegis of general international law but under the law of the military occupiers. The Nürnberg Tribunal had ultimately been considered in law either as a common organ of the four occupying Powers, or as an organ of the German people set up by the occupying Powers. While such a technical explanation might be seen as justified by the principles of natural law and morality which lay at the root of any decent legal system, it was more than abundantly clear that the absence of general rules of international law and the complete absence in the Tribunal of any judges appointed by either neutral or occupied countries precluded any description of the Nürnberg Tribunal as a genuinely international court

prosecuting acts committed by individuals and punishable under general international law. In short, the legal and political framework in which the trials had taken place had been such that, while warranted morally and politically, they had not been justified under the international law of that time. It was difficult, therefore, to see how the Charter of the Nürnberg Tribunal and the trials that followed could be regarded as precedents justifying the current underestimation of the difficulties that the international community of today would encounter on the way to establishing an international criminal court and its complementary institutions.

67. In the case of war crimes, general international law had long provided a relatively adequate answer, for by virtue of the laws and customs of war the alleged author of any such crime was liable to be tried and punished by a captor belligerent State. Of course, prosecution still seemed to be a matter of choice on the part of the captor, and the draft code might instead stipulate that the captor State was under a legal obligation to prosecute. In any event, no revolutionary reform of the existing unwritten law seemed to be necessary.

68. The problem was different in the case of crimes against peace and crimes against humanity, precisely because, while international machinery would be the only proper solution, the establishment of an international court would meet the most serious obstacles in the realities of international relations. Indeed, the international court that would be established under the code would be called upon to try principally, if not exclusively, individuals. As such, it would have to be nothing less than a supranational court, rather than an international court such as the ICJ, which dealt with disputes between States. It would be a long and difficult undertaking to convince the sovereign States of today, which were considered to be not inclined to accept the jurisdiction of the ICJ in the draft articles on State responsibility, to agree to the establishment of a supranational court. Even if the establishment of such an international jurisdiction were accepted, it was difficult to imagine how, and under what conditions, it would have a chance to function satisfactorily in dealing with charges of crimes against peace or crimes against humanity brought against the members of a sovereign State's Government.

69. Another international, yet not supranational, theoretical solution would be to entrust such international criminal jurisdiction to *ad hoc* bodies appointed either by the Security Council or by the General Assembly, with the co-operation of Member States. But the difficulty for such problematic bodies of delivering consistent and impartial pronouncements and of obtaining the necessary co-operation from all the States directly or indirectly involved in each case would be of such magnitude as to imperil the very credibility and effectiveness of the draft code.

70. The only viable option thus seemed to be the one mentioned in paragraph 52 of the Commission's report on its thirty-seventh session, namely the so-called principle of universal jurisdiction.¹⁵ However, such a principle could surely not be applied overnight; it could be

¹⁵ *Yearbook ... 1985*, vol. II (Part Two), p. 13.

pursued only on a step-by-step basis. Each step in the extension of national jurisdiction would have to be accompanied by a parallel step in inter-State co-operation in the detection, apprehension, extradition, trial and punishment of persons accused or found guilty of a crime. Although conceivable for crimes such as piracy, drug trafficking, slavery, torture, hijacking, counterfeiting or certain neutral forms of terrorism, such a development seemed improbable for crimes with highly political connotations such as the most serious among the crimes that should be dealt with in the code. Indeed, the adoption of the universal jurisdiction solution presupposed a degree of unification of the criminal laws of different States that would be very hard to achieve.

71. Mr. JAGOTA congratulated the Special Rapporteur on his excellent fourth report (A/CN.4/398), which would enable the Commission to make substantial progress on the topic at the present session.

72. He had already commented on the substance of new draft articles 1, 2, 3 and 11 at the previous session.¹⁶ The new definition of crimes or offences in draft article 1 was acceptable, but the scope and unity of the concept of "offences against the peace and security of mankind" should be covered in the commentary to the article.

73. He also endorsed the definition of aggression contained in paragraph 1 of new draft article 11. The competence of the Security Council under the Charter of the United Nations to determine that other acts constituted aggression or to assess the gravity of such acts would none the less remain intact. Similarly, he approved of the content of the other paragraphs of article 11. On the other hand, an additional paragraph should be included on the preparation of the use of armed force against another State, as had been done in article 2, paragraph (3), of the 1954 draft code, together with the limitations mentioned in that draft.

74. The report conveyed the impression (*ibid.*, paras. 175-176) that the draft code should perhaps foster the concept of universal criminal jurisdiction and leave it to the competent court to prescribe penalties for the offences committed. For the time being, he wished simply to reiterate that penalties were a deterrent to a potential offender and that they protected the interests of the international community. Even though the absence of penalties would not make the criminal acts innocent and permissible, it would be useful for the Commission to await the decision of the General Assembly and the reaction of Governments before dealing with that aspect.

75. Part I of the report rightly distinguished crimes against humanity from crimes against peace and war crimes, a classification that had been adopted in Principle VI of the Nürnberg Principles¹⁷ and in the 1954 draft code. Given the developments in the law since 1954, it should be defensible to elevate the autonomy of crimes against humanity and give them priority over war crimes.

¹⁶ See *Yearbook ... 1985*, vol. I, pp. 76-77, 1888th meeting, paras. 49-58.

¹⁷ See 1958th meeting, footnote 4.

76. There might be an overlap between crimes against humanity and war crimes. Since article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide stated that "genocide, whether committed in time of peace or in time of war, is a crime under international law", that aspect could be taken into account in defining the term "war crimes".

77. Quite properly, genocide and *apartheid* were included in draft article 12 as crimes against humanity. The second alternative definition of *apartheid*, taken from article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, was preferable. A mere reference to that Convention, or use of the first alternative, would simply define a given crime indirectly, rather than directly indicate its elements and identify it as a crime as should be done in a self-contained code. The wording of the second alternative might be considered by the Drafting Committee, without any adverse effect on the interpretation of the 1973 Convention.

78. Paragraph 3 of draft article 12 enumerated other crimes against humanity. Even though most of them would also be crimes under the national laws of States, they also constituted crimes against humanity in view of their nature as inhuman acts against elements of the population. Like other members, he too considered that terrorism should be mentioned in a separate paragraph as a crime against humanity.

79. Paragraph 4 of article 12, concerning serious damage to the environment, was based on article 19 of part I of the draft articles on State responsibility, which the Special Rapporteur had already used in defining the offence in subparagraph (d) of the first alternative of draft article 3 submitted in the third report (A/CN.4/387, chap. III). Accordingly, the matter was already before the Commission in connection with the topic of State responsibility and also that of international liability for injurious consequences arising out of acts not prohibited by international law. It had been suggested that the issue should be left at that, so that the proper remedy against any serious damage to the environment would be damages in tort or in other civil action, and hence that it should not be raised to the level of an international crime. In his opinion, a serious breach of an international obligation relating to the environment might be tantamount to an inhuman act against elements of a population affected thereby, and it should therefore be treated as a crime against humanity. Paragraph 4 of draft article 12 should therefore be retained, subject to possible redrafting in the light of the comments made in the Sixth Committee of the General Assembly and by Governments.

80. Referring to part II of the report, he noted that the Special Rapporteur had submitted two alternatives for draft article 13, one of them defining war crimes in general terms, with a definition of the term "war" that seemed to combine a general definition and an enumeration of criminal acts. As to terminology, he considered that the Commission should retain the term "war crimes" for reasons of usage and clarity. The term would not imply "legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations", to use the words of

the preamble to Additional Protocol I of 1977 to the Geneva Conventions.¹⁸ In order to include a reference to armed conflict, it might be useful to define the term "war crime" as follows:

"Any serious violation of the laws or customs of war or an armed conflict constitutes a war crime."

The meaning of "armed conflict" could be explained in the commentary.

81. With regard to methodology, article 2, paragraph (12), of the 1954 draft code simply used the words "acts in violation of the laws or customs of war". It might be useful, however, to include a non-exhaustive enumeration, as proposed in the second alternative of draft article 13, but with a number of changes. Subparagraph (b) (i) should be supplemented to include the additional elements referred to in article 130 of Geneva Convention III and in article 147 of Geneva Convention IV.¹⁹ The specific points to be included would be "unlawful treatment of prisoners of war and protected persons, taking of hostages". In subparagraph (b) (ii), the parentheses around the words "in particular first use of nuclear weapons" should be removed. The deterrent effect of such a provision, pending the conclusion of a comprehensive convention on the subject, could not be over-emphasized.

82. As to part III of the fourth report, concerning "other offences", the Special Rapporteur raised the question (A/CN.4/398, para. 117) whether membership of an organization implicated in a criminal affair should constitute a separate offence or whether it should be subsumed under complicity or participation. Article 2, paragraph (13), of the 1954 draft code included the acts of conspiracy, direct incitement, complicity and attempt as offences. They were also separate offences under article III of the 1948 Genocide Convention. Yet draft article 14 did not expressly mention direct incitement or membership of a criminal group or organization as other offences.

83. The Indian Penal Code²⁰ dealt at considerable length with such concepts as: joint offenders, or the criminal responsibility incurred by each person when a criminal act was committed by several persons pursuant to a common intention; abetment, namely aiding or instigating the commission of a criminal act, or engaging in a conspiracy if an illegal act or omission took place pursuant thereto; criminal conspiracy, namely agreement to commit an illegal act or to commit an act that was not illegal by illegal means; membership of an unlawful assembly committing an offence pursuant to a common object; and attempts to commit an offence that was punishable with imprisonment, whether or not for life, and failed because of circumstances independent of the volition of the offender. In addition, the offences of abetment, conspiracy and attempt were specifically included in connection with offences against the State, offences relating to the armed forces and offences affecting the human body, such as culpable homicide and murder, and other serious offences. Even

an attempt to commit suicide was a separate offence, with a prescribed punishment.

84. In view of the seriousness of the acts constituting offences or crimes against the peace and security of mankind, the Commission should include conspiracy, abetment or direct incitement, complicity and attempt in the draft code as separate offences. Such provisions should be placed in the part containing the list of offences, rather than among the general principles, since they dealt with the identification of an offender committing a specified act. As to draft article 14, he preferred the first alternative of section A. The substance of the second alternative should form the subject of a commentary elaborating on the term "conspiracy". Provision might also be made for the article to cover direct incitement, as had been done in the 1954 draft code, the 1948 Genocide Convention and the 1973 *Apartheid* Convention. No reference need be made to mere membership of an organization or group as an act constituting a crime, unless the person concerned came within the scope of the other provisions of draft article 14.

The meeting rose at 1 p.m.

1963rd MEETING

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

Chairman: Mr. Julio BARBOZA

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

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

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

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

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

¹⁸ See 1959th meeting, footnote 6.

¹⁹ See 1958th meeting, footnote 7.

²⁰ *The Indian Penal Code*, with commentary and notes by M. P. and R. Tandon, 12th ed. (Allahabad, Allahabad Law Agency, 1979).

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

PART I (Crimes against humanity)

PART II (War crimes) and

PART III (Other offences) (concluded)

1. Mr. MAHIOU said that the Special Rapporteur's argumentation in his fourth report (A/CN.4/398) was so convincing that it might make the Commission tend to forget the very complex underlying problems it would have to solve in formulating the draft code. The approach he had adopted, which combined the analytical with the synthetic method, was also entirely satisfactory. It had enabled him to identify general principles, as the Commission required of him, while avoiding the twofold danger of proposing too detailed definitions and, conversely, formulating unduly abstract principles that would be difficult to relate to concrete situations. In criminal law it was necessary to stay within the realm of the concrete.

2. Ideally, the draft code should meet three requirements: it should define offences against the peace and security of mankind; it should specify the corresponding penalties; and it should determine the court competent to characterize the offences and impose the penalties. As to the last requirement, it was not certain that States were opposed to the establishment of an international criminal jurisdiction, for the good reason that many of them would be embarrassed at having to try certain offences themselves and would probably be glad to refer them to an international court.

3. Precision and rigour were necessary for progress in formulating the draft code. In internal criminal law, particularly where the characterization of crimes was concerned, lack of precision was dangerous because it could lead to the violation of fundamental freedoms: any unduly flexible or general characterization might give rise to abuses. What was true of internal law was *a fortiori* true of international law, especially if, instead of providing for the establishment of an international court, the Commission recognized the principle of universal jurisdiction, according to which it would be for national courts to try the offences specified in the code. To provide against the risks—which would be even greater in that case—of contradictions and even errors in the interpretation of facts, the Commission would have to draft definitions that were as precise as possible. Of the different alternatives proposed by the Special Rapporteur in the draft code, he himself therefore preferred the most precise and rigorous, which were not likely to give rise to abusive or even erroneous interpretations.

4. The same concern for rigour might also lead the Commission to reduce the number of offences covered by the code and to retain only those whose inclusion was approved by the greatest number of States.

5. The Special Rapporteur had been quite right to try to draw up a list of criteria for characterization. The basic distinction he had made between crimes against peace, crimes against humanity and war crimes provided a very good starting-point at the present stage of

the work. That distinction was, of course, relative, since one and the same offence could, for example, be both a war crime and a crime against humanity. But that was quite normal; the same relativity was to be found in internal law.

6. That fundamental distinction having been accepted, the question arose whether it would not be appropriate to introduce, in each of the three categories of crime, a further distinction between crimes whose definition did not give rise to any major objection by States or to any real controversy in judicial practice or legal doctrine, and crimes on which it was much more difficult to reach agreement.

7. For the former, which included, in particular, aggression, genocide and most war crimes, it would be sufficient to abide by the definitions and characterizations contained in the principal relevant international conventions—although, in the case of war crimes, "simple" crimes might be distinguished from those which were also crimes against peace or against humanity.

8. For the second group of crimes, however, it was essential to identify the elements which conferred their specific character upon offences against the peace and security of mankind and caused a particular act or occurrence to be included among the offences to which the code would apply. In that respect, the Special Rapporteur had greatly facilitated the Commission's task. In his analysis of crimes against humanity (*ibid.*, paras. 20-26), he had reviewed several elements, some of which were material, some psychological and others mixed. Such elements were: atrocity of the crime, infringement of a fundamental right, massive scale, official position of the perpetrator and motive. Taken separately, each of those criteria could, of course, be contested. It had been questioned in the Commission, for example, whether the element of massiveness was always necessary. In fact, of the five criteria contemplated by the Special Rapporteur, only that of motive appeared to be unanimously accepted.

9. It had also been asked whether an act or occurrence had to have all those characteristics at once in order to be qualified as a crime against humanity, or only some of them, and if so which? One thing appeared certain: one of the criteria alone was not enough, and some of them, in particular the official position of the perpetrator, were not decisive. For an individual, whether acting on behalf of a State or in a personal capacity, could certainly commit a crime against humanity. On the other hand, three elements were decisive: gravity, massiveness and motive. They must all be present together for a crime against humanity to be determined. That condition would keep the draft code from encroaching on internal law by dealing with ordinary crimes which came under the jurisdiction of the national courts. He therefore believed it would be inadvisable to adopt as many criteria as possible and lengthen indiscriminately the list of offences to be included in the code.

10. True, from the legal and ethical points of view, both the broad concept and the narrow concept of a crime against humanity could perfectly well be de-

fended. But the Commission also had to take account of the wishes of States. It needed to know what States were prepared to accept, or, more precisely, to tolerate, and how far it was possible to go without provoking unduly negative reactions on their part. It would be regrettable if the inclusion of crimes which were already covered by internal law, or which States might not wish to be included in the draft code, were to hinder the codification of provisions condemning the gravest and the most odious crimes.

11. The part of the report dealing with serious damage to the environment (*ibid.*, paras. 66-67) was perhaps rather too elliptical, and an uninformed reader might even think that damage resulting from an accident was placed on the same footing as damage resulting from an intentional act. More emphasis should therefore be placed on motive. Among cases of serious damage to the environment, which could result from acts committed either during an armed conflict or in time of peace and could therefore be classified either as crimes against humanity or as war crimes, mention should be made of damage resulting from the destruction of a nuclear power plant, the torpedoing of a giant oil tanker and the destruction of offshore oil-drilling installations. Those acts, the consequences of which were extremely serious, had their place among the offences to be made punishable under the draft code.

12. On the question whether the use of nuclear weapons should be included, it should be borne in mind, first, that an individual could make use of such a weapon contrary to the orders of his superiors. Hence the question of possible individual responsibility arose in that regard. The most controversial question, however, was whether only the "first use" of nuclear weapons should be included among war crimes. For his part, he doubted whether the distinction made between the "first use" and the response was justified. True, the first case constituted aggression, whereas the second was only the exercise of the right of self-defence. But since the response could cause damage as serious as or even more serious than the aggression, it too was a crime. In fact, he would be inclined to think that the "first use" of a nuclear weapon was both a war crime and a crime against humanity, and that the response, because of its consequences, was a crime against humanity. The distinction between "first use" and subsequent uses might perhaps be more justified if it were made in part II of chapter I of the draft articles, dealing with general principles. The case of the author of the response could be provided for in draft article 8, on exceptions to the principle of responsibility.

13. On the question of making the use of nuclear weapons a crime, opinions were far from unanimous. Those opposed to doing so argued, in particular, that it was a separate question and that certain States were already trying to draft a convention prohibiting the use of nuclear weapons. That argument, though impressive, was not decisive. For some of the other acts and occurrences referred to in the draft code were also the subject of negotiations between States or of discussions in other bodies, and that did not prevent the Commission from continuing its work of codification concerning them.

14. The Human Rights Committee, which was also considering that problem, had stated in its report to the General Assembly at its fortieth session⁴ that:

... It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

and that:

The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

15. The Commission could not remain indifferent to the view expressed by that body. If the use of nuclear weapons, as well as that of weapons having equivalent effects, were not dealt with in the draft code, a paradoxical situation would result, which would well illustrate the moral of La Fontaine's fable: "According to whether you are powerful or lowly, court opinion will make you white or black." For in that case, terrorism, which was the weapon of the weak and the poor, would constitute an offence against the peace and security of mankind, but the use of nuclear weapons, which belonged to the powerful and rich, would not.

16. In conclusion, he supported the draft articles submitted by the Special Rapporteur, on the understanding that some improvements would have to be made, in particular to achieve greater precision and rigour in the definition and characterization of the offences to be covered by the draft code.

17. Mr. RAZAFINDRALAMBO said that a detailed examination of the Special Rapporteur's fourth report (A/CN.4/398), which was quite up to the Commission's expectations, revealed a certain number of gaps, which were mainly due to Government delays. The Commission had decided at the outset to raise not only the problem of the criminal responsibility of the State, but also, especially, that of the implementation of the code, that was to say the questions of penalties and choice of jurisdiction. Although the question of the criminal responsibility of the State could be deferred without causing too much difficulty, the same could not be said of the implementation of the code, particularly the attribution of competence. A draft code that did not contain provisions on its implementation might well remain a dead letter.

18. Although it was probably impossible to go into that question further at the present stage of the work, it was nevertheless highly desirable that the Commission should inform the General Assembly that it urgently needed the directives necessary for carrying out its mandate and information concerning the modalities of application of the code and the type of jurisdiction chosen by the General Assembly.

19. As had been said repeatedly during the debate, the provisions of the code, because of their criminal nature, should be drafted with rigour and precision, so as not to be open to different interpretations. All the constituent elements of the general concepts and of the offences in-

⁴ *Official Records of the General Assembly, Fortieth Session, Supplement No. 40 (A/40/40), annex VI, paras. 4 and 6.*

cluded should appear in the texts of the articles themselves, not in the commentaries.

20. Furthermore, in formulating the draft articles, the type of court that would be required to apply them—national or international—should be taken into account. If the General Assembly opted for national jurisdiction, different courts could be called upon to try similar cases; and if the judge had to determine for himself the content and scope of certain concepts or definitions that were formulated too vaguely in the code, judicial precedents might not be uniform. But even if, as the Special Rapporteur seemed to expect, most States finally opted for an international criminal jurisdiction, he himself would still favour a precise and detailed formulation.

21. In chapter II of the draft code, which dealt with specific offences, the Special Rapporteur had divided offences against the peace and security of mankind into three groups, each of which had a separate title and was covered by a single article. Because of the method chosen, the articles, in which the offences referred to were treated in separate paragraphs and the examples presented in subparagraphs, were unusually long for criminal provisions. That method was not always very clear, because the list of acts or occurrences cited as examples did not appear to follow a pre-established order. Some members had even spoken of overlapping and duplication. But that was something which could be settled in the Drafting Committee.

22. As to the order in which the three categories of offences appeared, although the Special Rapporteur had departed from the Nürnberg Principles⁵ and the 1954 draft code by choosing to place crimes against humanity before war crimes—a choice which the Commission might possibly reject—he had, by providing in part IV of chapter II for “other offences”, namely conspiracy, complicity and attempt, followed the example of those instruments, which were obviously based on common-law systems. For in written-law systems, complicity and attempt were incorporated in the general principles, while conspiracy was a special case, either of complicity or of participation as co-author of a crime, or even, as in French criminal law, a separate crime.

23. He had reservations regarding the title of part IV. Since there were considered to be three categories of offences against the peace and security of mankind, the fact that a special part was devoted to “other offences” could at first sight imply that those offences did not constitute offences against the peace and security of mankind. Perhaps it would be preferable to discard that general formula and simply to identify each of the offences covered by its name and to leave it in the position which the Special Rapporteur had assigned to it.

24. In any event, draft article 14 should define the concepts of conspiracy, complicity and attempt instead of simply stating, for example, that “The following also constitute offences against the peace and security of mankind: A. Conspiracy to commit ...”. It should not be forgotten that the code would be the only instrument of international law containing criminal provisions.

25. In that respect, where the offences specified were already defined in existing instruments, it would be preferable—especially if competence in the area of offences against the peace and security of mankind were to be attributed to internal jurisdiction—to repeat those definitions, if possible *in extenso*. It did not matter whether the instruments in question were conventions that had not been ratified by all States, or even General Assembly resolutions. It was generally accepted that those resolutions could embody principles of customary law, which were thereby binding on the international community.

26. Turning to the three major categories of offences, he said that, with regard to crimes against humanity, he fully endorsed the interpretation given to the word “humanity” in the report (*ibid.*, para. 15) as meaning the “human race as a whole”. He also agreed with the qualifying criteria identified by the Special Rapporteur (*ibid.*, paras. 21-26). Seriousness and massiveness, in particular, were fully characteristic of crimes against humanity. Naturally, all such crimes presupposed a criminal intent; but the qualification ultimately depended on the motive, which, as the Special Rapporteur stressed, was a special, distinct intention, forming part of the crime.

27. As he had already said at the Commission’s thirty-sixth session,⁶ the draft code should retain the crimes referred to in the 1954 draft code, namely genocide and inhuman acts, together with those, such as *apartheid*, which were the subject of conventions that had been adopted and had entered into force subsequently. Inhuman acts should in his opinion retain their specific nature.

28. Moreover, all crimes against humanity which did not have the specific features of *apartheid* and genocide and which, in particular, did not have a mass element should be regarded as inhuman acts. That was the case of enslavement. Nevertheless, he would not be opposed to treating that crime, which was the subject of various international conventions in force, as a separate offence. However, he could not subscribe to the proposals to add to the list of inhuman acts, for example, the traffic in women or even drug trafficking. Those international crimes did not have the particularly serious character of offences against the peace and security of mankind and should be dealt with by internal laws.

29. Serious damage to the environment had a place among crimes against humanity. Although that crime—like genocide, *apartheid* and colonial domination—was also treated in the draft articles on State responsibility, its inclusion in the draft code and its qualification as a crime did not appear to raise serious reservations within the Commission.

30. Regarding war crimes, he was fully in favour of extending the scope of the draft code to include non-State entities such as national liberation movements. That would only be affirming the provisions of Additional Protocol I to the 1949 Geneva Conventions.⁷ He

⁶ See *Yearbook ... 1984*, vol. 1, pp. 11-12, 1816th meeting, paras. 41-42.

⁷ See 1959th meeting, footnote 6.

⁵ See 1958th meeting, footnote 4.

approved of the various proposals to retain the traditional expression "war crime" and agreed with the Special Rapporteur that there was a clear difference between crimes against humanity and war crimes.

31. Regarding the wording of draft article 13, he said that, if a consensus were reached on a non-restrictive list, he would not be opposed to the Commission adopting that solution despite the risk that the list might be interpreted broadly.

32. Subparagraph (b) (ii) of the second alternative of draft article 13 included among war crimes "the unlawful use of weapons, and particularly of weapons which by their nature strike indiscriminately ...". If, as appeared to be the case, that provision was accepted in principle, it was difficult to see how it could be claimed that it did not cover the use of nuclear weapons. While it could admittedly be argued that it would be more realistic not to mention the use of nuclear weapons, in order to avoid rejection of the entire draft code by the nuclear Powers from the outset, it could also be argued that, in the event of a nuclear holocaust, there would be no judges or accused persons left on earth.

33. However, from the strictly legal standpoint, since the indiscriminate use of weapons of mass destruction had always been considered contrary to the laws and customs of war and since prohibition of those weapons had been enshrined in the Additional Protocols to the Geneva Conventions, it was difficult to claim that the use of nuclear weapons, which were undeniably weapons of mass destruction, was not illegal. Furthermore, to the extent that the Commission agreed to punish acts resulting in serious damage to the environment, it should draw the inevitable conclusions and recognize that the use of nuclear weapons would undeniably cause serious damage to the environment.

34. However, no rule of international law, except those deriving from the Treaty on the Non-Proliferation of Nuclear Weapons,⁸ which many States had not ratified, prohibited the manufacture of nuclear weapons. It would therefore be difficult to prohibit possession of such weapons and to order the destruction of existing stocks.

35. In part III of the report, the Special Rapporteur analysed the difficult concepts of conspiracy, complicity and attempt with exemplary thoroughness.

36. With regard to conspiracy, he endorsed the Special Rapporteur's proposal to retain the concept of conspiracy as an offence not only for crimes against peace, but for all offences against the peace and security of mankind. Furthermore, in keeping with the Convention on the Prevention and Punishment of the Crime of Genocide, membership in a group or organization or participation in a concerted plan should be characterized as crimes, since that was the only way to reach an individual belonging to a criminal organization. For the reasons invoked earlier, all elements constituting conspiracy should be listed in the text of the paragraph covering that offence.

37. Complicity should also be clearly defined. Section B of draft article 14 provided a good starting-point in that respect.

38. With regard to attempt, he recalled that the 1954 draft code covered acts preparatory to the use of armed force and attempt, with no other explanation, for all offences against the peace and security of mankind. Since section C of draft article 14 said nothing on that point, the Commission should give a clear explanation of the scope it intended to give to the concept of attempt in international criminal law—instead of implicitly referring to the solutions offered by internal criminal law—and, especially, decide whether voluntary desistance should enable the charge to be set aside. The definition should make it clear that attempt was an unequivocal and direct type of conduct, which represented a substantial step towards the commission of an offence against the peace and security of mankind, but which had not succeeded because of circumstances beyond the perpetrator's control.

39. Mr. RIPHAGEN said that two different approaches could be adopted to the elaboration of a code of offences, one concerned with strengthening the rules governing relations between States, and the other dealing with offences, the perpetrators of which, because of the bias of the competent national authorities, were often inadequately punished or, because of the transnational character of their acts, were not easily punished solely within the framework of a domestic legal system.

40. The first approach, with which his remarks would be concerned, involved three interrelated considerations. First, not all rules governing relations between States required strengthening; secondly, there was *a priori* much to be said in favour of limiting the code to offences which had a "State-like" character; and thirdly, crime and punishment in relation to individuals necessarily implied a moral element.

41. The strengthening of rules governing relations between States entailed providing for the legal consequences of internationally wrongful acts beyond the legal framework of such relations. The rules governing the criminal responsibility of individuals came into play. That was particularly necessary since, as experience showed, it was exceedingly difficult to punish States as such without either adversely affecting the interests of other States, or acting contrary to fundamental human rights, including the right to self-determination. The aim would be to give direct effect to particular rules which had a *jus cogens* character. That direct effect—which would concern, firstly, persons not acting on behalf of the State and, secondly, legal relationships which were not regulated by rules affecting relations between States—necessarily implied an adaptation of the content of rules governing relations between States and must have an impact on normal rules concerning the jurisdiction of the State and mutual assistance between States. In a sense, the whole operation of establishing a code was meant to bring the rules governing relations between States back to the original and final subjects of law, namely human beings. That was true even where punishment was meted out by the authorities of a State or of an international organization

⁸ United Nations, *Treaty Series*, vol. 729, p. 161.

and where the interests of the international community of States as a whole were involved, or at least invoked.

42. Reverting to his original three interrelated considerations, he said that the first consideration evoked the connection between the crimes to be dealt with in the draft code and the concept of international *jus cogens*. The hard core of international *jus cogens* would seem to lie in the conditions which marked the boundaries of the system of coexistence of separate and sovereign States, which suggested that the offences to be defined in the code should be limited to what had, somewhat loosely, been described as the “most serious” offences. In that connection, he seriously doubted, for example, that interference by the authorities of one State in the internal or external affairs of another State could be described purely and simply as a crime against peace entailing individual criminal responsibility (draft article 11, para. 3). That was too wide a concept to be dealt with in rules of individual criminal responsibility.

43. The second consideration concerned the so-called “mass element”. The Commission was confronted with the necessity of adapting the content of the rules of international law in order to make them applicable to an entirely different relationship deriving from individual criminal responsibility. In his view, it was entirely correct not to limit such criminal responsibility to persons acting on behalf of the State. On the other hand, the behaviour to be covered by the draft code must be distinguishable from common crimes, which were a matter solely for domestic judicial systems. The distinction would seem to be that the conduct punishable under the code—necessarily individual conduct—must be shown to form part of a pattern of behaviour or general design involving interrelated but separate acts, perpetrators and victims. That was what he had meant by “State-like character”, a concept which would not be easy to express in the code. Naturally, criminal intent of the individual perpetrator was part of the interrelationship between the elements of the overall pattern of behaviour, as were the object and purpose of the behaviour itself. Indeed, such patterns of behaviour would normally include a form of organization on the active side, and the singling out of a group of persons as “enemies” on the passive side, again a “war-like” situation and corresponding “State-like” behaviour.

44. The third consideration—the moral element—was addressed mainly in draft articles 8 and 9 submitted by the Special Rapporteur. It included the “moral choice” of the perpetrator concerning a command given to him. However, the moral element did not stop there. There was also a moral element involved in the nature of the punishment and the punishing authority. Moral determinations as to the justification of a punishment tended to become “timeless”, in that the idea of *hic et nunc* tended to prevail over consideration of both past and future circumstances. While that was to some extent unavoidable, he nevertheless wondered whether it was really just, in respect of all the offences provided for in the code, to ignore the passage of time. There again, the Commission should be wary of an overdose of abstraction.

45. Mr. EL RASHEED MOHAMED AHMED said that the report under discussion (A/CN.4/398) was a

source of pride for all African scholars. He proposed to make some general remarks on that admirable report, while at the same time making a brief reference to the general principles of Islamic law on certain issues, thereby widening the ambit of comparison.

46. With regard to crimes against humanity, the Special Rapporteur stated (*ibid.*, para. 7) that the doctrinal bases for the regulation of armed conflicts had been laid down in the *Summa theologiae* of St. Thomas Aquinas and in *De Jure Belli ac Pacis* by Grotius. No doubt that was true, but St. Thomas, and indeed Grotius, could have been influenced by earlier doctrine embodied in the teachings of Islam.

47. Tradition had it that the Prophet Mohammed ordered his armies not to kill the wounded, the elderly, women or children and not to cut down trees. However, with regard to human heritage, it was difficult, if not impossible, to draw a clear line of demarcation. Civilizations, cultures, races, tribes and ethnic groups intermingled, disappeared and sometimes dissolved into larger societies. Despite the fact that human history had been marked by a constant series of struggles, what remained was the human heritage. The Koran contained an account of how Kabeel (Cain) had slain Habeel (Abel) out of jealousy and greed. As a result, the Koran stipulated: “That was why We laid it down for the Israelites that whoever killed a human being, except as a punishment for murder or other wicked crimes, should be looked upon as though he had killed all mankind; and that whoever saved a human life should be regarded as though he had saved all mankind.”⁹

48. Man thus appeared as the epitome of humanity, so that a person who transgressed the right of one man to live transgressed the very right to life itself. According to Islamic jurisprudence, there were five essentials which had to be protected and preserved: (1) the self; (2) the mind; (3) offspring; (4) property; (5) religion. A careful examination of those five essentials made it possible to discern the true meaning of crime. The Koran had been preceded by the Old Testament and the New Testament. The Ten Commandments had been revealed in the three divine books.

49. The question arose of how to draw the line of demarcation between serious crimes and other crimes. Some crimes remained serious all the time, whereas others might not be so at all times and in all places. The various criteria proposed (*ibid.*, para. 21), such as “barbarity, brutality or atrocity”, “humiliating and degrading treatment” and “outrages upon personal dignity”, were not precise. The one nearest to precision was perhaps “infringement of a right”. Possibly the best test would be the comprehensive one of infringement of the five essentials to which he had referred. That was in any event the test which he proposed to apply when discussing the various types of crime.

50. Genocide, squarely met that test. Literally, “genocide” meant the killing of a race. It was difficult, however, to confine genocide to its literal meaning or even to restrict it to the killing of a race, a group or a

⁹ *The Koran*, translated by N. J. Dawood (Penguin Books, 1974), pp. 390-391, sura 5, verse 32.

nation. He himself did not agree with those who, like Vespasien Pella, felt that killing a political group did not fall within the scope of genocide. On the other hand, he agreed with those members of the Commission who considered that, for the crime of genocide to be present, there must be a systematic pattern or design of acts against a group of people. In the absence of a more precise definition of genocide, the definition contained in the 1948 Genocide Convention could be accepted, if only for practical reasons. Thus he supported the Special Rapporteur's proposal that the crime of genocide should be included in the draft code.

51. *Apartheid* could also be included, since it outraged the conscience not only of Africa, but of the whole world. Although it was confined to one country, its consequences affected other countries as well, as shown by the recent raids against Zambia, Zimbabwe and Mozambique.

52. He fully agreed with Mr. Balanda (1960th meeting) on the subject of the environment. Much of Africa had become a desert as a result of deforestation. In his own country, Sudan, a serious drought was forecast for the current year. The dumping of nuclear waste constituted another threat to the environment. When it took place in the territories of developed countries with a high standard of safety measures, such dumping might perhaps not affect other countries. A much more dangerous situation capable of affecting the whole African continent would arise, however, if a recent plan to dump nuclear waste in the African desert materialized. An article on protection of the environment should therefore be included in the draft code.

53. On the question of war crimes, he favoured retaining that term, which had become accepted in international law. Its meaning should, of course, be extended so as to embrace all armed conflicts. For the purposes of drafting, the distinction between war crimes and crimes against humanity was important, although there was some inevitable overlapping. Since war was now illegal, any act consequential of war was also necessarily illegal. Such acts could vary in degree and in nature. As far as their definition was concerned, therefore, he favoured a combination of a general formula with a non-exhaustive list.

54. While terrorism was a dangerous phenomenon of the contemporary age, he doubted whether it would be helpful to try to draw a distinction between its various forms. In any event, any distinction which might be drawn was unlikely to gain unanimous acceptance. The best course would therefore be to condemn terrorism in all its forms, since an international criminal code would be incomplete if it did not include provisions on the subject.

55. He agreed that the question of nuclear weapons was a delicate one and that it was not possible to stop the manufacture, stockpiling or testing of such weapons. Nevertheless, he saw no reason why an effort should not be made to prohibit the use of nuclear weapons.

56. On the subject of "other offences", he found himself in broad agreement with Mr. Jagota (1962nd meeting). The Penal Code of Sudan, notwithstanding

certain amendments to introduce Islamic provisions, was based on the Indian Penal Code. The terminology of both codes was the same and could be useful at the international level.

57. He agreed on the desirability of including "other offences" in the draft code. He had no difficulty with such concepts as conspiracy and attempt, but had serious doubts with regard to the validity of the concept of membership of a group. Such membership ought not to serve to incriminate any member of the group, unless the group itself was illegal and the member was tried on that account alone. He agreed with Mr. Jagota that "other offences" such as attempt and conspiracy should be dealt with in separate provisions and not be included among the general principles.

58. Lastly, he agreed that the draft code would be deficient if it did not contain any provisions on implementation. The absence of such provisions, however, would not make the adoption of the code a futile exercise. He recalled that the General Assembly, in its resolution 40/69 of 11 December 1985, had stressed that the elaboration of a code of offences against the peace and security of mankind

... could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations.

Clearly, the Governments represented in the General Assembly wanted the draft code prepared and accepted. It would be paradoxical if, when the code was completed and it came to the point of signing and ratifying the convention embodying it, the same Governments were to object to it.

59. In any event, the adoption of an international code of offences would be useful in many practical ways. It would strengthen international peace, as stated in resolution 40/69; it would influence legal thinking in various parts of the world; and it would ultimately enable differences to be reconciled and common ground to be found.

60. Mr. DÍAZ GONZÁLEZ joined previous speakers in congratulating the Special Rapporteur. The debate on the first three parts of the fourth report (A/CN.4/398), which was coming to an end, led him to wonder whether it was not impossible or too difficult to draw up a draft code of offences against the peace and security of mankind. Despite the adage that there was nothing new under the sun, the debate had shown that to speak of genocide, *apartheid* and colonialism was to display both romanticism and grandiloquence. Consequently, if for one reason or another the Commission was not able to define genocide or aggression by using existing definitions, it would have to return the study to the General Assembly and explain that it had to wait for romanticism to give way to realism in order to pursue its task. Only then would it be in a position to draft the articles in question.

61. It had been said that the Commission's task was neither political nor sociological. Was law to be found in a pure state only in a test-tube? Was law not a creation of the mind? Did it not evolve? He asked those questions because everything governed by law was in fact of sociological, even political, origin. Man

established rules of law designed to regulate his own conduct and even that of States. Thus the institution of marriage did not “legalize” mating until millennia after man appeared on earth. The aim had been to protect first the stability of the family, then the rights of the child. Currently, marriage was a legal institution as well as a sociological, biological and physiological institution. Over the centuries, that institution had evolved; it was constantly changing. Perhaps one day the principle inherited from the Romans, *Infans conceptus pro nato habetur quoties de commodis ejus agitur* would even disappear. Marriage was no longer based on procreation, which had been called into question by abortion and *in vitro* conception, for example. In the light of those considerations, he cautioned members of the Commission against becoming too attached to the idea that the Commission could not go forward because it had to deal with law and not politics.

62. Why had the General Assembly invited it to attempt to draft an international criminal code? The Commission had based its work on the Nürnberg proceedings. Those proceedings had as their point of departure not the law, but the decision of the victors of the Second World War to punish the perpetrators of atrocities committed during the conflict. On that occasion it had been necessary to violate the legal principle *nulla poena sine lege*. Although the law had been violated, justice had been done, at least from the point of view of the Allies who had triumphed in the Second World War. Mankind had applauded the procedure adopted, although numerous crimes, such as colonialism, had not been condemned at that point. The Commission was now attempting to ensure that the crimes referred to in the draft code were punished not on the basis of a decision by one State, but because they were against the law.

63. Nevertheless, although Nazi terror had been brought to an end, mankind currently lived in fear of a nuclear conflict and was being subjected to a balance of terror. The purpose of the code which the Commission was to elaborate was to prevent a State from taking it upon itself to play accuser, judge and executioner at the same time by imputing a crime to another State on the basis not of the law, but of the force or power at its disposal or at the disposal of its allies and protectors. That was the reason for the existence of an international criminal code. Moreover, any codification effort was aimed not only at establishing norms, but also at creating the organ that would apply them. He therefore endorsed the idea that the Commission should consider the creation of an international court as a mechanism for the application of the code it was to elaborate. Even if such a step could be described as romantic, it must be attempted.

64. Referring to the Spanish text of the fourth report, he was pleased to note that the word *crimen* had definitively replaced the term *delito*. Furthermore, he agreed with the philosophy underlying the report and approved of the form in which the Special Rapporteur had approached questions, informing members of his doubts and requesting Member States to indicate their points of view.

65. On the matter of the offences dealt with by the Special Rapporteur in his fourth report, he noted that many appeals for caution had been made throughout the debate concerning the definition of the term “genocide”. Although all members of the Commission appeared to be in agreement on which offences to include in the code, they were seeking pretexts for avoiding mention of that term. Whether or not the Convention on the Prevention and Punishment of the Crime of Genocide had been ratified by a large number of States, it did contain a definition of genocide, which had not prevented the Commission from devoting a good part of its time to debating the meaning of that term. One of the advantages of the Nürnberg trials had been not to have debated the question and to have set forth a definition of genocide. While he understood the appeals for caution made by some members of the Commission, those appeals should refer not only to the draft code, but to the work of the Commission in general. However, in the specific case of the draft code, the Commission should be extremely precise. He agreed with those members who had defended the idea of limiting the scope of the code and of not extending it to include offences already punishable under internal laws.

66. The draft code rightly covered acts causing serious damage to the environment. When a State bombed another country, indiscriminately destroying its flora and fauna, it was committing a crime against humanity by condemning the people of the country in question to die of thirst and starvation.

67. It was quite justifiable to include a provision on State terrorism in the draft code. In considering terrorism, it was the underlying causes that should be sought. It had been said that terrorism was the weapon of the poor. In fact, it was also the supreme means available to a people struggling for its liberation and independence, whence its links with colonialism. A people subjected to colonialism and over whom the colonial Power exercised State terrorism had no resources other than violence. He cited the example of the Latin-American countries in the nineteenth century and of the French who had joined the resistance under the occupation and whom the Germans had described as subversive terrorists. Similarly, the black population of South Africa had no recourse other than violence and terrorism. Numerous heads of State and of Government, moreover, had practised terrorism in their time to win independence for their countries. In the framework of the draft code, terrorism should be limited to State terrorism and colonialism. For those who believed colonialism was a thing of the past, he noted that, unfortunately, it had not disappeared in Latin America, or even in Europe and other continents where there were still occupied territories and colonies. The Declaration on the Granting of Independence to Colonial Countries and Peoples¹⁰ had established the principle of self-determination of peoples, but what was to be said of the occupied territories which were not acceding to independence and which were to be re-attached to the territories from which they had previously been separated?

¹⁰ General Assembly resolution 1514 (XV) of 14 December 1960.

68. All such crimes were interconnected. Colonialism went hand in hand with serious damage to the environment. In America, a colonial power occupied two-thirds of the cultivable area of an island country and was using it for firing-ranges and military training camps, and in so doing was committing a crime against humanity. Colonialism should appear among the crimes condemned by the code, whether the Commission decided to call it a crime of a colonial nature, colonial domination, or something else.

69. It had been said that it would be difficult to characterize *apartheid* as a crime in the code, because it was not very clear what the term signified. Supposedly, *apartheid* was comprised of a set of acts already sanctioned by internal law and would therefore not lend itself to a definition that could be encompassed in the code. In his view, *apartheid* was clearly a set of crimes, among the most abominable committed by man against man, and should be condemned by the code.

70. He recalled that Mr. Boutros Ghali (1961st meeting) had advocated referring to what had been done on continents other than Europe to combat offences against the peace and security of mankind. As early as 1820, many years before the founding of the Red Cross by Henri Dunant, Bolivar, representing Colombia, and General Morillo, representing the King of Spain, had signed a treaty regulating and humanizing war. In that respect, reference might also be made to the conventions that had been elaborated and the studies that had been carried out on offences against the peace and security of mankind either under the auspices of OAS or otherwise.

71. In conclusion, the question of nuclear weapons was a political one. Indeed, everything was political and sociological in origin and everything that man sought to regulate had appeared in his environment and not in a pure state in a test-tube. He did not believe that the Commission could succeed in drafting a concise article on what should be understood by a ban on nuclear weapons. He also believed that no distinction should be made between a State which made first use of nuclear weapons and a State which used them as a response. In either case, the main loser would be mankind as a whole. The prohibition always came after the experience, as shown by the case of toxic gases, which had been used during the First World War and then prohibited by conventions. But in the case in hand, the General Assembly was not preventing the Commission from condemning the use of nuclear weapons, or at least attempting to do so. The question of the use of nuclear weapons should not remain a matter for political bodies alone.

72. Mr. KOROMA congratulated the Special Rapporteur on the analytical and empirical qualities of his fourth report (A/CN.4/398). While recognizing that the hypotheses on which the draft code was based were valid, he did not agree in all respects with the content of the report. For example, he could not accept the idea of ascribing a degree of cruelty to technological progress in itself; nor would he place self-defence and peace-keeping in the same category of exceptions to the use of force.

73. In his view, the Commission should refrain from dealing with topics that were too politically controversial and which, in the absence of any common ground, afforded no possibilities for progressive development or codification. Consideration of such topics should be deferred until sufficient areas of agreement for their codification had been reached.

74. Those considerations had made him at first reluctant to speak on the topic. In order to overcome his misgivings, he had applied the tests of relevance and utility to the topic. As the debate had developed, he had arrived at a positive conclusion with regard to the utility of the topic and its relevance for the maintenance of international peace and security.

75. The Commission had a mandate to develop progressively and codify those values which the international community had in common, and must therefore identify conduct which was harmful or injurious to the common interests of mankind as a whole. In that connection, the international community considered the use of force in international relations illegal. In the event of armed conflict, however, the laws and customs of war had to be respected. He favoured retaining the reference to "customs", since otherwise the suggestion would be that all the laws and customs of war had been codified, which was not the case.

76. The draft code that the Commission was called upon to elaborate would prohibit the use of force and regulate the conduct of armed conflicts so as to avoid unnecessary harm or cruelty to those directly or indirectly involved in such conflicts. Such a code could serve not only preventive, but also educational purposes. It would enhance respect for human rights throughout the world.

77. Turning to the draft code itself, he approved of the tripartite division of offences into crimes against humanity, war crimes and other offences. In his view, in order to qualify as an offence against the peace and security of mankind, an act had to meet certain requirements. First, the act—or omission—had to be of a serious nature; secondly, a mass element had to be present, except for certain types of offences where a systematic pattern of behaviour might be sufficient, although criminal intent (or at least recklessness) also had to be present.

78. The source of law applicable to those offences could be found in conventions, in custom, in international instruments and in case-law. He agreed, however, that the Commission should not legislate by reference and that the code itself should specify the acts that were to be regarded as offences.

79. He agreed that crimes against humanity had acquired an autonomous standing—distinct from war crimes—and that they could be committed in time of peace. For an act or omission to be qualified as a crime against humanity, certain elements had to be present, such as intent to cause harm or inflict suffering, cruelty or suffering inflicted on human beings, and the degradation of human beings. He agreed with the Special Rapporteur's proposal to combine a general formula with a non-exhaustive list in the definition of crimes against humanity.

80. Genocide should come first in the hierarchy of crimes against humanity. The unique nature of that offence lay in the intent to destroy in whole or in part a national, ethnic, racial or religious group. Without such intent, mass killings would qualify as homicide punishable under internal law. On the other hand, where that intent was present, the murder of even a single individual could constitute genocide.

81. *Apartheid* should be given autonomous status as a crime against humanity. It had been defined in the relevant Convention of 1973 in terms of policies and practices of racial segregation and discrimination as practised in southern Africa for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them. Hence acts of *apartheid* must have been perpetrated in the context of southern Africa for the purposes described above. *Apartheid*, which the international community had declared to be a crime against humanity and a violation of the principles of international law, constituted a very serious offence.

82. The 1973 Convention, which had declared *apartheid* to be a crime, had been in force for some 10 years and had been ratified or acceded to by some 90 States, not only from Africa, but also from Europe, Asia and Latin America. The Convention could thus be said to have received universal approval. It was clear from article II of the Convention that its effect was confined to southern Africa. Articles III and IV showed that the aim was not to indict everyone in South Africa, but only the representatives of the State of South Africa, such as the members of the executive.

83. It was interesting that some States which had ratified neither the 1973 *Apartheid* Convention nor the International Covenants on human rights were none the less in the forefront of the struggle against *apartheid* and of the promotion of human rights. Thus the absence of such ratifications in no way detracted from the universal acceptance of those important instruments. Moreover, the decisions of the ICJ in a number of cases reinforced the conception of *apartheid* as an autonomous offence and a crime against humanity.

84. Slavery and the slave trade should also be included among crimes against humanity. Those acts had been prohibited by many international conventions and, given their serious nature, there was universal consensus that they constituted an affront to mankind.

85. He supported retaining the term "war crimes", on the understanding that, as the Special Rapporteur indicated (A/CN.4/398, para. 76), the word "war" related to the material aspect of the offence. In that connection, he supported the definition proposed by Mr. Jagota (1962nd meeting, para. 80), which had the advantage of being both simple and clear.

86. The issue of nuclear weapons was divisive; and as for the question of damage to the environment, it was linked to other topics currently being considered by the Commission.

87. Finally, the question of what was to be included in the draft articles depended on the nature of the draft

code. If the code was to serve simply as a standard, some further offences could be included in it. If, however, the Commission hoped that States would adopt the draft code, it should confine itself to those areas on which there was universal consensus.

The meeting rose at 1.15 p.m.

1964th MEETING

Wednesday, 11 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

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

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf. Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

PART IV (General principles) and

PART V (Draft articles)

1. Chief AKINJIDE said that his remarks on the Special Rapporteur's excellent fourth report (A/CN.4/398) were in the nature of suggestions intended to assist in improving the draft and to contribute material for the Special Rapporteur's next report.

2. The present topic was one of the most important on the Commission's agenda. It was also a very sensitive one in that it dealt with matters connected with the very existence of mankind and brought back painful memories of the Second World War. For his part, he agreed on the need for a draft code that would attract as much support as possible and hence foster peace and harmony throughout the world.

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

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

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

3. The Commission's work on the topic was likely to affect the balance of power, as well as certain economic interests, competing ideologies and even the vanity of States. Against that background, every effort should be made to strike a balance between the various conflicting interests at stake.

4. Like Mr. Balanda (1960th meeting), he thought that more attention should be paid to the experience in Africa and Asia, as well as to developments in the law in those continents. Concrete examples could be cited in that connection, the first being the trials of mercenaries in Angola a few years previously, when a number of white mercenaries had been arrested in that country and charged with crimes against humanity, crimes against peace and the crime of mercenarism. To his knowledge, they had been the first trials of their kind since the Nürnberg and Tokyo trials at the end of the Second World War.

5. The tribunal which had tried the mercenaries in Angola had been a national court, but the international implications of its judgment should not be underestimated, nor should their special relevance to the present discussion. It should also be noted that the mercenaries had acted on behalf of an outside—although unknown—Power, so that the case had been one of war by proxy. It was significant, moreover, that international observers had been allowed to attend the trial. Some of the accused had been sentenced to death and executed, despite outcries in their countries of origin; most of them had been citizens of developed countries. Others had been sentenced to terms of imprisonment, and others discharged for lack of evidence.

6. The Angolan tribunal had applied laws *ex post facto*, a problem that had of course already arisen in connection with the Nürnberg and Tokyo trials. At Tokyo, the Indian judge had given a dissenting opinion, one of the grounds being that the law applied by the tribunal was *ex post facto* and hence invalid. There had already been differences of opinion on that point in connection with the earlier Nürnberg trial and many eminent jurists, including Mr. Reuter, had written on the subject. The Angolan judges, in applying laws *ex post facto*, had invoked the international precedents of the Nürnberg and Tokyo trials.

7. A case of such importance could therefore not be ignored in considering the present topic and he strongly urged the Special Rapporteur to consult the records of the proceedings of those trials, which would have to be translated from the Portuguese, for the purposes of his future work. He also suggested that due account should be taken of Benin's experience of mercenarism. A study of the records of the proceedings of the trial of a mercenary in that country would prove a rewarding exercise.

8. In the course of the discussion, Mr. Jagota (1962nd meeting) had referred to the Indian Penal Code and Mr. El Rasheed Mohamed Ahmed (1963rd meeting) to the Penal Code of Sudan, and in particular to the provisions on attempt, conspiracy, complicity and accessories before and after the fact. Those two codes had their origin in the colonial era, but they embodied significant departures from European concepts with regard to the

trial and punishment of criminals. The position in his own country, Nigeria, was that a code similar to those of India and Sudan was applied in the northern part of the country (the Penal Code of Northern Nigeria), where Indian and Sudanese case-law was currently invoked and law books from those countries were in common use. In the south, however, the Criminal Code of Southern Nigeria, modelled on the Criminal Code of Queensland, Australia, had remained in force. In many respects, and more especially in matters pertaining to complicity, conspiracy and attempt, the codes of India, Sudan and Northern Nigeria were far more advanced than the corresponding legislation anywhere in Europe. He therefore urged the Special Rapporteur to study those laws for his future work.

9. Africa and Asia were contributing a great deal to the development of international law on the topic under consideration. The Commission's work would be all the poorer if that contribution were ignored.

10. The members of the Commission who were opposed to making *apartheid* a crime had not, in his opinion, advanced any persuasive reason in support of their position. Their arguments had been demolished by Mr. Koroma (*ibid.*) and hence there was no need to repeat the latter's excellent statement.

11. He thus found himself in disagreement with Sir Ian Sinclair (1960th meeting). The various international conventions and United Nations resolutions, as well as the Charter of the United Nations itself, were enough to demonstrate the all too clear grounds for regarding *apartheid* as a crime. The British people held liberal views and the overwhelming majority of them condemned *apartheid* and wanted to see it ended. What then were the reasons for the unwillingness to make *apartheid* a crime?

12. In a recent article, *The Times* of London had indicated some of them, the first being that there were in South Africa one million Whites who held United Kingdom passports in addition to South African passports. Consequently, they would be able to take refuge in the United Kingdom if they had to leave South Africa and they might well have to be received in an already overcrowded island. Yet it was only fair to weigh in the scales of justice the one million Whites with two passports against the 26 million Blacks with nowhere to go. Another argument put forward by that newspaper was that 250,000 jobs in the United Kingdom depended on exports to South Africa. In a country with 4 million unemployed, those jobs were important. *The Times* had also emphasized that, apart from the Common Market and the United States of America, South Africa accounted for the largest volume of exports by the United Kingdom. Those considerations of self-interest explained, but did not justify, the reluctance to make *apartheid* a crime.

13. At the same time, it was as well to remember that Nigerian imports from the United Kingdom were larger than South African imports from the same source. Also, there were several thousand Whites living in Nigeria, some actually holding Nigerian passports. He was convinced that, if the Blacks came to power in

South Africa, the Whites would be able to live there in peace and their interests would be fully protected.

14. The African National Congress had been set up in 1912—a fact that was not very often mentioned. In 1910, with the creation of the Union of South Africa, political power had been transferred to 2 million Whites as against 20 million Blacks. A similar process had taken place in 1923 in Rhodesia, where power had been transferred to 200,000 Whites in a country with 4 million Blacks. The progress towards the independence of the African peoples, however, could not be stopped and countries previously ruled by Whites were now ruled by Blacks—Kenya, Zimbabwe and Zambia being obvious examples. In the United States of America, segregation had been overcome since the Second World War. Australia—once well known for its “White Australia” policy—was now a staunch opponent of *apartheid*. As for South Africa, the choice was clearly between allowing peaceful change, on the one hand, and violence and revolution, on the other.

15. The matter was one that could not be examined purely from the legal angle; humanitarian considerations also had to be borne in mind. During the discussion, it had been suggested that the opponents of *apartheid* were being too emotional or too political. For his part, he could not but be emotional where millions of human lives were being wasted. Again, international law evolved from foreign policies and it could not be divorced from politics. He therefore urged that *apartheid* should be included in the draft code as a crime, and he welcomed Mr. Reuter’s statement (*ibid.*), which had been all the more remarkable in view of France’s past as a colonial Power.

16. Every single nation condemned nuclear weapons and there was an obvious contradiction between such condemnation and the refusal to make the use—or at least the first use—of nuclear weapons a crime under international law. In that regard, he was greatly concerned that, as a result of computerization, there would be no guarantee that a computer would not set off a nuclear attack in error as a result of a mistaken alarm. Some provision should be made in the draft articles for that type of situation.

17. The Special Rapporteur had rightly made use of the material provided by the Nürnberg and Tokyo trials. All the same, it should not be forgotten that the victors who had organized those trials also had sins to answer for. The Nazis had killed millions of Jews, but atomic bombs had destroyed Hiroshima and Nagasaki.

18. Mr. ILLUECA said that the Commission’s consideration of the general principles that would form the legal, moral and philosophical foundations of the draft code inevitably brought it face to face with the norms concerning human rights now incorporated in the rules of international law applicable to armed conflicts. It should be noted in that regard that the branch of international law previously known as the “law of war” was now termed international humanitarian law.

19. During the Second World War, both the Axis and the Allied Powers had indiscriminately bombed civilian populations and civilian targets to break the morale of

the population. It was also apparent from the statistics on losses of human lives that 17 million soldiers, sailors and airmen had died in the conflict, compared with 18 million civilians. At the present time, the risks were incalculable: since the hecatomb at Hiroshima and Nagasaki, the potential of nuclear weapons for mass destruction had maintained a climate of terror.

20. It was from that standpoint that the members of the Commission should look at the general principles, bearing in mind the message in which the Secretary-General had urged them, on the occasion of the International Year of Peace, to give expression to the aspiration of all peoples for peace and to move towards the achievement of the objectives of the United Nations.

21. It was entirely right that offences against the peace and security of mankind should be defined in the context of public international law, without reference to systems of internal law. It therefore followed that the perpetrators of crimes under international law, together with their victims, should be regarded as subjects of international law.

22. Everyone was fully aware that, traditionally, international law was designed first and foremost to govern the rights and duties of States in their mutual relations. Nevertheless, the emergence over the past 40 years of many enduring international organizations and the concern of the international community to protect human rights and fundamental freedoms had led to the adoption of new rules of international law aimed, among other things, at punishing genocide and *apartheid*, as well as war crimes, crimes against peace and crimes against humanity.

23. Accordingly, one could not fail to share the view of those who maintained that international law consisted essentially of the principles and rules of conduct applicable by States in their mutual relations, rules which also included the legal norms concerning the functioning of international organizations, their mutual relations and their relations with States and individuals, as well as certain legal rules concerning individuals and non-State entities, inasmuch as their rights and duties affected the international community.

24. With reference to chapter I of the draft articles, it should be noted that the Spanish heading of part I, *Definición y calificación*, did not meet the Special Rapporteur’s concern to describe the features of a crime under international law. The word *calificación* should be replaced by *tipificación*, both in the fourth report (A/CN.4/398) and in the draft articles, and in particular in the heading of part I and in the title and text of draft article 2.

25. With regard to the principles relating to the international offender, it would be wise, in view of the close link between the Special Rapporteur’s comments (*ibid.*, para. 148) and draft article 3, to specify in the title of that article that a “criminal” penalty was being referred to. Moreover, it should not be inferred from those comments that the concept of the offender under international law was confined to the individual. To illustrate

that point, he recalled that article 3 of Hague Convention IV of 1907⁴ stipulated that:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Similarly, article 5, paragraph 1, of the International Covenant on Civil and Political Rights⁵ covered the responsibility of the State, the group and the individual as potential perpetrators of international offences. The list contained in article 2 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination⁶ was even broader in that, among potential perpetrators of international offences, the word "institution" was added to the State, the group and the individual. The 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* went still further by specifying in article III that:

International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State ...

26. Those texts illustrated the close links between the doctrine of human rights and the rules of international law applicable to armed conflicts, links which were of extreme importance in elaborating the draft code, for some human rights could not be classed as rights of the individual, but fell within the category of collective rights. Such rights included: the right of peoples to self-determination, set forth in article 1 of the International Covenant on Civil and Political Rights and in General Assembly resolutions 1514 (XV) and 1803 (XVII); the right of national, ethnic, racial and religious groups to live as such, recognized by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the right of a racial group not to be subjected to systematic domination and oppression by another racial group, as guaranteed by the 1973 *Apartheid* Convention; and the right of ethnic, religious or linguistic minorities to respect for their integrity, set out in article 27 of the International Covenant on Civil and Political Rights.

27. Draft article 3 submitted by the Special Rapporteur contained two basic concepts, namely illegality and penalty, but said nothing about one of the essential elements of the doctrine of criminal law: culpability. Needless to say, no penalty could be imposed without guilt. The Special Rapporteur had provided for guarantees against the *jus punendi* of the State in draft article 6, but it was essential to specify in article 3 that there could be no penalty without guilt. If the person committing the act was to be punished, it was necessary for him to have understood and wanted the act or omission that was attributed to him, and he should not be allowed to invoke any ground for precluding culpability. Accordingly, the phrase "provided his guilt is established" should be inserted in article 3 after the word "therefor".

28. The guarantees available to any person charged with an offence, mentioned by the Special Rapporteur

(A/CN.4/398, para. 149), were set forth in draft article 6. In that regard he drew attention to article 11, paragraph 1, of the Universal Declaration of Human Rights⁷ and article 14, paragraph 2, of the International Covenant on Civil and Political Rights, and added that the Commission should in its future work seek to remedy the present legal vacuum in matters pertaining to collective criminality on the part of States, organizations, institutions or groups of persons.

29. At its fortieth session, the General Assembly had given the Commission clear and precise guidelines on the question of individual and collective victims by adopting in resolution 40/34 the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was the outcome of the endeavours of a number of meetings of experts and of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. In the resolution, the General Assembly not only recognized the existence of millions of victims of crime and abuse of power, but also affirmed the necessity of adopting national and international measures to secure recognition of, and respect for, the rights of such persons. For his own part, he also welcomed the draft international instruments elaborated by the various United Nations Congresses on the Prevention of Crime and the Treatment of Offenders in the field of criminal law and international crime.

30. The very existence of various international declarations or conventions, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁸ demonstrated that the international community was continuing to elaborate instruments which unquestionably had primacy over international custom in the matter of whether or not the perpetrators of international offences could be made subject to a universal criminal jurisdiction.

31. The definition of "victims of abuse of power" contained in paragraph 18 of the Declaration annexed to resolution 40/34 was of major interest for the purposes of the draft code. In its work on penalties, the Commission should also take account of paragraph 8 of that Declaration, which stated:

Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

In paragraph 12, the Declaration established that, when compensation was not fully available from the offender or other sources, States should endeavour to provide the requisite financial compensation. In addition, paragraph 10 of the Declaration related to substantial harm to the environment and contained elements that could be used by the Commission.

32. The description of "abuses of power" given by the experts who had met in Ottawa in 1984 to elaborate the draft declaration on justice and assistance for victims

⁴ Convention respecting the Laws and Customs of War on Land (see 1958th meeting, footnote 7).

⁵ United Nations, *Treaty Series*, vol. 999, p. 171.

⁶ General Assembly resolution 1904 (XVIII) of 20 November 1963.

⁷ General Assembly resolution 217 A (III) of 10 December 1948.

⁸ General Assembly resolution 39/46 of 10 December 1984, annex.

intended for the Seventh Congress could also be used to identify the offences in the draft code:

Abuses of power that are crimes under international law, such as crimes against peace, war crimes, crimes against humanity, genocide, *apartheid*, slavery, torture, extra-legal execution, enforced or involuntary disappearances and other gross violations of human rights infringing upon the right to life, liberty and security of persons, shall be subject to investigation. Persons against whom there is evidence that they have committed such crimes shall be subject to prosecution wherever they may be found, unless they are extradited to another State which has the authority to exercise jurisdiction in respect of such crimes. The defence of "obedience to superior orders" shall not be admissible for persons accused of such crimes.⁹

33. In connection with the principles relating to the application of criminal law in space, the Special Rapporteur reached the conclusion that, "in the absence of an international jurisdiction, the system of universal competence must be accepted for offences against the peace and security of mankind" (A/CN.4/398, para. 176). His own opinion was that the establishment of an international criminal jurisdiction was essential in order to ensure observance of the fundamental rights of accused persons, along with their right to a fair and public hearing by an independent and impartial tribunal, to be presumed innocent until proved guilty according to the law, and to enjoy all the necessary guarantees for their defence. In formulating the principles relating to the application of criminal law in space, in its report on its thirty-eighth session, it would be better for the Commission to use the expression "universal jurisdiction for offences against the peace and security of mankind" rather than "universal competence for offences against the peace and security of mankind".

34. Clearly, the principle of universal jurisdiction, as embodied in draft article 4, paragraph 1, was linked to the idea that the State should judge a person charged with an offence who was on its territory or extradite that person to a State willing to exercise its criminal jurisdiction. Until such time as there was an international criminal court, it was entirely reasonable to propound the principle of universal jurisdiction. In the case of hostage taking, which also gave rise to compulsory universal jurisdiction—unlike piracy, which lent itself only to optional universal jurisdiction—the ICJ had stated that:

... Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. ...¹⁰

Such an affirmation by the Court gave food for thought to those who considered that the Universal Declaration of Human Rights, as a General Assembly resolution, had no binding force. Had the Declaration acquired that binding force with the passage of time? Was it or was it not a source of law? Were practices harmful to the life, liberty and security of persons breaches of international legal rules or were they not? Was a breach of principles recognized by general international law involved?

⁹ A/CONF.121/IPM/4 and Corr.1, annex I, draft declaration, art. VIII, para. 1.

¹⁰ *United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 42, para. 91.

35. On the subject of the application of criminal law in time, the Special Rapporteur enunciated the principles of non-retroactivity and the non-applicability of statutory limitations to offences covered by the code, principles which the Special Rapporteur examined closely in the light of contemporary international law (*ibid.*, paras. 150-172). The principle of non-retroactivity (*ibid.*, paras. 151-163) was set forth in concrete form in draft article 7, on which he would comment after some brief remarks on the principle *nullum crimen sine lege, nulla poena sine lege*.

36. The root of the principle of legality lay in the struggle waged by peoples for centuries to institutionalize their security under the law in the face of the arbitrary exercise of power and, more specifically, to urge rulers to make equitable use of penalties. History showed that the principle *nulla poena sine lege* lay not in Roman law, in Germanic law or in canon law, or even in the merging of those three systems in the Middle Ages. It had appeared for the first time in England, in the Magna Carta in 1215, and had taken on its full dimensions in the Declaration of the Rights of Man and the Citizen, proclaimed at the beginning of the French Revolution. Tribute should none the less be paid to Beccaria, the Italian criminologist, who had enunciated it as early as 1764 in *Crimes and Punishments*, and to Feuerbach, the German jurist, who had devised the well-known Latin formula in a treatise on criminal law published in 1801. The same principle was embodied in the Bill of Rights in the United States of America, in the Charter of the United Nations, in the American Declaration of the Rights and Duties of Man, in the Universal Declaration of Human Rights and in the Declaration of Fundamental Principles of the Standard Penal Code for Latin America.

37. As for draft article 7, the wording of paragraph 1 could be improved by adding the phrase "in accordance with the provisions of the present Code". The text of paragraph 2 more or less followed the wording of paragraph 2 of article 15 of the International Covenant on Civil and Political Rights, but it would be interesting to know why it said "according to the general principles of international law", when the formula used in the Covenant was "according to the general principles of law recognized by the community of nations".

38. Draft article 5 unequivocally and indisputably set forth the principle of the non-applicability of statutory limitations to offences against the peace and security of mankind, in keeping with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. It would be useful, in the same context, for the Special Rapporteur to consider a new draft article stipulating that States should not grant asylum to any person with respect to whom there were serious reasons for considering that he had committed a crime against peace, a war crime or a crime against humanity, as stated in article 1, paragraph 2, of the Declaration on Territorial Asylum¹¹ and in principle 7 of the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.¹²

¹¹ General Assembly resolution 2312 (XXII) of 14 December 1967.

¹² General Assembly resolution 3074 (XXVIII) of 3 December 1973.

39. The exceptions to the principle of responsibility set out in draft article 8 were highly technical issues that called for very close examination. They corresponded in fact to the causes for precluding culpability, a subject to which he would revert in due course. He also reserved the right to revert to draft article 9, which dealt with an extremely delicate matter and on which Mr. Ogiso (1961st meeting) had made some very sound comments.

40. Mr. FLITAN, reviewing the general principles discussed in part IV of the fourth report (A/CN.4/398), said that he unreservedly endorsed the principles relating to the juridical nature of offences against the peace and security of mankind, for such offences were well and truly offences under international law, directly defined by international law, independently of systems of municipal law. Moreover, those principles were in conformity with the ones set forth in the draft articles on State responsibility.

41. As to the principles relating to the international offender, he wished to reaffirm that the code should apply first and foremost to States. Admittedly, the General Assembly had requested the Commission to confine itself, for the time being, to the criminal responsibility of individuals, without prejudging the question of the criminal responsibility of States. Nevertheless, in working out provisions relating to individuals alone, the Commission was not really following the instructions of the General Assembly and was in some way prejudging the question of the criminal responsibility of States. Indeed, a code applicable exclusively to individuals would not have the requisite deterrent effect and would be of no great value.

42. In respect of the guarantees for a person charged with an offence, it would be necessary to mention in draft article 6 the right to a defence, or more properly the obligation to ensure that the accused person had the defence he wanted, and perhaps specify at the same time that every trial must be held before a jurisdictional body. From the purely drafting point of view, it would also be better, in the body of article 6, to add the word "jurisdictional" before "guarantees", for it was already contained in the title. Those points, however, could be settled in the Drafting Committee.

43. The application of criminal law in time involved two principles: the non-retroactivity of criminal law and the non-applicability of statutory limitations to offences against the peace and security of mankind. As to the first of those principles, he fully shared the Special Rapporteur's view that the rule *nullum crimen sine lege, nulla poena sine lege* was applicable in international law, on the understanding that the term *lex* meant not only written law, but also custom and the general principles of law.

44. The principle of the non-applicability of statutory limitations to offences against the peace and security of mankind was unanimously upheld by the Commission and called for no special comment.

45. In connection with the principles relating to the application of criminal law in space, he would have no objection if the code enunciated the principle of universal jurisdiction. Nevertheless, the Commission should take account of recent cases which revealed that in

France, Yugoslavia and Israel, in particular, a trend had emerged towards recognition of the competence of a judge of the nationality of the victim, rather than of the court of the place of arrest.

46. As to the principles relating to the determination and scope of responsibility, the Special Rapporteur indicated (*ibid.*, paras. 255-258) that he had not deemed it advisable to elaborate on exculpatory pleas and extenuating circumstances, since those concepts were closely bound up with the application of penalties, in other words with a matter that fell within the competence of the judge. For his own part, he did not entirely share that view. Regardless of the jurisdiction for trying offences against the peace and security of mankind, the judge would need to find in the code the most precise information possible on the penalties that were applicable.

47. On the subject of exceptions to criminal responsibility, the Special Rapporteur was right to say (*ibid.*, paras. 190-196) that coercion, state of necessity and/or *force majeure* could not relieve the perpetrator of responsibility for the offence unless there had been a grave and imminent peril, unless the perpetrator had himself not contributed to the emergence of the peril, and unless there had been no disproportion between the interest sacrificed and the interest protected. In the case of coercion, however, it might be as well to stipulate that the perpetrator must have had no other way of escaping the peril. Needless to say, such an exception could not apply in the case of crimes against peace and crimes against humanity, for the consequences of those crimes could not be likened in any way with those of any other act. He fully agreed that a special provision should be included on *force majeure*.

48. The Special Rapporteur took the view (*ibid.*, para. 215) that error, whether of law or of fact, could relieve the offender of responsibility for a war crime. Personally, he was not sure that such an exception had a place in a code intended to penalize the most serious offences.

49. In the matter of superior order, and more especially its links with error, his own view was that compliance, by an error of law or of fact, with an unlawful order could not constitute an admissible exception.

50. It would be useful, in connection with reprisals and self-defence, for the draft code to stipulate expressly that armed reprisals were contrary to international law.

51. Lastly, concurrent breaches, extenuating circumstances and exculpatory pleas could be dealt with in part II of chapter I of the draft, on general principles, but he had doubts about the proposal to include in that general part the provisions concerning "other offences". In the criminal codes of systems of internal law, the forms of participation were always viewed in conjunction with the corresponding offences. It would be illogical to deal, in the general part of the draft, with the forms of participation in offences which were not dealt with until later, in chapter II. It would be more usual to set forth the offences before dealing with the forms of participation therein.

52. Sir Ian SINCLAIR, referring to part IV of the fourth report (A/CN.4/398), said that he was particularly grateful to the Special Rapporteur for including a section on general principles. He had always been a partisan of the view that the Commission should consider the general principles in parallel with the efforts to establish a list of offences for inclusion in the draft code. Such an approach made it possible both to test the case for including a particular offence against the proposed general principles and to assess the proposed general principles in the light of the possible content of the list of offences.

53. He would concentrate initially on draft article 4, which dealt with the concept of universal jurisdiction over offences against the peace and security of mankind. There were two reasons for his choice: firstly, he could not agree that universal jurisdiction was a general principle; and secondly, the entire question of how the draft code was to be implemented raised issues of fundamental importance to the work in hand.

54. In his report (*ibid.*, para. 173), the Special Rapporteur rightly recalled the basic principles of jurisdiction. In the first instance, criminal jurisdiction could be, and was, founded on the territorial principle. It could also be founded on the nationality principle. However, the principle that each State was entitled to exercise criminal jurisdiction over aliens in respect of crimes committed outside its territory and not affecting or prejudicing its national security had, in general international law, hitherto been limited to piracy, except in the case of conventions expressly designed to deal with specific types of crimes. By no means could it be said that universal jurisdiction was a general principle of law: rather, it was a limited exception to other principles. Consequently, he could not agree that universal jurisdiction, in the sense in which that concept was used in article 4, paragraph 1, should stand as a general principle applicable to all the offences that might be included in the draft code.

55. In fact, he would suggest to the Special Rapporteur that much more thought should be given to the fundamental issue of how the draft code was to be implemented. It should not be dealt with in a perfunctory and wholly unsatisfactory manner in the context of general principles. If the Commission's work was to have any value at all, other than as an empty manifesto, the problem of implementation must be tackled seriously and objectively. It was implied that there were two alternatives: universal jurisdiction or an international criminal jurisdiction. He was wholly unable to accept the notion of universal jurisdiction, at least in regard to crimes against peace and crimes against humanity, and he had serious reservations about its applicability to war crimes. In the case of crimes against peace, for example, could one seriously contemplate that the courts of one State should be entitled to arraign the responsible leaders, or even subordinates, of another State—possibly even trying them *in absentia*—on charges of having committed or participated in the crime of aggression? He could think of no notion more destructive of the peace and security of mankind. It would be a recipe for constant conflict, far outweighing any possible benefit that would accrue

from enforcing the code in that way. Similar considerations applied to the trial of crimes against humanity. The considerations which had led the drafters of the Convention on the Prevention and Punishment of the Crime of Genocide to eschew the principle of universal jurisdiction in the prosecution of the crime of genocide were just as valid today as they had been 35 years earlier.

56. He could not agree with those of his colleagues who believed that, even in the absence of effective implementation provisions, the code would be of value as a deterrent. Other United Nations organs could produce broad condemnations of acts which the international community as a whole already condemned. The Commission's mandate was much stricter. It was to produce a code of offences against peace and security that was capable of being effectively and impartially enforced.

57. An international criminal jurisdiction was therefore the best method for effective and impartial implementation. In that connection he disagreed with Mr. Arangio-Ruiz (1962nd meeting), who took the view that, while an international criminal jurisdiction might ultimately be the best solution, universal jurisdiction should be retained in the mean time. Even as an interim measure pending the establishment of an international criminal jurisdiction, universal jurisdiction was not acceptable. As Mr. Razafindralambo had suggested (1963rd meeting), the General Assembly should be urged to fulfil its responsibilities towards the Commission. Three years earlier, the General Assembly had been asked for guidance as to whether the Commission's mandate was to be regarded as encompassing the preparation of the statute of an international criminal jurisdiction.¹³ No reply had yet been received, and the request should be reiterated. He for one was convinced that the code could be made effective only if an international criminal court was vested with jurisdiction to try offences under the code. He was well aware of the political and other objections to the establishment of such a court; but if the international community was not prepared to contemplate such a course, it should not call on the Commission to formulate a code of offences that would be offences only on paper. The Commission had its own reputation to protect. A criminal code that lacked teeth was a mockery and an insult to a lawyer's every instinct. Accordingly, whatever the political or other obstacles, the members of the Commission would be failing in their duty if they did not reiterate the request made to the General Assembly in 1983 for guidance on that aspect of the matter. Meanwhile, he would continue to be resolutely opposed to applying the concept of universal jurisdiction to the offences to be listed in the code, save to the extent that existing conventions might impose the obligation of prosecution or extradition in respect of narrowly and clearly defined offences.

58. With regard to draft article 2, the concept expressed in the first sentence posed no difficulty, but he had doubts about the second sentence, namely: "The fact that an act or omission is or is not prosecuted under

¹³ *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69 (c).

internal law does not affect this characterization.” As a statement of principle, it could not be faulted in so far as it related only to characterization of the act, but it immediately prompted the question of what would happen if an individual was prosecuted under internal law for an offence which was or might be, simultaneously, an offence against the peace and security of mankind. In his previous statement on the topic (1960th meeting), he had stressed the importance of not confusing common crimes with crimes against humanity. Yet that was not an easy matter, and it might prove in the event to be impossible to distinguish between the two. Was the individual to be exposed to double jeopardy? What about the general principle of *non bis in idem*? He was by no means sure that it was covered by draft article 6, which dealt with jurisdictional guarantees. The whole issue of the relationship between common crimes and the offences to be listed in the code warranted careful examination, and he would welcome any further explanations the Special Rapporteur might care to offer on that aspect of the subject. No doubt it was closely bound up with the issue of implementation, but the possibility could not be ignored that, on the basis of the text in its present form, individuals might be exposed to double jeopardy.

59. In his report (A/CN.4/398, paras. 164-172), the Special Rapporteur briefly expounded his reasons for setting out in draft article 5 the rule that statutory limitations should not apply to offences against the peace and security of mankind, a rule that should be looked at very carefully. It was interesting to note that only 24 States were parties to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, and that only two States had become parties to it since 1980. He was not suggesting that that was a decisive reason not to include such a principle in the draft code, but it certainly gave some food for thought. A critical question was how to balance conflicting considerations: on the one hand, to ensure that crimes of such gravity and horror should not go unpunished notwithstanding the lapse of time, and on the other, to take proper account of the difficulty of marshalling convincing and compelling evidence against a particular individual when most of the witnesses were dead or might have only hazy recollections of events in the long-distant past. For the time being, he would reserve his position on that proposed principle, but doubted whether it commanded sufficiently widespread support to be incorporated in the code.

60. Recalling his previous reference to draft article 6, he said it was gratifying that the Special Rapporteur had suggested the need to include jurisdictional guarantees. Obviously, everything would depend on how the code was to be implemented. If, as he hoped, implementation was to be effected by means of an international criminal court, the necessary guarantees of a fair trial would be spelt out in detail in the statute of the court. He therefore regarded article 6 as being simply a marker for the future. As now formulated, it would be quite insufficient in the context of implementation of the code by national courts or on the basis of universal jurisdiction. Given the nature of some of the offences to be included

in the code, it was difficult to see how a fair trial on the law and facts could be achieved by a national court. It was a well-known feature of the common-law system that “justice must not only be done, it must be seen to be done”. Even if, in a particular set of circumstances involving application of the code, justice was done by a national court in a trial of an alien for an offence against the peace and security of mankind committed outside its territory, justice would not be seen to be done. Jurisdictional guarantees were important, but they should be built into the statute of an international criminal court having exclusive or quasi-exclusive jurisdiction to try offences falling within the scope of the code.

61. He experienced much less difficulty with draft article 7, on the non-retroactivity of criminal law. He would not enter into the difficult question of whether the Charter of the Nürnberg Tribunal had involved any departure from the rule *nullum crimen sine lege*, although much could be said, and had been said, in favour of the contrary proposition. In his opinion, the general principle of criminal law at issue was accurately expressed in article 7 of the European Convention on Human Rights, to which the Special Rapporteur referred (*ibid.*, para. 162).

