

Document:-
A/CN.4/L.399 [and Corr.1]

Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee: titles of parts II and III of the draft; articles 2 to 6 and 20 to 28 - reproduced in A/CN.4/SR.1968 to SR.1972

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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necessity than of *force majeure*. He also wondered what role coercion proper played alongside of state of necessity, which involved mental coercion, and of *force majeure*, which involved physical coercion.

74. He approved of subparagraphs (c) and (d), subject to his remark regarding the imminent nature of the peril. Lastly, he pointed out that the Spanish text of subparagraph (e) (i) stated the opposite of what the Special Rapporteur had sought to express in a provision which still raised some doubts in his mind. While the solution adopted for chapter V of part 1 of the draft articles on State responsibility was understandable, in the case of human beings the question was whether they should be required to show heroism and even sacrifice their lives for the sake of compliance with a *jus cogens* obligation. How could the extent of the interests at stake be measured? He had no definite view on the matter, but would invite members to reflect upon it further.

75. The solution proposed in draft article 9 was, in his view, satisfactory.

The meeting rose at 1.10 p.m.

1968th MEETING

Tuesday, 17 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Jurisdictional immunities of States and their property (continued)* (A/CN.4/396,¹ A/CN.4/L.399, ILC (XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE

ARTICLES 2 TO 6 AND 20 TO 28

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report (A/CN.4/L.399) and the texts of articles 2 to 6 and 20 to 28 adopted by the Committee.

2. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the report set out the complete texts of the draft articles for adoption on first reading. It included articles already adopted—to which some drafting adjustments had been made—as well as articles adopted by the Drafting Committee at the present session. It had been necessary to renumber certain articles, whose previous numbers appeared in square brackets.

3. Before turning to the articles adopted by the Committee at the present session, he drew attention to certain drafting changes made to previously adopted articles to secure greater consistency in terminology. For example, the introductory phrase appearing in many articles of part III, "Unless otherwise agreed between the States concerned", had been added to article 14 [15]. In articles 13 [14] and 17 [18], the words following that introductory phrase had been aligned with those in other articles in part III, so that they now read: "the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to ...". Article 16 [17] had been adjusted to include the usual phrase "which is otherwise competent". Changes to previously adopted articles that were consequent upon the adoption of new articles would be noted in the discussion of those new articles.

4. In view of the limited time available, he would not refer specifically to the titles of the articles recommended by the Drafting Committee, although certain changes had been made to the titles originally proposed.

ARTICLE 2 (Use of terms)

5. He introduced the text proposed by the Drafting Committee for article 2, which read:

Article 2. Use of terms

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

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

6. The Special Rapporteur had proposed a definition of the term "State property" for inclusion in paragraph 1;² but in the light of the discussion and of the articles in parts III and IV relating to property of the State, the Drafting Committee had considered it unnecessary to include such a definition in article 2. The relevant articles themselves were believed to provide sufficient guidance as to what was meant by "State property" in the context of each article.

* Resumed from the 1947th meeting.

¹ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

² See 1942nd meeting, para. 5.

7. Paragraph 2 was based on the text submitted by the Special Rapporteur.³ It had been amended by the deletion of the words "by the rules of any international organization" and the addition of the words "in other international instruments". That addition had been thought useful in the light of existing and proposed regional conventions on the topic, although some members considered that paragraph 2 stated the obvious.

8. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission agreed provisionally to adopt paragraph 2 of article 2.

It was so agreed.

Article 2 was adopted.

ARTICLE 3 (Interpretative provisions)

9. Mr. RIPHAGEN (Chairman of the Drafting Committee), recalling that paragraph 2 of article 3 had been provisionally adopted by the Commission at its thirty-fifth session, introduced the text proposed by the Drafting Committee for paragraph 1. The whole of article 3 read:

Article 3. Interpretative provisions

1. The expression "State" as used in the present articles is to be understood as comprehending:

- (a) the State and its various organs of government;
- (b) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
- (c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;
- (d) representatives of the State acting in that capacity.

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

10. The two interpretative provisions proposed for paragraph 1⁴ had been referred to the Drafting Committee: one dealt with the expression "State" and the other with the expression "judicial functions". It had become apparent that a description of "judicial functions" would entail complex drafting, because that expression could have a variety of meanings under different legal or constitutional systems. Besides, it was not essential to include such a provision, since the expression appeared only once in the draft, namely in article 2, paragraph 1 (a). The commentary to article 2 could give examples of the kind of "judicial functions" intended to be covered by that article.

11. The Drafting Committee had, however, adopted the interpretative provision for the expression "State", which was to be found in paragraph 1 of article 3. The introductory phrase had been modified to bring out more clearly that the purpose was to aid in the interpretation of an expression, not to define a term.

12. The various subparagraphs of paragraph 1 had been reworded for greater clarity and precision. The new subparagraph (a) was intended to cover the content of the former subparagraph (a) (i), referring to the sovereign or head of State, who would, in most systems, be considered as one of the organs of government. Subparagraph (a) now referred simply to "the State and its various organs of government", which meant the various ministries, departments and sub-entities of the central Government, however designated.

