Document:-

A/CN.4/L.379

Draft articles on jurisdictional immunities of states and their property. Texts adopted by the Drafting Committee: articles 13, 14, 16, 17 and 18 - reproduced in A/CN.4/SR.1868 and SR. 1869

Topic:

Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-

1984, vol. I

therefore, there was every reason to treat international crimes and acts of aggression in separate articles. Mr. Balanda had suggested that the provision in regard to aggression should be amplified, in particular by a reference to a threat of the use of force or to preparatory acts. That, however, would be entering further into the realm of primary rules than was strictly necessary for the topic. Moreover, the Definition of Aggression was fairly explicit and he did not think that the Commission could go much beyond that.

41. Mr. Balanda had also mentioned the possibility of regional systems of *jus cogens* or regional law on international crimes. Special régimes would be allowed under article 2, but he did not think such a course would be possible in the case of international crimes, within the meaning of article 19 of part 1 of the draft, which would appear to refer only to universal régimes.

42. The possibility of fuller, or alternative, wording for article 14, paragraph 3, had been suggested and it was, of course, a matter for discussion. However, reference by analogy was being made to the United Nations Charter procedures. It was perhaps going too far at the current stage in international relations, but he would point out that article 14, paragraph 1, which spoke of the "applicable rules accepted by the international community as a whole", was to be viewed as a window on the future development of the international community as a whole.

43. It had been affirmed that article 16 was not exhaustive but, in his view, it could not be anything but exhaustive; otherwise, the other articles would make no sense. The intention was that article 16 should exclude from the draft a number of questions not directly related to the rights and obligations of States *inter se*, as well as some questions which it would be better to leave to other bodies to develop.

44. Mr. Balanda's remark regarding article 1 should be dealt with on second reading, since that article had already been provisionally adopted by the Commission. The same was true of articles 27 and 28 of part 1 of the draft. He had not perhaps responded to all the questions raised, but assured members that he would endeavour to reflect in the relevant part of the Commission's report all the views expressed during the debate.

45. Mr. REUTER said he would like to know whether the Special Rapporteur wished to refer the draft articles to the Drafting Committee and would also like to learn the views of other members of the Commission in that regard.

46. Mr. USHAKOV said that, in principle, he was not opposed to referral to the Drafting Committee of the articles which had been discussed. In the present instance, however, not all members had spoken on the draft articles, or some members, like himself, had commented on only some of them because of lack of time. Moreover, the Special Rapporteur might like to modify the articles in his next report so as to take account of the views expressed during the debate. For that reason, it might be useful to revert to consideration of the draft articles at the following session, before referring them to the Drafting Committee.

47. Mr. LACLETA MUÑOZ, supported by Mr. McCAFFREY, suggested that the Commission should refer to the Drafting Committee only articles 5 to 9, for they were the ones on which most of the comments had been made.

48. Mr. THIAM said that the discussion had obviously not come to an end, since a number of members, in a spirit of co-operation, had not spoken on the topic. He would have some reservations about referring the draft articles to the Drafting Committee, for he wished to express his views on some of them.

49. Mr. MAHIOU said he shared the view of Mr. Thiam, since he too had not taken part in the discussion, first because he had not wished to delay the Commission's work still more, and secondly because his duties in the Drafting Committee had prevented him from examining them in detail. If the articles were to be referred to the Drafting Committee, he would reserve the right to comment on them at the following session.

50. Mr. FRANCIS, supported by Sir Ian SINCLAIR and Mr. OGISO, suggested that articles 5 and 6, at least, should be referred to the Drafting Committee.

51. Mr. QUENTIN-BAXTER said that he could agree to that suggestion, on the understanding that the topic of State responsibility would be the first item taken up at the next session.

52. Mr. RIPHAGEN (Special Rapporteur) said he believed the correct course would be to refer articles 5 and 6 to the Drafting Committee, but any member who had not had an opportunity to speak on them would be able to do so at the next session.

53. The CHAIRMAN suggested, in the light of the comments made, that the Commission should refer articles 5 and 6 to the Drafting Committee, on the understanding that at its thirty-seventh session the topic of State responsibility would be taken up at an early stage and that comments on articles 5 and 6 would be allowed.

It was so agreed.

The meeting rose at 1.05 p.m.

1868th MEETING

Friday, 20 July 1984, at 3.30 p.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

Jurisdictional immunities of States and their property (*continued*) * (A/CN.4/L.379)

[Agenda item 3]

Draft articles proposed by the Drafting Committee

Articles 13, 14 and 16

1. Mr. MAHIOU (Chairman of the Drafting Committee) said that, before introducing the draft articles on jurisdictional immunities of States and their property recommended by the Drafting Committee to the Commission for provisional adoption (A/CN.4/L.379), he wished to indicate briefly the status of the Committee's work on the draft articles referred to it on various topics.

2. The workload of the Drafting Committee had been particularly heavy at the preceding sessions of the Commission, and owing to lack of time it had been unable to consider, at a given session, all the draft articles referred to it. Of the 27 draft articles before it at the current session on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it still had eight to consider. It had considered all five draft articles referred to it on the topic of jurisdictional immunities of States and their property, although it had left aside some of them, including articles 6 and 11, which were to be taken up at the appropriate time, after consideration of part III of the draft articles had been completed.

3. The Drafting Committee had been unable to consider the nine draft articles on the law of the non-navigational uses of international watercourses which had been referred to it only recently. The draft articles on the topic of State responsibility left pending in the Committee at the previous session of the Commission had been withdrawn by the Special Rapporteur and two of the new draft articles submitted by him in his fifth report (A/CN.4/380) had been referred to the Drafting Committee at the 1867th meeting.

4. Thus the Drafting Committee, which had taken the unprecedented step of holding its first meeting during the first week of the current session, had held a total of 28 meetings, at which it had considered 24 draft articles on two topics. It still had before it 19 draft articles; eight on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, nine on the law of the non-navigational uses of international watercourses and two on State responsibility.

5. With regard to the draft articles on jurisdictional immunities of States and their property, he wished to thank the Special Rapporteur and all members of the Drafting Committee for their tireless efforts in the consideration of the topic. The Special Rapporteur had again displayed remarkable ingenuity by continuously providing the Committee with new texts, revised to take account of the preoccupations expressed by members of the Commission or the Committee itself.

6. In all five draft articles which it had considered, namely articles 13, 14, 16, 17 and 18, the Drafting Committee had included the introductory phrase "unless otherwise agreed between the States concerned", as an indication of the residual nature of the various rules set forth. However, the Committee recommended that, on second reading, the Commission should consider whether a more general, separate provision should be prepared to avoid repetition of the phrase in the various articles.

Article 13 (Contracts of employment)

7. The Drafting Committee proposed the following text for article 13:

Article 13. Contracts of employment

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

2. Paragraph 1 does not apply if:

(*a*) the employee has been recruited to perform services associated with the exercise of governmental authority;

(*b*) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

(*c*) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(*d*) the employee is a national of the employer State at the time the proceeding is instituted;

(*e*) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

8. The Drafting Committee had had before it not only the original version of draft article 13 as submitted by the Special Rapporteur in his fifth report (A/CN.4/363 and Add.1),[1] but also the revised text of that article submitted to the Committee by the Special Rapporteur at the previous session of the Commission[2] and reproduced in document ILC (XXXVI)/Conf.Room Doc.1. The basic thrust of the article had been retained, although a number of drafting changes had been made in the interests of clarity.

9. The wording of paragraph 1 of article 13 had been based on that of article 15, provisionally adopted by the Commission.[3] The words "considered to have consented to the exercise of jurisdiction", which had appeared in the revised text of article 13, had been replaced by "cannot be invoked". In addition, drawing on both the original text and the revised version of article 13 submitted by the Special Rapporteur, paragraph 1 stipulated that the

* Resumed from the 1841st meeting.

[1] See *Yearbook ... 1983*, vol. II (Part Two), p. 18, footnote 54. For the discussion of draft article 13 at the thirty-fifth session of the Commission, see *Yearbook ... 1983*, vol. I, pp. 49 *et seq.*, 1763rd to 1766th meetings and 1767th meeting, paras. 1-8.

[2] See *Yearbook ... 1983*, vol. II (Part Two), p. 20, footnote 58.

[3] See 1833rd meeting, footnote 4 (*k*).

subject-matter related to "a contract of employment between the State and an individual for services performed or to be performed". The application of the rule was thus subject to two conditions; first, the employee must have been recruited in the other State and, secondly, he must be covered by any social security provisions in force in that other State. Those qualifications had been added in the light of the comments made during the debate in the Commission and were intended to highlight the necessary link or contact between the employee and the State before whose courts the action was brought. It should be noted, however, that the reference to "social security provisions which may be in force" had been made flexible to take account, first, of the fact that, under the internal labour legislation of some States, an employee might be required to join a social security scheme, while in other States such coverage might be optional, and, secondly, of the provisions of article 33 of the 1961 Vienna Convention on Diplomatic Relations.