62. Draft article 8, on the other hand, raised some problems. In principle, subparagraph (a) was the counterpart of article 3 of the 1954 draft code and was not open to objection. He would simply like to point out that it reinforced the case for establishing an international criminal court to try offences under the code, particularly offences involving the criminal responsibility of heads of State or Government. Subparagraph (c) was, in a modified form, the counterpart of article 4 of the 1954 draft code and the Special Rapporteur explained (*ibid.*, paras. 217-226) the relationship between superior order and coercion, and the extent to which coercion of a subordinate to obey an obviously illegal order by a superior might relieve the subordinate of criminal responsibility. It was a difficult matter. The defence of superior order had been raised in practically every war crimes trial for which records existed. It was only natural: given the strictly hierarchical relations that existed in any structure of military command, compliance with an order of a superior must be the norm. Indeed, non-compliance was itself an offence under military law. On the other hand, he could accept that compliance with an obviously illegal order could not relieve the perpetrator of the act of his criminal responsibility. He was not even convinced of the possible exception of coercion, although he was willing to be persuaded by the arguments advanced by the Special Rapporteur (*ibid.*, paras. 218-225), at least in the case of war crimes. However, the formulation of draft article 8 would have to be looked at more carefully.

63. With regard to the responsibility of the superior, dealt with in draft article 9, he tended to believe that the issue could be settled by applying the notion of complicity as one of the “other offences”, and hence that no separate article was necessary.

The meeting rose at 1 p.m.

1965th MEETING

Thursday, 12 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf. Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

PART IV (General principles) and

PART V (Draft articles) (continued)

1. Mr. LACLETA MUÑOZ said that the elaboration of a code of offences against the peace and security of mankind was the first task that had been assigned to the Commission. The need at that time had been to confirm the decisions of the Nürnberg Tribunal, and above all to lay down the principle that offences against the peace and security of mankind did exist—in other words, to institutionalize the principle so that the rule *nullum crimen sine lege* could not be invoked to avoid punishing that type of offence. Yet to carry out that task properly, which naturally had to be undertaken within the framework of the international organization created after the Second World War, namely the United Nations, it had proved necessary to wait until the Organization, and more precisely the General Assembly, had defined the concept of aggression, which was tied in with the concepts of collective security and armed intervention against the perpetrators of aggression, the principle of decolonization, and so on.

2. Unfortunately, the draft under consideration did not mark any progress in that regard, but the Commission could not be blamed for that. The Commission had not been able to deal in the draft code with the responsibility of the State or provide a mechanism for implementation, in other words a jurisdiction, and was therefore reduced to performing a mere task of codification, precisely because of the observations that had been

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

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

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

made by States and the guidelines given by the Sixth Committee of the General Assembly.

3. As to the draft articles submitted by the Special Rapporteur, a general observation was in order. Since the question of State responsibility had been set aside, the draft code was supposed to apply solely to individuals. However, in a number of provisions, it had not been possible to avoid using the formula “by the authorities of a State”. Hence the acts in question were indeed attributable to the State.

4. Unquestionably, an offence against the peace and security of mankind was a universal offence, as stated in draft article 4; but it was difficult to see how it could be stated, in the second sentence of paragraph 1, that “Every State has the duty to try or extradite any perpetrator of an offence ... arrested in its territory”. Only the words “alleged perpetrator” or “an individual suspected of having committed an offence” could be used. Nothing in the draft code made it possible to determine who the “perpetrator” was, something due partly to the fact that the draft was limited to enunciating the principle of universal competence, which was absolutely unsatisfactory, instead of providing for a jurisdictional mechanism.

5. Draft article 8 spoke of self-defence; but was it self-defence by the individual or self-defence by the State? There again the problem was the distinction between acts by the State and acts by the individual. Doubtless it involved a criminal act which was committed in the exercise of the State’s right to self-defence and which, as such, lost its criminal nature. Nevertheless, that point had to be clarified.

6. Draft article 9 provided for the responsibility of the superior, which appeared to be a sound solution, one that was in any event preferable to retaining the concept of complicity. It was difficult to see how complicity could be considered for acts in which a superior and a subordinate were associated, especially when it was the conduct of organs of the State that was involved.

7. He had no objection to using the term “war crime” in draft article 13. Admittedly, war was unlawful and hence some people might have difficulty accepting that acts committed during actions which were themselves already outlawed and had been proscribed by the international community should be characterized as crimes; yet war was unfortunately a reality and could not be ignored. Furthermore, the traditional term “war crime” seemed preferable to the formula “crime in the case of an armed conflict”. It would be sufficient to explain in the commentary to the article that the Commission realized that, at the present time, “war” was no longer a legal concept.

8. With regard to acts constituting crimes against peace, how, in the case of aggression, could the launching of an attack against the territory of a State be an act of persons other than the “authorities of a State” vested with decision-making power? Not every soldier in an army could be required to ask himself whether the order he was receiving was lawful, and whether he could carry it out without running the risk of being prosecuted for participating in an act of aggression. The same problem also arose in connection with other provisions.

Generally speaking, not every individual could be expected to behave heroically and refuse to carry out an order which he believed was not in keeping with obligations that actually devolved upon the State under the provisions of the code. It was an extremely serious problem and must be taken into account, at least at the interpretation stage.

9. In draft article 11, the Special Rapporteur had simply reproduced the terms of the Definition of Aggression⁴ and, wisely and logically, refrained from considering the procedure to be followed, and especially the means of action available to the Security Council in cases of aggression. Because of that, however, the interpretation and implementation of article 11 would raise difficulties and, since the judges of various States would, under the terms of draft article 4, be called upon to apply it, some very surprising results could well emerge. A situation might arise, for example, in which a judge sentenced a person on the basis of article 11, paragraph 5, whereas the Security Council might conclude that the act which had led to that person's conviction did not constitute aggression. Such an example showed how difficult it would be to implement the code before the question of jurisdiction was settled and the modalities for implementation of its provisions were established.

10. He had no objection to mentioning the "threat of aggression" in paragraph 2 of article 11. In paragraph 3 (b), however, the formula "exerting pressure ..." was very disturbing, for the conduct referred to in that subparagraph was completely normal. It was even an essential aspect of diplomacy. Every State exerted pressure at times in order to obtain a particular advantage from another State. The subparagraph should therefore be recast. Paragraph 4 as a whole was satisfactory and was the one that best brought out the concept of the responsibility of the individual. In paragraph 5, a breach of obligations arising from treaties in force should indeed be mentioned; but there, too, the question was who would apply that provision. The breach covered by that paragraph was committed by the authorities of a State acting in the context of State policy. That problem had not arisen at the Nürnberg trial, for the good reason that the country in question had been subdued by armed force. But when the code entered into force, who would determine and apply the penalties if the accused State had not been subdued and if the code did not at least stipulate that the State must hand over the guilty party or parties? Furthermore, even if a provision to that effect were incorporated in the draft code, the State, in the case covered in paragraph 5, would not abide by it, since the guilty party would have acted in the context of the policy that the State itself had defined.

11. Draft article 12 was limited to codifying generally accepted rules and therefore seemed acceptable. With regard to the definition of *apartheid*, in paragraph 2, he believed that the second alternative should be retained, but the reference to southern Africa should be removed, for *apartheid* was a crime that could be committed anywhere in the world.

12. As to war crimes, he was in favour of the second alternative of draft article 13, which expressly referred to the unlawful use of weapons. In his opinion, however, the Commission neither could nor should go any further. Although the use of a nuclear weapon was without any doubt a crime in moral terms, it could not be considered as such in legal terms, since unfortunately it was not yet prohibited by positive norms of international law.

13. In part IV of chapter II of the draft, the Special Rapporteur had not submitted any provisions relating to extenuating circumstances or exculpatory pleas, deeming them to have no place in a draft code that did not specify penalties (A/CN.4/398, para. 256). It was true that the effect of extenuating circumstances and exculpatory pleas was to modify the penalty applicable, but it should be possible to describe some of them without necessarily referring to penalties.

14. Mr. USHAKOV said that he was very disappointed with the draft articles, for they marked no progress over the 1954 draft code, which the Special Rapporteur had followed too faithfully. International law, legal thinking and State practice had evolved since 1954, and that evolution should have been taken into account.

15. The Special Rapporteur had even repeated the linguistic mistakes and translation errors contained in the French version of the 1954 text, which had originally been drafted in English. Thus the formula *Le fait, pour les autorités d'un Etat, de préparer... d'organiser ou d'encourager...*, contained in article 2, paragraphs (3) *et seq.*, of the 1954 draft, and which was now found in draft article 11, was a bad translation of the English formula "The preparation ... the organization, or the encouragement of the organization, by the authorities of a State ...". Similarly, in article 1 of the new draft, the expression *crimes de droit international*, a French translation of the English expression "crimes under international law", used in the 1954 text, was incorrect. The phrase should be *crimes en vertu du droit international*. Indeed, a "criminal offence" committed by an individual—in the Soviet Union the notion of "criminal offence" was used in contrast to a "civil offence" or an "administrative offence"—was a crime under international law, and not a crime of international law, which could be committed only by States and presupposed a breach of rules of international law.

16. Those errors, which affected only the form, were easy to correct. Unfortunately, the Special Rapporteur had also closely followed the 1954 draft in substance, something which was more serious. At the time, it had been clear that the international crimes covered by the draft code were crimes committed by individuals. The concept of international crime by the State had not yet entered into international law; the notion had emerged only in legal writings. The situation had now changed, however, and the Commission itself had distinguished, in article 19 of part I of the draft articles on State responsibility, between two categories of internationally wrongful acts, namely international crimes by States and international delicts by States. Thus, when the term "international crimes" was used, it was necessary to explain whether the crimes in question were crimes by States or the "criminal offences" of individuals. In its

⁴ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

present form, the draft code under consideration was a hybrid: it did not apply wholly to States or wholly to individuals.

17. The draft articles concerning general principles, which provided in particular that "Every State has the duty to try or extradite any perpetrator of an offence ... arrested in its territory" (article 4) and that "No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature" (article 5), as well as the provisions relating to other offences, and particularly conspiracy (article 14), obviously covered offences committed by individuals. The State, as such, could not be arrested, nor could it foment conspiracy.

18. On the other hand, draft articles 11, 12 and 13, concerning acts which constituted offences against the peace and security of mankind, had in almost all instances nothing to do with the conduct of individuals. For example, in article 11, paragraph 1, which specified that "The commission by the authorities of a State of an act of aggression" constituted a crime against peace, the act in question was necessarily an act of the State. The expression "the authorities of a State", which indeed was not defined anywhere in the draft code, certainly did not designate the entire body of State officials, or even the members of the Government, who could not be held responsible as State agents for an act of aggression committed by the State. In the case of ministers, for instance, one or more of them might not even have been informed of the launching of the aggression. Even the head of State might not have participated in initiating the act of aggression and might not have been informed of it: that depended on his functions and the extent of the powers he enjoyed.

19. The purpose of the draft code was not to deal with international crimes by States. If the Commission wished to draw up a list, whether or not exhaustive, of international crimes by States—something which did not seem essential for the moment—it could do so only in the framework of the draft articles on State responsibility and on the basis of article 19 of part 1 thereof, which defined an internationally wrongful act by the State, an act that could be an international crime or an international delict.

20. If the draft code was to cover offences against the peace and security of mankind committed by individuals, as it ought to, it should specify the types of conduct and acts which fell within that category of offences, and the persons to whom those types of conduct or those acts could be attributed. No one could be answerable for anything other than his own acts. If the code was not sufficiently precise on that point, it would be impossible to prosecute, convict and punish the perpetrators of offences against the peace and security of mankind, for judges needed detailed rules indicating clearly which acts or conduct they should penalize.

21. At the Commission's previous session, he had proposed a draft article⁵ the terms of which should be reproduced in the preliminary provision and paragraph 1 of draft article 11, as follows:

"The following persons shall be recognized as responsible under international law for offences against the peace and security of mankind and shall be liable to punishment:

"1. Persons planning, preparing, initiating or causing an act of aggression to be committed or a war of aggression to be waged by a State."

That text was based on a provision of the Charter of the Nürnberg Tribunal which expressly mentioned the conduct of "persons". If, however, it was clear that the act or conduct in question could not be that of an individual, the word "person" could be omitted.

22. Paragraph 2 of draft article 11 raised the same problem as paragraph 1. As now formulated, it could not apply to individuals, for "recourse by the authorities of a State to the threat of aggression against another State" could only be an act of the State. The paragraph also raised another problem: the expression "threat of aggression" was unsuitable and in reality had no meaning. Furthermore, the Charter of the United Nations spoke of "threats to the peace", not "threats of aggression". The threats used against a State were not threats of aggression. Accordingly, paragraph 2 should be modified, and the particular kind of conduct in question should be specified. The following formula might be used:

"Persons, whether or not belonging to the authorities of a State, who threaten another State or cause it to be threatened, for example by the armed forces."

The Commission should scrutinize that notion of threat more closely and decide exactly what it covered. He himself did not yet have a firm position on the question.

23. Paragraph 3 of draft article 11, which spoke of "Interference by the authorities of a State in the internal or external affairs of another State ...", called for the same kind of comments. It dealt with acts of the State, and not acts of the individual. At the Commission's previous session, he had proposed a different formula for that provision,⁶ and had suggested, in addition, that the intervention characterized as a crime should be "armed" intervention, in other words the most serious form of intervention. He had proposed the following text:

"Persons planning, preparing, ordering or causing a State to engage in armed intervention in the internal affairs of another State."

24. Similarly, paragraph 4, concerning terrorist acts, applied only to the authorities of a State. If such a thing as State terrorism did exist and if it was to be made an offence, that form of terrorism was not attributable to State authorities as such, but to certain individuals among those authorities. For that reason, at the Commission's previous session, he had proposed⁷ the following formula:

"Persons planning, preparing, ordering or causing terrorist acts to be committed by a State against another State."

⁶ *Ibid.*, p. 62, para. 48.

⁷ *Ibid.*, para. 49.

⁵ *Yearbook ... 1985*, vol. 1, pp. 61-62, 1886th meeting, para. 44.

25. Alongside of State terrorism, there was terrorism committed by individuals who had no link with the State. In that regard, a distinction was made between national terrorism, committed by the nationals of that country against the authorities or the population of that country, and international terrorism, committed by the nationals of a country against, for example, the population or official representatives of another country. If the most serious acts of international terrorism were to be included among offences against the peace and security of mankind, something which could well be envisaged, the draft code would first have to cover the perpetrators of the terrorist acts themselves—with a very precise indication of the acts and conduct concerned—and only then the persons who aided or abetted them in committing such offences.

26. Again, paragraphs 5, 6 and 7 of draft article 11 did not deal with the conduct of the individual at any time. For that reason, at the previous session, he had also proposed⁸ for those texts a formula which stressed that the actions and conduct in question were those of individuals and not of the State.

27. As to paragraph 8, relating to mercenarism, which in its present form covered only complicity or related offences, he had proposed the following text:⁹

“Mercenaries who engage in armed attacks against a State which are so serious that they are tantamount to acts of aggression.”

The paragraph should above all cover mercenaries: the agents of the State who recruited, organized, equipped and trained them—and who should be distinguished from State authorities as such—could be mentioned as a secondary consideration, for example as accomplices.

28. Like draft article 11, draft articles 12 and 13 related to acts nearly always committed by the State and not by individuals. That was true, for example, of subparagraph (b) (ii) of the second alternative of article 13, which dealt with the unlawful use of weapons, and particularly first use of nuclear weapons. The draft code should expressly refer to first use of that type of weapon, for the General Assembly had adopted resolutions to that effect; but there was no specific indication in article 13 of the types of conduct for which individuals could be tried, convicted and sentenced. He himself had proposed the following text:¹⁰

“Persons planning, preparing or ordering the first use by a State of nuclear weapons.”

29. Although international crimes by States should all be considered as offences against the peace and security of mankind, the same was not true of international crimes by individuals. Drug trafficking, for example, was an international “criminal offence”, but it did not constitute an offence against the peace and security of mankind. Only the most serious international criminal offences should be placed in the category of offences against the peace and security of mankind.

30. He had as yet no firm position on the question whether or not the notion of offences by individuals

against the peace and security of mankind should be defined, as an international crime by a State had been defined in article 19 of part 1 of the draft articles on State responsibility. On the one hand, a general definition would have the advantage of removing any ambiguity about the type of offence involved. It would make it possible to establish clearly that the types of conduct and the acts included in the draft code were those which incurred the criminal responsibility of individuals, not that of States. Furthermore, when new offences had to be added to the list of offences against the peace and security of mankind, they could be added on the basis of that definition. On the other hand, proper drafting of the articles listing the different acts and types of conduct in question, which were by far the most important—in other words a clear statement of the constituent elements of such acts and types of conduct—would mean that a general definition was not really indispensable. In any event, draft article 1 did not contain a general definition of an offence against the peace and security of mankind: it was limited for the time being to identifying the constituent elements.

31. In draft article 10, the Special Rapporteur distinguished three categories of offences against the peace and security of mankind, a distinction that did not appear to be well-founded. An act of aggression, for example, or rather the conduct of individuals who had planned, prepared, initiated or caused an act of aggression to be committed, was both a crime against peace and a crime against humanity. International terrorism by the State, or by individuals, was not only a threat to the peace, but also a danger for humanity. Mercenarism, or rather the conduct of mercenaries, had a place in all three categories. The same was true of war crimes, which were also crimes against peace and crimes against humanity. It would therefore be preferable to retain the general denomination “offences against the peace and security of mankind”, which was applicable to all the acts and types of conduct covered by the draft code.

32. Contrary to what was said in draft article 8, self-defence in cases of aggression was not always an exception to the principle of the criminal responsibility of individuals. A situation could occur in which military personnel, or even civilians, committed crimes falling under the draft code while resisting armed attack by another State or during a civil war, in other words in the course of exercising the State’s right to self-defence. Hence self-defence could not be invoked in all cases to preclude criminal responsibility. It was quite easy for an individual to violate the laws of war or commit inhuman acts while the State was acting in conformity with its rights. That should be taken into account in the draft article.

33. The most important thing for the time being was to draw up the list of offences against the peace and security of mankind and clearly state the constituent elements, in other words the acts and types of conduct by individuals that were unlawful and constituted such offences, so as to provide the courts with the requisite information to be able to try and punish the perpetrators. Only then could the introductory articles,

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 47.

as well as the provisions relating to conspiracy, complicity, attempt and other offences, be prepared.

34. In any event, if the code was to be truly useful, it should take account of the changes in international law, legal thinking and State practice, and of the various instruments and texts adopted on the subject by the international community, and should therefore avoid following the 1954 text too closely, which was the main defect of the draft articles submitted by the Special Rapporteur.

35. Mr. FRANCIS commended the Special Rapporteur for his fourth report (A/CN.4/398), which filled in the gaps in the earlier ones. It covered the topic more fully and, so to speak, brought it to life. At previous sessions, he had been among those members who had urged the Special Rapporteur to submit draft articles on general principles, something that had now been done, although not completely. It was none the less gratifying to have at least a preliminary draft of general principles that could be developed at a later stage. Since the draft articles themselves were not due for discussion at the present session, he would not comment on them except to illustrate certain points in his general remarks.

36. In his earlier reports, the Special Rapporteur had drawn attention to the test of seriousness to characterize offences against the peace and security of mankind. It was very important to ensure that that element had its proper place in the draft. One possibility was to embody it in a provision in part II of chapter I of the draft articles, dealing with general principles. An alternative course, which he himself favoured, was to insert a new article after article I to set out the notion of the gravity of the offence, the term "gravity" being preferable to "seriousness" because it reflected better the characteristics of the offence. Moreover, the notion of "gravity" appeared in the fourth preambular paragraph of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

37. Draft article 2 (Characterization) was based on Principle II of the Nürnberg Principles¹¹ and would be better placed in part II (General principles) of chapter I of the draft code. As far as the wording of article 2 was concerned, the first sentence conveyed the idea embodied in Principle II, albeit in somewhat too general terms, but the second sentence was open to criticism in that it could give rise to double jeopardy, as Sir Ian Sinclair (1964th meeting) had pointed out. His own suggestion would therefore be to revert to the more specific language in Principle II of the Nürnberg Principles.

38. It should also be stated somewhere in the draft that the provisions of the code were without prejudice to the attribution of criminal responsibility to States, a matter which the Commission had set aside for the time being, in the absence of instructions from the General Assembly.

39. No comment was required at the present stage on draft article 3. He voiced support for the Special Rapporteur's approach to draft article 4, which dealt with two important elements for the viability of the topic,

namely the principle of the universality of the offence and the idea of the establishment of an international criminal jurisdiction. With regard to the principle of universality, he endorsed the suggestion by Sir Ian Sinclair (1960th meeting) to introduce into the article the idea expressed by the Special Rapporteur that, "in the term 'crime against humanity', the word 'humanity' means the human race as a whole and in its various individual and collective manifestations" (A/CN.4/398, para. 15). Accordingly, the first sentence of paragraph 1 could be reworded as follows: "An offence against the peace and security of mankind is an offence against all mankind" or "an offence against mankind as a whole". A formula of that kind would make article 4 more generally acceptable by taking the sting out of the concept of universality.

40. The idea of a universal jurisdiction was the ideal solution, but that would not be possible for quite some time. For lack of a better word, the jurisdiction that would prevail in the mean time could be said to be "multilateral". Mr. Arangio-Ruiz (1962nd meeting), by inviting the Special Rapporteur to comment on the feasibility of creating an international criminal jurisdiction and of a territorial State taking action to implement the code, presumably had been expressing a preference for the type of jurisdiction mentioned in paragraph 1 of draft article 4 and had been arguing that States were reluctant to submit to an international court. However, since the articles dealt not with States but with individuals, he himself believed that States would be less reluctant to allow their nationals to be tried by an international criminal jurisdiction, should the occasion arise. Sir Ian Sinclair (1964th meeting) had expressed his preference for an international criminal jurisdiction, and the Special Rapporteur had captured the mood of the times by providing for both possibilities in article 4. His own opinion was that it would be more difficult to execute judgments in the framework of an international criminal jurisdiction alone than in the framework of the type of jurisdiction mentioned in paragraph 1, which was none the less insufficient in itself. A national court was not the most appropriate forum for trying the head of State of another country, for example.

41. Article 5, concerning the non-applicability of statutory limitations, had a place in the draft. Admittedly, the 1968 Convention on that subject had not received as many ratifications as desired, but the situation should be given time to develop. Draft article 6, which was based on Principle V of the Nürnberg Principles, was acceptable, but the wording should be refined. Draft article 7 was clearly useful, but paragraph 2 called for further consideration when the Commission came to discuss the text of the draft articles at a future stage.

42. Another gap in the report concerned Principle IV of the Nürnberg Principles, regarding the order of a superior. The Special Rapporteur had treated that principle as an exception, in the terms set forth in draft article 8, subparagraph (c). In his view, however, the principle should be treated independently and set out in positive terms in the part of the draft relating to general principles.

¹¹ See 1958th meeting, footnote 4.

43. Important as the articles were, there was room for exceptions to the principle of responsibility, but the Commission should be selective in establishing them. He agreed with Sir Ian Sinclair's suggestion (*ibid.*) that the matter should be considered at a later stage and considered that the exceptions should be contained in a separate section of the draft.

44. Another concept to be taken into account was the one set forth in article VII of the Genocide Convention, namely that offences against the peace and security of mankind were not to be considered as political crimes for the purpose of extradition.

45. Lastly, referring to Mr. Ushakov's comment that the Special Rapporteur had relied heavily on the Nürnberg Principles in drafting the code, he pointed out that the Special Rapporteur could not have avoided doing so, although it was plain that one should not go too far in that direction. He hoped that the Commission would in the future be in a position to give more detailed consideration to the general principles.

46. Mr. JAGOTA, referring to the texts that had served as precedents for the preparation of part IV of the fourth report (A/CN.4/398), said that Principles I to V of the Nürnberg Principles as formulated by the Commission in 1950 had dealt with the responsibility of individuals for international crimes; the autonomy of international crimes; the liability of officials, including heads of State or Government; the non-applicability of the defence of order of a Government or of a superior, provided that a moral choice was in fact possible to the offender; and the right of an offender or accused person to a fair trial on the facts and law. No reference had been made in those principles to the questions of the non-retroactivity of criminal law or penalties and of statutory limitations, or to other defences or exceptions discussed in part IV of the report.

47. The draft code of offences prepared by the Commission in 1954 had concentrated on the criminal responsibility and punishment of the individual, the liability of responsible government officials, including heads of State, despite their official position or status, and the qualified non-applicability of the defence of order of a Government or of a superior.

48. With regard to exceptions to responsibility, the Commission had, in its work on part I of the draft articles on State responsibility, also examined extensively the question of circumstances precluding wrongfulness of an act or conduct of a State or attributable to a State, a matter which might also apply to the criminal responsibility of the State. That had been done in particular at the Commission's thirty-first (1979) and thirty-second (1980) sessions, when draft articles 29 to 34, dealing respectively with consent, legitimate countermeasures, *force majeure* and fortuitous event, distress, state of necessity, and self-defence, had been considered and adopted on first reading. Suitable exceptions had also been made concerning the protection of *ius cogens* and humanitarian law. In addition, in the matter of preclusion of wrongfulness, draft article 35 had dealt with the subject of compensation for damage.

49. The Commission had not yet studied at length the question of State responsibility for criminal offences, or

prescribed any penalties, or considered exculpatory pleas and extenuating circumstances. Similarly, the question of the criminal responsibility of the individual for an act committed by the State, and exceptions thereto, had not been tackled in the Commission's work on State responsibility. It was against that background that the Commission had decided to examine the general principles, including exceptions, to be set out in the draft code of offences, both to maintain consistency and to take account of other concepts and principles that were relevant to the content and scope of the code. It had also decided to limit its consideration of the draft code to the criminal responsibility of the individual, keeping the question of the criminal responsibility of the State open for future development.

50. Bearing those considerations in mind, he had some specific comments to make on part IV of the report and draft articles 3 to 9. With regard to the juridical nature of offences and the nature of the offender, he agreed with the Special Rapporteur and endorsed the texts of draft articles 3 and 6. He also agreed with the Special Rapporteur about the two aspects of the application of criminal law in time, namely non-retroactivity and the non-applicability of statutory limitations. The question of the scope of non-retroactivity was a sensitive issue. In internal law, the limits were strictly adhered to. In the Constitution of his country, India,¹² article 20, paragraph 1, provided:

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

The term "law in force" had been given a strict, rather than broad, interpretation in the Indian courts. The same approach was adopted in draft article 7, paragraph 1, submitted by the Special Rapporteur. If an element of flexibility was considered desirable for international law, the wording of article 7, paragraph 2, might be made stricter by changing the phrase "according to the general principles of international law" to "according to the generally recognized principles and rules of international law". As to the non-applicability of statutory limitations, draft article 5 met with his approval.

51. On the question of the application of criminal law in space, dealt with in draft article 4, he would suggest, as he had already had occasion to do (1962nd meeting), that the Commission should postpone detailed consideration of the matter until a definite view had been expressed by the Sixth Committee of the General Assembly on the issue of an international criminal jurisdiction. The question of penalties and of exculpatory pleas and extenuating circumstances could be left to the competent courts.

52. Draft article 4 seemed to be based in particular on the corresponding provisions of the conventions on genocide and *apartheid*. It should stand as the residual position of the Commission if the establishment of an international criminal jurisdiction was considered

¹² A. P. Blaustein and H. Hecker, *India, Constitutions of the Countries of the World*, A. P. Blaustein and G. H. Flanz, eds. (Dobbs Ferry (N.Y.), Oceana Publications, 1986).

neither desirable nor possible for the present. In that connection, he supported the views expressed by Sir Ian Sinclair (1964th meeting) and hoped that they would be politically acceptable to a large section of the world community.

53. In regard to the question of exceptions to the principle of responsibility, which was the subject of draft article 8, the non-exceptions embodied in subparagraphs (a) and (c) should not cause many problems, since they were in conformity with the essence of the 1954 draft code. Matters of form would, of course, be settled by the Drafting Committee.

54. He also endorsed draft article 9 as a counterpart of article 8, subparagraph (c), or even independently, although its content would also be covered by the provisions relating to complicity. As to the other exceptions to responsibility, if the individual concerned acted as an official or agent of a State, the applicability of the circumstances precluding the wrongfulness of the act of that State would also have to be examined carefully with reference to each category of offences—crimes against peace, crimes against humanity and war crimes—despite the basic differences between the present topic and that of State responsibility, particularly in terms of their scope. One example was the defence of state of necessity as precluding the wrongfulness of an act of the State. The Commission had devoted much time to considering it in 1980 and had specified in article 33 of part 1 of the draft articles on State responsibility that state of necessity could not be invoked if the international obligation with which the act of the State was not in conformity arose out of a peremptory norm of general international law, or if the obligation was laid down by a treaty which explicitly or implicitly excluded the possibility of invoking state of necessity, such as a treaty dealing with humanitarian law, or if the State in question had contributed to the occurrence of the state of necessity. In the commentary to article 33, the Commission, referring to *jus cogens*, had said:

... The Commission wishes to emphasize this most strongly, since the fears generated by the idea of recognizing the notion of state of necessity in international law have very often been due to past attempts by States to rely on a state of necessity as justification for acts of aggression, conquest and forcible annexation. ...¹³

State of necessity could therefore not be invoked in connection with crimes against peace and crimes against humanity, in view of the gravity of such crimes. Similar considerations applied to the idea of consent. No one consented to aggression, colonialism, genocide or *apartheid*, or the violation of any other rule of *jus cogens*. The exceptions arising from *force majeure*, fortuitous event or distress would also have to be examined carefully with reference to each category of offences. The qualified exceptions of coercion—both in relation to orders of a superior and in other circumstances—and error of law or of fact should pose no problems. No error of law or of fact could, however, be invoked in the case of a crime against humanity or a crime against peace, as the Special Rapporteur rightly affirmed in his report (A/CN.4/398, paras. 211 and 216).

55. The conditional application of the exceptions to responsibility in draft article 8, subparagraphs (b), (c), (d) and (e), was clearly stated, in the light of the indications given in the report (*ibid.*, para. 196). The conditions on those exceptions would thus preclude their application to crimes against humanity and crimes against peace, bearing in mind the proportionality of the interest sacrificed to the interest protected. The exception of self-defence in cases of aggression was not controversial and would be easier to draft if it formed the subject of a separate paragraph or article. The question of reprisals, referred to in the report (*ibid.*, paras. 241-250), called for further reflection.

56. The Commission would also have to consider whether certain well-known exceptions applicable to alleged offenders under national penal laws should be expressly mentioned in the draft code, particularly since it was to be confined for the time being to offences committed by individuals, whether as agents of the State or otherwise. The exceptions he had in mind were the age of the offender (in the case of a child or minor), unsoundness of mind or insanity, induced intoxication against the will of the offender or without his knowledge, the right of private defence of life and property, and consent of the alleged victim. If those defences or exceptions were to be applicable to the person concerned under the terms of draft article 6, which stated that "any person charged with an offence ... is entitled to the guarantees extended to all human beings", the point should be clarified in the commentary.

57. In conclusion, the Commission would need to spend more time reflecting on the content and scope of draft article 8, concerning exceptions to the principle of responsibility. However, he generally agreed with the conclusions reached by the Special Rapporteur with regard to justifying facts (*ibid.*, para. 254).

The meeting rose at 1 p.m.

1966th MEETING

Friday, 13 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

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

¹³ *Yearbook ... 1980*, vol. II (Part Two), p. 50, para. (37).

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

PART IV (General principles) and

PART V (Draft articles) (continued)

1. Mr. OGISO expressed appreciation to the Special Rapporteur for elaborating the general principles underlying the draft code of offences against the peace and security of mankind and said it was particularly gratifying to note that the principle *nullum crimen sine lege, nulla poena sine lege* had its rightful place among the general principles. He would concentrate on three major questions dealt with in part IV of the fourth report (A/CN.4/398): the rule *nullum crimen sine lege*, exceptions to criminal responsibility, and an international criminal jurisdiction.

2. With regard to the rule *nullum crimen sine lege*, it was stated in the report: "If the word *lex* is understood to mean not written law, but *droit* in the sense of the English word 'law', then the content of the rule will be broader" (*ibid.*, para. 156). Unlike the continental legal system, the Anglo-American system relied heavily upon a body of judicial precedents and, in that sense, unwritten law was also a part of the "law". Such a body of judicial precedents, if not written law within the strict meaning of the term, constituted authoritative evidence of the state of positive law. Only if *lex* was defined as positive law, therefore, could the rule *nullum crimen sine lege* extend not only to the countries of the continental legal system, but also to those of the Anglo-American legal system.

3. The Special Rapporteur, however, went on to assert (*ibid.*, para. 161) that that concept of justice had been the decisive factor in the Nürnberg Tribunal and cited the remark by Judge Biddle that "the question then was not whether it was lawful but whether it was just to try ...". He for one was opposed to that position. It was unacceptable that *lex*, in the rule *nullum crimen sine lege*, should designate something beyond positive law, such as a vague and undefinable concept of justice *per se*.

4. On the other hand, he accepted the Special Rapporteur's conclusion (*ibid.*, para. 163) that "the rule *nullum crimen sine lege, nulla poena sine lege* is applicable in international law". But the Special Rapporteur should clarify what he meant by "custom and the general principles of law" (*ibid.*), otherwise a dangerous situation could arise by allowing non-legal concepts to creep into the legal rule *nullum crimen sine lege*. In that connection, the words "general principles

of international law" in draft article 7, paragraph 2, must be very carefully examined.

5. In his view, the prohibition of any rule applicable *ex post facto* lay at the very core of criminal law, and the essential criterion of criminal responsibility was whether or not a positive law prohibiting a specific act existed at the time of the commission of the act. The rule *nulla poena sine lege* meant that the perpetrator of the act could not be punished if, at the time of the commission of the act, the law did not prescribe any penalty. As the Special Rapporteur stated (*ibid.*, para. 181), "the Commission has not yet decided clearly whether the draft under consideration should also deal with the penal consequences of an offence". Perhaps for that reason the secondary rules on the topic under consideration had not yet emerged. Nevertheless, in his opinion, some guidelines for rules of punishment must be given in the draft code, in order to avoid, for example, a situation in which an individual could be sentenced to death for an act which was not forbidden by law at the time it was committed.

6. With regard to the principles relating to the determination and scope of responsibility, generally speaking he supported the Special Rapporteur's approach, namely that there should be no exception to criminal responsibility other than coercion, state of necessity and *force majeure*. The Special Rapporteur also pointed out (*ibid.*, para. 199) that the distinctions between coercion, state of necessity and *force majeure* were not found in all legal systems, which was perfectly true.

7. As far as the exception of superior order was concerned, he endorsed the Special Rapporteur's formulations, but wondered whether the threat of a grave, imminent and irremediable peril, stemming from a superior order to an individual might not vary according to the degree of discipline in which the individual was operating. In particular, freedom of choice would be extremely limited in the case of a subordinate military officer. While he did not believe that a military officer should be entirely relieved of responsibility because of a superior order, the degree of rigidity of discipline could constitute an extenuating factor.

8. The Special Rapporteur was right about error of fact; but error of law was still likely to occur, especially in the case of customary international law, which was not precisely codified. He himself wondered whether responsibility could be attributed to an individual simply because of ignorance of the law, as was laid down in draft article 8, subparagraph (e), which embodied the idea of *jus cogens*, a concept which, as he had underlined on many occasions, should be clearly defined.

9. Draft article 8, subparagraph (e) (iii), contained another element of balance, namely between the interest sacrificed and the interest protected. The principle appeared at first sight to be sound, but doubts were possible about its impartial application, particularly if no international criminal jurisdiction was established.

10. On the question of criminal jurisdiction, a number of members of the Commission, including himself, had stressed the need to establish an international criminal court for the purposes of implementing the code, and he welcomed that trend of thought among his colleagues.

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

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

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

All were aware of the political difficulties attached to the establishment of an international court. Yet such a court was indispensable in order to provide as much objectivity as possible in the interpretation and application of the code. He could support the idea of universal competence only pending the establishment of an international criminal court: in the case of crimes against peace and crimes against humanity, the international court formula was essential. The Commission, as a unique legal organ of the General Assembly, should in his view openly address the question of the best possible procedure for implementation of the code.

11. Mr. BALANDA said that the matters discussed by the Special Rapporteur under the heading "other offences" were more in the nature of general principles than a separate category of offences, for complicity or attempt were conceivable in each of the proposed categories of crimes.

12. In answer to those members who questioned the usefulness of classifying offences into three categories, he would draw attention to the passage in the fourth report (A/CN.4/398, para. 254) in which the Special Rapporteur stated that the theory of justifying facts involved varying applications and differed in scope according to the offences or categories of offences in question; that, in view of their gravity, crimes against humanity could not be justified; that the only possible justification for crimes against peace was self-defence in cases of aggression; and that the theory of justifying facts could only really apply in relation to war crimes. That distinction between the three categories of crimes also applied when it came to penalties. While at the present stage he wished to reserve his position in the matter, he would stress that there could be no code of offences without penalties. There was, however, one category of crimes that had to be punished more severely than the others, namely crimes against humanity.

13. On the delicate issue of the criminal responsibility of States, a number of representatives in the Sixth Committee of the General Assembly had spoken in favour of recognizing such responsibility (see A/CN.4/L.398, para. 39). It was perhaps a novel idea, but he did not see how the draft code could ignore the criminal responsibility of States. Even allowing for the fact that a State acted through individuals and that, if apprehended, those individuals could be prosecuted, it would be wrong to punish them as individuals, since they would have acted as agents of the State. Accordingly, a person who committed a terrorist act on behalf of a State could not be punished as an individual: it was the organ in whose service the individual was engaged that incurred responsibility and was answerable for the act in question. Consequently, a whole range of penalties applicable to the individual were automatically excluded, and the Commission would have to identify penalties that were suitable for punishing crimes by States. If it did not accept the concept of the criminal responsibility of the State, it would be all the more necessary for the Commission to substantiate its position in that some crimes could be committed only by States.

14. With regard to the general principles, he endorsed the view that, in drafting the code, the Commission should refrain from legislating by *renvoi*. In that con-

nection, draft article 6 only alluded to the judicial guarantees provided for in the Universal Declaration of Human Rights⁴ and in Additional Protocol II⁵ to the 1949 Geneva Conventions. Those guarantees should be expressly stipulated.

15. International law had an element of autonomy so far as general principles were concerned, for under internal law those principles were generally applied to all offences, of whatever kind, whereas some of the general principles enunciated in the report could not be so applied. For instance, the theory of justifying facts could not apply to crimes against humanity, given the nature of such crimes, whereas under internal law it could always be invoked save as otherwise provided by law.

16. There were also two other principles that were not mentioned in the report. The first was the principle applicable to concurrent offences, whereby the penalty varied according as a series of offences or a compound offence were involved. That basic question would have to be dealt with under the general principles, since it obviously had a bearing on the application of penalties. The other principle not mentioned, one that was embodied in the internal law of some States, was that the perpetrator of a political crime could not be extradited. In that instance, in order not to thwart the general duty to extradite proposed by the Special Rapporteur, the Commission should affirm such a duty even for political crimes, since the motive for a crime against humanity was connected with political, racial, ethnic and national considerations. Two further principles would also have to be affirmed in the draft code, namely the principle of adversary proceedings and the principle of two-tier jurisdiction.

17. He agreed with the Special Rapporteur's proposals regarding the non-applicability of statutory limitations, on the understanding that it would be necessary for that purpose to agree on the facts—in other words the alleged perpetrator of an offence against the peace and security of mankind remained liable to prosecution at all times irrespective of the period that elapsed between the commission of the offence and his arrest—and to agree on the penalty—in other words the period that elapsed between arrest and trial did not absolve the offender from serving his sentence.

18. Similarly, he endorsed the idea of non-retroactivity as set forth in draft article 7. Under internal law, however, if a new law more favourable to the accused was enacted, it generally had retroactive effect. What would be the position in the present case if the principle of national jurisdiction were recognized? How would a national court that was required to deliver judgment react towards such a law, bearing in mind the principle of non-retroactivity laid down in the code?

19. The other principles proposed by the Special Rapporteur also met with his approval, but he wondered whether the principle whereby everyone was deemed to know the law was applicable in the context of the draft code.

⁴ General Assembly resolution 217 A (III) of 10 December 1948.

⁵ See 1959th meeting, footnote 6.

20. The question of implementation of the code involved delicate issues. Virtually all members took the view that a code without implementation machinery would be useless. Implementation, however, required not only penalties, but also an organ capable of applying them. In cases where an act was not punishable under the internal law of a State, the courts of that State which were called upon to apply the code would have great difficulty in determining the relevant penalty unless it was indicated in the code. It was therefore important to provide for penalties in the code itself. Moreover, the Commission was also bound to abide by the principle *nulla poena sine lege* and hence it would have to specify the whole range of penalties.

21. The question of penalties inevitably introduced the issue of the organ that would order them, which in turn gave rise to the problem of providing for either universal jurisdiction or the creation of an international criminal court. The Special Rapporteur proposed opting at first for universal jurisdiction, whereby the perpetrators of offences against the peace and security of mankind would be brought before the courts of the State on whose territory they had been apprehended or to which they had been extradited. But the problems involved were legion and prompted certain remarks which were not intended as criticism, but might give the Commission food for thought. How, for instance, could the impartiality of national courts be guaranteed? Or how, if an act was perpetrated by the highest authorities of a State, could a judge in the forum State be prevented from refusing to try those authorities? Might not the State in question, for its part, refuse to extradite, as a result of political pressures detrimental to co-operation between States? Furthermore, in the event of extradition, there would be the problem of gathering evidence to prove the guilt or innocence of the accused; and, where a political leader had taken the decision to commit an act of aggression and had been brought before the courts of the injured State, the problem of the impartiality of the judges. Again, in the event of national jurisdiction, the penalties could well vary significantly from country to country, owing to the diversity of legal systems. Finally, national laws differed in one more respect, namely the penalties for complicity: in some States an accomplice was liable to the same penalty as the principal offender, whereas in others he did not suffer the fate reserved for the main actor. Those factors indicated that the principle of universal jurisdiction did not necessarily offer an entirely satisfactory solution.

22. The idea of having an international criminal court, whether the ICJ or some other body, also gave rise to a certain number of problems. The problem of evidence, for example, would be even more acute than in the case of universal jurisdiction. If the role were assigned to the ICJ, would it have a "general prosecution department for mankind" so that the prosecutor could gather evidence? What would be the prosecutor's powers in that regard? Who would undertake the search for war criminals? Would States be prepared to collaborate by extraditing criminals who were on their territory and bringing them before such an international criminal court? Once the criminals had been convicted, where would they serve their sentence? How could the principle of two-tier jurisdiction be observed at the inter-

national level? Would the international court pass judgment at first and at final instance?

23. On another point, he observed that the draft, and particularly articles 11 and 13, gave the impression that the offence would be completed once a person had carried out the act deemed to be a crime. Under internal law, however, the act was not sufficient in itself: it had to be accompanied by the mental element of intent. If intent was to be included, therefore, would it apply to all offences? Or should the Commission, in order to underline the autonomy of the code in relation to internal law, go so far as to hold that there was an offence as soon as the act had been committed, even where the mental element was lacking?

24. Paragraph 2 of article 7 should perhaps be redrafted because, at the stage envisaged in that paragraph, the person in question had not been convicted and was therefore still presumed to be innocent. It would suffice in that connection to replace the words "guilty of an act or omission" by "prosecuted for an act or omission". Lastly, the subject of draft article 9 was concerned with participation in a crime and did not warrant a separate article.

25. With regard to the possibility of making the use of weapons of mass destruction a crime, his only comment was that it would be regrettable not to mention it in a code of offences against the peace and security of mankind, even if it was embarrassing for political reasons, and that the Commission could be found wanting if it were to remain silent. *Apartheid* should, of course, also be included.

26. Mr. ARANGIO-RUIZ said that there seemed to be some degree of misunderstanding concerning his earlier remarks about the universal jurisdiction formula as opposed to the international criminal court formula. The establishment of an international court undoubtedly represented the ultimate goal of the world community, but it would be unwise not to appreciate with all possible accuracy—or worse, to minimize—the obstacles to the attainment of such a goal. Yet that was precisely what scholars and diplomats had been doing unconsciously since the 1940s and 1950s, by accepting too easily the alleged but non-existent analogy between the situation that had obtained in 1945 and the present situation of international society. It was for that reason that he had discussed at length the nature of the Nürnberg and Tokyo Tribunals in his previous statement (1962nd meeting). Taking the Nürnberg Principles and trials as precedents inevitably led to ambiguity, for, notwithstanding its essential conformity to political expediency and to justice, the Nürnberg experience could not serve as a precedent for the international criminal court that should be established for the implementation of the code.

27. For that reason, it had to be acknowledged that the problem confronting the Commission was not international but supranational. In fact, perhaps a better term would be "infranational". None of the States participating in the European Community, for example, really felt that its sovereignty had been reduced. The reason lay essentially in the fact that the Community's institutions operated in respect of physical and juridical

persons who were, after all, only the common, private subjects of the member States. But the international court necessary for implementing the code would have to deal in many cases with persons who were at the summit of the political organization of sovereign States. It might even have to summon sovereigns themselves. There was no real comparison with the Court of Justice of the European Communities or with the *tribunaux arbitraux mixtes* established by the peace treaties following the First World War.

28. Precisely on the basis of such a premiss, he had ventured to predict that it would be very unlikely that sovereign States would, at a sufficiently early stage, accept such a set of supranational institutions as an international criminal court and the ancillary institutions required for the court to carry out its functions in respect of the "authorities", to use provisionally the 1954 terminology criticized by Mr. Ushakov (1965th meeting).

29. It was therefore only on the basis of such discouraging realities that he had suggested that the forms of implementation of the code would inevitably be those currently available. He had none the less placed a number of tentative qualifications on the idea of the universal jurisdiction formula. First of all, there should be a gradual approach to such a system and very strict distinctions should be drawn between the various offences. For some offences, a high degree of co-operation among national institutions responsible for the administration of penal justice could be achieved at a relatively early stage. For others, the means of implementation of the code would doubtless have to remain those currently in place within the organized international community. There were obviously certain crimes against peace and crimes against humanity which involved the policies of some Governments to such an extent that there would hardly be any hope of obtaining any participation from them in efforts for prosecution and repression by national courts. That would undoubtedly represent an extremely serious gap in the system of implementation of the code. The same problem would none the less have to be faced within the framework of the more appropriate international criminal jurisdiction solution, an alternative which did not seem to stand a better chance of acceptance or effectiveness for crimes of that type.

30. In conclusion, he recalled that one of the best international lawyers of the time had written 20 years earlier that it would probably take 100 years for "federal analogies" to become valid in international law and international organization. There was thus a point at which both formulas faced almost the same difficulties.

31. Mr. TOMUSCHAT said that the general principles set forth by the Special Rapporteur could be considered as the corner-stone of a future international criminal code. They went beyond the field of substantive law on certain points, in particular the basic rule on jurisdiction contained in draft article 4, whereby every State would have the right—in fact the duty—either to try or to extradite any person charged with an offence against the peace and security of mankind. Such a rule of universal jurisdiction was appropriate for the gravest crimes, a description which applied to most of the of-

fences included in the draft code. In some other instances, however, the character of the offence was very far from being of such gravity as to warrant a worldwide system of jurisdiction. For example, a matter of interference in a State's affairs, which was such a cloudy notion, could never be entrusted, as far as interpretation and application were concerned, to national tribunals: their diverging ideologies would make the question of guilt or innocence essentially and issue of political discretion.

32. Besides, to declare every State competent to try an alleged perpetrator of an offence against the peace and security of mankind would lead to chaos. It would be much wiser to base jurisdiction on a genuine connection, as did the ICJ in a different context, or at least on a reasonable connection. Otherwise, a race could well start to obtain the extradition of persons whom the State arresting them did not wish to try; or again, a State on one continent might call for the extradition of persons charged with committing atrocities on another continent.

33. Moreover, any attempt to establish rules determining jurisdiction as between States in the matter was likely to prove of no avail. An international criminal court was the best solution, but for his part he would be content with an international commission of inquiry to establish the facts in each case and publish a report.

34. Acceptance of an international jurisdiction would be a test of whether the draft code was taken seriously or whether it was mainly intended as a tool to be used against the weak but never against the powerful. Criminal law rested upon the principle of equality and any bias in applying it was a denial of justice. To his mind, the code had to be accompanied by appropriate enforcement machinery; otherwise, it would hardly be worth formulating.

35. In the field of human rights, it was appropriate to proceed step by step, identifying and framing the legal rules first and only then considering the establishment of implementation machinery. The position with respect to the present topic, however, was totally different. Criminal law in a sense ensured the individual's enjoyment of human rights, but at the same time interfered with the basic rights of those who were prosecuted. The utmost care should therefore be exercised to avoid any harmful effects. Consequently, the draft code should be accompanied by a draft statute of an international criminal court.

36. Turning to the provisions of the draft code, he agreed with the basic idea embodied in draft article 2, which did away with safeguards afforded by the rules of domestic law. In the event of grave abuses of the sovereign rights of a State, those who had perpetrated them as State agents were precluded from invoking the usual privileges of State sovereignty.

37. Draft article 3, on the other hand, left much to be desired. In the case of State responsibility, it was perhaps sufficient to identify a number of objective criteria or elements of the internationally wrongful act. But in the present instance, where the criminal responsibility of the individual was at stake, subjective factors came into play: punishment presupposed guilt,

and the subjective element took the form of criminal intent or simple negligence. For practically all the offences listed in the draft code, intent would be necessary: mass crimes could not be the result of negligence. That point would have to be clarified explicitly, in order to avoid misunderstanding.

38. Having already spoken on the question of establishing an international criminal court, he would not dwell on draft article 4. Draft article 5 was acceptable in so far as it applied to the offences listed in article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, but he doubted whether the same held true for all crimes against peace. For example, the offence of interference in a State's affairs was much less serious than murder—a crime to which statutory limitations would apply under internal law. One should also remember the need to facilitate reconciliation. The recent return to democracy in Uruguay had been made possible by the promise not to prosecute for certain serious crimes committed under the previous régime. Whatever the objections to forgetting crimes in such cases, it was plain that a multiplicity of trials would prevent the healing of wounds. Hence he was reluctant to accept a rigid rule which would not permit reconciliation in that kind of situation. The question also arose as to who would be able to grant pardon under the draft code. The principle of universal jurisdiction would, unfortunately, appear to stand in the way of measures of clemency.

39. On the subject of draft article 6, he fully endorsed the remarks made by Mr. Illueca (1964th meeting). The guarantees of a fair trial had been spelled out by the international community in article 11 of the Universal Declaration of Human Rights⁶ and article 14 of the International Covenant on Civil and Political Rights.⁷ The Covenant had received world-wide recognition and had more than 80 States parties. Since that international standard existed, it should be mentioned in the draft article.

40. Draft article 7 dealt with an issue which lay at the heart of the legal debate in the Nürnberg trial, namely application of the law *ex post facto*. In that regard, he would simply point out that the purpose of drafting the present code was precisely to remedy the shortcomings of trials of that type by codifying offences against the peace and security of mankind. When the code came into force, the issue of application of the law *ex post facto* would no longer arise.

41. As he interpreted article 7, it meant that punishment of a person guilty of an offence against the peace and security of mankind would be lawful only in accordance with the provisions of the code, unless the specific requirements of paragraph 2 were met. In fact, it was the code itself that would bring into being, in law, the category of offences in question, and that point should be expressly stated in the article. On the other hand, Mr. Illueca had been right to say that paragraph 2 should be aligned with article 15, paragraph 2, of the International Covenant on Civil and Political Rights,

which contained the concluding phrase "recognized by the community of nations".

42. He agreed with many of the rules proposed in draft article 8; but it was essential to remember that the draft code dealt with the criminal responsibility of the individual. In that respect, the introductory words of the article could lead to misunderstanding, with their misplaced reference to "self-defence in cases of aggression". In the first place, self-defence against aggression was not itself aggression that needed to be justified. In the second place, the only relevant act of self-defence in the present context was individual self-defence. Mr. Ushakov (1965th meeting) had therefore been right to suggest that the text should be amended to clarify the distinction between those two kinds of self-defence.

43. Great care should be taken with the drafting of article 8. The negative form was used throughout and could be interpreted as meaning that the presumption of innocence did not apply, a presumption that was an essential achievement within a civilized community and must be retained in the present context.

44. *Force majeure*, dealt with in subparagraph (b) of draft article 8, had no place in the draft code, which related only to acts or omissions of the individual. Under criminal law, no individual could be charged with the consequences of *force majeure*. The provision on error, in subparagraph (d), was also very doubtful. Since *mens rea* was a general requirement and negligence was not sufficient for there to be an offence, an error of fact would often take away the gravity of the offence. One could imagine a case of artillerymen firing at what they believed to be enemy soldiers but actually hitting a civilian target. Were they to be held responsible for having committed a war crime? Lastly, subparagraph (e) of the article stood in need of redrafting, if only because the rules of *jus cogens* were concerned with inter-State relations and hence could not be invoked under criminal law. Clearly, article 8 as a whole needed a thorough re-examination in order to make it conform to the generally recognized principles of criminal law.

45. Mr. CALERO RODRIGUES said that the Special Rapporteur had submitted a set of general principles which were strictly connected with the international crimes under consideration and, for the purpose of formulating them, had taken care to rely on the general principles of domestic law. Not all those principles, however, could be transposed into international law, nor were they all applicable to the offences listed in the draft code.

46. With regard to the juridical nature of the offences, draft article 1 (Definition) was an improvement over the earlier text, contained in the second alternative of former draft article 3 (A/CN.4/387, chap. III). The Special Rapporteur's approach thus avoided the drawbacks of a general definition. It should be noted that national criminal codes did not normally define a crime in general terms: they simply set forth in the different articles the definition of each of the crimes in question.

47. He also agreed with the rule embodied in draft article 2 (Characterization) and the proposition, as stated in the first sentence, that the characterization of an act

⁶ See footnote 4 above.

⁷ See 1964th meeting, footnote 5.

as an offence against the peace and security of mankind, under international law, was independent of the internal order. As to the second sentence and the problem of double jeopardy, or *non bis in idem*, mentioned by Sir Ian Sinclair (1964th meeting), some redrafting was necessary to clarify that there was no question of going back on that established principle.

48. On the subject of the application of the code in space, he noted that in principle the code was intended to apply universally, or more precisely, in the territories of all the States parties. The question then arose of indicating the competent jurisdiction. In that connection, the principle *aut dedere aut judicare* was applied, for example in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁸ when States agreed to consider certain acts as crimes under their respective national laws. The principle was thus applied under classical “international criminal law”, but the present topic came rather under the heading of “inter-State criminal law”, “supranational criminal law” or “universal criminal law”. The problem was not one of choice of law but rather of the delegation of powers on the part of States.

49. The two previous speakers had suggested that the provisions of draft article 4 were premature and had convincingly demonstrated the impossibility of applying the system of universal jurisdiction. Theoretically at least, an international criminal court was the only acceptable solution.

50. As to the application of the code in time, Kelsen and other writers had held that non-retroactivity was not a principle of international law. With reference to the Nürnberg trial and the principle *nullum crimen sine lege*, it had been said that the term *lex* could be considered in a broad sense, so as to include customary law, general principles, natural law, rules of morality, and so on. The explanation was perhaps ingenious, but it was not convincing. It would be better not to try to solve that problem in the draft but simply to specify that the code would apply only to offences committed after its entry into force.

51. The idea of the non-applicability of statutory limitations was acceptable in view of the gravity of the offences concerned. Most national criminal codes applied the principle of a graduation of statutory limitations according to the gravity of the offence. Moreover, the non-applicability of statutory limitations to war crimes and crimes against humanity could be regarded as an existing principle of international law, despite the somewhat limited acceptance of the 1968 Convention on the subject.

52. In regard to the scope of the code *ratione personae*, the Commission had decided, as a working hypothesis, to limit the application of the code to individuals, and in the course of its work that hypothesis had become more convincing. The Commission could therefore request the General Assembly to confirm that choice.

53. The concept of international crimes was set forth in article 19 of part 1 of the draft articles on State

responsibility and, if it were maintained, the provisions of that article would apply to crimes imputable to States. The present draft code covered international crimes committed by individuals.

54. The wording of draft article 3 would have to be reviewed. It provided that any person who committed an offence against the peace and security of mankind was responsible therefor, which was not always true, for the person committing the act could well adduce some justification.

55. The most important general principle, however, was that of imputability. For a person to be punishable, the crime must exist and that person must be responsible. Generally speaking, in criminal law the question of attribution of responsibility or imputation of a crime to a person covered two kinds of situations: first, cases in which a person could not be held responsible for subjective reasons, in other words reasons attaching to the person (*in personam*); secondly, cases involving objective “justifying facts” attaching to the act (*in rem*). The first category, *in personam*, included mental incapacity, coercion—whether physical or moral—and error. The second category, *in rem*, included superior order, self-defence and state of necessity.

56. The Special Rapporteur’s approach in his fourth report (A/CN.4/398, paras. 177 *et seq.*) was somewhat different, for he spoke of “justifying facts”, which eliminated the wrongful character of the act, and “exculpatory pleas”, which concerned the scope of responsibility. In the latter case, the basis of responsibility was not affected: the wrongful act existed, but the perpetrator could not be punished.

57. The concept of extenuating circumstances was close to that of exculpatory pleas and the Special Rapporteur rightly said (*ibid.*, para. 181) that the question could not be dealt with at the present stage, when penalties were not yet under consideration. For his own part, he none the less wished to enter a reservation regarding the Special Rapporteur’s statement, in connection with the imposition of penalties, that:

... If, as seems likely, the present draft is to be limited to a list of offences, leaving it to States to decide on their prosecution and punishment, then it will be for States to apply their own internal laws in the matter of criminal penalties. ... (*Ibid.*)

58. The Special Rapporteur mentioned six possible justifying facts (*ibid.*, para. 190): coercion; state of necessity and *force majeure*; error; superior order; the official position of the perpetrator of the offence; and reprisals and self-defence; but he excluded reprisals and self-defence, which would not apply to all offences under the code (*ibid.*, paras. 250 and 253). He also concluded that the official position of the perpetrator could not be invoked as a justifying fact, a conclusion which he himself endorsed. Nevertheless, a provision on the subject was necessary, bearing in mind the general rules of immunity. Such a provision could perhaps take the form of a separate paragraph in article 3 defining the responsibility of the perpetrator. Accordingly, four justifying facts remained: coercion; superior order; state of necessity and *force majeure*; and error.

59. He had serious doubts about the wording of draft article 8, which enunciated a general principle of non-

⁸ General Assembly resolution 39/46 of 10 December 1984, annex.

exception and then proceeded to confirm the principle for each possible case by accompanying the confirmation with an exception to the exception. For example, the provision that "Coercion, state of necessity or *force majeure* do not relieve the perpetrator of criminal responsibility" was followed by the phrase: "unless he acted under the threat of a grave, imminent and irremediable peril". The same clause was attached to the provision concerning the order of a Government or of a superior. In the case of error, the addition was "unless, in the circumstances ... it was unavoidable for him".

60. He would suggest that, instead, each justifying fact should be stated in positive terms and clearly defined. For instance, in the case of coercion, the draft code should state that, in order for a justifying fact to be considered as such, the perpetrator must have been under a "grave, imminent and irremediable peril". By way of comparison, he pointed out that some criminal codes, including that of Brazil, stated that only "irresistible coercion" could be considered as a justifying fact. The same applied to a superior order, which could constitute an admissible defence if, as stated by the Special Rapporteur, it took the form of an act of coercion (*ibid.*, para. 225). The offences dealt with in the draft code were so serious that an order by itself could not constitute a justifying fact. Only when it amounted to coercion could an order be admitted as an exception to responsibility.

61. In regard to state of necessity, the Special Rapporteur affirmed that "there should be no disproportion between the interest sacrificed and the interest protected" (*ibid.*, para. 196). That would seem to apply also to coercion: a person whose life was threatened did not have a legal obligation to forfeit it in order to save the life of others. Indeed, that problem could even arise in connection with acts of genocide.

The meeting rose at 1 p.m.

1967th MEETING

Monday, 16 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

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

Draft Code of Offences against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART IV (General principles) *and*

PART V (Draft articles) (*concluded*)

1. Mr. McCaffrey said that he would make some general and very preliminary comments on the general principles contained in part IV of the fourth report (A/CN.4/398).

2. Referring to the two principles relating to the application of criminal law in time, he said that, with regard to the rule *nullum crimen sine lege*, he agreed with the Special Rapporteur's conclusion that the protection of the individual against arbitrary action should be the lodestar of the Commission's work (*ibid.*, para. 156), particularly if no international criminal court was to be established. Similarly, he endorsed the conclusion that a flexible content should be assigned to that rule (*ibid.*, para. 157). He also agreed generally with the statement—cited in the report (*ibid.*, para. 161)—by the United States Judge Francis Biddle, which raised the question whether the principle *nullum crimen sine lege* related to natural law or to positive law. That question, however, would not be an obstacle once the code was drawn up, since the offences would be clearly defined. He further shared the view expressed by the Special Rapporteur that the word "law" should be understood in its broadest sense (*ibid.*, para. 163). The Commission should avoid an unduly narrow interpretation of the rule *nullum crimen sine lege*. In any event he doubted whether that rule would raise problems with regard to the code, since the current situation was quite different from the one which had obtained in 1945, and there was generally greater agreement in the international community with regard to legal principles. The rule *nulla poena sine lege*, on the other hand, might raise problems, since it would necessarily involve an attempt to set parameters for penalties.

3. With regard to the principle of statutory limitations in criminal law he did not believe it was entirely accurate to state (*ibid.*, para. 165) that that concept was unknown in Anglo-American law, since it did indeed exist in current American law, for example. Obviously, the concept of statutory limitations was less problematic with regard to individuals than with regard to States. Even with regard to individuals, however, he was not convinced that policy considerations underlying statutory limitations, such as stale evidence and procedural guarantees, were wholly inapplicable to the subject at hand. If the individual was to be protected

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

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

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

against arbitrary action, the Commission must consider building into the code some provisions analogous to the statutory limitation periods contained in most criminal codes. The matter deserved further study, particularly in the light of the poor ratification record of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

4. Turning to the application of criminal law in space, and referring to the idea of universal jurisdiction as discussed by the Special Rapporteur (*ibid.*, paras. 173-176), he pointed out that, in the past, universal jurisdiction had rarely been exercised by regular national courts. The examples cited by the Special Rapporteur (*ibid.*, paras. 174-175) had involved tribunals specially constituted to deal with unique situations. As for the Special Rapporteur's conclusion (*ibid.*, para. 176) that the absence of an international jurisdiction led ineluctably to vesting jurisdiction in national courts, he was not convinced of that. The problem was to define the tribunals and the circumstances under which they were deemed competent. The precise nature, implications and modalities of universal jurisdiction were in fact little understood outside commercial régimes. Did national courts have jurisdiction over the kind of crimes being dealt with? At whose instance could alleged perpetrators be prosecuted, that of private citizens or that of the authorities of a foreign State? Could alleged perpetrators be prosecuted *in absentia*? Could those questions be left to municipal law, which would ordinarily govern them? If they were, the result would be chaos.

5. Several models for universal jurisdiction existed in international law. Articles 9 and 10 of the Harvard Law School draft convention on jurisdiction with respect to crime⁴ narrowly circumscribed the circumstances under which a State could exercise universal jurisdiction. In volume II of their treatise on international criminal law, M. C. Bassiouni and V. P. Nanda⁵ emphasized international criminal law as realized by means of a necessary link with municipal criminal law and municipal judicial organs. The American Law Institute, in its draft revision of the *Restatement of the Foreign Relations Law of the United States*, pointed out that the new section 404 of the law recognized the existence of certain offences which, under international law, any State might punish, even though it had no links of territory or nationality with the offenders. He noted in that connection Mr. Tomuschat's point (1966th meeting) that not even in the Convention on Genocide had the principle of universal jurisdiction been accepted. He agreed with Sir Ian Sinclair (1964th meeting) that the subject should be studied most carefully, and that the Commission must avoid encouraging what would be chaotic enforcement efforts at best, and vendettas at worst.

6. He also agreed that the Commission should ask the General Assembly whether it should proceed with the drafting of the statute of an international criminal

court, or even inform the Assembly that it would do so. Regarding Mr. Balanda's point (1966th meeting) that political offences should not be allowed as exceptions to extradition for the purposes of the code, he said that would be very problematic but was worth studying, along with the entire question of extradition.

7. With regard to the determination and scope of responsibility, he appreciated the Special Rapporteur's intellectual rigour in distinguishing between justification, extenuating circumstances and exculpatory pleas. After providing illustrations of how those definitions would in his view be applied, he said that, while he agreed with the Special Rapporteur's conclusion in the matter (A/CN.4/398, para. 181), the question of the acceptance or rejection of exculpatory pleas by judges in the national courts warranted further study.

8. Regarding coercion, state of necessity and *force majeure*, he said that the judgment cited by the Special Rapporteur that "No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever" (*ibid.*, para. 192) appeared to conflict with the conclusion that crimes against humanity and crimes against peace should be excluded from those exceptions since they were out of proportion to any other act (*ibid.*, para. 198). That conclusion bore closer scrutiny, since, even in respect of a crime against humanity, a person who was being coerced would not be deterred by anything in the code. He referred in that connection to Mr. Calero Rodrigues's example of a guard in a concentration camp. The same was true of *force majeure* at least.

9. Regarding error, he was generally in agreement with the Special Rapporteur's conclusion (*ibid.*, para. 216) but, as Mr. Tomuschat had noted, further study was needed, particularly with regard to errors of fact.

10. On the matter of superior order, he welcomed the Special Rapporteur's distinction between, on the one hand, cases involving coercion and error, and on the other, invocation of the order alone as justification. With regard to coercion, the Special Rapporteur made an important point concerning the strictness of the Nürnberg Charter compared with the flexibility of the Nürnberg Principles (*ibid.*, para. 221). As for error, he agreed with the general principle stated in the report (*ibid.*, para. 230). In that connection, he referred to L. C. Green's *Superior Orders in National and International Law*,⁶ a thorough comparative study of a number of countries' legal systems which the Special Rapporteur might find interesting. In particular, the study concluded that, in assessing whether the order obviously involved the commission of a criminal act, the court must consider whether the order was so obvious to other persons in circumstances similar to those of the accused. He agreed with the Special Rapporteur's broad conclusion (*ibid.*, para. 233) that "an order is not in itself a justification".

11. Mr. SUCHARITKUL said that the final version of the draft code should contain a list of acts constituting offences against the peace and security of mankind, as well as provisions on general principles, penalties and the creation of an international court.

⁴ *Research in International Law*, part II: "Jurisdiction with respect to crime", *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 29 (1935), pp. 440-441.

⁵ *A Treatise on International Criminal Law*, vol. II, *Jurisdiction and Co-operation* (Springfield (Ill.), Charles C. Thomas, 1973).

⁶ Leyden, Sijthoff, 1976.

12. Turning to the draft articles submitted by the Special Rapporteur, he said that the definition laid down in draft article 1, though satisfactory, could perhaps be amplified by a provision to the effect that offences against the peace and security of mankind were "the most serious" crimes under international law.

13. Draft article 3 dealt with both responsibility and penalties, two concepts that might well go hand in hand. The responsibility in question was, of course, that of the individual, not that of the State. So far as penalties were concerned, the Special Rapporteur had rightly refrained from entering into detail, for if the Commission decided to deal with the question of the penalties applicable, it would end up by asking whether or not the code should provide for the death penalty or imprisonment for life, and that would be going too far. It would be better to leave it to the court having jurisdiction to decide, in each case, what penalty to impose. The wording adopted by the Special Rapporteur, namely "Any person ... is ... liable to punishment", therefore seemed sufficient, although it could if necessary be supplemented by some examples of penalties.

14. The Special Rapporteur had rightly specified, in paragraph 2 of draft article 4, that the provision in paragraph 1 did not prejudice the question of the existence of an international criminal jurisdiction. Ideally, of course, it should be possible to establish an international court; but that would be difficult to achieve in practice, particularly since it was hoped in some quarters to apply the code to States in their capacity as legal persons. The question of the criminal responsibility of States, however, came within the remit of another Special Rapporteur and therefore did not have to be considered in connection with the draft code.

15. In the absence, or pending the establishment, of an international criminal court, national courts should be able to try offences against the peace and security of mankind, which, as stated in draft article 4, paragraph 1, were universal offences. In that connection, he pointed out that, under the Constitution of the United States of America (article 1, section 8, tenth paragraph), Congress was authorized to define and punish acts of piracy on the high seas and any other offence against the law of nations. Also there were numerous crimes, including those covered by the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft⁷ and by the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,⁸ that were punishable, at least in theory, on the basis of universal jurisdiction.

16. Draft article 5 stated the general principle that no statutory limitation should apply to offences against the peace and security of mankind, because of their nature. In that connection, a degree of caution was indicated. Given the significant evolution of the concept of mankind with the passage of time—it had initially been linked to citizenship but had subsequently acquired a biological dimension—it was quite possible that an act that had not constituted an offence at the time it had been committed could become one as a consequence of

the adoption of a different definition of an offence against the peace and security of mankind.

17. Fortunately that principle, which could prove dangerous at times, was tempered by the principle of the non-retroactivity of criminal law, as provided for under draft article 7, which stipulated that no person could be convicted of an act or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind. Just like the jurisdictional guarantees provided for under draft article 6, the rule *nullum crimen sine lege, nulla poena sine lege* was designed to protect any person accused of an offence against the peace and security of mankind. But the victims of such offences also had to be protected. He therefore also supported paragraph 2 of article 7, which was entirely equitable since it was directed not at persons against whom charges or a prosecution had been brought, but at those who had already been tried and convicted.

18. Draft article 8 also had his support. The right to self-defence was a natural right of both the individual and the State, and it was therefore normal for the exercise of that right to constitute an exception to the principle of responsibility. The order of a Government or of a superior, referred to in subparagraph (c), could relieve the perpetrator of an offence against the peace and security of mankind of criminal responsibility only if he had acted under threat of a grave, imminent and irremediable peril. As for an error of law or of fact, obviously it could constitute an exception to the principle of responsibility only if it was unavoidable for the perpetrator of the offence. The reference to coercion was more open to question. His own view was that, if the perpetrator of a crime was subjected to total physical coercion (*vis absoluta*), he was no longer truly the perpetrator but became an instrument, and so could not be held responsible.

19. Draft article 9, which provided that criminal responsibility could be imputed to the superior, was satisfactory, even though it could be said to depart from the principle that criminal responsibility was strictly personal and that no one could be held responsible for the acts of others.

20. The provisions relating to participation in responsibility, and in particular to conspiracy and complicity, had their proper place among the general principles and could be included, for instance, in draft article 3.

21. Turning to chapter II of the draft, he said that the distinction drawn by the Special Rapporteur in draft article 10 between crimes against peace, crimes against humanity and war crimes was fully justified. Apart from the fact that it was in conformity with State practice, that distinction reflected the differences that existed between the various offences against the peace and security of mankind in terms of exculpatory pleas, extenuating circumstances, justifying facts and even penalties. Justifying facts, for instance, could be invoked only for war crimes; and the penalties for the three categories of crimes were not the same.

22. As to crimes against peace, the subject of draft article 11, aggression, the threat of aggression and interference in the internal or external affairs of another

⁷ United Nations, *Treaty Series*, vol. 704, p. 219.

⁸ *Ibid.*, vol. 860, p. 105.

State were undoubtedly, by their very nature, extremely serious acts. But that was not true of terrorist acts. Only the most serious acts should figure in the draft code.

23. It was also not true of the offences dealt with in draft article 13. Any serious violation of the laws or customs of war was a war crime, but not every war crime was an offence against the peace and security of mankind. It would therefore be better to delete the reference to the laws or customs of war, which varied considerably according to time and place, and to keep to the criterion of seriousness. Only the most serious war crimes could rank among offences against the peace and security of mankind.

24. Finally, in elaborating the draft code, the Commission should not take solely as its basis the 1954 draft code, the Definition of Aggression,⁹ the 1907 Hague Regulations respecting the Laws and Customs of War on Land¹⁰ and the 1949 Geneva Conventions¹¹ and their 1977 Additional Protocols.¹² It should also take account of the relevant General Assembly resolutions to which Mr. Illueca (1961st and 1964th meetings) had referred. Some members of the Commission had questioned the intrinsic value of those resolutions. Mr. McCaffrey, for instance, had argued that, as the General Assembly was not a legislative body, the texts it adopted did not always have legal force and did not necessarily bind all States. That opinion was not shared by the international community as a whole, the Group of 77 in particular taking a different view. Even though they did not all have the force of law like the Universal Declaration of Human Rights, the resolutions of the General Assembly carried undeniable weight, for example the declaratory, hortatory or codifying resolutions, or the resolutions designed to crystallize rules of law or, again, the resolutions that promoted the progressive development of international law. Accordingly, the Commission should take them into account.

25. Mr. MALEK said that he would confine himself to a few brief comments on certain points raised during the discussion.

26. According to some members of the Commission, certain acts, including international terrorism, traffic in human beings, drug trafficking and slavery, should be classified as crimes against humanity, in which category the Special Rapporteur also proposed to include serious damage to the environment. Admittedly, in moral and human terms, it would be highly desirable for all such acts, which were of an extremely serious nature, to be treated as crimes against humanity; but it had to be recognized that the only acts that could be included in the draft code were those covered by the definition of a crime against humanity whose main elements had formed part of international law for a fairly long time. Technically speaking, it was difficult to see how drug trafficking, for instance, or in some cases even international terrorism, could be classified as crimes against humanity when they were characterized by the fact that

they had been committed for specific, and restrictively determined reasons of a social, political or other nature. By the same token, slavery, though abhorrent, could not be classified as an offence except where, as in the case of the kind of slavery covered by the draft code—namely the “enslavement ... [of] elements of a population on social, political, racial, religious or cultural grounds” (art. 12, para. 3)—it embodied the various elements peculiar to a crime against humanity as adopted in all official and doctrinal definitions laid down since the Nürnberg trial.

27. The principle of the non-applicability of statutory limitations to offences against the peace and security of mankind was laid down in draft article 5. He would not restate the legal bases for the principle, but would merely point out that it was self-evident and could not be disregarded or opposed on any valid ground. When any of the offences in question went unpunished, whether by virtue of statutory limitations or for any other reason, there was often a violent and far-reaching reaction. Often, the effect was to deliver the guilty parties over to the victims or to persons connected to the latter by blood, race or religion. Such people tended never to forget, nor to retreat before any legal or other obstacle in inflicting on the guilty parties the punishment they deserved.

28. The principle of the non-applicability of statutory limitations seemed to draw its strength less from the legal sources that went to justify it than from the spontaneous support of the universal conscience which revolted against the idea that such serious crimes could be allowed to go unpunished. It was not only the enduring consequences of a war which had ended nearly half a century earlier that had to be borne in mind, but also the consequences of the numerous conflicts being waged in various areas of the world, including that by which Lebanon was now being torn asunder. Future generations there would retain the terrifying memory of the acts of cruelty that were being committed and of those who committed, aided and abetted them. It was to be hoped, therefore, that the Commission would in due course adopt article 5 as drafted without opposition and without introducing any amendment to restrict its scope.

29. There was a clear statement in draft article 7 regarding the principle of the legality of the charge, but the principle of the legality of the penalty had apparently not been mentioned. It was, of course, an extremely complex matter in the context of international criminal justice, but the Special Rapporteur might perhaps wish to revert to it at a later stage. In fact, the Commission should review article 5 of the draft code as adopted on first reading at its third session, in 1951. The article, which it had been very hesitant to delete in 1954, read:

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.¹³

It had been argued, in support of the deletion of the article, that it did not take sufficient account of the generally recognized principle *nulla poena sine lege*, since the court exercising jurisdiction would be free to

⁹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹⁰ See 1958th meeting, footnote 7.

¹¹ *Ibid.*, footnote 6.

¹² See 1959th meeting, footnote 6.

¹³ *Yearbook ... 1951*, vol. II, p. 137.

determine the penalties to be applied. That criticism was perhaps partially justified; but at least article 5 as thus drafted would have the merit of underlining the real and effective nature of the provision which was currently the subject of draft article 3 and read: "Any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment." It would make it clear that the offences set forth in the code would never intentionally go unpunished.

30. It was likewise doubtful whether leaving it to the court which had jurisdiction to determine the penalty could be contrary to the *nulla poena sine lege* principle. If the jurisdiction of a national court had been recognized, that court would apply the penalties provided under internal law. If an international criminal court were created and its jurisdiction to try the offences covered by the code were recognized, it would apply the penalties prescribed, either by the international law in force, which contained useful indications in that regard and provided for various penalties—even the death penalty for crimes against peace, war crimes and crimes against humanity—or by any international instrument by which it was directly bound, such as the instrument creating it or conferring jurisdiction upon it. It was difficult to see how, at the current stage, the Commission could take account of the principle of the legality of penalties except by adopting a general provision of the kind envisaged in the above-mentioned article 5, particularly if it decided to include States among the perpetrators of offences punishable under the code.

31. The question of the creation of an international criminal court had been raised by many members of the Commission, who had referred, sometimes emphatically, to the close connection between such a court and the draft code. Indeed, if the preparation of the draft code was to serve any real purpose, it would be necessary, simultaneously, to determine the authority that would be called upon to apply it. That was a matter of paramount importance. In that connection, the Commission should, in its report on its thirty-eighth session, draw the attention of the General Assembly to resolution 1187 (XII) of 11 December 1957, in which the General Assembly had decided to defer consideration of the question of an international criminal jurisdiction until such time as it took up again the question of defining aggression and the question of the draft Code of Offences against the Peace and Security of Mankind. It should also underline the close connection between the code and the establishment of an international criminal court and should submit its observations on the matter with a view to encouraging the General Assembly either to set up a special committee to prepare a draft statute for an international criminal court, as it had done in 1950 and 1952, or to entrust the task to the Commission itself. It should not be forgotten that, at its second session, in 1950, the Commission had expressed the view that it was desirable and possible to establish an international judicial organ for the trial of persons charged with crimes over which jurisdiction would be conferred upon that organ by international conventions.¹⁴

32. Mr. ROUKOUNAS, referring to draft articles 2 and 4, said that, under the terms of article 2, the

characterization of an act as an offence against the peace and security of mankind was independent of internal law; in other words, internal law could not be invoked against international law nor have the effect of "decriminalizing" an act characterized as an offence under the code. It followed that individuals had international obligations which took precedence over the obligations incumbent on them at the national level, even if, during the 1950s, neither the then Special Rapporteur nor the Commission had referred expressly to the primacy of international law. The proposed wording, therefore, provided a way of dealing indirectly with the relationship between international law and internal law.

33. He had two remarks to make in that connection. First, it was the independence of international law with regard to penalties that was referred to in the 1951 draft, and it was understandable that, at the time, a penalty imposed by international courts had had to be legalized, so to speak. An international court could therefore impose a penalty irrespective of whether similar penalties existed under internal law. The Special Rapporteur referred to "characterization" rather than to "penalties" because the Commission had, for the time being, taken the characterization of an act as a crime as its working hypothesis. Secondly, the question arose whether the Commission, by using that wording, was also resolving the various matters concerning the relationship between international law and internal law from the internal law standpoint; for quite apart from the fact that internal law could not be invoked against international law, and although taking account of it, the Commission also had to ensure that international law did not clash with internal law. Very many, if not most, of the offences included in the draft code were already covered by international law, and States knew that they had to comply with their international obligations in that regard.

34. It would therefore be useful to consider the position in the light of internal law. A comparative study would show that three possibilities were open to States: (a) the exact terms of the international instrument—which did not have to be a treaty—could be incorporated in their respective criminal codes, possibly with penalties being added; (b) only a part of the international instrument could be incorporated in their criminal codes, to fill a *vacuum legis*; (c) a general reference to the laws and customs of war could be included in their criminal codes.