13. The new subparagraph (b) covered political subdivisions, such as the constituent territories of a federal State and autonomous regions that were entitled to perform acts in the exercise of the sovereign authority of the State. It was thus made clearer that it was not a matter merely of exercising "governmental" authority in the broad sense, but of exercising the higher level of authority associated with the State itself; "local" or municipal governments were excluded.

14. Subparagraph (c) was based on the former subparagraph (a) (iv), the text of which had been simplified to show that it covered agencies and instrumentalities of the State to the extent that they were entitled to perform acts in the exercise of the sovereign authority of the State.

15. Subparagraph (d) was new and covered representatives of all the entities referred to in the preceding subparagraphs, when acting as representatives of those entities. That subparagraph had to be read, of course, in conjunction with article 4.

16. In consequence of the adoption of the interpretative provision in article 3, the Drafting Committee had adjusted article 7, paragraph 3, by introducing the notion of "political subdivisions" and replacing the reference to "governmental authority" by a reference to "sovereign authority".

17. Mr. USHAKOV said that, since he had been unable to take part in the Drafting Committee's work, he would comment on the articles it had proposed.

18. It was not the State as such that should be defined in article 3, but the organs which represented it in international relations and which should enjoy immunities in the exercise of their functions and in respect of the property they needed for those functions. He also had some doubts about the words "organs of government" used in paragraph 1 (a), which did not mean anything specific. In article 5 of part 1 of the draft articles on State responsibility,⁵ the Commission had defined what was meant by a "State organ" by providing that

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

Where an organ was a natural person, that person could act either as an organ or in a private capacity. For example, the ministers and ambassadors who were members of the Commission were acting not as State organs, but in their personal capacity, and thus did not engage the responsibility of the State of which they were nationals. Article 6 of part 1 of the above-mentioned draft articles

³ *Ibid.*

⁴ *Ibid.*, para. 6.

⁵ *Yearbook ... 1980*, vol. II (Part Two), p. 31.

also explained the meaning of "State organ". Hence he did not see why the draft articles on jurisdictional immunities should refer to "organs of government" rather than "State organs".

19. He also had reservations about the expression "political subdivisions of the State", in paragraph 1 (b). Article 7 of part 1 of the draft articles on State responsibility referred to "territorial governmental entities", which might, for example, be the republics of a federated State. Although he understood the idea conveyed by the expression "political subdivisions of the State", he did not think that it expressed that idea properly.

20. He noted that, in the English text of paragraph 1 (c), the Drafting Committee had replaced the term "governmental authority" by "sovereign authority". That amendment was rather awkward because the State organs in question, for example regional or departmental authorities, did not exercise sovereign power on behalf of the State, but only the governmental authority of the State. In that connection, he referred to article 7, paragraph 2, of part 1 of the draft articles on State responsibility, which also referred to "governmental authority". The term used by the Drafting Committee might raise problems, especially as it was also used in article 28 of the present draft.

21. He agreed with the idea expressed in article 3, but did not think that the terms used were entirely satisfactory.

22. Mr. MAHIU said that, in the last clause of paragraph 2, commas should be placed after the word "if" and the word "State".

23. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt paragraph 1 of article 3.

It was so agreed.

Article 3 was adopted.

ARTICLE 4 (Privileges and immunities not affected by the present articles)

24. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 4, which read:

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

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:

(a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(b) persons connected with them.

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

25. Paragraph 1 was a simplified version of the text submitted by the Special Rapporteur;⁶ it emphasized the

exercise of the functions of various official missions and persons connected with them. The provisions submitted by the Special Rapporteur as subparagraphs (b) and (c) had been deleted as being unnecessary.

26. Paragraph 2 had been added as a result of the discussion on draft article 25 (Immunities of personal sovereigns and other heads of State) submitted by the Special Rapporteur.⁷ Since some elements of draft article 25 were already covered in article 3, paragraph 1 (a) and (d), it had been thought best to place the remaining element in article 4 and word it in general terms as a safeguard clause, without going into needless detail.

27. As a consequence of the adoption of article 4 and of the articles of part IV on immunity from measures of constraint, the Drafting Committee had re-examined the text of article 15, paragraph 3, and had deleted it as being unnecessary.

28. Mr. USHAKOV said that he was not sure of the meaning of the words "persons connected with them" in paragraph 1 (b). It might be better to refer to the diplomatic, administrative and technical staff of missions, since the words "connected with" might be interpreted, for example, as referring to persons taking part in a training course with a mission.

29. Although it was true that heads of State enjoyed certain privileges under international law, he did not think those privileges were accorded *ratione personae*. Heads of State enjoyed immunities as State organs, not as natural persons. Article 21 of the 1969 Convention on Special Missions, dealing with the privileges and immunities of heads of State and persons of high rank, did not refer to immunities *ratione personae*.