10. In paragraph 2, the five subparagraphs proposed by the Special Rapporteur in his revised version of the article had been retained. In subparagraph (*a*), the Committee had considered it preferable to refer to the "employee" rather than to the "individual" and to make it clear that he had been "recruited to perform services associated with" the exercise of governmental authority, on the grounds that it would give rise to confusion if the words "appointed under the administrative law of the employer State" were used, as States had different practices, procedures and regulations regarding appointments and recruitment. The reference to "services associated with the exercise of governmental authority" was intended to convey a broader criterion than that originally proposed, since the text should cover lower ranking employees who, while not being formally entrusted to perform functions in the exercise of the employer State's governmental authority, nevertheless performed services which, in one way or another, involved, or were "associated with", the exercise of governmental authority. The matter related to an employer State having given the employee a measure of trust in respect of certain aspects of the exercise of governmental authority.

11. Subparagraph (*b*) had been redrafted to indicate clearly that a State would be immune in a proceeding that was intended to force an employer State to recruit, reinstate or renew the contract of employment of an individual. However, the subparagraph did not relate to a proceeding whose purpose was to obtain monetary compensation or damages for breach of contract or for acts of an employer State alleged to be in violation of the local labour laws or regulations.

12. Subparagraphs (*c*) and (*d*) remained basically the same as those proposed by the Special Rapporteur in his revised text. Their order had simply been reversed to reflect the logical sequence of the events provided for in the two subparagraphs. Subparagraph (*d*) provided immunity for the employer State, in addition to that provided in subparagraph (*c*). There was no need to refer in subparagraph (*c*) to the possibility of the employee and the employer State reaching some other agreement, since subparagraph (*e*) provided for just such an eventuality by stipulating that the rule of non-exemption from jurisdiction set out in paragraph 1 did not apply if the employee and the employer State had otherwise agreed in writing. Nevertheless, the Drafting Committee had shared the Special Rapporteur's view that such a provision did not mean that the parties to the contract were completely free. Often, for reasons of public policy, States conferred on their courts exclusive jurisdiction in some matters, regardless of any clauses that might have been written into contracts with a view to precluding such jurisdiction. Accordingly, subparagraph (*e*) contained a final clause covering that point. In the revised version of that subparagraph, the Special Rapporteur had referred to the "subordinate rank of the employee", but the Committee had taken the view that that consideration was not relevant and had thus deleted it from the text proposed to the Commission. Finally, the title of article 13 proposed by the Drafting Committee remained the same as that proposed by the Special Rapporteur.

13. In conclusion, he pointed out that some members of the Drafting Committee, himself among them, had expressed reservations with regard to the article as a whole, which they considered to be unnecessary and even counter-productive, in that it might discourage foreign States from recruiting employees in the State of the forum and from placing them under the social security provisions in force in that State. Furthermore, in the view of one member of the Committee, the basic criterion governing the application of the rule of non-immunity set out in paragraph 1 should be whether the employee was a national or permanent resident of the State of the forum at the time when the contract was concluded. The member in question had prepared and distributed to the Committee a version of article 13 reflecting that position.

14. Mr. USHAKOV said that, as a confirmed believer in the jurisdictional immunities of States, he was opposed, on principle, to almost all the articles proposed by the Drafting Committee. He also had serious doubts regarding the wording of article 13, which concerned the competence of the courts of the forum State in matters involving contracts of employment concluded between employer States and individuals. According to the text of the article, that competence extended to individuals who were nationals or permanent residents of the forum State. That raised numerous questions.

15. First, was the court to apply the law of the employer State or that of the forum State? If the applicable law was that of the employer State, why would the case be brought before a court of the forum State rather than of the employer State? If the applicable law was that of the forum State, why did the article provide for two different régimes for a single category of employees, depending on whether they were nationals of the employer State or of the forum State? Secondly, where the applicable law was that of the forum State, it was because it was considered more favourable to the employee in question than the law of the employer State. However,

what evidence was there that that assumption, rather than the contrary, was valid? Thirdly, proceedings would be instituted against the State, and not against a State enterprise. Finally, proceedings were very costly, and a State against which a proceeding was brought would incur unnecessary expenditures.

16. Mr. KOROMA said that the universally recognized rule was that a State was immune from jurisdiction unless it consented to waive immunity. The Commission must be careful not to allow the exception to that rule to replace the rule itself. In spite of the efforts made by the Special Rapporteur to reconcile divergent views, the Commission was far from achieving a consensus on draft article 13. His own position was that the draft article challenged the rule whereby States were immune from the jurisdiction of other States and that, if it were adopted, there would be the possibility that States might on occasion be dragged into court proceedings. Apart from the costs involved, no State would care to find itself in that position. Finally, since not every State had the type of social security system to which the text referred, the article would apply to only a limited number of States. While he would not object to the provisional adoption of the draft article by the Commission, he hoped that further endeavours would be made to find a formula that satisfied all points of view.

17. Mr. NI regretted that he found himself unable to agree with the thought behind article 13 and considered that it should not have a place in the draft articles. He had on previous occasions, both in the Commission and in the Drafting Committee, stated his reasons for taking that position. He was grateful to the Special Rapporteur for the effort he had made in reshaping the draft article by removing the notion of presumed consent. Nevertheless, exceptions were still exceptions and would reduce the principle of the sovereign immunity of States to an expression of nominal value. In fact, the text under consideration appeared to present a more restrictive view than the restrictive practice in certain States, inasmuch as it provided for the possibility of directly disallowing jurisdictional immunity without even requiring the consent of the State proceeded against. However, he would remain flexible and would not object to the provisional adoption of draft article 13, if the Commission so decided, in the hope that there was still time for further reflection, reconsideration and readjustment before it was made final. He requested that his observations should be fully reflected in the report of the Commission.

18. Mr. McCaffrey supported article 13 as a necessary element in the draft articles in the light of the approach adopted by the Commission, namely not to endeavour to include broad and general principles concerning exceptions, but rather to identify specific areas in which State practice had recognized such exceptions and to give them thorough consideration. He wished to reserve his position on paragraph 2 (*b*), which was perhaps too broadly drafted. The Chairman of the Drafting Committee had explained that the intention was not to preclude an action for damages for failure to hire or rehire, but to preclude an attempt to coerce a State into rehiring an individual employee. Perhaps the text could be amended on second reading to reflect that intent more accurately. It was true that not all States that took a so-called functional or restrictive approach to questions of sovereign immunity had special provisions of the kind contained in the draft articles, but most of those that did not, including his own country, handled such matters under the broader heading of trading and commercial activities. However, as the Special Rapporteur had noted on several occasions, the Commission had not taken the broader approach.

19. Chief AKINJIDE expressed serious concern with regard to draft article 13. He recalled that the United States of America had enacted the *Foreign Sovereign Immunities Act of 1976*, which restricted the immunity of States in a number of matters, particularly in commercial transactions. With the *State Immunity Act 1978*, the United Kingdom had perpetrated considerable demolition work in respect of immunities. Since that time, the interpretation of the two Acts had been expansive and elastic in the national courts. To that legislation, the Commission was proposing to add articles 13, 16 and 18. It must be aware that, in so doing, it was progressively diminishing and demolishing the immunity of States. The countries most affected by the provisions of the draft articles would be the developing countries. For example, insurance policies on goods imported into developing countries were usually taken out in Europe or the United States. When such goods were lost, the insurance companies refused to pay. When his own country had enacted that all goods must be insured within the country, they had started to vanish in a mysterious way and the local insurers had been saddled with enormous claims far outstripping their ability to pay. If the draft articles were adopted, the resources and interests of the developing countries would be seriously jeopardized.

20. He associated himself with the view expressed by previous speakers that draft article 13, although very ingeniously worded, was not in the interests of the community of nations. Many foreign embassies in developing countries recruited hardly any local staff, since they could afford to bring out their own nationals to work for them. However, the embassies of developing countries in the developed countries had to recruit local staff, and the effect of article 13 would be to make many foreign Governments objects of ridicule.

21. Mr. MAHIOU (Chairman of the Drafting Committee), speaking as a member of the Commission, said that, in endeavouring, quite rightly, to protect the legitimate rights of employees—although in practice the cases envisaged would be few—draft article 13 would achieve a paradoxical result, in that it would encourage States to avoid any contentious situation simply by refusing to recruit local personnel, whether they were nationals or permanent residents of the forum State. The resulting detrimental effect on the local employment situation could present problems, particularly in forum States with high rates of unemployment. However, in a spirit of compromise, he had not opposed the adoption of draft article 13 by the Drafting Committee.

22. Mr. BALANDA shared the view expressed by Mr. Mahiou. The protection afforded to States under the provisions of draft article 13, paragraph 2 (*a*), was not

sufficient to safeguard the interests of countries, particularly developing countries, since it concerned only "services associated with the exercise of governmental authority". The situation referred to by Chief Akinjide was very real, and the Commission should proceed on the basis of realities. The current trend among developed countries was to assign to their diplomatic missions in developing countries staff recruited within their own territories, thus bypassing the local labour force. Unfortunately the converse was not true, since developing countries did not have sufficient means to send their nationals to work in their missions abroad. In practice, it was only the developing countries that would be affected by the provision of paragraph 1, regarding which he had grave reservations.