35. Even though the formal incorporation of the international instrument into internal law was not required under all constitutional systems, in practice internal law and, in the case in point, criminal law should include rules identical or parallel to those contained in the international instrument. That was first of all because the punishment of international crimes by national courts—when there was such punishment—was the rule, and punishment by an international legal organ was the exception, thus far at least. Even after the Second World War, a number of crimes had been tried by domestic courts. Also, in order to ensure that statutory limitations did not apply, the international instrument had to be accompanied by provisions in the national

¹⁴ *Yearbook ... 1950*, vol. II, p. 379, document A/1316, para. 140.

criminal law defining the crime and laying down the penalty. The same applied to extradition, in the case both of the requesting State and of the State to which the request was made.

36. He therefore considered that it was necessary to supplement or replace draft article 2 by a provision that would impose an obligation on States to take all necessary measures at the internal level to ensure recognition of the characterization of the offence and any penalty provided for under the code. In that way, the Commission would get round the fact that internal law could not be invoked against international law. He even wondered whether it would not be advisable also to consider the question of a State absolving itself or any other State of liability, to which reference was made in articles 51, 52, 131 and 148, respectively, of the four 1949 Geneva Conventions.

37. Turning to draft article 4, he said that he favoured the establishment of an international criminal court to try and punish universal offences. In the mean time, such offences would be tried by national courts, vested with a kind of international function. He wondered, however, whether the word "arrested", in the second sentence of paragraph 1, had a special meaning. With regard to universal jurisdiction, which of course was not the rule in contemporary international relations, he recalled that when Additional Protocol I¹⁵ to the 1949 Geneva Conventions had been drawn up, extradition and the question of universal jurisdiction in general had been the subject of lengthy and difficult negotiations that had resulted in the drafting of article 88, which dealt in fairly vague terms with co-operation between States. That was a clear indication that, in some cases, there was universal jurisdiction, whereas in others States were encouraged to co-operate in the punishment of international crime.

38. Universal jurisdiction should not always necessarily be confused with the principle *aut dedere aut judicare*. A comparison of article V of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* with articles VI and VII of the Convention on the Prevention and Punishment of the Crime of Genocide revealed the differences of interpretation to which that maxim could give rise. The Commission could therefore confine universal jurisdiction to those areas where it already existed, such as genocide and *apartheid*, and then consider whether, for other crimes, such as those covered by the 1949 Geneva Conventions and their 1977 Additional Protocols, it could envisage either universal jurisdiction or the broadest possible co-operation among States, until such time as it had completed the definition of each offence and the list of offences to be included in the code.

39. Mr. EL RASHEED MOHAMED AHMED expressed his support for the Special Rapporteur's general approach with regard to the general principles. He proposed to refer once again to the principles of Islamic law, wishing to inject some spiritual content into the discussion.

40. War in Islam was essentially defensive. Aggressive war was repugnant in the eyes of God. The Koran said: "Fight for the sake of Allah those that fight against you, but do not attack them first. Allah does not love the aggressors."¹⁶

41. International law had prohibited wars of aggression. Nevertheless, armed conflict was an enduring phenomenon, shorn of the chivalrous element of a declaration of war. If war was to be considered illegal, then the consequences of it should be borne by the warmongers. For that reason, Islamic law lent support to the Principles of Nürnberg.

42. Moreover, responsibility in Islamic law was strictly personal. The notion of collective responsibility was unknown, except in the single case where a person was killed in a given place and it was proved that the inhabitants knew, or should have known, the killer and had not identified or surrendered him.

43. He had already expressed his agreement (1963rd meeting) with the definition in the report of offences against the peace and security of mankind and their subdivision into three categories. Peace, however, had not been defined. While it was true that offences against the peace and security of mankind were international crimes, defined by international law, nevertheless the terminology used was inevitably borrowed from internal law. Difficulties of interpretation were therefore bound to arise, except in the unlikely event of an international criminal forum being set up. In the event of the principle of universal jurisdiction being agreed upon, it would be only natural for judges to be influenced by their own education and training. International law had not emerged from a vacuum. The Statute of the ICJ itself referred, in Article 38, paragraph 1 (c), to the application by the Court of "the general principles of law recognized by civilized nations".

44. In the absence of authoritative interpretation, a general glossary would seem to be necessary. It would not be enough, however, to mention in the commentary that the meaning of a term or expression was not the same as in domestic law. Since the draft code consisted only of a list of offences, it did not contain rules of procedure; but it was procedural law that provided the constitutional guarantees for the offender. Accordingly, he supported Mr. Illueca's suggestion (1964th meeting) that the draft code itself should set forth guarantees.

45. With regard to non-retroactivity, the position in Islamic law was not very different from that under common law. There was a difference in that respect between crimes punished under provisions of the Koran or the Sunna and offences left to be sanctioned by the temporal ruler as and when circumstances demanded. The law providing for the latter kind of offence had to be published before it was applied. In that respect the situation was similar to that of the Continental legal systems.

46. However, the concept of justice applied at Nürnberg did not correspond exactly to the concept of justice

¹⁵ See 1959th meeting, footnote 6.

¹⁶ *The Koran*, sura 2, verse 190 (translated by N. J. Dawood, *op. cit.* (1963rd meeting, footnote 9), p. 352).

in Islamic law. Although the procedure was criminal in nature, the sentence had to be circumscribed. It had to take into consideration the right of the victim, while maintaining an equitable balance between the right of the community to bring the accused to justice and the right of the accused to be protected from arbitrary action.

47. Hans Kelsen had said that, "in case two postulates of justice are in conflict with each other, the higher one prevails";¹⁷ but the Islamic solution to which he had just referred was much more logical. It was an equity-oriented formulation which indicated the test to be applied to evaluate the two conflicting postulates. The conclusion reached by the Special Rapporteur on that point was the best compromise in the circumstances, subject to adopting Mr. Jagota's suggestion (1965th meeting, para. 50) that the expression "general principles of international law", in draft article 7, paragraph 2, be replaced by "generally recognized principles and rules of international law".

48. As far as statutory limitations were concerned, most schools of Islamic jurisprudence did not recognize limitation, except within very narrow confines. Those who recognized the operation of the rule of limitation did so in cases (such as the consumption of alcohol) which, by their nature, were difficult to prove after a lapse of time. They also felt that belated prosecution was apt to be motivated by spite or some other ulterior motive. With regard to such crimes as murder, however, no limitation was admitted.

49. As for jurisdiction, Islamic law generally favoured the territorial principle, on practical grounds.

50. An international criminal court would be very difficult to establish; the difficulties of such a scheme had been clearly explained by Mr. Balanda (1966th meeting). In the mean time, the system of universal jurisdiction would have to suffice. A number of conventions, such as those relating to piracy, in fact provided for universal jurisdiction. He did not believe that the draft code would be without usefulness if an international forum were not established. It would not be effective, however, if it were not applied in one way or another. In the circumstances, the solution proposed by the Special Rapporteur was the only feasible one.

51. It remained to complete the code by specifying penalties. The Commission would have to address itself to that task. It was the absence of penalties, rather than the lack of an international forum, that would deprive the code of its effectiveness.

52. On the subject of defences, superior order called for a number of observations. Responsibility in Islamic law was strictly personal. The defence of superior order was not admissible, for the Prophet had said: "Verily, there is no obedience to the order of any creature in disobedience of God." The Caliph Abu Bakr had said in his inaugural speech: "Obey me so long as I obey God. If I disobey God, I claim no allegiance from you." Whatever the order received from a superior, it had to be examined in the light of that higher law: whether one

called it the law of God or natural law, its normative value was not entirely man-made.

53. Again, in Islam, every ruler was responsible for his subordinates. Nevertheless, criminal liability attached to the ruler only if it was proved that he knew, or had reason to know, of the unlawful act and could have prevented it. He accordingly agreed with Mr. Ushakov (1965th meeting) and Mr. Sucharitkul that responsibility should be purely personal, but that a superior who knew of and had the power to stop atrocities, but had remained silent, was criminally responsible.

54. Turning to the draft articles, he stressed the need to define peace and security in article 3. In regard to article 7, he reiterated his support for Mr. Jagota's suggestion concerning paragraph 2. In article 11, the definition of aggression seemed inconsistent with the general theme of the Special Rapporteur's fourth report (A/CN.4/398) and with the Commission's decision to adopt the principle of individual rather than State responsibility. For article 12, paragraph 2, he preferred the second alternative. He also favoured the second alternative of article 13, which was more comprehensive.

55. Chief AKINJIDE recalled that, in his earlier statement (1964th meeting), he had referred to the problems that would be created by any reference to the "customs of war", as opposed to the more precise "rules of war", which created no such difficulties. Customs of war varied from one period of history to another. They had been very different in the Middle Ages from those of modern times, and no one could tell what they were likely to be in 50 or 100 years' time.

56. An instrument containing references to the customs of war would be difficult to ratify for countries with a written constitution. Moreover, in most countries an act of parliament would have to be passed to implement the convention that was expected to emerge from the present draft. Any crime provided for by that instrument must be covered by a specific provision: a vague reference to the customs of war was inadequate.

57. In many developing countries, the principle *nullum crimen sine lege* was being honoured more in the breach than in the observance. Military Governments, in particular, frequently created crimes and penalties by decree, and often gave them retroactive effect.

58. On the question of responsibility, he stressed the need to establish degrees of responsibility. Clearly, a commander who ordered a criminal action and a recruit who merely obeyed orders could not be held responsible to the same degree. Both the crime and the punishment had to reflect that difference. The draft international convention against the recruitment, use, financing and training of mercenaries¹⁸ at present under consideration by the General Assembly thus differentiated between various degrees of responsibility. The same was true of the 1977 OAU Convention for the Elimination of Mercenarism in Africa.¹⁹ In the trials of mercenaries in Angola, that differentiation had been applied in practice.

¹⁸ See 1960th meeting, footnote 8.

¹⁹ OAU, document CM/817 (XXIX). See also A/CN.4/368, p. 64.

¹⁷ See 1962nd meeting, footnote 11.

59. He agreed with the misgivings of Sir Ian Sinclair (1964th meeting) and Mr. McCaffrey regarding the system of universal jurisdiction. If that system were to be adopted, it would lead to enormous problems. It was worth noting that article 14 of the draft international Convention against the recruitment, use, financing and training of mercenaries adopted the principle of territoriality.

60. With regard to statutory limitations, he pointed out that there were cases in which limitations had to remain applicable. At the national level, an individual sometimes was not prosecuted because it was considered desirable in the public interest not to do so. Cases of that sort depended on the gravity of the offence, the circumstances and the general atmosphere.

61. Draft article 11, paragraph 8, which defined mercenarism, was based on the definition in article 47, paragraph 2, of Additional Protocol I²⁰ to the 1949 Geneva Conventions. Its terms, however, were out of date and should be revised in the light of the present-day experience of developing countries. Among other things, the element specified in subparagraph (iii) of "desire for private gain" as the motivation of the mercenary would have to be amended, since it would place an intolerable burden on the prosecution. Besides, mercenaries had been known to be motivated by considerations other than private gain.

62. The CHAIRMAN, speaking as a member of the Commission, said that his remarks would pertain to the whole of the Special Rapporteur's fourth report (A/CN.4/398). He wished first to emphasize the distinction that should be drawn between States and individuals. Some crimes could be committed only by States: that applied to aggression and, in general, to all crimes against peace, including terrorism and mercenarism as envisaged by the Special Rapporteur, in the commission of which the State played a leading role. Other crimes, such as war crimes, could be attributed to individuals. That differentiation should be borne in mind and would form the basis of any amendments to the draft articles that he might suggest.

63. In the case of a crime that could be committed only by a State, to whom should the act and responsibility for it be attributed? In the case, for example, of aggression, there could be no individual aggressors. Aggression was therefore attributable to the State, which had acted through its agents, who were individuals. Accordingly, the same conduct could be attributed to the State and the individual. Individuals were not responsible for the crime of aggression as individuals, but were responsible for having enabled the State to commit the crime in question. Thus the same conduct gave rise to the commission of a crime under international law and to the attribution of consequences to the State, on the one hand, and to individuals—as the agents of the State—on the other. Those consequences were, in the first case, the ones provided for in draft articles 1, 6, 14 or 15, as applicable, of part 2 of the draft articles on State responsibility²¹ and, in the second case, the

penalties to which individuals would, where appropriate, be liable, on which issue the Commission had yet to take a decision. In the light of that fact, several articles in the draft code should be amended. With regard to draft article 3, for instance, he wondered whether the Commission had already decided to punish States guilty of crimes such as aggression. How could their responsibility be engaged? Perhaps a second sentence could be added to article 3, reading: "Individuals whose conduct is attributable to the State and has caused the latter to commit the offence in question shall likewise be responsible."

64. As for the division of offences into three categories, he considered that draft article 10 would serve no useful purpose, even if the Commission decided to retain that division, particularly since the division itself could give rise to objections as to whether it was in keeping with other concepts. As he had already pointed out,²² it was no easy matter to give uniform content to the topic under the title "peace and security". It was an acknowledged fact that more security was not synonymous with peace. The expression "peace and security" denoted an indivisible concept of a situation whose peace and security components were not readily distinguishable from one another. Yet a distinction was drawn between crimes against peace, which of necessity were detrimental to security, crimes against humanity, which could be presumed to affect its peace and security, and war crimes, which were also prejudicial to peace and security although the "peace" element might be entirely lacking, since the crimes in question were committed in wartime. The fault lay in history, which had handed down to the Commission a form of wording taken from a report addressed by Judge Francis Biddle to President Truman (see A/CN.4/387, para. 21) and perhaps more in keeping with the thinking of the time than with logical reasoning. He wondered, therefore, whether the Commission should not try to find another title for the draft code, such as code of crimes against the security of mankind, a formula that would justify the tripartite classification of crimes against peace, crimes against humanity and war crimes, all of which endangered the security of mankind.

65. Turning to the draft articles submitted by the Special Rapporteur, he noted that the content of former draft article I had been incorporated into the present draft article 1, as amplified by draft article 2. Both provisions were acceptable to him.

66. So far as crimes against humanity were concerned, he agreed that a "mass element" was not essential to the definition of genocide, given that the act of causing harm to a single individual constituted an offence against mankind. What really mattered was intent. If there was reliable evidence of a plan to exterminate a particular group, few cases would be needed for the crime of genocide to have been committed. In the absence of such evidence, the intent would have to be gleaned from what Mr. McCaffrey (1962nd meeting) had termed a "systematic pattern".

67. With regard to *apartheid*, he preferred the second alternative submitted by the Special Rapporteur for

²⁰ See 1959th meeting, footnote 6.

²¹ *Yearbook ... 1985*, vol. II (Part Two), pp. 20-21, para. 106 (art. 1) and footnote 66 (arts. 6, 14 and 15).

²² See *Yearbook ... 1985*, vol. I, p. 50, 1885th meeting, para. 19.

paragraph 2 of draft article 12, because the code should be complete in itself and not refer to other instruments. The device whereby the activities of certain States would be objectively characterized as criminal was useful and would make it possible to stigmatize South Africa's conduct.

68. The code should also deal with serious damage to the environment. However, paragraph 4 of draft article 12 could be recast in the light of the conventions that imposed an obligation on States parties to preserve the environment.

69. The second alternative of draft article 13, dealing with war crimes, was preferable in his view, and Mr. Malek's proposal in that connection (1958th meeting, para. 6) merited consideration. Also, he had no objection to the retention of the expression "war crimes". As for nuclear weapons, he recognized that their use could be viewed differently according to whether it was a case of aggression or defence. However, it was a feature of such weapons that they could cause irreversible damage to the environment, not only that of the belligerent parties, but that of mankind as a whole, which seemed to him to be a consideration of paramount importance.

70. Noting that the provisions of draft article 14, dealing with other offences, concerned the individual responsible, to the exclusion of the State, he said that he agreed on the need to find flexible forms of responsibility in view of the special gravity of the offences in question. He did not, however, think that the Commission should go so far as to include the concept of conspiracy. So far as attempt was concerned, the possibility of voluntary withdrawal should not be forgotten: the *iter criminis* could come to an end either as a result of circumstances beyond the control of the offender or as a result of the exercise of his free will, namely his desistance. Many criminal codes encouraged withdrawal by reducing or abolishing the penalty applicable to a person guilty of attempt.

71. He had already referred to the general principles covered by draft article 3. Draft article 4 dealt with universal jurisdiction and left the way open for the possible establishment of an international criminal court. At its second session,²³ the Commission had already come out in favour of the establishment of an international judicial organ to try genocide and other crimes. It was a solution that gave rise to problems, but those problems would perhaps not be insuperable. The trouble with establishing an international judicial organ was that it might remain idle. It was doubtful whether the individuals responsible for State crimes or crimes directly imputable to the State would be brought before such a court by the States of which they were the leaders unless trials *in absentia* were authorized, in which case the body in question would become engaged in hectic activity, trying heads of State and other authorities accused on more or less political grounds. Initially, therefore, universal jurisdiction seemed to be the best solution, despite the drawbacks to which several members had referred. The Commission should concentrate on that solution rather than any other. Who in fact

could say whether international co-operation would yield satisfactory results?

72. He agreed with draft article 5, given the particularly serious nature of the offences in question, as well as with draft article 6 and paragraph 1 of draft article 7. The flaw in the Nürnberg and Tokyo trials derived from the non-application of the principle *nullum crimen, nulla poena sine lege*. It had been said that justice had prevailed over principle at the time. That principle, however, was an achievement of liberal criminal law, designed to lay down objective rules and protect the individual against abuse of authority. Sources of law as vague as natural law, or even the general principles of international law, did not satisfy that obligation. Paragraph 2 of draft article 7 therefore gave him cause for concern, as he did not altogether understand how a very general principle could be applied to criminal conduct. Consequently, the reference to general principles did not seem to be in keeping with the *nulla poena sine lege* principle. Penalties would also have to be provided for if that principle was not to be violated, in which connection the Commission should indicate the main lines to be followed in national legislation. The Commission was not under the same constraint as the Nürnberg International Military Tribunal had been. The Commission was drawing up a detailed code in accordance with current legal techniques without fear that some unknown crime would go unpunished because it failed to comply with the general principles of international law.

73. With regard to the exceptions provided for in draft article 8, which apparently applied only to the individuals responsible for State crimes and not to their perpetrators—an expression that should be replaced by "persons responsible"—the objection raised by Mr. Ushakov (1965th meeting) seemed justified, since the argument of self-defence could be adduced by the State. However, individuals would not be absolved on that account from all responsibility in the case of war crimes, even if the State to which they were answerable was acting in self-defence. Furthermore, in the case of State crimes for which individuals were responsible, the official position of individuals seemed to be more than an exception: it was a pre-condition for a State crime to exist. Subparagraph (a) was therefore acceptable. On the other hand, it was difficult to see why *force majeure* was included in subparagraph (b), since it was divorced from the will of the person who committed the offence, and in the absence of intent there could be no crime. In that connection, he drew attention to article 31 of part 1 of the draft articles on State responsibility, which dealt with *force majeure*. The reference to state of necessity seemed tautological, since a state of necessity in fact arose out of the existence of a grave, imminent and irremediable peril. As to the imminent nature of the peril, it would be better to provide that the situation had to be such that the interest could be protected only by a breach of the obligation, since there might be cases where the obligation would inevitably be violated without the danger being imminent. Nor was the requirement of a grave and imminent peril in keeping with *force majeure*, which implied an irresistible force. The very notion of peril seemed inseparable from that of choice, which was more characteristic of a state of

²³ See footnote 14 above.

necessity than of *force majeure*. He also wondered what role coercion proper played alongside of state of necessity, which involved mental coercion, and of *force majeure*, which involved physical coercion.

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

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

The meeting rose at 1.10 p.m.

1968th MEETING

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

Chairman: Mr. Doudou THIAM

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

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

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE

ARTICLES 2 TO 6 AND 20 TO 28

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

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

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

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

ARTICLE 2 (Use of terms)

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

Article 2. Use of terms

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

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

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

* Resumed from the 1947th meeting.

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

² See 1942nd meeting, para. 5.

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

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

It was so agreed.

Article 2 was adopted.

ARTICLE 3 (Interpretative provisions)

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

Article 3. Interpretative provisions

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

- (a) the State and its various organs of government;
- (b) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
- (c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;
- (d) representatives of the State acting in that capacity.

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

10. The two interpretative provisions proposed for paragraph 1⁴ had been referred to the Drafting Committee: one dealt with the expression "State" and the other with the expression "judicial functions". It had become apparent that a description of "judicial functions" would entail complex drafting, because that expression could have a variety of meanings under different legal or constitutional systems. Besides, it was not essential to include such a provision, since the expression appeared only once in the draft, namely in article 2, paragraph 1 (a). The commentary to article 2 could give examples of the kind of "judicial functions" intended to be covered by that article.

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

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

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

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

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

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

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

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

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

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

³ *Ibid.*

⁴ *Ibid.*, para. 6.

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

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

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

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

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

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

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

It was so agreed.

Article 3 was adopted.

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

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

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

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

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

(b) persons connected with them.

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

25. Paragraph 1 was a simplified version of the text submitted by the Special Rapporteur;⁶ it emphasized the

exercise of the functions of various official missions and persons connected with them. The provisions submitted by the Special Rapporteur as subparagraphs (b) and (c) had been deleted as being unnecessary.

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

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

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

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

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

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

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

⁶ See 1942nd meeting, para. 7.

⁷ *Ibid.*, para. 10.

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

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

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

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

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

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

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

39. Mr. SUCHARITKUL (Special Rapporteur) reminded members that the Commission was not reopening the discussion on substance, or more particularly on the question whether any particular person

enjoyed immunity and, if so, to what extent. Article 4 was simply a safeguard clause. It provided that the present articles were without prejudice to any privileges and immunities which might otherwise be enjoyed by the persons concerned.

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

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

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

Article 4 was adopted.

ARTICLE 5 (Non-retroactivity of the present articles)

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

Article 5. Non-retroactivity of the present articles

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

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

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

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

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

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

Article 5 was adopted.

ARTICLE 6 (State immunity)

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

Article 6. State immunity

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

50. At its thirty-second session, in 1980, the Commission had provisionally adopted a text for article 6.⁸ That article had subsequently been the subject of much discussion and divergence of views in the Commission, and the Drafting Committee had been requested to re-examine it. The text now proposed attempted to show more clearly the intention not to take a position on the existing doctrinal theories of the basis for “State immunity”. It was drafted in a neutral fashion and included the clause: “subject to the provisions of the present articles and the relevant rules of general international law applicable in the matter”. It stated a unitary rule.

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

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

53. Mr. FRANCIS suggested that the title of part II of the draft, “General principles”, should be amended to

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

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

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

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

It was so agreed.

TITLE OF PART III (Limitations on State immunity)

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

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

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

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

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

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

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

It was so agreed.

ARTICLE 20 [11] (Cases of nationalization)

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

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

Article 20 [11]. Cases of nationalization

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

65. Article 20 was based on paragraph 2 of the former article 11. That paragraph had been referred to the Drafting Committee as a result of the Commission's adoption of article 16⁹ (now article 15).

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

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

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

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

agree with the word *propriété*, which was defined in relation to the local law of a territory.

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

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

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

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

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

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

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

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

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

mula “under its jurisdiction” would introduce some ambiguity.

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

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

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

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

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

It was so agreed.

Article 20 [11] was adopted.

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

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

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

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

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

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

83. Article 21 began part IV of the draft, which was entitled “State immunity in respect of property from measures of constraint”. It was based on the former article 22,¹¹ which had been restructured and modified. The new introductory clause spoke of a State enjoying immunity “in connection with a proceeding before a court of another State”. The reference to “a proceeding” covered both the proceeding on the merits and the measures of constraint. It had been recognized, however, that a request for application of measures of constraint might be made in a third State,

that was to say a State other than the defendant State or the State of the forum of the merits proceeding. Such a third State would be the State in which the property against which measures of constraint were sought was physically located and under whose laws or treaties such a proceeding was possible.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 21 [22] was adopted.

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

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

Article 22 [23]. Consent to measures of constraint

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

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

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

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

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

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

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

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

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

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

¹³ *Ibid.*, p. 57, footnote 206.

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

It was so agreed.

Article 22 [23] was adopted.

ARTICLE 23 [24] (Specific categories of property)

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

Article 23 [24]. Specific categories of property

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Article 23 [24] was adopted.

The meeting rose at 1 p.m.

1969th MEETING

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

Chairman: Mr. Julio BARBOZA

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

Draft Code of Offences against the Peace and Security of Mankind¹ (concluded)* (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPporteur
(concluded)

SUMMING-UP OF THE DISCUSSION

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

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

* Resumed from the 1967th meeting.

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

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

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

¹⁴ *Ibid.*, pp. 57-58, footnote 206.

at the present stage, reply in detail to all the questions raised, some of which would require long consideration, he would try to deal with the general problems posed by members of the Commission.

3. The division of offences into three categories, to which there had been few objections, was justified by the fact that each category of offences had its own particular characteristics and that it would have been extremely difficult to establish general principles applicable to all the offences covered by the draft code. As he stated in the report: "Some principles will apply more generally to crimes against peace or to crimes against humanity, while others will apply more generally to war crimes" (*ibid.*, para. 260 (d)).

4. For example, the principles relating to justifying facts applied primarily to war crimes. There could be no justification for crimes against humanity, by reason of their motive, from which they were inseparable. The only possible justification for crimes against peace was self-defence in cases of aggression. It would be for the Commission to decide whether a special article should be devoted to that classification.

5. The classification was not, however, intended to place the various categories of offences in watertight compartments. As in internal law, there could be concurrent offences: for example, if genocide was committed in time of war, it was both a crime against humanity and a war crime. Additional Protocol I to the 1949 Geneva Conventions expressly provided that *apartheid* was a war crime when it was committed in time of war (art. 85, para. 4 (c)).⁴ When concurrent offences had been committed, it was for the court to decide whether the severest penalty should be imposed or whether separate penalties should run concurrently. But the fact that one and the same act could be included in several categories did not in any way impugn the validity of the theoretical distinction between those categories.

6. With regard to the content *ratione materiae* of the draft code, two different approaches had been adopted in the Commission: the maximalist approach of those who wished to extend the scope of the code to a range of other offences, and the minimalist approach of those who wished the code to cover only a limited number of offences constituting a "hard core".

7. In its report on its thirty-sixth session, the Commission had indicated that, after carefully considering the advantages and disadvantages of the two approaches, it

... tended to take the view that the effect of the draft would be weakened if it were extended so far that the essential considerations were lost sight of. To go beyond the minimum content ... would blur the distinction between an international crime and an offence against the peace and security of mankind; ... The code ought to retain its particularly serious character as an instrument dealing solely with offences distinguished by their especially horrible, cruel, savage and barbarous nature. These are essentially offences which threaten the very foundations of modern civilization and the values it embodies. It is these particular characteristics which set apart offences against the peace and security of mankind and justify their separate codification.⁵

If the content of the code were made too broad, it would be deprived of its specificity and transformed into a

veritable international penal code, in which it would be very difficult to distinguish offences against the peace and security of mankind from other international crimes.

8. As to the content *ratione personae*, some members of the Commission still believed that international criminal responsibility for offences against the peace and security of mankind should be attributable to States. He noted, however, that, in its report on its thirty-fifth session, the Commission had said:

With regard to the subjects of law to which international criminal responsibility can be attributed, the Commission would like to have the views of the General Assembly on this point, because of the political nature of the problem;⁶

Having received no reply from the General Assembly, the Commission, at its thirty-sixth session, had taken the following position:

With regard to the content *ratione personae* of the draft code, the Commission intends that it should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility ...⁷

Thus, although the draft articles sometimes referred to the responsibility of the State, that meant only its civil responsibility. It was indeed obvious that, if agents of the State committed an offence when acting on its behalf, they engaged the civil responsibility of the State. That was, moreover, a principle that should be enunciated in the draft code.

9. In its report on its thirty-sixth session, the Commission had recognized that

... the criminal responsibility of individuals does not eliminate the international responsibility of States for the consequences of acts committed by persons acting as organs or agents of the State. But such responsibility is of a different nature and falls within the traditional concept of State responsibility. ...⁸

That was the frame within which the Commission had to work, and it must avoid mixing the different kinds of responsibility.

10. Moreover, the concept of the criminal responsibility of States was still far from clear, and if it had to be studied some day, the question would arise whether it came under the draft code or under the draft articles on State responsibility. Although for the time being only the criminal responsibility of natural persons would be considered, it still had to be decided whether those natural persons were private individuals or State authorities.

11. In his third report (A/CN.4/387, chap. III), he had submitted a draft article 2 consisting of two alternatives, the first applying to offences committed by natural persons, whether authorities of a State or private individuals, and the second applying only to offences committed by the authorities of a State. The Commission's decision had been to reject the second alternative and refer only the first to the Drafting Committee.⁹

⁴ See 1959th meeting, footnote 6.

⁵ *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 63.

⁶ *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69 (b).

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

⁸ *Ibid.*, p. 11, para. 32.

⁹ *Yearbook ... 1985*, vol. II (Part Two), pp. 13-14, para. 60.

12. The “authorities of a State” were referred to in some of the draft articles because the offences in question, particularly aggression and *apartheid*, could be committed only by the authorities of a State, that was to say natural persons acting on behalf of a State. States did, of course, commit offences, but they did so through the intermediary of their organs or agents. The State was an abstraction, so it could not be said that an offence could be committed only by a State. The draft articles dealt with offences committed by natural persons, whether they were acting in their personal capacity or on behalf of a State.

13. Many members of the Commission had questioned the legal basis of the offences covered by the draft code. Some had expressed doubts about the legal force of the conventions on which the draft articles were based, arguing that not enough States had ratified the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, for example.

14. In his view, that argument was not well founded. The judgments of the ICJ were a source of international law even though the Court’s compulsory jurisdiction had been recognized by only 48 States. The same was true of the awards of arbitral tribunals, although they were only temporary bodies. The legal force of the resolutions adopted by the General Assembly had also been called into question. Many of those resolutions, however, in particular the one prohibiting mercenarism and those relating to national liberation movements, had contributed to the formulation of rules of law, so that their legal force could not be denied.

15. In fact, whatever the effect of those instruments, the offences covered by the draft code were so serious that they necessarily constituted violations of peremptory norms of international law. If conventions and other international documents could not be taken as a basis, the Commission could rely on the concept of *jus cogens*. Besides, the draft articles on State responsibility provided that international crimes had effect *erga omnes* and that all States could be held responsible for them—even those which had not acceded to the relevant conventions or had not supported the relevant General Assembly resolutions. When it came to punishing offences as serious as those dealt with in the draft code, the criterion to be adopted was not that of contractual obligations, but that of peremptory norms of international law.

16. With regard to “intent”, since every offence—and *a fortiori* an offence against the peace and security of mankind—presupposed a criminal intent by definition, he had not gone into that concept at great length, but he was quite willing to do so if that was the Commission’s wish.

17. The problem of intent arose primarily in connection with damage to the environment, which could, of course, be damaged involuntarily. But where offences were concerned, intent was absolutely essential. In internal law, some offences and even certain crimes could be committed without intent. That was true, in particular, of assault and battery leading to involuntary homicide.

Similarly, employers who did not take the necessary sanitary measures or precautions to prevent accidents at the workplace could be prosecuted and convicted in the event of an accident, regardless of whether there had been a wrongful intent. Gross negligence was thus, in a way, equivalent to wrongful intent. In other words, when intent could not be established, it was the consequences of the offence that had to be taken into consideration.

18. But however serious it might be, damage to the environment was not always a crime against humanity; for such crimes had racial, religious or political motives which could not always be ascribed to serious damage to the environment. That question required more thorough study.

19. With regard to the content of certain notions, and more particularly war crimes, some members had said that the customs of war could not be codified and should therefore not be referred to in the definition of war crimes. But it should not be forgotten that, in the matter of war crimes, customary law had often come before treaty law. The 1907 Hague Convention respecting the Laws and Customs of War on Land,¹⁰ which had been applied before it had been ratified, contained a provision stating:

Until a more complete code of the laws of war has been issued ... the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Since then, there had been little progress on codification of the laws and customs of war, and Additional Protocol I to the 1949 Geneva Conventions, adopted in 1977, contained a similar provision reading:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from *established custom** ... (Art. 1, para. 2.)

In its Judgment, the Nürnberg Tribunal had stated:¹¹

The law of war is to be found ... in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. ... in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

20. Hence he did not think that the reference to the “customs of war” could be deleted from the definition of war crimes. The Commission would have to revert to the question whether the expression “laws or customs of war” should be retained as it stood in that definition or whether it should be expanded.

21. The concepts of “complicity”, “conspiracy” and “attempt” had also been much discussed during the Commission’s debate. The practice of transposing those internal law concepts to international law without indicating their content was particularly dangerous because, in internal law, their content varied from one country to another. Some members of the Commission had said that they would have liked him to have pro-

¹⁰ See 1958th meeting, footnote 7.

¹¹ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal*. ..., p. 64.

vided examples taken from African comparative law. But although, since their independence, the penal codes of African countries had gradually moved away from the penal codes of the former metropolitan powers to reflect African realities, the general principles of law on which they were based and which were of universal scope had fortunately remained the same. Moreover, since the offences covered by the draft code were well-known offences, most of which had been defined in international conventions, it was difficult to see how they could be any different in Africa. Thus, instead of making a comparative law study—which was in any case not within his terms of reference—he had tried to define the content of those concepts.

22. With regard to complicity, whose content in internal law could be either limited or extended, the discussion seemed to show that most members of the Commission believed that it should be given an extended content, so that a charge of complicity could be brought not only for acts committed prior to or concurrently with the offence, but also for certain subsequent acts, such as concealment of malefactors and receiving stolen goods.

23. The same problem arose with regard to *complot*. According to Continental law, *complot*, whether with a view to insurrection, civil war or action against the territorial integrity of a State, was solely a crime against the State. But in international law there were cases in which *complot* had a broader meaning and was regarded not only as a crime against the State, but also as an offence against the peace and security of mankind. That raised the question of “conspiracy”. If *complot* were defined as a crime against the State, it would certainly not include all the elements of conspiracy; but if it were considered that *complot* could also be directed against mankind or result in an act constituting a war crime, and if it were further recognized that it could engage the collective responsibility of those who had instigated it, the concept of *complot* could then be assimilated to that of conspiracy.

24. Opinions on that important question were still divided. He noted, however, that conspiracy was expressly referred to in conventions designed to prevent and punish certain offences against the peace and security of mankind, such as the 1948 Convention on genocide and the 1973 Convention on *apartheid*. If conspiracy was recognized for genocide and *apartheid*, it could hardly be ruled out for other crimes against humanity. The main characteristic of such crimes was that they were usually committed through participation in groups within which it was difficult to distinguish a principal perpetrator from accomplices. Since the crimes in question were extremely serious and had to be effectively prevented and punished, some writers had taken the view that it was not unreasonable to recognize conspiracy in certain cases. At the current stage in the work, however, he had no very definite opinion on the question.

25. As to “attempt”, members of the Commission generally appeared to take the view that it should not include preparatory acts. For there to be an attempt, there must be commencement of execution.

26. Comments had also been made on the term *auteur* (“person who commits”). Some members had said that draft article 3 should refer not to *l'auteur*, but to *l'auteur présumé* (“person presumed to have committed”). He did not entirely agree, because the *auteur* was the person whose guilt had been established by the competent court. Moreover, the idea of an *auteur présumé* was contrary to the principle of criminal law whereby any person being prosecuted was presumed innocent. While benefiting from the presumption of innocence he could not, at that stage, be presumed to have committed the offence.

27. It had also been argued that the term *auteur* was too vague and that a minister or even a head of State might not have taken part in an act of aggression against another State or might not even have been informed of it. But that theory was not acceptable. It was contrary to the principle of government solidarity. The members of a Government were jointly responsible for its acts. They could be relieved of their responsibility only by publicly expressing disapproval of the act or by resigning. Silence made them accomplices. Moreover, if the Nürnberg Tribunal had accepted that theory, it would have had to acquit most of the major Nazi war criminals.

28. Referring to the position of certain offences in the draft code, some members had taken the view that the provisions relating to complicity, conspiracy and attempt should appear in chapter I, part II, on general principles. But complicity, conspiracy and attempt were not principles; they were offences, and if they were not included in the list of offences, it would be impossible to determine what penalties were applicable to them. Besides, complicity, conspiracy and attempt were characterized as offences in national penal codes, which specified the penalties to be imposed on anyone found guilty of them.

29. There might also be some doubt about the place to be assigned to terrorism and the category in which it should be included. As a recent example had shown, hostilities might well break out as a result of terrorism carried out by one State against another State, which was referred to in the draft code. That type of terrorism was thus a crime against peace; but since not all terrorist acts were directed against a national, ethnic, racial or religious group, it was more difficult to affirm that they were also crimes against humanity.

30. Turning to the question of method, he observed that there were two ways of defining an offence. One was to formulate a general definition, as the Commission had done for war crimes in the 1954 draft code. If the Commission chose that method, simply stating that a war crime was a violation of the laws and customs of war—that term being used in a very broad sense—and leaving it to the competent court to determine whether the act complained of was in fact a violation of the laws and customs of war, it would avoid having to deal with a number of sensitive issues.

31. The other way was to make a non-limitative enumeration. But if it were decided to refer, by way of example, to a certain number of acts constituting war crimes, they would have to be the most representative acts. It was difficult to see how the Commission could

refer to the use of asphyxiating gases, for example, and omit the use of nuclear weapons, as some members wished.

32. That was an issue on which both politicians and lawyers were divided. The advocates of positive law maintained that, since it was not prohibited by any international convention, the use of nuclear weapons could not be classed as a war crime. On the basis of *lex lata*, they distinguished between the first use of force, which was assimilated to aggression, and the second use of force, which, unless the response was disproportionate to the attack, was simply equivalent to the exercise of the right of self-defence provided for in Article 51 of the Charter of the United Nations. But it was not possible to disregard the political considerations underlying that reasoning. Politically, it could well be argued that, if States undertook never to make first use of nuclear weapons, it was because they had a large enough stock of conventional weapons to make that unnecessary. So if a *lex lata* position was adopted, it was extremely difficult to decide one way or the other.

33. But according to the advocates of normative law, that was to say on the basis of *lex ferenda*, the situation was quite different. Relying on the fact that the law of war had always aimed at protecting civilian populations and that other types of weapon had already been prohibited, they maintained that prohibition of the use of nuclear weapons should be the subject of a peremptory norm of international law. But if that thesis prevailed, it would be necessary, as some members of the Commission had suggested, to condemn not only the use of nuclear weapons in general, without any distinction between first and second use, but also the manufacture and possession of nuclear weapons. That was a good illustration of the problems posed by the enumerative method. If the Commission decided to list some acts constituting war crimes, it could not omit the use of nuclear weapons.

34. With regard to general principles, there had been no real objection to the definition of offences against the peace and security of mankind in draft article 1. Some members had made proposals designed to improve the wording of that article, but they would be mainly for the Drafting Committee to consider. Other members had suggested that "seriousness" should be added to the criteria adopted. He was willing to include that criterion, even though unanimous agreement had not been reached on it, since some members of the Commission regarded it as a subjective idea that would add nothing to the text. He was also quite willing to specify that the offences referred to in the draft code were offences committed by individuals.

35. Draft article 3 (Responsibility and penalty) and draft article 4 (Universal offence) had been favourably received, and there seemed to have been no objections to draft article 5, which provided for the non-applicability of statutory limitations to offences against the peace and security of mankind. Nevertheless, some members had raised the questions whether, after a lapse of time, it might not be difficult to obtain evidence, and whether the principle of imprescriptibility might not cause difficulties. That problem also arose in internal law; for some countries had a 10-year period of

prescription in criminal matters, and there might well be doubts about the possibility of producing evidence 10 years after an offence had been committed and about the value of testimony taken so long after the event. In any case—as was too often forgotten—it was for the competent court to decide whether the evidence produced was admissible or not.

36. The principle of non-retroactivity stated in draft article 7 had also been accepted. No one had disputed the fact that, in the maxim *nullum crimen sine lege*, the word *lex* referred not only to treaty law, but also to custom and the general principles of law.

37. Although agreement in principle had been reached on exceptions, a number of reservations had been made on draft article 8. The first had related to the use of the negative form. But he had drafted the article in that form only in order not to leave the door too wide open for exceptions. Since the draft code related to the most serious offences, it could not provide for the exceptions applicable under ordinary law without imposing specific limits on them.

38. It had also been said that coercion should be accepted as a defence for certain crimes against humanity. He had doubts on that point, because a crime against humanity presupposed a specific motive, and a person acting under coercion had no motive. It was true that international courts had recognized the exception of coercion, but only in very few cases and subject to such conditions that very few persons had invoked it successfully.

39. In fact the solution might be to make a distinction between justifying facts and non-responsibility. In the case of offences against the peace and security of mankind, it could hardly be said that coercion was a justifying fact, but it might be said that it was a factor precluding or attenuating responsibility. For although it would be difficult to find any fact that could justify an offence against the peace and security of mankind, it was possible to find causes of non-responsibility, such as coercion, or factors attenuating responsibility. That, too, was a question that needed deeper study.

40. Some members of the Commission considered that certain subjective elements such as insanity and minority should also be taken into account. But the concept of insanity must be handled with great caution, for how was it possible to determine where it began and ended? As to minority, it was inconceivable that a minor could commit a war crime, since minors were not required to do military service; and it was also difficult to see how a minor could commit a crime against humanity.

41. The most controversial question was that of the criminal court that would be competent to try offences against the peace and security of mankind. Some members had objected to the principle of universal competence, while others had expressed reservations about the possibility of establishing an international criminal jurisdiction. At the present stage in the development of the law it would be difficult to establish an international criminal jurisdiction or to secure acceptance of the principle of universal competence, but that was no reason for not going forward. It would, indeed, be irrespon-

sible not to do so. There were, of course, many difficulties, but the Commission must try to surmount them.

42. The solution proposed in draft article 4, which stated the principle of universal competence without excluding the possibility of establishing an international criminal jurisdiction, was doubtless not perfect; but although it could easily be criticized, it was much more difficult to suggest acceptable alternatives. He himself was not an ardent supporter of that principle and he would be prepared to support any proposal that was more satisfactory.

43. It had been said that the applicable rule in criminal matters was that of territoriality. That was indeed so in internal law, but there was no justification for affirming that it was so in international law as well. The Nürnberg Tribunal and the other international tribunals set up at the end of the Second World War under Law No. 10 of the Allied Control Council had not had exclusive jurisdiction. War crimes had been tried by German and French courts, which had exercised concurrent jurisdiction. In fact, there had always been a combination of several systems and it was difficult to see how the position could be different today.

44. The 1948 Convention on genocide did not anywhere provide that the principle of territoriality was an absolute rule. According to article VI of that Convention:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction ...

The Convention thus recognized that there could be two jurisdictions.

45. The 1973 Convention on *apartheid* also did not recognize the principle of exclusive territorial jurisdiction. Article V provided:

Persons charged with the acts enumerated in article II ... may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction ...

Similarly, principle 2 of the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity¹² provided:

Every State has the right to try its own nationals for war crimes or crimes against humanity.

while principle 5 provided:

Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, *as a general rule** in the countries in which they committed those crimes. ...

46. It had also been argued that, if the principle of universal competence were applied, courts might take contradictory decisions. But that often happened in internal law; there was nothing more inconsistent than the judgments of national criminal courts, which, depending on the circumstances, imposed heavier or lighter penalties for the same crime. The problem of the

pressure to which judges might be subject arose both in internal law and in international law.

47. Attention had also been drawn to extradition, which, although subject to very specific rules, was not a simple procedure; even in internal law, cases of extradition were relatively rare. Contrary to what had been said during the debate, however, offences against the peace and security of mankind were not political offences; they were ordinary crimes. Consequently, States were required to extradite anyone who had committed such an offence. But it was not only the rule that offences against the peace and security of mankind were ordinary crimes that had been laid down. All the relevant conventions contained provisions on extradition. Article XI, paragraph 1, of the 1973 Convention on *apartheid*, for example, provided:

Acts enumerated in article II ... shall not be considered political crimes for the purpose of extradition.

and article VII of the 1948 Convention on genocide provided:

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. ...

The principle of extradition was thus well established in the case of offences against the peace and security of mankind and the possible difficulties in applying that principle in practice could not be advanced as an argument for rejecting the system of universal competence.

48. The only really difficult problem was that of offences against the peace and security of mankind committed by members of a Government. Some members of the Commission had questioned whether that case should be dealt with in the draft code. According to some writers, the establishment of an international criminal jurisdiction would help to solve the problem. In their view, if the perpetrator of the act did not appear before the court, he would be convicted *in absentia*. There would thus be condemnation by the international community; but he realized that that was a matter requiring further reflection.

49. The last difficulty pointed out had related to the rule *non bis in idem*. Some members of the Commission feared that a plurality of competent courts might jeopardize that rule. But that was a matter that could be settled by agreement; there was nothing to prevent States from concluding a convention providing that crimes tried by a court of one State could not be retried by a court of another State. Moreover, as early as 1883, the Institute of International Law had stated the principle that:

Sentences pronounced after fair trial by the courts of any State ... shall prevent any further prosecution of the guilty person for the same act.¹³

50. If an international criminal jurisdiction were established, the difficulty would arise from the fact that the same act was not characterized in the same way in international law and in internal law. By virtue of the principle of the autonomy of international law, an international criminal court would not, in principle, be bound to respect a judgment of a national court. But,

¹² General Assembly resolution 3074 (XXVIII) of 3 December 1973.

¹³ Resolution on conflict of criminal laws, art. 12 (*Annuaire de l'Institut de droit international, septième année* (Brussels), 1885, p. 158).

there again, there were a number of possible solutions. First, States could conclude agreements; but it might also be provided in the statute of the international court that, where there had already been a conviction for an offence, the court, by virtue of the principle of the autonomy of international law, would pronounce a purely declaratory judgment without any sentence.

51. Thus, although there certainly were difficulties, they should not be an insurmountable obstacle to the elaboration of the draft code.

52. He realized that the Commission would one day have to deal with the question of penalties, but it might perhaps be better to wait until its work was much further advanced and the members of the international community had taken a clear-cut position on the implementation of the code.

53. Mr. USHAKOV said that, under the penal codes of some States, such as the Soviet Republics, conspiracy was not recognized only in connection with crimes against the State. It also meant association of persons to commit any crime jointly. He did not think that government solidarity could be referred to in criminal matters, since it could exist only as a result of a particular political philosophy.

54. Mr. FRANCIS said that three questions deserved further consideration by the Special Rapporteur. The first concerned *apartheid*. The Special Rapporteur, in chapter II, part II, of the draft articles, appeared to assume that *apartheid* could be committed only by a State. But in his own view, while the State would establish the general framework for *apartheid*, the State alone could not make that policy effective. Therefore any private individual who helped to implement the policy in any way would be committing the crime of *apartheid* and, depending on the circumstances, would be punishable as an accomplice or a conspirator, for example. The second question concerned terrorism. He believed that the Special Rapporteur had conceded, in a previous debate,¹⁴ that individuals could commit the crime of terrorism, and Mr. Malek had vividly illustrated such a possibility. Lastly, the Special Rapporteur held that crimes against humanity could be committed only with respect to groups, which might be ethnic, racial or religious. He doubted whether that was entirely true, since the world was currently witnessing an abundance of crimes against humanity which were not based on race or religion. Crimes committed in a country populated by a single race naturally did not have the same connotation as crimes committed in a country having a plurality of races.

55. Mr. CALERO RODRIGUES, noting that the debate had been concluded, said that the time had come for the Commission to decide how to proceed. He had previously made three suggestions: first, that the Special Rapporteur should present revised draft articles at the next session, without a new analysis; secondly, that the Planning Group should draw up a plan for future study of the topic; and thirdly, that the Commission should remind the General Assembly that it had not yet replied

to the questions previously put to it by the Commission, and that its replies were necessary for the orderly continuation of the Commission's work. Those questions were whether the Commission should proceed with the preparation of an instrument for the establishment of an international jurisdiction, and whether it should proceed on the basis that only individuals would be responsible under the code.

56. Chief AKINJIDE said that he endorsed Mr. Francis's views on *apartheid* and would have liked more attention to have been paid to that matter in the Special Rapporteur's summing-up. It was not enough to say that *apartheid* was a crime by a State: the tap-root of *apartheid* lay outside South Africa and was primarily economic. If the economic basis for *apartheid* were removed, the political basis would collapse. Those benefiting economically from *apartheid* should also be treated as criminals for the purposes of the draft code.

57. Mr. THIAM (Special Rapporteur), replying to the comments made and questions raised by several members of the Commission, said that he had dealt with the concept of conspiracy precisely because its meaning varied from one country to another. The members of a Government were obviously bound by political solidarity; it would be unthinkable for a minister to dissociate himself from aggression after the act, and if he did not resign before the act had been committed, he would, of course, also be responsible for it.

58. He saw no objection to the idea of broadening the concept of a crime against humanity: in the broader sense, a crime against humanity would be committed when one ethnic group massacred another or when a minority was the target of criminal acts. The 1954 draft code did not mention *apartheid*, and he would welcome any specific proposals that members of the Commission might wish to make on that subject. But he did not see how it would be possible to prosecute the Government of a Western country which benefited from *apartheid*. Moreover, it would be rather difficult to add new elements to the relevant conventions, of which he had taken due account. He warned members of the Commission against the dangers of drafting the code from a political point of view.

59. Although slavery had been dealt with in draft article 12, paragraph 3, he planned to devote a separate article to it in his next report.

60. He thought it was for the Commission to pronounce on the proposals made by Mr. Calero Rodrigues. The Commission could, of course, make suggestions to the Sixth Committee of the General Assembly, but it would be difficult to take decisions on future work that would be binding on the new members of the Commission.

61. Mr. KOROMA said he agreed with the Special Rapporteur that it was not desirable to bind the future members of the Commission to a schedule of work. Nevertheless, he endorsed Mr. Calero Rodrigues's suggestions concerning revision of the draft articles and a reminder to the General Assembly.

¹⁴ See *Yearbook ... 1985*, vol. I, p. 81, 1889th meeting, para. 19.

62. Sir Ian SINCLAIR suggested that a decision on the reminder to the General Assembly could be taken immediately. The replies to the questions submitted were central to the continuation of the Commission's work on the topic, and the reminder should be included in the Commission's report to the General Assembly. Mr. Calero Rodrigues's suggestion regarding the plan for future study of the topic was sound, but the Special Rapporteur should be allowed full freedom of action. He might, for example, wish to include in his next report an indication of how the topic should be studied in the future.

63. Mr. DÍAZ GONZÁLEZ said that it would be very useful if the Special Rapporteur could submit revised draft articles at the Commission's next session, but it might not be entirely appropriate for the Commission to draw up a programme of work for that session. Any suggestions to be made should be formulated by the Planning Group. Similarly, it was for the Special Rapporteur to indicate in his next report how he wished the questions dealt with in the draft code to be considered. It was quite right to urge the Sixth Committee to answer the questions already put to it, particularly with regard to an international criminal jurisdiction.

64. Mr. THIAM (Special Rapporteur) said that he would formulate the questions to be put to the Sixth Committee in the chapter of the Commission's report dealing with the draft code. He had taken note of the proposals made by Mr. Calero Rodrigues, but thought that it would be better to leave it to the Commission to decide, at its next session, what course of action was to be followed, so that it would not be prematurely bound by one method or another.

65. Mr. KOROMA said that the discussion had left him wondering how the Commission would proceed with the draft code at its next session.

66. Mr. CALERO RODRIGUES pointed out that a programme of work would be extremely useful to the new members of the Commission in proceeding with the study of the topic. He therefore urged the Planning Group to propose a tentative plan.

67. The CHAIRMAN said there appeared to be agreement that the Special Rapporteur should submit, at the next session, revised draft articles based on his own wisdom and on the wishes of the Commission, and that the Planning Group should prepare a programme of work for the Commission's next session. The Special Rapporteur would draft, for the Commission's report, the questions that should be put to the Sixth Committee.

It was so agreed.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/396,¹⁵ A/CN.4/L.399, ILC
(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (continued)

ARTICLE 24 [26] (Service of process)

68. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 24 [26] which read:

Article 24 [26]. 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 forum State 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 their receipt 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.

69. Article 24 was the first article in part V of the draft, entitled "Miscellaneous provisions". As he had said at the previous meeting, the elements included in the former article 25 (Immunities of personal sovereigns and other heads of State) had been either deleted or incorporated in earlier articles. The present text was based on paragraphs 1 and 2 of the former article 26,¹⁶ dealing with service of process. Paragraphs 3 and 4 of that article, concerning default judgment, formed the basis of the new article 25.

70. Paragraph 1 had been amplified and spelt out the various means by which service of process could be effected. It employed the word "shall" instead of "may". It should be noted that a hierarchy of such means was provided, beginning first with special arrangements. Transmission by registered mail addressed to the head of a foreign ministry, or by any other means, was possible as the last means available, if permitted by the law of the forum State and that of the defendant State.

71. Paragraphs 2 and 3 were new and were taken from similar provisions in the 1972 European Convention on State Immunity.¹⁷ Paragraph 4 was based on paragraph 2 of the former article 26, which had been modified to make it clear that the appearance in question related to the merits and was not, of course, an appearance for the sole purpose of challenging the jurisdiction of the court.

¹⁶ See 1942nd meeting, para. 10.

¹⁷ *Ibid.*, footnote 6.

¹⁵ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

72. Sir Ian SINCLAIR said that he was content in principle with article 24. At the Commission's 1944th meeting, he had expressed concern about the provision on service by registered mail. His concern had been partly allayed by the Drafting Committee's decision to make that method very subsidiary and to qualify it, in paragraph 1 (*d*), with the words "if permitted by the law of the forum State and the law of the State concerned".

73. He suggested a minor amendment to the text of paragraph 2. In the last part of the paragraph, the reference to "their" receipt by the Ministry of Foreign Affairs was ambiguous, since it was not clear what the word "their" referred to. He therefore suggested that the words "their receipt" should be replaced by the words "receipt of the documents".

74. Mr. KOROMA proposed that, in paragraph 1 (*b*) and (*c*), the words "failing such arrangement" should be replaced by the words "in the absence of such an arrangement".

75. Mr. SUCHARITKUL (Special Rapporteur) suggested that that proposal should be held over until the second reading. The Drafting Committee had already considered it, but had retained the present wording, among other reasons because the formula suggested could not be introduced into paragraph 1 (*d*), which began with the words "failing the foregoing".

76. Mr. KOROMA said that he would not press his proposal but wished his preference to be placed on record. If the wording of paragraph 1 (*d*) was the only reason for not accepting his proposal, consideration could be given to improving that wording.

77. Mr. RAZAFINDRALAMBO, referring to the suggestion made by Sir Ian Sinclair, proposed that, in the French text of paragraph 2, the words *au ministère* should be replaced by the words *par le ministère*.

78. Mr. BALANDA suggested that paragraph 1 (*a*) should be shortened by deleting the words "for service". With regard to paragraph 1 (*d*), he did not think that the law of the forum State and the law of the State concerned need both permit transmission by registered mail; such a requirement would be excessive. In order to simplify matters, paragraph 1 (*d*) should be amended to read: "... if permitted by the law of the forum State or the law of the State concerned ...".

79. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the question raised by Mr. Balanda had been discussed at length in the Drafting Committee. The problem was that the document to be served had legal force. It was a matter of performing an act of authority in another State, whose consent was obviously required. Clearly, therefore, the law of that State would have to permit service by registered mail. Similarly, the law of the forum State would have to permit that method. That was why the Drafting Committee had specified that the method of service must be permitted by the law of both countries.

80. Mr. BALANDA pointed out that the Special Rapporteur had not established any hierarchy for the various procedures and that the order proposed in

paragraph 1 had been established during the debate, with diplomatic channels coming first and transmission by registered mail as a last resort. In his opinion, the nature of the document required should be determined in accordance with the law of the forum State.

81. Chief AKINJIDE propounded the hypothetical example of two States, of which State A permitted service by registered mail and State B did not. If a plaintiff in State A tried to serve process upon State B, the legal adviser of State B would advise that no service had taken place and that the communication should be ignored. Clearly, therefore, the method of service by registered mail had to be lawful in both the States concerned.

82. Mr. USHAKOV said that, because procedures varied from country to country, there was a significant difference between the English and French titles of article 24. On second reading, the Commission should therefore choose more general and neutral terms, which should be defined in article 2; otherwise, persons unfamiliar with the legal systems on which the draft was based might have some difficulty in understanding the provisions of article 24, as it would be difficult to use different texts concurrently.

83. Mr. TOMUSCHAT observed that, in the French text, the term "service" had been rendered as *signification ou notification*, which gave the impression that article 24 contained a general rule applicable to all notifications—of judgments, for example—and a special rule for the service of documents instituting proceedings. The English text contained no such ambiguity; it simply dealt with service of process.

84. Mr. SUCHARITKUL (Special Rapporteur) pointed out that the 1972 European Convention on State Immunity, which was a bilingual instrument, used "service" in English and *signification ou notification* in French as equivalent terms.

85. Mr. LACLETA MUÑOZ said that the Spanish text of article 24 was very clear and referred only to *notificación*. He did not think that the words *signification* and *notification*, as used in the French text, referred to two different things. They would seem, rather, to be synonymous.

86. Mr. KOROMA proposed the deletion of paragraph 4 as being unnecessary. Objection to service could be raised at any point in a proceeding.

87. Mr. DÍAZ GONZÁLEZ suggested that, in order to make the Spanish text of paragraph 4 clearer, the words *Ningún Estado que comparezca en relación con el fondo en un proceso promovido contra él podrá* should be replaced by *El Estado que comparezca en relación con el fondo en un proceso promovido contra él no podrá*.

88. Mr. SUCHARITKUL (Special Rapporteur) said that paragraph 4 reflected the existing practice. Once a court was seized of the merits of a case, it was too late to raise any procedural objection.

89. Mr. KOROMA pointed out that, in some cases, a court could join the procedural objection to the merits and consider them both together.

90. Mr. BALANDA said that the words "Any State that enters an appearance on the merits" in paragraph 4 were not very clear. Despite the rather awkward wording of paragraph 4, however, there was no doubt that the members of the Commission unanimously agreed on the principle that objections could be raised only at the start of a proceeding, *in limine litis*. Consequently, once a State had begun to defend itself in a proceeding instituted against it, it could no longer claim that service of process had not been properly effected.

91. Chief AKINJIDE said that the Nigerian rules of procedure contained a rule expressed in exactly the same terms as paragraph 4. Upon being sued, a defendant could appear in court in either of two ways: he could appear on the merits, in which case no procedural issues could be raised; or he could appear on protest and could raise any procedural objections. Of course, it was open to the court to join the procedural objections to the merits.

92. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 24 [26] with the amendments proposed by Sir Ian Sinclair, by Mr. Razafindralambo for the French text, and by Mr. Díaz González for the Spanish text.

It was so agreed.

Article 24 [26] was adopted.

ARTICLE 25 [26] (Default judgment)

93. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 25 [26], which read:

Article 25 [26]. 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.

94. Article 25 was based on paragraphs 3 and 4 of the former article 26.¹⁸ The earlier text had been redrafted in the light of the discussion and paragraph 1 now specified a minimum time-limit of three months from the date of service of process before a default judgment could be rendered. It had been considered preferable to specify a time-limit, rather than rely on the subjective notion of a period of time subject to a reasonable extension.

95. Paragraph 2 similarly specified a minimum period of time to be allowed for applying to have a default

judgment set aside, if such a time-limit was set by the court under internal law. That part of the provision assumed that procedures existed under internal law for setting aside or appealing against a default judgment. Such procedures might not exist, or might be at the discretion of the court, depending on the applicable rules of civil procedure of the forum State. Finally, provision had been made for transmission of a translation of the judgment, if necessary.

96. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission agreed provisionally to adopt article 25 [26].

Article 25 [26] was adopted.

ARTICLE 26 [27] (Immunity from measures of coercion)

97. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 26 [27], which read:

Article 26 [27]. Immunity from measures of coercion

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

98. The new text was based on paragraph 1 of the former article 27.¹⁹ The rule had been modified, however, to make it relate only to measures of coercion requiring a State to perform, or refrain from performing, a specific act, on pain of suffering a monetary penalty. The Drafting Committee believed that it was not advisable or realistic to prohibit a court from exercising its usual power to order a party to perform or refrain from performing a specific act. The enforcement of such an order against a State was, of course, a different question and was covered by part IV of the draft. Thus article 26 was limited to providing immunity from a court order for specific performance that carried with it the coercive measure of a monetary penalty for non-compliance with the order. In some legal systems, including the French system, the penalty was termed *astreinte*.

99. It had been thought preferable to formulate the provision as a separate article, instead of including it in article 27, since it related to something more than a "procedural immunity".

100. Mr. RAZAFINDRALAMBO proposed that, at the end of the French text, the word *financière* should be replaced by *pécuniaire*.

101. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 26 [27] with the amendment to the French text proposed by Mr. Razafindralambo.

It was so agreed.

Article 26 [27] was adopted.

¹⁸ *Ibid.*, para. 10.

¹⁹ *Ibid.*

ARTICLE 27 (Procedural immunities)

102. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 27, which read:

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.

103. The two paragraphs of the new text were based on paragraphs 2 and 3 of the former article 27.²⁰ Those paragraphs had been reformulated in the light of the debate. Paragraph 1 first spoke of “no consequences” being entailed by the conduct in question, although it stated that the consequences which might ordinarily result from such conduct in relation to the merits of the case would still obtain. That wording preserved the applicability of any relevant rules of the internal law of the forum State. The second sentence of paragraph 1 specified that no fine or penalty could be imposed. Paragraph 2 drew on paragraph 3 of the former article 27 and a corresponding provision of the 1972 European Convention on State Immunity. It should be noted that both paragraphs applied whether a State was plaintiff or defendant.

104. Sir Ian SINCLAIR said that he wished to place on record his reservation on paragraph 2 with regard to the position of the State as a plaintiff. He could accept the provisions of paragraph 2 when the State was a defendant.

105. Mr. TOMUSCHAT made the same reservation. In his view, the rule set out in paragraph 2 had no justification when the State was involved in a proceeding as plaintiff; it would then confer a privilege on the defendant. It should also be borne in mind that, in many cases, it was very difficult to recover monies deposited as security.

106. Mr. BALANDA proposed that, in paragraph 2 of the French text, the word *caution*, which referred to a person, should be replaced by *cautionnement*.

107. Mr. MAHIU said that security was required of a plaintiff, not of a defendant, for if a defendant were required to provide security, he would not appear. Thus article 27, paragraph 2, would make sense only if it referred to the plaintiff. It was in the light of his own country's internal law that he made that comment.

108. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 27 with the amendment to the French text proposed by Mr. Balanda.

It was so agreed.

Article 27 was adopted.

²⁰ *Ibid.*

ARTICLE 28 (Restriction of immunities)

109. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 28, which read:

Article 28. Restriction of immunities

A State may restrict in relation to another State the immunities provided in the present articles to such extent as appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or as required by any international agreement applicable in the matter between them. However, no such restriction shall prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*).

110. The former article 28²¹ had been modified in a number of respects. The reference to “extension” of immunities had been deleted as being unnecessary. Such extension was possible in any case and to make provision for it would add nothing to the draft. Thus the new article referred only to “restriction” of immunities.

111. The first sentence contained the essential elements of the original text, with appropriate drafting improvements. The second sentence was new and incorporated what was considered to be an essential element, namely that in no event could restriction of immunities prejudice the immunities of a State in respect of acts performed by it in the exercise of its sovereign authority (*acta jure imperii*). That provision was intended to protect the “hard core” of State immunities and to draw a line beyond which restrictions were not permitted.

112. The wording of that provision had, of course, been the subject of some discussion. The French expression *les prérogatives de la puissance publique* seemed to express the basic idea most accurately. Again drawing on the 1972 European Convention on State Immunity, the Drafting Committee had decided to include in all language versions, after the phrase “exercise of sovereign authority”, the Latin expression *acta jure imperii* in parentheses, in order to bring out within the context of that particular article the fundamental nature of the sovereign authority in question.

113. The CHAIRMAN suggested that the discussion on article 28 should be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

²¹ *Ibid.*

1970th MEETING

Wednesday, 18 June 1986, at 3.15 p.m.

Chairman: Mr. Motoo OGISO

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr.

Mahiou, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

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

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (continued)

ARTICLE 28 (Restriction of immunities)² (continued)

1. Mr. USHAKOV said that he was utterly opposed to article 28. It contained an alarming and preposterous proposition, for under its terms two States parties to the future convention would be able to decide, unilaterally or bilaterally, not to abide by the rules set forth in that convention.

2. The expression "for reasons of reciprocity" signified, as he read it, that if one State unilaterally violated its obligations with respect to the immunities provided for in the articles, another State could then decide that a tacit agreement existed to commit such a violation. Where would that lead? Again, as though it were not bad enough to imply that violating its obligations under the articles was the "standard practice of that other State", the expression was further qualified by the phrase "to such extent as appears to it to be appropriate", which was quite absurd. And what on earth was meant by an "international agreement applicable in the matter"?

3. Furthermore, the first sentence of the article, which laid down that "the immunities provided in the present articles" could be restricted, did not accord with the second, which specified that the obligations under the articles were not affected. In addition, the words "sovereign authority" in the second sentence meant no more nor less than the exercise of governmental authority; it was therefore quite wrong to add, by way or explanation, the Latin term *acta jure imperii*, which meant something entirely different.

4. Rather than permit violations of the obligations under the future convention, article 28 should provide for the imposition of restrictions in the form of lawful countermeasures. As drafted, the article completely upset the established order of things and was therefore totally unacceptable.

5. Mr. FLITAN said that article 28 posed no major problem of substance so far as he was concerned, although the wording could be improved to bring it into line with the draft as a whole. In his view, under the terms of article 8, States could give their consent to restrictions of immunity other than those specified in the draft articles. It would none the less be preferable to speak of exceptions to, rather than restrictions of, immunity.

6. With those points in mind, he proposed that the title of article 28 should be amended to read "Other exceptions to immunities". Furthermore, the two sentences of the article should form two separate paragraphs. He agreed that the phrase "to such extent as appears to it to be appropriate", which was somewhat arbitrary, could be deleted from the first sentence, but favoured retention of the reference to reciprocity. The word "standard" should be deleted from the phrase "standard practice of that other State", in keeping with the wording of article 3, paragraph 2. The first sentence would thus read: "A State may introduce exceptions other than those provided in the present articles to the immunities of another State for reasons of reciprocity or conformity with the practice of that other State ...".

7. At the beginning of the second sentence, the words "However, no such restriction shall" should be replaced by "The introduction of other exceptions to immunities on the basis of paragraph 1 shall not". It could be left to the Drafting Committee to decide whether to retain the Latin expression *acta jure imperii*.

8. Chief AKINJIDE said that, after hearing Mr. Ushakov's remarks, he had come to the conclusion that, if it was allowed to stand, article 28 could render any future convention inoperative. As was apparent from the Special Rapporteur's commentary to the article in his eighth report (A/CN.4/396, para. 42), article 28 served little purpose. Also, it might create more problems than it solved, since it could be used in bad faith. In the circumstances, he considered that article 28 should be deleted in its entirety.

9. Sir Ian SINCLAIR said that a number of connecting factors had been inserted in articles 11 to 20 to indicate that, if a case was covered by those factors, immunity could not be invoked, and that, if the case was not, the residual rule of immunity in article 6 would operate. The problem was that the Commission was not required to harmonize the rules of civil jurisdiction applied by States. Consequently, there might be certain rules of civil jurisdiction applied in a particular State that went slightly beyond those connecting factors. Some degree of flexibility was therefore necessary to cope with what was recognized, under the 1972 European Convention on State Immunity, as a kind of grey zone. An added reason for introducing a measure of flexibility into the draft was that the Commission could not predict future developments.

10. To take an example pertaining to contracts of employment, the jurisdiction of United Kingdom courts extended to any contract of employment entered into in the United Kingdom, even if the services under the contract were to be performed wholly outside the United Kingdom. Under article 12 [13], paragraph 1, immunity could of course be invoked, but only in respect of a contract of employment between a State and an individual for services performed or to be performed, in whole or in part, in the territory of the State of the forum. In the case of a contract of employment for services to be performed not even in part in the territory of the State of the forum, the position might well be that, since the case was not covered by the particular connecting factor under article 12 [13], paragraph 1, the rule of immunity would prevail. Yet that might not necessarily be the

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

² For the text, see 1969th meeting, para. 109.

right solution in terms of the overall economy of the draft. In his view, therefore, some provision along the lines of article 28 was highly desirable.

11. While the wording of the article was open to some criticism, he would point out, in response to Mr. Ushakov, that a State acting in good faith in pursuance of an article like article 28 that was designed to introduce an element of flexibility would not necessarily be committing an internationally wrongful act in relation to the other articles of the draft. Some of Mr. Ushakov's arguments therefore fell to the ground.

12. His own difficulty with article 28 was that it was not at all clear what was meant by "for reasons of reciprocity". That expression would thus have to be explained in the commentary, but he did not think it referred to reciprocity as a countermeasure within the meaning of the draft articles on State responsibility.

13. He believed very strongly that the second sentence of article 28, including the reference to the concept of *acta jure imperii*, should be retained, since it represented the "bottom line" and set the limits beyond which immunities could not be restricted.

14. Mr. KOROMA said that he had some objections to article 28 as formulated, but understood the Special Rapporteur's intention. Accordingly, he proposed that the title of the article should be changed to "Reciprocal immunities" and that the body of the text should be amended to read:

"States may agree between themselves, on the basis of reciprocity and in conformity with the practice of those States or as may be required by an international agreement applicable in the matter, to modify the immunities provided in the present articles."

15. Mr. CALERO RODRIGUES said that an objective examination of the matter revealed that Mr. Ushakov's interpretation of article 28 was mistaken. The purpose of the article was in fact to make provision for any possible grey areas in the application and interpretation of the draft articles. For instance, if on the basis of its own interpretation a State applied the articles restrictively, another State was entitled to interpret and apply the articles in the same way, either by reason of reciprocity or because such interpretation was the standard practice of the other State, or again because it was the result of an international agreement between the States in question. In all such cases there was no collective right to violate a treaty, but merely a right to interpret the treaty restrictively. That was quite clear from the second sentence of article 28, which was not preposterous but simply the logical consequence of the need to acknowledge in the draft articles that there would always be grey areas in which States had some freedom of movement and that such freedom should apply both ways.

16. Mr. MAHIU said that he had no strong position concerning article 28, although he did have doubts about its utility. Even if it were retained in the light of the explanations given by Sir Ian Sinclair and Mr. Calero Rodrigues, a drafting problem still remained and certain ambiguities would have to be removed. He thus fully agreed about the need to cater for grey areas in

the interpretation of the draft, provided that the actual wording of the article did not itself create such areas.

17. Although Mr. Ushakov's comments regarding the phrase "for reasons of reciprocity, or conformity with the standard practice of that other State" were perhaps somewhat harsh, they contained more than a grain of truth. It might be as well to replace the conjunction "or" by "and" in order to make a stronger connection between the two elements. Such a course would also help to eliminate any ambiguity or difficulties of interpretation. Reciprocity was of course already recognized under international law, along with the right of two States to conclude an agreement with a view to modifying a particular aspect of their relations. Admittedly, it might be useful to state the self-evident, but that in itself could also create ambiguity.

18. There was no need whatsoever for the Latin term *acta jure imperii* at the end of the second sentence. First of all, it would be difficult to render into other languages, such as Arabic. In addition, the expression "sovereign authority" appeared elsewhere in the draft articles without being accompanied by the term *acta jure imperii*. The sudden inclusion of the latter in article 28 could only add to the inherent ambiguity.

19. Mr. USHAKOV said that some members seemed to take the view that any State party to the future convention or to bilateral treaties could interpret the convention or the treaties as and how they wished. Interpretation, in their opinion, was a grey area. Never before in the Commission had he heard such a startling proposition. The fact of the matter was that a difference as to interpretation involved a dispute between two States that fell to be decided in the manner provided for under international law, namely by negotiation, conciliation or arbitration, or, if need be, by invoking Article 33 of the Charter of the United Nations. That was abundantly clear from all international conventions, but it would suffice to refer members to article 84 of the 1975 Vienna Convention on the Representation of States.

20. The draft articles provided for State immunity on the one hand, yet on the other proposed that such immunity could be restricted and even violated. It was something quite unheard of.

21. Mr. ARANGIO-RUIZ said that, as a matter of principle, the legislator should avoid deliberately introducing grey areas into a legal text. It was for those who interpreted the text, whether academics or practitioners, to ascertain whether such grey areas existed. Accordingly, any member of the Commission who considered that a grey area did exist should try to remove it. However, given the differences of opinion, he would suggest that a small working group, which could be composed, *inter alia*, of Chief Akinjide, Mr. Calero Rodrigues, Mr. Flitan, Mr. Mahiou, Sir Ian Sinclair and Mr. Ushakov, should be appointed to deal with the matter.

22. Mr. LACLETA MUÑOZ said that article 28 was the outcome of lengthy and complex negotiations and reflected a compromise, one which, like all compromises, was unsatisfactory in certain respects. While

he shared Mr. Calero Rodrigues's views to a large extent, he had been impressed by Mr. Ushakov's initial submission, the main point of which, if he had understood correctly, was that the other State might perhaps not have violated the convention. A degree of flexibility was none the less important in order to take account of the minor differences between the connecting factors which appeared from article 11 onwards. The problem was that the first sentence of article 28 imposed no limitation at all. Hence the solution would be to adopt some wording similar to that in article 47 of the 1961 Vienna Convention on Diplomatic Relations, so as to provide for flexibility in interpretation.

23. Mr. TOMUSCHAT said that article 28 should be aligned with article 47 of the 1961 Vienna Convention to allow for a measure of flexibility to be built into the draft convention. Accordingly, he proposed that the opening clause of article 28 should be reworded to read: "A State may in relation to another State apply restrictively the immunities provided in the present articles ...".

24. There were also certain points of drafting that required examination, particularly in the French text, which used the word *limitation* in the title but the word *restriction* in the second sentence.

25. Mr. FRANCIS, agreeing that the article under discussion should be brought more into line with article 47 of the 1961 Vienna Convention, said that the main problem was one of drafting and he therefore supported Mr. Arangio-Ruiz's suggestion for a small working group to be appointed. If that suggestion were adopted, the best course would then be to place the article between square brackets and revert to it later.

26. Mr. SUCHARITKUL (Special Rapporteur) said that the original intention had been that article 28 should give an indication of the relative nature of immunity. A State could waive immunity at any stage in a proceeding, which meant that the same rule could be applied in different ways, depending on the jurisdiction. Consequently, there was a certain lack of harmony, which in turn called for a measure of flexibility. At the same time, there was a limit to flexibility, since a State could extend or restrict immunity only if certain conditions were met. Those conditions related to reciprocity, conformity with standard practice, and the existence of bilateral conventions for example, such as those concluded within the framework of EEC, OAS or ASEAN. He recognized that there were a number of inherent difficulties in the draft and was prepared to accept, for instance, Mr. Flitan's proposal as one way of dealing with them. The term *acta jure imperii* in the second sentence was a matter of formulation, not substance, and could be dealt with in the commentary. He was willing to prepare a revised text of the draft article with the assistance of Sir Ian Sinclair and Mr. Ushakov.

27. Mr. REUTER said that article 28 raised the delicate problem of the relationships between treaties and called for very careful drafting, but it was not a provision of basic substantive importance. In view of the lack of time at the Commission's disposal, it would be more prudent to delete the article altogether for the time

being. He would, however, have no objection if some other method of proceeding were adopted.

28. The CHAIRMAN said that the Chairman of the Drafting Committee might wish to hold a meeting of the Committee to reconsider article 28. If no agreement was reached in the Drafting Committee, then perhaps Mr. Reuter's proposal to delete the article could be adopted.

29. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that it was apparent from the wide divergence of opinion in the Commission that points of substance as well as drafting were involved. One point of substance concerned the need to recognize whether there was a grey area. If so, it would necessarily relate not only to interpretation, but also to matters not covered by the draft, and the difficulty could not be resolved by using the formula contained in the 1961 Vienna Convention. Consequently, there was no sense in discussing article 28 further until a decision was taken on article 6.

30. Mr. EL RASHEED MOHAMED AHMED said that the extreme positions taken by members were not conducive to compromise. For that reason he supported the proposal to place article 28 between square brackets; it could then be taken up on second reading.

31. Mr. DÍAZ GONZÁLEZ said that he was not convinced of the utility of article 28 but, so far as the Spanish text was concerned, it would be preferable to replace the word *limitar* in the first sentence by *restringir*. As to the second sentence, the meaning was already quite clear from the terms of article 3, namely that only acts performed in the exercise of the sovereign authority of the State enjoyed immunity. Consequently, the question of a grey area was not at issue: such areas would always exist. A decision on article 28 should be deferred until it was known what form article 6 would take. In that way, an interminable discussion would be avoided.

32. Sir Ian SINCLAIR said that he was very much opposed to deleting article 28 at the present stage. The best solution would be to place the article between square brackets and refer it to the General Assembly. It could then be transmitted to Governments for comment and, on that basis, be considered more closely on second reading.

33. Mr. USHAKOV said that, so far as he was concerned, the main point was not whether there was a so-called grey area. Obviously, if two States parties believed that there was a grey area, nothing prevented them from concluding a special agreement to regulate the matter. But that was not what was being proposed in article 28, for, under the terms of that article, a State could unilaterally restrict immunity, simply because it appeared "to be appropriate" to do so in certain circumstances, and hence it could violate the provisions of the future convention. What was more, some members held that another State could do likewise for reasons of reciprocity—reciprocity that might well take the form of an international crime. Countermeasures, on the other hand, were something quite different and could be

taken until such time as the first State ceased its violation.

34. Mr. KOROMA said that the question whether two or more States could agree among themselves to apply immunities restrictively was not in doubt. What was unacceptable was for one State to restrict immunity unilaterally and, in the process, compel another State to do likewise and classify it as reciprocity. He therefore strongly urged that the Special Rapporteur be allowed to work out a new text which would reflect members' reservations. If that was not possible, the article could be placed between square brackets and referred to the General Assembly.

35. Chief AKINJIDE said his fear was that article 28, which provided for a subjective test of reciprocity, could be used by a powerful State for punitive purposes. Of course there were certain grey areas, as everybody was only too well aware, but they had already been dealt with in, for instance, articles 12 [13], 13 [14], 16 [17], 17 [18] and 18 [19], all of which contained the introductory clause: "Unless otherwise agreed between the States concerned". Consequently, there was little point in retaining article 28, with or without square brackets. It might even do more harm than good, as had proved to be the case with various instruments of national legislation on immunity. The manner in which the courts had applied the United Kingdom *State Immunity Act 1978* and the United States *Foreign Sovereign Immunities Act of 1976* in cases in which he had been involved on behalf of his Government had been quite devastating. He therefore maintained the view that article 28 should be deleted.

36. Sir Ian SINCLAIR said that he wished to make it clear for the record that the Nigerian cement cases³ in the United Kingdom had been determined not under the *State Immunity Act 1978*, but according to the common law of England, which had reflected the views of the English courts on the trend in international law towards the restrictive doctrine.

37. The Commission was dealing with a very complicated area involving interactions between principles of public international law and the rules of civil jurisdiction under national systems of law. Many of the problems in international relations were caused by the lack of harmonization of those rules, although some progress in that direction had been achieved by the member States of EEC in the context of the 1968 Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments.

38. Article 28 also raised an important point of principle, for the obvious cases were regulated but certain limited instances still remained in which it simply was not possible to perceive all the kinds of cases involving foreign States that might arise before national courts in the future. As he saw it, therefore, article 28 related solely to the exceptions and limitations in part III of the draft which contained certain connecting factors, the effect of which would be virtually to establish a rule of immunity if a particular case was not fully covered by

³ *Trendtex Trading Corporation v. Central Bank of Nigeria* (1976) (*The Law Reports 1977, Queen's Bench Division*, p. 529); on appeal (1977) (*The All England Law Reports 1977*, vol. 1, p. 881).

those factors. He was willing to endeavour to narrow the terms of article 28 along those lines. Nevertheless, it might not prove possible to reach agreement in the short time available, in which case the article could, as he had already suggested, be placed between square brackets and forwarded to States for comment, with an indication in the commentary that there was a sharp division of views in the Commission on the need for the article.