30. Mr. SUCHARITKUL (Special Rapporteur) explained that the expression *ratione personae* had always been used to designate the privileges and immunities which were enjoyed by a diplomatic agent personally, as distinct from immunities *ratione materiae*, which were connected with his functions. The 1961 Vienna Convention on Diplomatic Relations clearly specified the privileges and immunities *ratione personae* that protected the diplomatic agent from being sued in purely personal matters. Immunities *ratione personae*, unlike immunities *ratione materiae*, did not survive the termination of the functions or appointment of the diplomatic agent. Should he subsequently return to the country of his former appointment, it would be possible to prosecute him. The position of heads of State was, in most countries, similar to that of diplomatic agents. They were inviolable and immune from prosecution for as long as they held office.

31. Mr. KOROMA said that he agreed with Mr. Ushakov that paragraph 1 (b) needed to be re-examined, since it was open to various interpretations. It could be taken to mean, for example, that the technical staff of an embassy or the officials of an international organization or an international conference enjoyed immunity.

32. He also had doubts about paragraph 2. He would like to know, for example, whether a head of State, once divested of his official capacity, could be pro-

⁶ See 1942nd meeting, para. 7.

⁷ *Ibid.*, para. 10.

secuted on his return to a country where a charge had been brought against him.

33. Mr. EL RASHEED MOHAMED AHMED said that he agreed with Mr. Ushakov on paragraph 1 (b). If that provision was intended to cover only diplomatic staff, it could be added to paragraph 1 (a). As it stood, it was capable of being interpreted much too widely.

34. Mr. ARANGIO-RUIZ said that, although he shared Mr. Ushakov's opinion on the wording of paragraph 1 (b), he endorsed the Special Rapporteur's explanations concerning immunities *ratione personae*. Rather serious diplomatic incidents had taken place in Rome in the 1920s and the Court of Cassation, making no distinction between diplomatic immunities and parliamentary immunities, had refused to recognize any immunity of diplomatic agents accredited to the King of Italy in respect of matters in which they had been involved in their private capacity. Following strong protests by the diplomatic corps, Italian jurisprudence had evolved and had recognized the existence of such diplomatic immunities. Even in the case of debts incurred as a result of personal purchases, a diplomatic agent enjoyed immunity from jurisdiction.

35. Mr. USHAKOV said that the age of ambassadors accompanied by their suites was past and there remained only diplomatic missions. If a head of State travelling privately abroad received special treatment, he owed it to courtesy, to *comitas gentium*, not to international law.

36. Mr. LACLETA MUÑOZ said that he did not agree with Mr. Ushakov about the personal immunities of heads of State. However, the enumeration in paragraph 1 (a) implied that consular posts, special missions and other missions or delegations were not diplomatic missions. Perhaps it should be explained in the commentary to article 4 that "diplomatic missions" meant "permanent diplomatic missions".

37. The Spanish text of paragraph 1 (b) did not raise any problems. In French, the word *attachées* was a technical term used in diplomacy to refer specifically to certain persons who performed functions in a diplomatic mission. The main purpose of the provision was to protect the privileges and immunities enjoyed by States and by the persons mentioned by reason of their functions, which were performed for the State. It did not extend those privileges and immunities to categories of persons other than those who already enjoyed them in accordance with other rules of international law.

38. Mr. ARANGIO-RUIZ said that *comitas gentium* played no part in the example he had given of jurisdictional immunities accorded to diplomatic agents and that the only applicable rules were those of positive international law, whether conventional or customary. The *raison d'être* of such immunities was to be found in the Latin maxim *ne impediatur legatio*, which conveyed the idea that diplomatic agents must be protected from all disturbance, even in their private lives.

39. Mr. SUCHARITKUL (Special Rapporteur) reminded members that the Commission was not reopening the discussion on substance, or more particularly on the question whether any particular person

enjoyed immunity and, if so, to what extent. Article 4 was simply a safeguard clause. It provided that the present articles were without prejudice to any privileges and immunities which might otherwise be enjoyed by the persons concerned.

40. With regard to the position of heads of State, a great many countries, such as the United States of America, the United Kingdom, France and Thailand, extended full privileges to a head of State. The provisions of article 4, paragraph 2, were thus based on abundant State practice.

41. Paragraph 1 (b) of the article also covered private servants in so far as they otherwise enjoyed immunities. The provision was merely a safeguard clause: if the persons concerned enjoyed immunity, their position was safeguarded; article 4 did not confer any immunities. Once again, he urged members not to engage in a debate on the substance of immunities.

42. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 4, on the understanding that the various views expressed would be placed on record.

Article 4 was adopted.

ARTICLE 5 (Non-retroactivity of the present articles)

43. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 5, which read:

Article 5. Non-retroactivity of the present articles

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

44. The Drafting Committee had discussed the utility of including an article on non-retroactivity in the draft. It had eventually been agreed that, since article 28 of the 1969 Vienna Convention on the Law of Treaties would apply if no article on non-retroactivity were included, it would be preferable to include a rule that was clearer and more flexible. The text now referred to "any question ... arising in a proceeding ... prior to the entry into force" of the articles "for the States concerned".

45. Although not all the complex issues of non-retroactivity were covered by article 5, it had been thought advisable to propose such a rule for submission to States. The article also included the useful proviso that the present articles were without prejudice to the application of any rules set forth therein to which jurisdictional immunities of States and their property were subject under international law independently of the present articles.