23. The CHAIRMAN, speaking as a member of the Commission, said that he appreciated the Special Rapporteur's efforts to make draft article 13 as flexible as possible. However, for reasons he had previously stated,[4] and as a matter of principle as far as the nature and scope of State immunity was concerned, he wished to associate himself with the reservations already expressed by most of the previous speakers on that draft article. While it was true that the phrase "unless otherwise agreed between the States concerned" had been introduced in paragraph 1, and that paragraph 2 (*a*) also contained a limitation, the end result of the article would nevertheless be a significant restriction of State immunities. His second objection was that the application of that article would do more harm than good, even as far as local employees of foreign employer States were concerned.

24. Speaking as Chairman, he said that if there were no further comments, he would take it that, with the reservations stated, the Commission wished provisionally to adopt draft article 13.

It was so agreed.

Article 13 was adopted.

ARTICLE 14 (Personal injuries and damage to property)

25. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 14:

Article 14. Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

26. As in the case of article 13, the Drafting Committee had had before it both the original version of article 14 submitted by the Special Rapporteur in his fifth report (A/CN.4/363 and Add.1)[5] and the revised version submitted by the Special Rapporteur at the previous session of the Commission,[6] and reproduced in document ILC (XXXVI)/Conf. Room Doc.1.

27. The wording of the draft article had been based on that of articles 8, 9 and 10, provisionally adopted by the Commission,[7] and thus contained no reference to "consent" to jurisdiction. Other minor drafting changes had been made in the interests of clarity. The structure of the draft article followed very closely the original text submitted by the Special Rapporteur in his fifth report, which had been simpler than the revised version submitted at the previous session. The Committee had decided, for example, to exclude references to a State's organs, agencies, instrumentalities, etc., and to a State's maintaining offices, establishing premises or engaging in certain transport activities. Such matters could be dealt with in the commentary.

28. In order to highlight the relationship between the act or omission and the foreign State, the Drafting Committee had added the words "which is alleged to be attributable to the State". Of course, the question of attribution was distinct from that of immunity, in that it related to merits, and would be determined in due course in accordance with local law. In addition, the Committee had accepted the wording proposed by the Special Rapporteur in his revised version of the article, to the effect that the death, injury or damage must have occurred wholly or partly in the territory of the forum State. The double requirement that the act or omission must have occurred in the territory of the forum State, and that the author of such act or omission must have been present in that territory at the time of the act or omission, had been maintained, in order to show clearly that injuries or damage resulting from extraterritorial acts or omissions did not fall within the scope of the draft article.

29. In his revised version of article 14, the Special Rapporteur had proposed a paragraph 2 which provided that paragraph 1 was without prejudice to rights and obligations regulated by agreements specifying or limiting the extent of liabilities or compensation. The Drafting Committee had been of the view that that matter related to the broader question of the effects produced by article 14 and other articles on provisions concerning the jurisdictional immunities of States as contained in international bilateral and multilateral agreements on special matters or fields, such as agreements of the status of forces. Accordingly, the Committee had agreed not to include a paragraph along the lines suggested by the Special Rapporteur, on the understanding that he would prepare a more general provision for possible inclusion in the final provisions of the draft. The title had not been changed, except in the French version. One member of the Drafting Committee had opposed draft article 14 as unnecessary and incomprehensible.

[4] See *Yearbook ... 1983*, vol. I, pp. 70-71, 1766th meeting, paras. 8-11.

[5] See *Yearbook ... 1983*, vol. II (Part Two), p. 19, footnote 55. For the discussion of draft article 14 at the thirty-fifth session of the Commission, see *Yearbook ... 1983*, vol. I, pp. 75 *et seq.*, 1767th meeting, paras. 9 *et seq.*, and 1768th to 1770th meetings.

[6] See *Yearbook ... 1983*, vol. II (Part Two), p. 20, footnote 59.

[7] See 1833rd meeting, footnote 4 (*f*) and (*g*).

30. Mr. USHAKOV said that he, too, was opposed on principle to article 14. First, the words "unless otherwise agreed between the States concerned" were not as innocent as they seemed. Politically and legally, they meant that States must agree on the jurisdictional immunity of the foreign State, thereby completely reversing the very principle of jurisdictional immunities of States by quite simply establishing the principle of the jurisdictional non-immunity of States. The phrase in question should also be deleted from all the other articles submitted. Secondly, the text did not specify under what legislation or system of law the act or omission was to be allegedly attributable to the State. If it was to be so considered under international law, it would be the international responsibility of the States that would come into play, and the question of competent courts would be raised. If the applicable law was to be the internal law of the forum State, it was difficult to see how it could establish rules attributing an act or omission to a foreign State. Moreover, why should a court consider the question of attribution? Such a procedure would be contrary to the very logic of the law as such. Thirdly, if an act or omission was attributed to a State, it would still be necessary to determine the author. The author would, of course, be the State; but, under the provision of the proposed article itself, the author of the act or omission must also be present in the territory of the forum State at the time of the act or omission. Would the author then be an individual? How would that be possible if the act or omission had already been attributed? The text of draft article 14 reduced to nothing the principle of the sovereign immunity of States and was absolutely incomprehensible.

31. Mr. NI said that the observations he had made in connection with draft article 13 applied also to draft article 14 and to the other draft articles before the Commission.

32. Mr. KOROMA said that most of the points he had advanced in respect of draft article 13 applied also to draft article 14. When the draft article had first been considered by the Commission, he had argued, in common with other members, that the matters covered by it were best dealt with extrajudicially and had suggested the possibility of excluding it. [8] He maintained that position.

33. The text of draft article 14 lent itself to many interpretations. For example, the phrase "in respect of proceedings which relate to compensation" could be interpreted to mean that, even when the parties agreed on the method of settlement or on the compensation to be paid, if that compensation was not eventually paid the State could be taken to court at the decision of the plaintiff. Similarly, the phrase "act or omission which is alleged to be attributable to the State" could mean that, if the plaintiff submitted a claim and there was a counter-claim by the defendant, the plaintiff could answer it by asserting that the act could not be attributed to the State, but was a personal matter. The text would have to be considered more carefully to avoid the possibility of such interpretations, which he knew were not intended. However, his fundamental point was that such matters would be more appropriately settled between the States themselves than through judicial means. He was happy to report that his country, when recently involved in such a case, had adopted that view.

34. Mr. RAZAFINDRALAMBO expressed his appreciation to the Chairman of the Drafting Committee for his objective and extremely clear presentation of the articles currently before the Commission and to the Special Rapporteur for the flexibility and competence which he had shown. While he subscribed to the principle of the exception to jurisdictional immunities of States provided for in article 14, he shared the reservations expressed by Mr. Ushakov regarding the wording proposed by the Drafting Committee. The original reference to a State's organs, agencies and instrumentalities acting in the exercise of governmental authority and engaging State responsibility had been deleted. However, the authors of the injurious act or omission were persons acting on behalf of those organs, agencies and instrumentalities, and thus of the State itself. It was through them that the State was presumed responsible for the injury and was brought before a court of the forum State.

35. As far as the substance was concerned, he pointed out that the internal law of many States ensured the protection of victims by providing that, in cases of bodily injury, the forum State was subject to the jurisdiction of the ordinary courts, whereas as a general rule such was not the case. That was the principle which, in article 14, had rightly been extended to cover the foreign State. Indeed, there was no reason to accord more favourable treatment to the foreign State than to the forum State in cases of bodily injury resulting, for example, from traffic accidents.

36. The CHAIRMAN, speaking as a member of the Commission, said he had a number of reservations on draft article 14, for the basic reasons he had already explained in connection with draft article 13. Apart from the matter of principle, he agreed with Mr. Koroma that, in the cases covered by the article, the better remedy lay in a practical settlement between the two States concerned, without prejudice to the principle of immunity.

37. Speaking as Chairman, he said that, if there were no further comments, he would take it that, with the comments and reservations duly recorded, the Commission wished provisionally to adopt draft article 14.

It was so agreed.

Article 14 was adopted.

ARTICLE 16 (Patents, trade marks and intellectual or industrial property)

38. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 16:

Article 16. Patents, trade marks and intellectual or industrial property

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

(*a*) the determination of any right of the State in a patent, industrial

[8] See *Yearbook ... 1983*, vol. I, p. 73, 1766th meeting, para. 28.

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

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

39. Article 16 as submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2)[9] had been maintained in substance in the new version proposed by the Drafting Committee, but had been restructured along the lines suggested during the debate in the Commission. As a result, the two paragraphs contained in the Special Rapporteur's original text had been combined by merging subparagraphs (*a*) and (*b*) of the original paragraphs 1 and 2 and adopting a common *chapeau* to cover both.

40. In subparagraph (*a*), the Drafting Committee had preferred to use the words "the determination of any right of the State", rather than the possibly more restrictive expression "the determination of the right to use". The new wording also made it unnecessary to refer to the State as "the owner or applicant". The phrase "the determination of any right of the State", which would be explained in the commentary to the article, should be understood broadly, since the right of a State in a patent, for example, could be determined incidentally in the context of a court's ruling regarding the right of others claiming the same or a similar right in the same patent.