39. Mr. SUCHARITKUL (Special Rapporteur) said that he was quite willing to prepare a revised version of article 28 for the Commission's consideration at the next meeting. Alternatively, he would be content to place the article between square brackets with an indication in the report on the present session that the Commission would revert to the article on second reading, at which time the question of deletion could be considered if necessary.

40. Mr. USHAKOV said that placing the article between square brackets would not be acceptable in any way. He requested that it be placed on record that he had not been able to participate in the Drafting Committee's work on article 28.

41. Mr. DÍAZ GONZÁLEZ said that he had no objection to the suggestion to place article 28 between square brackets or to incorporate some appropriate reference in the commentary. It should none the less be made quite clear that, if article 28 was referred to the General Assembly, it was precisely because the Commission had so decided and not because the Drafting Committee had approved the article. He wished his position in the matter to be placed on record.

42. Mr. KOROMA proposed that a decision on article 28 be deferred until the following day.

43. The CHAIRMAN suggested that article 28 should be placed within square brackets and that an appropriate explanation should be included in the Commission's report. In addition, if the Special Rapporteur prepared a revised version which received general acceptance in informal consultations, that version could be examined by the Commission after it had completed its consideration of article 6.

44. Chief AKINJIDE, supporting Mr. Koroma's proposal, said that the first issue to be decided was whether any revised draft of article 28 submitted by the Special Rapporteur was acceptable to the Commission. If it were, the question of square brackets would not arise. The two issues should in any event be discussed together at the Commission's next meeting.

45. Following a brief exchange of views in which Chief AKINJIDE, Mr. FRANCIS, Mr. KOROMA, Sir Ian SINCLAIR and Mr. SUCHARITKUL (Special Rapporteur) took part, the CHAIRMAN suggested that a decision on article 28 should be deferred until the following day.

It was so agreed.

ARTICLE 6 (State immunity) (*continued*)*

46. Mr. SUCHARITKUL (Special Rapporteur) said that he would like to know whether article 6 would be

* Resumed from the 1968th meeting, paras. 49 *et seq.*

acceptable to Mr. Ushakov if the phrase “and the relevant rules of general international law applicable in the matter” were deleted. He would also welcome other members’ views in that connection.

47. Mr. USHAKOV said that article 6 would be totally unacceptable to him unless the phrase in question were deleted. He noted that, whereas the English text used the expression “general international law”, the French text spoke simply of *droit international*. Again, a better title for part II would be “General rules”, since not all the articles in that part stated principles.

48. Sir Ian SINCLAIR said that article 6 had given rise to a very lengthy discussion in the Drafting Committee and it would be unwise for the Commission not to recognize that a number of members felt very strongly that the article would be acceptable only if it included the words “the relevant rules of general international law applicable in the matter”. His own view was that, however the article was formulated, it expressed a single basic rule and not a rule of immunity subject to exceptions. The limitations merged, as it were, with a statement of principle, which was the only way to achieve a consensus on the article.

49. Mr. KOROMA said that, although it had been affirmed that article 6 was unitary in intent, it had a dual application. There could be no other reason for the two elements of the formulation, namely “the provisions of the present articles” and “the relevant rules of general international law applicable in the matter”. The rules of jurisdictional immunity were much broader than were the latter. Hence article 6 was not acceptable.

The meeting rose at 5.25 p.m.

1971st MEETING

Thursday, 19 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

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

Visit by a member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Ago, a Judge of the International Court of Justice, and thanked him on behalf of the members of the Commission for the valuable contribution he had made to the Commission’s work, particularly when he had been Special Rapporteur for the topic of State responsibility.

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

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (continued)

ARTICLE 28 (Restriction of immunities)² (continued)

2. Mr. SUCHARITKUL (Special Rapporteur) said that, in response to the wishes of certain members, he had amended the title and reworded the text of article 28 to read:

“Article 28. Implementation provisions

“Subject to mutual agreement or on condition of reciprocity, immunity may be granted to a State, in respect of itself and its property, in connection with a proceeding before a court of another State, to a greater [wider] or lesser [narrower] extent than is required under the present articles, provided always that no such adjustment shall deprive any State against its will [without its consent] of the immunities it enjoys in respect of acts performed in the exercise of its sovereign authority.”

3. The new text dealt not only with the restriction of immunities, but also, like the former article 28 which he had submitted,³ with the possibility of granting immunities greater than those required under the draft articles. Accordingly, the title proposed by the Drafting Committee, “Restriction of immunities”, had been replaced by “Implementation provisions”.

4. Should the Commission be unable to reach a decision on the revised text, he suggested that it should be placed in square brackets as had sometimes been done in the past, for example at the thirtieth session, in the case of article 36 *bis* of the draft articles on treaties concluded between States and international organizations or between international organizations.⁴

5. Mr. USHAKOV said that neither article 28 as proposed by the Drafting Committee nor the text now proposed by the Special Rapporteur was acceptable to him. The granting of wider immunities than those required by the present articles did not need to be authorized either by the articles or by another State. Since greater liberality was always possible, the words “to a greater ... extent” were pointless.

6. Moreover, the last part of the article, beginning with the words “the immunities it enjoys ...”, implied that immunities were also granted to a State other than in respect of the exercise of its sovereign authority, which was inconceivable. A State might claim that another State was not exercising its sovereign authority in order to avoid applying the provisions of the articles and thus deprive that State of its immunities. Such a text

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

² For the text proposed by the Drafting Committee, see 1969th meeting, para. 109.

³ See 1942nd meeting, para. 10.

⁴ *Yearbook ... 1978*, vol. II (Part Two), p. 134.

would enable a State party to the future convention unilaterally to restrict its scope. If *acta jure gestionis* were introduced into the articles, that would play into the hands of multinational corporations, which were always ready to encroach upon the sovereignty of young States. Hence he was absolutely unable to accept article 28 in any form whatsoever.

7. Mr. KOROMA said that he doubted whether article 28 was really necessary, since it only said what States were in a position to do in any case. It was not desirable to put the matter in the form of a general rule, which could be misinterpreted as limiting the fundamental rule of State immunity. If the Commission wished to retain an article along the lines of article 28, however, he reserved the right to submit a reformulation of the text. He suggested that the title should be "Reciprocal immunities".

8. Sir Ian SINCLAIR made the informal suggestion that article 28 should be replaced by a text based on article 47 of the 1961 Vienna Convention on Diplomatic Relations, which might prove more acceptable to members. That text could read:

"Article 28

"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 a court of 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 different or more favourable treatment than is required by the provisions of the present articles.

"3. Paragraph 2 shall not be applied in such a way as to prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*)."

9. It would be noted that paragraph 2 (b) began with the words "where by agreement ...", unlike the corresponding provision of the 1961 Vienna Convention (art. 47, para. 2 (b)), which read: "where by custom or agreement ...". The formula which he proposed was thus similar to that used in the 1972 European Convention on State Immunity, which referred only to the possibility of different treatment by agreement between the States concerned.

10. Mr. USHAKOV said that the provision to be embodied in article 28 might be based on article 47 of the 1961 Vienna Convention or on similar articles of other conventions. He doubted whether courts could be referred to in that provision, because they applied internal law, even if that law followed the rules stated in the future convention or rules of customary international law. It would be preferable to refer only to the State of the forum. In any event, the proposed text was contrary to the principle *pacta sunt servanda*.

11. Sir Ian SINCLAIR said that he was prepared to remove the words "a court of" from his proposed

paragraph 2 (a), so that the opening words would read: "where the State of the forum ...".

12. Mr. REUTER said that, although he did not object to article 28, he would prefer not to take a position on it until Governments had commented on the delicate question of the relationship between the present articles and other treaties.

13. Mr. DÍAZ GONZÁLEZ said that the discussion could serve no useful purpose, since it related not to a drafting problem, but to a question of substance. He suggested that article 28 should be placed in square brackets and reconsidered only after the views of Governments were known.

14. Mr. SUCHARITKUL (Special Rapporteur) suggested that the Commission should suspend its consideration of article 28 pending circulation of Sir Ian Sinclair's redraft.

15. Mr. KOROMA urged the deletion of article 28. The first part of the article was controversial and the second part introduced nothing new.

16. Mr. LACLETA MUÑOZ suggested that the Commission should base article 28 on article 47 of the 1961 Vienna Convention, as Sir Ian Sinclair had done in his proposal, which should be made available in writing. Since no consensus had been reached, he would not oppose the deletion of article 28; instead of submitting a specific text to the Sixth Committee of the General Assembly, the Commission should refer in its report to the problems that had arisen, thus giving Governments an opportunity to state their views on the matter. The Commission should, as it were, act as a drafting committee for the Sixth Committee.

17. Sir Ian SINCLAIR said that, since the Drafting Committee's text had attracted some criticism, it might be advisable to place it in square brackets. As the Special Rapporteur had pointed out, there was a precedent in the draft articles on treaties concluded between States and international organizations or between international organizations, in which article 36 *bis* had been placed in square brackets, with the following footnote:

The Commission agreed at its 1512th meeting to take no decision concerning article 36 *bis* and to consider the article further in the light of comments made on the text of the article by the General Assembly, Governments and international organizations.⁵

The Commission could well follow that precedent and re-examine the article on second reading.

18. Chief AKINJIDE supported Mr. Koroma's proposal that article 28 be deleted. He had not heard a single convincing argument in favour of its inclusion in the draft, and if it were retained, the article would have economic, political and other implications that were more far-reaching than it appeared on the surface.

19. Mr. USHAKOV suggested that, since the only two possibilities were to retain or to delete article 28, a vote should be taken, even though the Commission rarely took votes on first reading.

20. Sir Ian SINCLAIR said that those two possibilities were not the only ones. The Commission also had

⁵ *Ibid.*, footnote 619.

before it a proposal to put the text of article 28 in square brackets and re-examine the matter on second reading in the light of the comments of Governments. The adoption of that proposal would be a fair compromise between the position of members who favoured the deletion of the article and that of members who believed that its provisions were essential. In any case, he did not favour taking a vote, something which the Commission had not done on first reading for many years.

21. Mr. RIPHAGEN, speaking as a member of the Commission, recalled that, at the start of the consideration of the topic at the current session (1942nd meeting), he had pointed out that the provisions of article 28 affected the whole draft. In the Sixth Committee, many years previously, he had expressed doubts as to whether it was possible to frame an international convention covering all cases of immunity and non-immunity. Since then, the European Convention on State Immunity had been concluded (1972), and that Convention certainly did not achieve such a full coverage. In view of the gaps that remained, an article along the lines of article 28 was necessary in the draft.

22. Speaking as Chairman of the Drafting Committee, he said that, if the Commission was unable to agree on the article, the best solution would be to place the text in square brackets, as had been done in 1978 with the article 36 *bis* referred to by other speakers. It was interesting to note that the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations had not included that article 36 *bis* in the final text of the Convention.⁶ Some participants had considered that it went too far, while others had thought that it did not go far enough.

23. Mr. ARANGIO-RUIZ urged the suspension of the discussion on article 28, in the hope that agreement might be facilitated.

24. Mr. KOROMA said that no one appeared to be satisfied with the text which the Drafting Committee had proposed for article 28. He would prefer to await circulation of the texts proposed by the Special Rapporteur and Sir Ian Sinclair.

25. Mr. TOMUSCHAT said that the text read out by Sir Ian Sinclair was much closer to what many members could accept. He suggested that the Commission should wait until it had received that text in all the working languages before proceeding with the discussion.

26. Mr. DÍAZ GONZÁLEZ said that the analysis by the Chairman of the Drafting Committee had been most judicious and his arguments quite convincing. The Commission had to take a decision either to delete article 28 or to place it in square brackets and state the reasons for doing so in its report, which meant explaining that the majority was not in favour of including such a provision in the draft.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to

suspend consideration of article 28 and to resume the discussion of article 6.

It was so agreed.

ARTICLE 6 (State immunity)⁷ (concluded)

28. Mr. SUCHARITKUL (Special Rapporteur) said that the text before the Commission was the outcome of the Drafting Committee's efforts to arrive at a compromise formula. Unfortunately, Mr. Ushakov had been absent at the time of the Committee's meetings and now found unacceptable the reference to "the relevant rules of general international law applicable in the matter". Some other members, however, believed that those words were essential, or at least useful.

29. Sir Ian SINCLAIR said that article 6 had been the subject of a long and difficult debate in the Drafting Committee, precisely because he and other members believed it was necessary to include the concluding words. Those words made it clear that the rule embodied in article 6 was stated within the framework of future developments in international law. The matter was not one that could be covered by the provisions of article 28.

30. Mr. USHAKOV said that the situations in regard to articles 6 and 28 were not quite the same, because article 28 was totally inadmissible, whereas in article 6 only the words "and the relevant rules of general international law applicable in the matter" were unacceptable. He proposed that those words should be placed in square brackets and that the report should indicate that the Commission had not been able to reach a decision on them. If the Commission had been considering article 6 on second reading, he would have asked for a vote on those words.

31. Mr. ARANGIO-RUIZ observed that the English text of article 6 referred to "general international law", whereas the French text referred only to *droit international*. If the Commission replaced the words "and the relevant rules of general international law applicable in the matter" by the words "and any relevant rule of general international law", it would avoid a *renvoi* to the existing general rules applicable in the matter at present, without neglecting the possibility of future development of international law. The deletion of the words "applicable in the matter" would clearly show that the draft articles were meant to codify international law and take precedence over any other rule. In that form, the passage in question would refer to any possible future development of general international law, which was in the hands of the international community.

32. Mr. LACLETA MUÑOZ, referring to the Spanish text, said that the words *sin perjuicio de lo dispuesto* could be interpreted in two opposite ways and should be replaced by the words *según lo dispuesto*. He shared Mr. Arangio-Ruiz's view concerning the reference to "the relevant rules of general international law applicable in the matter"; the references to customary law in many of the Commission's draft articles were only justified in so far as the Commission might doubt

⁶ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted on 20 March 1986 (A/CONF.129/15).

⁷ For the text, see 1968th meeting, para. 49.

whether it had attempted complete codification. If the Commission had tried to codify international law, there was no reason to refer to “the relevant rules of general international law applicable in the matter”, because it was those rules that it had tried to codify. By retaining the words in question, it would give the impression that it was convinced that it had not codified general international law. He therefore suggested that the Commission should either delete those words or adopt Mr. Arangio-Ruiz’s proposal.

33. Mr. KOROMA urged the deletion of the last phrase from article 6. As it stood, the article went beyond mere codification. To legislate for the future was to enter the realm of uncertainty.

34. Mr. CALERO RODRIGUES said that he would welcome the deletion of the concluding phrase, which he had accepted in the Drafting Committee only in a spirit of compromise, because other members had pressed for it. In view of the continuing division of opinion on the matter, he supported the proposal by Mr. Ushakov that the phrase should be placed in square brackets.

35. Mr. USHAKOV said that, in his opinion, the reference to “the relevant rules of general international law applicable in the matter” implied that the Commission had not found all the exceptions provided for by international law. It would be ridiculous to provide that the future convention would be subject to customary international law. From those few words it could be concluded that the Commission had not been able to analyse and codify the rules of customary international law. The words in question should therefore be placed in square brackets and the report should explain the differences of opinion that had emerged during the debate.

36. Mr. BALANDA said he had always thought that the draft articles should constitute a *corpus juris* intended to govern jurisdictional immunities and nothing else. He considered that, if the phrase in question were not deleted, it should at least be placed in square brackets.

37. Chief AKINJIDE said that very few members wished to retain the controversial concluding phrase of article 6. If it were taken to relate to existing international law, it would constitute an admission that the Commission had not fulfilled its task of codification. But at the same time, it would not be possible to take account of an unknown future. Thus the phrase did not appear to serve any purpose. If the Commission could not agree to delete it, it should at least be placed in square brackets.

38. Mr. BARBOZA said that he shared the views of Mr. Calero Rodrigues, Mr. Lacleta Muñoz, Mr. Ushakov, Mr. Balandá and Chief Akinjide. If the Commission was engaged in codification, there was no need for it to refer to general international law unless the future convention was to be an instrument of a residuary nature and the rules of general international law were to take precedence over its provisions. Thus the last phrase of article 6 was entirely unnecessary. If general international law applicable in the matter developed in the future, the same would happen to the future convention as to other conventions, namely one

or other of its provisions would fall into desuetude and be replaced by a new rule of general international law. But the Commission was not obliged to provide for that situation. If the words in question could not be deleted, the compromise solution of placing them in square brackets would be acceptable to him.

39. Mr. REUTER said that he was categorically in favour of retaining the concluding phrase. All the draft articles prepared by the Commission testified to remarkable work that could not be called into question by a few words. His conception of the advantages of a very detailed text was not the same as that of other members of the Commission. He warned them against the tendency to reason as though texts were perfect and had the simplicity and clarity of mathematical operations. However detailed it might be, the text under consideration contained gaps and ambiguous wording that was open to different interpretations. In his view, the Commission had not laid down the principle of immunity in absolute terms; it had drafted a moderate and wise text which took account of the realities of immunity, but also took other factors into consideration and was thus a work of conciliation. Hence he could not accept the idea that the Commission had established a presumption of general immunity apart from a strict interpretation of the texts.

40. The interpretation and application of the articles and the solution of the other problems they raised should benefit from the same spirit of conciliation as had prevailed during the elaboration of the draft. The Commission should keep faith with its work and take account of factors other than the rule of immunity. It had been said that the immunities of a head of State were purely functional; he was one of those who thought that the State could enjoy only functional immunities and did not believe in immunity by divine right. He did not approve of the idea of replacing the concept of the sovereign by that of the State. The phrase to which objection had been raised had no other purpose than to show that a spirit of conciliation and compromise had prevailed during the preparation of the draft, which relied on other realities than that of an immunity by divine right.

41. Mr. TOMUSCHAT said he agreed that, in view of the objections of some members, the concluding phrase should be placed in square brackets. For his part, he had some difficulty in understanding the meaning of that phrase. It could be interpreted as meaning that States had a choice between following the provisions of the present articles and following those of the relevant rules of general international law. Such an interpretation would undermine the whole future convention.

42. There would inevitably be some gaps in the rules set out in the draft articles, so there was room for a provision along the lines of the contested phrase; but the present wording could cause misunderstanding. The best course would therefore be to place it in square brackets.

43. Mr. ARANGIO-RUIZ recalled that, unlike the English-speaking countries, his country and others had long since adopted the principle of relative rather than absolute State immunity. At the time when the English-

speaking countries had begun to adopt a more sensible approach to the issue, which had a human rights aspect, there had been a different, entirely respectable exigency in the international community. That was the need, in view of the gap between North and South, to protect the southern countries from the theory of restricted immunity. It was a positive step to widen the scope of immunity in the draft articles, which codified general international law and which he believed would become written law.

44. Referring to remarks by Mr. Ushakov, he said there was no danger that his suggestion might be taken to imply that the future convention might be modified by the general international law of the future. The deletion of the words "applicable in the matter" would leave open the possibility of future developments, such as an eventual limitation of the degree of immunity when the gap between North and South had been reduced.

45. Mr. DÍAZ GONZÁLEZ said that he had been opposed from the outset to the inclusion in article 6 of the words "and the relevant rules of general international law applicable in the matter", to which he had agreed only so that the Drafting Committee might reach a compromise. Although he would not go into all the pertinent arguments advanced in favour of deleting that phrase, he wished to remind the Commission that law, like society, was constantly changing. What was true today might no longer be true tomorrow. Legal rules had to be adapted and amended according to the international situation, development, and social change.

46. The best solution would therefore be to delete the phrase in question, thereby strengthening the principle of the jurisdictional immunity of States enunciated in the first part of the article. If the Commission decided to retain it, however, he too would be in favour of placing it in square brackets and deleting the words "applicable in the matter".

47. Mr. MAHIOU said that, in his opinion, the words "and the relevant rules of general international law applicable in the matter" could well be deleted; but since the Commission was still divided on the issue, the best solution might be to place those words in square brackets.

48. Sir Ian SINCLAIR said that, for the reasons given by Mr. Reuter, he was in favour of retaining the whole text of article 6. He agreed with Mr. Díaz González that the law was in a constant state of evolution; that applied both to general international law and to other systems. In the circumstances, it was important for article 6, which stated the basic principle of immunity within the concept of a unitary rule, to include the possibility of further developments in general international law in that context. He had no objection to the deletion of the words "applicable in the matter", as proposed by Mr. Arangio-Ruiz, since they were largely covered by the phrase "relevant rules of general international law".

49. Mr. KOROMA said that he was not certain which of the several suggested explanations of article 6 would be included in the commentary.

50. Mr. REUTER pointed out that the French text needed to be brought into line with the English by adding the word *général* after the words *droit international*.

51. The CHAIRMAN, noting that a considerable number of members of the Commission appeared to be in favour of placing the phrase "and the relevant rules of general international law" in square brackets, and of deleting the words "applicable in the matter", suggested that article 6 should be amended in that way.

It was so agreed.

52. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 6 proposed by the Drafting Committee, as amended.

Article 6 was adopted.

TITLE OF PART II (General principles)

53. The CHAIRMAN, noting that Mr. Ushakov had proposed that part II should be entitled "General rules" rather than "General principles" (1970th meeting, para. 47) and that Mr. Francis had proposed the title "General provisions" (1968th meeting, para. 53), invited members to take a decision on those two proposals.

54. Mr. FRANCIS said that his main objection to the title "General principles" had been that the text, from article 7 through to the end of part II, appeared to be wider in scope than that title implied. However, he thought that the title could be left to the discretion of the Drafting Committee.

55. The CHAIRMAN suggested that, for the time being, the present title should be retained and that Mr. Francis's comments should be reported in the summary record of the meeting.

It was so agreed.

TITLE OF PART III (Limitations on State immunity) (*concluded*)*

56. The CHAIRMAN invited the members of the Commission to take a decision on the title of part III, in which it had been proposed that the words "Limitations on" should be replaced by "Exceptions to".

57. Sir Ian SINCLAIR said that there had been a long discussion in the Drafting Committee concerning the title of part III. The conclusion had been that the word "limitations" was preferable given the general understanding that what was sought in article 6 was a unitary rule susceptible of the interpretation given to article 6 of the 1958 Convention on the Continental Shelf in the *Case concerning the delimitation of the Continental Shelf* between the United Kingdom and France (1977).⁸ The Court of Arbitration had found that article 6 of the Convention was a single rule, and that the exception formed part and parcel of the rule itself. The Drafting Committee had considered that the same

* Resumed from the 1968th meeting, paras. 57 *et seq.*

⁸ United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 3.

reasoning applied to the articles under consideration and that it was therefore preferable not to use the word "exceptions" in the title of part III.

58. Mr. SUCHARITKUL (Special Rapporteur) said that he had no strong objections to the use of the word "limitations".

59. Mr. BARBOZA said that it would be preferable to use the word "exceptions", for if the word "limitations" were retained, the title would apply more to the provisions of article 6 of part II than to those of the articles in part III.

60. Mr. KOROMA said that, despite the explanation given by Sir Ian Sinclair, he believed the word "exceptions" would be more appropriate in the title of part III. A rule had been stated, albeit restrictively, in article 6 and exceptions to that rule were set out in the following articles.

61. Mr. MAHIOU said that he preferred the word "exceptions", which had, moreover, been used in the text originally submitted by the Special Rapporteur.

62. Mr. RIPHAGEN (Chairman of the Drafting Committee), supported by Mr. KOROMA and Chief AKINJIDE, suggested that the best course would be to include both proposals in the title in square brackets.

63. Mr. USHAKOV said that he, too, thought it would be better to use the word "exceptions", which corresponded to the content of the articles of part III; but he would not press the point.

64. Mr. MAHIOU observed that none of the members of the Commission who had stated a preference for the word "exceptions" had requested that it should be substituted for the word "limitations" forthwith or that the word "limitations" should be placed in square brackets. There was thus no need to go as far as the Chairman of the Drafting Committee had suggested. The word "limitations" could be retained without being placed in square brackets. It would suffice if the views of members who were in favour of using the word "exceptions" were reported in the summary record of the meeting.

65. Mr. RAZAFINDRALAMBO said that he was one of the members of the Drafting Committee who had agreed to the compromise solution of retaining the word "limitations", even though he preferred the word "exceptions". But if article 28 were adopted, even in square brackets, he would prefer the word "exceptions" to be used in the title of part III, in order to avoid confusion with the title of article 28.

66. Mr. BARBOZA proposed that, instead of replacing the word "limitations" by "exceptions", both words should be placed in square brackets, as the Chairman of the Drafting Committee had suggested. That solution appeared to be more in keeping with the Commission's wishes.

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that the words "exceptions" and "limitations" were to

be placed in square brackets in the title of part III, in accordance with the wishes of many members.

It was so agreed.

ARTICLE 28 (Restriction of immunities) (*continued*)

68. Sir Ian SINCLAIR proposed the following text:

"Article 28

"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 different or more favourable treatment than is required by the provisions of the present articles.

"3. Paragraph 2 shall not be applied in such a way as to prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*)."

69. Mr. USHAKOV said that, subject to minor drafting changes, paragraphs 1 and 2 of the proposed text were acceptable. But the same was not true of paragraph 3, which, not to mention the reference to *acta jure imperii*, was unacceptable because it nullified the provisions of paragraph 2.

70. Under paragraph 3, the State of the forum, referred to in paragraph 2 (a), could not apply a provision of the articles restrictively because of a restrictive application of that provision by the other State if that other State had acted in the exercise of sovereign authority. If that other State violated a provision of the articles, but did so in the exercise of sovereign authority, the forum State could not take countermeasures, for they would prejudice the exercise of sovereign authority by the other State.

71. Again, under paragraph 3, two States which wished to extend to each other different treatment, in accordance with paragraph 2 (b), could do so only if such treatment did not prejudice the exercise of sovereign authority.

72. Paragraph 3 would thus prevent States from concluding agreements that were in their interests, and was therefore unacceptable. States were free to conclude any agreement they wished, whether in respect of *acta jure imperii* or in respect of *acta jure gestionis*, and the draft articles, which did not enunciate peremptory norms of international law, could not restrict their freedom to do so.

73. Mr. FRANCIS, referring to remarks made by Mr. Tomuschat, said that the text proposed by Sir Ian Sinclair represented an excellent attempt to align the Commission's approach with article 47 of the 1961 Vienna Convention on Diplomatic Relations, and for that reason paragraphs 1 and 2 were completely accept-

able to him. But inasmuch as paragraph 3 introduced a new dimension to article 47 of the Vienna Convention, by removing from the area of restriction immunities relating to the exercise of sovereign authority, he would reserve his position on that paragraph.

74. Mr. KOROMA pointed out that the main objection to article 28 had been the fact that it could be interpreted unilaterally and therefore encourage violation of the principle *pacta sunt servanda*. The new text proposed by the Special Rapporteur (para. 2 above) met that objection by making immunity subject to mutual agreement or reciprocity and should therefore be given close attention by the Commission. Sir Ian Sinclair's draft had not removed that objection, since it left open the possibility of forcing a respondent State to act likewise in relation to a State which unilaterally violated the principle *pacta sunt servanda*.

75. Sir Ian SINCLAIR said that he had no pride of authorship in his proposed text for article 28, which he had put forward only because the Special Rapporteur's proposal seemed to be drawing some criticism. If there was a consensus to accept the Special Rapporteur's draft, he would certainly not oppose it.

76. As to Mr. Ushakov's objection to paragraph 3, that paragraph was an integral part of the proposal, since it attempted to indicate a bedrock limit beyond which a State could not apply a restrictive approach to the present articles or by agreement extend treatment different from that required by them. That issue had nothing to do with what would happen if a State violated the future convention, in which case countermeasures could be taken within the framework of the articles on State responsibility. That possibility was not precluded by paragraph 3 and, indeed, was an entirely different issue.

77. Mr. LACLETA MUÑOZ said that the advantage of the text submitted by Sir Ian Sinclair was that paragraph 2 (a) provided that the State of the forum could, by way of reciprocity, restrictively apply any provision of the articles which the other State concerned had applied restrictively, while allowing it to claim that there had been a violation of the articles. Thus it could not be said that the State which had been the first to apply a provision restrictively was telling the other State how it must act. The other State had a choice of two possible courses: it could either decide to interpret the provision restrictively itself, or claim that there had been a violation of the articles and act accordingly.

78. The problem that arose was whether paragraph 3 should also apply to the case covered by paragraph 2 (b). That was in the realm of *jus cogens*. In his view, States were free to modify the provisions of the draft articles as they saw fit. The wording of paragraph 3 should therefore be amended to make it clear that it applied only to paragraph 2 (a).

79. Mr. TOMUSCHAT, replying to Mr. Koroma's objections to Sir Ian Sinclair's draft, pointed out that the first two paragraphs were based on universally recognized and accepted treaty practice, since article 47 of the 1961 Vienna Convention was the model followed in the new version of article 28. He believed that a

distinction must be made between violation of a treaty and restrictive application of its provisions, which was the language now used in paragraph 2 (a). Since all members of the international community had accepted article 47 of the Vienna Convention, it was quite normal to include a similar provision in the draft articles on State immunities.

80. Referring to Mr. Lacleta Muñoz's remarks, he agreed that paragraph 3 should not apply to paragraph 2 (b) because, as Mr. Ushakov had pointed out, States were free to regulate their mutual relations as they saw fit and to extend to each other more liberal or more restrictive treatment than that required by the present articles. He had no objection to the deletion of paragraph 3, however, because it introduced the concept of *acta jure imperii*, which did not appear anywhere else in the draft articles and could give rise to difficulties of interpretation.

81. Mr. USHAKOV said that article 47, paragraph 2 (a), of the 1961 Vienna Convention on Diplomatic Relations, which stated that discrimination would not be regarded as taking place

(a) Where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;

certainly did not provide that the sending State was entitled to apply the provisions of that Convention restrictively. A sending State which had ratified the Convention and applied one of its provisions restrictively was not respecting the obligations it had undertaken and was committing a breach. It was true that, although there certainly was a breach in such a case, article 47 did not expressly say so; but it could not therefore be concluded that a State which had ratified the Convention was free to apply its provisions restrictively. The article simply provided that it was not discriminatory for a State to apply one of the provisions of the Convention restrictively by way of a countermeasure.

82. Mr. KOROMA said it was obvious that the Commission was not going to come to a conclusion easily; there appeared to be a fundamental objection to article 28 as presently drafted. He wondered whether it might not be preferable to delete article 28 and submit both the new proposals to the Sixth Committee of the General Assembly. He suggested that, in the first part of the new text proposed by the Special Rapporteur (para. 2 above), the words "in connection with a proceeding before a court of another State" should be deleted.

83. Mr. SUCHARITKUL (Special Rapporteur) said that he agreed with Mr. Koroma: it was time for the Commission to decide not to take a decision. The Drafting Committee's text should be placed in square brackets and the new proposals included in the commentary and footnotes to article 28. He agreed to the deletion of the phrase mentioned by Mr. Koroma.

84. Chief AKINJIDE said he thought that the Special Rapporteur's proposal was a retrograde step. If the three drafts were to be included in the report, they should all be placed on an equal footing.

The meeting rose at 1.05 p.m.

1972nd MEETING

Friday, 20 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

later: Mr. Alexander YANKOV

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

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

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

ARTICLE 28 (Restriction of immunities) (concluded)

1. Mr. SUCHARITKUL (Special Rapporteur) thanked members for their co-operation over the past 10 years. Twenty-seven of the draft articles had been adopted, and only one remained. He hoped that the Commission could take a decision that would make it possible to transmit the draft articles to Governments in accordance with the Commission's statute.

2. A new draft of article 28 had been prepared by several members on the basis of Sir Ian Sinclair's proposal (1971st meeting, para. 68), and that was encouraging. Speaking as a member of the Commission, he was glad to be able to say that any one of the proposed versions of article 28 would be acceptable to him.

3. Mr. REUTER said that, after informal consultations, he and several other members of the Commission wished to propose a new text for article 28 which largely reproduced the first two paragraphs of the text proposed by Sir Ian Sinclair. That text read:

"Article 28

"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."

Since the informal group which had drafted the text had not chosen a title, members of the Commission might perhaps make suggestions.

4. Mr. USHAKOV said that he could accept the text read out by Mr. Reuter.

5. Mr. EL RASHEED MOHAMED AHMED said that he had been authorized by Chief Akinjide and Mr. Koroma to say that they joined him in accepting the text just read out by Mr. Reuter. Adopting that text would be an appropriate way to conclude the Commission's work on State immunity and to express gratitude to the Special Rapporteur.

6. Sir Ian SINCLAIR said that he had no objection to the new text, which was largely based on his own proposal. He would like to put on record, however, that deleting paragraph 3 of his draft meant that the Commission would have to concentrate more closely on the concluding phrase of article 6, which had been placed in square brackets. Any restrictive application pursuant to article 28 would have to take into account the "relevant rules of general international law".

7. Mr. USHAKOV said that the rules of general international law referred to in the last phrase of article 6 related not to the principle of immunity, but to exceptions to that principle. Hence the comment made by Sir Ian Sinclair was not valid.

8. Mr. DÍAZ GONZÁLEZ said that, although he would certainly have preferred article 28 to be deleted, he had no objection to the new compromise text.

9. Mr. RAZAFINDRALAMBO, speaking also on behalf of Mr. Mahiou, said that he would join the majority of the members of the Commission who were in favour of the new draft article 28, even though he had some reservations about paragraph 2 (a). It was to be feared that the provisions of that subparagraph might be applied in a manner prejudicial to third world countries, which always appeared as plaintiffs in the courts of industrialized investor countries.

10. Mr. LACLETA MUÑOZ said that he supported the text read out by Mr. Reuter.

11. Mr. BALANDA said that he would support the general opinion, even though he thought that paragraph 2 (a) could not be interpreted as implicitly authorizing States parties to evade their obligations by violating any provision of the future convention on jurisdictional immunities.

12. Mr. FRANCIS said that he endorsed the points made by Mr. Razafindralambo and Mr. Balanda; if paragraph 3 of Sir Ian Sinclair's text had been retained, paragraph 2 (a) would have been made much tighter.

13. The CHAIRMAN, noting that there was general agreement, suggested that the Commission should provisionally adopt the text of article 28 submitted by the informal group of members.

It was so agreed.

14. The CHAIRMAN invited the Commission to decide on the title of article 28.

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

15. Sir Ian SINCLAIR proposed that the title should be "Non-discrimination", which was the title of article 49 of the Convention on Special Missions.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Sir Ian Sinclair's proposal for the title of article 28.

It was so agreed.

Article 28 was adopted.

ADOPTION OF THE DRAFT ARTICLES ON FIRST READING

17. The CHAIRMAN, noting that the first reading of the draft articles on jurisdictional immunities of States and their property had been completed, suggested that the Commission should adopt the whole set of draft articles as amended during the discussions, on the understanding that the comments made by members of the commission would be reflected in the summary records.

It was so agreed.

The draft articles on jurisdictional immunities of States and their property were adopted on first reading.

TRIBUTE TO THE SPECIAL RAPPORTEUR

18. Mr. REUTER speaking also on behalf of many other members of the Commission, proposed the following draft resolution:

"The International Law Commission,

"Having adopted provisionally the draft articles on jurisdictional immunities of States and their property,

"Desires to express to the Special Rapporteur, Mr. Sompong Sucharitkul, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on jurisdictional immunities of States and their property."

19. The CHAIRMAN invited the Commission to adopt that draft resolution.

The draft resolution was adopted.

20. Mr. SUCHARITKUL expressed his deep gratitude to the members of the Commission, and in particular to Mr. Reuter. What he had learned with the Commission he would cherish for the rest of his life. He believed that the measure of a man's greatness was not his ability to create or destroy, but his capacity to endure the hardship and suffering so often visited upon human beings.

21. The CHAIRMAN said that Mr. Sucharitkul had performed a task of great historical significance. His merit was all the greater because the topic entrusted to him, being at the confluence of public international law, private international law and other legal disciplines, was extremely complex and delicate. His wisdom and level-headedness, and the spirit of conciliation and compromise that he had displayed throughout the work, had enabled him to achieve remarkable results.

Mr. Yankov took the Chair.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,² A/CN.4/394,³ A/CN.4/402,⁴ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf.Room Doc.5⁵)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

22. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the topic (A/CN.4/402).

23. Mr. BARBOZA (Special Rapporteur) said that, in his preliminary report (A/CN.4/394), he had begun with a review of the work that had been done thus far, and had noted that the discussion of the topic had been divided into two stages: one before and one after the submission of the schematic outline.

24. During the first stage, when basic problems had been discussed, the previous Special Rapporteur's main concern had been to dissociate his topic from that of State responsibility for wrongful acts. That had been essential, because the question of prevention also seemed to be part of the topic of State responsibility. He had not found it satisfactory to base the whole draft on strict liability, partly because he had not thought that such liability really had a basis in international law and partly because, if he had followed that course, he would have had to leave aside obligations of due care.

25. In order to find a broader legal foundation for the two components of prevention and reparation, the previous Special Rapporteur had adopted the principle reflected in the maxim *sic utere tuo ut alienum non laedas*. Since that principle was very general, it had had to be adapted to the two objectives of minimizing the possibility of loss or damage and, where necessary, providing means of redress without restricting the freedom of States to undertake, in their territory, activities which might be useful.

26. The previous Special Rapporteur had used two means of separating the present topic from that of State responsibility: he had confined it to the realm of primary rules and treated obligations of prevention as consisting only in the duty to take account of the interests of other States.

27. After the submission of the schematic outline, the previous Special Rapporteur had, with the approval of the Commission and the General Assembly, undertaken to define the content of the topic. The survey of State practice with regard to transboundary loss or injury arising out of acts not prohibited by international law, prepared by the Secretariat (A/CN.4/384), had shown

² Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

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

⁴ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

⁵ The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

that there was abundant State practice and had confirmed that, despite all the difficulties encountered, work on the topic should continue. In his fifth report, the previous Special Rapporteur had submitted five draft articles,⁶ but it had not been possible to refer them to the Drafting Committee.

28. In his own preliminary report, after reviewing the work done so far, he had said that what he intended to do in the immediate future was to avoid reopening the general discussion and work on the basis of the raw material provided by the schematic outline, by making comments and proposing changes he considered necessary in the light of State practice.

29. He had also said that he intended to give detailed consideration to such questions as causality, shared expectations, the incomplete obligations of prevention envisaged in the schematic outline, the duty to make reparation and the role of international organizations, which had all been commented on during the discussions, and to leave open the question of the final scope of the topic. He had also indicated that he intended to re-examine the five draft articles submitted by the previous Special Rapporteur.

30. Except for the questions of causality and the role of international organizations, which he preferred to consider at a later stage, he had dealt with all those matters in his second report (A/CN.4402), which began with three preliminary questions. The first concerned the use of the terms "responsibility" and "liability" in English. He would not go into the complexities of common-law legal terminology, but it should be noted that, like the French term *responsabilité* and the Spanish term *responsabilidad*, those two terms referred both to the consequences of wrongfulness—secondary obligations—and to the obligations incumbent on any person living in society. Thus, if the Commission took account of both meanings of those terms, which included obligations of prevention, it would not be going beyond the scope of the topic.

31. The second question concerned the unity of the topic, which the previous Special Rapporteur had endeavoured to preserve by linking the concepts of prevention and reparation, so as to overcome that dichotomy. In order to strengthen the unity of the topic, he himself was proposing "injury" as a unifying agent. Injury which had already occurred, in the case of reparation, and potential injury, in the case of prevention, constituted the cement of the prevention-reparation continuum. Moreover, by emphasizing the concept of injury, the Commission would be moving further away from the sphere of State responsibility for wrongful acts, since, in part I of the draft articles on that topic, injury had not been taken into account in defining the conditions for the existence of an internationally wrongful act.

32. The third question concerned the scope of the topic. He had taken as a point of departure the idea put forward by the previous Special Rapporteur that the source State had a duty to avoid, minimize or repair any

"appreciable" or "tangible" physical transboundary loss or injury when it was possible to foresee a risk of such loss or injury associated with a specific activity; but he did not intend to disregard the possibility of revising or changing that idea, if necessary.

33. In his second report, which dealt only with the schematic outline as revised by the previous Special Rapporteur in his fourth report,⁷ he made a critical analysis of the dynamics of the outline, but left aside for the time being the factors set out in section 6, the matters dealt with in section 7, and the settlement of disputes. He did not refer to the five draft articles submitted later by his predecessor, and that explained why such important questions as whether the topic covered "situations" as well as "activities" were not discussed.

34. The schematic outline consisted of two parts. The first dealt with treaty régimes to govern hazardous activities, while the second related to the rights and obligations which arose when loss or injury occurred and no treaty régime existed.

35. Two obligations were provided for in the first part: the obligation of States to supply information on the kinds and degrees of loss or injury that might be caused by any hazardous activity carried out in their territory, and the obligation to propose remedial measures. The obligation to provide information differed from the obligation to propose remedial measures in that, although failure to fulfil the first could entail adverse procedural consequences—without prejudice to those provided for by general international law—the second did not give rise to any right of action. If the measures proposed did not satisfy the affected State, that second obligation became an obligation to enter into negotiations for the establishment of fact-finding and conciliation machinery, which also did not give rise to any right of action.

36. If the two States concerned were unable to establish fact-finding machinery, if such machinery was ineffective or if it so recommended, the obligation would then become an obligation to enter into negotiations to determine whether a régime should be established between those two States and, if so, what form it should take. Those were combined obligations: they would lead to the establishment of a régime and contribute to prevention, because they would allow the affected State to take measures unilaterally for that purpose and because such a régime would promote prevention.

37. In addition to those obligations, there appeared to be a pure obligation of prevention. Since the compulsory nature of prevention was not entirely clear from the wording of section 2, paragraph 8, of the schematic outline, which was identical with that of section 3, paragraph 4, it could and should be explained when draft articles came to be formulated. The source State was under an obligation to keep the hazardous activity under review and to take any measures it deemed necessary and feasible to safeguard the interests of the affected State. The schematic outline did not contain any indication of a possible right of action in respect of that obligation.

⁶ For the texts of draft articles 1 to 5 submitted by the previous Special Rapporteur, see *Yearbook ... 1984*, vol. II (Part Two), p. 77, para. 237.

⁷ See footnote 5 above.

38. The second part of the schematic outline dealt with reparation for injury in the absence of a treaty régime. It provided for an obligation of reparation, so that, subject to certain conditions, an innocent victim would not be left to bear his loss or injury. Reparation was subject to two conditions, namely shared expectations and actual negotiation, during which a number of factors had to be taken into account in determining the amount of compensation.

39. There were two types of shared expectation. They could derive from some prior understanding between the parties to the negotiation, from common principles, or from patterns of conduct defined at the bilateral, regional or international levels.

40. In view of the arguments that might be taken into account during negotiations relating to reparation, such reparation might be different from that made, for example, as a result of a wrongful act. In the latter case, it would be necessary either to restore the situation that had existed at the time the injury had occurred or to compensate the affected State. In the case of the negotiations under consideration, however, account would be taken of other elements, such as the reasonable nature of the conduct of the source State, the expenses it had incurred to prevent injury and the usefulness of the activity in question to the affected country. Such a system was, moreover, quite close to the practice of States, which often set a limit on the amounts of compensation, and to what was provided for *mutatis mutandis* in the internal law of some countries.

41. The most important principle was that enunciated in section 5, paragraph 1, which was based on Principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration)⁸ and was intended to ensure that all human activities in the territory of a particular State were conducted with as much freedom as was compatible with the interests of other States. That principle was associated with two other principles: the principle of prevention—standards of prevention always being determined in the light of the means available to the source State and the importance and economic viability of the activity in question (sect. 5, para. 2)—and the principle of reparation (sect. 5, para. 3). There was also a principle relating primarily to legal procedure, which was based on a rule stated by the ICJ in the *Corfu Channel* case (merits).⁹ According to that principle, the affected State would be allowed liberal recourse to inferences of fact and circumstantial evidence or proof in order to establish whether the activity in question might give rise to loss or injury.

42. In his critical analysis of the schematic outline, he had noted that, whereas the English and Spanish titles of the topic referred to “acts”, the outline referred only to “activities” which might have injurious consequences. It was the latter term that should be adopted.

43. The activities in question were those which gave rise or might give rise to transboundary injury, whether

they were ultra-hazardous—with a low risk of catastrophic damage—or simply involved a high risk of minor damage. According to some writers, the topic did not cover activities which caused pollution, because States knew, or were in a position to know, the causes of such pollution, which was, moreover, prohibited beyond a certain threshold. Although he would not take a position in the matter, he must point out that activities which might accidentally cause serious pollution would come within the scope of the topic under consideration and that, in any event, the affected State would have two possible courses of action: either it could claim that the activity in question was wrongful and require that its effects should cease, or it could rely on the articles the Commission would prepare and require not only the establishment of a treaty régime between the parties concerned, but also compensation for the damage caused.

44. There were also some heterogeneous activities whose wrongfulness was precluded under articles 29, 31, 32 and 33 of part 1 of the draft articles on State responsibility.¹⁰ Although such activities were not wrongful, compensation had to be paid for any injury they might cause.

45. The obligations were complete obligations whose breach entailed consequences, and he had reached the conclusion that a right of action must not be ruled out. Otherwise, the affected State might not be in a position to take action, as it might be permitted to do under general international law, to compel the source State to perform its obligations.

46. Three possible approaches had been considered in the report. He had ruled out the first, which was to leave things as they were, and the second, which was to provide for sanctions, since it would oblige the Commission to venture into the realm of secondary rules. The third approach was to delete the first sentence of section 2, paragraph 8, and of section 3, paragraph 4, of the schematic outline, concerning the absence of a right of action, and that was the solution he recommended.

47. Injury caused in the absence of a treaty régime gave rise to an obligation to negotiate with a view to making reparation (sect. 4, para. 1, *in fine*) and raised the question of the obligation of reparation and its justification. It had been recognized in earlier reports that, despite the objections to what was known as “strict liability” in international law, that liability formed the basis of the obligation of reparation, although efforts had been made to strengthen that obligation so that it would not derive exclusively from strict liability, and to base it on the quasi-contractual and quasi-customary aspects of “shared expectations”. Although the normative content of international liability might thus be diluted, as Gunther Handl had observed (see A/CN.4/402, para. 43, *in fine*), he did not see any other acceptable solution. With regard to the idea of mitigating the effects of strict liability, the purpose of the draft was to establish a general régime, not a régime that would be applicable to a particular activity. Strict liability was not monolithic: it involved different degrees of strictness, as was shown by various treaty

⁸ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

⁹ Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4, at p. 18.

¹⁰ *Yearbook ... 1980*, vol. II (Part Two), p. 33.

régimes, such as the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy,¹¹ which provided for very strict liability by introducing the innovative concept of “channelling” and tracing liability back to the nuclear operator, and the 1972 Convention on International Liability for Damage Caused by Space Objects,¹² which provided for a lesser degree of strictness. The essential need was to design a régime of liability for risk that would be flexible enough to apply not to a particular activity, but to any of the activities in question.

48. Strict liability did have a basis in general international law and to say that it did not would mean that an activity which was not prohibited by international law and which was carried out within the territory of a State could cause transboundary damage without entailing any obligation to provide compensation. Such a position could be based only on a theory of sovereignty which did not take account of the interdependence that characterized the modern community of nations and would, moreover, be contrary to the principle of the sovereign equality of States, because it would overlook the other aspect of sovereignty, namely that a State was entitled to use its own territory without any outside interference. An activity which was socially useful, but which created a risk, had to take account of foreign interests if it was to be carried out freely.

49. Although there had been some criticism of the concept of “shared expectations”, they did have a role to play. In any event, they might be a factor that would be difficult to interpret and to prove if the burden of proof lay on the affected State. While there was no need to establish a category that would be difficult to define, an objective element might be found in the ideas contained in section 4, paragraph 4, of the schematic outline, such as the existence in the internal law of the States concerned of the principle of strict liability or the principle of reparation for injury. There he was referring simply to the principle embodied in the internal law of many countries, and not—for it was too early for that—to implementation rules. The absence of that principle in the internal law of the source State or the affected State might be claimed as an exception by the former.

50. Consideration might also be given to the possibility of providing for exceptions to the rule of reparation, by adopting either the concept of *force majeure* as such or a restricted form of *force majeure*, as in certain conventions under which *force majeure* applied to certain political situations or to a particular type of disaster. Another exception might be negligence on the part of the affected State or the fact that third parties acted with intent to harm. There was also the possibility of not allowing any exceptions when the source State had failed to fulfil its obligations to provide information or to negotiate. The Commission would have to choose between all those options, on the clear understanding that the aim was to establish a general régime which did not have to include strict liability in the narrow sense of the term. That concept would,

rather, have to be mitigated to protect it from undue automatism, which would alarm many countries.

51. He had already reached the conclusion that the only obligation of prevention was the one referred to in section 2, paragraph 8, and section 3, paragraph 4, which was the obligation to keep a hazardous activity under constant review and to take any measures necessary to prevent injury. That obligation involved a duty of care and it meant that States had to determine whether the methods of prevention used were reasonable and, in general, whether they met the standards of modern technology.

52. In a treaty régime, such as those governing certain activities involving risk, provision might be made for dual protection, as had been done in the régime established by the arbitral tribunal in the *Trail Smelter* case,¹³ in which rules and procedures had been laid down to reduce pollution to an acceptable level. The tribunal had stated that any failure to follow those rules and procedures would be a wrongful act and, at the same time, that reparation must be made in the event of pollution accidentally reaching a higher level than foreseen, in which case there would be strict liability.

53. Obligations of prevention might therefore be regarded as obligations of conduct combined with a régime of strict liability. But such a combination did not seem possible in a general régime such as that which he was trying to establish, for the primary effect of the obligation of due care, which would come into play only after injury had occurred, would be to aggravate the position of the source State with regard to compensation.

54. It had only been by way of example that he had compared that obligation with obligations to prevent a given result, which came into play under a régime of strict liability, where reparation must in principle be made in every case, since it was governed by a primary rule. But the obligations to provide information and to negotiate, which were not only of a preventive nature and which were autonomous, would not depend on the occurrence of injury, and their breach would constitute a wrongful act. They would, for all that, not be excluded from his study, for it was intended to deal with the injurious consequences of activities not prohibited by international law, which would include the consequences of acts that could not be dissociated from those activities and might be wrongful. An injury caused by a wrongful act would become an injurious consequence of a lawful activity from which that act was inseparable.

55. It was entirely appropriate to follow the reasoning of the previous Special Rapporteur, who had been trying to separate international liability from State responsibility; but that was a distinction of a purely conceptual nature and there was no reason not to take account, in a future convention, of those two forms of responsibility, which were intended to prevent damage from occurring and, if it did, to mitigate the consequences as much as possible. The principles referred to in the schematic outline appeared to be well-founded and necessary to

¹¹ United Nations, *Treaty Series*, vol. 956, p. 251.

¹² *Ibid.*, vol. 961, p. 187.

¹³ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

the development of the study. When the study had reached a more advanced stage, however, other principles might have to be brought into play and those already taken into account might have to be reviewed.

The meeting rose at 11.25 a.m.

1973rd MEETING

Monday, 23 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

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

Organization of work of the session (concluded)*

[Agenda item 1]

1. The CHAIRMAN suggested that the meeting should be suspended to enable the Enlarged Bureau to meet and consider matters of importance for the continuation of the Commission's work.

The meeting was suspended at 10.05 a.m. and resumed at 11.50 a.m.

2. The CHAIRMAN informed members that the Commission would consider agenda item 7 (International liability for injurious consequences arising out of acts not prohibited by international law) until 25 June inclusive, after which it would consider item 6 (The law of the non-navigational uses of international water-courses) until 1 July inclusive. One further day would be allocated for the consideration of item 3 (Jurisdictional immunities of States and their property) and another for the consideration of item 4 (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier).

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/384,¹ A/CN.4/394,² A/CN.4/402,³ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf.Room Doc.5⁴)

[Agenda item 7]

* Resumed from the 1955th meeting.

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

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

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

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

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

3. Mr. USHAKOV congratulated the Special Rapporteur on his second report (A/CN.4/402), which contained valuable information on the general theory and development of contemporary international law. He nevertheless had some doubts as to the merits of the schematic outline proposed by the previous Special Rapporteur and adopted in some measure by the present Special Rapporteur. He feared that, if the Commission adopted the outline as the starting-point for its work, it would succeed neither in codifying the existing rules of general international law—which in the present case were to be found more in customary law than in treaty law—nor in legislating by proposing rules that had yet to come into being. The schematic outline was defective in two respects: it did not specify which activities would be covered by the draft articles and it made no distinction between injurious consequences of limited scope and those that affected all of mankind.

4. With regard to section 1 of the schematic outline, which related to scope and definitions, he wondered whether it was advisable to refer first to activities within the control of a State—and it would in any event be preferable to use the word “jurisdiction”—and, thereafter, to activities conducted on ships or aircraft. The main point in that regard was not to define, but to specify clearly, the activities to be covered. Given that any human activity had some harmful consequences, section 1 added nothing to the study of the topic, for its scope was too vast.

5. He would draw a distinction between activities which had minor consequences and were of concern only to the States adjacent to those on whose territory they were conducted, and activities whose consequences could have repercussions from one end of the Earth to the other. In the first case, even though it was open to question whether the source State should inform the neighbouring States of its intention to carry out an activity or of the technical aspects of the activity itself, it was comparatively easy to decide about which matters the first State should inform the others and, if need be, hold discussions with them, as was sometimes the practice with regard to the use of “shared resources”. An example had been provided by France and Spain in connection with Lake Lanoux.

6. In the second case, however, the question that arose concerned the obligation to inform and negotiate that would be incumbent on the source State. To which items would the information relate? Was all of mankind to engage in negotiations on a technical project? The really major problems with which mankind was now confronted were caused by air and marine pollution. Such pollution, which was also governed by such imponderable factors as winds, was not always limited to countries situated in any particular direction by reference to the source State, and could affect the entire planet. The problem was further aggravated by the fact that it was not always possible to foresee the consequences of a particular activity. The inventor of DDT, for example, had received the Nobel prize for the insecticide's benefits to the development of agriculture, but

in the long term it had been realized that DDT posed a serious threat to the flora and fauna of all countries.

7. So far as the Chernobyl disaster was concerned, it was the kind of accident that militated in favour of co-operation among all States with a view to the adoption of adequate preventive and safety measures. That was why, following the accident, the Soviet authorities had requested IAEA to convene a conference on possible technical measures to be taken with a view to preventing any future accident involving the peaceful uses of nuclear energy. Scientists and technicians from all over the world should work together to develop preventive and protective measures. Serious pollution problems of that kind, which arose at the global level, could not be dealt with in the same way as those that gave rise to compensation. International co-operation in that sphere was thus essential.

8. In the light of those considerations, he was sceptical about the basic concepts of the report under consideration. The Commission had to decide which activities were the most dangerous for mankind with a view to proposing primary rules and introducing the principle of international co-operation for preventive purposes, rather than adhering to the principle of material liability. In the manner envisaged, the study on international liability would lead nowhere save to a dead end. If, on the other hand, the activities to be covered were clearly specified, it would be possible to go beyond the stage of liability and compensation and to tackle the real problem, namely co-operation among States.

9. Mr. McCaffrey said that, in the past four years, the discussion of the topic under consideration had given rise to some confusion about the type of activities to be covered. In the English title of the topic, moreover, the word "acts" should be replaced by "activities". The Commission was focusing on catastrophic accidents that caused widespread harm but were the result of normal activities regarded as lawful by the international community. In other words, the activities in question were considered to be desirable because they were socially beneficial, for example the operation of nuclear reactors, chemical plants and dams.

10. Several questions arose in that regard. The first was whether it was an internationally wrongful act to introduce such an activity in a border or other region where it would harm other States if an accident occurred. In his opinion, the answer was negative. The second question was whether it was the duty of the source State to inform and negotiate, and he believed that international law did entail such a duty. The third question was what happened if an accident occurred even though the source State had taken all the precautions it possibly could. He did not believe that an internationally wrongful act was involved in such a case, since it had been deemed permissible to conduct the activity itself. The question whether the source State had the duty to provide compensation did, however, deserve close scrutiny, and in his view the answer to that question was affirmative. What remained to be decided in such a case was the scope of the duty to provide compensation.

11. Some ongoing activities, such as industrial or agricultural activities, of which the source State was aware and which it could control would, however, seem to give rise to State responsibility for the harm they might cause and should therefore be eliminated from the scope of the topic under consideration. In that connection, reference might be made to the *Trail Smelter* case⁵ and to Principle 21 of the Stockholm Declaration.⁶

12. Another category of activities which could be eliminated was the one to which Mr. Ushakov had referred and which might, for example, involve the use or manufacture of a chemical that was not initially known to be harmful, but was later discovered to be so. Examples were DDT, other chemicals and elements such as mercury and cadmium. In his own view, until the point when the harmful nature of the activity became known, there would be no duty to provide compensation: the source State could not be expected to monitor and regulate harmful consequences of which it was unaware. Once the harmful nature of the activity became known, however, the source State did have the duty to control and stop those consequences. At that point the situation came within the topic of State responsibility being dealt with by Mr. Riphagen.

13. In connection with the duty to inform and to negotiate, the question was: whom to inform and with whom to negotiate? Theoretically, the source State had the duty to inform all States that might be affected by a catastrophic accident; but in practice that would obviously be impossible in the case of activities such as the operation of nuclear plants. That was the reason for international organizations such as IAEA, which was currently preparing two conventions on information in the event of disaster and on safety. The fact that only States in the region would have to be notified would, however, not mean that the source State did not have a duty to provide compensation for harm suffered as a result of an accident. Thus, if the international community considered such activities to be lawful, despite the catastrophic damage they might cause, it had to find a way to limit the source State's duty to provide compensation.

14. In conclusion, he said that the entire topic could be viewed as an attempt to codify the thrust of the arbitral award in the *Trail Smelter* case. In that connection, he referred members to his second report on the law of the non-navigational uses of international watercourses (A/CN.4/399 and Add.1 and 2, paras. 125-128). The similarity lay not in the nature of the activities in question, but in the process followed: the States concerned had negotiated, submitted their dispute to arbitration and accepted the régime established by the arbitral tribunal. Any harm caused by an activity carried out in compliance with that régime would not strictly speaking be wrongful, but would entail a duty to provide compensation for the damage caused. A similar régime might govern the safe operation of a nuclear plant.

15. Mr. KOROMA said that he agreed with the distinction made by Mr. McCaffrey between "acts" and

⁵ See 1972nd meeting, footnote 13.

⁶ *Ibid.*, footnote 8.

“activities”. But he believed that the Commission should focus on “acts”, not on “activities”, and he would explain why in a future statement.

The meeting rose at 1 p.m.

1974th MEETING

Tuesday, 24 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

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

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/384,¹ A/CN.4/394,² A/CN.4/402,³ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf.Room Doc.5⁴)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Sir Ian SINCLAIR noted that the meaning of the terms “responsibility” and “liability” had been a source of confusion in the Commission’s debates in previous years. The Special Rapporteur’s comments (A/CN.4/402, paras. 2-5) fortunately shed new light on the distinction between the two terms. He himself had been particularly struck by L. F. E. Goldie’s observation, cited in the report under consideration (*ibid.*, para. 4), that, in the context of articles VI and XII of the Convention on International Liability for Damage Caused by Space Objects⁵ and of article 235 of the 1982 United Nations Convention on the Law of the Sea:

... responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required. That is,

liability connotes exposure to legal redress once responsibility has been established. ...

2. It was in that broad sense that the two concepts must be understood in the context of the present topic. Some of the recent confusion had arisen from the idea that, in traditional international law, responsibility could be attributed to a State only where it had committed an internationally wrongful act: that view formed the basis for part 1 of the draft articles on State responsibility. However, since the term “responsibility” had a broader meaning in comparative civil law, where it denoted the duties or standards which the law imposed on the performance of a function in society, it had to be asked whether similar duties or standards could not be derived from international law in relation to activities which, though not unlawful in the territory where they were being carried out, none the less had or might have injurious consequences for persons or things outside that territory. He believed that the answer to that question had to be affirmative. The notion of responsibility in that broader sense thus had to apply also to lawful activities which were carried out within a territory and caused or might cause physical transboundary harm, and the consequential notion of liability, which, according to that view, was limited to the consequences of failure to perform the duties or to fulfil the standards imposed by the law, must also apply to such activities. Responsibility in that broader and more generic sense encompassed the consequential and narrower notion of liability and was not limited to internationally wrongful acts.

3. The foregoing led to the conceptual problems discussed by the Special Rapporteur in his report under the heading “Unity of the topic” (*ibid.*, paras. 6-10). Initially, he had had some reservations about the Special Rapporteur’s analysis (*ibid.*, para. 7), but on further reflection he agreed that, in the context of the present topic, prevention and reparation fell within the domain of primary rules. Prevention certainly did, but he would submit that reparation also did, at least if certain conditions were met. He had referred to some of those conditions in earlier statements. For example, the activity must be such that the risks of its causing physical transboundary harm were known to the source State. If the source State permitted a dangerous chemical plant or nuclear reactor to be built close to its border with another State, it must be presumed to have accepted the risk that, in the event of an accident, physical transboundary harm would occur.

4. Things were, however, not always that simple and several examples had already been given of cases where, despite the most careful monitoring of the activity by the source State, the risks inherent in the pursuit of that activity had not been known, or could not have been known, to the source State at the time when it had permitted the continuation of the activity. New scientific and medical discoveries were thus constantly having an impact on the law. Should the source State be liable for the consequences—whether for all the consequences or only for those which were reasonably foreseeable—of permitting the continuation of an activity which, because of the lack of scientific or medical evidence, it had not known or could not have known to be in-

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

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

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

⁴ The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission’s thirty-fourth session, is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter’s fourth report, submitted at the Commission’s thirty-fifth session, are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

⁵ See 1972nd meeting, footnote 12.

herently dangerous to persons and things outside its territory? Posed in that way, the question seemed to call for a negative answer. However, where should the costs of the resulting loss or injury lie? Perhaps, under the circumstances, they should lie where they fell, precisely because the source State could not have been aware, at the time when it authorized the continuation of the activity, that physical transboundary harm would or might occur.

5. The question was much more acute when the source State was in fact aware that some physical transboundary harm might result from the continuation of the activity, but was not aware of the extent of the harm that could result. Should it be liable for all the direct consequences of the continuation of the activity, which would take the form of loss or injury to persons or things outside its territory, or only for those consequences that had been reasonably foreseeable? That was an area in which a more detailed comparative law analysis would be required.

6. The Commission had already discussed the question whether the proposed general régime, which covered the obligations of prevention and reparation, should be limited to "ultra-hazardous" activities. He remained unconvinced on that issue. Everyone was, of course, aware in general terms of what might, in the present state of human knowledge, constitute ultra-hazardous activities. The obvious examples were the construction and operation of nuclear reactors for peaceful purposes and of plants producing dangerous or toxic chemical substances. Other examples could be added, such as that of dams built near an international border. Those examples were, however, only indicative of the current state of scientific or medical knowledge. What was "ultra-hazardous" today might not be so tomorrow, and the opposite was also true. He was therefore sceptical about the possibility of drawing a clear line between "ultra-hazardous" and other activities. Such a distinction could not form the basis for a general régime, however cautious and qualified it might be.

7. The part of the report dealing with injury caused in the absence of a treaty régime was the most interesting and provocative section and he expressed admiration for the balanced approach the Special Rapporteur had adopted, particularly in regard to strict liability and the principle of State sovereignty (*ibid.*, paras. 52-53). He had been particularly struck by the observation that "sovereignty is, like the god Janus, two-faced" (*ibid.*, para. 53) and by the Special Rapporteur's exegesis of how sovereignty should be viewed in the context of the interdependence of States. That view of the concept of State sovereignty had been borne out by a recent event which was highly relevant to the Commission's consideration of the topic and to which Mr. Ushakov (1973rd meeting) had referred. The accident at Chernobyl—for which he wished to convey to Mr. Ushakov and, through him, to the Soviet people his heartfelt sympathy for the loss of life and potential long-term injury suffered—had clearly shown what great importance the problem had assumed. The effects of that accident had been felt far beyond the borders of the Soviet Union. Of course, as Mr. Ushakov had said, that lent enormous weight to the need to elaborate régimes to

prevent such accidents in future, but it also raised, in a very acute form, the question of liability for physical transboundary harm. Quite recently, the United Kingdom Government had been obliged to prohibit, for a limited period, the slaughter of young lambs in certain mountain regions precisely because there had been a fourfold increase in the levels of radiation found in those animals as a result of the Chernobyl disaster. On whom should the liability for the loss suffered as a result of that prohibition fall? It would seem wholly inequitable for it to fall on the farmers affected by the prohibition. It would seem equally inequitable for it to fall on his country's Government, which was wholly innocent of any responsibility, whether in the narrower or in the broader sense, for the events giving rise to the damage suffered.

8. The Commission was not the forum in which to argue about liability for a particular incident involving transboundary harm. Everyone was fully aware of man's imperfections. Although enormous progress had been made during the century in unravelling the secrets of nature, the more man discovered, the less he knew of the ultimate mysteries. In Shakespeare's words, man was "most ignorant of what he's most assured". But men, as inevitably transitory inhabitants of the planet, had a duty not only to their own generation, but also to succeeding generations, to conduct their activities so as not to cause damage and, if damage was caused, to provide reparation. That principle would naturally require much more refinement in the present context and, in particular, a move from the abstract to the particular. The Special Rapporteur was grappling seriously with the difficult problems that arose in that regard.

9. Mr. RIPHAGEN recalled that, more than 2,000 years earlier, Democritus had stated the theory that "everything which exists in the universe is the product of chance and necessity". That theme had been taken up by the French biologist Jacques Monod in his famous work,⁶ and a psychologist such as Freud must have been struck by the idea that human behaviour might be based on the laws of nature. For the lawyer, however, the behaviour of the free individual was the starting-point; the individual's contribution was the ultimate concern. That theme was relevant to the topic under consideration and its *a priori* limitations, namely physical activities giving rise to physical transboundary harm ("necessity"), and the element of the human contribution to risk ("chance").

10. Those two limitations were a prerequisite for the fusion of the otherwise separate questions of prevention and reparation; preventive and repressive measures, which were distinct in time; primary and secondary rules; and bilateral and multilateral situations. Even with those two limitations, however, the fusion created many problems, particularly when it came into conflict with the dogma of State sovereignty, which was the basis of international law. Such a conflict inevitably meant that account had to be taken, with the necessary adaptations, of the normal rules of State responsibility. It also tended to emphasize the need for a minimum international régime, starting with the somewhat elusive

⁶ *Le hasard et la nécessité. Essai sur la philosophie naturelle de la biologie moderne* (Paris, Editions du Seuil, 1970).

duty of States "to co-operate", which included the duty to provide information.

11. With regard to the adaptation of the normal rules of State responsibility, it seemed clear that the subjective element of "persons acting on behalf of the State" could not be transplanted to the topic under consideration because liability went further and actually covered activities and situations within the "territory or control" of the State. It therefore involved an obligation to exercise control or jurisdiction. But how far did that obligation go?

12. It followed from the two *a priori* limitations of the topic that, normally, the activities and situations referred to would, in the first place, be "hazardous" for the territory of the State within which they occurred. There was thus a fair chance that the territorial State would have established its control over such activities by means of national legislation or otherwise. The minimum international obligation would then be that, in the exercise of such control, the State would treat in-boundary effects in the same way as transboundary effects: it would thus be an obligation of non-discrimination. At present, however, some States did not act in accordance with that obligation, possibly because of the absence of reciprocity.

13. Prior to the obligation not to discriminate, there was an obligation to establish control over the activities and situations in question. It was there that the question of the "source" of the obligation or, in other words, the "objective" element of the obligation became all important. There again, it would seem that the normal rules of State responsibility could not be followed and that the vaguer concept of "shared expectations", which was usually associated with "soft law", would have to be introduced. In that connection, it was significant that the Special Rapporteur had highlighted the element of "damage", in contradistinction to the rules of State responsibility so far adopted by the Commission. Indeed, while all the obligations or quasi-obligations in question were "obligations of result", in the sense of articles 21 and 23 of part 1 of the draft articles on State responsibility,⁷ there was an obvious necessity in the present case to translate them into obligations or quasi-obligations requiring the adoption of a particular course of conduct, in the sense of article 20 of those draft articles. In the mean time, or in other words until the maxim *sic utere tuo* was translated into legally intelligible obligations or quasi-obligations, the law could not remain silent, even though it necessarily had to concentrate on the indivisibility of the physical environment, the procedural aspect of State conduct and the allocation of risks.

14. In that context, the mystical notion of territorial sovereignty would inevitably have to be replaced by, or at least adapted to, a more functional notion of divisions, which, in turn, could not entirely escape the temporal notion embodied in another maxim, *qui prior est tempore potior est jure*, which had some of the same defects as the maxim *sic utere tuo*. For example, if an obligation of prior notification was incumbent on the State which planned to change environmental condi-

tions, the slight imbalance thus created would be re-established by the fact that such a change had to be the result of an ultra-hazardous activity.

15. As experience in Europe and Africa had shown, however, shared expectations implied a modicum of shared planning. If, for example, one African country's policy of protecting endangered species led to a prohibition for peasants to shoot elephants whose passage through their land destroyed their crops, but also entitled those peasants to compensation, it would be too much to require, in the name of non-discrimination, compensation for the peasants of a neighbouring country where the shooting of elephants was not prohibited. Another example concerned Europe, where the transboundary pollution control activities of OECD had led to the adoption of a sort of saving clause in respect of uncoordinated land use policies.⁸ In yet another example, the environment seemed to be territorially divisible: France made savings by dumping the saline wastes from its potassium enterprises into the Rhine, but it cost the Netherlands a great deal of money to purify the waters of the Rhine. What would international law do about that type of situation? Sharing the financial burden was the obvious answer and that was what was provided for in the treaty concluded on that matter.⁹

16. Burden-sharing was obviously a form of compensation and it might involve compensation for the source State rather than for the affected State. In any event, the question was completely different from that of reparation in the context of State responsibility.

17. No measure of prevention, except refraining from carrying out the potentially harmful activity in the first place, could be absolute. The element of chance might always intervene—and that raised the question of risk allocation. Normally, in the case of pure chance, the law left the loss where it fell, as Sir Ian Sinclair had pointed out. Why should there be a difference in the case of the topic under consideration? The answer was that, in the present case, the activity was ultra-hazardous in itself. As Sir Ian Sinclair and Mr. Ushakov (1973rd meeting) had noted, however, there was also the question of the meaning of the term "ultra-hazardous". Did the fact that an activity took place in all the States concerned mean that it was not in itself ultra-hazardous? Another question that arose was that of the benefits of the activity for the source State: in borderline cases, in particular, the benefits might be entirely for one State and the risks entirely for another State.

18. The notion of necessity presupposed knowledge of the laws of nature, but such knowledge was very limited and consisted mainly of hindsight. The law could never be more than the state of the art at the time it was promulgated and, by definition, was thus imperfect. In such circumstances, the law had to turn to the substitute of procedural conduct, which would consist of information and consultation in good faith. It was difficult to

⁸ Recommendation of the OECD Council of 17 May 1977 (C(77)28(Final)), annex, title A, para. 3 (c) (*OECD and the Environment* (Paris, 1979), p. 118).

⁹ Convention on the Protection of the Rhine against Pollution by Chlorides (Bonn, 3 December 1976), *International Legal Materials* (Washington, D.C.), vol. XVI, No. 2 (March 1977), p. 265.

⁷ *Yearbook ... 1980*, vol. II (Part Two), p. 32.

add to that primary obligation of information and consultation a secondary rule of State responsibility. Nevertheless, the absence of information and consultation could very well be an element of fact allowing the risk to be shifted to the source State which failed to comply with that quasi-obligation.

19. Mr. CALERO RODRIGUES, referring to the schematic outline prepared by the previous Special Rapporteur, said that the scope of the topic had been defined therein as physical activities that gave rise or might give rise to physical transboundary harm, which was understood as harm of a certain magnitude. Sir Ian Sinclair and Mr. Ushakov (1973rd meeting) had, however, drawn attention to the problems that arose when efforts were made to define the notion of harm. Should the notion relate only to catastrophic accidents or did it also apply to more gradual damage, such as that caused by acid rain? Another question was that of the lack of scientific knowledge, as indicated by the controversy over the danger to the ozone layer. Should the building of a nuclear arsenal be regarded as potentially more "catastrophic" than the construction of a nuclear plant for peaceful purposes? In his opinion, the scope of the topic should be defined much more precisely than in the schematic outline and that was a task to which the Special Rapporteur should attach priority.

20. The schematic outline referred to two types of primary obligations: responsibility to prevent damage, and liability to make reparation for damage—and everyone agreed that those two questions were closely linked. He had initially thought that liability presupposed damage, but, in view of the social aspects of the topic, he agreed that the Commission also had to study the question of prevention. The schematic outline reduced prevention to a set of procedural obligations: to provide information, to co-operate to establish fact-finding machinery and to negotiate. Mr. Ushakov had indicated some of the problems that arose in connection with those procedural obligations and, as the Special Rapporteur had rightly pointed out in his second report (A/CN.4/402, para. 11 (c)), emphasis had to be placed on the role of international organizations in that regard.

21. No matter what type of régime was established, and even if the régime was strictly observed, harm might still occur. That led to what the previous Special Rapporteur had once called the "monster" of objective liability, to which States were reluctant to submit. However, some sort of obligation to make reparation must be admitted: the main problem was to establish the extent of that reparation. The schematic outline placed limits on reparation on the basis of shared expectations, a concept about which he had some doubts, and of the preventive measures taken, the nature of which would be determined by negotiation. In his view, the idea of reparation should be dealt with more extensively in the draft. It was not sufficient to say that it would be determined by negotiation; some guidelines, however general, should be established for the negotiations.

22. As to the concept of prevention, he believed that the principle of "due care" was essential and that procedural obligations were secondary. The previous Special Rapporteur had suggested that procedural obligations should not give rise to any right of action;

but the present Special Rapporteur was proposing that they should be made hard obligations by deleting the reference to a "right of action" in section 2, paragraph 8, and section 3, paragraph 4, of the outline. He personally was not certain that it was an improvement to make hard obligations of those procedural obligations because that would not be an inducement to co-operation. Moreover, unlike the Special Rapporteur, he did not see how article 73 of the 1969 Vienna Convention on the Law of Treaties supported the idea that procedural obligations should be treated as hard obligations (*ibid.*, para. 41 (a)). Nor was he convinced by the Special Rapporteur's comment that: "If we leave the text of the outline as it is, we might be prohibiting the affected State from availing itself of this possibility given to it under general international law" (*ibid.*). That State was, first of all, only a "potentially" affected State; moreover, threats of retaliation were not the best way of promoting co-operation.

23. He was not certain that the Special Rapporteur was right in concluding that "the obligations to inform and to negotiate are sufficiently well established in international law, and any breach of these obligations thus gives rise to wrongfulness" (*ibid.*, para. 67). He did, however, agree with the Special Rapporteur's conclusion about the obligation laid down in section 2, paragraph 8, and section 3, paragraph 4, of the schematic outline (*ibid.*, para. 66, first sentence). One of the problems that arose was the relationship between reparation—if harm occurred—and prevention. "Harm" was at the centre of both institutions and the purpose of any internationally agreed régime would be to establish measures of prevention in order to avoid or minimize the risks of harm. The same result could be achieved by unilateral action of the source State, which did, after all, have to consider its own interests. In that connection, he was not quite sure what the Special Rapporteur meant by "prevention after the event" (*ibid.*, para. 46).

24. There was still much work to be done in defining the scope of the topic under consideration. Some clarifications would probably be provided when the Commission began to deal with the draft articles. In conclusion, he urged members not to attach too much importance to the procedural aspects of the question of prevention.

25. Mr. FLITAN said that he would make two general comments before turning to the content of the Special Rapporteur's second report (A/CN.4/402). First, as the Special Rapporteur had pointed out in his preliminary report, "the duty to make reparation is somewhat lost among the procedures established in section 4 of the schematic outline" (A/CN.4/394, para. 16 (d)). That defect would have to be remedied in the draft articles, during the consideration of which the Commission would be better able to define the content of the topic.

26. Secondly, the topic under consideration was not a political one: it related to the question of development. In other words, it was less an East-West problem than a North-South problem. Although every State could theoretically cause or suffer harm, in practice those that caused it were usually developed countries and those that suffered it developing countries. The draft articles

to be submitted by the Special Rapporteur would show how he intended to take account of the interests of developing countries, as he had undertaken to do in his preliminary report (*ibid.*, para. 17).

27. In chapter I of his second report, which dealt with the use of terms, the unity of the topic and the scope of the topic, the Special Rapporteur rightly emphasized that the distinction made in Anglo-Saxon law between "liability" and "responsibility" was not simply a problem of terminology (A/CN.4/402, para. 2). In that connection, he himself shared the view expressed by the previous Special Rapporteur in his fifth report that:

The phrase "responsibility and liability", as used in the United Nations Convention on the Law of the Sea, ... corresponds closely to the twin themes of prevention and reparation, which form the basis of the present topic.¹⁰

28. He agreed with the conclusions reached by the Special Rapporteur on the basis of the distinction between "liability" and "responsibility", the counterpart of which was the distinction between the obligation of prevention and the obligation of reparation. The first conclusion was that some individuals had to fulfil certain specific obligations even before the occurrence of an event giving rise to injurious consequences. The second was that the State was thus liable for the injurious consequences of certain activities carried out within its territory or control. The term "control" was preferable to the term "jurisdiction", which would, because of all the examples that would be possible, be too restrictive. The third was that the State also had an obligation of prevention; it thus had to do everything in its power to prevent or minimize injurious consequences.

29. At least in the case of some categories of activities, prevention was the basis for the prevention-reparation continuum. It would, however, probably be necessary to draw a more clear-cut distinction between the activities in question, because the same procedure could not be established for all of them: some activities might cause harm occasionally, while others gave rise to minor injurious consequences all the time. In the case of some activities, moreover, prevention could be ruled out and account could be taken only of reparation.

30. The Special Rapporteur had rightly proposed that the unifying link between prevention and reparation should be injury, which also made it possible to distinguish between the topic under consideration and that of State responsibility. That point would, however, require further clarification, because, although strict liability could not exist without injury, State responsibility for a wrongful act did not depend on the existence of injury.

31. With regard to the scope of the topic, the Special Rapporteur had recalled that the key element of the schematic outline was the duty of the source State to avoid, minimize or repair any physical transboundary loss or injury when it was possible to foresee a risk of such loss or injury associated with a specific dangerous activity. In order to create a focus, an obligation of prevention could be established in such cases; but there

were other cases where risk could not be foreseen. That was further proof that the schematic outline did not make a sufficiently clear distinction between the various categories of activities.

32. Although the type of harm to which reference was being made was "physical transboundary harm", it must be borne in mind that activities which States conducted outside their borders—on the high seas, for example—could also cause harm. That case should also be covered in the draft articles.

33. A detailed study should also be made of the role to be played by international organizations. It was all very well to say that there was a duty to co-operate through the intermediary of such organizations, but it might be necessary to go even further and say that States had an obligation to inform the competent international organizations and that such organizations had an obligation to co-operate in good faith in establishing an appropriate régime. Consideration might even be given to the possibility of making the obligation of reparation applicable to such organizations in some cases, although that would, of course, be without prejudice to the obligation of reparation incumbent on the State which caused the harm.

34. There had been strong objections to the idea of a régime of collective liability, but, as the Special Rapporteur pointed out (*ibid.*, paras. 52-53), the obligation of reparation was based on the principle of sovereignty. There was no reason why some States should have to bear the injurious consequences of activities carried out by other States. The principle that the latter had to make reparation for the harm caused by the activities they carried out was thus entirely equitable.

35. In his view, the Special Rapporteur should give further thought to the question of the sharing of costs. Since activities that might give rise to injurious consequences benefited the State which carried out those activities, was it not quite natural that that State should bear the consequences thereof? In determining whether harm had occurred, the Special Rapporteur might draw inspiration from the international conventions that governed certain activities.