46. Mr. KOROMA remarked on the use of the word "question" rather than "case". He wished to know whether the intention was to refer not to a case being litigated, but to a matter referred to a Ministry of Foreign Affairs.

47. Mr. SUCHARITKUL (Special Rapporteur) explained that the word “question” had been used not only to widen the principle of non-retroactivity, but also to conform to the Commission’s practice regarding non-retroactivity provisions in its earlier drafts. It should be noted that article 5 referred to a question arising “in a proceeding instituted ... before a court”. The reference was thus clearly to proceedings in court and not to steps taken with the executive branch.

48. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 5.

Article 5 was adopted.

ARTICLE 6 (State immunity)

49. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 6, which read:

Article 6. State immunity

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

50. At its thirty-second session, in 1980, the Commission had provisionally adopted a text for article 6.⁸ That article had subsequently been the subject of much discussion and divergence of views in the Commission, and the Drafting Committee had been requested to re-examine it. The text now proposed attempted to show more clearly the intention not to take a position on the existing doctrinal theories of the basis for “State immunity”. It was drafted in a neutral fashion and included the clause: “subject to the provisions of the present articles and the relevant rules of general international law applicable in the matter”. It stated a unitary rule.

51. After long discussion in the Commission over a number of years, the Drafting Committee now recommended the proposed text for provisional adoption. In anticipation of its adoption, the square brackets which had appeared in paragraph 1 of article 7 had been removed.

52. Mr. USHAKOV said that he was firmly opposed to article 6 as proposed by the Drafting Committee, which made the whole draft pointless. The “provisions of the present articles” should reflect the rules of international law, since the Commission’s task was to codify that law and develop it where appropriate. By referring to “the relevant rules of general international law applicable in the matter”, the Commission gave the impression that there were rules which it had not taken into account in its draft. What State would accede to an instrument that invited it to look elsewhere for possible exceptions? By adopting such wording, the Commission would make itself look ridiculous.

53. Mr. FRANCIS suggested that the title of part II of the draft, “General principles”, should be amended to

read “General provisions”. The present title was open to criticism since, apart from article 6, the articles in part II did not contain any general principles, but simply basic provisions. Even the general principle stated in article 6 was itself based on another general principle, namely that of the sovereign equality of States.

54. He agreed with Mr. Ushakov on the need to make the last part of article 6 clearer and more precise. As it stood, it could lead to misunderstanding and might even be dangerous.

55. Mr. REUTER suggested that, before continuing consideration of article 6, the Commission should examine the other articles proposed. Since article 6 was the result of a compromise, it was quite normal that it should not be entirely satisfactory, and it might therefore be wiser to revert to it when the other articles had been examined.

56. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Reuter’s suggestion.

It was so agreed.

TITLE OF PART III (Limitations on State immunity)

57. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Drafting Committee had examined the title of part III and had decided to adopt a title that was more descriptive and less susceptible of being interpreted from a doctrinal point of view. Instead of “Exceptions to State immunity” the new title read: “Limitations on State immunity”.

58. Mr. KOROMA said that he saw no valid reason for that change. He preferred the former title: “Exceptions to State immunity”.

59. Mr. DÍAZ GONZÁLEZ said that, in Spanish, it would be preferable to say *Limitaciones a la inmunidad del Estado*.

60. Mr. BARBOZA said that he agreed with Mr. Koroma that the word “exceptions” should be restored in place of “limitations”.

61. Mr. USHAKOV said that, although he would not press the point, he found the word “exceptions” preferable to “limitations”, since part III dealt with cases in which there was no immunity.

62. Mr. REUTER suggested that the title of part III might be considered at the same time as article 6.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to discuss the title of part III at a later stage, at the same time as article 6.

It was so agreed.

ARTICLE 20 [11] (Cases of nationalization)

64. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 20 [11], which read:

⁸ *Yearbook ... 1980*, vol. II (Part Two), p. 142.

Article 20 [11]. Cases of nationalization

The provisions of the present part shall not prejudice any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual, which is situated within its territory.

65. Article 20 was based on paragraph 2 of the former article 11. That paragraph had been referred to the Drafting Committee as a result of the Commission's adoption of article 16⁹ (now article 15).

66. The former article 11 had dealt with the scope of part III; the Special Rapporteur had also submitted article 21 on the scope of part IV. In both cases, the Drafting Committee had decided that a general provision was unnecessary. The substantive provisions of the respective parts had been considered sufficient, without any descriptive introductory provisions on scope. Furthermore, the Special Rapporteur's revised version of article 11, paragraph 1, concerning reciprocity,¹⁰ had been considered unnecessary in the light of article 28. Thus paragraph 1 of article 11 as well as article 21 had been deleted.

67. Paragraph 2 of the former article 11, concerning measures of nationalization, formed the basis of the new article 20. The original proposal had been slightly modified in order to bring out more clearly its "non-prejudicial" character, and the phrase "in the exercise of governmental authority" had been deleted as stating the obvious. The Drafting Committee had decided that the appropriate place for the new article was at the end of part III.