41. The enumeration of various forms of intellectual or industrial property had been shortened somewhat by the deletion of "service mark" and "plant breeders' right", and the phrase "or any other similar form of intellectual or industrial property" had been added to make it clear that the list was not exhaustive. As the commentary would explain, the new wording covered not only the two forms that had been deleted, but also new forms of intellectual or industrial property as they were developed, such as computer software.

42. The Special Rapporteur had included in the original text a phrase indicating the types of legal protection afforded those various forms of intellectual or industrial property, and had referred specifically to property that had been "registered, deposited or applied for or is otherwise protected". Taking into account the comments made in the Commission and the complexities involved in attempting to reflect varying domestic laws which afforded legal protection to the various forms of property involved, the Drafting Committee had agreed on a general formulation which, it thought, could cover the various types of legal protection afforded under internal law, thus dispensing with the original enumeration. The words "a measure" were meant to imply some specific measure of legal protection, such as the measures specified in the original text. The phrase "in the State of the forum" had been used instead of "in another State", to make it even clearer that the right of the foreign State in question related to various forms of intellectual and industrial property which had been afforded a measure of legal protection in the State of the forum.

43. In subparagraph (*b*), the words "attributable to", in the original text, had been deleted in the light of comments made in the Commission. In addition, the new structure of the draft article had enabled the Drafting Committee to abbreviate the wording by referring to "the right mentioned in subparagraph (*a*) above", instead of repeating the enumeration of the various forms of intellectual or industrial property involved. As in subparagraph (*a*), the Committee had used the expression "State of the forum" rather than "that other State", to emphasize that the alleged infringement by the foreign State of a right owned by a third person must occur in the territory of the State of the forum which had protected that right. As a result, the State of the forum could give effect only in its own territory to the protection which it had itself afforded to the right of a third person allegedly infringed in the territory of the State of the forum by a foreign State.

44. Finally, some members of the Drafting Committee had maintained the objections or reservations expressed during the debate in the Commission on paragraph 2 of article 16 as originally proposed. In their view, the paragraph had been prejudicial to the interests and development of developing countries, so that it was highly dangerous to include such a provision in the draft. In that connection, he recalled that, in the Commission's debate, concern had been voiced that article 16 might be interpreted as allowing the courts of one State to sit in judgment on the effects of the nationalization, by another State, of certain forms of intellectual or industrial property. It had been recognized that that concern was real, but that in fact it also related to the tenor of other articles of the draft.

45. The Drafting Committee had agreed with the Special Rapporteur that the entire question of the extraterritorial effects of nationalization might be dealt with in article 11,[10] concerning the scope of the draft articles, which had been referred to the Drafting Committee but which the Committee would take up only at a later stage, after all the other articles of part III of the draft had been examined. The proposal of the Special Rapporteur had been the addition of a second paragraph to draft article 11 indicating that nothing in the articles of part III would prejudge the question of the extraterritorial effects of nationalization by a State of property situated within its territory when such act was performed in the exercise of sovereign authority and in accordance with its internal laws. It was hoped that such a general formulation would take account of the concern expressed in the Commission on that matter. The commentary to article 16 would of course refer to that understanding concerning draft article 11. The Drafting Committee had also amended the title of the article to correspond to the new wording of the text.

46. Finally, some members of the Drafting Committee

[9] For the text submitted by the Special Rapporteur and the discussion thereon in the Commission at the current session, see 1833rd to 1837th meetings and 1838th meeting, paras. 1-24.

[10] See *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; for the revised text, *ibid.*, p. 99, footnote 237.

had opposed draft article 16 because of its implications and the risks it entailed, in particular with regard to third world countries, which were greatly concerned about the transfer of technology needed to assist their economic development.

47. Mr. USHAKOV said that he could accept subparagraph (*a*) of draft article 16, since it was an extension of article 15, provisionally adopted by the Commission. [11] However, as he had already explained in the Commission (1834th and 1835th meetings), he was opposed to subparagraph (*b*) because of its pro-imperialist character. The third parties whose rights were referred to in that subparagraph were actually multinational corporations which were being protected against developing countries.

48. Chief AKINJIDE said that the very serious misgivings which he had expressed (1834th meeting) about draft article 16 persisted in respect of the text proposed by the Drafting Committee. If the draft article were adopted by the Commission, three quarters of the world's developing countries would have the greatest difficulty in accepting the draft. To take the copyright aspect alone, a country such as his own, where foreign textbooks and other books whose copyright was held by foreign companies were very widely used, would be very seriously disadvantaged by the provisions of both subparagraphs (*a*) and (*b*). Until he knew the precise nature of the proposed protective clause to be incorporated in draft article 11, he would be unable to accept draft article 16. Accordingly, he suggested that consideration of that text should be suspended pending the adoption of a decision on draft article 11.

49. Mr. BALANDA said that, until the new wording of draft article 11 had been decided, he wished to reserve his position on draft article 16, subparagraph (*b*), in view of its consequences for the interests of developing countries. He endorsed the observations made by Chief Akinjide.

50. Mr. RAZAFINDRALAMBO recalled that he had already explained his position (1836th meeting) on draft article 16 and expressed his opposition to the principle set forth therein, particularly in paragraph 2 of the original text. The possibility of adding a second paragraph to draft article 11, on the other hand, was tempting. Like Chief Akinjide, he considered, however, that it would be advisable to reserve any decision on draft article 16 until the new draft article 11 to be proposed by the Drafting Committee had been considered. Even if article 11 were to contain a safeguard clause regarding the effects of nationalization, article 16, and in particular subparagraph (*b*), would unquestionably present a danger to developing countries. Consequently he agreed with Mr. Ushakov that that provision would not be favourably received by third world countries.

51. Mr. KOROMA said that he had been absent from the earlier discussion on draft article 16 in the Commission and had thus been unable to emphasize the very serious implications of the article, which seemed to him to run counter to the Lima Declaration [12] and other important documents representing the wishes of the international community at large. He very much doubted whether the article as it stood would be acceptable to the General Assembly. However, the adoption of an adequate safeguard clause elsewhere in the draft articles might change the situation, and he therefore supported Chief Akinjide's proposal that consideration of draft article 16 should be deferred pending a decision on draft article 11.

52. Mr. McCAFFREY said that he hoped the Commission would not shelve draft article 16, which it had amply considered and which had been substantially revised after full and intensive consideration in the Drafting Committee. In order to meet the concern expressed in connection not only with article 16 but also with other parts of the draft, the Special Rapporteur had suggested the inclusion of a general safeguard clause, to be incorporated in article 11, to the effect that nothing in the articles of part III was to prejudge the question of the extraterritorial effects of nationalization. While it was of course important to see the language of article 11, the substance of article 16 would not be affected thereby, so that to defer action on article 16 pending the adoption of article 11 would serve no purpose. The fears expressed by some members of the Commission should be allayed by the wording of article 16 itself. To take the example of copyright mentioned by Chief Akinjide, nothing in article 16 would affect a country's right to copy books copyrighted in other countries, or generally to pursue its own policies with regard to intellectual or industrial property. He found it difficult to believe that anyone would argue that a State had the right to sell with impunity, in the territory of another State, goods subject to copyright or other protection in that territory.

53. Mr. REUTER said that he understood the reservations of some members of the Commission regarding articles that were presented as compromise solutions. Those reservations called for three comments. First, while he could have understood perfectly the rejection of draft article 16 in its entirety, it was difficult to see, particularly from the point of view of the developing countries, why subparagraph (*a*) should be acceptable and subparagraph (*b*) should not. If a State did not accept the principle of industrial or intellectual property within its territory, that was its sovereign right. As he understood it, if the existence of freedom in some States was accepted, the freedom of a State to institute protection of intellectual and industrial property must be respected, and it must also be accepted that such protection would be based on the law of that State. However, if the provisions of subparagraph (*b*) were not accepted, the State concerned would be prohibited from observing or ensuring observance in its territory of the rules concerning its intellectual property, and therefore prohibited from initiating actions for infringement of copyright; in other words, a State was to be compelled to accept, for the benefit of other States, the freedom to infringe

[11] See 1833rd meeting, footnote 4 (*k*).

[12] Lima Declaration and Plan of Action on Industrial Development and Co-operation, adopted by the Second General Conference of UNIDO, 12-26 March 1975 (ID/CONF.3/31, chap. IV).

legislation which, under subparagraph (*a*), it was entitled to establish. For that reason, he did not understand the distinction between subparagraph (*a*) and subparagraph (*b*) of draft article 16. The developing countries had rightly called for transfers of technology under special conditions. Consequently he did not understand why, while accepting that a State should ensure observance of its legislation within its territory as it saw fit, an exception should be established and it should not therefore be possible to institute actions for infringement when such legislation was infringed. Why ask for transfers of technology under such circumstances?

54. Secondly, he was firmly opposed to the proposal that consideration of draft article 16 should be postponed. The problem of extraterritorial effect was admittedly a difficult one, but it was quite different from that presented in the draft article.