36. Mr. OGISO said that the Special Rapporteur's very comprehensive second report (A/CN.4/402) constituted a valuable basis for discussion of the topic. Several previous speakers, especially Sir Ian Sinclair and Mr. Riphagen, had raised the question whether reference should be made to "physical" transboundary harm. The Special Rapporteur himself specifically referred to "physical transboundary harm" in the part of his report relating to the scope of the topic (*ibid.*, para. 11 (a)). Thereafter, however, the Special Rapporteur referred to "transboundary injury" (*ibid.*, paras. 23 and 30), without specifying that the injury had to be "physical". He recalled that the previous Special Rapporteur had discussed that point and had dealt in his fifth report with the "element of a physical consequence".¹¹ The Commission itself, in its report on its thirty-sixth session, had noted that "the topic as now delineated hinges upon the element of a physical conse-

¹⁰ *Yearbook ... 1984*, vol. II (Part One), p. 171, document A/CN.4/383 and Add.1, para. 40.

¹¹ *Ibid.*, pp. 160 *et seq.*, paras. 17 *et seq.*

quence producing transboundary effects".¹² The physical element was thus one of the basic components of the topic under consideration. He did not believe that the omission of that element in chapters II and III of the Special Rapporteur's report was in any way intentional. He nevertheless urged the Special Rapporteur not to fail, in his further work, to use the adjective "physical" in connection with transboundary consequences or transboundary harm. The transboundary element and the physical element were equally essential.

37. The general feeling in the Commission appeared to be that the source State had a duty to provide information on any activity that might give rise to physical transboundary harm; such information had to be supplied at the request of the affected State. He himself agreed with the idea that that was the first duty of the source State, but, in referring to that duty, the Special Rapporteur had failed to draw attention to an important exception: the State concerned was not obliged to provide information relating to State secrets or commercial secrets. That problem was covered in section 2, paragraph 3, of the schematic outline.

38. With regard to the duty to negotiate, the Special Rapporteur referred to "fact-finding machinery" (*ibid.*, para. 38). Although he himself had no doubts about the need for such machinery, he thought that the relevant duty should be formulated in more general terms. The previous Special Rapporteur had expressed the view that the source State should have some freedom of choice in that regard. If the provisions on the negotiation procedure were too specific, the result might be that such freedom of choice would be restricted. The present Special Rapporteur basically concurred with that view (*ibid.*, para. 40). In that connection, he himself agreed with Mr. Calero Rodrigues about the Special Rapporteur's proposal to delete the first sentence of section 2, paragraph 8, and of section 3, paragraph 4, of the schematic outline (*ibid.*, para. 41 (c)).

39. As to strict liability, the Special Rapporteur appeared to take a somewhat different approach from that of his predecessor by referring in his report to instances where liability was "less strict" and to others where "strict liability" was interpreted as meaning the reversal of the burden of proof.

40. In his own view, the régime to be applied was one of less strict liability. In that connection, he noted that the report contained the following significant passage:

... according to the régime established in the schematic outline, this is injury for which the source State would in principle be liable, because the innocent victim, also in principle, should not be left to bear it. (*Ibid.*, para. 35.)

That passage seemed to indicate that a strict liability régime was in principle applicable. That approach represented a significant departure from the previous Special Rapporteur's position, which had been that, although the strict liability régime was applicable under specific treaties governing such hazardous situations as nuclear accidents and pollution by oil tankers, it would be too great a leap to try to apply the strict liability régime outside areas governed by particular international agreements. It was precisely as a substitute for

such a régime that the previous Special Rapporteur had put forward the concept of the balance of interests between the source State and the affected State and had provided for the duty to negotiate on the basis of that concept. He therefore urged the present Special Rapporteur to give careful consideration to the balance-of-interests concept before reaching a conclusion on the application of the strict liability régime to the topic under consideration.

41. In that connection, it was significant that, in several of his reports, the previous Special Rapporteur had usually referred to the "duty", rather than to the "obligation", to provide information and to negotiate. In his own view, the concept of "duty" was slightly broader than the concept of "legal obligation". The concept of duty could be associated with that of good faith and good-neighbourliness and was, moreover, in keeping with Principle 21 of the 1972 Stockholm Declaration.¹³

42. He regarded the previous Special Rapporteur's efforts as an attempt to solve the problem of reparation without immediately resorting to the strict liability régime: hence the use of the balance-of-interests concept. The question of how to achieve that balance could be more appropriately dealt with at a later stage.

43. Lastly, he said that he fully agreed with the Special Rapporteur's observations on the role that might be played by international organizations (*ibid.*, para. 11 (c)).

44. Mr. BARBOZA (Special Rapporteur) said that, although his intention was not, as Mr. Ogiso seemed to think, to depart significantly from the previous Special Rapporteur's concept of strict liability, he saw no other solution, at the current stage in the consideration of the topic, than the application of strict liability combined with the mechanisms proposed by his predecessor. Strict liability would, in any event, not operate automatically; at the current stage in the development of international law, it would, moreover, be difficult to establish such a régime. The draft thus had to take account of the idea on which the earlier reports had been based and which was that the effects of strict liability had to be mitigated. In that connection, he would submit several proposals to the Commission; he was, for example, considering the possibility of a régime of exceptions that had not been envisaged in the earlier reports, which were quite sketchy.

45. Mr. USHAKOV, referring to section 1, paragraph 2 (d) (ii), of the schematic outline, asked which States would be informed of a dangerous activity carried out on ships or aircraft within the control of a State and with which States that State would have to negotiate.

46. Mr. BARBOZA (Special Rapporteur) said that he was unable to provide satisfactory answers to Mr. Ushakov's questions because he still had not gone far enough in his study of the topic. He was, in fact, only at the outline stage. The previous Special Rapporteur himself had, moreover, not dealt with such problems.

The meeting rose at 12.45 p.m.

¹² *Yearbook ... 1984*, vol. II (Part Two), p. 74, para. 225.

¹³ See 1972nd meeting, footnote 8.

1975th MEETING

Wednesday, 25 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

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

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/384,¹ A/CN.4/394,² A/CN.4/402,³ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf. Room Doc.5⁴)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ROUKOUNAS, referring to the various aspects of the schematic outline, said that it would be necessary to define and draw up a list of the activities which might give rise to injurious consequences for the environment. Such activities might, for example, include the peaceful uses of nuclear energy, the exploration and utilization of outer space, the carriage of oil, the exploration and exploitation of marine natural resources, the exploitation of shared natural resources, the utilization of international watercourses and the production and stockpiling of some types of weapons. In view of the wide variety of activities which might pollute and damage the environment, the Commission should be careful not to make the list too selective: some activities might later be eliminated if it turned out that they were already regulated.

2. The spatial context would also have to be defined. The schematic outline stated that activities "within the territory or control of a State" were within the scope of the topic. The concepts of "territory" and "control" would, however, be difficult to apply in the case of activities which gave rise to pollution in outer space and which were not yet governed by any international régime, since no State had ratified the 1985 Vienna Convention for the Protection of the Ozone Layer. Outer space as a medium for the transmission of the radio frequency spectrum was nevertheless part of the natural environment. It was a limited natural resource which

might become saturated, but, according to the administrative regulations of ITU, it was not exhaustible.

3. It would also have to be determined what consequences were to be regarded as injurious. Contrary to what was provided for in the draft articles on State responsibility for wrongful acts, injury was, in the present case, a *sine qua non* for liability. The various types of activity in question would, however, necessarily give rise to various kinds of injurious consequences. A number of questions would have to be answered: at what level of seriousness were the consequences of an activity to be regarded as injurious? What did "appreciable harm" mean? Could appreciable harm be the result of an accumulation of acts which would, by themselves, not be hazardous?

4. There would have to be a definition also of "loss or injury". The 1972 Convention on International Liability for Damage Caused by Space Objects⁵ and the 1979 Convention on Long-range Transboundary Air Pollution⁶ did not define injury in the same way. In his view, the Commission had to carry out further research before deciding that "unforeseeable injury" should not come within the scope of the topic.

5. Turning to the régime proposed in the schematic outline, he said that it was difficult to regulate activities that were on the borderline between what was lawful and what was unlawful. Three possible situations might arise in that regard. The first was that, as a result of the development of international law, an activity which had been lawful might simply be not prohibited and then become wrongful. It would gradually move from one legal category to another. Nuclear weapon tests in the atmosphere, for example, had followed that course before being prohibited in 1963. The second situation was that in which lawful activities were governed by special conventions. In the case of oil pollution on the high seas, for example, compensation for injury was governed by treaty rules. Since the activity in question was not unlawful, it continued to be carried out. In some cases, however, an activity which was lawful might be suspended: that was the case, for example, of activities giving rise to transboundary pollution of some magnitude. The third situation was that in which lawful activities were governed by a general convention. According to the schematic outline, which covered that third situation, the activity continued to be lawful as long as the State concerned applied a particular procedure before or perhaps after injury had occurred. A basic rule thus appeared to be embodied in a set of procedural rules. The objective, which was to maintain good relations between the States concerned between the time injury occurred and the time reparation was made, was commendable, but difficult to achieve.

6. In that connection, it should be recalled that the obligations to inform and to co-operate were already provided for in Principles 21 and 22 of the 1972 Stockholm Declaration⁷ and that the international community had been working along those lines for some

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

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

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

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

⁵ See 1972nd meeting, footnote 12.

⁶ E/ECE/1010.

⁷ See 1972nd meeting, footnote 8.

time. At the current stage, however, it was still not known how those principles and the many relevant conventions were being applied in practice. He was thinking primarily of international organizations, which had an important role to play in that regard and which should be considered as having autonomous rights and obligations, as the 1982 United Nations Convention on the Law of the Sea clearly showed.

7. A procedural régime to promote co-operation between States would, of course, be entirely welcome, but there should be no implication that it would operate automatically. According to the schematic outline, a hazardous activity continued to be lawful under a régime consisting of four parts, namely information, co-operation, injury and reparation. Prior information might, however, be difficult to provide or to obtain, since some States did not, for example, deem it appropriate to indicate whether their warships were nuclear-powered or not, and in some cases co-operation might break down, although the source State would still take the necessary measures unilaterally. There would then be a direct shift from injury to reparation. Consideration might therefore be given to the possibility of including in the schematic outline much more specific rules which would give States some freedom of choice.

8. It must be borne in mind that considerable importance had been attached to the theoretical basis for the topic. Reference had thus been made to strict liability or liability for risk, to international solidarity and to sovereign equality among States. As a justification for reparation, mention had also been made of territorial integrity or the protection of the sovereignty of the affected State. In his second report (A/CN.4/402), the Special Rapporteur appeared to have a slight preference for strict liability—and he himself shared that preference.

9. Since an international fund for the protection of States against transboundary injury caused by lawful activities was not likely to be established for quite some time, efforts should perhaps be made now to formulate not only a set of procedural rules, but also a general rule of conduct which would make the hazardous activities in question lawful while specifying their international limits. The problem was a global one which might as easily arise on the border between Canada and the United States of America as in Stockholm or in the Corfu Channel, and to which no solution had yet been found.

10. The unity of the topic, as dealt with by the Special Rapporteur (*ibid.*, paras. 6-10), should be a reminder of the oneness of the human race in its efforts to cope with the advantages and disadvantages of modern-day science and technology, or with what Paul Valéry had described as “the time when the finished world begins”.

11. Mr. BALANDA said that the topic under consideration was an interesting, but difficult one because it involved prospective law: no general rule had yet been formulated to govern activities which would promote the development of States, but which involved risks.

12. With regard to the scope of the topic, the Special Rapporteur, who had not yet defined the concept of

“situations”, was proposing that for the time being reference should be made only to activities which might cause “appreciable” or “tangible” physical transboundary harm (A/CN.4/402, para. 11). The problem was, however, that it was not easy to determine the degree of seriousness beyond which harm had to be repaired.

13. Some members had suggested that account should be taken only of ultra-hazardous activities; but, since practically no rules of customary law were applicable and treaty practice was not very abundant, a wide variety of activities would not be covered by any legal rules if that course were followed.

14. There was also the problem whether the provisions that would be formulated would apply only to activities conducted by States or whether they would also apply to activities carried out by other entities within the jurisdiction of States. What the Special Rapporteur said in that regard (*ibid.*) was not very clear. The reference to the exclusive jurisdiction of the State as a territorial or controlling authority appeared to imply that the State was responsible for all activities carried out in its territory. That was, however, precisely the interpretation which the previous Special Rapporteur had wanted to avoid and, in all his reports, he had therefore used the term “acting State”, which would apparently be applicable only if account were taken of activities conducted by the State itself and not of all the activities which could be carried out in its territory. That point would therefore have to be clarified.

15. The Special Rapporteur had successfully demonstrated the conceptual unity of the topic, which encompassed both prevention and reparation, with injury as the unifying criterion as far as substance was concerned (*ibid.*, paras. 6-10).

16. With regard to the obligation of prevention, the source State did, of course, have to be required to do everything possible to prevent the activities it undertook from giving rise to injurious consequences. But it first had to know what risks the activity in question might involve; it could very well undertake an activity without knowing that it might give rise to certain injurious consequences. There was thus an important element of unpredictability, which would, in the event of harm, entail the responsibility of the source State. Consequently, a rule relating to the obligation of prevention would have to make it clear that prevention depended on the state of the art with regard to the activity in question. The State could not reasonably be held responsible if, despite limited scientific and technological resources and know-how, it had done everything possible to identify the injurious consequences of an activity and if it had not been able to prevent harm from occurring.

17. Although the obligation to provide information and the obligation to co-operate were incumbent only on the source State, the obligation to negotiate was incumbent not only on the source State, but also on all States that might be aware of the impact of the activity carried out by the source State. Since States were sovereign, some might refuse to co-operate and negotiate. It would therefore be necessary to find a way of solving that problem.

18. According to the schematic outline, failure to fulfil the obligation to provide information, to cooperate and to negotiate did not in itself give rise to any right of action; in other words, it did not give rise to an obligation of reparation if harm occurred. The existence of an obligation of reparation depended on shared expectations or negotiation. However, in regard to grounds for exoneration, the Special Rapporteur stated:

These exceptions, which mitigate the application of strict liability, might not be appropriate if the source State behaved in a way that was incompatible with its obligations to provide information and to negotiate ... (*Ibid.*, para. 61.)

The Special Rapporteur thus seemed to be of the opinion that, by ruling out the possibility for the source State to claim exceptions, failure to fulfil the obligation to provide information and to negotiate did entail the responsibility of that State. That was an apparent contradiction.

19. In his own view, the source State had to fulfil the obligation to provide information before the activity began, not after. The previous Special Rapporteur had set a limit on the right to information by providing that the State could refrain from communicating certain types of information in order not to reveal trade secrets. The present Special Rapporteur would have to explain whether he thought that there should be limits on the right to information or whether it should, rather, be absolute.

20. As to the content of the obligation to provide information, it might, for example, be asked whether a State which was about to build a factory to undertake an activity that might give rise to transboundary harm had to supply the blueprints for that factory or whether it merely had to provide general indications concerning the injurious consequences to which the activity in question might give rise.

21. In his report (*ibid.*, para. 17), the Special Rapporteur referred to the possibility of introducing the concept of due diligence, probably in order to establish a kind of balance. If account was not taken of the source State's diligence in trying to prevent harm, that State might be held liable for any harm done to a neighbouring State. The Special Rapporteur should include further details on that point in his future reports.

22. With regard to the obligation of reparation, he could not fully agree with the views expressed by the Special Rapporteur (*ibid.*, paras. 46 *et seq.*). Although the limitation of the automatic application of strict liability might be acceptable in some cases, the obligation of reparation should not, in view of the nature of the topic, depend on a disturbance of the balance of interests which "shared expectations" or negotiation had tended to establish between the States concerned. To regard the obligation of reparation as a treaty obligation would be to deprive the topic of its autonomy, or in other words to preclude liability for risk. Since the activities in question always involved risk, the obligation of reparation could not be conditional. It had to be autonomous. The Special Rapporteur rightly stated that the obligation of reparation was based on the principle of sovereignty. If a sovereign State with exclusive jurisdiction over its territory caused harm to another

State, it had to make reparation, whether or not there had been a breach of some agreement concerning negotiation or a failure to meet "shared expectations".

23. Reparation was not the same as compensation. The purpose of reparation was to re-establish a pre-existing situation to the extent possible. Compensation came into play when harm could not be physically repaired. It could be asked how, in the present context, reparation would operate, particularly when harm continued to take place. Would reparation be made over a period of time or would compensation be made once and for all? In view of the particular features of reparation and compensation, the Commission should try to establish a different régime for each.

24. If grounds for exoneration were allowed, even though, as things now stood, the obligation of reparation would arise only in the event of failure to meet "shared expectations", it was to be feared that reparation would become impossible. The affected State would not be able to obtain either reparation or compensation. The Special Rapporteur would therefore have to give further thought to that question in order to avoid any imbalance. It would be quite abnormal if the source State, which would benefit from carrying out an activity that caused harm, were not bound to make reparation to the affected State, which would not derive any benefit from that activity.

25. In the case of the carriage of oil by sea, for example, it would be entirely logical to allow such grounds for exoneration as *force majeure* and fortuitous event, because the harm that might be caused in such a case, namely pollution, was necessarily accidental. That was not true, however, when, as in the present case, risk was inherent in the activity in question. In any event, if grounds for exoneration were to be allowed, the Commission would have to be very cautious and take account of the legitimate interests of the affected State.

26. A number of clarifications would have to be provided with regard to harm. It would, for example, have to be determined whether what had been caused was direct or indirect harm and whether the source State had an obligation to make reparation for all the consequences of the activity it had carried out.

27. Further consideration should also be given to the question of the establishment of an international compensation fund, which would be the only means of reconciling the interests of the source State and the affected State, by taking account of the harm suffered by the latter and enabling it to obtain suitable reparation.

28. The distribution of costs would have to be studied very carefully. It was important not to prejudice the legitimate interests of the affected State; but, if that State had an obligation to share costs, although it derived no advantage from the activity which caused it injurious consequences, it would suffer further harm.

29. Mr. FRANCIS congratulated the Special Rapporteur on his excellent second report (A/CN.4/402), on which he had some preliminary comments to make.

30. First, the level of care required in connection with the present topic fell short of the familiar concept of the

“duty of care”. Secondly, the purpose of the topic was not to establish secondary rules, but rather to lay down rules which would, from the legal point of view, constitute guidelines or recommendations for the source State and the affected State. In that connection, he agreed that the Special Rapporteur should follow the example of his predecessor and use the term “source State”.

31. In the context of the present topic, the Commission was engaged in establishing primary rules to govern the question of reparation and the obligation to negotiate. The previous Special Rapporteur had emphasized that those primary rules came into play in the event of transboundary harm being caused by an activity which was not prohibited by international law. The schematic outline had been based on those assumptions.

32. In his report, the present Special Rapporteur specified that: “At the present stage, we will work only on the outline itself and not on the amendments proposed in the first five draft articles submitted subsequently” (*ibid.*, para. 13). The articles in question were, of course, articles 1 to 5 submitted by the previous Special Rapporteur in his fifth report.⁸ The present Special Rapporteur also pointed out that the schematic outline did not give any indication of the qualitative nature of the risk involved:

... No indication is given of the kind of risk that is meant. Nothing is said about whether the risk lies in the existence of a very slight probability of catastrophic injury ... or whether we are to consider only the activities that Jenks termed “ultra-hazardous” ... (*Ibid.*)

33. He himself would prefer the Commission to deal with the five draft articles already submitted on the basis of the schematic outline, provided, of course, that a flexible approach was adopted. With regard to the scope of the topic and the qualitative nature of the risk involved, it was essential to bear in mind the distinction between the present topic and that of State responsibility. State responsibility dealt with internationally wrongful acts, whereas the present topic was concerned with acts not prohibited by international law. At the current stage, the Commission should not be concerned with the question of the qualitative nature of risk, but should concentrate on the broad objectives of the topic.

34. As to the general adequacy of the schematic outline, he drew attention to a comment made by the previous Special Rapporteur in his third report:

Of course, it should be made very clear that a schematic outline is not a substitute for the proof of any of the propositions it may briefly indicate. Every element in the schema must later be tested by reference to received principles of international law and emerging State practice, or acceptability to States in the light of their experience and perceived needs. If in any case that test is not satisfied, the schematic outline must be revised. ...⁹

The element of flexibility had thus been left wide open by the previous Special Rapporteur.

35. The scope of the topic should be seen in the context of its object, namely acts not prohibited by international law. Such acts could be performed either by State

agents or by other persons. At the present stage, the Commission should not try to determine the level of risk to be taken into consideration. Many examples could be given to show how wide a range of situations there was to be covered. The essential point was that the present topic concerned all transboundary harm resulting from activities not prohibited by international law.

36. The recent accident at Chernobyl, in connection with which he wished to join in Sir Ian Sinclair’s expression of sympathy (1974th meeting) to Mr. Ushakov, was relevant to the scope of the topic. One of the conclusions to be drawn from that accident was that the Commission would have to be very careful in delimiting the scope of the topic from the spatial point of view.

37. With regard to the question of the role of international organizations, he noted that the Special Rapporteur clearly indicated that the practice of the member States of such organizations would affect the scope of the topic (A/CN.4/402, para. 11 (c)). Since the Special Rapporteur would have to examine that practice, it would be premature at the current stage to reach any conclusions on that point.

38. He recalled that the previous Special Rapporteur had, in his third report, indicated that:

... The best course was to suspend judgment about the unresolved questions of scope until the content of the topic had been more fully explored. ...¹⁰

In his own view, any attempt to revise the schematic outline would therefore be premature at the current stage.

39. Lastly, he drew attention to the comments made by the present Special Rapporteur on the terms “responsibility” and “liability” (*ibid.*, para. 5), on the concept of the duty of care (*ibid.*, para. 6) and on the question of negotiation (*ibid.*, para. 41 (c)). In essence, the Special Rapporteur wanted negotiation to be a binding element in the schematic outline and, accordingly, had suggested that the first sentence of section 2, paragraph 8, and of section 3, paragraph 4, of the outline should be deleted. The cumulative effect of those comments would be a premature revision of the schematic outline. At the same time, the present topic would be shifted in the direction of State responsibility, or in other words in a direction opposite to its very nature. All was, however, not lost. Both the previous and the present Special Rapporteurs had admitted that the schematic outline might have to be revised. His own suggestion was that the outline should be retained as it stood, on the understanding that it would be revised in the light of future developments. The Commission should proceed on that basis to consider the five draft articles submitted by the previous Special Rapporteur.

40. Mr. TOMUSCHAT said that, in addition to its intellectual merits, the Special Rapporteur’s excellent second report (A/CN.4/402) had the advantage of drawing up a detailed balance sheet of all the work done on the topic thus far. The Special Rapporteur had thus given the Commission a solid foundation for its future work. He himself wholeheartedly agreed with that approach,

⁸ See 1972nd meeting, footnote 6.

⁹ *Yearbook ... 1982*, vol. II (Part One), p. 52, document A/CN.4/360, para. 4.

¹⁰ *Ibid.*, p. 61, para. 48.

which recognized the Commission as a collective working unit.

41. As to the question of the legal basis for the topic under general international law, he fully agreed with the Special Rapporteur's conclusions (*ibid.*, paras. 52-54). Basically, liability for acts not specifically prohibited by international law could be traced back to the principle of sovereign equality or equal sovereignty. Interference in the internal affairs of another State was prohibited. The use of force in international relations was also prohibited by Article 2 of the Charter of the United Nations. National sovereignty must, however, be protected against other impairments as well. Quite obviously, physical transboundary effects constituted a third category of acts against which States had to be safeguarded. For sovereignty to retain its meaning, self-determination had to be guaranteed in the economic and social fields.

42. As he saw it, there was no doubt about the legal existence of a rule which could already be relied upon at the present stage: that rule was *sic utere tuo ut alienum non laedas*. Since that ground rule was only a broad principle, whose meaning within the context of the present topic was controversial, there was a definite need to codify in detail the rights and duties of territorial interdependence.

43. He concurred with the Special Rapporteur's approach of not separating the question of prevention from that of reparation of damage and of dealing with them together. Three basic reasons could be given in support of that approach. The first was the interest of the community of nations, and indeed of mankind as a whole, to be preserved from harm to the greatest possible extent. From that point of view, reparation *ex post facto* was always the second best solution. The second reason was that, in many instances, it would not be possible to identify the State which had caused the damage. The third reason was that, in the event of a major disaster, the damage could be so great that the duty to pay compensation would prove rather theoretical. Clearly, therefore, emphasis had to be placed on prevention. A good example was provided by the Chernobyl incident, in connection with which he wished to express his sympathy to the Soviet people. The Soviet Union would obviously have serious difficulties in meeting all the claims that might be made.

44. It was precisely in such circumstances that the role of international organizations became important. Internationally accepted standards could never be enacted by one State alone. They were conceivable only as the outcome of a co-operative effort, which nowadays could be made only within the framework of an international organization.

45. Consequently, he partly disagreed with the schematic outline, and in particular with section 2, where the relationship between a potential source State and a potentially affected State was regarded primarily as a bilateral one. In his view, if a State followed the guidelines adopted by an international organization, it could not be deemed to have an obligation further to discuss safety standards with its neighbours.

46. The role which international organizations were called upon to play might not be easy to define because of the wide range of functions and activities involved. The fact was, however, that many international organizations had been entrusted, *inter alia*, with the task of setting standards of conduct intended precisely to prevent physical transboundary harm.

47. As to the scope of the topic, he agreed with the Special Rapporteur on the need to focus on physical transboundary harm (*ibid.*, para. 11). That concept was, however, a rather broad one. Reading the previous Special Rapporteur's fifth report, it was almost frightening to see what could be included under the heading of "physical transboundary harm". Even diseases had been mentioned by the previous Special Rapporteur, who had apparently been of the opinion that, since individuals were under the control of the territorial State, the spread of an epidemic might be regarded as physical transboundary harm.

48. In his own view, the Commission should concentrate primarily on damage caused by way of the air. The main question that arose was whether States would assume responsibility for damage caused to other States by carrying out military activities. In that connection, a careful analysis of the legal position would be appropriate.

49. Other speakers had referred to the choice between establishing a general rule and identifying areas of hazardous activities. He himself agreed with the Special Rapporteur that both methods should be applied concurrently, because they supplemented one another. Indeed, different categories should even be established. It was clear that the ordinary régime of State responsibility applied wherever standards established by an international treaty had been violated. Violations of resolutions of international organizations were, however, a different category; he had in mind resolutions without binding effect which identified substances that should not be released into the environment. Such resolutions served to underline the high-risk nature of certain activities, and, if damage occurred, full compensation was called for. The same would apply to activities which the laws of all countries regarded as high-risk activities. In his view, a nuclear power plant clearly came within that category.

50. The general rule then applied to all other activities which did not qualify as high-risk activities. The operation of a chemical plant was thus not usually regarded as an ultra-hazardous activity. In that field, any rule on reparation would require some flexibility.

51. Although he, like other Continental lawyers, was not familiar with the concept of shared expectations, he believed that in the present context it was entirely appropriate. Since every human activity in an industrial society had some kind of negative effect on the environment, the task at hand was to set limits of mutual tolerance. If all States engaged in the same deleterious activities, none could claim damages from the others for the harmful effects. The best example in that regard was air pollution caused by road traffic. So long as all the States concerned took no remedial steps, even serious damage to forests could have no legal consequences. If,

however, one State or a few States required the use of air pollution abatement devices, the negative expectation of continuing to pollute the air would be destroyed.

52. That and other examples showed that, in the present context, the yardstick could never be an absolute one. It was through their own practices that States determined the content of what was required under the general principle of due diligence. Some legal concepts therefore had to be framed on the subject, and they had to allow the necessary flexibility. He agreed with the Special Rapporteur that the concept of shared expectations could play that role.

53. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on his second report (A/CN.4/402), which reflected the same grasp and mastery of the topic as those of the previous Special Rapporteur, whose fourth report had, moreover, been welcomed by the Sixth Committee of the General Assembly. The schematic outline which the previous Special Rapporteur had submitted could therefore be regarded as having clearly defined the scope and elements of the topic under consideration. The present Special Rapporteur had rightly decided to focus on the schematic outline, which he regarded as the basic raw material for the topic, but some elements of which had given rise to objections in the Commission and in the Sixth Committee, where the discussions had made it clear that some additions and deletions would be necessary. Accordingly, he himself would draw the Special Rapporteur's attention to various aspects of his report, on which he would request some clarifications and make some suggestions.

54. He would not refer to the question of the unity of the topic, according to which prevention and reparation were one and the same thing viewed from different angles, but he would spend some time on the question of the scope of the topic.

55. As the Special Rapporteur stated:

The schematic outline ... deals primarily with the duty of the source State to avoid, minimize or repair any "appreciable" or "tangible" physical transboundary loss or injury, when it is possible to foresee a risk of such loss or injury associated with a specific dangerous activity. ... (*Ibid.*, para. 11.)

It would be interesting to assess that proposition not in abstract and general terms, but in the light of specific cases, for example by taking the viewpoint of the developing countries, something that would be all the more to the point in that, in his preliminary report (A/CN.4/394, para. 17), the Special Rapporteur had said that he would give careful attention to the interests of the developing countries.

56. Those countries did deserve particular attention because it was difficult to place them on the same footing as the highly industrialized countries and because it could not be denied that, in the developing countries, activities that might cause appreciable physical transboundary harm were usually carried out by corporations controlled either in whole or in part by foreign interests. The activities of such corporations had led to a number of very serious accidents, such as the disaster at the Union Carbide plant at Bhopal in India. Even when hazardous activities were carried out by na-

tional corporations in developing countries, those corporations used technologies guaranteed by industrialized countries. That was the case of nuclear plants practically everywhere in the third world. However, the schematic outline apparently did not contain any provisions relating to the liability of countries with exported high-risk technologies, at least in terms of guarantees of reparation.

57. With regard to the nature of harm, the Special Rapporteur appeared to be using the term "transboundary" in the strict sense, in other words in the sense of "neighbouring" or "bordering", and thus to be dealing only with the situation of neighbouring countries and of countries in the same continent. That meant that account was not being taken of the interests of countries in other continents and, in particular, of the countries of the South, which ran the greatest risk of becoming affected States, with the aggravating factor that they had no means of challenging a source of injury located in a country in the North. That was a matter of even greater concern because the industrialized countries continued to have dependent territories in the South where they could freely carry out hazardous activities, such as nuclear tests and the stockpiling of nuclear weapons. Risks might also be created by freedom of navigation in countries of the South and by the overflight of those countries' territory by aircraft carrying dangerous substances. That brought to mind the problem of the large numbers of potentially affected States to which Mr. Ushakov (1973rd meeting) had referred. As for the affected State, not enough emphasis had been placed on the fact that harm could be suffered by the international community as a whole, since the common heritage of mankind might, for example, be affected. That question should be studied in detail by the Special Rapporteur.

58. Referring to the source State's obligations to provide information and to negotiate, he fully agreed with the principles laid down by the Special Rapporteur, although he had some comments to make concerning their application. The Special Rapporteur had explained that the obligation to inform would lead not only to the establishment of a régime, but also to reparation. Perhaps reference should be made to an obligation "having regard to" the establishment of a régime. He agreed with the idea that the obligation to inform was one of the obligations of prevention and that there was thus a close link between that obligation and the obligation to negotiate, for the aim was to negotiate a régime of prevention, limitation and, where necessary, reparation. Was that an incomplete obligation, or so-called "soft law" or, rather, a well-established obligation under which negotiation would be compulsory? In the latter case, the obligation would involve penalties.

59. That had not been the solution adopted by the previous Special Rapporteur, who had considered that the obligations to inform and to negotiate should not in themselves give rise to any right of action. Noting that negotiation would be inevitable if the draft did not provide for any dispute-settlement machinery, the present Special Rapporteur had disputed the validity of his predecessor's position. He himself had some doubts about the conclusions which the present Special Rap-

porteur had drawn in that regard. In his view, there had to be independent fact-finding machinery, because otherwise the draft might be incomplete, if not inapplicable, at least as far as North-South relations were concerned, since the industrialized States of the North were source States, while the developing States of the South were potential affected States. The conflict between those two categories of States reminded him of Jean de la Fontaine's fable of the meeting between the iron pot and the clay pot. Fact-finding machinery had to be established either by agreement between the parties or, better still, through compulsory recourse, at the request of one party, to assistance from third States or international organizations, as provided for in section 6, paragraph 16, of the schematic outline, with a view to protecting the interests of the affected State and the source State. Such assistance should be compulsory at the fact-finding stage.

60. Referring to the question of the assessment of harm, he noted that Mr. Ushakov and Mr. Calero Rodrigues (1974th meeting) had convincingly shown how difficult it was to make an assessment of the direct and immediate consequences of an injurious activity that would be satisfactory and equitable for the two parties concerned. Harm might have been caused by many factors, as shown by the problems that experts had encountered in trying to determine why European forests were dying. The proliferation of nuclear plants and nuclear explosions in outer space would, moreover, mean that it would be quite arbitrary to attribute harm exclusively to the activities carried out in one single country.

61. A fact-finding and negotiation procedure based on the provisions of the schematic outline might therefore be ineffective or might not be used, at least in North-South relations. Fact-finding was, however, the cornerstone of the prevention-reparation continuum. He agreed with Mr. Ushakov's proposal that consideration should be given to the possibility of holding global and multilateral negotiations in the interests of the entire international community with a view to establishing international fact-finding and dispute-settlement machinery of an institutional and permanent nature. Judging by section 7, part III, and section 8 of the schematic outline, that idea appeared to have been one of the concerns of the previous Special Rapporteur, who had unfortunately not had time to develop it. He hoped that the present Special Rapporteur would be of the opinion that one of his main tasks was to propose autonomous machinery for the implementation of international responsibility, an intention he appeared to have expressed at the end of his preliminary report (A/CN.4/394, para. 17), when he had stated that he would give careful attention to the degree of progressive development of international law which might be required by the novelty of the topic and the demands of equity. Such machinery, which might form part of a compulsory conciliation and arbitration procedure, would be intended to help States fulfil the obligation to provide information and to negotiate in connection with activities which were not prohibited by international law, but which might have injurious consequences for other States.

62. Chief AKINJIDE, referring to the comments made by Mr. Flitan (1974th meeting) and Mr. Razafindralambo, said that, while the problems raised by the topic could easily be solved in developed countries, the situation was not so simple in developing countries, which could not cause transboundary harm because they did not have the necessary technology. Such harm was caused by the transnational corporations which operated in the developing countries' territory and were, in some cases, not even entirely within those countries' laws. According to the schematic outline and the Special Rapporteur's second report (A/CN.4/402), a number of obligations were incumbent on a State whose activities caused transboundary harm. In the case of the developing countries, that meant that States were given responsibility without power, whereas transnational corporations had power without responsibility. In many cases, the host country did not have a clear understanding of the reasons underlying the transboundary harm. If, for example, the Union Carbide accident in India had occurred not in the heart of the country, but near a border, and had affected a neighbouring State, how could the Indian Government have been expected to assume all the responsibilities and fulfil all the obligations with which it would have been saddled? Another example concerned his own country, which was an oil producer and had experienced a blow-out that had lasted for weeks and caused enormous pollution affecting a neighbouring State. Since even the transnational corporation in question, Texaco, had found it extremely difficult to cope with that situation, his country could hardly have been expected to understand what was occurring. He urged the Special Rapporteur not to assume that the problem related to developed countries alone and to pay more attention in future to the developing countries' situation.

63. Mr. KOROMA said that, until now, the law on the topic under consideration had been classical and historical. He agreed that the rule *sic utere tuo ut alienum non laedas* must be adapted to meet present-day conditions and must not be diluted, for it was more relevant to the international community now than it had been in the past.

64. With regard to the title of the topic, he agreed with Mr. McCaffrey's proposed amendment (1973rd meeting) to the English text. The topic concerned activities which were not considered to be unlawful, but which might give rise to acts causing harm. Changing the English title would make it clearer that it was not the activities that were prohibited, but the acts to which they gave rise.

65. As to the scope of the topic, he noted that the Special Rapporteur had so far confined himself to physical harm. In his own view, the topic should be expanded to include the idea of economic and financial loss brought about by physical damage.

66. Turning to the question of liability, he said that the source State had a primary duty not to cause harm or injury, but, if harm was caused, it had a secondary duty to make reparation. A corollary to the primary duty was the right of the affected State to be compensated for the harm suffered. The Special Rapporteur should endeavour to establish the basis for liability

more firmly and convincingly in order to make the topic more acceptable to the international community.

67. Although several multilateral conventions provided for the duty to inform, negotiate and establish conciliation machinery in respect of a number of régimes, he was not certain that that duty existed as such in customary law. However, when a State found that an activity had the potential for causing harm and invited the source State to negotiate or to enter into conciliation, the source State had a duty to do so. In conclusion, he noted that, in the second report (A/CN.4/402, para. 57), the sentence

... Nor does it appear very logical that an affected State which does not provide under its domestic law for compensation for such occurrences should be allowed to claim it when the injury originates in a neighbouring State.

did not appear to follow logically from the two sentences that preceded it. Perhaps the Special Rapporteur could provide further clarifications in that regard.

The meeting rose at 12.50 p.m.

1976th MEETING

Thursday, 26 June 1986, at 10 a.m.

Chairman: Mr. Alexander YANKOV

later: Mr. Julio BARBOZA

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

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/384,¹ A/CN.4/394,² A/CN.4/402,³ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf. Room Doc.5⁴)

[Agenda item 7]

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

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

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

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

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. BARBOZA (Special Rapporteur), summing up the debate, said that he had adopted an overall approach to the topic because there were a number of points on which he wished the Commission to comment before he continued his study. The first was the unity of the topic, which at first sight seemed to have two aspects: that of prevention and that of reparation. He had considered it necessary to find a unifying criterion that was not purely formal. He had also wished to make it quite clear that prevention formed an integral part of the topic, since in the past it had been objected that liability arose only as a consequence of the non-fulfilment of an obligation. That explained the evolution of the meaning of the term "liability".

2. The second point was the need to define the scope of the topic, if only provisionally, while the third was the important issue of obligations. It was necessary to decide whether the Commission would venture into the ill-defined area of law-in-the-making or whether it would introduce real obligations into the schematic outline.

3. His fourth point concerned the operation and basis of what was known as "strict liability" and the extent to which the Commission could accept its mitigation and the obligation to make reparation. He believed that it was not a sufficiently rigorous theoretical argument to base reparation on the obligation of prevention and to recognize that, in the last analysis, reparation was based on strict liability. He had found it necessary to justify that view by pointing out that strict liability could be more or less strict and that the Commission could agree on the acceptable degree of strictness; in other words, it could recognize that the obligation of reparation was based on some form of strict liability and choose the model on which a consensus could be reached.

4. He had not gone into all the questions raised by members of the Commission. For example, Mr. Ogiso (1974th meeting) had observed that information might be withheld for security reasons or to safeguard trade secrets. He himself had not known whether the Commission would accept the obligation to provide information as it had been proposed, and he had therefore left it aside; but that certainly did not mean that he would not revert to it later. Another question had related to indirect injury, which was not yet a matter of concern because it was not known whether the obligation of reparation would rest on the foundations he had indicated. That was why he had not gone into the modalities of compensation for continuing injury, which would be considered at a later stage.

5. With regard to the scope of the topic, that was to say the delimitation of the activities to be studied, it had been suggested that a list of those activities should be drawn up. But it must not be forgotten that the purpose of the study was to establish a general régime and that, consequently, to enumerate the activities would mean using a drafting technique entirely different from that employed hitherto. Moreover, the General Assembly had requested the Commission to study all—and not only some of—the injurious consequences of activities

that were not prohibited. The Commission should also avoid freezing the topic and try to draft a set of rules applicable not only to activities that were hazardous at the present time, but also to those which might result from technological developments.

6. Some members had suggested that the topic should cover areas beyond national jurisdiction. For example, Mr. Roukounas (1975th meeting) thought that it could be extended to cover pollution in outer space and Mr. Balanda (*ibid.*) had mentioned the possibility of dealing with the problem of damage to areas forming part of the common heritage of mankind. That possibility had never been ruled out, and it certainly deserved further consideration. There were, however, many conventions dealing with questions of liability in such areas.

7. Mr. Ushakov and Mr. McCaffrey (1973rd meeting) had expressed the view that only ultra-hazardous activities should be taken into account. But such activities were difficult to define and some of them which were hazardous at the present time might no longer be so in the future, and vice versa. A dividing line also had to be drawn between such activities and those that were merely hazardous. Why restrict the basic principle that an innocent victim must not be left to bear loss or injury, by excluding merely hazardous activities? Mr. Balanda had objected to that possibility.

8. Mr. McCaffrey had suggested that the topic should not include activities that caused pollution. It was not certain that pollution was prohibited, and if it was not certain, how could a claim for compensation be justified without clear evidence of wrongfulness? What would happen in the event of extraordinary pollution caused by an accident? If pollution were simply prohibited, it might not give rise to compensation, whereas under the régime contemplated, compensation would, in principle, always be due as a logical consequence of strict liability. It should also be made clear that, between the two extremes of ultra-hazardous activities and activities which caused pollution, there was an intermediate category of those that were more hazardous than usual activities. Mr. Calero Rodrigues (1974th meeting) and Mr. Roukounas had asked for further particulars of the characteristics of hazardous activities. He would try to provide some in the future, but at the present stage of his work he was dealing only with generalities and a schematic outline.

9. The scope of the topic might be affected by the meaning given to the term "transboundary". According to some members, it applied only to adjoining countries; but it should, in fact, apply to any damage which went beyond the borders of a country, whether or not the affected country was a neighbour of the source country.

10. With regard to the obligations to provide information and to negotiate, Mr. Ushakov and several other members had asked who was to be informed in the case of activities which could have disastrous consequences and with whom negotiations were to be conducted. Such accidents were extremely rare and in most cases the countries which might be affected would not be difficult to identify: they would be the neighbouring countries,

or perhaps only some of them. In the case of the Chernobyl nuclear power station, the Soviet Union's neighbours had not all been affected, let alone mankind as a whole. That plant was, however, in the heart of the Soviet Union. If that country built such a plant only a few kilometres from the Soviet-Finnish border, would it not have an obligation to inform Finland, and perhaps to negotiate with it?

11. The Soviet Union had requested that an international conference be held to discuss the matter; did that not mean that it believed it should provide information to IAEA member countries and that it would negotiate a security régime with them? He did not think that to be relieved of the obligation to provide information it was enough to notify an international organization or to convene an international conference. Moreover, unless an international convention went into great detail, it would merely lay down minimum security rules; it would not relieve States of their liability in the event of an accident.

12. Relevant experience had been gained in three of the cases mentioned in his second report (A/CN.4/402, footnote 40 (*d*)): the nuclear plant for the generation of electricity at Dukovany in Czechoslovakia, the Rütli nuclear plant in Switzerland and the construction of a refinery in Belgium near the border with the Netherlands.

13. On the question of the obligations to provide information and to negotiate concerning activities carried out on vessels under State control, he cited the example of nuclear-powered vessels, such as the *Otto Hahn* (Federal Republic of Germany) and the *Savannah* (United States of America), which had been the subject of many bilateral agreements between the countries of registry and countries which might be affected by the activities carried out on board those vessels. Under those agreements, the vessels were authorized to anchor in the ports of the States parties and there was a régime for compensation in the event of damage. A similar example was that of nuclear test explosions in outer space, which, at the time when they had been permitted, had been announced publicly and had led to the establishment of safety zones of which shipping was kept closely informed. In one case, compensation had been paid by the United States to crew members of the Japanese fishing vessel, the *Fukuryu Maru*.

14. Mr. Calero Rodrigues and Mr. Ogiso had said that the obligations to provide information and to negotiate should not be strict obligations. His own proposal had been simply to refer to general international law. If it was considered that general international law did not attach any consequence to the breach of such obligations, there would be nothing to lose by deleting the reference to a right of action in the schematic outline. On the other hand, if it was considered that general international law did give rise to adverse consequences, it could not be denied that the draft would place States in a worse position than they were in under general international law—and that would be neither fair nor advisable. He wished to make it quite clear in that connection that he had no intention of providing for penalties in the draft.

15. Some members of the Commission had said that they were in favour of complete, if not strict, obligations. He considered that the proposal to rule out any right of action was inequitable and would jeopardize fulfilment of the obligations to provide information and to negotiate. For example, if State A proposed to build a factory near its border with State B, which might be a future source of harmful emissions, and did not notify State B or supply it with information requested, would State B have to bear the risk and would it be deprived of any right of action so long as it had not suffered any injury? Would it have to wait until the investments made in State A had become irreversible, or at least until the problem had become much more difficult to resolve? In his view, State B had a right of reciprocity, a right to exert pressure and even to go so far as to take measures by way of reprisal.

16. Mr. Calero Rodrigues had said that he had been surprised to read in the report (*ibid.*, para. 46) that the obligation of reparation was really no more than prevention after the event. That idea, which had been taken from the previous Special Rapporteur's fourth report, was intended to demonstrate the unity of the topic; it meant that prevention and reparation both had the same purpose, namely to eliminate loss or injury. Although he did not object to that view, he was trying to find another idea which would demonstrate the profound unity of the topic.

17. Several members, including Mr. Tomuschat (1975th meeting), had referred to the role of international organizations. That was a question which warranted careful consideration and would be dealt with in greater detail at a later stage.

18. Mr. Balanda (*ibid.*) had drawn attention to the fact that some States were not in a position to know of all the activities being carried on in their territories, which might be very extensive and lacking in adequate means of communication, and that they could therefore not be held liable for activities carried on by individuals of whose existence they were not aware. In that connection, the question arose whether it would be appropriate to replace the term "source State" by "acting State".

19. Mr. Balanda had also said that he (the Special Rapporteur) appeared to think that failure to fulfil the obligations to provide information and to negotiate should not give rise to any right of action. As he had already indicated, however, that was not the case; he had proposed adverse procedural consequences, such as the fact of not being able to claim exceptions. Mr. Balanda also appeared to think that he did not have any definite ideas about the duty of care. Such a duty did, in fact, exist and he intended to set it out expressly in the draft articles.

20. Mr. Balanda also believed that the obligation of reparation was not autonomous and that it depended on too many circumstances. In fact, he (the Special Rapporteur) had been trying to find an area of agreement among the tendencies which divided the Commission. That might be done by applying the logic of strict liability, or of more or less strict liability, combined with the mitigation of liability, an example of which would be the concept of "shared expectations". Mr. Balanda

had also referred to the possibility of establishing a régime of exceptions, which would be stated negatively, since the schematic outline already provided for too many conditions.

21. Several members had urged that due account should be taken of the developing countries' interests, of which they had given a number of examples. As he had already indicated, he would do everything possible to take those interests into account.

22. Various members of the Commission had expressed the opinion that the word "activities", rather than "acts", should be used in the English title of the topic. No dissenting opinion had been expressed, but that was a point which the Commission might deal with at a later stage.

23. The Commission's discussions had given him the impression that the main difficulties lay in matters of procedure, whereas a fairly broad consensus had been reached on principles. He warned the Commission that it would be quite dangerous to allow procedural problems to overshadow principles. For example, there had been no objection, except in terms of procedure, to the obligations of prevention, information and reparation. But it was his intention not to provide for strict liability without some kind of "mitigating" mechanism. He believed that the next step in the study of the topic should be the formulation of articles on the basis of the schematic outline and in the light of the discussions which had been held in the Commission and which would be held in the Sixth Committee of the General Assembly.

24. Sir Ian SINCLAIR noted that the Special Rapporteur had indicated that the role of international organizations within the framework of the topic would have to be examined. Referring to the Secretariat's survey of State practice relevant to the topic under discussion (A/CN.4/384), he asked whether the Special Rapporteur intended to update any information that might be relevant and possibly add further questions to the questionnaire that had been circulated. It would be helpful for the Commission to have the most up-to-date information available.

25. Chief AKINJIDE suggested that States should also be asked to update their information on the topic.

26. Mr. BARBOZA (Special Rapporteur), welcoming the suggestion made by Sir Ian Sinclair, said that the Secretariat's survey and the questionnaire would be updated and, if necessary, supplemented.

27. Mr. FRANCIS inquired to what extent the Special Rapporteur intended to make fundamental changes to the schematic outline at the present stage.

28. Mr. BARBOZA (Special Rapporteur) said that, as he had indicated in his summing-up, the study of the topic should be pursued on the basis of the areas of agreement that had emerged and the new possibilities that had come to light during the debate.

29. Mr. DÍAZ GONZÁLEZ said that the flexibility of the schematic outline would facilitate the Commission's work on the topic, especially since it was not yet known what approach the new Special Rapporteur would

adopt. The Commission could not work within a rigid framework.

Mr. Barboza took the Chair.

The law of the non-navigational uses of international watercourses (A/CN.4/393,⁵ A/CN.4/399 and Add.1 and 2,⁶ A/CN.4/L.398, sect. G, ILC(XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

NEW DRAFT ARTICLES 10 TO 14

30. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the topic (A/CN.4/399 and Add.1 and 2), as well as the new draft articles 10 to 14 contained therein, which read:

Article 10. Notification concerning proposed uses

A [watercourse] State shall provide other [watercourse] States with timely notice of any proposed new use, including an addition to or alteration of an existing use, that may cause appreciable harm to those other States. Such notice shall be accompanied by available technical data and information that is sufficient to enable the other States to determine and evaluate the potential for harm posed by the proposed new use.

Article 11. Period for reply to notification

1. A [watercourse] State providing notice of a proposed new use under article 10 shall allow the notified States a reasonable period of time within which to study and evaluate the potential for harm entailed by the proposed use and to communicate their determinations to the notifying State. During this period, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not initiate, or permit the initiation of, the proposed new use.

2. If the notifying State and the notified States do not agree on what constitutes, under the circumstances, a reasonable period of time for study and evaluation, they shall negotiate in good faith with a view to agreeing upon such a period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects. The process of study and evaluation by the notified State shall proceed concurrently with the negotiations provided for in this paragraph, and such negotiations shall not unduly delay the initiation of the proposed use or the attainment of an agreed resolution under paragraph 3 of article 12.

Article 12. Reply to notification; consultation and negotiation concerning proposed uses

1. If a State notified under article 10 of a proposed use determines that such use would, or is likely to, cause it appreciable harm, and that it would, or is likely to, result in the notifying State's depriving the notified State of its equitable share of the uses and benefits of the international watercourse, the notified State shall so inform the notifying State within the period provided for in article 11.

2. The notifying State, upon being informed by the notified State as provided in paragraph 1 of this article, is under a duty to consult with the notified State with a view to confirming or adjusting the determinations referred to in that paragraph.

3. If under paragraph 2 of this article the States are unable to adjust the determinations satisfactorily through consultations, they shall

⁵ Reproduced in *Yearbook ... 1985*, vol. II (Part One).

⁶ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

promptly enter into negotiations with a view to arriving at an agreement on an equitable resolution of the situation. Such a resolution may include modification of the proposed use to eliminate the causes of harm, adjustment of other uses being made by either of the States, and the provision by the proposing State of compensation, monetary or otherwise, acceptable to the notified State.

4. The negotiations provided for in paragraph 3 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and interests of the other State.

Article 13. Effect of failure to comply with articles 10 to 12

1. If a [watercourse] State fails to provide notice to other [watercourse] States of a proposed new use as required by article 10, other [watercourse] States which believe that the proposed use may cause them appreciable harm may invoke the obligations of the former State under article 10. In the event that the States concerned do not agree upon whether the proposed new use may cause appreciable harm to other States within the meaning of article 10, they shall promptly enter into negotiations, in the manner required by paragraphs 3 and 4 of article 12, with a view to resolving their differences.

2. Subject to article 9, if the notified State fails to reply to the notification within a reasonable period in accordance with article 12, the notifying State may proceed with the initiation of the proposed use, in accordance with the notification and other data and information communicated to the notified State, provided that the notifying State is in full compliance with articles 10 and 11.

3. If a [watercourse] State fails to provide notification of a proposed use as required by article 10, or otherwise fails to comply with articles 10 to 12, it shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article 9.

Article 14. Proposed uses of utmost urgency

1. Subject to paragraph 2, a State providing notice of a proposed use under article 10 may, notwithstanding affirmative determinations by the notified State under paragraph 1 of article 12, proceed with the initiation of the proposed use if the notifying State determines in good faith that the proposed use is of the utmost urgency, due to public health, safety, or similar considerations, and provided that the notifying State makes a formal declaration to the notified State of the urgency of the proposed use and of its intention to proceed with the initiation of that use.

2. The notifying State may not proceed with the initiation of a proposed use under paragraph 1 unless it is in full compliance with the requirements of articles 10, 11 and 12.

3. The notifying State shall be liable for any appreciable harm caused to the notified State by the initiation of the proposed use under paragraph 1, except such as may be allowable under article 9.

31. Mr. McCaffrey (Special Rapporteur) first drew attention to Conference Room Document 4, circulated at the Commission's thirty-sixth session, in 1984, which had been reissued for convenient reference to the articles provisionally adopted in 1980,⁷ the provisional working hypothesis accepted in 1980⁸ and the other draft articles submitted by the previous Special Rapporteur.⁹

32. Introducing his second report (A/CN.4/399 and Add.1 and 2), he pointed out that it contained two substantive chapters: chapter II, which dealt with general views on draft articles 1 to 9 submitted by the

⁷ The texts of articles 1 to 5 and X and the commentaries thereto, provisionally adopted by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

⁸ *Ibid.*, p. 108, para. 90.

⁹ The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

previous Special Rapporteur in his second report¹⁰ and referred to the Drafting Committee in 1984,¹¹ and chapter III, which contained the five new draft articles 10 to 14. Chapter II was quite long and detailed, because he had thought it important to lay before the Commission, for the first time during the current quinquennium of membership, the overwhelming support for the most fundamental principles of the work on the topic: equitable utilization and *sic utere tuo ut alienum non laedas*.

33. That support could be divided into four categories. The first contained citations from, and brief descriptions of, treaty provisions concerning contiguous and successive watercourses, which were contained in annexes I and II to chapter II of the report. He would be grateful if any members who had information not listed in those annexes would apprise him of it. The second category covered positions taken by States in diplomatic exchanges, to which a controlling weight could not be assigned, but which would be of use to the Commission in its work. The third category comprised decisions of international courts and tribunals, which were discussed in the report (*ibid.*, paras. 101-133). The fourth category comprised other international instruments, such as declarations and resolutions of intergovernmental conferences, reports by expert groups and intergovernmental organizations, and studies by international non-governmental organizations (*ibid.*, paras. 134-155). Some of the material had been placed before the Commission earlier, but not in its present analytical framework.

34. Four points arose in connection with draft articles 1 to 9 referred to the Drafting Committee. In regard to the definition of the term “international watercourse [system]”, which he discussed in his report (*ibid.*, paras. 60-63), he noted that the Commission had on several occasions decided to allow its approach to develop unconstrained by a definition *ab initio*. As to the “shared natural resource” concept (*ibid.*, paras. 71-74), while he had no objection to that concept, he did recognize that it had given rise to controversy in the past. Strictly speaking, he did not believe it was necessary to apply it in the context of the work in hand. The legal content of the concept could be expressed in other ways and more concretely in other articles.

35. On the question whether the factors listed in paragraph 1 of article 8 (Determination of reasonable and equitable use) should be included in an article or in the commentary to an article, it would be useful to have the views of members. In the discussions on that issue in 1983 and 1984, several senior members had taken the view that the factors listed in that article did not really represent law, but were simply an indicative list of the kinds of circumstances that could be relevant to the determination of equitable use. They had believed that it would be sufficient to retain something along the general lines of the introductory part of paragraph 1.

36. The fourth question to which he wished to draw attention was whether article 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States) should be framed solely in terms of “appreciable harm”, or whether it should be expressly recognized in the article itself that an equitable apportionment might well entail some degree of “appreciable harm” in the form of unmet needs in one or more of the States concerned. He dwelt on that question in his report (*ibid.*, paras. 171-187), and confirmed his adherence to the maxim *sic utere tuo ut alienum non laedas*, by virtue of which a State was required to refrain from causing harm to another State through the use of an international watercourse. The provisions of article 9 were intended as an expression of that principle adapted to international watercourses in a manner consistent with the principle of equitable utilization.

37. The issue of equitable utilization usually arose where the water available was insufficient—in quantity, quality or otherwise—to satisfy the needs of two or more States using the watercourse. The object of equitable apportionment was to maximize the benefits and minimize the harm to the States concerned. If the supply of water was inadequate, equitable apportionment would result in unmet needs for one or more States. It would therefore be much clearer and legally more precise not to refer in article 9 to “appreciable harm”, but to introduce the concept of prohibition of causing legally redressable injury. The term “injury” meant a legally recognizable instance of factual harm. Article 9 would thus deal with the duty to refrain from causing harm that was not consistent with equitable apportionment.

38. In his report (*ibid.*, paras. 182-184), he had put forward three alternative redrafts for article 9. Those texts were not formal proposals; they were intended only to illustrate possible means of reconciling the principle *sic utere tuo ut alienum non laedas* with the principle of equitable apportionment. He therefore asked members not to dwell on the actual drafting, but to express their views on the general question whether article 9 should speak only of “appreciable harm” or be brought into line with the principle of equitable apportionment.

39. Before proceeding to introduce the five new draft articles submitted in his report, he recalled that, at its thirty-second session, in 1980, the Commission had adopted six articles—articles 1 to 5 and X—and had accepted a provisional working hypothesis on the meaning of the term “international watercourse system”. At its thirty-sixth session, in 1984, when it had referred to the Drafting Committee draft articles 1 to 9 submitted by the previous Special Rapporteur in his second report, the Commission had decided that the Committee should also have before it the provisionally adopted articles 1 to 5 and X, the provisional working hypothesis and draft articles 1 to 9 as submitted by the previous Special Rapporteur in his first report.¹²

40. Turning to the five new draft articles 10 to 14, concerning procedural rules applicable in cases involving

¹⁰ For the texts of these articles and a summary of the Commission's discussion on them at its thirty-sixth session, see *Yearbook ... 1984*, vol. II (Part Two), pp. 89 *et seq.*, paras. 291-341.

¹¹ *Ibid.*, pp. 87-88, para. 280.

¹² *Ibid.*, p. 88, footnote 285.

proposed new uses of watercourses, he suggested that, in view of the lack of time, the best course would probably be to hold a general discussion and deal only with the main thrust of the articles. The discussion would provide guidance for a possible reformulation of the draft articles in the report to be submitted at the next session. Each article was followed by "comments", which were not intended as a commentary: they were merely explanatory notes giving sources or references to earlier texts.

41. It would be useful to focus on the situations to be covered, rather than on the precise wording of the draft articles. Once agreement had been reached on the situations and on how to cover them, it should not prove difficult to find generally acceptable formulations. The different possible situations, discussed in the report (*ibid.*, paras. 192-197), fell into two general categories, the first of which was that of problems concerning existing uses, which were adequately dealt with in paragraphs 1 and 2 of article 8 as referred to the Drafting Committee.

42. The second general category (*ibid.*, paras. 195-197) could be divided into two subcategories of situations. The first was that of a State wishing to initiate a new use which might have significant adverse effects on another State's use of a watercourse. That situation was dealt with in chapter III of the outline for a draft convention submitted by the previous Special Rapporteur, and in the five new draft articles he himself had submitted. The second subcategory was that of a State wishing to make a new use, but being factually unable to do so because of the uses being made by another State. That situation was not expressly provided for in either chapter II or chapter III of the outline for a convention; he had therefore invited members to express their views on how to deal with it (*ibid.*, para. 197, *in fine*).

43. Introducing the five new draft articles 10 to 14, he explained that they dealt with new uses and, in particular, with the first subcategory of situations he had mentioned, where one State wished to make a new use which might have significant adverse effects on other States using the same international watercourse. The articles dealt with the same general subject-matter as draft articles 11 to 14 submitted by the previous Special Rapporteur and discussed by the Commission in 1983 and 1984.

44. Draft article 10 dealt with notification concerning proposed new uses that might cause appreciable harm to other States. Paragraph (9) of the comments on that article explained that the reference to "available" technical information meant that the notifying State was generally not required to do additional research at the request of the potentially affected State, but only to provide such relevant information as already existed and was readily accessible.

45. Draft article 11 dealt with the period for reply to notification. Paragraph (2) of the comments explained that the article referred to a "reasonable" period of time because a specific period, such as six months, might be unreasonably long in some cases and unreasonably short in others. The Commission would

have to give careful consideration to the choice between that formula and a definite time-limit.

46. Draft article 12 dealt with the reply to notification, consultation and negotiation concerning proposed uses. Its provisions were important, but sufficiently self-explanatory not to require further comment at the present stage.

47. Draft article 13 dealt with the effect of failure to comply with articles 10 to 12. Paragraph 3 specified that a State failing to provide notification of a proposed use would incur liability for any harm caused to other States by that use, even if such harm was not in violation of article 9. The previous Special Rapporteur had suggested that the procedures provided for in article 13 should be linked with the dispute-settlement mechanism.¹³

48. Draft article 14 dealt with situations of the utmost urgency in which the notifying State needed to proceed with the proposed use immediately, for example for public health or safety reasons, as indicated in paragraph 1. That exception, however, should not be made so broad as to swallow the rule itself, hence the good faith requirement mentioned in paragraph (3) of the comments.

49. As he stressed in his concluding remarks (*ibid.*, para. 199), those draft articles were not intended to be all-encompassing. In particular, they did not deal with such situations as, first, State A believing that State B was exceeding its equitable share, and secondly, State A wishing to make a new use of the watercourse but being factually unable to do so because of the uses being made by State B. He would welcome the views of members on those questions, as well as on the four points he had mentioned concerning articles 1 to 9 and on the set of procedural rules proposed in the new draft articles 10 to 14.

50. Mr. USHAKOV said that, if he was to take a position on the Special Rapporteur's proposals, he would first have to know why they were being made. For although the topic of the law of the non-navigational uses of international watercourses had been under study for 15 years, the object to be achieved was still not known. In any event, it would be absolutely pointless to try to elaborate draft articles, as the first two Special Rapporteurs had proposed, with a view to the adoption of an international convention. The uses of international watercourses concerned riparian States, and it was for them to define the legal status of the watercourse system they shared and to regulate its use. Riparian States would not be able to accept a convention of universal scope in which non-riparian States imposed on them a régime which was not their own. A convention ratified by 50 States, only 2 of which might be riparian States, would be of no value whatsoever.

51. There would also be no point in trying, as the third Special Rapporteur, Mr. Evensen, had suggested, to draft a framework convention, that was to say a binding instrument containing general rules that would have to be elaborated in agreements between riparian States. Like a general convention, and for the same reasons, such an instrument would be worthless. Moreover, it

¹³ See *Yearbook ... 1984*, vol. I, p. 102, 1831st meeting, para. 12.

could not stand on its own, because it would have to be supplemented by special agreements between riparian States.

52. In fact, if the Commission wished to do useful work, it should confine itself to making recommendations. It might draft a very general definition of an international watercourse, or several variants between which riparian States could choose, on the understanding that, if they did not find any of the proposed definitions satisfactory, they could adopt another. Of the very detailed provisions the Commission might draft, riparian States could choose those they found suitable, or only some of the rules they contained.

53. If the Commission adopted that approach, the difficulties would be reduced; but if it tried to draft generally acceptable binding rules, its efforts would be in vain, because in that sphere the interests of States were divergent and even the views of members of the Commission were hard to reconcile.

54. Mr. McCaffrey (Special Rapporteur) said that the issue raised by Mr. Ushakov had been before the Commission since the General Assembly had referred the topic to it in 1970. It was striking that, in the Sixth Committee of the General Assembly, very great interest had been shown by many States in the topic of international watercourses. When Mr. Schwebel had been Special Rapporteur, the Commission had decided to structure its work on the topic in the form of a framework instrument. The purpose of that instrument would be to provide guidance to States in solving their watercourse problems. States would thus be able to apply and adjust the provisions of the Commission's draft to suit their particular needs.

55. To say that the draft would have the form of a framework instrument was not to deny its usefulness. Many of its provisions constituted the application to international watercourses of general principles of international law. A clear statement of those principles would undoubtedly assist States and help them to avoid disputes.

56. It was the Commission's custom to refrain from making any recommendation to the General Assembly on the fate of its drafts until the work on each topic had been completed. Moreover, any recommendation made by the Commission at the present stage—for example that a codification conference be convened—would not be binding on the General Assembly, which could always decide to give the draft the form of a declaration or a set of recommendations. The awareness of that fact should not, however, inhibit the Commission at the present stage of its work.

57. Mr. FRANCIS said that, as a citizen of a small island State, he would refrain from dwelling at length on the topic of international watercourses. He wished mainly to comment on Mr. Ushakov's remarks. It was certainly correct to say that the Commission would be wise not to attempt to prepare a draft convention for riparian States; but he could endorse the Special Rapporteur's remarks regarding the great interest shown in the topic. He himself recalled the statements made by the representatives of many riparian States in the Sixth Committee during the discussion on the topic, which

had also been studied by the Asian-African Legal Consultative Committee. The final result of the Commission's work might well be to provide guidelines—or perhaps a handbook—for riparian States. At the present stage, however, the Commission should press on with its work and leave the ultimate fate of the draft to the General Assembly.

The meeting rose at 1 p.m.

1977th MEETING

Friday, 27 June 1986. at 10 a.m.

Chairman: Mr. Doudou THIAM

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

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/393,¹ A/CN.4/399 and Add.1 and 2,² A/CN.4/L.398, sect. G, ILC (XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPporteur
(continued)

NEW DRAFT ARTICLES 10 TO 14³ (continued)

1. Mr. FLITAN congratulated the Special Rapporteur on the scientific precision with which he had introduced his second report (A/CN.4/399 and Add.1 and 2), which contained very interesting ideas on a very sensitive topic.

2. Before turning to draft articles 1 to 9 referred to the Drafting Committee in 1984, he wished to comment on a matter of principle which had already been discussed at some length, namely the form that the draft articles should take. In view of the different situations to be taken into account, and to avoid any misunderstanding, it would be better for the draft to consist simply of recommendations to States. The Commission had been requested by the General Assembly to formulate a framework agreement, not a draft convention. The ex-

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

isting texts should not be discarded, but the draft articles should contain rules of a residual nature so that States might have a clear idea of international law pertaining to watercourses at the present time, for water was used to meet a wide variety of needs and was something that made for controversy in international life. The Commission nevertheless had to proceed cautiously. It should not prepare draft articles that were too detailed and went beyond the limits of a framework agreement setting out general principles.

3. With regard to the draft articles referred to the Drafting Committee, he agreed in principle with the Special Rapporteur's recommendation (*ibid.*, para. 63, *in fine*) that draft article 1, which contained the definition of an "international watercourse", should be withdrawn for the time being. Nevertheless, while it was wise not to take a clear-cut position on such a sensitive and complicated issue as the definition of an international watercourse, there was no reason to proceed on the basis of the provisional working hypothesis accepted in 1980. In 1984, the previous Special Rapporteur had decided, in the light of the objections expressed by many members of the Commission, to abandon the idea of an "international watercourse system".⁴ Hence the Commission could use as a provisional working hypothesis the text of article 1 which it had approved and referred to the Drafting Committee in 1984.

4. The concept of "shared natural resources", set out in draft article 6, had been sharply criticized in 1983 and was, he reaffirmed,⁵ contrary to international law and therefore unacceptable. It had to be rejected if the draft framework agreement requested of the Commission was to be accepted by a large number of States. Clearly, it was essential to avoid including such a controversial issue in the draft.

5. For the same reason, all the factors listed in draft article 8 as determining whether the use of the waters of an international watercourse was reasonable and equitable should be deleted, for they did not embody any legal principles. They involved geographic, climatic and hydrological concepts, and the list was far from exhaustive. Accordingly, it should be left to States to decide which factors were to be taken into account, and article 8 should consist only of the first sentence of paragraph 1.

6. In connection with draft article 9, on the duty to refrain from causing "appreciable harm" to other watercourse States, the Special Rapporteur proposed in his report (*ibid.*, paras. 179-187) many new ideas that were of considerable scientific value. On the basis of the text of draft article 9 referred to the Drafting Committee, the Special Rapporteur presented three different ways of formulating the principle of equitable utilization embodied in that article, indicating that he preferred the third approach (*ibid.*, para. 184). Personally, he was in favour of that third approach, which reconciled the right of equitable utilization with the duty not to cause harm and was more precise than the first two alternatives. Similarly, he shared the Special Rapporteur's view that "an article drafted along the general

lines of this third alternative would best achieve the goals of a provision on this subject, viz. to set forth the 'no harm' rule while making it consistent with the principle of equitable utilization" (*ibid.*).

7. As to the new draft articles 10 to 14 submitted by the Special Rapporteur, the explanation of the word "available" given in paragraph (9) of the comments on article 10 was in his view somewhat contradictory, because data and information which were not readily available could not be produced. Consequently, it would not be possible to indemnify the notifying State for any expenses it incurred.

8. On the other hand, he shared the view expressed by the Special Rapporteur in paragraph (2) of the comments on article 11. It would indeed be difficult to set a precise time-limit of six months, which might be too long in some cases and too short in others. Equally valid were paragraph (5) of the comments on article 13 and paragraphs (3) and (4) of the comments on article 14.

9. Lastly, it was not necessary at the present time to decide on the question of drafting further articles on specific situations, in view of the General Assembly's request for the preparation of nothing more than a draft framework agreement. States themselves should solve any important problems for which the draft articles, in their present form, failed to supply an answer.

10. Mr. MAHIOU commended the Special Rapporteur on his very thorough and complex second report (A/CN.4/399 and Add.1 and 2). The flexible and respectful attitude that the Special Rapporteur had adopted towards his predecessors risked, in a sense, making the Commission's task more difficult in that it had four different options to choose from. The report did perhaps contain too many footnotes and lengthy quotations and the Special Rapporteur had felt compelled to reopen the debate on certain issues, but despite those defects his analysis and conclusions were very convincing.

11. As Mr. Ushakov (1976th meeting) had said, the work would naturally be much easier if the Commission simply had to prepare guidelines for States; but as the Special Rapporteur recalled (A/CN.4/399 and Add.1 and 2, para. 59), the Commission had adopted a specific approach and had to continue to follow that approach. It must therefore strive to work out the framework agreement which it had been instructed to prepare.

12. He could agree to the Special Rapporteur's proposal that draft article 1 be withdrawn for the time being and that the Commission defer its consideration of the definition of an international watercourse (*ibid.*, para. 63). He none the less wondered whether it might not be possible to use that definition, since it had become a less controversial issue as a result of the abandonment of the "system" concept in 1984.

13. The Special Rapporteur had taken a more cautious attitude towards the "shared natural resource" concept, but it would be premature to discard it, as the Special Rapporteur advocated in his report (*ibid.*, para. 74). The concept had developed considerably as a result of the Commission's work and the Special Rapporteur himself had introduced some equally controversial con-

⁴ See *Yearbook ... 1984*, vol. II (Part Two), p. 89, para. 290.

⁵ See *Yearbook ... 1983*, vol. I, p. 213, 1791st meeting, para. 9.

cepts, such as “limited territorial sovereignty” (*ibid.*, para. 162), which might create further confusion about the “shared natural resource” concept.

14. With regard to the determination of reasonable and equitable use of the waters of an international watercourse, there was no need for the Commission to resume its discussion of article 8, which had already been referred to the Drafting Committee; but it was an important provision and some of the factors listed should indeed be included in the article itself, which should not be confined solely to the first sentence of paragraph 1.

15. He fully agreed with the Special Rapporteur’s analysis and conclusions concerning the concepts of injury and equitable utilization (*ibid.*, para. 172, and especially para. 173). The Special Rapporteur had drawn a useful distinction between “factual harm” and “legally recognizable injury”, which would entail consequences and lead to compensation.

16. Of the three proposals made by the Special Rapporteur concerning the duty not to cause “appreciable harm” (*ibid.*, paras. 182-184), the first was the least satisfactory, because the use of the term “injury” in the very broad sense might give rise to problems, while the purpose of article 9 was precisely to avoid any problems of interpretation. The idea stated in the second proposal was quite correct, but the wording might have to be amended. Like the Special Rapporteur, he would be in favour of the third proposal (*ibid.*, para. 184), which was much more concise and would be acceptable if the text were amended to remove any ambiguity. As it now stood, the proposed wording appeared to authorize a State to cause harm to another State, although only in exceptional circumstances.

17. The draft articles on the procedural rules to be applied in the event of a dispute between States concerning the utilization of a watercourse related to matters that had already been dealt with both in the draft on State responsibility for wrongful acts and in the draft on international liability for injurious consequences arising out of acts not prohibited by international law. Since those topics related to loss or injury caused in a wide variety of sectors and already provided for general means of solving such problems, the purpose of the draft articles under consideration would be to arrange for more detailed methods to deal with individual situations in the framework of specific agreements, as the Special Rapporteur in fact suggested in his report (*ibid.*, para. 193). The Special Rapporteur, however, apparently ruled out the idea of the need for specific procedures, and he himself had also begun to question whether they were really necessary. The matter thus called for further consideration.

18. Finally, the Special Rapporteur discussed various situations that might arise between States in the utilization of an international watercourse (*ibid.*, paras. 192-197). However, the distinction he made in paragraph 197 between an existing use and a new use of a watercourse was not at all convincing and was quite difficult to imagine. His own doubts would almost certainly be dispelled by explanations from other members

of the Commission and the Special Rapporteur, whose conclusions were none the less very interesting.

The meeting rose at 11.30 a.m.

1978th MEETING

Monday, 30 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/393,¹ A/CN.4/399 and Add.1 and 2,² A/CN.4/L.398, sect. G, ILC (XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

NEW DRAFT ARTICLES 10 TO 14³ (*continued*)

1. Mr. CALERO RODRIGUES thanked the Special Rapporteur for his second report (A/CN.4/399 and Add.1 and 2) and his oral introduction (1976th meeting). The report itself seemed rather lengthy, although the wish to make it a self-contained document was understandable. In particular, the discussion in no less than 12 paragraphs of the Harmon Doctrine, in favour of which no one would argue seriously, could have been dispensed with. Other parts of the report, such as that under the heading “equitable utilization or ‘limited sovereignty’ ” (A/CN.4/399 and Add.1 and 2, paras. 92-99), could give rise to prolonged discussion. The statement that

... leading studies of the law of international watercourses have concluded that the rights and obligations of States in respect of the use of international watercourses are the same whether the watercourse is contiguous or successive (*ibid.*, para. 76)

was open to dispute. The distinction between rights and obligations of States with regard to contiguous and suc-

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³ For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

cessive watercourses had been drawn in the 1933 Declaration of Montevideo concerning the industrial and agricultural use of international rivers,⁴ the 1971 Act of Asunción⁵ and the 1971 Act of Santiago concerning hydrologic basins.⁶ In his report (*ibid.*, para. 93), the Special Rapporteur quoted paragraph 2 of the Declaration of Asunción in support of his argument; but paragraph 1 of that Declaration stated that, in the case of contiguous international rivers which were under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use was made of the waters. Consequently, the assertion that there was no distinction of any kind was far too sweeping.

2. Mr. Ushakov (1976th meeting) had been right to say that a future convention would be of little use if it was accepted only by non-riparian States, or if it was accepted only in one region or only by upper or lower riparian States. Hence, in preparing the draft articles, the Commission should seek a compromise, refrain from insisting on doctrinal points and make the draft as simple as possible, so that it could serve as a basis for bilateral or regional agreements. On the other hand, having recourse to formulating recommendations, as Mr. Ushakov had suggested, would not provide a solution. In any event, it would be for States to decide whether the draft articles were to be accepted as rules of law or simply as guidelines.

3. He agreed with the Special Rapporteur's recommendation that the Commission should strive for simplicity in drafting articles on the topic and with his point that to provide a great deal of detail or guidance might prove to be counter-productive and unnecessarily time-consuming (A/CN.4/399 and Add.1 and 2, para. 59). On the other hand, he was not sure about the Special Rapporteur's observation (*ibid.*, para. 58) that the Commission's task was the codification and progressive development of legal rules which applied to physical phenomena. The legal rules applied to the conduct of States, not to physical phenomena. Certainly, the review of the physical characteristics of water contained in the first report of the second Special Rapporteur, Mr. Schwebel,⁷ was instructive, but it was not fundamental to the topic.

4. As to the definition of an "international watercourse system", the Special Rapporteur recommended (*ibid.*, para. 63) the "withdrawal" of draft article 1, which had been referred to the Drafting Committee in 1984. Such a step would conform to the conclusion reached by the Commission in 1976 that the definition could be left until a later stage. "International watercourse" and "international watercourse system" were not very different concepts if the working hypothesis of 1980 was maintained. According to that hypothesis, an international watercourse system, for the purposes of the draft articles, was not an objectively unitary concept, but a use-related, relative concept. The final part

of the working hypothesis was even more categorical, stating that

... to the extent that the uses of the waters of the system have an effect on one another ... the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.⁸

5. Reference to the "system" concept instead of that of a "drainage basin" had been considered by many as an unsatisfactory basis for the draft. If the system concept was interpreted in accordance with the working hypothesis, it lost the feature that made it objectionable. However, some doubt then arose as to whether it retained its usefulness. "Withdrawal" of draft article 1 referred to the Drafting Committee in 1984 might be viewed as a rejection of the deletion of "system". Since that was not the intention, the best solution might be for the Commission simply to decide that the Drafting Committee should not take up the question of the definition until the work on the draft was nearing completion.

6. With regard to the possibility of reviving the "shared natural resource" concept, he had consistently maintained that, if the Commission was to succeed in its efforts, it must seek compromises. The inclusion in the draft of the "shared natural resource" concept would act as a stumbling-block, so it would be unwise to insist on retaining it. On the other hand, omitting it would not exclude the two basic principles of "equitable use" and "no harm" already recognized by the Commission. He agreed with the Special Rapporteur's assertion (*ibid.*, para. 74) that replacing the "shared natural resource" concept with an entitlement to "a reasonable and equitable share of the uses of the waters of an international watercourse" gave a more definite legal content to draft article 6 without eliminating any fundamental principle. For those reasons, he was opposed to any revival of the "shared natural resource" concept.

7. He endorsed the idea of simplifying draft article 8, for as he himself had suggested in 1984,⁹ the commentary could include the indicative list of factors to be taken into account in determining whether the use of the waters of an international watercourse was exercised in a reasonable and equitable manner. It should be left to the States concerned to decide, in negotiating specific agreements, which factors were to be applied to the situation in hand.

8. The Special Rapporteur raised the question whether the principle contained in draft article 9, namely *sic utere tuo ut alienum non laedas*, should be expressed in terms of an obligation "not to cause injury", rather than "not to cause appreciable harm". In other words, should the Commission discard the material, objective concept of "harm" in favour of the legal concept of "injury"? In his own view, the "no harm" principle was fully satisfactory; indeed, in 1984, he had stated his belief that the whole of the draft articles, including the principle of "equitable utilization", could be deduced from that principle.¹⁰ The Special Rapporteur seemed to believe (*ibid.*, para. 180) that application of the "no

⁴ See *Yearbook ... 1974*, vol. II (Part Two), p. 212, document A/5409, annex I.A.

⁵ *Ibid.*, pp. 322-324, document A/CN.4/274, para. 326.

⁶ *Ibid.*, p. 324, para. 327.

⁷ *Yearbook ... 1979*, vol. II (Part One), pp. 145 *et seq.*, document A/CN.4/320, chap. I.

⁸ See 1976th meeting, footnote 8.

⁹ See *Yearbook ... 1984*, vol. I, p. 237, 1854th meeting, para. 9.

¹⁰ *Ibid.*, para. 5.

harm” principle could have excessively constraining effects in that, where a State engaging in “equitable use” did cause harm, the “harm” could be considered permissible and should not entail a legal “injury” or be “otherwise wrongful”. The Special Rapporteur went on to say (*ibid.*, para. 181) that what should be prohibited was not conduct that caused harm, but conduct whereby a State exceeded its equitable share, and that the focus should therefore be on the duty not to cause legal injury (by making a non-equitable use) rather than on a duty not to cause factual harm. That concern might already be covered to some degree by the last part of article 9, whereby a State must refrain from and prevent appreciable harm “unless otherwise provided for in a watercourse agreement or other agreement or arrangement”.