68. Mr. USHAKOV said that the words "situated within its territory" might cause difficulties in the event of nationalization of a shipping company which owned vessels located abroad or a commercial enterprise having some of its goods abroad. In that connection, the question arose whether a vessel was to be regarded as movable or immovable property; but the answer was probably to be found in the internal law of each State. Apart from those considerations, he had no objection to article 20.

69. Mr. REUTER pointed out that there was a considerable difference between the English and French texts. In the French, the words *situé sur son territoire* referred only to *un objet de propriété industrielle ou intellectuelle*, not to *un bien meuble ou immeuble*, because the word *situé* was in the masculine singular, whereas the English text gave the impression that the words "is situated" referred to all the property mentioned. What had been the intention of the Special Rapporteur and the Drafting Committee? He was inclined to think that the word *situé* referred only to industrial or intellectual property. He even wondered whether the territorial relationship was not limited to the legal concept of property itself; for industrial or intellectual property was a legal concept that could be defined only in relation to a legal system. It would therefore have been more correct in French to make the word *situé*

agree with the word *propriété*, which was defined in relation to the local law of a territory.

70. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, in the French text, the word *situé* should be in the plural, since it applied both to movable or immovable property and to industrial or intellectual property.

71. Mr. ARANGIO-RUIZ said that, as Mr. Reuter had rightly pointed out, industrial property was linked not so much to a territory as to a legal system. When it came to consider article 20 on second reading, the Commission should therefore find a formula that was more correct from the legal standpoint and took account of the link between industrial property and the legal system concerned.

72. Mr. MAHIU said that the provisions of part III, referred to in the words "The provisions of the present part", were not the only ones involved. The provisions that could have implications for the extraterritorial effects of measures of nationalization were chiefly those of part IV. Hence either the wording should be amended to apply also to the provisions of part IV, or the provisions of article 20 should be reproduced in part IV.

73. The phrase "situated within its territory" could perhaps be replaced by "under its jurisdiction", for movable or immovable property came under the jurisdiction of the State in whose territory it was situated. Industrial or intellectual property was linked to that State's legal system, and the words "under its jurisdiction", which covered both the territorial aspect and the link with the system of law, might well solve the problems mentioned by Mr. Ushakov and Mr. Reuter.

74. Mr. SUCHARITKUL (Special Rapporteur) suggested that the phrase "The provisions of the present part" should be replaced by "The provisions of the present articles", so that the provisions of part IV would also be covered. He had no objection to using the words "under its jurisdiction", rather than "situated within its territory".

75. Mr. RIPHAGEN, speaking as a member of the Commission, said that he supported the proposal to replace the words "The provisions of the present part" by "The provisions of the present articles", but thought it better to retain the phrase "situated within its territory". The legal term "extraterritorial effects" was not easy to define, but if it was to be used, then the phrase "situated within its territory" should also be retained. Determining the location of intellectual and industrial property was a question of private international law and the Commission could not settle it. Some writers took the view that such property was situated in all countries in which it was protected.

76. Mr. REUTER said that he shared the view expressed by Mr. Riphagen. If the words "under its jurisdiction" were used, the article might well become much more obscure. Moreover, the purpose of article 20 was to reserve the possibility of "extraterritorial effects". It did not call into question the nationalization of movable, immovable, industrial or intellectual property situated within the territory of the State. The for-

⁹ See *Yearbook ... 1984*, vol. II (Part Two) p. 59, para. 207 and footnote 200.

¹⁰ *Yearbook ... 1982*, vol. II (Part Two), p. 99, footnote 237.

mula “under its jurisdiction” would introduce some ambiguity.

77. Mr. USHAKOV agreed that it would be better to use the formula “The provisions of the present articles”. Article 20 could be kept provisionally in part III, but it would ultimately have to appear in part IV.

78. The last phrase of article 20, “which is situated within its territory”, was somewhat strange. The measures of nationalization taken by a State produced extraterritorial effects only when the property affected by the measures was in the territory of another State at the time of the nationalization or was transferred to another State as a result of the nationalization. If the property was in the territory of the State which nationalized it, the question of extraterritorial effects did not arise. It would be much better to delete the phrase and place a full stop after the word “intellectual”.

79. Mr. REUTER supported Mr. Ushakov’s proposal.

80. Mr. MAHIU said that he withdrew his proposal, since he found Mr. Ushakov’s proposal entirely satisfactory.

81. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 20 [11] with the amendment proposed by Mr. Ushakov, namely the deletion of the phrase “which is situated within its territory”.

It was so agreed.

Article 20 [11] was adopted.

ARTICLE 21 [22] (State immunity from measures of constraint)

82. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 21 [22], which read:

Article 21 [22]. State immunity from measures of constraint

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

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

(b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

83. Article 21 began part IV of the draft, which was entitled “State immunity in respect of property from measures of constraint”. It was based on the former article 22,¹¹ which had been restructured and modified. The new introductory clause spoke of a State enjoying immunity “in connection with a proceeding before a court of another State”. The reference to “a proceeding” covered both the proceeding on the merits and the measures of constraint. It had been recognized, however, that a request for application of measures of constraint might be made in a third State,

that was to say a State other than the defendant State or the State of the forum of the merits proceeding. Such a third State would be the State in which the property against which measures of constraint were sought was physically located and under whose laws or treaties such a proceeding was possible.