55. Thirdly, the problem for the Commission was to determine whether it could arrive at a compromise formula between two perfectly legitimate conceptions of the principle of the jurisdictional immunity of States: on the one hand, a conception of personal immunity, namely that the State was the State and enjoyed immunity in all its actions; on the other hand, a functional conception of immunity, which he himself advocated. In the view of some members of the Commission, including himself, there was no established rule of public international law which currently served as a basis for the general principle of the personal immunity of the State. However, if all the articles pertaining to exceptions were to be eliminated, the members in question would obviously never accept articles embodying a general principle of the personal immunity of the State, since all the articles that would be eliminated provided for a number of exceptions to such personal immunity. That was another reason why he supported draft article 16. While he respected the views of those who supported the application of the theory of personal immunity, which was so simple and so radical that the final draft would contain very few articles, it was nevertheless necessary to determine whether there was a way of arriving at a compromise formula. That was the point at issue in the articles under consideration and in subsequent articles.

56. Mr. MAHIOU (Chairman of the Drafting Committee), speaking as a member of the Commission, said that he had reservations regarding draft article 16, despite the changes made by the Drafting Committee. First, the draft article was too broad in scope and could thus give rise to controversy. It seemed to strengthen the existing rules on patents, trade marks and other intellectual or industrial property, whereas the developing countries were in fact asking that those rules should be adapted to take greater account of their rights, interests and development needs.

57. Secondly, such an article could be included in the draft only if, among other things, its wording were revised in order to contain its scope within clearly defined limits. It was important to prevent the courts of the forum State, in dealing with questions of intellectual or industrial property, i.e. questions of a commercial nature, from ruling on other matters pertaining to acts of sovereignty. Some courts were inclined to broaden their areas of competence to related matters and, in dealing with commercial disputes, to pronounce on action by the public authorities—for example through measures of expropriation and nationalization—in connection with the acquisition of patents or other rights. In view of the possible addition of a second paragraph to draft article 11, the Commission might be better advised to take up the suggestion of Chief Akinjide and temporarily to postpone the adoption of draft article 16 until it had decided on the content of draft article 11.

58. Mr. OGISO said that, although draft article 16 had been discussed extensively in the Commission as well as in the Drafting Committee, it appeared that some misunderstandings still existed on two points. First, reference had been made in the earlier discussion (1834th meeting, para. 12) to the development history of a certain country whose products had been famous for their cheapness in the past, but which were now synonymous with high quality, and it had been asserted that, if at the beginning of its modernization, the country concerned had had a law on patents, such progress would not have been achieved. If the country referred to was Japan, he wished to say that, as a matter of historical fact, when Japan had embarked upon the process of modernization some 100 years earlier, one of the first steps of the new Japanese Government at the time had been to establish a patent law, in order to show that Japan's legal system was as modern as the systems of Western countries.

59. Secondly, in his country's experience, patent law did not operate to the disadvantage of developing countries. Japan had two methods of co-operating with developing countries with a view to assisting their further economic development. It either provided economic assistance through governmental organizations, or it promoted private investment by encouraging Japanese private industries to co-operate with industries in developing countries. Such encouragement could not be successful unless the recipient developing countries gave proper protection to the technology and capital invested in those countries. Economic co-operation at the private level had yielded remarkable results in a number of developing countries. He believed, therefore, that a law on the protection of intellectual or industrial property would enhance economic development rather than stand in its way. Conversely, co-operation at the private level would be damaged by the absence of a provision such as that incorporated in subparagraph (*b*) of draft article 16; indeed, far from being advantageous to the developing countries, the absence of such a provision might favour developed countries, particularly those whose industries were mainly State controlled.

60. Mr. LACLETA MUÑOZ said that he had no objection to the wording of draft article 16. Moreover, he did not see how that article, referring as it did to the jurisdictional immunity of States, could affect copyrights in developing countries or the transfer of technology to those countries, since, in the absence of any protection of intellectual property in a State, the article in question would have no effect within the territory of that State.

61. He did not understand the objection raised to subparagraph (*a*) regarding, for example, copyright for school textbooks, since in normal circumstances such copyrights were seldom the property of a State. In any event, a State wishing to enjoy freedom from copyright could so provide in its internal law. It simply had to decline to accept any international obligation in that regard, as it was entitled to do.

62. With regard to subparagraph (*b*), he supported whole-heartedly the observation made by Mr. Reuter. Rejection of that subparagraph would simply be tantamount to conceding that, within the territory of another State, a foreign State had the privilege of using a right belonging to a third person and protected by the internal law of that other State. The question of the extraterritorial effect of nationalization, which was also raised by other articles, could and must be dealt with by other bodies.

63. Mr. SUCHARITKUL (Special Rapporteur) said that subparagraph (*a*) of article 16 could hardly give rise to any serious objection, since a State was surely entitled to determine its rights as it wished.

64. With regard to subparagraph (*b*) whose operation was of course confined to the territory of the State of the forum, he agreed with the views expressed by Mr. Ogiso. A developing country, which was a sovereign State like any other, could pursue its own policies within its own frontiers and even expect some recognition of the extraterritorial effects of those policies. However, it could not expect the law of another State not to be respected in the territory of that other State. As Mr. Ogiso had pointed out, the provision in subparagraph (*b*), far from being to the disadvantage of developing countries, could actually operate to their benefit.

65. With regard to the procedure to be adopted, he pointed out that the safeguard clause to be added to draft article 11 was intended to allay misgivings in connection not only with draft article 16 but also with draft article 15. It would expedite matters if the Commission were provisionally to adopt draft article 16 as proposed by the Drafting Committee, on the understanding that a clause along the lines indicated by the Chairman of the Drafting Committee (see para. 45 above) would be included in draft article 11, or at another place to be finally decided by the Commission.

66. Chief AKINJIDE thanked the Special Rapporteur for his explanation, which merely reinforced his contention that to adopt draft article 16 subject to the adoption of draft article 11, before the text of article 11 had been accepted by the Drafting Committee, would be to put the cart before the horse. He was not convinced by the arguments advanced to prove that article 16 would not operate against the interests of developing countries, and stood by his proposal that adoption of draft article 16 should be deferred.

67. Mr. McCAFFREY said that he still could not understand Chief Akinjide's objection. Nothing in draft article 16 was inconsistent with a Government's wish not to enter into a patent or copyright convention. Such a convention might in fact affect a country's ability to pursue its own policies with regard to the protection of intellectual or industrial property, but article 16 certainly did not do so. With regard to the proposal that consideration of draft article 16 should be deferred pending the adoption of draft article 11, he thought that, in order to make progress, it was sometimes necessary to assume that a particular problem would eventually be resolved to the Commission's satisfaction. That had been the case in connection with article 6 of the draft articles under consideration, [13] in connection with the note concerning a tentative understanding of the term "international watercourse system", [14] in connection with the draft articles on the law of the non-navigational uses of international watercourses, and also, at the previous session, in connection with the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. In each of those instances, the Commission had acted on the Special Rapporteur's assurance that a provision designed to allay the concern of certain members would eventually be proposed and acted upon. To defer consideration of article 16 would, in his view, be dangerous and counter-productive. He appealed to members not to oppose a decision being taken on draft article 16, bearing in mind that the decision, taken on first reading, would be only provisional.

68. Mr. KOROMA said that, in response to Mr. McCaffrey's appeal and in the light of the Commission's previous methods of work, he would not insist upon deferring the decision on draft article 16. He hoped, however, that the Special Rapporteur would take account of the extent of the opposition to the article in the Commission. In his view, article 16 largely nullified article 5 of the draft, on which the Commission had worked so hard. He shared the view of Chief Akinjide, and he continued to consider that adoption of the article would indirectly imply acceptance of the WIPO conventions.

69. Mr. USHAKOV said that, in view of the serious reservations expressed with regard to article 16, it would be logical to adopt the same procedure as in the case of article 23 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (see 1864th meeting, para. 22), and to place article 16 in square brackets.

70. Mr. McCAFFREY remarked that, unlike draft article 16 under consideration, article 23 of the draft on the status of the diplomatic courier had not been approved by the Drafting Committee.

71. Mr. USHAKOV pointed out that he had not been the only member of the Commission to oppose draft article 16.

72. Chief AKINJIDE said he saw no difference between the situation regarding draft article 16 and that concerning draft article 23. Moreover, he failed to see why the text of the proposed amendment to draft article 11 (see para. 45 above) was not yet before the Commission.

73. The CHAIRMAN noted that there was a real di-

[13] See 1833rd meeting, footnote 4 (*e*).

[14] See *Yearbook ... 1980*, vol. II (Part Two), p. 108, para. 90.

vergence of views both on the substance of article 16 and on the procedure to be adopted in its respect. He was reluctant to put the matter to the vote, and suggested that it should be left open until the next meeting.

74. Mr. REUTER proposed that, since the Commission was divided, the matter should be put to a vote in order to save time. The differences of view could then be reflected in the report.

75. The CHAIRMAN said that a vote could not be taken because the Commission lacked a quorum.

76. Mr. KOROMA said that, his very great admiration and respect for Mr. Reuter notwithstanding, he deprecated the practice of asking for a vote. He did not believe that a vote in the existing context would advance the work of the Commission, and was in favour of endeavouring to find a compromise solution.