9. None of the three alternatives suggested by the Special Rapporteur (*ibid.*, paras. 182-184) seemed better than the existing wording of article 9. The first referred to an obligation not to “cause injury”: that was acceptable from the legal point of view, but there was already a general obligation under international law to refrain from causing “injury”. The second alternative referred to a State’s obligation not to “exceed its equitable share”. In some cases, where the problem was a quantitative one, it might be possible to determine what constituted an “equitable share” (yet he himself would prefer the expression “equitable use”). However, in a case like that of the Amazon basin, how was the “share” of the uses to be attributed to upper and lower riparian States to be measured? Harm would be a more practical yardstick for determining the basic obligations of the States concerned. “Equitable use” was, in essence, a use that caused no harm.

10. The third alternative attempted a sort of compromise whereby a State’s obligation was not to cause appreciable harm “except as may be allowable within the context of [its] equitable utilization of that international watercourse”. That exception might be regarded as too vague, since the determination of an “equitable share” or “equitable use” was not always easy, and might in some instances prove impossible. If an exception to the “no harm” principle was to be admitted, it would be better to express it in more precise terms, as in the existing wording of article 9. Consequently, replacement of the objective concept of “harm” by the legal concept of “injury” in article 9, or even adjustment of the article to include the concept of “equitable share” or of “equitable use”, would not be an improvement. While from the drafting point of view the articles submitted by the Special Rapporteur were an improvement on previous articles covering the same subject, from the substantive point of view they focused to a lesser extent on “harm”, which would make practical problems more difficult to solve.

11. Draft article 10 submitted by the Special Rapporteur spoke of the obligation to provide timely notice of any proposed new use, including an addition to or alteration of an existing use, that might cause appreciable harm to other States. Some of the terms contained in draft article 11 submitted by the previous Special Rapporteur had been eliminated: reinsertion of

the word “project” or “programme” might clarify the new formulation.

12. The new draft article 11, concerning the period for reply to notification, provided for a reasonable period of time within which to study and evaluate the potential for harm, rather than the six months provided for in draft article 12 submitted by the previous Special Rapporteur. That change might be an improvement, in that it could be left to States to decide what constituted a reasonable period.

13. Under the terms of the new draft article 12, the replying State was allowed to determine that the proposed use was likely to cause it appreciable harm or might result in the loss of its equitable share of the uses and benefits of the international watercourse. He was not sure whether such a dual determination would serve any useful purpose. Indeed, it might make the articles less effective. The consequences of a reply unfavourable to the proposed use would be an obligation to consult with a view to confirming or adjusting the “determinations” and, if no agreement was reached through consultations, negotiations with a view to an equitable resolution of the situation by modification of the use or payment of compensation. The previous Special Rapporteur had gone further in that regard by providing, in his draft article 13, for the settlement of disputes and by dealing with the possibility of proceeding with the new use. That was an important point, for it was assumed that all States would act in good faith; but the negotiations might be prolonged simply to prevent the introduction of a new use of a watercourse. Provision should therefore be made to safeguard against such cases.

14. The terms of paragraphs 1 and 2 of the new draft article 13 seemed reasonable. However, the provisions of paragraph 3, namely that a State failing to provide notification of a proposed use as required by article 10 would incur liability for any harm caused to other States by the new use, whether or not such harm was in violation of article 9, appeared to be based on the assumption that article 9 would move away from the realm of harm to the realm of injury. It was to be hoped that such a shift would not limit the responsibility of the State introducing a new use which caused harm. States should be liable for any harm they caused, regardless of whether a breach of a purely legal obligation was involved.

15. In draft article 14, the Special Rapporteur retained the concept of proposed uses of utmost urgency, which was a very delicate question. The wording of that safeguard provision should be considered carefully, otherwise it could clearly give rise to abuse by States, which could invoke utmost urgency almost as a matter of course, thus nullifying the effect of the system being established.

16. Mr. LACLETA MUÑOZ thanked the Special Rapporteur for his second report (A/CN.4/399 and Add.1 and 2), which gave an overall view of the work done on the topic. He was not opposed to the idea that the definition of the expression “international watercourse” or “international watercourse system” could be deferred, although in his opinion the draft dealt with

uses of watercourses, not of watercourse systems. He was therefore prepared to accept the definition proposed by the previous Special Rapporteur, Mr. Evensen, but not the system concept, for reasons he had already explained.¹¹ He had also agreed with Mr. Evensen's decision to remove the "shared natural resource" concept from draft article 6, again for reasons he had already fully explained.¹²

17. It was unquestionably useful to codify general norms stemming from State practice in the use of international watercourses on the basis of the principle *sic utere tuo ut alienum non laedas*, but prevention or reduction of harm should not be confused with optimal use of a watercourse system. International law did not compel States to make optimal use of all watercourse systems, something which would involve major changes in the concrete use of watercourses; yet carrying the "shared natural resource" concept to its extreme would lead to exactly that.

18. With regard to draft article 8, he shared Mr. Calero Rodrigues's view that there was no point in listing in the text of the article all the factors which determined reasonable and equitable use of a watercourse, which were at any rate too vague. It would be sufficient to mention them in the commentary to the article. The question raised by the Special Rapporteur regarding draft article 9 (*ibid.*, paras. 179-187) was of major importance. It was essential to refer to legal "injury", rather than to appreciable harm, which in the strict sense of the term would mean that the downstream States had an absolute right of veto over anything that the upstream States could do; in other words, it would amount to saying that use of the watercourse would be guaranteed in favour of the later users, namely the downstream States.

19. As to the five draft articles submitted by the Special Rapporteur, the question was to what extent the procedural rules set forth therein also applied in the context of chapter II of the draft framework agreement, on general principles, rights and duties of watercourse States, for they seemed to relate solely to co-operation and management in regard to international watercourses. In his opinion, the replacement of the previous draft article 10 (General principles of co-operation and management) by the new draft articles 10 to 14 was a positive step, since that change reflected the need for procedures to determine an equitable use of a watercourse and the concrete application, in each specific instance, of the "no harm" principle. Hence it was an important change, yet one which did not rule out the possibility of reusing the text of the previous article 10 in the "open" part of the draft articles, in other words the articles designed to facilitate and promote not minimum co-operation in order to avoid harm, but co-operation on another level: the co-operation required to arrive at joint utilization with the ultimate goal of the best possible use of the watercourse. For that reason, the ideas contained in chapter III of the report were extremely interesting and merited favourable consideration.

20. Mr. BARBOZA said that his position in favour of elaborating treaty provisions rather than recommendations had already been clearly stated. Consequently, he would simply respond to the questions raised by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2).

21. He approved of the Special Rapporteur's proposal (*ibid.*, para. 63) to postpone the question of defining the concept of an international watercourse or an international watercourse system, in keeping with a long-standing tradition of the Commission. Again, it was an excellent idea to revert to the provisional working hypothesis accepted by the Commission in 1980 (*ibid.*). In 1984, he had found it unfortunate that the previous Special Rapporteur should make the mistake of turning the working hypothesis into an article and, above all, of deleting the system concept as soon as it encountered opposition.¹³

22. The "shared natural resource" concept expressed the legal nature of water as viewed from the standpoint of the Commission's work, and it obviously stemmed from applicable legal principles. It should be borne in mind that the extent and the method of sharing differed, depending on, for example, whether the sharing of a natural resource or good-neighbourly relations were involved. For that reason it was useful to have a definition indicating the true legal nature of the "shared natural resource" concept. Nevertheless, he understood the Special Rapporteur's concern in that regard and was ready to agree that the matter should be considered later on, but he was opposed to the idea of completely eliminating the concept from draft article 6.

23. As to draft article 8, since it was not certain that the "shared natural resource" concept would be retained in the draft articles, it was absolutely essential to develop the concept of reasonable and equitable use, which was rather vague—a comment that also applied to draft articles 7 and 9. It was important to establish, in the body of the draft, principles and norms which explained that expression. Accordingly, the factors listed in article 8 should be retained in the text, not relegated to the commentary, so as to give a concrete idea of the concept of reasonable and equitable use of the watercourse, if only by way of indication.

24. With regard to the Special Rapporteur's question concerning draft article 9, he doubted that the word "harm" could be used in connection with use of a watercourse when a particular need was not met. If a new use fell within the equitable share of uses to which the State incriminated was entitled, it was impossible to speak of harm, whether in the sense of unlawful harm, or injury, or of so-called "lawful" harm. Consequently, it would be better to use another term, such as "deprivation", for the term "harm" had a negative connotation and therefore could not be allied to the concept of reasonable and equitable use. For that reason he preferred the text submitted by the previous Special Rapporteur (*ibid.*, para. 179) and could not agree to any of the three proposals made by the present Special Rapporteur (*ibid.*, paras. 182-184). In any event, only the first proposal might possibly be acceptable.

¹¹ *Ibid.*, p. 268, 1859th meeting, para. 28.

¹² *Ibid.*, para. 33.

¹³ *Ibid.*, p. 242, 1855th meeting, para. 6.

25. He failed to see why the new draft articles 10 to 14 should be included in chapter III of the draft, entitled "Co-operation and management in regard to international watercourses". A clear division had to be made between matters relating to causing harm, which were covered by draft article 9, and matters relating to co-operation, which were governed by the previous draft article 10. Perhaps it would be better to set aside a special chapter for the rules of procedure applicable in each case.

26. With regard to the new draft article 10, he took the view that efforts should be made to ensure that the cost of the search for information did not fall to the notified State in cases where the notifying State had furnished insufficient information. The concept of a reasonable period of time, mentioned in draft article 11, was somewhat vague and it would be preferable to stipulate a period of six months, which could be extended at the request of a State. He endorsed the text of draft article 13 and also, in principle, that of draft article 14, for the new wording was an improvement over the previous text. Mr. Calero Rodrigues's comments on article 14 were highly relevant, and more thought should be given to that article.

27. Lastly, he shared Mr. Mahiou's opinion (1977th meeting) that there might be a link between the present articles and the question of responsibility, both for wrongful acts and for acts not prohibited by international law. Obviously, in the case of the former it was necessary to turn to the general rules established in the draft on State responsibility, but matters were more difficult in the case of acts not prohibited by international law. The obligations of States in matters pertaining to the use of watercourses were to prevent any harm. In the event of an accident, the State causing it would not be deemed to have committed a wrongful act if it could prove that it had taken reasonable steps to prevent it. The question was whether the State concerned would be exempt from all responsibility, something which would be contrary to the principles set forth in chapter V of the draft, or whether it would be compelled to negotiate in order to compensate the victim of the harm caused. In that case the compensation would not be the same as the amount required if the State had committed a wrongful act, for it would be subject to the modifications made necessary by the balance of interests and all the factors which entered into consideration. More thought should be given to that question.

28. Mr. RIPHAGEN said that the rules on the non-navigational uses of international watercourses lay between those on international liability for injurious consequences arising out of acts not prohibited by international law and those on State responsibility. All three sets of rules were by and large residual, leaving a large measure of choice to the States concerned. Moreover, whereas the Commission's whole effort in drafting the rules on State responsibility could be described as making a straight line more elliptical, its work on the topic under consideration really involved making the ellipse of the rules on international liability for injurious consequences more circular.

29. With luck, activities carried out within a territory would give rise only to inboundary harm, whereas the

use of an international watercourse system necessarily involved transboundary harm. The harm in question lay in human conduct in using the watercourse and, by the same token, in the relative scarcity of water. It was precisely within that context of "uses" and "scarcity" that the problem of international law arose. Consequently, distinctions must be drawn between actual and potential users and between what were known in French as *privatif* and *non privatif* uses. Those distinctions were very relative, since the actual use shaded into the potential use, according to circumstances, and the *non privatif* into the *privatif*.

30. The negative aspect of the "shared natural resource" concept was acceptable in so far as it meant that the territorial division of watercourses was not the full answer to the problem. Yet the concept did err on the other side in that it suggested the idea of common territory, something which might of course go much too far. Everything shared must eventually be divided, but the point was that the territorial division must be replaced by a functional division, which was the basis of the concept of equitable utilization.

31. However, what did equitable distribution of uses mean? In draft article 8, it was stated that "all relevant factors" must be taken into account, which actually meant nothing at all, since no one would advocate taking irrelevant factors into account. Nor did it seem very helpful to mention a large number of relevant factors without saying anything about the solution of conflicts as between those factors. It would in fact be more helpful to mention irrelevant factors and/or exclude particular solutions to conflicts. In any event, if and when the equitable distribution was known, in other words when it was accepted by all the system States, the question of partition could be treated in the same way as the territorial partition which underlay most "normal" rules of international law, including the rules of State responsibility. Any conduct on the part of one system State which took something away from the equitable share of another system State inflicted injury on the latter and was an internationally wrongful act.

32. Nevertheless, the situation was seldom as simple as that, if only because an equitable distribution might become inequitable as a result of a natural event constituting a fundamental change of circumstances. Even if a system agreement existed, its provisions would seldom if ever provide for an automatic quantitative solution for all situations. Naturally the problem was even more complicated in the absence of any system agreement or if not all the system States participated in such an agreement. In cases of that kind, it might be said that maintenance of the quantitative *status quo* of factual uses was lawful and that certain changes of the *status quo*, such as human interference creating a fundamental change of circumstances, were unlawful. The latter could be described as causing "appreciable harm", provided it was understood that that term covered only acts resulting in a manifestly inequitable distribution. In such circumstances, the law was forced to deal with a substitute, namely the procedural conduct of States designed to arrive at *ad hoc* or more permanent systems arrangements. In most instances, the ideal solution was a permanent organization permitting *ad*

hoc solutions, particularly in cases of changes resulting from natural events. Such an organization did not necessarily entail adoption of the "shared natural resource" concept. Only an organization that did not permit any use of water without sharing it would ultimately imply acceptance of that concept. One example was the International Sea-Bed Authority established under the 1982 United Nations Convention on the Law of the Sea. Nothing of that kind had as yet been suggested by the Special Rapporteur.

33. Short of such international management of an international watercourse system, the difficult problem that arose in connection with national measures was the time factor, in other words the question as to how long procedure could delay proposed action, particularly in cases of so-called "utmost urgency", which were dealt with in draft article 14. Such cases might be compared with a state of necessity as dealt with in article 33 of part I of the draft articles on State responsibility. The rules set out in that article might perhaps help to avoid the risk of abuse referred to by Mr. Calero Rodrigues.

34. Mr. EL RASHEED MOHAMED AHMED said that his first general comment was on Mr. Ushakov's pertinent question (1976th meeting) about the real purpose underlying the work on the present topic. Of course, the General Assembly had urged the Commission to expedite completion of its study and, as Mr. Flitan had pointed out (1977th meeting), if the draft took the form of a framework agreement, States would be able to identify the rules of international law that could assist them in resolving their problems or disputes.

35. Perhaps a more pertinent answer was provided in the statement by the Observer for UNIDROIT at the twenty-fifth session of the Asian-African Legal Consultative Committee, held at Arusha in February 1986:

The Observer for UNIDROIT was of the view that it may be appropriate to reconsider the subject of international rivers in the light of the progress registered in recent years. He pointed out that, whilst the International Law Commission had considered the subject from the viewpoint of the bilateral and multilateral agreements for non-navigational uses of international rivers, recent practice revealed the creation and functioning of international commissions and organizations for the sharing of water resources of such international rivers as the Senegal, Niger ... and La Plata. In his opinion the new postures and tendencies should review the old and traditional law and contribute to the progress in the field of regional and subregional cooperation in the sharing of international rivers. ...¹⁴

It was in that light that the five new draft articles submitted by the Special Rapporteur should be considered.

36. At the Commission's thirty-sixth session, Mr. Reuter had observed in connection with the content of the draft that:

... The Commission was divided between two contradictory alternatives: to prepare draft articles which, because of their lack of precision, would not mean much, but would be favourably received; or to draft a precise text which would raise difficulties because of its precision. He would prefer the second course ...¹⁵

¹⁴ Asian-African Legal Consultative Committee, *Report of the Twenty-fifth Session, held in Arusha from 3rd to 8th February 1986* (New Delhi, 1986), summary record of the seventh plenary session of 5 February 1986, para. 2.

¹⁵ *Yearbook ... 1984*, vol. I, p. 246, 1855th meeting, para. 41.

Sir Ian Sinclair had supported that view.¹⁶ Hence it seemed that the draft articles should be based on generally recognized principles of law, an attitude the Special Rapporteur himself appeared to adopt, since he suggested in his report that "at least initially, the Commission [should] concentrate on the elaboration of the basic legal principles operative in this area" (A/CN.4/399 and Add.1 and 2, para. 59).

37. As to the four questions raised by the Special Rapporteur (1976th meeting), he agreed that the issue of defining the term "watercourse" should be deferred. He had been particularly troubled by the omission of the term "system", although it was to be found in several places in the report under consideration. Again, in the new draft article 10, the term "watercourse" had been placed between square brackets before the word "State". In paragraph (3) of the comments on that article, the Special Rapporteur explained that the term "watercourse" appeared in brackets when used as an adjective to modify the word "State(s)", pending the Commission's decision on the use of the term "system". It was a point that would have to be taken up in the future.

38. At the thirty-sixth session, he had accepted the geographical definition, but had called for technical advice in order to amplify it.¹⁷ He had had in mind at the time the fact that a river like the Nile had its source in a complex of lakes in Central Africa (Victoria, Kyoga, Edward, Mobutu and Turkana) and some five tributaries from the Ethiopian Plateau, some of them permanent and some seasonal or semi-seasonal. Clearly, technical knowledge of hydrology was essential if the Commission was to deal with the issues involved. Furthermore, other factors might well have to be taken into consideration after completion of the study.

39. The "shared natural resource" concept had been rejected both in the Commission and in the Sixth Committee of the General Assembly. Upper riparian States were not ready to yield their sovereignty, but they were prepared to recognize the right of the lower riparians to a share in the waters. In that regard, concepts such as "reasonable", "equitable" or "fair", despite their vagueness, had been preferred. As he saw it, the "shared natural resource" concept was not satisfactory and he would rather opt for a balance-of-interests formula such as that advocated by the Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law in his second report (A/CN.4/402, para. 54). Indeed, support for such an approach had been expressed during the discussions in the Sixth Committee:

Some representatives, however, considered that efforts should focus on achieving a correct balance between the rights and duties of all riparian States, an objective which the Commission had not yet achieved. ... (A/CN.4/L.398, para. 452.)

Such a balance of interests would naturally be based on the conditions and circumstances prevailing in each riparian State. In recent years, very great demographic changes had occurred in Africa and they had to be carefully assessed before conclusions could be drawn.

¹⁶ *Ibid.*, pp. 255-256, 1857th meeting, para. 19.

¹⁷ *Ibid.*, p. 240, 1854th meeting, para. 26.

40. The material compiled and analysed by the Special Rapporteur appeared to indicate a preference for “equitable distribution”, “equitable rights” or “reasonable and equitable rights”. Those expressions were not identical with the “shared natural resource” concept, a controversial concept which was best avoided. The right of a riparian State was governed by the duty not to cause harm, and an equitable use, on a balance-of-interests basis, would be in keeping with the principle *sic utere tuo ut alienum non laedas*, as the Special Rapporteur himself recognized (A/CN.4/399 and Add.1 and 2, para. 173). If the concept were retained, it would also be necessary to eliminate the “system” concept, in the interests of consistency.

41. In regard to the list of factors given in draft article 8, the deletion of which had been proposed at the thirty-sixth session, the factors themselves did not in fact contain any legal principles, nor did they provide any criteria for determining the reasonable and equitable use of a watercourse. Accordingly, the list should be placed in an annex, as had been done in the case of the 1982 United Nations Convention on the Law of the Sea, or it should be included in a schedule of rules appended to the draft instrument.

42. Like the Special Rapporteur, he preferred the third of the proposed formulations for draft article 9 (*ibid.*, para. 184), but saw no immediate reason for omitting the proviso “unless otherwise provided for in a watercourse agreement or other agreement or arrangement”. In that connection, the question arose of the test of equitable utilization, a variable which depended on circumstances and could not be gauged quantitatively or qualitatively. The Special Rapporteur conceded that there was no mechanical formula for determining what was equitable and suggested that the matter could be regulated by a system of procedural rules under chapter III of the draft (*ibid.*, paras. 185-186). That method afforded a practical solution, provided it was coupled with enforcement machinery, such as the Permanent Joint Technical Commission for Nile Waters.

43. The five draft articles submitted by the Special Rapporteur were not new in substance. As he had already stated, the procedures and rules they embodied would be effective if the appropriate machinery were established. Mr. Reuter had commented at the thirty-sixth session¹⁸ that it would not be possible to apply the draft articles in practice unless more important functions were assigned to international organizations, a point that could well be the crux of the matter, inasmuch as the practical result would boil down to cooperation, development, conservation and just and proper utilization of the waters available for all the copriarians. UNDP had taken the initiative of inviting the Nile Basin countries to a workshop organized by the Mekong River Committee secretariat at Bangkok in January 1986 and, at the close of the proceedings, the countries in question had requested UNDP assistance to study, propose and set up appropriate machinery for cooperation.

44. In general, he had no objection to the new draft articles and would simply like further explanation on

two points. First, in the case of draft article 10, who was to decide that appreciable harm might be caused? For instance, the notifying State embarking on a project for a new use of a watercourse might well fail to see that the project could cause any harm to anybody. Secondly, in connection with paragraph 3 of draft article 14, was it the Special Rapporteur’s intention to introduce the concept of strict liability?

45. Mr. REUTER said that he was struck both by the length of the Special Rapporteur’s second report (A/CN.4/399 and Add.1 and 2) and by the detailed questions on which the Special Rapporteur wished to have the Commission’s views. The report took the Commission back to its point of departure, and a pessimist might well feel that the Commission was getting nowhere, since the initial positions had not changed. Yet the situation could also be looked at in another way: like the eagle flying in ever-wider circles, the Commission was constantly rising higher.

46. Regarding the various positions, he doubted whether the Harmon Doctrine had disappeared, for territorial sovereignty was very much an enduring concept. Indeed, the hesitation shown by members in that respect was a reflection of the very real problems experienced by downstream States, which felt threatened by upstream States.

47. As to terminology, certain terms were no longer neutral, such as the expression “shared resources”, which had originated in Latin America and raised the question whether the resources were already shared or were to be shared. Terms such as “system” had an excellent pedigree, and there was no doubt that the solutions adopted by the Supreme Court of a country such as the United States of America were ideal. Nevertheless, in the modern world and in the present state of things such results could not, unfortunately, be expected on an international scale. Some terms had also taken on an emotional connotation, as had “supranationality” recently in Europe.

48. Similarly, he was disturbed by the questions of “injury”, “harm” and “responsibility for wrongful acts or lawful acts”. On a related subject, namely the sharing of the continental shelf, it had been recognized in determining the status of the shelf that the act of delimitation was purely declarative. Consequently, a State had from the outset exercised sovereignty over the portion of the shelf attributed to it, since no arrangement had been made for an intermediate period during which sovereignty had not been shared. It had thus been recognized that, ultimately, the State had always had sovereign rights over the portion in question. But the case of a zone under dispute raised the problem of its status prior to the dispute. In answer to the question whether rights and obligations regarding use were fixed for all time, he would be inclined to reply in the negative. If the lawful act which governed the status of the waters was of a constitutive and not a declarative nature, it followed that, when a State altered the natural state of the waters in question, since their status was not determined the State was not violating any rule of law, except in exceptional cases.

¹⁸ *Ibid.*, pp. 246-247, 1855th meeting, para. 44.

49. In that connection, he advocated caution regarding terminology: rather than speak of injury or harm, the Commission should consider using the word "change" for the time being. Uses of watercourses raised problems only at such times as they harmed nature or substantially changed the watercourse régime. He was therefore in favour of removing from the initial draft articles the idea of qualifying a change by reference to a rule of law, especially if the rule was not enunciated.

50. The legal act which must establish the status of the waters was, in his opinion, something which could be decided in the internal legal system by the legislator alone, and not by arbitrators or judges. The examples of arbitral awards which sprang to mind were all linked to a convention, and everyone knew what kind of use could be made of a convention! Such conventions, moreover, did not exist among the developing countries. Consequently, he seriously doubted whether solutions of that type could be envisaged.

51. However, he agreed with the idea that, through mediation, independent men of integrity could intervene discreetly in negotiations, for which reason draft article 8 was indispensable. Naturally, the terms of the article would have to be weighed very carefully. It was, of course, difficult to find new terminology which did not too quickly become loaded with inferences that would condemn it in the eyes of the Sixth Committee of the General Assembly. Apart from article 8, the Commission would be dealing with a text that was essentially one of procedure. If the rules of procedure were so precise that they might in some instances give rise to a problem of traditional responsibility in the event of their non-observance, it should always be remembered that the courts rarely held that there had been a breach of the obligation to negotiate. Normally, neither party incurred responsibility when negotiations failed. Hence it was necessary to go beyond information, consultation and negotiation. He noted the tendency in that respect to set "reasonable periods of time" in the negotiation procedures when the subject did not lend itself to the determination of specified periods. In the modern world, rivers were not suitable for impromptu projects and the building of dams or power stations was the result of lengthy work by experts; thus the six-month period originally proposed was justified.

52. With regard to organizational matters, in view of the current financial situation of the United Nations, the idea of creating a permanent institution attached to the United Nations, rather than a regional organization, was perhaps not the best one. On the other hand, the option of mediation was essential and the Commission should lay the appropriate foundations in its draft. Mediation could play a paramount role, especially for developing countries, as the World Bank had proved in the case of India. Mediation would thus fill out the range of options open to the parties to a dispute of a quasi-territorial nature; providing only for negotiations between the parties was not an entirely satisfactory solution. The Commission should avoid any emotional terminology, but not any of the substance; that was why the previous Special Rapporteur had deleted the word "system" without abandoning the system concept.

The Commission should also examine procedure very closely. If it was to draft a provision on a temporary régime, it would have to define a régime that was fairly flexible. Lastly, it would have to agree to some work on the organizational aspect and make use especially of the concept of mediation.

The meeting rose at 12.45 p.m.

1979th MEETING

Tuesday, 1 July 1986, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCafrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/393,¹ A/CN.4/399 and Add.1 and 2,² A/CN.4/L.398, sect. G, ILC(XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

NEW DRAFT ARTICLES 10 TO 14³ (*continued*)

1. Mr. BALANDA congratulated the Special Rapporteur on his very clear second report (A/CN.4/399 and Add.1 and 2), which contained a wealth of material. The importance of the topic was plain for everyone to see. Watercourses provided a wide variety of resources which were capable of contributing to the development of States and justified the formulation of a set of rules to govern their uses, which might be for drinking-water supplies, the construction of dams for rural electrification, fishing, irrigation, or the mining of precious raw materials.

2. The members of the Commission appeared to agree that the draft should take the form of a framework agreement providing guidelines for co-operation among States. He had no objection to the pragmatic approach

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

² Reproduced in *Yearbook ... 1986*, vol. II (Part One).

³ For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

adopted by the Special Rapporteur, who had chosen not to go into the question of definitions; but when the study reached a more advanced stage it might be wise for the Commission to decide on the nature of the uses to be covered by the rules and principles to be established.

3. At previous sessions, the Commission had discussed the "international watercourse system" concept, which some members had been unable to accept because it had a doctrinal connotation and could give rise to differences of opinion. Since most members of the Commission and the majority of representatives in the Sixth Committee of the General Assembly seemed to favour a framework agreement, however, a more flexible approach would have to be adopted so that States which wanted their co-operation to take a particular form could agree jointly on the utilization of the watercourses within their respective jurisdictions and would not be prevented from establishing a watercourse system if they so wished.

4. The Commission had also discussed the "shared natural resource" concept. It was quite true that the theory of absolute sovereignty was no longer acceptable with regard to the utilization of watercourses by States, even in their own national territories: every State had to take account of the rights of the other riparian States. Perhaps those who opposed that concept objected primarily to the idea of "sharing". In fact, the concept applied to the use of the watercourse by the riparian States on an equal footing, in other words to the equal rights and obligations of those States, not to the "physical" sharing of the waters to the advantage of one State or another. The previous Special Rapporteur had expressed the idea of sharing in draft articles 6 and 7, an idea in support of which the present Special Rapporteur cited some representative illustrations in his report. He personally hoped, therefore, that the framework agreement that would emerge from the Commission's work would not prevent States from pooling their resources for the purpose of sharing them if they so wished.

5. As to the overall structure of the draft that had taken shape thus far, he was struck by the fact that, although the Special Rapporteur and his predecessors had proposed a great many procedural rules relating to information, negotiation and co-operation, it was not at all clear what penalties would be applicable in the event of failure to comply with those rules. The proposed consultation machinery was thus based on the original point of departure.

6. He was also struck by the fact that the Special Rapporteurs had placed so much emphasis on the idea of harm and on the obligation to make reparation. By borrowing from other systems, might it not be possible to correct some of the more excessive elements of that approach? Furthermore, the operation of the proposed régime would depend almost entirely on the co-operation and good will of States, whereas in fact the utilization of watercourses gave rise to conflicts of interests. Good will might be lacking in some cases and, under the notification procedure, the initiation of a proposed new use that was important to a particular State or group of States might be delayed for quite some time.

Hence the need to find new procedures that would make it easier for States to achieve what they regarded as being in their own interests.

7. The impact of the interests of States was also quite striking. It was apparent from earlier reports on the topic that the position of a State wishing to use the resources of a watercourse was regarded as individualistic, for that State was simply invited to co-operate with the other States concerned. The inevitable result was that there would always be an underlying clash of interests. The Commission therefore had to find some sort of corrective procedure if it wanted to establish an effective system. Thus Mr. Reuter (1978th meeting) had advocated mediation. The absence of procedures for conciliation, or at least for the settlement of disputes, could well hamper the functioning of the framework agreement. It therefore seemed to him that none of the Special Rapporteurs had followed the right approach.

8. As to the criteria used by the Special Rapporteurs to propose rules which, unfortunately, would not be easy to apply, the Commission still did not have clear-cut answers to such questions as what determined whether a State had exceeded its share of the uses of the waters of a particular watercourse; what constituted appreciable or significant injury or harm for which reparation would have to be made; and whether agreements governing the use of international watercourses were in keeping with the basic rules contained in the 1969 Vienna Convention on the Law of Treaties.

9. In his comparative law study (A/CN.4/399 and Add.1 and 2, chap. II, annex II), the Special Rapporteur referred to the Organization for the Development of the Senegal River, the Niger Basin Authority, the Organization for the Management and Development of the Kagera River Basin and the Economic Community of the Great Lakes Countries, but he did not go into the way those systems operated. They might none the less prove to be a source of inspiration. The Commission should therefore pay close attention to the African experience, since the countries concerned were prompted by the desire to work together in using joint resources.

10. Mr. Riphagen (1978th meeting) had suggested an interesting idea, namely a permanent organization for the management of shared resources. That was already being done by the African countries: a joint body managed the interests of all the watercourse States and evaluated the uses to be made of the watercourse. The States concerned all took part in the financing and also benefited from the uses. A key role was thus played by joint planning. What the Special Rapporteur was proposing was that each State, in its planning of uses of the waters, should take account of the interests of the other riparian States. Under the African system, one single body was in charge of the planning; the States concerned all shared in the benefits and did not have to notify one another of future projects or wait for replies to notifications before going ahead with their plans; nor did they have to co-operate on a piecemeal basis, since co-operation was institutionalized from the outset. In addition, there were no problems of time-limits and

confidentiality. So far, the concepts of injury and reparation had played a key role in the draft, but they had no meaning when resources were managed collectively.

11. Another important factor was the high cost of work on watercourses. If, in accordance with the Vienna Convention on the Law of Treaties, States were allowed to denounce an agreement at any time, entities sharing in the uses of the waters might suffer injury, because a State denouncing a treaty would jeopardize a joint water resources management project by depriving it of part of its financing. Some African States had therefore agreed to be bound by such a system for a period of 99 years: in the interests of the greater good, they had given up the freedom to which they were entitled under the Vienna Convention.

12. Such factors might give food for thought and shed new light on the régime proposed by the Special Rapporteur. They were preferable to prohibitions. The Special Rapporteur would do well to draw on a system which had been operating for nearly 15 years and which, despite its shortcomings, would provide answers to some of the questions that were bound to arise if the régime now under consideration were ever to be established.

13. With regard to the draft articles, the Special Rapporteur drew a distinction in connection with draft article 9 (A/CN.4/399 and Add.1 and 2, para. 181) between "harm" and "injury"; but in French law no such distinction existed. The Special Rapporteur also asked members to indicate which of the three alternatives he was proposing for article 9 (*ibid.*, paras. 182-184) they preferred. Personally, he had great difficulty in deciding. As he saw it, problems would inevitably arise if a prohibition were placed on injury; but since it was necessary to find an approach that would offer the fewest possible drawbacks, he tended to favour the third alternative.

14. The wording of draft article 10 should be amended, for it was not clear whether the words "with timely notice" referred to the planning stage or to the implementation stage. Referring to the last sentence of paragraph (9) of the comments on that article, he doubted whether a State which had been notified that another State intended to undertake a new use of a watercourse and which wanted further information so that it might evaluate the potential harm could be required to pay some of the costs incurred in producing such information. Did that mean that, if a State could not afford to pay any of the costs, it would be deprived of the information it needed and, consequently, of the possibility of knowing what risks it faced?

15. As to draft article 11, he agreed with other members that a minimum period of time should be set: the proposed six-month period would be reasonable. It was, moreover, the State which proposed to make a new use of a watercourse that had to provide information to the other States concerned, without waiting for them to request it to do so.

16. He had doubts about draft article 13. How, for example, could other States be required to fulfil an obliga-

tion which should be incumbent only on the State which wished to make a new use of a watercourse? Since draft article 10 established obligations for a State proposing a new use, he did not see how other States could take the place of the State which did not fulfil its obligations. That might, however, be merely a drafting problem. Paragraph 2 of article 13 could pose problems for developing countries, which might need more time than other States to reply to a notification. The element of surprise should, moreover, be avoided. If a notification had been made and a reasonable period of time had elapsed, the other States should be given prior notice before any proposed use was undertaken, so that there would not be any misunderstanding on their part about protection of their interests.

17. Draft article 14 also gave rise to serious misgivings, for it allowed a State to claim that a proposed use which might affect the interests of other States was one of the utmost urgency. Such a provision would destroy the entire structure of co-operation, notification and negotiation provided for in the draft. Paragraph 2 of the article was very difficult to reconcile with the idea of utmost urgency: in such a case, how could the State proposing to initiate a new use be expected to provide notice and wait for expiry of the necessary period of time? The Commission should be more careful in deciding what provisions to include in article 14.

18. Mr. ARANGIO-RUIZ said that, speaking as a citizen of Italy, which had only a few very small international watercourses on its borders with France and Switzerland, he would confine his preliminary remarks to questions of technique or method rather than substance, such as those on which the Special Rapporteur had requested a response. His comments would hinge mainly on points made during the discussion by other members.

19. The first point was that raised by Mr. Ushakov (1976th meeting), who had drawn attention to a very real problem, namely the form that the draft should take. In that regard, he himself strongly favoured the idea of a framework convention, as did most members. If such an instrument could set forth some substantive general principles, meaning legal principles—as a matter either of codification or of progressive development of international law—it would be in the interests not only of riparian States, but also of the international community as a whole.

20. Bearing in mind the relationship between the present topic and the topics of State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law, and the draft Code of Offences against the Peace and Security of Mankind, the Commission ought to be able to produce a significant set of draft articles on what was one of the more concrete and specific subjects on its agenda, a subject to which the rules codified or developed by the Commission on the other topics would have to apply. Should the Commission prove unable to do so, it would be casting doubt on the effectiveness and value of the rules it was establishing in its draft articles on the related topics. Besides, a framework convention could easily include, in addition to the general principles and rules

of “hard law”, any declaratory statements deemed desirable.

21. As Mr. Reuter (1978th meeting) had said, the Commission was in danger of going round in circles in its discussions. It simply had to decide once and for all between a draft taking the form of recommendations and a draft framework convention. It also had to decide whether it wished to retain the concept of an international watercourse system, as well as that of a shared natural resource. Again, it would have to choose between the concepts of “harm” and “injury”. He fully agreed with Mr. Reuter regarding the difficulty of framing legal rules in respect of watercourses, but did not entirely share his pessimism, which might have been prompted in part by the substantive differences between the positions taken by members.

22. In particular, he did not share the view that the régime of international watercourses was not governed by existing rules and principles (*lex lata*) and that the Commission’s task with regard to the topic would therefore be exclusively one of legislation. A comparison might be useful, in that respect, with some aspects of the law of the sea, notably with the role of equity in the delimitation of sea-bed areas between neighbouring States.

23. The idea that article 6 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone contained a fundamental rule of equidistance was probably not as correct as had been thought in the early stages of its application. A number of judicial and arbitral decisions had soon made it clear that equidistance was a rule only in the sense of an ideal starting-point. Cases of two perfectly parallel coasts calling for a median parallel boundary existed only on paper. Once cases had to be decided in practice, the various factors involved inevitably had to be taken into account. It had thus become apparent, especially since 1969, that the basic rule in matters pertaining to delimitation was that of an equitable result. Of course, that created a difficulty for lawyers who placed equity outside substantive law and considered it as a procedural rule, regarding an “equity judgment” as a law-creating, legislative decision, rather than as a law-applying decision. Such had been the view expressed in 1969 by Judge Morelli in the *North Sea Continental Shelf* cases.⁴ In his dissenting opinion, Judge Morelli had indicated that, with the fall of the rule of equidistance from its pedestal and the fact that its operation had become governed by considerations of equity, the coastal State’s rights could no longer be said to exist *ab initio*.

24. For his own part, however, he believed that equity did not lie outside the scope of substantive law. The rule concerning equitable criteria to achieve an equitable result was a substantive rule and could operate as between the States themselves, even without the help of a tribunal. Accordingly, States’ rights did exist *ab initio*, notwithstanding the redimensioning of the alleged rule or principle of equidistance.

⁴ See *North Sea Continental Shelf*, Judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 206 *et seq.*, dissenting opinion of Judge Morelli, paras. 11 *et seq.*

25. As far as international watercourses were concerned, the difficulties were much greater, because what was involved was not a delimitation of space but a delimitation of quantities and qualities of water and its uses. He did not propose to take a stand, for the time being, on the substantive issues involved, and would hear with interest the views of those members who had experience of the great international watercourses. He would none the less emphasize that not all the provisions to be included in the framework agreement would constitute new rules, or in other words represent progressive development of the law. Some of them would undoubtedly be declaratory and have the character of codification of existing law. Clearly, general international law contained certain principles and rules concerning the non-navigational uses of international watercourses, and such rules and principles included equity as an integral part of existing substantive law.

26. In the Commission’s work on other topics, such as those of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law, principles and rules were being framed that would govern the uses of non-international rivers. He thus felt sure that there existed *a fortiori* principles and rules concerning international rivers which States themselves applied and which arbitral tribunals and the ICJ would apply as judicial bodies, not as legislative bodies.

27. It was essential not to overlook a feature peculiar to watercourses, one which distinguished them from the sea-bed, land areas and even celestial bodies. The feature was a consequence of the nature of water. From the point of view of sovereignty, water was not entirely dissimilar from the part of outer space that did not consist of celestial bodies and their atmospheres. Water moved, and not only in the bed of the watercourses, but also in the atmosphere, the clouds and the sea. It was possible to appropriate the fish in water, or the energy from water, but not the element itself. It was therefore difficult to conceive that those matters would lie outside the purview of the principles and rules of general international law, a number of which had been reviewed by the former Special Rapporteur, Mr. Schwebel. It was the Commission’s task to discuss them and use them in formulating a framework agreement. That part of the work would not constitute legislation in the sense in which the Commission could be said to legislate: it would be codification. Only as a distinct further step could the Commission seek to identify any points or issues for the purpose of progressive development of the law.

28. On a point of method, he suggested that the Special Rapporteur should endeavour to submit to the Commission, as from the next session onwards, two distinct sets of proposals: the first would cover matters *de lege lata* and the second matters *de lege ferenda*. Among the latter, it would be for the Commission to decide which should be included in the framework agreement and which should be left to agreement between the States concerned. It was essential also to determine which points should be covered by legal rules or principles and which should form the subject of mere recommendations.

29. Most of the questions raised by the Special Rapporteur could be viewed in the light of those comments. He saw some value in the "system" concept, but did not wish to express a definite opinion on the subject at the present stage. As to the choice between "harm" and "injury", he failed to see the difference between the two: surely a harm covered by a legal rule or a harm resulting in legal consequences constituted an "injury" in the legal sense. Lastly, the problem of optimum utilization and that of the possible role of international organizations were clearly matters *de lege ferenda*.

30. Mr. ROUKOUNAS, referring to the questions raised by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2), said that the "system" concept sought to transpose hydrological and physical factors to the legal plane. The watercourse "system", which underscored the functional aspect, was in many respects a unit that afforded the requisite flexibility to take account of specific situations. The "system" placed emphasis on the uses of the waters, on the interdependence of those uses and on the interdependence of the States concerned. The working hypothesis referred to the Drafting Committee, like the draft articles submitted up until 1984, was founded on the "system" concept, which was both modern and old in the sense that H. A. Smith had used it as early as 1931, undoubtedly on the basis of sound scientific and practical criteria. Nevertheless, he would have no objection to the Special Rapporteur's suggestion that the consideration of draft article 1 should be deferred (*ibid.*, para. 63).

31. The "shared natural resource" concept could also be of assistance to the Commission in working out the régime to be established. It highlighted the fact that a riparian State could use a part, but not all of the watercourse, hence the need to arrange for effective international co-operation. If a community of interests really existed, there had to be equality of rights. Consequently, the concept should be used as a basis for the Commission's work.

32. Similarly, draft article 8 was essential and its content should not be transferred to an annex or a commentary, although it would of course have to be accompanied by the necessary explanations. In that connection, the Special Rapporteur stated that the delimitation of maritime boundaries was in some ways analogous to the apportionment of the uses and benefits of an international watercourse, since "both areas are fundamentally concerned with the allocation of resources as between two or more States" (*ibid.*, footnote to paragraph 174). In his own view, however, those were two entirely different matters and called for some comment.

33. First, the customary rule embodied in article 15 of the 1982 United Nations Convention on the Law of the Sea, relating to delimitation of the territorial sea between States with opposite or adjacent coasts, contained no reference to any principle of equity. Secondly, articles 74 and 83 of the Convention stated that the delimitation of the exclusive economic zone and of the continental shelf would be effected by agreement on the basis of international law in order to achieve an equitable solution. It was in that way that the concept of equity entered into a rule of law. In his opinion, the

draft should therefore incorporate a provision indicating the general meaning of that concept. Thirdly, greater care should be taken in quoting passages from judgments of the ICJ. In 1969, in its judgment in the *North Sea Continental Shelf* cases, the Court had adopted a position of principle—which the Special Rapporteur did not mention—and had explained what it had meant by the term "equitable principles",⁵ an interpretation which had not changed either in the Court or in practice. The Commission, however, was dealing with an entirely different matter, since the uses of an international watercourse were one thing and the delimitation of maritime boundaries as between two or more States was quite another. Incidentally, he did not share Mr. Arangio-Ruiz's view concerning the median line.

34. The "equitable powers" referred to by the Special Rapporteur (*ibid.*, footnote to paragraph 174) were not powers that were likely to be used by the ICJ on the basis of Article 38 of its Statute; rather, they were powers which the parties to a dispute could, by agreement, use in the absence of applicable rules or when they intended to set aside a rule of law. To his knowledge, the ICJ had never been given such powers by the parties to a dispute.

35. The Special Rapporteur had raised questions about the nature of "harm" and the way it should be qualified in draft article 9, as well as about the form of the relationship between harm and equitable utilization. In the latter connection, further clarification would be needed. The relationship should be established not by means of the negative wording used in the third alternative proposed for article 9 (*ibid.*, para. 184), but by referring to the régime to be established in the draft. The provision concerning harm might therefore begin with the words: "In applying the present articles, a State ...". At the current stage, it would, moreover, be premature to frame the issue of harm or injury in too restrictive a manner. All the documentation he had consulted spoke either of "harm", or of "appreciable", "significant" or "serious" harm, and even drew a distinction between harm and mere inconvenience. The best course would be to retain the basic idea of harm, as in the first or second alternatives for article 9 (*ibid.*, paras. 182-183), without qualifying it. In some cases, the uses of watercourses could constitute typical examples of responsibility either for lawful acts or for wrongful acts. Since the three Special Rapporteurs concerned had not yet engaged in any real co-ordination of views to adopt a logical approach to harm, it would be difficult to move ahead in regulating one aspect of responsibility, namely harm caused by the use of an international watercourse.

36. Mr. OGISO said he had no difficulty in accepting the Special Rapporteur's suggestion that the Commission should not attempt to define the "international watercourse" or "international watercourse system" concepts before adopting the substantive draft articles (A/CN.4/399 and Add.1 and 2, para. 63). However, as he had indicated at the thirty-sixth session,⁶ the Commission should not preclude the possibility of defining

⁵ *Ibid.*, pp. 48 *et seq.*, paras. 88 *et seq.*

⁶ See *Yearbook ... 1984*, vol. I, p. 252, 1856th meeting, para. 34.

the concept of an “international watercourse system”. If the discussion was to be based on the physical fact that an international watercourse constituted a unit and had a wide variety of components, so that any consideration of its development and utilization should take into account the basic reality of the watercourse, a reasonable conclusion might be that it would be desirable to have a definition of the “system” concept in the draft articles. Nevertheless, there might be cases in which the application of the “system” concept was not appropriate, as a result of the geographical peculiarities of the watercourses in question. Consequently, the concept could be retained in the draft articles, but for application subject to the agreement of all the system States concerned.

37. The Special Rapporteur, while not opposed to the “shared natural resource” concept, appeared to regard it as neither necessary nor desirable to define the concept at the present stage, since its substance, namely the principle of “equitable utilization”, had already been incorporated in the draft articles of 1984. His own view, which he had stated before, was that it would be premature to rule out the concept entirely.⁷ In fact, it might be useful for riparian States to adopt the concept in concluding agreements on joint development projects. Hence that concept, too, should be retained in the draft, with some margin of flexibility for applying it in certain instances.

38. He had no strong views as to whether the factors referred to in draft article 8, paragraph 1, should be retained in the article itself or transferred to the commentary and he could therefore subscribe to the view of the majority.

39. In the draft articles of 1984, and in the five new draft articles submitted by the Special Rapporteur, the word “appreciable” was used frequently, in such expressions as “to an appreciable extent” (art. 4, para. 2, and art. 5, para. 2) and “appreciable harm” (art. 9). However, the significance of the word appeared to vary, depending on the context. Draft article 9, for example, which defined the obligations of watercourse States towards one another, could be interpreted as meaning that any violation of those obligations could give rise to an internationally wrongful act. In the third report of the second Special Rapporteur, Mr. Schwebel, it was stated that one legal definition of the term “appreciable” was: “capable of being estimated, weighed, judged of, or recognized by the mind; capable of being perceived or recognized by the senses; perceptible but not a synonym of substantial”.⁸ Thus draft article 9 could be interpreted as applying in cases where a watercourse State failed to refrain from or prevent a use of an international watercourse resulting in harm to the rights or interests of other States which could be estimated but which was not substantial. Moreover, “interests” could be construed as meaning potential or planned use of the water. Accordingly, to call upon States to refrain from and prevent uses or activities causing harm to the interests of other States was to impose too heavy an

obligation on them. In that connection, it would be noted that the word “interests” did not appear in the three alternatives proposed for article 9 by the present Special Rapporteur (A/CN.4/399 and Add.1 and 2, paras. 182-184).

40. Mr. DÍAZ GONZÁLEZ said that it had become an increasingly common, but inappropriate and even harmful practice for the Commission to hold very superficial discussions of reports, discussions in which members were urged to make only very general comments because of the lack of time, and then simply refer the draft articles submitted by the Special Rapporteurs to the Drafting Committee with a request that it should consider them in detail and take a decision on them. When the draft articles were then referred back to the Commission, it still did not have enough time to spend on them and it therefore transmitted them to the General Assembly with the largest possible number of passages between square brackets, thereby refraining from taking the slightest decision on them. The Commission’s function had thus become one of preparing draft articles which the General Assembly later decided to retain or reject. It was an extremely unfortunate development. If the Commission wished to continue to serve some purpose, it would in future have to make an effort to give detailed consideration to all the reports submitted and, if necessary, would have to request the General Assembly to allow it more time to carry out its task properly.

41. The point that emerged most clearly from the Special Rapporteur’s thorough yet concise second report (A/CN.4/399 and Add.1 and 2) was the Commission’s uncertainty with regard to the present topic. That uncertainty, for which the present Special Rapporteur was in no way responsible, was the result of the way in which the work on the topic had been carried out. Compared with the extremely interesting proposals made by the second Special Rapporteur, Mr. Schwebel, draft articles 1 to 9 submitted in the second report of the third Special Rapporteur, Mr. Evensen, had been a step backwards, because they had called into question some of the basic ideas embodied in the draft articles already provisionally adopted by the Commission. For some unexplained and unjustified reason, the Commission had referred draft articles 1 to 9 to the Drafting Committee without having decided what should be done with the other texts provisionally adopted and despite the fact that the majority of members would have preferred to give them further consideration in plenary, since the amendments introduced by Mr. Evensen had related to substance, not to form.

42. As a result, the Drafting Committee now had before it draft articles submitted by the second Special Rapporteur, Mr. Schwebel, which the Commission had adopted on first reading, and nine other draft articles submitted by the third Special Rapporteur, Mr. Evensen. If the Commission so decided, the Committee might even have before it the five draft articles submitted by the present Special Rapporteur. Such a situation could not go on indefinitely. The Commission had to decide what it intended to do with all those texts.

43. The first question raised by the present Special Rapporteur related to the use of the term “international

⁷ *Ibid.*, p. 253, para. 43.

⁸ *Yearbook ... 1982*, vol. II (Part One), p. 100, document A/CN.4/348, footnote 292.

watercourse system”, which had been proposed by the second Special Rapporteur in 1980. In order to move ahead, the Commission had decided to retain that term, the only one on which there had been a consensus, but it had refrained from defining it. The third Special Rapporteur, Mr. Evensen, had proposed using the term “international watercourse”, but the definition he gave it had been tautological. In his own view, the Commission should use the term “international watercourse system”, which encompassed a large number of elements not taken into account by the term “international watercourse”, which denoted only the main watercourse.

44. The present Special Rapporteur was proposing that the Commission should use the working hypothesis accepted in 1980 (*ibid.*, para. 63). That hypothesis was, however, based on the “international watercourse system” and “shared natural resource” concepts, which therefore had to be retained. Although the term “shared natural resources” was far from perfect, what mattered was that it conveyed the idea of equal rights and equal obligations. Again, whether the Commission used the term “international watercourse system” or simply “international watercourse”, the international character of the watercourses in question was entirely relative, because they were used for non-navigational purposes only by riparian States or watercourse system States.

45. The General Assembly had decided that the Commission should prepare not a draft convention but a framework agreement that could be used by States as a basis for multilateral, regional or bilateral agreements. The fact remained, however, that every system had its own economic, social and human characteristics and it was therefore extremely difficult to formulate rules of a universal nature that would apply to all watercourse systems. The Commission had to have firm foundations in order to elaborate a framework agreement; but no progress would be possible if each new Special Rapporteur called into question the basic principles defined by his predecessors.

46. The present discussion merely went over ground covered four years earlier and would serve no purpose at all. To make any headway, the Commission had to decide what it wanted to do and define the basis for its work, taking into account the General Assembly’s instructions. If it intended to leave aside the principles underlying the draft articles which it had adopted on first reading, it would have to start from scratch, in other words draft new articles 1 to 9 before discussing those submitted by the present Special Rapporteur. The topic under consideration was far too complex for the Commission not to discuss it seriously and simply to prepare draft articles for submission to the General Assembly without going into the basic principles. All the arbitral awards and all the decisions by the ICJ and national courts mentioned by the Special Rapporteur in his report (*ibid.*, paras. 100-133 and 164-168) dealt with the general rules of river law. Agreements concluded by States belonging to the same watercourse system had, moreover, been based on the general rules of river law. It was therefore absolutely necessary to formulate rules. Judges themselves, who were not lawmakers, needed

rules; but the rules in question had to be of a universal nature.

47. He preferred the term “equitable utilization” to “optimum utilization”, because it was essential to stress that every riparian State had to be able to make equitable use of the waters of the international watercourse system to which it belonged.

48. Before becoming Special Rapporteur, Mr. McCaffrey had proposed that the concept of “equity” should be combined with the idea of “benefit”.⁹ But who would benefit? If, for example, Sudan decided to divert the waters of the Nile and share the benefits of that operation with Egypt, the Egyptian people would not benefit in the slightest because they would be deprived of water.

49. Thus, no matter what questions were raised, there was always the basic problem of what the Commission intended to do and on what basis it would formulate the draft articles. It could delay no further in shaping and following a specific course of action.

The meeting rose at 12.20 p.m.

⁹ See *Yearbook ... 1984*, vol. I, pp. 244-245, 1855th meeting, paras. 27-28.

1980th MEETING

Wednesday, 2 July 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

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

Co-operation with other bodies (concluded)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Rubin, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. RUBIN (Observer for the Inter-American Juridical Committee) said that the Inter-American

* Resumed from the 1958th meeting.

Juridical Committee had come to the conclusion in recent years that international law was facing a crisis throughout the world and that its work and that of the Commission were therefore of the utmost importance. Many of the topics dealt with by the Inter-American Juridical Committee were similar to those before the Commission, but there were some differences between the working procedures of the two bodies. The Inter-American Juridical Committee attempted, for example, to complete consideration of a given agenda item within the term of office of its members. In addition, some topics were deleted from the Committee's agenda in the interests of efficiency if no progress had been achieved or seemed likely. In other cases, the Committee had addressed itself to issues of immediate importance. At its last session, for example, it had been able to complete work on a draft convention on the restitution of minors. The draft convention was currently before member States and it was hoped that it would be submitted to a diplomatic conference in the near future and subsequently ratified. Another issue of enormous concern in the region was drug abuse. At a conference held recently in Rio de Janeiro, a number of measures had been recommended, including the consideration of legal issues by the Inter-American Juridical Committee.

3. Under the Charter of OAS, the Inter-American Juridical Committee also had a mandate to establish relations with universities and other centres of learning. That activity had been conducted very seriously in recent years. Courses on international law were provided during the second of the Committee's two annual sessions. In addition, exchanges with universities and centres of learning had been arranged and seminars were organized, in some cases in conjunction with the American Society of International Law and other institutions.

4. Three years earlier, the Inter-American Juridical Committee had adopted a resolution concerning the establishment of a federation of national associations of international law which would facilitate exchanges and the transfer of information between the various national associations. Until that time, there had been very little exchange of information, even between adjacent countries.

5. The CHAIRMAN, thanking Mr. Rubin for his interesting statement, said that the Commission greatly appreciated the visits by the observer for the Inter-American Juridical Committee, which were in keeping with a long-standing tradition, since the Committee was one of the oldest regional bodies dealing with international law.

6. The Commission and the Committee had a number of points in common. For example, the multiracial, multicultural and multilingual composition of the Committee, whose members came from countries which had different legal systems and had reached different stages of development, was similar to that of the Commission. The Committee also dealt with some of the same topics as the Commission, such as jurisdictional immunities and shared natural resources.

7. There were, of course, differences between the two bodies, but only because their scope was not the same.

Like all regional bodies, the Committee often had more immediate concerns than a universal body such as the Commission and the results of its work necessarily had a much more direct impact on people's lives. But the two bodies reflected the same trends and shared the same aspirations, and what separated them was quite insignificant by comparison with everything they had in common.

The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/393,¹ A/CN.4/399 and Add.1 and 2,² A/CN.4/L.398, sect. G, ILC(XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

NEW DRAFT ARTICLES 10 TO 14³ (concluded)

8. Mr. MALEK said that he had not taken part in the discussion on international liability for injurious consequences arising out of acts not prohibited by international law in order to enable the Commission to complete its discussion on that topic on time. Some of the comments he would have made in that connection were, however, relevant to the law of the non-navigational uses of international watercourses, for in many respects the two topics were strikingly similar.

9. The prevention of harm, which was the ultimate purpose of the topic of international liability, also formed the basis of the topic under consideration, under which, as indicated in previous reports, any use, however equitable, by a State of an international watercourse that caused or was likely to cause appreciable harm to another State would be regarded as wrongful.

10. With regard to the right to an equitable share of the uses of the waters of an international watercourse, the Special Rapporteur had referred in his second report (A/CN.4/399 and Add.1 and 2, paras. 125-128) to the well-known arbitral award in the *Trail Smelter* case between Canada and the United States of America. In that award, the tribunal had confirmed the principle of international law that

... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

and, in the light of the circumstances of the case, the tribunal had held that

... the Dominion of Canada is responsible in international law for the conduct of the *Trail Smelter*. ... It is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law ...

¹ Reproduced in *Yearbook ... 1985*, Vol. II (Part One).

² Reproduced in *Yearbook ... 1986*, Vol. II (Part One).

³ For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

The tribunal's answer to the specific question whether the Trail Smelter "should be required to refrain from causing damage in the State of Washington" had been affirmative, but in its conclusions on that point and on the question as to "what measures or régime, if any, should be adopted or maintained by the Trail Smelter?", the tribunal had given consideration, as required by the arbitration Convention, to the desire of the parties "to reach a solution just to all parties concerned". In accordance with the Convention, the tribunal had thus found that

... the phraseology of the questions submitted ... clearly evinces a desire and an intention that, to some extent, in making its answers ... the Tribunal should endeavour to adjust the conflicting interests by some "just solution" which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States, and as would enable indemnity to be obtained if, in spite of such restrictions and limitations, damage should occur in the future in the United States.

Nowhere in its conclusions had the tribunal suggested that a State might be bound to agree to suffer substantial transboundary harm, whatever offers of reparation or compensation might be proposed. Those conclusions thus contained elements of a rule which applied both to the uses of international watercourses and to the conduct of activities not prohibited by international law.

11. In his second report, the Special Rapporteur clearly summarized the work done on the law of the non-navigational uses of international watercourses, drew attention to the various problems raised in the Commission and in the Sixth Committee of the General Assembly and proposed a number of solutions, some of which would be hard to dispute and none of which could, in any event, be rejected out of hand. Those proposals, which were all technically sound, should greatly assist the Commission in finding compromise solutions that would be acceptable to all.

12. The topics with which the Commission was dealing were all very important, but none was as important as the one under consideration. The problems to which the non-navigational uses of international watercourses gave rise might not be terribly complex, but if they were not carefully considered with a view to finding solutions, they, more than other problems, might be the cause of extremely serious crises everywhere in the world. The African members of the Commission had often stressed the fact that widespread armed conflict might break out in Africa precisely because of drought, which was attributable to the absence of agreements on the rational allocation of water in that part of the world. Similarly, one of the main causes of the Middle East crisis, which was becoming increasingly serious, was the shortage of water in that region and the absence of rules that would make it easier to solve the specific problems to which that shortage gave rise.

13. Consideration had, however, never been given to the possibility of assigning the topic under consideration, which had been on the Commission's agenda for some 15 years, higher priority than other topics. There was, moreover, no sign of any willingness to compromise on the most controversial issues. Everyone continued to stand his ground. At the Commission's thirty-sixth session, during the consideration of the revised

draft articles submitted by the previous Special Rapporteur—which had taken account of the views expressed both in the Commission at its thirty-fifth session, and in the Sixth Committee of the General Assembly at its thirty-eighth session—he himself had noted with regret⁴ that the Commission had not made any progress since the previous session, when a hopeless discussion had been held on the original text of those draft articles. At that time, the obstacles had appeared to be increasingly difficult to overcome and points of view had looked less and less reconcilable. Unfortunately, there had not been any great improvement in the situation. Despite the constructive report submitted by the present Special Rapporteur, no progress had been made in the discussion now being concluded. The Commission continued to face the same basic problems, which still seemed insurmountable.

14. Referring to the solutions to those problems proposed by the Special Rapporteur, he said that he fully agreed with the conclusions concerning the definition of the term "international watercourse" (*ibid.*, para. 63). The Commission did not have to define that term in order to move ahead with its work on the draft articles. It could therefore set that question aside for the time being, thereby speeding up the study of the topic.

15. With regard to the use of the term "shared natural resource", he would be prepared to support any proposal that could be endorsed by the majority of members. Until now, he had not taken any decision either for or against the "shared natural resource" concept, which did not appear to have a very specific meaning and which was still not enshrined in international law, and he intended to refrain from taking any position which might delay the Commission's work on the important topic now under consideration. He did not think that it was appropriate, however, to adopt a concept which was not entirely clear and whose legal consequences were or might be referred to in article 6 or in other articles of the draft. There again, he agreed with the conclusions reached by the Special Rapporteur (*ibid.*, para. 74).

16. As to the duty not to cause "appreciable harm", he had always been convinced that, both in the context of the topic under consideration and in that of the topic of international liability, it would be appropriate to adopt the principle of prohibiting any appreciable harm, as stated in draft article 9 submitted in 1984 by the previous Special Rapporteur.

17. He reserved his position on the three alternatives for article 9 proposed by the present Special Rapporteur (*ibid.*, paras. 182-184) because those texts, like several of the Special Rapporteur's other proposals, required further thought. Since the draft articles were, unfortunately, a long way from being adopted, it was pointless to be in too much of a hurry. In any event, the Commission would have to spend more time on the present topic, particularly if, as he hoped, it had before it the entire set of draft articles.

18. Mr. YANKOV congratulated the Special Rapporteur on his lucid and constructive second report

⁴ See *Yearbook ... 1984*, vol. I, p. 266, 1859th meeting, para. 14.

(A/CN.4/399 and Add.1 and 2). Although the report gave an objective account of the work of previous Special Rapporteurs, the time had perhaps come for the present Special Rapporteur to endeavour to unify his approach to the topic, in order to facilitate the Commission's work.

19. A number of different schools of thought existed regarding the legal character to be given to the draft articles. However, that fact should not be allowed to impede the work of the Commission, which should endeavour to elaborate draft provisions of as simple and general a nature as possible, given the individual peculiarities of international watercourses. Modern treaty making was more imaginative than in the past. Recently, instruments had been elaborated which, while they were not treaties *stricto sensu*, had nevertheless had a significant impact on the regulation of international relations. Consequently, the draft articles should be as simple and general as possible, and the decision as to whether they should be given legal force should be left to Governments. Accordingly, the Commission should adopt a flexible approach at the current stage.

20. He agreed with the Special Rapporteur that the definition of an "international watercourse" or an "international watercourse system", while very important for the determination of the scope and structure of the draft articles, should be left until a later stage (*ibid.*, para. 63). There was a divergence of views among members of the Commission as to which term should be used. Personally, he believed that to conduct the study on the basis of an entire river basin, with all its ramifications, would be a very difficult undertaking. Consequently, the Commission should continue on the basis of the provisional working hypothesis accepted in 1980.

21. The retention of the "shared natural resource" concept could create more problems than it solved. He would prefer emphasis to be placed on principles of international law applicable to the use of natural resources, such as the duty to co-operate and not to cause harm, and on the principles of sovereign equality of States, territorial integrity, good-neighbourly relations and reasonable and equitable use of resources.

22. In determining what was meant by "reasonable and equitable use", the Commission should again adopt a flexible approach. Some of the relevant factors listed in draft article 8 were a statement of the obvious, while others related to very specific features difficult to determine *a priori*. Since the list was merely indicative, it would be preferable to regard reasonable and equitable utilization as a general guiding principle of law for determining the rights of States in respect of the non-navigational uses of international watercourses, as proposed by the Special Rapporteur (*ibid.*, para. 169), rather than to attempt to draft an exhaustive list of specific factors.

23. With regard to the maxim *sic utere tuo ut alienum non laedas*, emphasis should be placed on the sovereign rights of a State to use waters within its territory, while at the same time respecting the rights and legitimate interests of other user States. In that regard, he agreed with the Special Rapporteur that draft article 9 should be redrafted in such a way as to bring it into conformity

with the article or articles setting forth the principle of equitable utilization (*ibid.*, para. 180). Of the three alternative texts proposed by the Special Rapporteur, he preferred the third, which emphasized the duty to refrain from causing appreciable harm (*ibid.*, para. 184).

24. The new draft articles 10 to 14 deserved further consideration. Perhaps in his next report, the Special Rapporteur could endeavour to present more coherent articles containing the various elements, rather than submitting three categories of articles.

25. With regard to institutional aspects, the Commission should try not to be over-ambitious, particularly when reference was made to the United Nations, given the variety of possible situations and the difficulties encountered by a universal organization in attempting to deal with them. Finally, the Commission should in the future give priority to the present topic, with a view to completing consideration of it during its next term of office.

26. Mr. McCAFFREY (Special Rapporteur), summing up the debate, thanked all members who had spoken on the topic for their comments, which he had found very helpful. While the nature of the instrument being prepared and the approach to be adopted were for the Commission to decide, it should be noted that both the Commission and the Sixth Committee of the General Assembly had already endorsed the "framework agreement" approach. He shared the position of his two predecessors on how that term should be applied (A/CN.4/399 and Add.1 and 2, para. 13). The Commission should proceed on the basis that it was preparing a "framework agreement" containing the general principles and rules governing the non-navigational uses of international watercourses.

27. The exercise in which the Commission was engaged was, or could be, both declarative and constitutive. In 1980, the Commission had already recognized that it was possible to identify certain principles of international law already existing and applicable to international watercourses in general. In his report, he had attempted to identify some of the most basic of those principles. However, as suggested by Mr. Arangio-Ruiz (1979th meeting), the Commission should consider two sets of principles, one *de lege lata* and the other *de lege ferenda*. His own preference would be to exhaust the declarative aspect of the topic first, see how far it was possible to go in codifying and progressively developing legal principles, and then, possibly in a separate part of the draft, make recommendations regarding institutional mechanisms and other aspects of international watercourse management which were not required by international law, but would be highly desirable, or even necessary, for the smooth and effective management of a watercourse. Indeed, such a set of recommendations might prove to be one of the most valuable aspects of the Commission's work on the topic.

28. Members who had referred to the question whether the definition of an "international watercourse" or an "international watercourse system" should be postponed had indicated that the Commission should indeed, for the time being, defer such a defini-

tion and rely on the provisional working hypothesis accepted in 1980.

29. Members appeared to be fairly evenly divided as to whether the "shared natural resource" concept should be retained in the draft. However, some members on both sides had recognized that the term had become emotionally charged and had virtually taken on a life of its own. Consequently, they had suggested that effect could be given to the principles underlying the concept without the term itself being used. That might ultimately be the easiest course for the Commission to follow, at least provisionally.

30. There had also been a roughly even division of opinion in the Commission as to whether the relevant factors listed in draft article 8 should be retained in the text of the article itself or transferred to the commentary. Some members had expressed the view that draft articles 6 and 7 would be "empty" without some guidance as to how they should be applied, while others had been of the view that the factors did not reflect legal rules *per se* and thus should not appear in the draft. The question would have to be considered carefully by the Drafting Committee. If the factors were to be included in the article, the Commission must determine whether priority could be assigned to any of them and whether any indication could be given as to how to resolve conflicts between them. It seemed clear that the Commission should strive for a flexible solution, perhaps along the lines suggested by Mr. Yankov.

31. Members had also been fairly evenly divided as to whether the relationship between legally prohibited harm and the principle of equitable utilization should be made clear in draft article 9. Of those who had expressed a preference for redrafting in order to reconcile the two principles, most had preferred the third of the proposed alternatives (A/CN.4/399 and Add.1 and 2, para. 184). The matter should not be difficult to resolve. Draft article 9 as submitted by the previous Special Rapporteur could, of course, simply be interpreted as not prohibiting harm that would be allowed pursuant to an equitable allocation. That was perhaps the easiest solution. Alternatively, the article could be drafted in such a way as to emphasize the prohibition against causing harm, while preserving the principle of equitable utilization. That was a matter that could be dealt with by the Drafting Committee. Mr. Ogiso's point (1979th meeting) regarding the use of word "appreciable" was well taken and warranted close consideration by the Drafting Committee.

32. With regard to the new draft articles 10 to 14 which he had submitted, he noted that several speakers had pointed to the need for some mediation or conciliation mechanism in order to ensure that the whole system functioned properly. He agreed with that view and intended to consider the matter at a later stage. For the time being, however, his aim was to indicate the legal requirements regarding the uses or planned new uses of international watercourses.

33. While he realized that the allocation of maritime resources by international tribunals was not the same thing as the apportionment of the uses and benefits of international watercourses, some analogies could be

drawn, particularly with regard to fisheries. The Commission should determine whether judicial decisions relating to natural resources could be of assistance in its work on the topic.

34. A number of members had expressed the view that the general duty to co-operate should be accorded separate treatment. He would consider that point in future reports. He would also give particular consideration to whether draft article 11 should refer to a specific period of time, to whether draft article 14 was too open to abuse, and to the safeguards to be provided.

35. Mr. Flitan (1977th meeting) had seen a contradiction between the first and last sentences of paragraph (9) of the comments on draft article 10. In drafting the paragraph, he had simply meant to indicate that, if the information was not readily available, either because it was not easily accessible or simply because it was not known, then the State proposing a new use should not be required to bear the entire expense of finding it. Some discretion was needed in that regard. Naturally, if the notified State lacked means, as suggested by Mr. Balanda (1979th meeting), some equitable adjustment might be necessary, depending on a number of factors, including the reasonableness of the request and the importance of the information in question. In reply to another point raised by Mr. Balanda, he said that the notification should be given at the planning stage, rather than at the implementation stage, since the latter stage would be too late for any consultation procedure to take place. In response to a question raised by Mr. El Rasheed Mohamed Ahmed (1978th meeting), he said that, in the first instance, the proposing State must determine whether appreciable harm might be caused. However, there should be an objective standard. When there was any doubt, the State contemplating a new use of a watercourse should so notify other user States.

36. As to draft article 13, Mr. Balanda had wondered how other States could be required to fulfil the obligations incumbent on proposing States under article 10. The answer was that they could not. Upon learning of a proposed project, a potentially affected State could require the proposing State to comply with the provisions of article 10.

37. With regard to draft article 14, Mr. Riphagen (*ibid.*) had suggested that cases of utmost urgency might be treated as specific instances of a state of necessity, as provided for in part 1 of the draft articles on State responsibility. That possibility was worth considering. A case of utmost urgency might be a "circumstance precluding wrongfulness". Indeed, draft article 14, paragraph 3, stated only that the proposing State should be liable for any harm caused to the notified State by the initiation of the proposed use.

38. Mr. El Rasheed Mohamed Ahmed had wondered whether draft article 14, paragraph 3, introduced the concept of strict liability. It might more properly be seen as providing for cases of liability for injurious consequences arising out of acts not prohibited by international law, in which the State proceeding with a use of utmost urgency would be liable for any damage caused. In reply to a question raised by Mr. Balanda, he said that he had simply intended to state that the proposing

State should notify potentially affected States of its proposal and its urgency. He agreed, however, that some clarification was needed.

39. Mr. Mahiou (1977th meeting) had said that it was difficult to conceive of a concrete example of the situation described in the report (A/CN.4/399 and Add.1 and 2, para. 197) in which a State wishing to introduce a new use of a watercourse was actually unable to do so because of uses already being made by other States. Examples of such situations might be the introduction of fish stocks in watercourses into which paper-mill waste was being dumped, the use of already polluted water for irrigation, the use of a watercourse to provide drinking-water for a new settlement, and sensitive industrial uses which required purer water than that available.

40. He agreed that the topic he was dealing with overlapped to some extent with the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. He believed that the Commission's work on the latter topic and on the law of the non-navigational uses of international watercourses would be mutually complementary.

41. Although it must seem to many members that the Commission was marking time on the present topic, one reason for the difficulties encountered was that nine draft articles submitted by the previous Special Rapporteur had been in the Drafting Committee since 1984. It was to be hoped that the Committee would be able to take them up at the following session and that the Commission would be able to adopt a number of articles.

42. In future reports, he intended to continue with work on the procedural articles and to develop other points in chapter III of the outline, including the general principles of co-operation, but probably excluding management regulations, institutional mechanisms and other areas not strictly of a legally required nature. He also hoped to develop a number of principles on environmental protection.

43. Mr. DÍAZ GONZÁLEZ recalled that the Commission had already referred six draft articles to the Drafting Committee and then adopted them on first reading, after which they had also been approved by the Sixth Committee of the General Assembly. Since then, the Commission had abided by its decision. The Drafting Committee had, however, not been able to consider the other draft articles referred to it because the Commission had not given it any specific instructions. Since there had been objections to some aspects of the Special Rapporteur's second report (A/CN.4/399 and Add.1 and 2), the Commission should now decide how it intended to proceed with its consideration of the present topic.

44. Mr. McCAFFREY (Special Rapporteur) said that, at its thirty-second session, in 1980, the Commission had indeed provisionally adopted the six draft articles 1 to 5 and X; it had also accepted a provisional working hypothesis on the term "international watercourse system". None of those texts had since been rejected by the Commission. In the light of the developments which had taken place since 1980, however, the Commission had decided at its thirty-sixth session, in 1984, to refer

to the Drafting Committee the first nine draft articles submitted by the previous Special Rapporteur.

45. In the preliminary report which he himself had submitted at the Commission's thirty-seventh session (A/CN.4/393), he had proposed that the nine articles already referred to the Drafting Committee should remain with that Committee—a proposal which the Commission had accepted⁵—and that he himself should continue working on the basis of the outline proposed by the previous Special Rapporteur. In 1984, the Commission had also decided to refer to the Drafting Committee the six articles and the provisional working hypothesis adopted in 1980.⁶ In order to proceed expeditiously with the work on the topic, it was desirable not to change those arrangements. His hope was that the Commission would be able to complete its work on the articles which had been referred to the Drafting Committee.

46. He had never suggested that the members of the Commission agreed on all the points he had put to them, with the possible exception of the question of the use of the "watercourse system" concept. On most other points, the Commission was divided, but it should try to work out generally acceptable formulations. To that end, it should follow its usual method of requesting the Drafting Committee to discuss the problems that had arisen and propose possible solutions. He was in the Commission's hands, but he did not believe that it had to take any further action at the present stage.

47. Mr. USHAKOV said that, until now, the topic had been discussed only in general terms, not on an article-by-article basis. It might therefore be premature for the Commission to adopt a definite position at the present stage.

48. Mr. McCAFFREY (Special Rapporteur) said that, for the reasons given by Mr. Ushakov, he was not proposing that the new draft articles 10 to 14 which he had submitted should be referred to the Drafting Committee. He merely suggested that the articles already referred to the Drafting Committee should be left with that Committee.

49. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt the Special Rapporteur's suggestion.

It was so agreed.

**State responsibility (concluded)* (A/CN.4/389,⁷
ILC(XXXVIII)/Conf.Room Doc.2)**

[Agenda item 2]

***Content, forms and degrees of international
responsibility (part 2 of the draft articles)***

* Resumed from the 1956th meeting.

⁵ *Yearbook ... 1985*, vol. II (Part Two), pp. 70-71, paras. 281 and 285.

⁶ *Yearbook ... 1984*, vol. II (Part Two), p. 88, footnote 285.

⁷ Reproduced in *Yearbook ... 1985*, vol. II (Part One).

REPORT BY THE CHAIRMAN OF THE
DRAFTING COMMITTEE

ARTICLE 6

50. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Drafting Committee had devoted five meetings to article 6 of part 2 of the draft articles.⁸ He was grateful to Mr. Calero Rodrigues for chairing those meetings.

51. The Drafting Committee had not had enough time to complete its consideration of draft article 6, but it had reached a consensus on the introductory part of paragraph 1, on the opening words of paragraph 1 (a) and on the revised text of paragraph 1 (c) and (d). There had been no agreement on paragraph 1 (b) or on the concluding part of paragraph 1 (a). Lastly, there had been a large measure of consensus on paragraph 2.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded)*
(A/CN.4/400,⁹ A/CN.4/L.398, sect. D, A/CN.4/L.400)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE

ARTICLES 28 TO 33

52. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report (A/CN.4/L.400) and the texts of articles 28 to 33 adopted by the Committee.

53. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Committee's report set out the complete text of the draft articles proposed for adoption by the Commission on first reading. It included articles previously adopted, as well as articles 28 to 33, which had been adopted at the present session and were based on the former articles 36, 37, 39, 41, 42 and 43; the previous numbers of renumbered articles appeared in square brackets.

54. A few adjustments had been made to previously adopted articles in order to ensure greater consistency and to solve pending problems. For example, in article 3, paragraph 1 (2), which defined the "diplomatic bag", the description of the content of the bag had been brought into line with that contained in article 25. The order of articles 7 and 8 had been reversed, since it was more appropriate to place an article on the appointment of the courier before an article on his documentation. The title of article 13 had been expanded to correspond to that of article 27.

* Resumed from the 1951st meeting.

⁸ The text of draft article 6 considered by the Commission at its thirty-seventh session and referred to the Drafting Committee, as well as a summary of the discussion thereon, appear in *Yearbook ... 1985*, vol. II (Part Two), p. 20, footnote 66, and p. 22, paras. 119-126.

⁹ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

ARTICLE 28 [36] (Protection of the diplomatic bag)

55. He introduced the text proposed by the Drafting Committee for article 28 [36], which read:

Article 28 [36]. Protection of the diplomatic bag

1. The diplomatic bag shall [be inviolable wherever it may be; it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical devices].

2. Nevertheless, if the competent authorities of the receiving [or transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or transit] State may require that the bag be returned to its place of origin.

56. Article 28, which was based on the revised text of draft article 36 submitted by the Special Rapporteur and originally entitled "Inviolability of the diplomatic bag",¹⁰ had been discussed at length and had given rise to serious differences of opinion in the Commission and in the Drafting Committee, which explained the presence of so many square brackets in the text now being proposed. The Drafting Committee had been unable to agree on the basic substantive issues involved, namely the extent to which the draft could provide for a uniform régime for all categories of bags and what such a uniform régime should be.

57. Paragraph 1 reproduced the text submitted by the Special Rapporteur, but contained two sets of square brackets. The phrases that were not in square brackets were simply a repetition of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. The first phrase in square brackets referred to the concept of the "inviolability" of the bag. Some members had said that the use of that concept was not only logical, but also necessary. Others had had reservations about the inclusion of that concept because it did not appear in any of the existing relevant conventions with regard to the bag as such. The second phrase in square brackets related to electronic or technical examination of the bag. Some members had considered that it was necessary to include that phrase, which dealt with a practical contemporary issue that the 1961 and 1963 United Nations Conferences had not had to face. Others had taken the view that it should not be included or could be included only if it were qualified by a provision along the lines of paragraph 2. Still others had held that the phrase was unnecessary, since the existing conventions already excluded such examination. A minor drafting change had been made in paragraph 1: it had been thought more correct to refer to "other technical devices" than to "other mechanical devices".

58. Paragraph 2 was based on the corresponding paragraph proposed by the Special Rapporteur, but its unbracketed parts had been modelled more closely on article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Paragraph 2 thus now provided

¹⁰ See 1948th meeting, para. 1.

that a request could be made for the bag to be opened prior to requiring that it be sent back. The final phrase was, however, based on the Special Rapporteur's approach, not on that of the 1963 Vienna Convention.

59. Three issues on which no agreement had been reached had been indicated by square brackets. The words "or transit" had been placed in square brackets because members had not been able to agree whether a transit State should be in a position to make the request provided for in the paragraph. The word "consular" had been placed in square brackets because of the difference of opinion between those who believed that the provision of paragraph 2 on the possibility of requesting that the bag be opened should apply to all bags and those who thought that such a request could be allowed only with regard to the consular bag. The third phrase in square brackets related to the possibility that the receiving State might request that the bag be subjected to electronic examination. That provision for a "middle-step" request by the receiving State had been seen by most members as a useful addition, but one member had opposed it, believing it to be illogical and absurd, as well as contrary to existing law.