84. The phrase “or property in which it has a legally protected interest” had been placed in square brackets. That was due to a difference of opinion in the Drafting Committee on whether it was proper to provide protection in the case of a State having a legally protected interest in property, but not owning, possessing or controlling that property. Some members had thought it unnecessary to provide protection for such a low level of State interest in property, which would only inure to the benefit of the actual owner of the property. Others had thought that, since the State’s “interest” in property was covered in part III by article 14 [15], it was only logical to include corresponding protection in part IV, which would cover a number of cases in which a State could have a concrete interest in property even though it was not, or not yet, in possession or control of that property. The comments of Governments were requested on that particular point.

85. As suggested by the Special Rapporteur in his original proposal, two exceptions to the general provision on immunity from measures of constraint were provided for in subparagraphs (a) and (b).

86. In subparagraph (a), the expression “non-governmental” had been placed in square brackets, as it had in article 18 [19]; for the reasons, he referred members to the commentary to that article.¹² The Drafting Committee had discussed at length what kind of connecting factors should be included in subparagraph (a). Although not all members had been fully satisfied with the text, the Committee had eventually agreed to include the two connecting factors mentioned.

87. Subparagraph (b) was based on the original proposal, but incorporated drafting improvements, such as requiring that the property should be allocated for the satisfaction of the claim which was the object of the proceeding on the merits. Temporal issues raised by both subparagraphs would have to be addressed by the court concerned.

88. Mr. USHAKOV said that he could agree to article 21 only if the square brackets around the expression “non-governmental” in subparagraph (a) were deleted. The same applied to all the other articles in which that expression was between square brackets.

89. Mr. BARBOZA said that he would like to know why the Spanish text of subparagraph (a) differed from the English and French texts in that the expression “non-governmental” in square brackets had been translated as *no estatales*.

90. Mr. LACLETA MUÑOZ explained that some members of the Drafting Committee had thought it better to use the adjective *estatal* rather than *gubernamental*, which, in their opinion, related exclusively to the executive power. He was not entirely convinced that that

¹¹ *Yearbook ... 1985*, vol. II (Part Two), p. 57, footnote 206.

¹² *Ibid.*, p. 62, para. (7) of the commentary to article 19.

was so; as used in article 21, the word "governmental" had the meaning generally attached to it in public international law—it was synonymous with "State" in its adjectival form. In public international law, the term "Government" (*gobierno* in Spanish) signified more often than not the State, that was to say the Government, the territory and the people. Consequently, he would have no objection if the Spanish text were brought into line with the English and French by replacing the words *no estatales* by *no gubernamentales*.

91. Mr. USHAKOV said that the expression "non-governmental" had been translated into Russian by a term that was the exact equivalent of *no estatales* in Spanish. No other translation was possible.

92. Mr. CALERO RODRIGUES pointed out that, if the term *no estatales* was to be changed in article 21, it should also be changed in article 18.

93. Mr. RIPHAGEN, speaking as a member of the Commission, referred to the words in square brackets in the opening clause of article 21, "[or property in which it has a legally protected interest]". Article 21 dealt with three things: property of the State; property in the possession or control of the State; and property in which the State had a legally protected interest. In the last two cases, if proceedings were instituted against an owner who was not the State, or even against the physical object itself, article 7, paragraph 2, would apply. If the combined effect of article 21 and article 7, paragraph 2, was to make the physical object immune from measures of constraint, that would benefit the non-State owner of the property. In his view that result could be acceptable in the case of an object in the possession or control of a State, since measures of constraint on the use of the object were likely to affect the activities of that State. That did not apply, however, to legally protected interests in an object, which might indeed be manifold, but in the determination of which a foreign State often did not enjoy immunity. For that reason, he thought it would be best to delete the phrase in square brackets in articles 21 and 22.

94. Mr. KOROMA said that he found the expression "non-governmental" acceptable in article 21, subparagraph (a).

95. Mr. TOMUSCHAT said that he would like to place on record his view that subparagraph (a) was worded too restrictively. The phrase "and has a connection with the object of the claim" excessively limited the property subject to measures of constraint, particularly with respect to tort cases, and should perhaps be deleted.

96. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 21 [22].

Article 21 [22] was adopted.

ARTICLE 22 [23] (Consent to measures of constraint)

97. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 22 [23], which read:

Article 22 [23]. Consent to measures of constraint

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

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

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

98. Article 22 corresponded to the former article 23,¹³ which had undergone some drafting changes to make the new text consistent with other articles. For the reasons stated in regard to article 21, article 22 included a phrase in square brackets. The new wording stressed the "extent" of the express consent given and covered expressions of consent relating to measures of constraint, generally or as specified; to property, generally or in particular; or to both. The point was, of course, that a State was bound by its expressions of consent if they had been formulated in the manner indicated in article 22.

99. Mr. REUTER asked whether Mr. Riphagen's comments on the phrase "or property in which it has a legally protected interest", in article 21, also applied in respect of article 22.