77. The CHAIRMAN suggested that consideration of the text proposed by the Drafting Committee for article 16 should be continued at the next meeting.

It was so agreed.

The meeting rose at 6.05 p.m.

1869th MEETING

Monday, 23 July 1984, at 3.05 p.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/L.379, A/CN.4/L.381)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLES 16 (*concluded*), 17 and 18

ARTICLE 16 (Patents, trade marks and intellectual or industrial property) (*concluded*)

1. The CHAIRMAN recalled that, at the 1868th meeting, some members of the Commission had suggested that the adoption of article 16 proposed by the Drafting Committee (A/CN.4/L.379) should be deferred pending a decision on paragraph 2 of draft article 11. It would appear that those members were now prepared to agree to the provisional adoption of article 16, on the understanding that the text of paragraph 2 of article 11 as proposed by the Special Rapporteur (A/CN.4/L.381) would be referred to the Drafting Committee for consideration.

2. Mr. USHAKOV said that, although he was opposed to subparagraph (*b*), he had not asked for a vote on the draft article or for a final decision in the matter, since the article was being discussed on first reading and the text would necessarily have to be put to the vote on second reading. He asked that his views be reflected in the commentary, so that the Commission could be apprised of them at the outset of the thirty-seventh session, as the summary records of the meetings were due to be published in official form only in two years' time. Subparagraph (*b*) should have been placed between square brackets, a practice already followed by the Commission, even on first reading, for a particular draft article or a part of one. Lastly, it was regrettable that some draft articles, such as article 14, had been provisionally adopted. In his view, article 14 was totally unacceptable, both from the legal standpoint and from that of the prestige of the Commission, and would have been better deleted.

3. Mr. KOROMA said that he had serious reservations about draft article 16, but would not oppose its provisional adoption, on the understanding that reservations and comments would be taken into account when the article came to be re-examined. In his view, article 16 transcended the issue of nationalization, and article 11 provided only a partial response to the queries raised.

4. The CHAIRMAN said he would take it that the Commission agreed to the provisional adoption of draft article 16, on the understanding that all the reservations and comments made during the discussion would be duly reflected in the summary records of the meetings, in the report of the Commission and, so far as possible, in the commentary. In addition, paragraph 2 of draft article 11 as proposed by the Special Rapporteur (A/CN.4/L.381) would be referred to the Drafting Committee, with a view to meeting the concern of some members regarding the extraterritorial effects of nationalization.

It was so agreed.

Article 16 was adopted.

ARTICLE 17 (Fiscal matters)

5. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 17:

Article 17. Fiscal matters

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

As had been suggested during the discussion in plenary, the text of article 17 had been considerably simplified compared with the text originally submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2). [1]

[1] For the text submitted by the Special Rapporteur and the discussion thereon in the Commission at the current session, see 1833rd to 1837th meetings and 1838th meeting, paras. 1-24.

6. The Drafting Committee had decided that it was better not to list the various types of duties, taxes or other similar charges in the body of the article. In its view, it was impossible to draw up an exhaustive list, and even a non-exhaustive list would mean entering into detail in a branch of internal law that was complex and liable to change. The matter would be dealt with in the commentary. Accordingly, the general form of wording, "fiscal obligations... such as duties, taxes or other similar charges", had been used. Furthermore, since the rule involved the application of internal law, and particularly fiscal regulations that might or might not impose various fiscal obligations on a foreign State, it had been thought appropriate to refer to "fiscal obligations for which it may be liable under the law of the State of the forum". The members of the Committee all recognized that the question of "fiscal immunity" was quite distinct from that of "jurisdictional immunities".

7. Lastly, the Committee had decided not to retain paragraph 2 of article 17 as originally submitted by the Special Rapporteur. Although it recognized the importance of the subject-matter, it had taken the view that all matters pertaining to questions such as seizure, attachment or measures of execution could more appropriately be dealt with in the next part of the draft articles, which would deal specifically with those questions and which the Special Rapporteur would introduce at a later session of the Commission. In line with the new wording of the article, the title had been amended to read "Fiscal matters".

8. One member of the Committee had expressed reservations about article 17, judging it to be unnecessary, since it was designed to cater for situations or problems that would not arise in practice and were a pure figment of the imagination. In any case, States were subject to the fiscal obligations for which they might be liable under the law of the State of the forum. In the event of a dispute, the plaintiff in the proceedings would invariably be the foreign State and hence, under other articles of the draft, would not be exempt from the jurisdiction. Moreover, the whole question was one of comity and reciprocity as between the States concerned, and any request for privileges should be viewed in that context. Disputes about the existence of such privileges would be settled at the international level between the States concerned and had nothing to do with jurisdictional immunities.

9. Mr. USHAKOV said that he was utterly opposed to article 17, which was pointless. Its only justification was that it would apparently enable the revenue authorities of the State of the forum to institute legal proceedings for payment of a particular duty, tax or charge. The law of a State should of course apply to everybody, including foreign States, but it seemed in the case in point that the true purpose of the article was to undermine at all costs the jurisdictional immunity of States, to the benefit of transnational corporations, and hence to the detriment of young States. The jurisdictional immunity of States was the counterpart to their sovereignty and sovereign equality. To undermine the jurisdictional immunity of States was at one and the same time to undermine their independence and sovereign equality.

10. Mr. NI said that, as he had already had occasion to point out (1835th meeting), he could not agree to the draft articles now before the Commission, because they were contrary to the principle of the sovereign equality of States. Article 17, however, raised a particular point in that it referred to "obligations for which [the State] may be liable". His question was: liable to whom? In the case envisaged, the plaintiff was the forum State and the defendant was another State, but he was firmly of the opinion that a State could not be made subject to the jurisdiction of the municipal courts of the forum State. He had no intention of speaking again on points that he had already raised both in the Commission and in the Drafting Committee.

11. Mr. KOROMA said that his position was similar to that of Mr. Ushakov and Mr. Ni. He was opposed to article 17 but would not object to its adoption on a provisional basis.

12. Chief AKINJIDE, expressing agreement with Mr. Koroma and Mr. Ni, said that article 17 was totally unacceptable. Indeed, the draft article should have been couched in exactly opposite terms, so as to establish the basic premise that a State enjoyed immunity unless otherwise agreed between the two countries concerned. It might well prove difficult to win acceptance for a convention which, figuratively speaking, was gradually stripping the roof from the house of State immunity; in that sense, the Commission's work could perhaps be characterized as one of demolition rather than construction.

13. Mr. DÍAZ GONZÁLEZ said that, as he had been absent from the 1868th meeting and therefore unable to comment on article 16, he wished to endorse the reservations voiced by Mr. Koroma in regard to that article. As to article 17, he fully supported the remarks made by the four preceding speakers and therefore wished to enter an express reservation in its regard.

14. The CHAIRMAN, speaking as a member of the Commission, said that, whenever any aspect of the jurisdictional immunities of States was considered, new restrictions were introduced. As a result, the principle of State immunity was gradually being whittled away and thus deprived of its force.

15. Speaking as Chairman, he said he would take it that, due account being taken of the reservations expressed, the Commission wished to adopt draft article 17 provisionally.

It was so agreed.

Article 17 was adopted.

ARTICLE 18 (Participation in companies or other collective bodies)

16. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 18:

Article 18. Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

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

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

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

The Drafting Committee had endeavoured to formulate article 18, submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2),[2] in more general terms, so as to take account of the various kinds of legal persons and forms of association under different legal systems.

17. In paragraph 1, the expression "shareholdings" had been deleted, for it was implicit in the case of an incorporated body, and would not apply in the case of other collective bodies. The Committee had also decided that there was no need to refer to "the determination of its rights and obligations" and that a general reference to "a proceeding relating to its participation"would suffice.

18. During the debate in the Drafting Committee, it had become clear that the nature of the collective bodies covered by the article varied considerably from one legal system to another. For instance, the legal entity termed an "unincorporated body" in English had no equivalent in French. In order to overcome the virtually insurmountable difficulties of transposing terms and concepts specific to a particular language and legal system, the Committee had sought to arrive at a more general form of wording and to find an expression that would command sufficiently broad acceptance to cover the various types of legal persons and forms of association under the various legal systems. The phrase that had been used in French was *dans une société ou un groupement ayant ou non la personnalité juridique,* which corresponded in the English text to the phrase "in a company or other collective body, whether incorporated or unincorporated". The possibility had been raised of substituting the expression *entité commerciale* for *groupement* in the French text.

19. Similar difficulties had arisen with regard to the designation of the parties to a legal proceeding, which again inevitably involved the different kinds of collective bodies. That was why the Committee had formulated the opening part of paragraph 1 in more concise terms, providing in English: "a proceeding concerning the relationship between the State and the body or the other participants therein", and in French: *une procédure ... concernant les rapports sociétaires.*

20. It was immediately apparent that the two language versions did not correspond literally. However, the Drafting Committee believed that, in legal and conceptual terms, they corresponded in substance. In an area of such complexity, where legal systems differed in terminology and in the kinds of legal persons to be taken into consideration, the aim should be to ensure that the language versions corresponded in meaning and intent rather than to seek a word-for-word or strictly literal rendering. However, the Committee was conscious of the pitfalls involved in reflecting certain legal concepts that varied or differed from one language and one legal system to another. Its attention had often been drawn to the difficulties to which that gave rise in Russian, Spanish, Chinese or Arabic, difficulties which, in the case of draft article 18, were particularly evident.