60. As to the fate of article 28, the Drafting Committee had considered three possibilities: (a) reporting back the revised text submitted by the Special Rapporteur without making any recommendation; (b) redrafting the text in order simply to reflect the *status quo*, namely a paragraph 1 repeating the 1961 Vienna Convention formula for three types of bags and a paragraph 2 repeating the 1963 Vienna Convention formula for the consular bag; (c) suggesting that no article at all should be adopted on the matter.

61. In the end, the Drafting Committee had decided that it had a duty to indicate at least those areas of agreement which did exist and those on which disagreement on substantive issues subsisted. It would be for the Commission in plenary and ultimately for Governments to decide those questions. As in the past, the second reading of the article would no doubt be greatly facilitated by the comments and observations to be submitted by Governments.

62. Finally, the title of article 28, which now read "Protection of the diplomatic bag", was tentative and would require further discussion on second reading.

63. Mr. USHAKOV said that article 28, paragraph 2, would be acceptable if it referred to the "consular bag" and to the "receiving State".

64. Sir Ian SINCLAIR said that article 36, now article 28, had been a source of difficulties from the outset. It had been his understanding that the majority of representatives in the Sixth Committee of the General Assembly had wished to have a uniform system for all types of diplomatic bags. The draft articles were in fact predicated on that approach. He had serious reservations with regard to article 28 as it now stood. It would have been preferable for the Commission to agree that the provisions of paragraph 2 should apply to all bags. It was because of the provisions of paragraph 1, and the failure to agree on them, that some phrases had been placed in square brackets.

65. Mr. KOROMA reiterated his view that article 28 was superfluous. It was the attempt to take account of new developments that had made the text of the article unacceptable to several members. All that was needed was a statement that the diplomatic bag could not be opened or detained and that it must be exempt from examination directly or indirectly. The introduction of references to electronic and other devices created a position of inequality as between States because many States simply did not possess such devices.

66. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 28 [36].

Article 28 [36] was adopted.

ARTICLE 29 [37] (Exemption from customs duties, dues and taxes)

67. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 29 [37], which read:

Article 29 [37]. Exemption from customs duties, dues and taxes

The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and related charges other than charges for storage, cartage and similar services.

68. Article 29 reproduced with only slight modification the revised text of draft article 37 submitted by the Special Rapporteur.¹¹ The usual expression "or, as the case may be" replaced the expression "or, as appropriate", and the words "and departure" replaced the words "or exit". The word "free", which had formerly qualified the words "entry, transit or exit", had been deleted, as it added nothing to the meaning and was subject to various interpretations. The concluding phrase had been brought into line with the corresponding phrase in article 36, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations.

69. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission agreed provisionally to adopt article 29 [37].

Article 29 [37] was adopted.

ARTICLE 30 [39] (Protective measures in case of *force majeure* or other circumstances)

70. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 30 [39], which read:

Article 30 [39]. Protective measures in case of force majeure or other circumstances

1. In the event that, due to *force majeure* or other circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the bag has been entrusted or any other member of the crew, is no longer able to maintain custody of the diplomatic bag, the receiving State or, as the case may be, the transit State shall take appropriate measures to inform the sending State and to ensure the integrity and safety of the diplomatic bag until the authorities of the sending State take repossession of it.

¹¹ *Ibid.*

2. In the event that, due to *force majeure*, the diplomatic courier or the diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, that State shall accord protection to the diplomatic courier and the diplomatic bag and shall extend to them the facilities necessary to allow them to leave the territory.

71. Article 30 was based on the revised text of draft article 39 submitted by the Special Rapporteur.¹² That text had been recast so that paragraph 1 now referred to *force majeure* or other circumstances, such as illness, which might prevent the diplomatic courier, the captain of a ship or aircraft in commercial service to whom the bag had been entrusted or any other member of the crew from maintaining custody of the bag. The emphasis had now been more appropriately placed on events such as accidents, abandonment, loss or misplacement which prevented custody of the bag from being maintained. The point was that the "guardian" of the bag had for some reason been unable to maintain custody of it. Paragraph 1 did not deal with lost or misplaced bags which had been transmitted unaccompanied through the postal service or by some other mode of transport. In such cases, the transmittal service concerned would retain responsibility for dealing with the kind of events referred to in paragraph 1. The purpose of the obligation under paragraph 1 had been brought out more clearly by the provision that the receiving State or the transit State must take appropriate measures to inform the sending State of the situation and to ensure the integrity and safety of the bag until the authorities of the sending State had regained possession of it.

72. Paragraph 2 concerned an event of *force majeure* which resulted in the courier or bag being present in the territory of a State not initially foreseen as a transit State. The proposed text specified that such a State must not only accord protection to the diplomatic courier and the diplomatic bag, but must also extend the facilities necessary to allow them to leave the territory. The commentary would explain that it was for the State on whose territory the courier and the bag were present to decide whether they were simply to be allowed to return directly to the sending State or whether they were to be allowed to continue their journey to their destination.

73. The title now referred not only to *force majeure*, but also to "other circumstances".

74. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission agreed provisionally to adopt article 30 [39].

Article 30 [39] was adopted.

ARTICLE 31 [41] (Non-recognition of States or Governments or absence of diplomatic or consular relations)

75. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 31 [41], which read:

Article 31 [41]. Non-recognition of States or Governments or absence of diplomatic or consular relations

The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be affected either by the non-recognition of the sending State or of its

Government or by the non-existence of diplomatic or consular relations.

76. Article 31 was a simplified version of the revised text of draft article 41 submitted by the Special Rapporteur.¹³ Paragraph 2 of the earlier text had been deleted because it stated the obvious and its content would be covered in the commentary.

77. Article 31 applied only to situations of non-recognition or lack of relations between a sending State and (a) a State on whose territory a special mission was received; (b) a State on whose territory the headquarters of an international organization was located; (c) a State on whose territory an international conference was held. An attempt had been made to draft the article specifically to cover those three situations, but the task had proved extremely difficult because a very heavy and detailed text would have been required. In order to avoid those problems and save time, the Drafting Committee had thought it wise to cast the safeguard clause in article 31 in broad and general terms.

78. The text no longer referred to host or receiving States or to transit States. Indeed, it had been questioned whether a transit State could be placed in the same position as a receiving or host State in the context of article 31. It had been generally agreed that the transit State might well require additional formalities, such as a visa or prior express consent to transit, before it accorded the facilities, privileges and immunities in question to a courier in transit from a sending State which it did not recognize.

79. Sir Ian SINCLAIR said that it should have been possible to draft a text that would specifically cover the three situations referred to by the Chairman of the Drafting Committee. As it now stood, article 31 had the disadvantage of being much too general and he hoped that it would be improved on second reading.

80. Mr. MAHIU said it seemed to him that the Drafting Committee had gone too far in trying to simplify article 31. The new wording might therefore lead to a debate on the scope of that provision and give rise to doubts on the part of States which did not recognize or maintain diplomatic or consular relations with a particular Government. The necessary explanations should therefore be included in the commentary. The Commission would, in any event, have to come back to the working of article 31 on second reading.

81. Mr. KOROMA suggested that the Commission should try to recast article 31 before submitting it to the Sixth Committee of the General Assembly.

82. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, at the current late stage, practical problems would make it difficult to revise article 31 in all languages.

83. Mr. REUTER said he thought that the doubts and misgivings which had been expressed were the result of the fact that the words "shall not be affected" covered both matters of law and matters of fact. He therefore

¹² *Ibid.*

¹³ *Ibid.*

suggested that those words should be replaced by “shall not be altered in principle”. The Commission would thus show clearly that it was not taking any position on the practical problems which might arise and that the principle of no change was valid only from the purely legal point of view. If that suggestion was not satisfactory, it might be explained in the commentary that various solutions had been possible.

84. Mr. USHAKOV said that the wording proposed by Mr. Reuter was unacceptable because it differed so radically from that of similar provisions contained in existing conventions. Certainly the text of article 31 needed to be clarified, and that could be done on second reading; it would, for example, have to be specified to which States article 31 applied. At the current stage, however, the Commission should refrain from drafting a text in too great a hurry.

85. Sir Ian SINCLAIR said that Mr. Reuter’s suggestion met some of his own concerns about the wording of article 31. He hoped that the commentary would reflect the Commission’s intentions with regard to that article and make it clear that its provisions did not apply to the *de facto* effects of non-recognition or absence of diplomatic or consular relations. He would be content with the matter being taken up on second reading.

86. Mr. TOMUSCHAT said that he also endorsed Mr. Reuter’s helpful suggestion; but unfortunately it would not change the fact that the wording of article 31 was much too general.

87. Mr. ROUKOUNAS said that, during the general debate (1951st meeting), he had questioned the validity of article 41, now article 31. Having heard the presentation of and comments on the provision, he maintained his reservations.

88. Mr. KOROMA suggested that article 31 should be left as it stood and that it should be accompanied by a suitable commentary.

89. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 31 [41] as it stood, on the understanding that it would be accompanied by a suitable commentary.

Article 31 [41] was adopted.

ARTICLE 32 [42] (Relationship between the present articles and existing bilateral and regional agreements)

90. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 32 [42], which read:

Article 32 [42]. Relationship between the present articles and existing bilateral and regional agreements

The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them.

91. Article 32 was now composed of one paragraph, whereas the text on which it was based, the revised draft article 42 submitted by the Special Rapporteur,¹⁴ had

had three. Two paragraphs had been deleted and the third had been amended.

92. Paragraph 1 of the earlier text had stated that the present articles “shall complement” the provisions of the four relevant codification conventions. The Drafting Committee had found that the word “complement” could give rise to varying interpretations and believed that the draft should not go into the complex area of treaty law concerning the application of successive treaties relating to the same subject-matter. It had thought that it would be wiser to leave that matter aside, since guidance might be provided by article 30 of the 1969 Vienna Convention on the Law of Treaties.

93. Paragraph 3 of the earlier text had been deleted because its content was already covered by article 6, paragraph 2 (b).

94. Paragraph 2 of the earlier text formed the basis for the article now being proposed. The words “shall not affect”, which had been used instead of the words “are without prejudice to”, were taken from article 73, paragraph 1, of the 1963 Vienna Convention on Consular Relations. The broad formulation in the original paragraph 2 had been changed because most members of the Drafting Committee had thought it likely that one or more of the four relevant codification conventions would in fact be affected by other provisions of the present draft, and in particular by article 28. State practice with regard to consular couriers and bags was, moreover, evidenced primarily in bilateral agreements. The possibility of there being relevant regional agreements had also been recognized; such agreements would not be affected by the provisions of the draft.

95. One member of the Drafting Committee had disagreed with the use of the term “bilateral or regional agreements” and had urged that the text should be based on that of article 73, paragraph 1, of the 1963 Vienna Convention so as to avoid arguments *a contrario*. That member had also been unable to agree that any of the provisions of the present draft could be said to “affect” the four codification conventions as such.

96. The title had been brought into line with the new content of the article.

97. Mr. USHAKOV said that, as it now stood, article 32 might imply that the future convention would be prejudicial to some agreements in force—and that was impossible under the law of treaties. He could, moreover, not agree with the members of the Drafting Committee who took the view that the words “regional agreements” could mean any bilateral agreements except agreements of a universal character. The idea reflected in article 32 was therefore acceptable, but the text itself was not.

98. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 32 [42] subject to the reservations formulated by Mr. Ushakov.

Article 32 [42] was adopted.

¹⁴ *Ibid.*

ARTICLE 33 [43] (Optional declaration)

99. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 33 [43], which read:

Article 33 [43]. Optional declaration

1. A State may, at the time of expressing its consent to be bound by the present articles, or at any time thereafter, make a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraph 1 (1) and (2) of article 3 to which it will not apply the present articles.

2. Any declaration made in accordance with paragraph 1 shall be communicated to the depositary, who shall circulate copies thereof to the Parties and to the States entitled to become Parties to the present articles. Any such declaration made by a Contracting State shall take effect upon the entry into force of the present articles for that State. Any such declaration made by a Party shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of that declaration.

3. A State which has made a declaration under paragraph 1 may at any time withdraw it by a notification in writing.

4. A State which has made a declaration under paragraph 1 shall not be entitled to invoke the provisions relating to any category of diplomatic courier and diplomatic bag mentioned in the declaration as against another Party which has accepted the applicability of those provisions to that category of courier and bag.

100. Article 33 was based on the revised text of draft article 43 submitted by the Special Rapporteur.¹⁵ It followed the general approach reflected in the earlier text, but had been formulated in a more precise manner; a new paragraph had also been added. Some members of the Drafting Committee had said that the article appeared to undermine the purposes of codification in the area, namely to provide uniform rules for all couriers and bags. It had nevertheless been recognized that such a provision could assist in obtaining a broader measure of government support for the draft as a whole.

101. Paragraph 1 had been recast in the light of the debate in plenary to provide that a State could specify any category of courier and corresponding category of bag to which it would not apply the present articles. The use of the words "corresponding category of diplomatic bag" was intended to make it clear that a State could not decide to apply the present articles to the consular courier, for example, but not to the consular bag. The categories of couriers and bags chosen for non-application must correspond to each other. Other drafting changes had been made for the sake of clarity and precision.

102. Paragraph 2, which was new, contained the necessary procedural elements for the application of paragraph 1. The first sentence provided that a declaration would be communicated to the depositary, who would circulate copies thereof to the parties and to the States entitled to become parties to the present articles. That sentence was based on article 23, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties. The second sentence indicated that a declaration made by a contracting State would take effect upon the entry into force of the present articles for that State. The term "Contracting State" had the meaning provided for in

article 2, paragraph 1 (f), of the 1969 Vienna Convention, which referred to "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force". The third sentence provided for a different period of time in the case of a declaration made by a "Party", which was, according to article 2, paragraph 1 (g), of the 1969 Vienna Convention, "a State which has consented to be bound by the treaty and for which the treaty is in force". In such a case, the articles would already have entered into force for the State concerned and its declaration would represent a change in its previous application of the articles. It had thus been thought necessary and fair to provide for a three-month "waiting period" before the declaration took effect.

103. Paragraph 3 was based on paragraph 2 of the text submitted by the Special Rapporteur, but the end of the sentence had been amended to make it clear that a withdrawal of a declaration had to be made "by a notification in writing".

104. Paragraph 4 was based on paragraph 3 of the text submitted by the Special Rapporteur, but its wording had been brought into line with that of paragraph 1. The title of the article had been shortened and now read simply: "Optional declaration".

105. Mr. FLITAN said that the purpose of the draft articles was to complement the four codification conventions referred to in article 3 and that the Commission could not make any changes in the régime established by those instruments. He was therefore in favour of the deletion of draft article 33, which specifically authorized amendments to the provisions of those conventions; that would, moreover, contradict the fact that some of those provisions were reproduced in the present draft.

106. Mr. YANKOV (Special Rapporteur) said that, in order to avoid any confusion with regard to the question of reservations as referred to in article 23, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, the commentary should make it clear that the optional declaration provided for in draft article 33 could in no way be regarded as a reservation, either in terms of its nature or in terms of its operation. If reference was to be made to the 1969 Vienna Convention, it would be more appropriate to mention article 77, paragraph 1 (e), on the functions of depositaries.

107. Mr. MAHIU said that paragraph 3 would require further clarification because paragraph 2 set a time-limit for a declaration made by a party, whereas paragraph 3 set no time-limit at all for the withdrawal of a declaration made under paragraph 1.

108. Mr. YANKOV (Special Rapporteur) said that the Drafting Committee had discussed the point raised by Mr. Mahiou. It was his own understanding that a withdrawal of an optional declaration would restore the normal position of the articles, so that there would be no need for any notification. That point could be explained in the commentary.

109. Mr. KOROMA said that he had some reservations with regard to article 33.

¹⁵ *Ibid.*

110. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 33 [43].

Article 33 [43] was adopted.

TITLES OF THE FOUR PARTS OF THE DRAFT ARTICLES

111. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, from the outset, the Special Rapporteur had proposed that the draft should be divided into parts, but the matter had been left pending until further progress had been made. Now that the complete draft had been prepared, the Drafting Committee proposed that the articles should be divided into the following four parts:

Part I. General provisions: articles 1 to 6;

Part II. Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplomatic bag: articles 7 to 23;

Part III. Status of the diplomatic bag: articles 24 to 29;

Part IV. Miscellaneous provisions: articles 30 to 33.

The titles of the four parts of the draft articles were adopted.

ADOPTION OF THE DRAFT ARTICLES ON FIRST READING

112. The CHAIRMAN, noting that the first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had been completed, suggested that the Commission should adopt the whole set of draft articles.

The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier were adopted on first reading.

TRIBUTE TO THE SPECIAL RAPPORTEUR

113. Mr. REUTER, speaking also on behalf of many other members of the Commission, proposed the following draft resolution:

“The International Law Commission,

“Having adopted provisionally the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

“Desires to express to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.”

The draft resolution was adopted.

114. Mr. YANKOV (Special Rapporteur) sincerely thanked all the members of the Commission for their appreciation of his efforts in what had, in fact, been a

collective undertaking by the Commission and its Drafting Committee. He was most grateful to the Secretariat for the valuable assistance it had given him in his work.

The meeting rose at 1.20 p.m.

1981st MEETING

Friday, 4 July 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

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

Draft report of the Commission on the work of its thirty-eighth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter II.

CHAPTER II. Jurisdictional immunities of States and their property (A/CN.4/L.403 and Add.1 and 2 and Add.2/Corr.1)

A. Introduction (A/CN.4/L.403)

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.403)

Section B was adopted.

C. Tribute to the Special Rapporteur, Mr. Sompong Sucharitkul (A/CN.4/L.403)

Section C was adopted.

D. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.403/Add.1 and 2 and Add.2/Corr.1)

SUBSECTION 1 (Texts of the draft articles provisionally adopted by the Commission on first reading) (A/CN.4/L.403/Add.1)

2. Mr. USHAKOV said that the reservations he had expressed in connection with the draft articles, both at previous sessions and at the present session, were still entirely valid.

Section D.1 was adopted.

SUBSECTION 2 (Texts of draft articles 2 (paragraph 2), 3 (paragraph 1), 4 to 6 and 20 to 28, with commentaries thereto, provisionally adopted by the Commission at its thirty-eighth session) (A/CN.4/L.403/Add.2 and Corr.1)

Commentary to article 2 (Use of terms)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

3. Sir Ian SINCLAIR proposed that the second part of the last sentence should be amended to read: "... the term does not, for the purposes of the present articles, cover the administration of justice in all its aspects, which, at least under certain legal systems, might include other functions related to the appointment of judges."

4. Mr. TOMUSCHAT said that the penultimate sentence should be deleted, for the reference to "administrative or police authorities" meant that the sentence went beyond the realm of the judiciary and invaded that of the executive.

5. Mr. McCAFFREY said that the penultimate sentence should not be deleted in its entirety, because the form of language it employed allowed for systems in which judgments were not enforced by the judge or court rendering them but by other State authorities. The words "administrative or police" could be deleted.

6. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph (2) with the amendments proposed by Sir Ian Sinclair and Mr. McCaffrey.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraphs (4) to (9)

7. The CHAIRMAN pointed out that paragraphs (4) to (9) of the commentary to article 2 had been deleted, as indicated in the corrigendum A/CN.4/L.403/Add.2/Corr.1.

8. In reply to a question by Mr. USHAKOV, Mr. SUCHARITKUL (Special Rapporteur) explained that paragraphs (4) to (9) had been deleted because of the reservations expressed by some members.

9. Mr. USHAKOV recalled that he had proposed (1945th meeting, para. 26) the inclusion in article 2 of a definition of the expression "State property" based on the corresponding definition in article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. The definition was necessary for two reasons. First of all, it should be made clear that, in the case of a dispute, the applicable law was the internal law of the State in question. When an individual contested the property rights of another individual of a different nationality, the dispute was decided by the court of the place where the property was situated. However, when the dispute was between an individual and the State of which he was a national, the only law applicable was the internal law of that State. Furthermore, the time of the dispute should be specified, whether the time when the proceeding was initiated, or when a measure of constraint was sought, or when execution was levied against the property.

10. The Commission would therefore have to revert to that question when it considered article 2 on second reading.

11. Sir Ian SINCLAIR said that he welcomed the deletion of paragraphs (4) to (9). The commentary to article 2 should simply explain the definitions the Commission had actually adopted. It would, of course, be possible to revert on second reading to the question of defining State property. In view of the difficulties regarding the precise role of internal law in the matter, it had not been possible at the present session to reach agreement on that subject.

12. Mr. MAHIOU, supported by Mr. RAZAFINDRALAMBO, proposed that the heading and the second sentence of paragraph (4) should be deleted, but that the first sentence should be retained, thereby making it perfectly clear that other definitions had indeed been proposed but that none of them had been adopted.

13. Mr. LACLETA MUÑOZ endorsed Mr. Mahiou's proposal, but suggested that the first sentence should be amended by replacing the words "earlier proposals by the Special Rapporteur having been withdrawn due to absence of utility" by "earlier proposals by the Special Rapporteur having been withdrawn because they were considered to be superfluous".

14. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt Mr. Mahiou's proposal to retain the first sentence of paragraph (4), as amended by Mr. Lacleta Muñoz, the rest of paragraph (4) and paragraphs (5) to (9) being deleted.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraphs (10) and (11) (new paragraphs (5) and (6))

Paragraphs (10) and (11) (new paragraphs (5) and (6)) were approved.

15. Mr. KOROMA said that he wished to place on record his reservation regarding the use of the adjective "commercial" in paragraph 1 (b) (i) of article 2 concerning the definition of the term "commercial contract". He hoped that the matter would be taken up on second reading of the article.

The commentary to article 2, as amended, was approved.

Commentary to article 3 (Interpretative provisions)

Paragraph (1)

16. Sir Ian SINCLAIR said that the fourth sentence was difficult to understand. He therefore proposed that the phrase beginning "in the light of its purposes ..." should be amended to read: "in the light of its object and purpose, namely to identify those entities or persons entitled to invoke the immunity of the State and also to identify certain instrumentalities and subdivisions ..."

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

17. Mr. MALEK said that, in the first sentence of paragraph (2) of the French text of the commentary, the

word *qui* should be placed between the word *international* and the word *jouit*.

18. As to article 3 itself, the word “but”, at the beginning of the last phrase of paragraph 2, introduced a restriction that was completely out of place. The word “and” should have been used.

19. Mr. CALERO RODRIGUES pointed out that Mr. Malek’s comment applied also to the English text of article 3.

20. Mr. DÍAZ GONZÁLEZ said that the same was true of the Spanish text.

21. Sir Ian SINCLAIR said that the point was a valid one, but could not be dealt with at the present stage, since the articles themselves had already been adopted. The matter could be held over to the second reading of the draft articles.

22. Mr. USHAKOV said he recognized that, once articles had been adopted, they could not be altered in terms of substance. However, changes for the purpose of correcting mere translation errors were surely permissible.

23. Mr. SUCHARITKUL (Special Rapporteur) said that the valid point raised by Mr. Malek was one of substance and, like the one raised earlier by Mr. Koroma in connection with article 2, should at the present stage be simply placed on record; it would no doubt be taken up on second reading.

24. Mr. ARANGIO-RUIZ criticized the reference in the first sentence of paragraph (2) of the commentary to the State “acting in its own name as an international legal person, enjoying jurisdictional immunities under international law”. The statement was inaccurate, because a foreign State acting in the courts appeared not as “an international legal person” but as a juridical person in the eyes of the domestic law of the forum State.

25. Mr. TOMUSCHAT, supported by Mr. McCAFREY, proposed that the concluding words of the first sentence, namely “as an international legal person, enjoying jurisdictional immunities under international law”, should be deleted.

26. Sir Ian SINCLAIR said that he too supported that proposal and suggested that the word “principal” before “category”, in the second sentence, should also be deleted.

27. Mr. ARANGIO-RUIZ urged that the phrase “acting in its own name”, in the first sentence, should also be deleted because it was unnecessary.

28. Mr. USHAKOV said that the commentary was posing so many problems because article 3 itself was not satisfactory. In particular, the interpretation given to the word “State” was inadequate and extremely ambiguous. On second reading of the draft, the Commission would therefore have to revert to the provisions of article 3, which was open to a number of objections in its present form.

29. Mr. CALERO RODRIGUES said that the words “acting in its own name” should be retained in the first sentence of paragraph (2) of the commentary. A State

could appear in a proceeding acting either in its own name or through one of its organs.

30. Mr. ARANGIO-RUIZ said that the organs in question were all part of the State. He saw no distinction between the various cases contemplated in paragraphs (2), (3) and (4) of the commentary.

31. Mr. SUCHARITKUL (Special Rapporteur) explained that the commentary was intended to reflect actual practice in the courts. It was not concerned with legal philosophy. In some cases, the foreign State had been sued in its own name, in others through one or other of its ministries.

32. Mr. ARANGIO-RUIZ said that, in all the cases referred to in paragraph (2), it was unquestionably the State that was sued. In the cases covered by the subsequent paragraphs of the commentary, the State was sued through one of the entities which represented it.

33. Mr. SUCHARITKUL (Special Rapporteur) said that, in order to meet the point raised by Mr. Arangio-Ruiz, the first sentence and the beginning of the second sentence of paragraph (2) could be reformulated to read: “The first category includes the State itself, acting in its own name and through its various organs of government, however designated ...”

34. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph (2) with the amendments proposed by Mr. Tomuschat and Sir Ian Sinclair and the change made by the Special Rapporteur.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

35. Mr. MAHIOU said that he had serious reservations about the equivalence of the English expression “sovereign authority” and the French expression *prérogatives de la puissance publique*, especially in view of what was said in the last sentence of the paragraph. Local or municipal authorities could not be said to exercise sovereign authority, since sovereign authority, at least in the French sense of the term, was exercised mainly at the international level, but they did exercise *prérogatives de la puissance publique*. In most countries, the mayor, the prefect or the governor of a region exercised police powers, for example, and they were definitely *prérogatives de la puissance publique*.

36. Furthermore, in some systems of internal law, there was a functional overlap at the local level. In other words, the same agent could act either in the name of the local community, the municipality or the region, or in the name of the State, in which case he was exercising *prérogatives de la puissance publique*. The problem of terminology, therefore, was actually cloaking a problem of substance. There was obviously confusion between acts of sovereignty falling within the international sphere and acts falling within the internal sphere.

37. Mr. LACLETA MUÑOZ pointed out that the formula “in the name or on behalf of the federal union”, at the end of the third sentence of paragraph (3) of the commentary, had the definite effect of limiting the

scope of application of paragraph 1 (b) of article 3 to federal unions, which did not appear to be the intention. It would be better simply to say "in the name of the State". If the Commission wished to mention federal unions expressly, the words "or of a federal union" could be added after the words "in the name of the State"; but such a detail was not necessary because, at the international level, any federal union was a State.

38. Mr. TOMUSCHAT said he agreed with both Mr. Mahiou and Mr. Lacleta Muñoz and felt that the whole of the last portion of the paragraph should be deleted. The statement that the component units of a federal union were "endowed with international legal personality or capacity to perform sovereign authority in the name or on behalf of the federal union" made surprising reading for those familiar with the workings of a federal State.

39. Mr. McCaffrey proposed that the words "federal union", at the end of the third sentence, should be replaced by "State"; a point of substance was involved in that change. The last sentence should be retained, because it followed on logically from the previous one, but the word "however" should be inserted between commas after the opening words "It was relatively clear".

40. Sir Ian SINCLAIR said that he agreed with Mr. Mahiou's remark regarding the two expressions "sovereign authority" and *prérogatives de la puissance publique*. The point was not simply one of translation, for it concerned the equivalence of two legal institutions. Accordingly, the words "which has been translated from the French expression", in the second sentence, should be changed to "which seems to be the nearest equivalent to the French expression". He agreed that the last sentence should be retained.

41. Mr. USHAKOV pointed out that the expression "political subdivisions" was not clear. To say, in the first sentence, that the State comprised "political subdivisions ... which are entitled to perform acts in the exercise of the sovereign authority of the State" was to give an interpretation which might well not be in conformity with the Constitution of one country or another. Under the Constitution of the USSR, for example, all of the Soviet Socialist Republics were sovereign States and could therefore participate in international relations, by concluding agreements with other countries for instance. Two of them, moreover, the Byelorussian and the Ukrainian Soviet Socialist Republics, were Members of the United Nations. International law could not define what was meant by "federal State", or by "department" in the French sense of the term. The only valid definition was the one which appeared in the Constitution of the State in question.

42. Consequently, on second reading of the draft articles, the Commission would have to either simply delete article 3, or word it differently and indicate expressly that the State comprised organs and other entities which were entitled to exercise sovereign authority under the internal law of that State.

43. Mr. BALANDA, supported by Mr. MAHIOU, proposed that the words *prérogatives de la puissance publique de l'Etat*, in the last sentence of the French

text, should be replaced by *prérogatives de la souveraineté de l'Etat*.

44. Mr. SUCHARITKUL (Special Rapporteur) said that Mr. Mahiou was correct in pointing out the difference between the two expressions, which of course was due to the differences between the two legal systems involved. He accepted the proposals to replace the words "federal union" by "State" and to introduce the word "however" in the last sentence.

45. Chief AKINJIDE said that he entirely agreed with Mr. Ushakov. If he had been able to see the commentaries before the adoption of article 3, he would not have been in favour of the article.

46. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph (3) with the amendments accepted by the Special Rapporteur, together with the changes proposed by Sir Ian Sinclair and Mr. Balanda to deal with the problem posed by the use of the expressions "sovereign authority" and *prérogatives de la puissance publique*.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

47. Mr. MAHIOU said that the word *mécanisme*, in the last sentence of the French text, should be deleted because it did not appear in the text of article 3.

It was so agreed.

48. Mr. BALANDA proposed that the words "they need not be accorded any jurisdictional immunity", at the end of the second sentence, should be replaced by "they do not enjoy any jurisdictional immunity".

49. Mr. SUCHARITKUL (Special Rapporteur) said that he was entirely willing to accept Mr. Balanda's proposal.

Mr. Balanda's amendment was adopted.

Paragraph (4), as amended, was approved.

Paragraph (5)

50. Sir Ian SINCLAIR proposed that the words "proceedings are likely to be instituted", in the last sentence, should be replaced by "proceedings may be instituted". Proceedings would not be instituted in every case.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were approved.

The commentary to article 3, as amended, was approved.

Commentary to article 4 (Privileges and immunities not affected by the present articles)

Paragraph (1)

51. Mr. McCaffrey proposed that the word "therefore", in the third sentence, should be deleted.

It was so agreed.

52. Sir Ian SINCLAIR said that the last sentence was not clear and proposed that it should read: "Both paragraphs are intended to preserve the privileges and immunities already accorded to specific entities and persons by virtue of existing general international law and more fully by relevant international conventions in force, which remain unaffected by the present articles."

53. Mr. LACLETA MUÑOZ endorsed Sir Ian Sinclair's proposal. The new text should be translated into Spanish carefully, for the present Spanish text contained a concept completely unknown to him which was not found in the English and French texts, namely the concept of *convenciones de derecho internacional general*.

Sir Ian Sinclair's amendment was adopted.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraph (5)

54. Mr. MAHIOU said that, in his opinion, only the first two sentences of paragraph (5) should be retained. The remainder of the paragraph was of no great use, but if it were to be retained he would request that the fifth sentence, concerning the *Mercantile v. Regno di Grecia* case, should be deleted. The commentary was intended to explain the meaning of article 4 and avoid any reference to case-law that might be contested. But the footnote concerning the *Mercantile* case referred to a court decision that could be contested. Moreover, the Commission should not give preference to one court over another.

55. Mr. LACLETA MUÑOZ said that he agreed with Mr. Mahiou's proposal. There were some indications that, with regard to the privileges of diplomatic agents, the same distinction might well be drawn as between acts of the State, namely the distinction between *acta jure gestionis* and *acta jure imperii*.

56. Sir Ian SINCLAIR endorsed Mr. Mahiou's comments and proposed that only the first two sentences of the paragraph should be retained.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

57. The CHAIRMAN drew attention to the deletion of paragraph (6) of the commentary to article 4 (A/CN.4/L.403/Add.2/Corr.1).

Paragraph (7) (new paragraph (6))

Paragraph (7) (new paragraph (6)) was approved.

Paragraph (8) (new paragraph (7))

58. Mr. MAHIOU said that the word *maison*, in the French text, was ambiguous and therefore posed problems of interpretation.

59. Mr. SUCHARITKUL (Special Rapporteur) suggested that the word could be replaced by *suite*.

It was so agreed.

Paragraph (8) (new paragraph (7)), as amended in the French text, was approved.

The commentary to article 4, as amended, was approved.

Commentary to article 5 (Non-retroactivity of the present articles)

Paragraph (1)

60. Sir Ian SINCLAIR said it should be emphasized that the rule being proposed by the Commission was a departure from article 28 of the 1969 Vienna Convention on the Law of Treaties. Accordingly, the first sentence should be deleted and the second sentence should begin: "Under article 28 of the 1969 Vienna Convention on the Law of Treaties, non-retroactivity is the rule ..."

It was so agreed.

61. Mr. LACLETA MUÑOZ said that, rather than the fourth sentence being expressed in the negative, it would be more natural to word it in the positive form by deleting the term "not".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

62. The CHAIRMAN drew attention to the deletion of paragraph (3) of the commentary to article 5 (A/CN.4/L.403/Add.2/Corr.1).

The commentary to article 5, as amended, was approved.

Commentary to article 6 (State immunity)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

63. Mr. USHAKOV said that paragraph (3) was totally unacceptable. First, it was difficult to grasp what was meant by the words "not unmindful of the limited capacity of human imagination", in the second sentence. Secondly, the paragraph was not satisfactory in that, far from explaining the various positions, it was drafted as if the entire Commission was of the same opinion. In fact, views regarding the phrase contained in square brackets in article 6 were divided. The statement in the third sentence of paragraph (3) that "Some members of the Commission felt that there should be explicit language ..." merely reflected the standpoint of a certain number of members of the Commission, while the penultimate sentence, beginning "This phrase, however, was thought unnecessary but tolerable by some ...", failed to explain the position of those members who did not concur.

64. Mr. MAHIU proposed that the second sentence of paragraph (3) should be deleted.

It was so agreed.

65. He also suggested setting out more explicitly the position of members who were opposed to the one described in paragraph (3) and also the intermediate position of other members.

66. The CHAIRMAN proposed that Mr. Ushakov should draft a sentence setting forth his point of view and that Mr. Mahiou should draft another sentence indicating the intermediate position to which he had referred.

It was so agreed.

Paragraph (3), as amended, was approved on that understanding.

The commentary to article 6, as amended, was approved.

Commentary to part III ([Limitations on] [Exceptions to] State immunity)

67. Mr. USHAKOV, supported by Mr. TOMUSCHAT, suggested that the second sentence should be deleted, in view of the divergent views to which it had given rise.

68. Sir Ian SINCLAIR said that it would be best to delete both the first and the second sentence.

It was so agreed.

69. Mr. McCaffrey said that the penultimate sentence of the paragraph should be reworded.

70. Mr. SUCHARITKUL (Special Rapporteur) proposed that that sentence might read: "The Commission was, however, of the view that, whatever title was eventually adopted, 'limitations on' or 'exceptions to' State immunity constituted an integral feature of a unitary principle of State immunity rather than a rule or series of rules independent of the principle."

71. Mr. KOROMA said that immunity was an autonomous rule and exceptions to or limitations on it could not constitute an integral part of it.

72. Sir Ian SINCLAIR proposed that, to take account of the view expressed by Mr. Koroma, the beginning of the penultimate sentence as proposed by the Special Rapporteur should be amended to read: "Some members of the Commission were, however, ..."; that sentence should then be followed by one stating: "Other members took a different view."

It was so agreed.

The commentary to part III, as amended, was approved.

Commentary to article 20 (Cases of nationalization)

73. Mr. USHAKOV said that he could not accept the expression "broad application", in the first sentence, and pointed out that article 20 was simply a typical safeguard clause.

74. Sir Ian SINCLAIR said that he shared the view expressed by Mr. Ushakov. In addition, he proposed that,

in the second sentence, the word "possible" should be inserted after "regarding".

It was so agreed.

The commentary to article 20, as amended, was approved.

Commentary to part IV (State immunity in respect of property from measures of constraint)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

75. Sir Ian SINCLAIR proposed that the second sentence should be amended to read: "Part IV provides in general, but subject to certain limitations, for the immunity of a State from all such measures of constraint in respect of the use of its property or property in its possession or control."

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

76. Sir Ian SINCLAIR said that the words "multinational corporations", in the second sentence, should be replaced by "private litigants", in order to reflect the fact that not all such cases involved multinational corporations.

77. Mr. KOROMA said that the reference to multinational corporations was important and reflected current trends in that it was only developed countries and multinational corporations which enjoyed absolute immunity.

78. Mr. McCaffrey said that the main problems regarding attachment were the result not of suits brought by multinational corporations, but of private litigation. He strongly objected to the reference to multinational corporations. If it was to be retained, he would insist on the addition of a sentence reading: "One member believed that the problem was not due to suits brought by multinational corporations."

79. Mr. KOROMA pointed out that, even in the literature in the United States of America, multinational corporations were singled out as bringing suits against States.

80. Sir Ian SINCLAIR associated himself with Mr. McCaffrey's views and suggested that the sentence proposed by Mr. McCaffrey should begin with the words "Some members".

81. Mr. TOMUSCHAT said that the commentary to the draft articles should reflect only the discussion which had taken place in the Commission.

82. Mr. SUCHARITKUL (Special Rapporteur) proposed that, as a compromise solution, the words "private litigants, including" should be inserted before "multinational corporations", in the second sentence, and that the sentence proposed by Mr. McCaffrey, as

amended by Sir Ian Sinclair, should be added at the end of the paragraph.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

83. The CHAIRMAN drew attention to the deletion of paragraph (4) of the commentary to part IV (A/CN.4/L.403/Add.2/Corr.1).

The commentary to part IV, as amended, was approved.

Commentary to article 21 (State immunity from measures of constraint)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

84. Mr. ROUKOUNAS, speaking also on behalf of Mr. MAHIOU, said that, rather than refer in footnotes to various cases, it would be better to refer to the cases cited in the Special Rapporteur's seventh report (A/CN.4/388, paras. 73 *et seq.*).

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

85. Sir Ian SINCLAIR proposed that the words "in the hands of the defendant" should be added at the end of the first sentence and that the word "conservation" should be replaced by "conservatory".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were approved.

Paragraph (7)

86. Mr. USHAKOV proposed that the paragraph should be deleted.

It was so agreed.

Paragraphs (8) and (9) (new paragraphs (7) and (8))

Paragraphs (8) and (9) (new paragraphs (7) and (8)) were approved.

Paragraph (10) (new paragraph (9))

87. Sir Ian SINCLAIR said that subparagraph (b) of article 21 did not necessarily imply that there was a connection between the claim and the property. He proposed that the first part of the paragraph should be reworded as follows: "Under subparagraph (b), the property can be subject to measures of constraint only if it has been allocated or earmarked for the satisfaction of the claim or debt which is the object of the proceeding."

It was so agreed.

88. That text would be followed by the sentence: "This should have the effect of preventing extraneous or unprotected claimants from frustrating the intention of the State to satisfy specific claims or to make payment for an admitted liability."

It was so agreed.

Paragraph (10) (new paragraph (9)), as amended, was approved.

Paragraph (11) (new paragraph (10))

Paragraph (11) (new paragraph (10)) was approved.

The commentary to article 21, as amended, was approved.

Commentary to article 22 (Consent to measures of constraint)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

The commentary to article 22 was approved.

Commentary to article 23 (Specific categories of property)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

89. Sir Ian SINCLAIR proposed that the second sentence should be amended to read: "Each of these specific categories of property cannot be presumed to be in use or intended for use for commercial [non-governmental] purposes, since, by its very nature, such property must be taken to be in use or intended for use for governmental purposes removed from any commercial considerations."

It was so agreed.

90. Mr. ARANGIO-RUIZ said that the term *instrumenti legati*, in the first sentence, should be amended to read *instrumenta legati*.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

91. Sir Ian SINCLAIR proposed the addition of the following text after the second sentence: "It also excludes property which may have been, but is no longer, in use or intended for use for diplomatic or cognate purposes." It might also be helpful to refer to a number of such cases.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were approved.

The commentary to article 23, as amended, was approved.

Commentary to article 24 (Service of process)

Paragraph (1)

92. Sir Ian SINCLAIR proposed that the second sentence should be shortened to read: "This is an approximate equivalent rather than a literal translation."

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraph (5)

93. Sir Ian SINCLAIR proposed that the second sentence should be replaced by the following text: "The reason for the rule is self-evident. By entering an appearance on the merits, the defendant State effectively concedes that it has had timely notice of the proceeding instituted against it." The last sentence would then begin: "The defendant State is, of course, entitled at the outset ..."

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 24, as amended, was approved.

Commentary to article 25 (Default judgment)

Paragraph (1)

94. Mr. TOMUSCHAT proposed that the words "if the domestic law so permits" should be added at the end of the paragraph.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

The commentary to article 25, as amended, was approved.

Commentary to article 26 (Immunity from measures of coercion)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

95. Sir Ian SINCLAIR, supported by Mr. TOMUSCHAT, said that the paragraph was unclear and should be deleted.

It was so agreed.

The commentary to article 26, as amended, was approved.

Commentary to article 27 (Procedural immunities)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

96. Sir Ian SINCLAIR proposed that the beginning of the second sentence should be amended to read: "Some reservations were made regarding the application ..."

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 27, as amended, was approved.

Commentary to article 28 (Non-discrimination)

Paragraph (1)

97. Mr. USHAKOV proposed that the words "and other corresponding conventions" should be added at the end of the first sentence.

It was so agreed.

98. Sir Ian SINCLAIR proposed that the word "notion", in the first sentence, should be replaced by "analogy".

It was so agreed.

99. He also proposed that the first part of the second sentence should be amended to read: "A certain degree of flexibility was considered desirable for those marginal instances where a restrictive application of the present articles might be adopted by the State of the forum ..."

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

100. Sir Ian SINCLAIR proposed that the second part of the first sentence should be amended to read: "which, with regard to immunities, may have adopted or may adopt treatment different from that provided for in the present articles".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

101. The CHAIRMAN drew attention to the deletion of paragraph (3) of the commentary to article 28 (A/CN.4/L.403/Add.2/Corr.1).

The commentary to article 28, as amended, was approved.

Section D.2, as amended, was adopted.

Chapter II of the draft report, as amended, was adopted.

The meeting rose at 1.10 p.m.

1982nd MEETING

Monday, 7 July 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

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

Draft report of the Commission on the work of its thirty-eighth session (continued)

CHAPTER IV. State responsibility (A/CN.4/L.405 and Add.1)

A. Introduction (A/CN.4/L.405)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.405 and Add.1)

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Paragraph 9

1. Sir Ian SINCLAIR said that he had some difficulty with the expression “soft law”, which referred to the residual character of the draft articles on State responsibility. It might be preferable to use a term such as “other arrangements”.

2. Mr. RIPHAGEN (Special Rapporteur) said that the term “soft law” was meant to denote rules of conduct non-conformity with which did not give rise to any consequences. With regard to Sir Ian Sinclair’s proposal, he said that, since paragraph 9 reflected what had been said by the Special Rapporteur during the Commission’s consideration of the topic, it should either be left as it stood or be deleted, but it should not be amended.

3. Mr. LACLETA MUÑOZ also wondered what was meant by the first sentence of paragraph 9. He also had difficulties with the Spanish translation (*derecho de disposición*) of the term “soft law”. It would be preferable simply to use the English term, which seemed difficult to translate.

4. Mr. REUTER said that the Special Rapporteur was, of course, free to express his personal opinion. However, in the second sentence of the paragraph, it was stated that that opinion “was already reflected in articles 2 and 4 of the draft articles of part 2”. He therefore had reservations with regard to paragraph 9 as a whole. He also had reservations with regard to the use of the term “soft law”: rules either were rules or they

were not. Moreover, the meaning of the expression “to establish *jus cogens*” was unclear.

5. Mr. USHAKOV said that the whole of paragraph 9, including the second sentence, simply reflected the opinion of the Special Rapporteur and therefore was not open to objection.

6. Mr. DÍAZ GONZÁLEZ said that, while he recognized that the paragraph reflected the personal opinion of the Special Rapporteur, it was difficult to establish any difference of degree between rules of law. Moreover, in the Spanish text, the use of the expression *derecho de disposición* made the second part of the first sentence incomprehensible.

7. Following an exchange of views in which Mr. NJENGA, Mr. RIPHAGEN (Special Rapporteur), Mr. KOROMA, Mr. JACOVIDES, Chief AKINJIDE and Mr. FRANCIS took part, the CHAIRMAN suggested that, in order to make it clear that the paragraph reflected the views of the Special Rapporteur, the first sentence should end at the word “responsibility” and the following text should begin with the words “In his view”.

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

8. Sir Ian SINCLAIR proposed that the word “intervene”, in the fourth sentence, should be replaced by “involve intervention in”.

It was so agreed.

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 14

Paragraphs 11 to 14 were adopted.

Paragraph 15

9. Mr. FLITAN proposed that paragraph 15 should be replaced by the following text:

“Some members of the Commission were of the view that it was not certain that providing for obligatory referral of the dispute to the ICJ, even in the particular cases covered by draft article 4, subparagraphs (a) and (b), of part 3, was acceptable. In that connection, it was recalled that a certain number of States had not accepted as obligatory the jurisdiction of the ICJ. Those members referred to the principle of the freedom of choice by the parties of the means of peaceful settlement of their dispute.”

It was so agreed.

10. Mr. LACLETA MUÑOZ said that, while he supported the principle that the parties to a dispute should be free to choose the peaceful means of settlement, that principle by no means precluded the possibility of States’ choosing the means to be employed in such cases before any dispute arose. That was an important consideration which had been referred to by a number of members and which should therefore be taken into account.

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

11. Sir Ian SINCLAIR proposed that, in the second sentence, the words "assort to all international obligations a compulsory means of settlement" should be replaced by "mean that all international obligations would be provided with a compulsory means of settlement".

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraph 18

12. Sir Ian SINCLAIR said that the word "modifications" should be replaced by "notifications".

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

13. Mr. REUTER proposed that, in the second sentence of the French text, the words *l'Etat dit auteur* should be replaced by *l'Etat considéré comme auteur*.

It was so agreed.

Paragraph 19, as amended in the French text, was adopted.

Paragraphs 20 to 25

Paragraphs 20 to 25 were adopted.

Paragraph 26

14. Mr. LACLETA MUÑOZ proposed that the words *en relación con tales procedimientos*, in the second part of the first sentence of the Spanish text, should be replaced by *en tales procedimientos*.

It was so agreed.

Paragraph 26, as amended in the Spanish text, was adopted.

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

15. Sir Ian SINCLAIR said that the expression "in common consent", in the second part of the first sentence, should read "by common consent".

It was so agreed.

16. Mr. REUTER proposed that the word *chapeau*, in the first sentence, should be replaced by "introductory clause".

It was so agreed.

Paragraph 28, as amended, was adopted.

Paragraph 29

17. Mr. MALEK expressed uncertainty as to the meaning of the expression "as a whole" at the end of the paragraph.

18. Mr. RIPHAGEN (Special Rapporteur) acknowledged that the expression was not very clear and could be deleted.

19. Mr. FLITAN proposed that the concluding words of the paragraph, "to decide, possibly within the wider framework of a convention on State responsibility as a whole", which were not easily understandable, should simply be replaced by "on the draft articles".

It was so agreed.

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

20. Chief AKINJIDE proposed that the words "pressure of work" should be replaced by "lack of time".

21. Mr. YANKOV supported Chief Akinjide's proposal. The reduction of the length of the session by two weeks had affected the Commission's consideration of a number of topics. That fact should be emphasized.

22. Mr. LACLETA MUÑOZ said that the wording used in the Spanish text seemed more explicit.

23. Mr. REUTER proposed that the words "owing to pressure of work" should be replaced by "due to the exceptional shortening of the Commission's session", in order to do justice to the Commission, which had had to make a considerable effort to consider two sets of draft articles while having two weeks less at its disposal than during previous sessions.

It was so agreed.

Paragraph 31, as amended, was adopted.

Paragraph 32 (A/CN.4/L.405/Add.1)

24. Mr. ROUKOUNAS proposed that, in the second sentence, the words "of part 2" should be inserted after "article 6".

25. Mr. ARANGIO-RUIZ recalled that, during the Commission's consideration of the topic, he had suggested (1955th meeting) that article 1 of part 3 of the draft articles should be made an integral part of article 6 of part 2.

26. Mr. USHAKOV proposed that the third sentence should be amended to read: "However, it should be noted that the Committee had made considerable progress in its consideration of the article"; the rest of the paragraph should be deleted.

27. Mr. RIPHAGEN (Special Rapporteur) said that he had no objection to the proposal made by Mr. Roukounas. With regard to Mr. Ushakov's proposal, he noted that he had given considerable thought to the way in which the status of the Commission's work on the draft articles on State responsibility should be conveyed to the Sixth Committee of the General Assembly, and that he had eventually deemed it necessary to add paragraph 32 for that purpose. He recognized, however, that the type of information

presented in that paragraph was something of a novelty in a report by the Commission and would not oppose its deletion, if that was the Commission's wish.

28. Mr. McCAFFREY, supported by Mr. CALERO RODRIGUES and Sir Ian SINCLAIR, said that it would be helpful for the Sixth Committee and for the newly elected members of the Commission at the next session to know what the Drafting Committee had achieved in its consideration of draft article 6; consequently, the paragraph should be retained.

29. Mr. FLITAN drew the Commission's attention to paragraph 9 of chapter VIII of the draft report (A/CN.4/L.409), in which it was stated that, due to lack of time, it had not been possible for the Commission at its present session to make significant progress on the topic of State responsibility, whereas the third sentence of paragraph 32 of chapter IV stated that some progress had been made in the Drafting Committee's consideration of article 6. The Commission should be careful to avoid any discrepancies in that respect.

30. However, he recognized that the Sixth Committee should be informed of the stage reached and that the new members of the Commission should be given an idea of what had been done at the present session. He therefore proposed that paragraph 32 should be retained, but that the third sentence should be deleted.

31. Mr. NJENGA said that the explanation provided in paragraph 32 was useful only for the Commission's own purposes. The text proposed by Mr. Ushakov would be adequate for the purposes of the Sixth Committee.

32. Mr. USHAKOV said that, while he would not press his proposal, he felt that the second part of paragraph 32 would be incomprehensible to anyone who had not taken part in the deliberations of the Drafting Committee.

33. Mr. LACLETA MUÑOZ supported the proposal made by Mr. Flitan.

34. Mr. REUTER said that, while the information contained in paragraph 32 was useful, it might perhaps be better to present it in a footnote.

35. The CHAIRMAN suggested that the word "some", in the third sentence, should be deleted.

It was so agreed.

36. Following an exchange of views in which Mr. RIPHAGEN (Special Rapporteur), Mr. ARANGIO-RUIZ, Mr. CALERO RODRIGUES, Sir Ian SINCLAIR and Mr. LACLETA MUÑOZ took part, Mr. MAHIU proposed that the first two sentences of paragraph 32 should be retained, with the amendment to the second sentence proposed by Mr. Roukounas, and that the rest of the paragraph should be presented as a footnote.

It was so agreed.

Paragraph 32, as amended, was adopted.

Section B, as amended, was adopted.

Chapter IV of the draft report, as amended, was adopted.

CHAPTER VIII. Other decisions and conclusions of the Commission (A/CN.4/L.409)

A. Relations between States and international organizations (second part of the topic)

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Programme and methods of work of the Commission

Paragraphs 2 to 6

Paragraphs 2 to 6 were adopted.

Paragraph 7

37. Mr. CALERO RODRIGUES suggested that the words "the conclusion of the term of office of the Commission", at the end of the paragraph, should be amended to read: "the conclusion of the term of office of its members".

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Paragraph 11

38. Mr. LACLETA MUÑOZ pointed out that the words "the Drafting Committee was established", in the first sentence, had been inadequately rendered in Spanish. He therefore proposed that, in the Spanish text, the words *se creó* should be replaced by *se constituyó*.

It was so agreed.

Paragraph 11, as amended in the Spanish text, was adopted.

Paragraphs 12 to 16

Paragraphs 12 to 16 were adopted.

Paragraph 17

39. Mr. FRANCIS, recalling what had been said in paragraph 9 of the chapter regarding the duration of the session, which had been curtailed from 12 to 10 weeks, proposed that the last sentence should be amended by replacing the word "also" by "always", and by adding at the end the words "and at its thirty-eighth session virtually achieved maximum possible use of such time and services".

40. Mr. McCAFFREY proposed that the last sentence should be reformulated as follows: "The Commission has always endeavoured to make maximum use of the conference time and services made available, and at its present session virtually achieved that goal."

41. Mr. LACLETA MUÑOZ supported the drafting amendments proposed and said that, in the penultimate sentence of the Spanish text, the words *en el momento de celebración* should be replaced by *en las horas de celebración*.

42. Mr. RAZAFINDRALAMBO supported the amendment proposed by Mr. McCaffrey but suggested

that the words "in the past" should be added after "endeavoured" in that text, in order to take account of the practice of the Commission.

43. Mr. FRANCIS said that he could accept the proposal made by Mr. McCaffrey, with the sub-amendment by Mr. Razafindralambo.

44. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 17 with the amendments proposed by Mr. McCaffrey, Mr. Lacleta Muñoz and Mr. Razafindralambo.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Section B, as amended, was adopted.

C. Co-operation with other bodies

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

45. Mr. REUTER proposed that the first sentence should be amended to indicate that Mr. Jagota had attended the January 1986 session of the Inter-American Juridical Committee in his capacity as Chairman of the Commission.

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraph 21

Paragraph 21 was adopted.

Section C, as amended, was adopted.

D. Date and place of the thirty-ninth session

Paragraph 22

Paragraph 22 was adopted.

Section D was adopted.

E. Representation at the forty-first session of the General Assembly

Paragraph 23

Paragraph 23 was adopted.

Section E was adopted.

F. International Law Seminar

Paragraphs 24 and 25

Paragraphs 24 and 25 were adopted.

Paragraphs 26 and 27

46. Mr. RIPHAGEN proposed that paragraphs 26 and 27 should be combined and that mention should be made of the fact that he had addressed the Seminar.

It was so agreed.

Paragraphs 26 and 27, as amended, were adopted.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

47. Mr. KOROMA suggested the inclusion of a suitable expression of gratitude to those States which had given donations for the Seminar.

It was so agreed.

48. Mr. McCAFFREY said that, in the last sentence, it would be more appropriate to say "have participated" than "have been accepted".

49. Mr. YANKOV said that the words "have been accepted" had been used because the participants were those persons who had been admitted by the selection committee. Perhaps the words "have been admitted" might be used.

50. Sir Ian SINCLAIR proposed that the last sentence should indicate the year in which the Seminar had begun, namely 1964.

It was so agreed.

51. Mr. LACLETA MUÑOZ said that he had been invited at the present session to be a member of the selection committee, which accepted a given number of persons depending on the number of places available. Consequently, he could see no objection to the use of the word "accepted" in the last sentence of paragraph 29.

52. Mr. RAZAFINDRALAMBO proposed the following wording: "Of the 495 candidates ... accepted as participants in the Seminar since its inception ..."

It was so agreed.

Paragraph 29, as amended, was adopted.

Paragraph 30

53. Mr. McCAFFREY noted that, in the penultimate sentence, it was stated that, if adequate contributions were not forthcoming, the holding of the 1987 session of the Seminar "may become difficult". Although similar language had already been used in the Commission's report on its previous session, he understood that the situation had become much more serious. He therefore proposed that the words "may become difficult" should be replaced by "may be in doubt".

It was so agreed.

Paragraph 30, as amended, was adopted.

Section F, as amended, was adopted.

Chapter VIII of the draft report, as amended, was adopted.

CHAPTER I. Organization of the session (A/CN.4/L.402)

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Paragraph 9

54. Mr. DÍAZ GONZÁLEZ said that the opening words of paragraph 9 gave a wrong impression. In fact, the Commission had given proper consideration to only two of the topics on its agenda, namely items 3 and 4.

Apart from not dealing at all with agenda item 8, the Commission had dealt only superficially with the various other items, due to lack of time.

55. Mr. YANKOV, while agreeing with the observation made by Mr. Díaz González, drew attention to paragraph 9 of chapter VIII of the draft report, where it was explained at length that the Commission had been short of time and had therefore been unable to give full treatment to many of the topics on its agenda.

56. Mr. FRANCIS said that he, too, agreed with Mr. Díaz González. The matter could perhaps be dealt with by means of a footnote referring to paragraph 9 of chapter VIII.

57. Mr. ARANGIO-RUIZ said that, in view of the importance of the matter, it would be better to stress the point again in paragraph 9 of chapter I.

58. Mr. KOROMA also supported the comments by Mr. Díaz González.

59. Mr. McCAFFREY proposed that the valid point made by Mr. Díaz González should be dealt with by adding, at the end of the first sentence of paragraph 9, the words “but as explained in the same chapter (paragraph 9), it was unable to give adequate consideration to several topics due to lack of time”.

It was so agreed.

Paragraph 9, as amended, was adopted.

Chapter I of the draft report, as amended, was adopted.

The meeting rose at 12.45 p.m.

1983rd MEETING

Tuesday, 8 July 1986, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

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

Draft report of the Commission on the work of its thirty-eighth session (continued)

CHAPTER VI. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.407 and Add.1)

A. Introduction (A/CN.4/L.407)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

1. Mr. McCAFFREY proposed that, in the second sentence, the word “however”, which was redundant because the word “but” had been used in the same sentence, should be deleted.

It was so agreed.

Paragraph 4, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.407/Add.1)

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

2. Mr. MALEK suggested that the first part of the second sentence should be amended to read: “Owing to the lack of available time, only just over three meetings were devoted to consideration of the topic and several members were unable to make statements ...”

3. Mr. BALANDA suggested that the words “Owing to the lack of available time”, in the second sentence, should be replaced by “Owing to the shortening of the present session”, in order to make it clear why the Commission had had so little time to consider the topic. He also suggested that, in the last sentence of the French text, the words *nuances d’opinion* should be replaced by *opinions*.

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7

4. Mr. MALEK said that he did not understand the meaning of the words “of its dynamics”, at the end of the second sentence.

5. Mr. BARBOZA (Special Rapporteur) said that, as he had indicated in his introductory statement (1972nd meeting, para. 33), his analysis had focused mainly on the dynamics of the schematic outline, in other words on the way it operated, and it was in that sense that the expression “of its dynamics” should be understood.

Paragraph 7 was adopted.

Paragraph 8

6. Mr. FLITAN said that, contrary to the Commission’s usual practice, some sentences of the French text of chapter VI had been drafted in the first person plural. He therefore proposed that, in the last sentence of paragraph 8, the words *nous permet de nous démarquer de manière encore plus nette du domaine* should be replaced by *permet de démarquer de manière encore plus nette ce sujet du domaine*. The words *a cessé d’être nécessaire* should, moreover, be replaced by *n’est pas nécessaire*.

7. Sir Ian SINCLAIR said that, in the last sentence, the words “In the view of the Commission itself” wrongly gave the impression that a conclusion reached by the Commission was being expressed.

8. Mr. BARBOZA (Special Rapporteur) said that Sir Ian Sinclair's point was well taken.
9. Mr. RIPHAGEN agreed with Sir Ian Sinclair that the content of the last sentence must not be attributed to the Commission as a whole.
10. Mr. CALERO RODRIGUES said that the fourth and fifth sentences stood in need of correction in so far as the term "injury" had been used. The term used in the original Spanish text was *daño*, whose meaning was very clear: it corresponded more to "harm" or "damage" than to "injury".
11. Mr. RAZAFINDRALAMBO said that the problems encountered by the English-speaking members of the Commission did not arise in French and that *préjudice* was the appropriate term to be used in paragraph 8. The French text of the last part of the last sentence should, however, be brought into line with the English.
12. Mr. McCAFFREY said that, in the light of earlier work on the topic, the question raised by Mr. Calero Rodrigues was an important one. The intention in the fourth and fifth sentences had been to refer to harm or to damage, rather than to injury in the sense of legally recognizable damage. The term "injury", in the fourth and fifth sentences, should therefore be replaced either by the term "harm", which would adequately render the Spanish term *daño*, or by wording along the following lines: "injury in the sense of factual harm".
13. Mr. MAHIOU drew attention to the need to harmonize the terminology used, particularly if injury was always to be regarded as harm or damage which might have legal consequences entailing rights and obligations. He agreed with Mr. Razafindralambo's suggestion concerning the last part of the last sentence.
14. Mr. REUTER said that, as a rule, there was no distinction in French between the concepts of *préjudice* and *dommage*. However, a term such as *lésion* was nearly always used in French to refer to a flaw in a contract and could not be regarded as a synonym of the term "harm". The Commission therefore had to be careful in its use of terms and reserve its general position.
15. Mr. BARBOZA (Special Rapporteur) said that, although the Commission had adopted the view that injury was not taken into account in defining the conditions for the existence of an internationally wrongful act and that a breach of an international obligation would be enough, even without material harm, there was nothing to prevent it from changing its mind. The last sentence of paragraph 8 could therefore be deleted, particularly since it merely reflected what was stated in his second report (A/CN.4/402, para. 9) and what he had indicated in his oral introduction (1972nd meeting).
16. Mr. TOMUSCHAT said that, if the last sentence were deleted, the concern expressed by various members would be allayed.
17. Sir Ian SINCLAIR proposed that only the first three sentences of paragraph 8 should be retained.
18. Mr. ARANGIO-RUIZ supported that proposal.
19. Mr. CALERO RODRIGUES said that, in his view, only the last sentence should be deleted. The Commission would, however, still have to deal with the problem of the use of the term "injury" in the English text.
20. Mr. KOROMA said that the appropriate term to use in the English text was "harm".
21. Mr. CALERO RODRIGUES said that the term "harm" was quite acceptable to him.
22. Mr. DÍAZ GONZÁLEZ said that the Commission appeared to agree that the last sentence should be deleted.
23. Mr. MAHIOU noted that, if the last sentence were deleted, the only remaining problem would be that of the wording of the fourth sentence of the English text.
24. Mr. FLITAN said that the logical approach would be to use the wording of the schematic outline.
25. Mr. BARBOZA (Special Rapporteur) said that the use of the English term "harm" should not give rise to any problems.
26. Mr. NJENGA said that the term "harm" was more appropriate than the terms "injury" or "damage". The term "injury" had, however, been used in the Special Rapporteur's second report (A/CN.4/402). He therefore proposed that the problem should be solved by using the wording suggested by Mr. McCaffrey, namely "injury in the sense of factual harm".
27. Mr. DÍAZ GONZÁLEZ and Mr. EI RASHEED MOHAMED AHMED supported that proposal.
28. Sir Ian SINCLAIR proposed that the fourth sentence should be amended to read: "Although the present Special Rapporteur did not rule out that idea, he found that the concept of 'injury' in the sense of material harm constituted the cement of that 'continuum': injury in that sense, whether as injury which had already occurred or ..."
29. Mr. CALERO RODRIGUES supported that proposal.
30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the amendment to the fourth sentence proposed by Sir Ian Sinclair and to delete the last sentence.
- It was so agreed.*
- Paragraph 8, as amended, was adopted.*
- Paragraph 9
31. Mr. McCAFFREY suggested that the secretariat should be requested to harmonize the tenses of the verbs used in chapter VI.
32. Since paragraph 9 consisted of one long sentence, he proposed that it should be divided into two: the first would end with the words "incumbent on any person living in society" and the second would begin with the words "He therefore concluded that those terms referred not only to the secondary obligation ...".
- It was so agreed.*

33. Mr. McCAFFREY requested the Special Rapporteur to explain how the conclusion, at the end of the new second sentence, that “obligations of prevention would be within the scope of the topic” related to the first part of the sentence.

34. Mr. BARBOZA (Special Rapporteur) said that the Commission’s discussions and his predecessor’s fifth report¹ clearly showed that the term “liability”—like the Spanish term *responsabilidad* and the French term *responsabilité*—referred both to the consequences of a breach of an obligation and to the obligation itself. Consequently, when the General Assembly had invited the Commission to study the topic of international liability for injurious consequences arising out of acts not prohibited by international law,² it had implicitly requested it to deal with the consequences of a breach of an obligation and with the duties which were incumbent on States and which included obligations of prevention. That was the conclusion he had reached as a result of his study. In his view, obligations of prevention were duties and they formed part of the general idea of liability.

Paragraph 9, as amended, was adopted.

Paragraph 10

35. Mr. ARANGIO-RUIZ said that the word “transboundary”, in the second sentence, was not sufficiently broad to cover all the possible forms of harm which might arise, such as large-scale environmental harm. A term more in keeping with the scope of the topic should be found.

36. Mr. BARBOZA (Special Rapporteur) pointed out that the meaning of the term “transboundary” was explained in the last sentence of paragraph 20.

37. Mr. KOROMA said that the second sentence might be interpreted as excluding activities which did not involve risk. Accordingly, he proposed that the words “involving risk” should be replaced by “not prohibited by international law”.

38. In addition, the point had been made during the Commission’s discussion that the scope of the topic should cover not only physical loss or injury, but also economic or financial loss. That point should be reflected in the report.

39. Mr. ROUKOUNAS proposed that, in order to take account of the suggestion by Mr. Arangio-Ruiz, the words “and affecting one or more States” should be added after the words “an activity involving risk”.

40. Mr. TOMUSCHAT, supported by Mr. McCAFFREY, pointed out that paragraph 10 summarized the views expressed by the Special Rapporteur in his report (A/CN.4/402) and could therefore not be amended.

41. Mr. MAHIOU said that he agreed with Mr. Tomuschat that the text should be left as it stood. He also noted that the last sentence appeared to meet the concern expressed by Mr. Koroma.

42. Mr. BARBOZA (Special Rapporteur) said that paragraph 10 was in the part of chapter VI dealing with his second report and that it reflected his opinion; it could therefore not be amended. Referring to the second point raised by Mr. Koroma, he said that, following lengthy discussions in the Commission and in the Sixth Committee for the General Assembly, it had been decided that the question of economic activities giving rise to harm should be discussed only at a later stage. Mr. Koroma’s opinion might, however, be reflected in another part of chapter VI of the report.

43. The CHAIRMAN suggested that Mr. Koroma might, if he so wished, draft a text to be included in another paragraph.

44. Mr. YANKOV said that the suggestions made by Mr. Koroma might be reflected in paragraph 18 of chapter VI of the draft report.

45. Mr. NJENGA said that, while he appreciated the fact that what the Special Rapporteur had said in his report could not be changed, he, like Mr. Koroma, wondered whether the Special Rapporteur was not limiting the scope of the topic to a narrower field than was implied by the title.

46. Mr. LACLETA MUÑOZ said that paragraph 10 reflected only the opinions and concerns of the Special Rapporteur. In order to avoid any misunderstanding, the first sentence of the English and Spanish texts should therefore be brought into line with the French text. The words “The point of departure”, at the beginning of the second sentence, should then be replaced by “His point of departure”.

47. Mr. KOROMA said that, in view of the comments made by members, he would defer making his proposal until a later stage.

48. Mr. BARBOZA (Special Rapporteur) said that he had “inherited” the scope of the topic and the point of departure in question as they had been defined in the previous Special Rapporteur’s reports and as they had emerged from the discussions in the Commission and the Sixth Committee. He had thus proceeded on the basis of what had been decided by consensus, not on the basis of his own ideas. He therefore considered that paragraph 10 should be left as it stood. The concern expressed by Mr. Koroma might, as suggested by Mr. Yankov, be reflected in paragraph 18.

49. Mr. TOMUSCHAT proposed that the words “The point of departure”, at the beginning of the second sentence, should be replaced by “The Special Rapporteur’s point of departure”, in order to make it clear that the views expressed were those of the Special Rapporteur.

Paragraph 10 was adopted.

Paragraph 11

50. Mr. McCAFFREY proposed that, for greater clarity, the words “It was observed in the second report that” should be inserted at the beginning of the paragraph.

It was so agreed.

¹ Yearbook ... 1984, vol. II (Part One), pp. 170-171, document A/CN.4/383 and Add.1, paras. 39-40.

² General Assembly resolution 3071 (XXVIII) of 30 November 1973, para. 3 (c).

51. Mr. BALANDA said that, in the third sentence of the French text, the words *des obligations en gestation* were much too vague and that the use of the term "soft law" in brackets did not make their meaning any clearer. He therefore proposed that the phrase *étaient des obligations en gestation (soft law)* should be replaced by *avaient des conséquences juridiques*, so that the possibility referred to in the remainder of the sentence would be easier to understand.

52. Mr. BARBOZA (Special Rapporteur) said that it had to be determined whether the obligations in question formed part of "soft law" or whether the schematic outline did not provide for the possibility of a right of action. His point of departure had been that the obligations referred to in the schematic outline did not, in themselves, form part of "soft law", although they could have consequences under general international law. In order to express that idea more clearly, the words *de par leur nature* might be added after the words *étaient des obligations en gestation (soft law)* in the French text.

53. Mr. ARANGIO-RUIZ said that, as in paragraphs 10 and 12, it had to be specified that paragraph 11 reflected the view of the Special Rapporteur. Although the term "soft law" was very ambiguous, it did, in his own opinion, refer to rules which were not yet, and might never be, rules of law, since "soft law" could continue to be "soft law" for centuries. That term therefore did not correspond to the French term *obligations en gestation*, which implied that there would be an outcome. Only the English term "soft law" should be used in the French text.

54. Mr. BARBOZA (Special Rapporteur) suggested that the French text should be brought into line with the Spanish text, which referred only to "soft law".

55. Mr. MAHIOU, supporting the views expressed by Mr. Arangio-Ruiz and Mr. Barboza, said that the French text was an interpretation, not a literal translation. It should therefore be brought into line with the English and Spanish texts by amending it to read: *Ensuite, il fallait déterminer si ces obligations, ou certaines d'entre elles, faisaient, par leur nature, partie de ce que l'on appelait soft law, ou bien si ...*

It was so agreed.

56. Sir Ian SINCLAIR proposed that the word "incomplete", in the third sentence, should be replaced by "imperfect", which was the term more commonly used in respect of obligations.

It was so agreed.

57. Mr. LACLETA MUÑOZ said that, in the Spanish text, the word *incompletas* should also be replaced by *imperfectas*. The word *la* before the expression "soft law" should be deleted.

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraph 12

58. Mr. McCaffrey proposed that the first sentence should begin with the words "In the view of the Special Rapporteur". The third sentence should end

with the word "expectations" and the next sentence should begin with the words "But ultimately, in the view of the Special Rapporteur".

59. Mr. BARBOZA (Special Rapporteur) said that he accepted Mr. McCaffrey's proposals. He pointed out, however, that the new fourth sentence ("But ultimately, in the view of the Special Rapporteur, it could not be denied ...") reflected his own view of the previous Special Rapporteur's work, or in other words an idea which had been advanced by his predecessor and which he himself had borrowed. He therefore suggested that the beginning of the sentence should be replaced by the words: "The previous Special Rapporteur had indicated that it could not be denied ..."

Mr. McCaffrey's amendments were adopted.

60. Mr. BALANDA said that, in his view, there was no need to use the words "strict liability" in the French text, and they should therefore be deleted. He also proposed that the words "In the Special Rapporteur's view" should be inserted before "The operation of the obligation of reparation" at the beginning of the new fifth sentence.

61. Mr. BARBOZA (Special Rapporteur) said that that sentence also reflected the opinion of the previous Special Rapporteur, as explained at the beginning of the third sentence, which read: "From what the present Special Rapporteur has been able to gather from earlier work ..."

62. Mr. FRANCIS said that he had understood the previous Special Rapporteur's view to have been that the concept of strict liability, as a norm in the area in question, was reflected only in the relevant conventions signed thus far. It was because of his dismissal, in given circumstances, of the notion of strict liability that he had specified in the schematic outline that the point at which a right of action would arise was when negotiations broke down and reparations were not made.

63. Mr. TOMUSCHAT pointed out that the paragraphing of the English text did not always correspond to that of the French and Spanish texts. The discrepancies should be remedied.

64. Mr. MAHIOU noted that the second sentence of the French text referred to *Ces deux orientations*, whereas the English text referred to "The investigation". Also, the word *nous* should be deleted from the French text of that sentence, the beginning of which would then read: *Cette orientation de recherche conduisait ...*

It was so agreed.

Paragraph 12, as amended, was adopted.

Tribute to Mrs. Maria Petermann

65. The CHAIRMAN informed members that Mrs. Maria Petermann, who had worked for the Commission for many years, was planning to take early retirement. He paid tribute to Mrs. Petermann for her competence and outstanding professional abilities, as well as for her devotion, discretion, warmth, kindness and sensitivity.

It was to be hoped that she might be able to come back to help the Commission at its next session.

66. Mr. REUTER, speaking also on behalf of the other members of the Commission from Western countries, said that, in paying tribute to Mrs. Petermann, the Commission was also paying tribute to the Secretariat as a whole. An international organization was essentially an inter-State body, but its secretariat ensured its continuing existence and gave it an international outlook. Although the United Nations was now in the midst of a crisis, it represented the only hope for the future.

67. Mr. USHAKOV, Mr. NJENGA, Mr. DÍAZ GONZÁLEZ and Mr. MALEK, speaking also on behalf of the members of the Commission from the Eastern European, African, Latin American and Asian countries, respectively, associated themselves with the tribute paid by the Chairman and Mr. Reuter to Mrs. Petermann, who had been a member of the Commission "family" for such a long time, and, through her, to all the international officials who worked so tirelessly on behalf of the United Nations.

The meeting rose at 1.10 p.m.

1984th MEETING

Tuesday, 8 July 1986, at 3.15 p.m.

Chairman: Mr. Doudou THIAM

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

Draft report of the Commission on the work of its thirty-eighth session (*continued*)

CHAPTER VI. International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/L.407 and Add.1)

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.407/Add.1)

Paragraph 13

1. Mr. BALANDA proposed that the word *interposer*, in the first sentence of the French text, should be replaced by *proposer*.

It was so agreed.

Paragraph 13, as amended in the French text, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

2. Mr. McCAFFREY drew attention to the need to correct the tenses of the verbs used in paragraph 15. In addition, he proposed that the paragraph should begin with the words "The Special Rapporteur considered that", in order to make it clear that the content of the paragraph reflected the view of the Special Rapporteur.

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 16 and new paragraph 16 bis

3. Mr. FLITAN proposed that the last sentence of paragraph 16 should be deleted, for it was out of place in that paragraph, which reflected the views of the Special Rapporteur.

4. Mr. ILLUECA said that the sentence in question was useful as a bridge between paragraphs 5 to 16, containing the Special Rapporteur's views, and paragraphs 17 *et seq.* The sentence should be retained, but be amended so as to indicate that the points referred to were the ideas put forward by the Special Rapporteur.

5. Mr. BARBOZA (Special Rapporteur) said that he agreed with Mr. Illueca, but the points in question were those raised not only by himself, but also by the previous Special Rapporteur.

6. Mr. FLITAN pointed out that paragraphs 17 *et seq.* dealt with the discussion in the Commission itself, a fact that should be made clear.

7. Mr. CALERO RODRIGUES agreed that it was important to separate the statement of the views of the Special Rapporteur from the account of the discussions in the Commission. He therefore supported the proposal to retain the last sentence. However, its content was foreign to the rest of paragraph 16. It should therefore be suitably adjusted and form a new paragraph 16 *bis*.

8. Sir Ian SINCLAIR proposed the following wording for the new paragraph 16 *bis*: "The discussion of the above-mentioned points in the Commission can be summarized as follows."

It was so agreed.

9. Mr. KOROMA noted that the second sentence of paragraph 16 stated that the discussion had not dealt with the question whether the topic covered "situations" as well as "activities". It should also be indicated that certain members had referred to "activities" not by reference to "situations", but by reference to "acts".

10. Mr. CALERO RODRIGUES proposed that the words "the discussion thus did not deal", in the second sentence, should be amended to read: "the discussion thus would not deal".

It was so agreed.

Paragraph 16, as amended, and new paragraph 16 bis were adopted.

Paragraph 17

11. Mr. CALERO RODRIGUES proposed that the words "in the sense of material harm" should be added after the word "injury" in the first sentence, as had been done in paragraph 8.

It was so agreed.

12. Sir Ian SINCLAIR proposed that the words "no formal objections", in the same sentence, should be corrected to read "no formal objection".

It was so agreed.

13. Mr. MALEK proposed that in the phrase "Some members regarded ...", in the second sentence, the word "Some" should be rendered in French by *Plusieurs* instead of *Quelques*. Several members, including himself, had in fact withdrawn their names from the list of speakers on the point in question.

Paragraph 17, as amended, was adopted.

Paragraph 18

14. Sir Ian SINCLAIR said that the third sentence was intended to reflect his views and some changes were required. In particular, the phrase "reference should be made only to" should be replaced by "the topic should be confined to"; the words "activities merely involving risk" by "other activities involving risk"; the words "at the present time" by "at an early stage of their development"; and the phrase "as had initially been the case with automobiles" by "as had initially been the case with the driving of automobiles on the public highway".

It was so agreed.

15. Mr. KOROMA proposed that the opening words of the third sentence, "Two members were of the opinion", should be replaced by "The view was expressed". It was contrary to the practice of the Commission to single out a specific number of members when giving an account of a discussion.

It was so agreed.

16. Mr. DÍAZ GONZÁLEZ said that the Spanish text used the word *riesgosas*, which did not exist. The words "involving risk", in the first and third sentences, should be rendered in Spanish by *que entrañan un riesgo*. In the last sentence, the words *que pueden entrañar un riesgo* should be used.

It was so agreed.

17. Mr. RIPHAGEN said that the words "(low risk of catastrophic damage)", in the third sentence, were difficult to understand and should be amended to read "(low probability of an accident that might cause catastrophic damage)".

18. Mr. LACLETA MUÑOZ proposed the adoption of Mr. Riphagen's amendment, as well as the proposals made by Mr. Díaz González regarding the Spanish text. In addition, throughout the Spanish text, the word *tópico* should be replaced by *tema*.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

19. Mr. MAHIOU proposed that the word *contamination*, in the first sentence of the French text, should be replaced by *pollution*, and the words *tout bonnement*, in the penultimate sentence, by *tout simplement*.

It was so agreed.

20. Mr. McCAFFREY said that he was the "One member" whose views were reflected in the first two sentences of paragraph 19. He would supply a revised text to give a more precise account of his views.

21. Mr. TOMUSCHAT proposed that the words "the Special Rapporteur will continue", in the last sentence, should be replaced by "the Special Rapporteur pointed out that he would continue".

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

22. Mr. MAHIOU proposed that the words *considérât devoir*, in the first sentence of the French text, should be replaced by *considérât comme devant*.

It was so agreed.

Paragraph 21, as amended in the French text, was adopted.

Paragraph 22

23. Mr. TOMUSCHAT proposed that the words "in the view of the Special Rapporteur" should be inserted after "Moreover", at the beginning of the paragraph, in order to make it clear that the paragraph expressed the Special Rapporteur's views.

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraph 23

24. Mr. McCAFFREY proposed the insertion of the words "the Special Rapporteur was of the view that" immediately after the opening words "as regards ships".

It was so agreed.

25. Mr. OGISO said that the statement at the end of the fifth sentence that "the United States paid compensation for injuries caused to the crew of the *Fukuryu Maru*" was inaccurate. He proposed that the passage in question should be replaced by the words "the United States had made an *ex gratia* payment where injuries had been sustained by the crew of the *Fukuryu Maru*".

It was so agreed.

26. Mr. TOMUSCHAT said that the meaning of the words "although there may be many of them, the activity is one and the same", in the first sentence, was difficult to grasp. They should be deleted and the first part of the sentence should simply read: "As regards ships, the Special Rapporteur was of the view that the

countries which might be affected by their operation must ...”

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraph 24

27. Mr. CALERO RODRIGUES said that paragraph 24 consisted of three parts. The first gave a summary of the Special Rapporteur's suggestions, the second summarized the debate in the Commission, and the third contained the Special Rapporteur's conclusions, to the effect that the course suggested by him had been tacitly accepted. There had in fact been no such acceptance and, for the time being, it could not be said that the Commission had endorsed the Special Rapporteur's suggestions. Accordingly, the last sentence should be replaced by the following: "Since, as indicated above (para. 6), the opinions expressed were only a partial reflection of the Commission's views, the matter should be considered further."