100. Mr. RIPHAGEN, speaking as a member of the Commission, said that the context was somewhat different, for there were no limits to what a State could decide to consent to. If the phrase in question were deleted from article 21, it should probably also be deleted from article 22. Nevertheless, as the context was different, the phrase could, if necessary, be retained in square brackets in article 22 and deleted from article 21.

101. Mr. USHAKOV said that he would like to see the phrase "for which a separate expression of consent shall be necessary", in paragraph 2 of the English text, brought into line with the French text by deleting the words "expression of".

102. Mr. McCAFFREY said that the phrase in square brackets was more important in article 21, where it was intended to cover all kinds of property and interests. It should be retained there at least until such time as comments had been received from Governments. For reasons of symmetry it could for the time being also be retained in article 22.

103. Mr. KOROMA said that the reservations of certain members concerning the phrase in square brackets, at least in respect of article 21, appeared to have been answered. He therefore suggested that the phrase should be retained.

104. The CHAIRMAN noted that no clear position had emerged on the question of deleting the square brackets around the phrase "or property in which it has a legally protected interest". If there were no objections, he would take it that the Commission agreed pro-

¹³ *Ibid.*, p. 57, footnote 206.

visionally to adopt article 22 [23] as proposed by the Drafting Committee.

It was so agreed.

Article 22 [23] was adopted.

ARTICLE 23 [24] (Specific categories of property)

105. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 23 [24], which read:

Article 23 [24]. Specific categories of property

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

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

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

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

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

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

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

106. Article 23 was based on the former article 24,¹⁴ which had undergone considerable change and adjustment in the light of the Commission's debate. The new paragraph 1 listed certain property which was not to be considered as being in use by a State "for commercial [non-governmental] purposes" under subparagraph (a) of article 21. The various subparagraphs of the former article 24 had been modified for greater clarity and precision, the territorial link had been stressed and, in the case of the new subparagraphs (d) and (e), so had the non-placement on sale of the property. The former subparagraphs (c) and (d) (property of a central bank and property of any other monetary authority) had been merged, and a new provision had been added concerning property forming part of an exhibition.

107. Paragraph 2 nevertheless allowed such categories of property to be subject to measures of constraint if the State had allocated or earmarked the property under subparagraph (b) of article 21 or if it had specifically consented to the taking of measures of constraint under article 22.

108. Mr. McCAFFREY said that, in his understanding, paragraph 1 (c) referred to property of the central bank which was held for its own account.

109. After a procedural discussion, the CHAIRMAN proposed that the beginning of paragraph 2 should be amended to read: "No property or part thereof belonging to the categories listed in paragraph 1 shall be subject ...". The French text would read: *Aucun bien ou partie d'un bien entrant dans une des catégories visées au paragraphe 1 ne peut ...*; and the Spanish text would be adjusted accordingly.

110. If there were no further comments, he would take it that the Commission agreed provisionally to adopt article 23 [24], subject to any drafting changes required for concordance of the different language versions.

It was so agreed.

Article 23 [24] was adopted.

The meeting rose at 1 p.m.

1969th MEETING

Wednesday, 18 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind¹ (concluded)* (A/CN.4/387,² A/CN.4/398,³ A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

SUMMING-UP OF THE DISCUSSION

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion.

2. Mr. THIAM (Special Rapporteur) said that the Commission's wide-ranging, detailed discussion of his fourth report on the topic (A/CN.4/398) would enable him to widen his field of study. Although he could not,

* Resumed from the 1967th meeting.

¹ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

¹⁴ *Ibid.*, pp. 57-58, footnote 206.

at the present stage, reply in detail to all the questions raised, some of which would require long consideration, he would try to deal with the general problems posed by members of the Commission.

3. The division of offences into three categories, to which there had been few objections, was justified by the fact that each category of offences had its own particular characteristics and that it would have been extremely difficult to establish general principles applicable to all the offences covered by the draft code. As he stated in the report: "Some principles will apply more generally to crimes against peace or to crimes against humanity, while others will apply more generally to war crimes" (*ibid.*, para. 260 (d)).

4. For example, the principles relating to justifying facts applied primarily to war crimes. There could be no justification for crimes against humanity, by reason of their motive, from which they were inseparable. The only possible justification for crimes against peace was self-defence in cases of aggression. It would be for the Commission to decide whether a special article should be devoted to that classification.

5. The classification was not, however, intended to place the various categories of offences in watertight compartments. As in internal law, there could be concurrent offences: for example, if genocide was committed in time of war, it was both a crime against humanity and a war crime. Additional Protocol I to the 1949 Geneva Conventions expressly provided that *apartheid* was a war crime when it was committed in time of war (art. 85, para. 4 (c)).⁴ When concurrent offences had been committed, it was for the court to decide whether the severest penalty should be imposed or whether separate penalties should run concurrently. But the fact that one and the same act could be included in several categories did not in any way impugn the validity of the theoretical distinction between those categories.

6. With regard to the content *ratione materiae* of the draft code, two different approaches had been adopted in the Commission: the maximalist approach of those who wished to extend the scope of the code to a range of other offences, and the minimalist approach of those who wished the code to cover only a limited number of offences constituting a "hard core".