21. The Drafting Committee trusted that, on second reading, the differences in terminology would be re-examined in order to achieve greater harmony between the various language versions in both terminology and concepts, with due regard to the need to render the requisite meaning faithfully in each of the languages. However, one member of the Drafting Committee had not approved of the approach adopted and had taken the view that the various language versions should be much closer to one another and that significant differences in interpretation would undoubtedly arise if the language versions differed to the extent envisaged, which would remove any likelihood of a uniform or effective application of the article.

22. The wording of paragraph 1 (*a*) had been brought into line with the new terminology, the word "participants" being substituted for "members". Also, in accordance with a suggestion made at the 1838th meeting (para. 20), the words "or international organizations" had been added. The English text of paragraph 1 (*b*) was identical to that submitted by the Special Rapporteur, but in the French and Spanish texts the words *soit contrôlée à partir de cet Etat* and *sea controlada desde ese Estado* had been replaced by *ait le siège de sa direction... dans cet Etat* and *tenga la sede de su dirección ... en ese Estado*, respectively. That amendment had been introduced to reflect the desired meaning more accurately in those languages.

23. Paragraph 2 was the same in substance as the text originally proposed, with only one slight change at the end of the paragraph to take account of the new terminology used in paragraph 1. The commentary would indicate that the agreement in writing between the parties provided for in paragraph 2 could not run counter to the wishes of the States concerned in the event of an agreement between them, as provided for in the opening clause of paragraph 1. In that case, too, consideration would have to be given to the form and placement of the standard clause safeguarding the freedom of States to contract, which read: "Unless otherwise agreed between the States concerned". The title had been amended to take account of the rewording of the article.

24. Lastly, one member of the Drafting Committee had voiced opposition to the adoption of the draft article in its new version. In his view, apart from the dangers posed

[2] See footnote 1 above.

by the marked discrepancy between the various language versions, the new formulation referred to concepts that were specific to certain legal systems and were incomprehensible when removed from the context of those systems; as now set forth, the article did not provide for an effective rule of general application.

25. Mr. USHAKOV said that he was opposed to draft article 18 because of differences in substance, not terminology, between the English and French versions. In addition, the article contained several enigmas. For instance, to whom was it supposed to apply? It referred to participation "in a company or other collective body", but what was meant by "collective body"? Did it mean an international organization? The French version was even more complicated. The word *groupement* had a political connotation, but what it did it mean in law? Another enigma lay in the words *ayant ou non la personnalité juridique*. Under Soviet law, civil proceedings could be brought against an entity only if it had legal personality.

26. In reference to paragraph 1 (*a*), he would cite the case of UPU, whose members were States and Non-Self-Governing Territories. Accordingly, under the terms of article 18, UPU could be the subject of a civil action in any State whatsoever. But the question was, how could the article be applied?

27. The term *rapports sociétaires*, in paragraph 1, was a further source of complication, particularly since it was rendered in English by an expression far removed from it ("relationship between the State and the body or the other participants therein"). Furthermore, the first part of paragraph 1, when read in conjunction with subparagraph (*b*), was contrary to internal law and private international law, since the question of place of control or principal place of business depended on the activities of the company, and not on the *rapports sociétaires*.

28. In his view, such difficulties stemmed from the fact that, in its haste to adopt any text that would undermine the principle of the sovereign immunity of States, the Drafting Committee had spent only a few hours on those draft articles, whereas it had devoted several meetings to article 23 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

29. Sir Ian Sinclair said that, in substance, he endorsed draft article 18. He did not altogether concede Mr. Ushakov's point that it contained a series of enigmas. Admittedly, a problem arose as to how to express in general terms a concept that might not be found in all legal systems. The reason why the Drafting Committee had adopted the terms "collective body", in English, and *groupement*, in French, was that there simply was no other legal equivalent. Admittedly, the terminology was not ideal and the article would require close examination on second reading. In substance, however, it met a felt need to provide for a rule of immunity. Mr. Ushakov had also said that the article could cover bodies such as UPU. Surely, however, Mr. Ushakov was overlooking the phrase "Unless otherwise agreed between the States concerned"? If an agreement conferred immunity upon members of UPU, that agreement would apply to the exclusion of article 18. As to Mr. Ushakov's point regarding the distinction between "relationship" and *rapports sociétaires*, in his own view the two terms corresponded in substance.

30. Mr. BALANDA said that the word *groupement* ("collective body") was a sociological and political term rather than a legal one. He proposed that it should be replaced, in the title, by the expression *entité commerciale* ("commercial entity") and, in the body of the draft article, by *entité* ("entity"). However, he had no objection to the substance of the article.

31. Chief AKINJIDE said that, while he was not opposed to article 18 in principle, it posed a virtually insoluble problem. The problem stemmed from the fact that there were three sets of competing interests to be reconciled: those of States where the economy was privately controlled; those of States where it was State controlled; and those of developing countries where, in many respects, the economy was not controlled by the State. One problem, for instance, was that, under article 18, central banks would not enjoy immunity; it was those banks, however, rather than private banks, which, in developing and certain other countries, opened letters of credit. It was important for the Commission to be clear about what it was accepting—which, as far as commercial transactions were concerned, was in effect what was embodied in the relevant legislation of the United States of America and the United Kingdom of 1976 and 1978, respectively.

32. Mr. MAHIOU (Chairman of the Drafting Committee), speaking as a member of the Commission, said that he had no objection to the substance of article 18. In so far as a State engaged in commercial operations, it could expect to be sued or to have to sue in order to protect its interests. However, while the first criterion set forth in paragraph 1 (*b*) (incorporation of the company under the law of the State of the forum) was clear, the second (establishment of the place of control or of the principal place of business in that State) was much less so and might well give rise to difficulty. On that point, therefore, he reserved his position.

33. Since legal systems varied from country to country, the Drafting Committee had naturally had difficulty in finding equivalent terms. However, he supported Mr. Balanda's proposal that the word *groupement* should be replaced by *entité commerciale*, which had the merit of already having been used in other draft articles and of introducing an additional concept, at least in French.

34. Mr. LACLETA MUÑOZ said that he had some doubts about the terminology, but appreciated that the Commission would have an opportunity to reconsider the matter. However, the application of article 18 should not be confined solely to commercial entities: for instance, non-commercial entities that owned movable and immovable property should not be excluded from the draft articles.

35. The CHAIRMAN suggested that the Commission should adopt draft article 18 provisionally, on the under-

standing that the comments made regarding terminology would be referred to the Drafting Committee.

It was so agreed.

Article 18 was adopted.

36. Mr. FRANCIS said that he would like it to be reflected in the summary record of the meeting that, although he had not entered any reservation in regard to the provisional adoption of the draft articles on jurisdictional immunities of States and their property, he reserved the right to comment on them at an appropriate point in the future.

37. Mr. MAHIOU (Chairman of the Drafting Committee) expressed appreciation of the co-operation he had received from members of the Drafting Committee, even when additional meetings had proved necessary. He also thanked the members of the Secretariat who had assisted the Drafting Committee in its work.

38. The CHAIRMAN thanked the Chairman of the Drafting Committee for his report and all members of the Committee for their co-operation.

Co-operation with other bodies (*concluded*) *

[Agenda item 10]

Statement by the Observer for the Asian-African Legal Consultative Committee

39. The CHAIRMAN invited Mr. Nemoto, Observer for the Asian-African Legal Consultative Committee, to address the Commission.

40. Mr. NEMOTO (Observer for the Asian-African Legal Consultative Committee) said that the official relations between the Commission and the Asian-African Legal Consultative Committee had grown and strengthened over the period of more than two decades since they had first been established. It was gratifying to note the enormous progress the Commission had made in regard to certain items on its agenda, and in particular on two topics of special interest to the Asian-African region: jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses.

41. With regard to State immunity, many Governments in the Asian-African region were deeply concerned about the recent legislation enacted in the United States of America and some other countries. At a meeting of legal advisers held at United Nations Headquarters in November 1983, the view had been expressed that the aim of the Commission should be to settle the law on the subject authoritatively, with a view to achieving a uniform approach in the application of State immunity. One of the recommendations made was that reciprocity should be the guiding principle and that the Commission might perhaps be requested to consider including a provision to that effect in the draft articles on jurisdictional immunities of States and their property.

42. The work of the Asian-African Legal Consultative Committee on the non-navigational uses of international watercourses had been suspended in 1973 following the Commission's decision to take up the subject. However, at its most recent session, in Tokyo, the Committee had decided to resume consideration of the topic in the light of the Commission's work. It was therefore gratified to note that the Special Rapporteur for the topic, Mr. Evensen, had submitted his second report (A/CN.4/381), containing a complete set of draft articles.