It was so agreed.

28. Mr. ROUKOUNAS said that the word "obligations" should be used in the singular throughout the paragraph.

It was so agreed.

Paragraph 24, as amended, was adopted.

Paragraph 25

29. Mr. FLITAN proposed that the second sentence should be amended to read: "A few members even believed that the role of international organizations should be examined not only from that point of view, but also in the light of the fact that they might become subject to rights and obligations."

It was so agreed.

Paragraph 25, as amended, was adopted.

Paragraph 26

30. Mr. McCAFFREY noted that, in several places in chapter VI, numbered paragraphs were subdivided into unnumbered subparagraphs, a method of presentation that should be avoided because it was confusing for the reader. He proposed that, throughout the report, such unnumbered subparagraphs should either become numbered paragraphs or be incorporated into the numbered paragraph to which they belonged.

It was so agreed.

31. Mr. ARANGIO-RUIZ pointed out the exaggerated character of the opening words of the penultimate sentence of paragraph 26, "The same member was the only speaker who expressed an opinion on possible exceptions". It would be much better to use the simpler formula: "It was stated that to provide exceptions to the obligation to make reparation was inappropriate because ..."

32. Mr. LACLETA MUÑOZ said that the drafting of the last two sentences needed to be reviewed in all the languages.

33. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 26 with the amendments proposed and on the understanding that the secretariat would review the wording used in the last two sentences.

Paragraph 26 was adopted on that understanding.

Paragraph 27 and new paragraph 27 bis

34. Mr. TOMUSCHAT said that there were two ideas in paragraph 27. The first was contained in the first two subparagraphs and related to multinational corporations. The third subparagraph introduced an entirely new idea, relating to fact-finding machinery and the settlement of disputes. The first two subparagraphs should therefore be merged and the concluding subparagraph should form a new paragraph 27 bis.

It was so agreed.

Paragraph 27, as amended, and new paragraph 27 bis were adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted.

Paragraph 30

35. Mr. OGISO said that, during the debate (1974th meeting), he had expressed opposition to the concept of automatic application of strict liability. Accordingly, a new sentence should be inserted after the first sentence, and should read: "One member expressed opposition to the idea of an obligation to make reparation based upon strict liability." The next sentence would then begin with the words "Another member".

It was so agreed.

36. Mr. ROUKOUNAS said that the phrase "between the States of the international community", in the last sentence, should be amended to read "between States as members of the international community".

It was so agreed.

Paragraph 30, as amended, was adopted.

Paragraphs 31 and 32

Paragraphs 31 and 32 were adopted.

Section B, as amended, was adopted.

Chapter VI of the draft report, as amended, was adopted.

CHAPTER VII. The law of the non-navigational uses of international watercourses (A/CN.4/L.408 and Add.1)

A. Introduction (A/CN.4/L.408)

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Paragraph 8

37. Mr. DÍAZ GONZÁLEZ said that the statement in the last sentence was inaccurate. It would not be true to say that, due to lack of time, the Drafting Committee had been "unable to consider" draft articles 1 to 9 at the 1984 session. It would be more correct to say that, to

date, the Drafting Committee had not been able to take any action on those articles.

38. Mr. FRANCIS pointed out that the Commission itself could not have taken any action on those articles in 1984 because it had had to appoint a special rapporteur. It was important to stress that the Commission had not been remiss in any way and that the delay was due to circumstances beyond its control.

39. Mr. McCAFFREY (Special Rapporteur) pointed out that paragraph 8 dealt with the Commission's discussions at the thirty-sixth session. It would seem inappropriate to say at the end of the paragraph that the Commission had not been able to deal with those draft articles "to date" and then proceed in paragraph 9 to describe the discussions at the thirty-seventh session.

40. His own preference would be to deal with the matter in a footnote. If such a method was unacceptable to Mr. Díaz González, the alternative would be to introduce a new paragraph explaining that the Drafting Committee had been unable to take up the draft articles at the thirty-sixth session. The same could be done with regard to the present session. However, there was no real need for such additional paragraphs, which had not proved necessary for the other topics. The Commission's report dealt with what had been done during the session, not with what had not been done.

41. Sir Ian SINCLAIR drew attention to paragraph 13 in section B (A/CN.4/L.408/Add.1) and especially the footnote in which it was stated that, at the present session, there had been "insufficient time for the Drafting Committee to take up" the draft articles in question. The paragraph and the footnote covered the whole question.

Paragraph 8, as amended, was adopted.

Paragraph 9

42. Mr. McCAFFREY (Special Rapporteur) said that the words "due to the resignation", in the first sentence, should be replaced by "following the resignation".

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

43. Mr. McCAFFREY (Special Rapporteur) said that the first sentence should be amended and divided into two. The first sentence would read: "The Commission considered the Special Rapporteur's preliminary report at its thirty-seventh session." The second sentence would begin with the words "There was general agreement". Lastly, at the end of the paragraph, the following words should be added: "and that members of the Commission would, of course, be free to comment on those views".

It was so agreed.

44. Mr. RAZAFINDRALAMBO said that some improvements were needed in the French text. In what was now the fourth sentence, the words *il fallait qu'elle fût*

tout en son pouvoir should be replaced by *la Commission devait faire tout ce qui était en son pouvoir* and the words *des plus graves de ceux* by *des problèmes les plus graves*. In the next sentence, the words *qui fussent* should be deleted and the words *en présence* should be inserted after *tous les intérêts*.

It was so agreed.

Paragraph 11, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.408/Add.1)

Paragraphs 12 to 15

Paragraphs 12 to 15 were adopted.

New paragraph 15 bis and paragraph 16

45. Mr. DÍAZ GONZÁLEZ said that the question put to members by the Special Rapporteur (1976th meeting) had related not only to the term "international watercourse", as indicated in paragraph 16, but also to whether the "working hypothesis" accepted by the Commission in 1980 should be used as a basis for its work. He, for one, had pointed out (1979th meeting) that the 1980 working hypothesis was itself based on acceptance of the "system" concept proposed by the former Special Rapporteur, Mr. Schwebel. Should that hypothesis now be adopted as a valid basis for continuing the work on the topic, it would have to be accepted in exactly the same way as it had been in 1980. Consequently, the paragraph should include an additional sentence to the effect that one member had pointed out that the 1980 working hypothesis would have to be accepted on exactly the same terms as it had been originally.

46. Sir Ian SINCLAIR proposed the insertion, before paragraph 16, of a new paragraph 15 bis reading: "Due to lack of time, not all members of the Commission were able to comment on the second report of the Special Rapporteur." That new paragraph would shed light on the statement in the first sentence of paragraph 16 that "most members who addressed the issue" had favoured deferring the definition of the term "international watercourse".

47. Mr. ILLUECA said that he supported that proposal.

New paragraph 15 bis was adopted.

48. Mr. FLITAN suggested that the additional sentence proposed by Mr. Díaz González should be inserted immediately before the last sentence of paragraph 16. In addition, the word "therefore", in the last sentence, should be deleted.

49. Mr. ROUKOUNAS said that, during the discussion (*ibid.*), he had been in favour of including the "system" concept. The sentence proposed by Mr. Díaz González should therefore begin with the words "Some members", rather than "One member".

50. Mr. LACLETA MUÑOZ said that, if reference was to be made to the fact that some members favoured the system approach, he would propose the addition of a formula along the following lines: "Some members

stated that they were not in favour of the 'system' approach." Certain members, like himself, preferred the "watercourse" concept, and the paragraph should strike a fair balance between the two schools of thought.

51. Mr. YANKOV proposed the insertion, at the end of the second sentence, of the phrase: "while other members were of the view that the 'international watercourse' concept would be satisfactory".

52. Mr. McCAFFREY (Special Rapporteur) said that, as he recalled, 11 members had spoken during the discussion in favour of deferring the definition of the term "international watercourse"; five had specifically said that they were in favour of the "system" approach, and only one member had spoken against that approach.

53. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 16 with the amendments proposed by Mr. Díaz González, Mr. Flitan, Mr. Roukounas, Mr. Laclea Muñoz and Mr. Yankov.

It was so agreed.

Paragraph 16, as amended, was adopted.

Paragraph 17

54. Mr. ROUKOUNAS proposed the insertion in the second sentence, after the words "to be derived therefrom", of the phrase "and that it should be included in the text". The word "Members", at the beginning of the next sentence, should be replaced by "Many members".

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraphs 18 and 19

Paragraphs 18 and 19 were adopted.

Paragraph 20

55. Mr. BALANDA proposed that the words "might not be capable", in the third sentence, should be amended to read "might not always be capable". The words "the needs", in the penultimate sentence, should be changed to "the expressed needs".

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraph 21

56. Mr. ROUKOUNAS proposed the insertion, after the second sentence, of a new sentence reading: "Still others preferred to use the term 'harm' without qualification."

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 22

57. Mr. ARANGIO-RUIZ said that paragraph 22 was a key paragraph, since it concerned the future work on the topic. Accordingly, it was not desirable to use a vague formulation like "to elaborate general principles

and rules", in the third sentence. The underlying issue was whether or not any legal rules or principles regarding international watercourses existed at the present time. There was some confusion in paragraph 22 between *lex lata* (codification), *lex ferenda* (progressive development) and the rather vague concept of "guidelines" or mere recommendations.

58. Mr. McCAFFREY (Special Rapporteur) said that certain changes should be made to the paragraph to meet the valid points raised by Mr. Arangio-Ruiz. The beginning of the third sentence should be amended to read: "The thrust of that approach was to elaborate draft articles setting forth the general principles and rules ..." As a consequential change, the last sentence would state: "... the formulation of draft articles setting forth legal principles and rules; the Commission could turn next to ..."

It was so agreed.

59. Sir Ian SINCLAIR proposed that, in the last sentence, the words "set of recommendations" should be replaced by "set of guidelines" and the words "that are not required by international law" by "that are not strictly required by international law".

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraph 23

60. Sir Ian SINCLAIR proposed that the words "members of the Commission", in the first sentence, should be amended to read: "those members of the Commission who spoke on the topic".

It was so agreed.

Paragraph 23, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VII of the draft report, as amended, was adopted.

The meeting rose at 5.50 p.m.

1985th MEETING

Wednesday, 9 July 1986, at 11 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov.

Draft report of the Commission on the work of its thirty-eighth session (continued)

CHAPTER V. Draft Code of Offences against the Peace and Security of Mankind (A/CN.4/L.406 and Add.1)

A. Introduction (A/CN.4/L.406)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

Paragraph 3 was adopted with a minor drafting change.

Paragraphs 4 to 7

Paragraphs 4 to 7 were adopted.

Paragraph 8

1. Mr. BALANDA suggested the insertion of the words "of the international criminal responsibility of States" after the word "problem", at the end of the third sentence, since it was precisely on that point that the Commission wished to have the views of the General Assembly.

2. Mr. USHAKOV said that he objected to the use in the last sentence of the formula "the prevailing opinion" and stressed that a different opinion had been expressed with regard to the criminal responsibility of States. In the absence of a vote, it was difficult to determine whether a particular opinion was the prevailing one or not.

3. Mr. THIAM (Special Rapporteur) pointed out that the formula in question had already been used in the Commission's report on its thirty-fifth session, in 1983.¹

4. Mr. USHAKOV said the fact that the formula had been used in the 1983 report made no difference to the essence of the problem. As a matter of principle, an opinion could not be said to be the prevailing opinion if no vote had been taken.

5. Mr. McCAFFREY said that he agreed with Mr. Ushakov. The final sentence of the paragraph did not reflect the situation at the end of the Commission's thirty-seventh session, since the matter in question had not really been considered at that time. Consequently, the sentence should either be deleted or redrafted.

6. Mr. ILLUECA said that he fully agreed with Mr. Ushakov and Mr. McCaffrey.

7. Sir Ian SINCLAIR said that, while he concurred with Mr. Ushakov in substance, the statement in the last sentence of the paragraph actually appeared in the Commission's report on its thirty-fifth session. If Mr. Balanda's proposal were adopted, it might be preferable to delete the whole of the last sentence.

8. Mr. FRANCIS said that the sentence could indeed be deleted, but there was no doubt as to its veracity, which was borne out by the Commission's report on its 1983 session.

9. Mr. CALERO RODRIGUES said that he would not be opposed to the deletion of the last sentence.

Nevertheless, the paragraph, as a summary of the Commission's work on the topic thus far, would be incomplete without it. Moreover, any redrafting of the text might imply that the Commission was attempting to go back on the position it had adopted in 1983. Perhaps a change in the tense used might be sufficient to accommodate the concerns expressed.

10. Mr. THIAM (Special Rapporteur) said that it would be possible to delete the phrase in question, since the amendment proposed by Mr. Balanda already dealt with the problem of the responsibility of States.

11. Mr. BALANDA explained that his proposal was intended simply to complete the meaning of the third sentence. Accordingly, as far as the last sentence was concerned, it was better not to delete the words relating to the criminal responsibility of States because that would leave a gap. Perhaps the best course would be to state that the Commission had already endorsed the principle of the criminal responsibility of States in a previous report, and give no indication of whether that view represented the prevailing opinion or not.

12. Mr. RIPHAGEN said that he agreed with Mr. Calero Rodrigues. The solution might be to amend the sentence to read: "The General Assembly was requested to indicate whether such a jurisdiction should also be competent with respect to States."

13. Mr. THIAM (Special Rapporteur) said that Mr. Riphagen's proposal was acceptable, inasmuch as it reflected the substance, if not the form, of the Commission's report on its 1983 session.

14. Mr. RAZAFINDRALAMBO said that he, too, accepted that proposal, but would have preferred a formula along the lines of: "Since a number of members of the Commission endorsed ..." It was nevertheless essential, in order to make the sentence more understandable, to retain the reference to criminal responsibility of States, for the previous sentence mentioned "a competent international criminal jurisdiction for individuals".

15. Following a brief exchange of views in which Mr. McCAFFREY, Chief AKINJIDE and Mr. CALERO RODRIGUES took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 8 with the amendments proposed by Mr. Balanda and Mr. Riphagen.

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraph 9 and new paragraph 9 bis

16. Mr. OGISO (Rapporteur) referring to the fourth sentence of paragraph 9, said that the question of serious damage to the human environment did not appear to have been discussed by the Commission at its thirty-seventh session and, as stated in paragraph 98 of the report on that session,² although the notion of economic aggression had been discussed extensively, no definite conclusions had been reached. Consequently, a

¹ See *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69 (c) (ii).

² *Yearbook ... 1985*, vol. II (Part Two), p. 18.

sentence along the same lines should be inserted after the fourth sentence of paragraph 9.

17. Mr. BALANDA said that the paragraph was too long and should be divided into two, the second paragraph—to be numbered 9 *bis*—starting with what was now the third sentence. The new paragraph would thus act as a counterpart to the shortened paragraph 9, which would deal with the content *ratione personae* of the draft code.

18. In the fourth sentence of paragraph 9—the second sentence of new paragraph 9 *bis*—the word “possibly”, before “serious damage to the human environment”, could be deleted. Finally, the reference to the “use” of nuclear weapons, at the beginning of the following sentence, could be replaced by a reference to the outlawing of nuclear weapons, since the issue was whether nuclear weapons as such were to be outlawed, regardless of the way in which they were used.

19. Mr. CALERO RODRIGUES, referring to Mr. Ogiso’s comments, said that the fourth sentence raised the same problem as had been dealt with earlier, namely the recognition of a general trend within the Commission. It was difficult to speak of a general trend in favour of including serious damage to the human environment, and particularly economic aggression, in the draft code. Hence it might be better to state that many opinions had been expressed on the matter, or alternatively to deal with damage to the human environment and economic aggression in one sentence, and colonialism and *apartheid* in another.

20. Mr. THIAM (Special Rapporteur) said that the suggestion by Mr. Calero Rodrigues was acceptable. It was true that the Commission had clearly endorsed the inclusion of colonialism and *apartheid* in the draft code, but there was some doubt regarding the inclusion of serious damage to the human environment and economic aggression. The fourth sentence could therefore end with the word *apartheid* and the other two points could be covered by a separate sentence worded along the following lines: “With regard to serious damage to the human environment and economic aggression, some members favoured ...”

21. Mr. FLITAN said that he had no objection to the Special Rapporteur’s proposal, but the expression “a number of members” should be used instead of “some members” in the proposed new sentence. In that connection, it should be emphasized that inclusion in the draft code of serious damage to the human environment and economic aggression was not, *a priori*, more controversial than inclusion of the other two points. Indeed, as the Special Rapporteur himself had said on numerous occasions, serious damage to the human environment was expressly mentioned in article 19, paragraph 3 (*d*), of part 1 of the draft articles on State responsibility, which the Commission had adopted on first reading in 1980,³ and which had not been called into question since then. The Commission should therefore act consistently. The only problem was that of formulating a more precise legal characterization. Moreover, with regard to economic aggression, no

member seemed to have suggested that the Commission should depart from the Definition of Aggression adopted by the General Assembly in 1974,⁴ or from the definition proposed by the Special Rapporteur in article 11, paragraph 3 (*b*), of the draft code.⁵ There, too, the problem lay in the need to find an appropriate legal characterization. Consequently, he had no objection to accepting the sentence in its present form.

22. Mr. FRANCIS said that, since there was an identifiable general trend in the Commission in favour of including damage to the human environment in the draft code but no such trend in the case of economic aggression, the sentence should be redrafted accordingly.

23. Mr. JACOVIDES said that he supported the proposal by Mr. Calero Rodrigues.

24. Mr. USHAKOV said that the second part of paragraph 9, relating to the content *ratione materiae* of the draft code, did not accurately reflect the Commission’s discussion. It should therefore be redrafted, bearing in mind that the Commission had not yet taken a concrete decision in the matter. Thus the words “The Commission intended” and “the Commission considered” should be replaced by wording such as “some members ...” or “other members ...”.

25. Sir Ian SINCLAIR said that he was prepared to accept the paragraph as it stood or with the amendment proposed by Mr. Ogiso. However, if the fourth sentence was to be divided into two, the division should be between colonialism and *apartheid* on the one hand, and serious damage to the human environment and economic aggression on the other.

26. Mr. THIAM (Special Rapporteur) said that it was preferable not to go back on a previous decision and he read out the conclusions adopted by the Commission in subparagraph (*c*) (i), (ii) and (iii) of paragraph 65 of its report on its thirty-sixth session.⁶ Those conclusions had not been altered in any way by the present draft report.

27. Mr. USHAKOV said that, in the absence of a formal decision by the Commission, there should be no reference to any “decision”. Naturally, he was in no way opposed to the idea of considering colonialism, for example, as a crime. However, as a matter of principle, it was essential to avoid giving the impression that the Commission had taken a decision on an issue when it had not in fact done so.

28. Mr. LACLETA MUÑOZ said that a clear distinction had to be drawn between colonialism and *apartheid*, which certainly had to be included in the draft code, serious damage to the human environment, which might possibly be included, and economic aggression, which fell within an entirely different context.

29. Mr. THIAM (Special Rapporteur) pointed out that paragraph 9 contained a historical account of the consideration of the question and that it was the Commission itself which had employed the formula in

⁴ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

⁵ See 1957th meeting, para. 1.

⁶ Yearbook ... 1984, vol. II (Part Two), p. 17.

³ Yearbook ... 1980, vol. II (Part Two), p. 32.

dispute. There was no reason to modify a text which the Commission had already adopted at the relevant time.

30. Chief AKINJIDE said it seemed apparent from the Special Rapporteur's comment that the fourth sentence was historically correct and required no amendment.

31. Mr. FRANCIS said that he could not agree with Mr. Lacleta Muñoz. The only item which should form the subject of a separate sentence was economic aggression. He therefore supported the proposal by Mr. Ogiso.

32. Sir Ian SINCLAIR urged that the sentence under review should be left unchanged, since it accurately reflected the position at the end of the Commission's thirty-seventh session. A sentence should, however, be added on the subject of economic aggression, as proposed by the Rapporteur (para. 16 above), along the lines of paragraph 98 of the Commission's report on its thirty-seventh session.

33. Mr. McCaffrey proposed that, in order to make the position clear, the words "As of the thirty-sixth session" should be inserted at the beginning of the fourth sentence.

34. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt the proposals by the Rapporteur and Mr. McCaffrey, and to divide paragraph 9 into two as proposed by Mr. Balanda.

It was so agreed.

Paragraph 9 and new paragraph 9 bis, as amended, were adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

35. MR. McCAFFREY proposed that the opening words should read: "At the same session, the Commission referred".

It was so agreed.

Paragraph 11, as amended, was adopted.

36. Mr. LACLETA MUÑOZ noted that the Spanish text of section A, comprising paragraphs 1 to 11, used the now discarded term *delito*, which had been superseded by the more appropriate term *crimen*, used in the remainder of the chapter. The discrepancy was inevitable because the introductory section covered the period before the term had been corrected. He proposed that the secretariat should prepare a suitable footnote for insertion in section A in order to clarify that point.

It was so agreed.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.406 and Add.1)

Paragraphs 12 to 34 bis (A/CN.4/L.406)

Paragraph 12

Paragraph 12 was adopted.

Paragraphs 13 to 17

Paragraphs 13 to 17 were adopted.

Paragraph 18

37. Sir Ian SINCLAIR said that the beginning of the first sentence was not clear and should be amended to read: "The Special Rapporteur considered that the term 'humanity' could be viewed from three different perspectives: that of culture ..."

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

38. Sir Ian SINCLAIR said that, in the fourth sentence of the English text, the inappropriate expression "correctional offences" should be replaced by "lesser offences".

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

39. Mr. MAHIU said that, in the first sentence of the French text, the words *la richesse* should obviously be replaced by *tout le contenu*.

It was so agreed.

Paragraph 20, as amended in the French text, was adopted.

Paragraphs 21 and 22

Paragraphs 21 and 22 were adopted.

Paragraph 23

40. Mr. RAZAFINDRALAMBO proposed that the words "the element of intent", in the last sentence, should be replaced by "motive".

41. Sir Ian SINCLAIR proposed that the words "to characterize an act", in the third sentence, should be amended to read "to characterize it".

42. Mr. McCaffrey suggested that the drafting of the same sentence could be improved by inserting a formula such as "The fact that ..." at the beginning.

43. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 23 with the various improvements suggested.

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraph 24

44. Sir Ian SINCLAIR said that the words "systematic plan", in the first sentence, should be replaced by "systematic design".

It was so agreed.

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

45. Mr. McCaffrey said that he failed to understand the precise meaning of the term “self-interest”, used in the first and second sentences in connection with the motivation of criminals.

46. Sir Ian Sinclair said that he experienced the same difficulty. Since the original French term was *intérêt*, it could be rendered in English as “private gain”.

It was so agreed.

Paragraph 26, as amended, was adopted.

New paragraph 26 bis

47. Mr. Riphagen proposed the insertion of an additional paragraph to the effect that some members doubted whether interference by the authorities of a State in the internal or external affairs of another State constituted in all cases a crime against humanity. As he recalled, at least one other member, namely Mr. Tomuschat (1966th meeting), had expressed that view.

48. The Chairman said that, if there were no objections, he would take it that the Commission agreed to the insertion of a new paragraph 26 bis, the text of which would be supplied to the secretariat by Mr. Riphagen.

It was so agreed.

Heading preceding paragraph 27

49. Mr. Mahiou proposed that, in the French text of the heading preceding paragraph 27, the definite article before the word *apartheid* and the partitive article before *autres* should be deleted.

50. Mr. Reuter said that he endorsed Mr. Mahiou's comment and proposed that the word “suggested” should also be deleted.

It was so agreed.

The heading preceding paragraph 27, as amended, was adopted.

Paragraph 27

51. Mr. Balanda proposed that the words “it was based on a constitution”, in the second sentence, should be replaced by “it was institutionalized”.

52. Mr. Thiam (Special Rapporteur) said that he had no objection to Mr. Balanda's proposal.

53. Mr. Razafindralambo said that a particular feature of *apartheid* was that it was embodied in the South African Constitution and the term “institutionalized” could well minimize the scope of the crime referred to in the paragraph.

54. Mr. Mahiou said that he preferred the term “institutionalized”, which covered all aspects of the matter, including the constitutional aspects.

55. Sir Ian Sinclair said that the English text was entirely satisfactory in its present form.

56. Mr. Arangio-Ruiz said that, in the French text, the term *constitutionnalis * might not be felicitous from a linguistic point of view, but it should none the less be retained, for it related to something that was quite precise.

57. Mr. Razafindralambo proposed that the words “it was based on a constitution” should be replaced by “it was embodied in a constitution”.

58. Mr. Balanda said that he was perfectly willing to respond to any proposal, but the words “based on a constitution” were narrower than “institutionalized”. The constitution formed an integral part of a country's institutions. It was for that reason that he had proposed a broader formula.

59. Mr. Thiam (Special Rapporteur) said that the phrase in question was taken from his report and it sought to illustrate the importance attached to an institution that was embodied in a constitution.

60. The Chairman said that, if there were no objections, he would take it that the Commission agreed to retain the phrase in question.

It was so agreed.

61. Sir Ian Sinclair proposed that the secretariat should correct the tenses of the verbs, not only in paragraph 27 but wherever necessary.

It was so agreed.

62. Mr. Koroma said that the first sentence of paragraph 27, referring to the various international instruments “condemning *apartheid*”, should more properly speak of instruments “declaring *apartheid* to be an offence”.

63. Mr. Ushakov said his position of principle was that no one could challenge a passage in a report that reproduced a statement by the Special Rapporteur or a particular member of the Commission. Consequently, it was difficult to see how any change could be made to a sentence beginning with the words “In his report, the Special Rapporteur proposed”. The choice of terms lay with the Special Rapporteur.

64. Mr. Thiam (Special Rapporteur) said that, while he shared Mr. Ushakov's point of view, he had no objection to meeting Mr. Koroma's wishes, as he had done in the past.

65. Mr. Koroma explained that the purpose of his proposal was to distinguish between legal censure and political censure.

66. The Chairman said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 27 with Mr. Koroma's amendment.

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

67. Mr. Calero Rodrigues said that the beginning of the paragraph should be brought into line with

the French text by stating: "Different views were expressed in the Commission on the inclusion ..."

It was so agreed.

Paragraph 28, as amended, was adopted.

Paragraph 29

Paragraph 29 was adopted.

Paragraph 30

68. Sir Ian SINCLAIR said that the initial phrase of the English text should read "The comments made in the Commission", in keeping with the original French text.

It was so agreed.

Paragraph 30, as amended, was adopted.

Paragraphs 31 to 33

Paragraphs 31 to 33 were adopted.

Paragraph 34

69. Mr. McCAFFREY said that it was incorrect to use the present tense in the last phrase, for it gave the mistaken impression that the passage in question expressed the views of the Commission itself. The past tense was required.

70. Mr. JACOVIDES proposed that the passage should be reworded as follows: "According to the latter members, drug trafficking was of course an international crime, but it was not, for all that, an offence against the peace and security of mankind."

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 34 with the amendment proposed by Mr. Jacovides.

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 34 bis

72. Mr. ARANGIO-RUIZ drew attention to the opening words of paragraph 34 bis, "One member of the Commission indicated". He was the member in question, but for the purposes of the record he would point out that at least two other members had shared his view.

73. Mr. KOROMA proposed that the sentence should begin with the words "Some members of the Commission".

It was so agreed.

74. Mr. DÍAZ GONZÁLEZ said that, in the Spanish text, the expression *libre disposición* should be replaced by *libre determinación*.

It was so agreed.

Paragraph 34 bis, as amended, was adopted.

New paragraph 34 ter

75. Mr. BALANDA proposed the inclusion of a paragraph 34 ter stating: "Some members proposed the

inclusion in the draft code of trafficking in children and women, and slavery."

New paragraph 34 ter was adopted.

The meeting rose at 1.05 p.m.

1986th MEETING

Wednesday, 9 July 1986, at 3.15 p.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov.

Draft report of the Commission on the work of its thirty-eighth session (continued)

CHAPTER V. Draft Code of Offences against the Peace and Security of Mankind (continued) (A/CN.4/L.406 and Add.1)

B. Consideration of the topic at the present session (continued) (A/CN.4/L.406 and Add.1)

Paragraphs 35 to 64 (A/CN.4/L.406)

Paragraph 35

Paragraph 35 was adopted with minor drafting changes.

Paragraph 36

1. Sir Ian SINCLAIR proposed that, in the second sentence, the words "war is no longer a right, but a wrongful act" should be replaced by the words "war is no longer lawful".

2. Mr. JACOVIDES supported that proposal.

3. Mr. RIPHAGEN also supported the proposal and himself proposed that, in the same sentence, the words "Except in very limited cases, such as self-defence or the maintenance of peace" should be deleted.

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt those amendments.

It was so agreed.

Paragraph 36, as amended, was adopted with minor drafting changes.

Paragraph 37

5. Mr. KOROMA proposed the insertion, before the last sentence, of a new sentence reading: "Furthermore,

they pointed out that not all the laws and customs of war had been codified.”

It was so agreed.

Paragraph 37, as amended, was adopted.

Paragraph 38

6. Mr. KOROMA pointed out that the words “and included collective action and peace-keeping operations” implied that such operations constituted cases of “armed conflict”, but that was a doubtful proposition.

7. Sir Ian SINCLAIR proposed that those words should be deleted; the examples given were not strictly necessary.

It was so agreed.

Paragraph 38, as amended, was adopted.

Paragraph 39

8. Mr. THIAM (Special Rapporteur) said that the second sentence should be deleted, since the draft code now included such a provision.

Paragraph 39, as amended, was adopted.

Paragraph 40

9. Mr. THIAM (Special Rapporteur) said that, in the last sentence, the words “concurrent offences were, moreover, not exclusive to the topic” should be replaced by “concurrent offences were, moreover, not a phenomenon characteristic only of the topic”.

Paragraph 40, as amended, was adopted subject to a correction in the Spanish text.

Paragraph 41

Paragraph 41 was adopted.

Paragraphs 42 to 44

Paragraphs 42 to 44 were adopted with some drafting changes.

Paragraphs 45

10. Mr. THIAM (Special Rapporteur) said that, in the penultimate sentence, the words “and the circumstances of each particular case” should be replaced by “and the question of the very existence of self-defence in the circumstances of each particular case”.

It was so agreed.

11. Mr. KOROMA proposed that, in the second sentence, the words “the use of nuclear weapons had to be condemned” should be replaced by “the use of nuclear weapons had to be outlawed”.

12. Mr. MAHIU said that he preferred the original wording, since a convention would be necessary to outlaw the use of such weapons.

13. Mr. McCAFFREY agreed with that view.

14. Mr. THIAM (Special Rapporteur) pointed out that, if the word “condemned” were replaced by “outlawed”, the whole sentence would probably have to be changed.

15. Mr. KOROMA said that many jurists and writers held that the outlawing of nuclear weapons stemmed from the provisions of the 1907 Hague Convention. No specific convention was needed for the purpose.

16. Mr. USHAKOV said that it would be more appropriate to refer to the prohibition of nuclear weapons. He proposed that the word “condemned” should be replaced by the word “banned”.

It was so agreed.

Paragraph 45, as amended, was adopted.

Paragraph 46

17. Mr. JACOVIDES proposed that the words “might prevent the draft from being adopted” should be replaced by “might be counter-productive in terms of the acceptability of the draft”.

It was so agreed.

Paragraph 46, as amended, was adopted.

Paragraphs 47 and 48

Paragraphs 47 and 48 were adopted.

Paragraphs 49 and 50

Paragraphs 49 and 50 were adopted with minor drafting changes.

Paragraph 51

18. Mr. MAHIU noted that the footnote relating to the *Hostage* case, cited in the last sentence, had been omitted. It should be restored.

It was so agreed.

Paragraph 51, as amended, was adopted with minor drafting changes in the French and Spanish texts.

Paragraph 52

19. Sir Ian SINCLAIR proposed that, at the end of the penultimate sentence, the words “holding a high political, civil or military position” should be amended to read “the fact of holding a high political, civil or military position”.

It was so agreed.

Paragraph 52, as amended, was adopted with minor drafting changes.

Paragraph 53

20. Mr. LACLETA MUÑOZ proposed that the words “Responsibility of the superior” should be amended to read “Complicity of the superior”.

21. Sir Ian SINCLAIR recalled that draft article 9 was entitled “Responsibility of the superior”. He could, however, accept Mr. Lacleta Muñoz’s proposal because draft article 9 dealt with complicity as a form of responsibility.

22. Mr. THIAM (Special Rapporteur) proposed that the word “complicity” should be used in all the

language versions, and that the quotation-marks should be deleted.

It was so agreed.

Paragraph 53, as amended, was adopted.

Paragraph 54

Paragraph 54 was adopted with minor drafting changes.

Paragraph 55

Paragraph 55 was adopted.

Paragraph 56

Paragraph 56 was adopted subject to a correction in the French text.

Paragraph 57

23. Sir Ian SINCLAIR noted that the words *un régime exorbitant du droit commun*, in the first sentence of the French text, had been translated into English as “a special ordinary law régime”. He proposed that the secretariat should be requested to find a more adequate translation.

24. Mr. LACLETA MUÑOZ proposed that, in the Spanish text, the words *este régimen exorbitante del derecho común* should be replaced by *un régimen especial derogatorio del derecho común*.

25. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 57 subject to the proposed amendments to the English and Spanish texts.

It was so agreed.

Paragraph 57 was adopted on that understanding.

Paragraphs 58 to 61

Paragraphs 58 to 61 were adopted.

Paragraph 62

Paragraph 62 was adopted with minor drafting changes.

Paragraph 63

Paragraph 63 was adopted.

Paragraph 64

26. Mr. THIAM (Special Rapporteur) said that the words “other offences” should be replaced by “these concepts”, which should not be in quotation-marks.

Paragraph 64, as amended, was adopted.

Paragraphs 65 to 109 (A/CN.4/L.406/Add.1)

Paragraph 65

27. The CHAIRMAN said that, in the second sentence of the English text, the words “humanity has more difficulty in finding a justification than in finding a war crime” should be deleted.

Paragraph 65 was adopted subject to that correction.

Paragraph 66

Paragraph 66 was adopted with minor drafting changes.

Paragraphs 67 and 68

Paragraphs 67 and 68 were adopted.

Heading preceding paragraph 69

28. Mr. USHAKOV said that the heading “Principles relating to the offender” was totally inadequate. He suggested that it should be amended to read “Principles relating to the official position of the offender”.

It was so agreed.

The heading preceding paragraph 69, as amended, was adopted.

Paragraph 69

Paragraph 69 was adopted with minor drafting changes.

Paragraph 70

29. Sir Ian SINCLAIR proposed that the words “in greater detail” should be inserted at the end of the first sentence.

It was so agreed.

Paragraph 70, as amended, was adopted.

Paragraph 71

Paragraph 71 was adopted with a minor drafting change.

Paragraphs 72 and 73

Paragraphs 72 and 73 were adopted.

Paragraphs 74 and 75

Paragraphs 74 and 75 were adopted with some drafting changes.

Paragraph 76

Paragraph 76 was adopted subject to a correction in the Spanish text.

Paragraph 77

30. Sir Ian SINCLAIR proposed that, in order to strengthen the idea expressed in the second sentence, the words “after a certain number of years” should be amended to read “many years after an alleged offence had been committed”.

It was so agreed.

Paragraph 77, as amended, was adopted.

Paragraph 78

31. Sir Ian SINCLAIR proposed that, in the second part of the first sentence, the words “which gives preference to nationality rather than to the place of the crime” should be replaced by “which was based on nationality rather than on the place of the crime”.

It was so agreed.

Paragraph 78, as amended, was adopted with some drafting changes.

Paragraph 79

32. Mr. McCAFFREY said that he was one of the members whose views were reflected in the fourth sentence. He nevertheless wished to make it clear that he was not, as that sentence suggested, opposed to the system of universal jurisdiction in general. He had expressed doubts only with regard to the applicability of that system in the instance under consideration. He therefore proposed that, at the beginning of the fourth sentence, the words "Among the members opposed to the universal system" should be amended to read "Among the members doubting the general applicability of universal jurisdiction". In the fifth sentence, the words "Other members opposed to that system" should be replaced by "Other members who expressed doubts concerning that system".

It was so agreed.

Paragraph 79, as amended, was adopted.

Paragraph 79 bis

Paragraph 79 bis was adopted.

Paragraph 80

33. Mr. THIAM (Special Rapporteur) said that the second sentence should be amended to read: "He pointed out that, although in principle every wrongful act engaged the criminal responsibility of its author, there could be exceptions to that rule."

34. Mr. USHAKOV said that the term "justifying facts", in the last sentence, was not clear. It would be difficult to translate into Russian. Reference was apparently being made more to "circumstances" than to "facts".

35. Mr. THIAM (Special Rapporteur) said that the term "justifying facts" was a well-established one. Unlike the term "extenuating circumstances", it did refer to facts.

36. Mr. REUTER noted that the last sentence referred to three sets of circumstances which eliminated or attenuated responsibility, namely justifying facts, exculpatory pleas and extenuating circumstances. That enumeration suggested that three subheadings would follow. In fact, however, there was only one subheading, "Justifying facts", preceding paragraph 81. He proposed that that subheading should be deleted.

It was so agreed.

37. Mr. McCAFFREY drew attention to a discrepancy between paragraph 65, which contained a list of six categories of general principles, and the following paragraphs. Paragraphs 66 to 79 bis referred to the first four categories, but the heading of the fifth category, namely "The determination and extent of responsibility", had been omitted altogether and the heading which immediately preceded paragraph 80, "5. Exceptions to criminal responsibility", was in fact that of the sixth category referred to in paragraph 65. That discrepancy was bound to raise questions in the minds

of readers and, in particular, in the Sixth Committee of the General Assembly.

38. Mr. THIAM (Special Rapporteur) said that one way of solving that problem would be to draft a new paragraph indicating that the question of the determination and extent of responsibility would be dealt with in a future report.

39. The CHAIRMAN suggested that the Commission might add a new paragraph 79 *ter*, which would be preceded by the heading "5. The determination and extent of responsibility". The heading which now preceded paragraph 80 would be renumbered and would read "6. Exceptions to criminal responsibility".

40. Mr. REUTER said that that proposal would be at variance with the thinking of the Special Rapporteur, for whom exculpatory pleas and extenuating circumstances came within the category entitled "The determination and extent of responsibility".

41. As an alternative, he proposed that the numbers preceding the six categories of principles listed in paragraph 65 should be deleted.

It was so agreed.

42. In addition, he proposed that, for the fifth category listed in paragraph 65, namely "The determination and extent of responsibility", a footnote should be added which might read: "The question of exculpatory pleas and extenuating circumstances will be discussed in a future report."

43. Mr. FRANCIS said that it would be wrong to suggest that the Commission had not dealt at all with the principles relating to the determination and extent of responsibility. That category of principles was discussed in the Special Rapporteur's fourth report (A/CN.4/398, paras. 177-259).

44. He realized that the intention was to amend paragraph 80 so as to eliminate the references to exculpatory pleas and extenuating circumstances, leaving only the reference to "justifying facts", but in his view the draft report should be arranged so as to conform to the headings listed in paragraph 65.

45. The CHAIRMAN said that the problem had been solved by deleting the numbers of the six headings listed in paragraph 65 and that it had been proposed that an explanatory footnote should be attached to the fifth heading.

46. Sir Ian SINCLAIR proposed that, in order to meet the concern expressed by Mr. Francis, the footnote to be attached to the heading "The determination and extent of responsibility" in paragraph 65 should indicate clearly that "the question of exculpatory pleas and extenuating circumstances will be dealt with in a future report, since the Commission did not discuss it at the present session and considered only the question of 'justifying facts'".

47. Mr. THIAM (Special Rapporteur) proposed that the last two sentences of paragraph 80 should be replaced by the following sentence: "These are the justifying facts."

48. Mr. REUTER proposed that the new sentence should read: "These were circumstances which, in certain legal systems, were known as 'justifying facts'." It would thus be clear that the paragraphs which followed dealt with the problem of justifying facts.

49. M. KOROMA said that he objected to the use in the English text of the term "justifying facts", which should be replaced by the more appropriate term "plea of justification".

50. Chief AKINJIDE said that he fully agreed with that suggestion.

51. Mr. USHAKOV said that he approved of the new sentence proposed by Mr. Reuter to replace the last two sentences. The proposed wording made it clear that the term "justifying facts" was connected with "certain legal systems" and it accurately reflected the real position. The French legal concept of *faits justificatifs* did not exist in Soviet criminal law. The same might be true in other legal systems.

52. Sir Ian SINCLAIR said that he entirely agreed with Mr. Reuter and Mr. Ushakov. While the issue was a difficult one, Mr. Reuter's proposal was a perfectly good statement of fact. It reflected the position in French law and, possibly, in some other systems of law.

53. He was, however, opposed to Mr. Koroma's suggestion that, in the English text, the term "justifying facts" should be replaced by "plea of justification", which was not precisely equivalent to the French legal concept of *faits justificatifs*. In some circumstances, the term "plea of justification" related to civil rather than to criminal law.

54. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the text proposed by Mr. Reuter to replace the last two sentences of paragraph 80.

It was so agreed.

Paragraph 80, as amended, was adopted.

Paragraph 81

Paragraph 81 was adopted with minor drafting changes.

Paragraph 82

55. Sir Ian SINCLAIR said that the first three sentences did not accurately describe the position in English law on exceptions to criminal responsibility. It was, for example, quite wrong to state, as did the third sentence, that an English judge "creates the law", although he could help to develop it on the basis of precedents. He therefore proposed that the third sentence should be deleted.

It was so agreed.

Paragraph 82, as amended, was adopted with minor drafting changes.

Paragraphs 83 to 85

Paragraphs 83 to 85 were adopted with some drafting changes.

Paragraph 86

Paragraph 86 was adopted.

Paragraph 87

Paragraph 87 was adopted with minor drafting changes.

Paragraphs 88 to 96

Paragraphs 88 to 96 were adopted.

Paragraph 97

Paragraph 97 was adopted subject to a correction to the footnote relating to the Hostage case.

Paragraphs 98 to 100

Paragraphs 98 to 100 were adopted.

Paragraph 101

Paragraph 101 was adopted subject to a correction in the French text.

Paragraph 102

Paragraph 102 was adopted with minor drafting changes.

Paragraph 103

56. Sir Ian SINCLAIR proposed that the words "in accordance with its rights", at the end of the paragraph, should be amended to read "in accordance with its right of self-defence".

It was so agreed.

Paragraph 103, as amended, was adopted.

Paragraph 104

Paragraph 104 was adopted.

Paragraphs 105 to 109

57. Mr. OGISO said that, although it was stated in paragraph 105 that the Special Rapporteur had "confined his examination of reprisals to armed reprisals", paragraphs 107 and 108 appeared to refer to belligerent reprisals. He requested the Special Rapporteur to clarify the position in that regard. If the intention was to deal not only with armed reprisals, but also with belligerent reprisals, that should be explained either in paragraph 105 or in one of the following paragraphs.

58. Mr. THIAM (Special Rapporteur) said that that was precisely his intention. Humanitarian law referred to reprisals and he therefore had to deal with them, at least in the case of war crimes.

59. Sir Ian SINCLAIR said Mr. Ogisso had rightly pointed out that paragraphs 106, 107 and 108 were not strictly confined to armed reprisals, but also encompassed reprisals which were carried out during an armed conflict but which might not be armed reprisals. He therefore suggested that paragraph 105 should be amended to state only that the Special Rapporteur had raised the question whether reprisals should constitute a "justifying fact".

60. Mr. OGISO said that he could agree with that suggestion.

61. Mr. McCAFFREY said that it would be rather strange to state that reprisals “constituted” a justifying fact. It would be preferable to say that the Special Rapporteur had raised the question whether “reprisals were legally justified”.

62. Mr. ARANGIO-RUIZ said that the real question was not whether reprisals constituted a “justifying fact”, but rather whether action or conduct carried out by way of reprisals constituted a “justifying fact”.

63. Mr. McCAFFREY suggested the following wording for the second sentence of paragraph 105: “He raised the question whether the defence of justification (‘justifying fact’) could apply to such reprisals.” In the legal system of the United States of America, there were three possible categories of defence for a criminal act: justification, excuse and mitigation.

64. Mr. LACLETA MUÑOZ said that paragraphs 105 to 109 went much too far. He could not agree, for example, with the sweeping statement in paragraph 109 that “reprisals merged sometimes with aggression, and sometimes with a war crime. In both instances, they constituted an offence and not a justifying fact.” There were cases in which reprisals were justified and that applied to some of the reprisals referred to in paragraph 109. When reprisals were justified, their author was also justified, except when the action taken was excessive.

65. Mr. THIAM (Special Rapporteur) said that, when the Commission had adopted part 1 of the draft articles on State responsibility, it had agreed that reprisals could in no case justify, or constitute a lawful response to, any act. That proposition would probably not be accepted by all States, but he had to work on the basis of a principle accepted by the Commission.

66. Mr. LACLETA MUÑOZ said that the proposition in question was true with regard to armed reprisals, but the scope of paragraph 105 was being extended to reprisals which took place during an armed conflict but which might not be armed reprisals. One example would be punishment lawfully imposed on a group of prisoners.

67. Mr. THIAM (Special Rapporteur) said that, under the 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals were prohibited. Reprisals against a civil population constituted a war crime. The idea contained in paragraphs 105 to 109 therefore had to be retained, but it might be worded differently.

68. He proposed that paragraph 105 should state: “The Special Rapporteur raised the question whether reprisals could, as such, be justified (‘justifying facts’).”

69. Sir Ian SINCLAIR proposed that paragraph 105 should read: “The Special Rapporteur raised the question whether the exception of justification (‘justifying facts’) could apply to reprisals.”

70. Mr. LACLETA MUÑOZ supported that proposal.

71. Mr. KOROMA said it should be made clear that paragraph 105 dealt with armed reprisals.

72. Mr. LACLETA MUÑOZ supported that proposal. If paragraph 105 did not refer to armed reprisals, it would contradict paragraphs 108 and 109. Paragraph 108 stated that reprisals carried out in breach of existing conventions or the customs of war “could not constitute admissible exceptions”. It followed that reprisals carried out in accordance with the relevant conventions were justified; such reprisals were, of course, not armed reprisals.

73. After a brief discussion in which Mr. McCAFFREY and Sir Ian SINCLAIR took part, Mr. THIAM (Special Rapporteur) said that, in consultation with the members concerned, including Mr. Lacleta Muñoz and Mr. Koroma, he would prepare a redraft of paragraphs 105 to 109 for submission to the Commission at its next meeting.

It was so agreed.

The meeting rose at 6.15 p.m.

1987th MEETING

Thursday, 10 July 1986, at 10.20 a.m.

Chairman: Mr. Alexander YANKOV

later: Mr. Doudou THIAM

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

Draft report of the Commission on the work of its thirty-eighth session (*continued*)

CHAPTER V. *Draft Code of Offences against the Peace and Security of Mankind* (*continued*) (A/CN.4/L.406 and Add.1)

B. *Consideration of the topic at the present session* (*continued*) (A/CN.4/L.406 and Add.1)

Paragraphs 65 to 109 (*continued*) (A/CN.4/L.406/Add.1)

Paragraph 65 (*continued*) and paragraphs 80 and 81 (*concluded*)

1. Mr. FRANCIS, referring to paragraph 80 of chapter V of the Commission’s draft report, which reflected views expressed by the Special Rapporteur in his fourth report (A/CN.4/398), said that it was essential that that fourth report should be presented to the General Assembly in exactly the same manner as the Special Rapporteur had presented it to the Commission. Paragraph 80 was in fact a summary of certain

paragraphs of section E of part IV of the Special Rapporteur's fourth report (*ibid.*, paras. 177, 178 and 181).

2. Since paragraph 80 dealt with the principles relating to the determination and extent of criminal responsibility and paragraph 81 with exceptions to criminal responsibility, as referred to in the Special Rapporteur's fourth report under that precise heading (*ibid.*, paras. 185-254), it clearly followed that the heading which preceded paragraph 80 should be "5. The determination and extent of responsibility", and not "Exceptions to criminal responsibility", which should therefore be renumbered and placed between paragraph 80 and paragraph 81.

3. He also proposed that the following sentence should be added at the end of paragraph 80: "He further pointed out that, in the determination of individual criminal responsibility, such facts as would preclude that responsibility should be considered as constituting exceptions." That sentence, based on paragraph 184 of the Special Rapporteur's fourth report, would serve as a link between paragraph 80 and paragraph 81.

4. With regard to the footnote to paragraph 65 suggested by Mr. Reuter (1986th meeting, para. 42), for which Sir Ian Sinclair had proposed a text (*ibid.*, para. 46), he said that exculpatory pleas and extenuating circumstances had been discussed briefly at the present session. He wished to know whether Sir Ian Sinclair would be prepared to agree to the insertion, in the first phrase of his proposed text, of the word "further" between the words "will be dealt with" and "in a future report", and to the content of the footnote being incorporated in the text of paragraph 115 as an independent statement constituting the last sentence of part IV (General principles) of section B of chapter V of the draft report.

5. The CHAIRMAN said that, unless the Commission decided to reopen the discussion of paragraphs 65, 80 and 81, the only course open to Mr. Francis was to request that his views should be reflected in the summary record of the present meeting.

6. Speaking as a member of the Commission, he said that he would not be in favour of reopening the discussion and reconsidering paragraphs which the Commission had already adopted.

7. Mr. FRANCIS said that the point was not that his views should be placed on record, but that the Commission should avoid using wording in its report that might mislead the General Assembly by wrongly suggesting that certain questions had not been considered at the present session.

8. Mr. DÍAZ GONZÁLEZ said that, since paragraphs 80 and 81 reflected the views of the Special Rapporteur, it was for the Special Rapporteur to decide on the wording to be used.

9. Mr. CALERO RODRIGUES agreed that it would not be advisable to reopen the debate on paragraphs already adopted. Some of the suggestions made by Mr. Francis constituted improvements, but it was for the Special Rapporteur to decide whether to incorporate them.

10. Sir Ian SINCLAIR said that, although the draft report might well read better with some of the suggestions made by Mr. Francis, time constraints made it very difficult to reopen the discussion of paragraphs 65, 80 and 81.

11. Since no final decision had been taken on the text of the footnote to be added to paragraph 65, he proposed that informal consultations should be held by the Special Rapporteur, Mr. Francis and himself on the wording of that footnote, which would, of course, indicate that the question of exculpatory pleas and extenuating circumstances had been referred to in the Special Rapporteur's fourth report.

12. Mr. McCAFFREY said that, although the suggestions made by Mr. Francis would undoubtedly improve the report, their inclusion was not absolutely necessary.

13. Mr. KOROMA said that he saw considerable merit in the suggestions made by Mr. Francis. The consideration of chapter V of the draft report had been complicated by the fact that the Special Rapporteur's opinions had been intermingled with comments made by members. He hoped that the lessons to be learned from that problem would be borne in mind during the preparation of future reports of the Commission.

14. Mr. FRANCIS said he could not agree that it was impossible for the Commission to review paragraphs that had already been adopted. Paragraph 80 stood in need of correction so that the presentation of the Special Rapporteur's fourth report to the General Assembly would be identical with the manner in which the Special Rapporteur had presented it to the Commission. Enough flexibility ought to be exercised to permit such correction so long as the draft report as a whole had not been adopted.

15. The CHAIRMAN said that the discussion had been useful in clarifying the methodological problems involved in the preparation of the Commission's report. The practical problem at hand could, however, be solved if, in a spirit of compromise, the Commission agreed to adopt the proposal by Sir Ian Sinclair for informal consultations concerning paragraph 65.

Sir Ian Sinclair's proposal was adopted.

Paragraphs 105 to 109 (*concluded*)

16. The CHAIRMAN recalled that, at the previous meeting, a number of suggestions had been made with regard to the wording of paragraphs 105 to 109. The members concerned and the Special Rapporteur had redrafted those paragraphs, which he now invited the Special Rapporteur to introduce.

17. Mr. THIAM (Special Rapporteur) introduced the text of the new paragraphs 105 to 109, which read:

"Means of defence based on reprisals

"105. In the Special Rapporteur's opinion, reprisals could take place in peacetime or in wartime.

"106. In peacetime, defence based on armed reprisals was not admissible.

“107. In wartime, defence based on reprisals was not admissible if the reprisals were carried out in violation of the laws and customs of war.

“108. These cases of inadmissibility resulted from the fact that reprisals merged sometimes with aggression if they were carried out in peacetime, and sometimes with a war crime if they took place in the course of an armed conflict and were carried out in violation of the laws and customs of war.

“109. In short, the Special Rapporteur’s view was that the prohibition of reprisals, since it was not general in *jus in bello*, meant that reprisals could be justified in all instances in which they were not prohibited. Yet the prohibition of reprisals, in the framework of Additional Protocol I of 1977, was only sectoral in nature; it applied solely to reprisals directed against the sick and the wounded, civilian populations, prisoners of war, and civilian or cultural objects.”

18. That new text should dispel the misunderstandings caused by the original text, which had not been explicit enough.

19. The CHAIRMAN invited members to consider the new text paragraph by paragraph.

Paragraphs 105 and 106

Paragraphs 105 and 106 were adopted.

Paragraph 107

20. Sir Ian SINCLAIR, noting that paragraph 107 was not very clear, requested the Special Rapporteur to explain whether it referred only to belligerent reprisals.

21. Mr. THIAM (Special Rapporteur) said that paragraph 107 did in fact refer to “belligerent reprisals”, the term that was commonly used in English law. He pointed out that Additional Protocol I of 1977 made no distinction between armed and unarmed reprisals.

22. Mr. REUTER said that Additional Protocol I of 1977 contained specific provisions, but no general rule, relating to the question of reprisals. What it prohibited were “belligerent reprisals”, in the sense of reprisals which could be carried out only in wartime in the framework of the new régime applicable in wartime. The term “belligerent reprisals” and the term “armed reprisals” would have to be clearly defined.

23. Sir Ian SINCLAIR said he had always thought that the term “belligerent reprisals” meant reprisals carried out in wartime against persons protected by the 1949 Geneva Conventions and that it did not refer to armed reprisals. He was, however, prepared to join in any consensus the Commission might reach on the meaning of that term.

24. Mr. RIPHAGEN said that, in his view, reprisals were measures taken contrary to the laws and customs of war and that, in some cases, they might be admissible, while in others they would be prohibited.

25. Mr. CALERO RODRIGUES said that paragraph 107 went with paragraph 109. In his view, the Special

Rapporteur had used the term “means of defence” in a legal sense, thus implying that a State could not invoke reprisals to avoid being held responsible. The wording of the French text of paragraph 107 did not give rise to any problems, but the English text might be understood differently, in something other than a legal sense. In French, the term *moyen de défense* meant a justifying fact which could be invoked as a defence.

26. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 107 in the light of the comments made.

Paragraph 107 was adopted.

27. Mr. CALERO RODRIGUES suggested that paragraphs 105, 106 and 107, which were very short, should be merged and that paragraphs 108 to 118 should be renumbered accordingly.

It was so agreed.

Paragraph 108

Paragraph 108 was adopted.

Paragraph 109

28. Mr. KOROMA urged the Special Rapporteur to reconsider the unnecessarily forthright statement that “reprisals could be justified in all instances in which they were not prohibited”.

29. Mr. THIAM (Special Rapporteur) said that the French text was very clear.

30. Mr. LACLETA MUÑOZ said that paragraph 109 merely described the true situation, which was that all reprisals were, fortunately, not systematically prohibited. The original text had appeared to rule out reprisals of any kind, although it was a well-known fact that reprisals could play a useful role by providing a response to a wrongful act.

31. Mr. KOROMA said that, since armed reprisals were prohibited under international law, he could not see any compelling reason for stating in paragraph 109 that other forms of reprisals were permitted.

32. The CHAIRMAN said that Mr. Koroma’s opinion on that point would be included in the summary record. As for paragraph 109, it expressed the views of the Special Rapporteur.

Paragraph 109 was adopted

Paragraph 110

Paragraph 110 was adopted with a minor drafting change in the French and Spanish texts.

Paragraph 111

33. Mr. THIAM (Special Rapporteur), replying to a question raised by Sir Ian Sinclair concerning the second sentence of subparagraph (2), said that the idea of proportionality could be explained by drawing a parallel between reprisals and self-defence, which required that the response should not be out of proportion to the attack that gave rise to it. In the case under consideration, the legal precedents to which he had referred in his

fourth report (A/CN.4/398, paras. 241-253) showed that a State could not invoke an exception if the reprisals it carried out to escape from a danger caused an even more serious danger.

34. Sir Ian SINCLAIR proposed that, in the second sentence of subparagraph (2), the words "the act which the perpetrator was seeking to elude" should be replaced by "the situation from which the perpetrator was seeking to escape".

It was so agreed.

35. Mr. LACLETA MUÑOZ proposed that, in subparagraph (3), the word "against" should be replaced by "with respect to".

It was so agreed.

Paragraph 111, as amended, was adopted.

Paragraph 112

36. Mr. THIAM (Special Rapporteur) said that, in the second sentence, the words "With regard to the exceptions as a whole" should be replaced by "With regard to the formulation of these exceptions in the draft code".

Paragraph 112, as amended, was adopted.

Paragraph 113

37. Mr. THIAM (Special Rapporteur) said that the word "superiors" should be replaced by "a superior".

Paragraph 113, as amended, was adopted.

Paragraph 114

Paragraph 114 was adopted.

Paragraph 115

Paragraph 115 was adopted with minor drafting changes.

Paragraph 116

Paragraph 116 was adopted.

Paragraph 117

38. Mr. THIAM (Special Rapporteur) said that, in the third sentence, the word "endorsed" should be replaced by "supported".

It was so agreed.

39. Mr. JACOVIDES proposed that, after the first sentence, the following new sentence should be added: "Certain specific suggestions regarding the draft articles were also provisionally made."

It was so agreed.

Paragraph 117, as amended, was adopted.

Paragraph 118

40. Mr. RAZAFINDRALAMBO proposed that, in the first sentence, the words "to other sessions" should be replaced by "to future sessions" and that, in the second sentence, the words "and also those expressed" should be replaced by "and the views that would be expressed".

It was so agreed.

41. Mr. McCAFFREY proposed that the penultimate sentence should be strengthened by replacing the words "will examine attentively any guidance that may be furnished" by "will examine attentively any guidance that the General Assembly may furnish". Instead of referring in the last sentence to a paragraph of the Commission's report on its thirty-fifth session (1983), he suggested that the content of that paragraph should be reproduced.

42. Sir Ian SINCLAIR proposed that the word "attentively", in the penultimate sentence, should be replaced by "carefully". As to the second suggestion made by Mr. McCaffrey, he proposed the insertion of a footnote reproducing the text of paragraph 69 (c) (i) of the Commission's report on its thirty-fifth session.

43. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 118 with the amendments proposed by Mr. McCaffrey and Sir Ian Sinclair.

It was so agreed.

Paragraph 118, as amended, was adopted.

44. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to defer the completion of its consideration of chapter V of the draft report until Mr. Francis, Sir Ian Sinclair and the Special Rapporteur had submitted the text of the footnote to be added to paragraph 65.

It was so agreed.

Mr. Thiam took the Chair.

CHAPTER III. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.404 and Add.1)

A. Introduction (A/CN.4/L.404)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

45. Mr. YANKOV (Special Rapporteur) said that the numbers of the draft articles referred to in subparagraph (b) should be amended to read "36 to 43".

Paragraph 5, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.404/Add.1)

Paragraph 6

46. Mr. OGISO (Rapporteur) proposed that the texts of draft articles 36, 37 and 41 to 43 as submitted by the Special Rapporteur in his seventh report (A/CN.4/400) should be deleted from footnote 4. Their inclusion in the Commission's report in addition to the texts of the draft articles adopted by the Commission on first reading might create confusion in the Sixth Committee of the General Assembly.

47. Mr. McCAFFREY said he agreed with the Rapporteur that the inclusion of the texts of the draft articles submitted by the Special Rapporteur would cause confusion in the Sixth Committee. Normally, the report

did not include the texts of draft articles submitted by the Special Rapporteur which had not yet been adopted by the Commission.

48. He pointed out that, in the second and last sentences of paragraph 6, the word “to” following the word “explanations” should be replaced by “concerning”.

It was so agreed.

49. Mr. CALERO RODRIGUES, supported by Mr. NJENGA, said that, even though articles had been adopted by the Commission on first reading, it would be helpful to representatives in the Sixth Committee if the texts of draft articles 36, 37 and 41 to 43 as submitted by the Special Rapporteur were reproduced in footnote 4.

50. Sir Ian SINCLAIR said that he was inclined to agree with the Rapporteur. The Commission should endeavour to maintain uniformity in the various chapters of its report. Since draft articles submitted by the Special Rapporteur for jurisdictional immunities of States and their property had not been included in chapter II of the draft report, it would be preferable not to include the draft articles in question in chapter III. Moreover, if those draft articles were reproduced in the footnote, representatives in the Sixth Committee might be led to make comparisons between them and the articles adopted by the Commission.

51. Chief AKINJIDE said he agreed that the inclusion of the draft articles in footnote 4 was bound to cause confusion in the Sixth Committee and suggest that the Sixth Committee was being asked to choose between the two sets of articles. Special rapporteurs were, after all, responsible to the Commission, not to the Sixth Committee, and once their proposals had been considered by the Commission, there was no need to submit them to the Sixth Committee. The draft articles should therefore be deleted from footnote 4.

52. Mr. McCAFFREY agreed with the view expressed by Chief Akirjide. There might be grounds for reproducing the draft articles in the report if the Commission had discussed them at length at the current session, but that had not been the case. Moreover, as Sir Ian Sinclair had pointed out, it was necessary to maintain some balance between the various chapters of the report. If the Commission decided to retain the draft articles in footnote 4, it would have to do the same in the chapter on jurisdictional immunities of States and their property. Otherwise, representatives in the Sixth Committee would inevitably wonder why the two topics had been treated differently.

53. Mr. REUTER said he also considered that the Special Rapporteur’s role was to report not to the Sixth Committee, but to the Commission, and that the Sixth Committee could not be regarded as a court of appeal. The first version of a text should be reproduced in the Commission’s report only when there was a commentary explaining how that version had served as a point of departure for the final text. In the case under consideration, however, the inclusion of the draft articles submitted by the Special Rapporteur might imply that there was some disagreement between the Commission and the Special Rapporteur. That was, in fact, not at all

true, since the Special Rapporteur’s proposals had been followed in almost every case and few changes had been made to the texts he had submitted.

54. Mr. ILLUECA said that he agreed with the view expressed by Mr. Calero Rodrigues. It had to be borne in mind that the Commission’s documents were intended not only for the Sixth Committee and the General Assembly, but also for world legal opinion. The Commission’s report should therefore describe all aspects of the work that had been done and reproduce all the texts the Commission had had before it. It would, moreover, be only common courtesy to defer to the Special Rapporteur’s wishes. Although the Commission had proceeded differently in other cases, each Special Rapporteur had his own working methods and should be able to express his views.

55. Mr. YANKOV (Special Rapporteur) said that, in reproducing the texts of the draft articles, he had simply intended to facilitate the consideration of the topic by the Sixth Committee. The draft articles had, after all, been discussed at the current session and representatives in the Sixth Committee were quite capable of distinguishing between them and the articles adopted by the Commission. However, in a spirit of compromise and to expedite the Commission’s work, he would not insist on the inclusion of the texts of the draft articles in footnote 4 to paragraph 6.

56. Mr. USHAKOV said that he shared the view of the Special Rapporteur, whose seventh report contained not only draft articles, but also commentaries reflecting legal developments. All, not part, of his report should therefore be reproduced. His own suggestion was that footnote 4 to paragraph 6 should simply indicate the symbol of the seventh report, “A/CN.4/400”, which contained the draft articles submitted by the Special Rapporteur.

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7

Paragraph 7 was adopted with minor drafting changes.

Paragraph 8

57. Mr. OGISO (Rapporteur) proposed that the words “thus completing the adoption on first reading of the whole set of draft articles on the topic”, in the second sentence, should be deleted.

It was so agreed.

Paragraph 8, as amended, was adopted.

New paragraph 8 bis

58. Mr. OGISO (Rapporteur) proposed the addition of the following new paragraph 8 bis:

“Also at its 1980th meeting, on 2 July 1986, the Commission adopted the whole set of draft articles on the topic. The texts are reproduced in section D.1 of the present chapter.”

It was so agreed.

59. Mr. USHAKOV proposed that the words "on first reading" should be inserted after the word "adopted".

It was so agreed.

New paragraph 8 bis, as amended, was adopted.

New paragraph 8 *ter*

60. Mr. OGISO (Rapporteur) proposed the addition of the following new paragraph 8 *ter*:

"At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles set out in section D.1 of the present chapter, through the Secretary-General, to the Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General not later than 1 January 1988."

A similar paragraph was contained in chapter II of the report, dealing with jurisdictional immunities of States and their property.

New paragraph 8 ter was adopted.

Section B, as amended, was adopted.

The meeting rose at 1.10 p.m.

1988th MEETING

Thursday, 10 July 1986, at 3.15 p.m.

Chairman: Mr. Doudou THIAM

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

Draft report of the Commission on the work of its thirty-eighth session (*continued*)

CHAPTER III. *Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier* (concluded) (A/CN.4/L.404 and Add.1)

C. *Tribute to the Special Rapporteur, Mr. Alexander Yankov* (A/CN.4/L.404/Add.1)

Paragraph 9

Paragraph 9 was adopted.

Section C was adopted.

D. *Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier* (A/CN.4/L.404/Add.1)

SUBSECTION 1 (Texts of the draft articles provisionally adopted by the Commission on first reading)

Section D.1 was adopted.

SUBSECTION 2 (Texts of draft articles 28 to 33, with commentaries thereto, provisionally adopted by the Commission at its thirty-eighth session)

Commentary to article 28 (Protection of the diplomatic bag)

Paragraph (1)

1. Mr. USHAKOV proposed that, since the Commission's discussions could not be described as a process of negotiation, the phrase "to submit to the General Assembly ... made in the Assembly", in the second sentence, should be replaced by "to adopt article 28 in its present form, as the observations and suggestions to be made by Governments".

2. Mr. McCAFFREY and Mr. LACLETA MUÑOZ endorsed that proposal.

3. Sir Ian SINCLAIR also supported Mr. Ushakov's proposal. In addition, he proposed that, in the first sentence, the words "much discussion" should be replaced by "lengthy discussion".

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (1) with the amendments proposed by Mr. Ushakov and Sir Ian Sinclair.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved with minor drafting changes.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved with some drafting changes.

Paragraph (7)

5. Mr. CALERO RODRIGUES proposed that, in the second sentence, the words "means of violating" should be amended to read: "means of examination which might result in the violation of".

It was so agreed.

6. Mr. McCAFFREY proposed that the word "sentence", in the first, second and last sentences, should be replaced by "phrase". He also proposed that, in the third sentence, the words "in exceptional cases" should be added after the word "possibility".

It was so agreed.

7. Mr. OGISO said that the words "the characteristics of today's international relations", in the third sentence, might give the impression that abuses of the diplomatic bag were a constant feature of modern-day international relations.

8. Mr. KOROMA, supporting the view expressed by Mr. Ogiso, proposed that the words “the characteristics” should be replaced by “certain characteristics”.

It was so agreed.

9. Mr. MAHIU pointed out that the English and Spanish texts consisted of four sentences, whereas the French text contained only three, and that the last part of the third sentence of the French text began with the words *d'après eux*, which did not appear in the English and Spanish texts. It was not at all clear whether those words referred to the view of the “Other members of the Commission” mentioned at the beginning of the third sentence or to the view of all members.

10. Sir Ian SINCLAIR, supported by Mr. LACLETA MUÑOZ, proposed that the English and Spanish texts should be brought into line with the French text by adding the words “In the view of those members” at the beginning of the fourth sentence.

It was so agreed.

11. Mr. McCAFFREY proposed that, in the third sentence, the words “subjecting the bag to electronic scanning or other technical devices” should be replaced by “subjecting the bag to security checks by means of scanning with electronic or other technical devices”.

It was so agreed.

12. Chief AKINJIDE said that, during the discussion, he and several other members had drawn attention to the fact that many airlines would not accept luggage which had not been scanned. He therefore proposed that the following sentence should be added at the end of paragraph (7): “The point was also made that bags and other luggage which had not been scanned would not be accepted by many airlines.”

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

13. Chief AKINJIDE said that, since there had been cases in which the diplomatic bag had been used to carry unwilling passengers, the third sentence should include a reference to the “transport of human beings”.

14. Mr. LACLETA MUÑOZ, supporting the view expressed by Chief Akinjide, proposed that the words “and even for the transport of human beings” should be added after the words “or other items” in the third sentence.

15. Mr. MAHIU said that the purpose of the third sentence was to deal with the problem of the smuggling of foreign currency, narcotic drugs and arms. Kidnaping was an entirely different problem.

16. Sir Ian SINCLAIR said that the commentary had to draw attention to contemporary international practice and therefore had to take account of the problem raised by Chief Akinjide. In 1964, a diplomatic bag had been opened at Rome Airport and a human being had been found inside. In London, in 1983, there had been an attempt to pass off as a diplomatic bag a crate con-

taining two people. In order to cover the case of attempt, he proposed that the words “or attempted to be used” should be added after the words “the diplomatic bag being used” in the third sentence.

17. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (8) with the amendments proposed by Mr. Lacleta Muñoz and Sir Ian Sinclair.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

Paragraph (9) was approved.

Paragraph (10)

Paragraph (10) was approved with minor drafting changes.

Paragraph (11)

Paragraph (11) was approved.

Paragraph (12)

18. Sir Ian SINCLAIR suggested that the last part of the last sentence, beginning with the words “as the satisfaction of the receiving State”, should be replaced by the following text: “since, on the one hand, the receiving State could always request more stringent protection measures, namely the opening of the bag, and since, on the other hand, it was left to the subjective appreciation of the competent authorities of the receiving State to determine whether the examination of the bag through electronic or other technical devices satisfied them”. Such wording would more objectively reflect the objections that had been raised to the proposal referred to in the paragraph.

19. Mr. MAHIU said that he was one of the members whose view was reflected in the last sentence. He proposed that that sentence should be amended to read: “Some members found this proposal illogical, contrary to existing law and questionable in so far as it would involve a multiplicity of controls and make satisfaction of the receiving State dependent on subjective criteria, and would, moreover, not require automatic release of the bag for lack of evidence.”

20. Mr. USHAKOV proposed that the following sentence should be added at the end of paragraph (12) to reflect his own views: “One member was of the opinion that this provision was illogical and absurd, as it in fact provided not for an option for the receiving State, but rather for the exercise by that State of two measures of control, one after the other.”

21. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (12) with the amendments proposed by Mr. Mahiou and Mr. Ushakov.

It was so agreed.

Paragraph (12), as amended, was approved.

The commentary to article 28, as amended, was approved.

Commentary to article 29 (Exemption from customs duties, dues and taxes)

Paragraph (1)

Paragraph (1) was approved with a minor drafting change.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved with minor drafting changes.

The commentary to article 29, as amended, was approved.

Commentary to article 30 (Protective measures in case of *force majeure* or other circumstances)

Paragraph (1)

Paragraph (1) was approved with minor drafting changes.

Paragraph (2)

22. Sir Ian SINCLAIR proposed that, in the first sentence, the words "such as death or an accident" should be amended to read "such as death, serious illness or an accident".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

Paragraph (5)

Paragraph (5) was approved with a minor drafting change.

Paragraph (6)

23. Sir Ian SINCLAIR proposed that, in the third sentence, the words "adverse weather conditions" should be inserted between the words "such as" and "the forced landing".

It was so agreed.

24. Mr. McCAFFREY proposed that, in the fourth sentence, the words "the transit State in the case of *force majeure*" should be replaced by "a State through which a bag transits due to *force majeure*".

It was so agreed.

Paragraph (6), as amended, was approved subject to a correction in the Spanish text.

Paragraph (7)

Paragraph (7) was approved with minor drafting changes.

Paragraph (8)

25. Mr. CALERO RODRIGUES proposed that the last sentence should be deleted because the example to

which it referred was not consistent with what was stated in the five preceding sentences.

It was so agreed.

Paragraph (8), as amended, was approved.

The commentary to article 30, as amended, was approved.

Commentary to article 31 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

Paragraph (1)

Paragraph (1) was approved with a minor drafting change.

Paragraph (2)

Paragraph (2) was approved subject to a minor correction in the French text.

Paragraph (3)

26. Mr. McCAFFREY proposed that paragraph (3) should be divided into two paragraphs, to be numbered (3) and (3 *bis*). The new paragraph (3) would consist of the first four sentences, and paragraph (3 *bis*) of the five remaining sentences, of the present paragraph (3). The explanation of draft article 31 would thus be dealt with separately, in the new paragraph (3 *bis*).

It was so agreed.

New paragraph (3) was approved with minor drafting changes.

New paragraph (3 *bis*)

27. Mr. McCAFFREY proposed that, since the view expressed in the penultimate sentence had not been that of the majority, the words "Most members" should be replaced by "Several members".

It was so agreed.

28. Sir Ian SINCLAIR proposed that, in the second sentence of the new paragraph (3 *bis*), the words "It thus purports to cover the legal protection" should be amended to read "It is thus designed to provide for the legal protection".

It was so agreed.

*New paragraph (3 *bis*), as amended, was approved with minor drafting changes.*

Paragraph (4)

29. Sir Ian SINCLAIR proposed that, in the first sentence, the word "strongly" should be added after the word "felt".

It was so agreed.

30. He further proposed that, in the same sentence, the words "as some expression of bilateral relations" should be replaced by "in the context of their bilateral relations".

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

31. Sir Ian SINCLAIR proposed that, in the first sentence, the words “While opting for the deletion ... a consensus to the effect that the granting” should be replaced by “The Commission was unanimously of the view that the granting”.

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 31, as amended, was approved.

Commentary to article 32 (Relationship between the present articles and existing bilateral and regional agreements)

Paragraph (1)

Paragraph (1) was approved with a minor drafting change.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved with minor drafting changes.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

Paragraph (5) was approved subject to a correction.

The commentary to article 32, as amended, was approved.

Commentary to article 33 (Optional declaration)

Paragraph (1)

32. Sir Ian SINCLAIR proposed that, in the third sentence, the words “to all categories of couriers” should be amended to read “to those categories of couriers”.

It was so agreed.

33. Mr. USHAKOV, noting that draft article 33, paragraph 1, referred to a declaration specifying any category of diplomatic courier and diplomatic bag to which the present articles would not apply, said that paragraph (1) of the commentary had obviously been written before the draft article itself had been amended. He therefore proposed that, at the end of the first sentence of paragraph (1) of the commentary, the words “to which they intend the articles to apply” should be replaced by “to which they did not intend to apply the articles”.

It was so agreed.

Paragraph (1), as amended, was approved with minor drafting changes.

Paragraph (2)

34. Sir Ian SINCLAIR proposed that the words “or States wishing to become parties” should be added after the words “States parties”.

It was so agreed.

35. Mr. KOROMA proposed that the following sentence should be added at the end of paragraph (2): “One member raised the question whether such a provision detracted from the effort to harmonize the law in this area.”

It was so agreed.

36. Mr. YANKOV (Special Rapporteur), replying to a question raised by Mr. Riphagen, said that draft article 33 did not provide for any kind of reservation; it was an agreed option placed at the disposal of States parties or States wishing to become parties to the future convention.

37. Sir Ian SINCLAIR proposed that the words “with respect to the various provisions” should be added after the words “agreed option” in what was now the first sentence.

It was so agreed.

38. Mr. REUTER proposed that the words “but an agreed option”, in the first sentence, should be amended to read “but was the implementation of an agreed option”.

It was so agreed.

39. Mr. USHAKOV proposed that, since a reservation was always unilateral, the words “of a unilateral character”, in the first sentence, should be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

New paragraph (2 bis)

40. Mr. FLITAN proposed that the following new paragraph (2 bis) should be added after paragraph (2):

“One member of the Commission considered that the inclusion of article 33 could make it possible for States unilaterally to modify the legal régimes established by the four codification conventions to which they were parties.”

It was so agreed.

New paragraph (2 bis) was approved.

Paragraph (3)

41. Sir Ian SINCLAIR proposed that, in the first sentence, the words “the opportunity at which” should be amended to read “the time at which”, and that, in the second sentence, the words “As to the opportunity” should be replaced by “As to the timing”.

It was so agreed.

42. He further proposed that, in the fourth sentence, the words “The opportunity” should be replaced by “The further option”.

It was so agreed.

Paragraph (3), as amended, was approved with minor drafting changes.

Paragraph (4)

Paragraph (4) was approved with minor drafting changes.

Paragraph (5)

43. Mr. CALERO RODRIGUES proposed that the words "(signatory States not yet having ratified and States having consented to be bound by the treaty when the latter has not yet entered into force)", at the end of the third sentence, should be deleted. If the future convention was to be open to all States, it would be necessary for all States, not just the two categories referred to in the phrase in brackets, to be notified.

44. Mr. YANKOV (Special Rapporteur) said that there could be States other than those in the two categories in question, but since the words in brackets might be somewhat misleading, he could agree to their deletion.

45. Sir Ian SINCLAIR said that he fully supported the proposal made by Mr. Calero Rodrigues. The question of the States that would be entitled to become parties to the future convention would be decided by a conference of plenipotentiaries. The practice nowadays was to entitle all States to become parties to a convention of that kind. The formula "States entitled to become Parties to the present articles" should therefore not be limited in any way.

46. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (5) with the amendment proposed by Mr. Calero Rodrigues and some minor drafting changes.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were approved with minor drafting changes.

The commentary to article 33, as amended, was approved.

Section D.2, as amended, was adopted.

Chapter III of the draft report, as amended, was adopted.

The meeting rose at 4.40 p.m.

1989th MEETING

Friday, 11 July 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso,

Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-eighth session (concluded)

CHAPTER V. Draft Code of Offences against the Peace and Security of Mankind (concluded)* (A/CN.4/L.406 and Add.1)

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.406 and Add.1)

Paragraph 65 (concluded) (A/CN.4/L.406/Add.1)

1. Sir Ian SINCLAIR recalled that, at the 1987th meeting, Mr. Francis had raised a number of questions regarding the relationship between paragraphs 65 and 80 of chapter V of the Commission's draft report. Following informal consultations between the Special Rapporteur, Mr. Francis and himself, it had been agreed that the following footnote to paragraph 65 would adequately reflect all the points of view expressed:

"Although the question of exculpatory pleas and extenuating circumstances, which is inextricably linked to the determination and extent of responsibility and at the same time to exceptions to criminal responsibility, was referred to under this heading by the Special Rapporteur in his fourth report (A/CN.4/398, paras. 177-184), it was not discussed in detail in the Commission. The observations made by members of the Commission on this question are summarized in paragraph 115 of the present report. The Special Rapporteur and the Commission will revert to the question of exculpatory pleas and extenuating circumstances at a later stage in their work on this topic."

2. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the text proposed by Sir Ian Sinclair.

It was so agreed.

Paragraph 65, as amended, was adopted.

Section B, as amended, was adopted.

Chapter V of the draft report, as amended, was adopted.

The draft report of the Commission on the work of its thirty-eighth session as a whole, as amended, was adopted.

Closure of the session

3. The CHAIRMAN thanked the members of the Commission for their co-operation, which had made it possible to achieve effective results. The end of the current session also corresponded, in some measure, to the completion of the mandate of the present members, since new elections would be held before the thirty-ninth

* Resumed from the 1987th meeting.

session. He paid tribute, on behalf of the Commission as a whole, to those members who had announced their intention not to seek a new mandate for the contribution they had made, and in particular to Mr. Ushakov, who was the second most senior member and who had left a special mark on the Commission with his knowledge, personality and the strength of his convictions. He also expressed appreciation to the members of

the Bureau, who had made his own task much easier, and to the secretariat.

4. After an exchange of congratulations and thanks, he declared the thirty-eighth session of the International Law Commission closed.

The meeting rose at 10.50 a.m.

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