43. The meeting of legal advisers in November 1983 had also considered the Commission's report on its thirty-fifth session, submitted to the General Assembly. In their own report, the legal advisers had concluded that, rather than debate each and every topic dealt with in the Commission's report, it would be desirable for the Sixth Committee to concentrate on those issues on which a debate would provide the Commission with guidance regarding the approach to be adopted or would promote detailed consideration at the final stage of the Commission's work on a particular topic. They had also thought that it would be useful if the Commission, in its report, could give some indication of the topics that required discussion in the Sixth Committee.

44. Referring to the current programme of work of the Asian-African Legal Consultative Committee, he said that the law of the sea, and in particular the provisions of the 1982 United Nations Convention on the Law of the Sea, [3] remained a priority. The Committee was participating in the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, and had presented a paper at the second session of the Preparatory Commission, held in Kingston, Jamaica, in March 1983, on preparations for the exploration and exploitation of the reserved areas. It was also studying the question of delimitation of maritime zones under the United Nations Convention on the Law of the Sea, the legal framework for optimum utilization of the resources of the exclusive economic zone, and the rights and interests of land-locked States. It was likewise pursuing its consultations with various United Nations agencies concerning economic, scientific and technical co-operation in the use of the Indian Ocean.

45. The Committee's work on promotion and protection of investments was virtually finalized. It had taken up that topic, along with a number of other matters connected with economic co-operation, following a suggestion made at the Ministerial Meeting on Regional Co-operation in Industry held in Kuala Lumpur, Malaysia, in 1980. The Committee had also been closely involved in aspects of the legal work of UNCTAD and had been actively participating in UNCITRAL. In particular, it had jointly sponsored with UNCITRAL a seminar on commercial arbitration in March 1984 and was planning another joint seminar in November 1984 to consider, *inter alia*, a suitable framework for trading in South-East Asia and the Pacific. Two other seminars on international economic co-operation were planned.

* Resumed from the 1849th meeting.

[3] See *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), document A/CONF.62/122.

46. The Committee's studies were continuing on such matters as the status and treatment of refugees, mutual co-operation in judicial assistance and the role of the ICJ in settling disputes. Another topic of considerable interest that would probably be taken up at the Committee's next session related to the concept of a peace zone in international law and to the framework of that zone.

47. In conclusion, he trusted that the Commission would participate at the Committee's next session, to be held in Kathmandu, Nepal, in February 1985.

48. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his statement, and expressed the Commission's appreciation of the very fruitful relations which the two bodies had enjoyed for more than two decades. He asked the Observer to convey to the members of the Committee the Commission's earnest hope that those relations would be maintained.

Statement by the Observer for the Arab Commission for International Law

49. The CHAIRMAN welcomed Mr. Ennaifer, Observer for the Arab Commission for International Law, and invited him to address the Commission.

50. Mr. ENNAIFER (Observer for the Arab Commission for International Law), referring to the mutual co-operation and support existing between the Commission he represented and the International Law Commission, said that the co-operation between the two bodies was reflected in the annual participation by an observer for the Arab Commission for International Law in part of the work of the International Law Commission. In an effort to render such co-operation more effective and dynamic, the Council of Ministers of the League of Arab States, at its session in 1984, had once again invited the organs of the general secretariat of the League, as well as of the Arab Commission for International Law, to co-operate closely with the International Law Commission. The mutual support of the two bodies was evident from the fact that the Arab Commission was pursuing objectives similar to those of the International Law Commission, although at the regional level in the Arab world. He wished the International Law Commission every success in the performance of its tasks.

51. The CHAIRMAN thanked the Observer for the Arab Commission for International Law for his statement and expressed his best wishes for the success of that Commission in its endeavours to promote international law and the rule of law in international relations. It could rest assured of the readiness of the International Law Commission to continue the whole-hearted co-operation that had been established between the two bodies.

Draft report of the Commission on the work of its thirty-sixth session

52. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter I.

CHAPTER I. ***Organization of the session*** (A/CN.4/L.370)

Chapter I of the draft report was adopted.

CHAPTER II. ***Draft Code of Offences against the Peace and Security of Mankind*** (A/CN.4/L.371 and Add.1)

A. Introduction (A/CN.4/L.371)

Paragraphs 1 to 13

Paragraphs 1 to 13 were adopted.

Paragraph 14

53. Sir Ian SINCLAIR proposed that, in the second sentence of paragraph 14, the words "during the present, thirty-fifth, session" should be amended to read: "during its thirty-fifth session".

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraphs 15 and 16.

Paragraphs 15 and 16 were adopted.

Paragraph 17

54. Sir Ian SINCLAIR pointed out that a correction should be made to the English and French versions of the first sentence of paragraph 17. The reference in parentheses at the end of the sentence should read: "(see paragraph 15 above)", as correctly indicated in the Spanish version.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraph 18

55. Sir Ian SINCLAIR pointed out that, in the first sentence, the words "at its thirty-fifth session" should be replaced by "on its thirty-fifth session". In the third sentence, the words "can be attributed" should be replaced by "could be attributed".

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19 was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.371 and Add.1)

Paragraphs 20 to 22 (A/CN.4/L.371)

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

56. Mr. McCAFFREY suggested that, at the end of the penultimate sentence, the words "serious damages" should be amended to read "serious damage", the reference being to serious damage to the environment.

It was so agreed.

57. Mr. LACLETA MUÑOZ, referring to the remark made by Mr. McCaffrey, pointed out that the term used in the Spanish version was not *daños* but *atentados*, which was preferable.

58. The CHAIRMAN noted that the term used in the French version was *atteintes*.

Paragraph 21, as amended, was adopted.

Paragraph 22

Paragraph 22 was adopted.

Paragraphs 23 to 55 (A/CN.4/L.371/Add.1)

Paragraph 23

59. Sir Ian SINCLAIR proposed that, in the third sentence, the fourth word, "does", should be replaced by "did". At the end of the fifth sentence, the words "the State's international responsibility" should be replaced by the wording of the title of the topic: "State responsibility". Lastly, in the concluding sentence, the words "of the problem" should be deleted.

It was so agreed.

60. Mr. LACLETA MUÑOZ said that, in the Spanish text, in two places in paragraph 23 and in several other places throughout the chapter, the words *responsabilidad penal* should be replaced by *responsabilidad criminal*.

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraph 24

61. Mr. FRANCIS said that subsection II, on the content *ratione materiae* of the draft code and the first stage of the Commission's work on the draft (paras. 24-31), did not reflect the understanding reached with the Special Rapporteur by Mr. Jagota, some African members of the Commission and himself. As recalled in the first sentence of paragraph 24, the General Assembly, by its resolution 38/132, had given the Commission a twofold mandate: first, to elaborate an introduction and, secondly, to draw up a list of offences. He could not accept the suggestion, in paragraph 24 and the following paragraphs, that the Commission should disregard the first part of its mandate. The report should indicate that at least one member considered that the Commission should have placed before the General Assembly an introduction summarizing the general principles of international criminal law.

62. The CHAIRMAN drew attention to item 2 of paragraph 55, in subsection IV (Conclusions). Presumably Mr. Francis was proposing that the report should record his view that the Commission should have dealt with that introduction at the current session.

63. Mr. THIAM (Special Rapporteur) said that, at the initiative of Mr. Francis, a meeting between African and Asian members had in fact been held, but that no agreement of any kind had been reached. Even had there been agreement among the members in question, he wondered what weight it would have carried with the Commission as a whole. Moreover, a special rapporteur was required to report to the Commission, not to regional groupings.

64. Sir Ian SINCLAIR suggested that the difficulty could be overcome by deleting from paragraph 24 the concluding words of the second sentence, "and that a question of method obliges it, at the present stage, to begin by preparing a list of international crimes and to take up the drafting of the introduction as a second step". The sentence would thus end with the words "for their elaboration", and a further sentence would be inserted on the following lines: "Some members expressed the view that the preparation of an introduction should proceed in parallel with the elaboration of the list of offences".

65. Mr. FRANCIS thanked Sir Ian Sinclair for a constructive proposal that satisfied him in part. He none the less considered that his views should be reflected in the report.

66. The CHAIRMAN suggested that Mr. Francis should submit in writing the form of words he wished to include in the report.

The meeting rose at 6 p.m.

1870th MEETING

Tuesday, 24 July 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft report of the Commission on the work of its thirty-sixth session (*continued*)

CHAPTER II. ***Draft Code of Offences against the Peace and Security of Mankind*** *(continued)* (A/CN.4/L.371 and Add.1)

B. Consideration of the topic at the present session *(continued)* (A/CN.4/L.371 and Add.1)

Paragraphs 23 to 55 *(continued)* (A/CN.4/L.371/Add.1)

Paragraph 24 *(continued)* and paragraph 25

1. The CHAIRMAN invited the Commission to consider the following text proposed by Mr. Francis:

> "[Some members however were of the view] that even a preliminary outline of the introduction was essential at the present stage of the Commission's work. It would at least comply, in spirit, with the mandate laid down by General Assembly resolution 38/132. Besides, it would elicit from the Sixth Committee comments of the representatives of Governments, which would assist the Commission in its future work on the topic.