7. In its report on its thirty-sixth session, the Commission had indicated that, after carefully considering the advantages and disadvantages of the two approaches, it

... tended to take the view that the effect of the draft would be weakened if it were extended so far that the essential considerations were lost sight of. To go beyond the minimum content ... would blur the distinction between an international crime and an offence against the peace and security of mankind; ... The code ought to retain its particularly serious character as an instrument dealing solely with offences distinguished by their especially horrible, cruel, savage and barbarous nature. These are essentially offences which threaten the very foundations of modern civilization and the values it embodies. It is these particular characteristics which set apart offences against the peace and security of mankind and justify their separate codification.⁵

If the content of the code were made too broad, it would be deprived of its specificity and transformed into a

veritable international penal code, in which it would be very difficult to distinguish offences against the peace and security of mankind from other international crimes.

8. As to the content *ratione personae*, some members of the Commission still believed that international criminal responsibility for offences against the peace and security of mankind should be attributable to States. He noted, however, that, in its report on its thirty-fifth session, the Commission had said:

With regard to the subjects of law to which international criminal responsibility can be attributed, the Commission would like to have the views of the General Assembly on this point, because of the political nature of the problem;⁶

Having received no reply from the General Assembly, the Commission, at its thirty-sixth session, had taken the following position:

With regard to the content *ratione personae* of the draft code, the Commission intends that it should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility ...⁷

Thus, although the draft articles sometimes referred to the responsibility of the State, that meant only its civil responsibility. It was indeed obvious that, if agents of the State committed an offence when acting on its behalf, they engaged the civil responsibility of the State. That was, moreover, a principle that should be enunciated in the draft code.

9. In its report on its thirty-sixth session, the Commission had recognized that

... the criminal responsibility of individuals does not eliminate the international responsibility of States for the consequences of acts committed by persons acting as organs or agents of the State. But such responsibility is of a different nature and falls within the traditional concept of State responsibility. ...⁸

That was the frame within which the Commission had to work, and it must avoid mixing the different kinds of responsibility.

10. Moreover, the concept of the criminal responsibility of States was still far from clear, and if it had to be studied some day, the question would arise whether it came under the draft code or under the draft articles on State responsibility. Although for the time being only the criminal responsibility of natural persons would be considered, it still had to be decided whether those natural persons were private individuals or State authorities.

11. In his third report (A/CN.4/387, chap. III), he had submitted a draft article 2 consisting of two alternatives, the first applying to offences committed by natural persons, whether authorities of a State or private individuals, and the second applying only to offences committed by the authorities of a State. The Commission's decision had been to reject the second alternative and refer only the first to the Drafting Committee.⁹

⁴ See 1959th meeting, footnote 6.

⁵ *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 63.

⁶ *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69 (b).

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

⁸ *Ibid.*, p. 11, para. 32.

⁹ *Yearbook ... 1985*, vol. II (Part Two), pp. 13-14, para. 60.

12. The “authorities of a State” were referred to in some of the draft articles because the offences in question, particularly aggression and *apartheid*, could be committed only by the authorities of a State, that was to say natural persons acting on behalf of a State. States did, of course, commit offences, but they did so through the intermediary of their organs or agents. The State was an abstraction, so it could not be said that an offence could be committed only by a State. The draft articles dealt with offences committed by natural persons, whether they were acting in their personal capacity or on behalf of a State.

13. Many members of the Commission had questioned the legal basis of the offences covered by the draft code. Some had expressed doubts about the legal force of the conventions on which the draft articles were based, arguing that not enough States had ratified the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, for example.

14. In his view, that argument was not well founded. The judgments of the ICJ were a source of international law even though the Court’s compulsory jurisdiction had been recognized by only 48 States. The same was true of the awards of arbitral tribunals, although they were only temporary bodies. The legal force of the resolutions adopted by the General Assembly had also been called into question. Many of those resolutions, however, in particular the one prohibiting mercenarism and those relating to national liberation movements, had contributed to the formulation of rules of law, so that their legal force could not be denied.

15. In fact, whatever the effect of those instruments, the offences covered by the draft code were so serious that they necessarily constituted violations of peremptory norms of international law. If conventions and other international documents could not be taken as a basis, the Commission could rely on the concept of *jus cogens*. Besides, the draft articles on State responsibility provided that international crimes had effect *erga omnes* and that all States could be held responsible for them—even those which had not acceded to the relevant conventions or had not supported the relevant General Assembly resolutions. When it came to punishing offences as serious as those dealt with in the draft code, the criterion to be adopted was not that of contractual obligations, but that of peremptory norms of international law.

16. With regard to “intent”, since every offence—and *a fortiori* an offence against the peace and security of mankind—presupposed a criminal intent by definition, he had not gone into that concept at great length, but he was quite willing to do so if that was the Commission’s wish.

17. The problem of intent arose primarily in connection with damage to the environment, which could, of course, be damaged involuntarily. But where offences were concerned, intent was absolutely essential. In internal law, some offences and even certain crimes could be committed without intent. That was true, in particular, of assault and battery leading to involuntary homicide.

Similarly, employers who did not take the necessary sanitary measures or precautions to prevent accidents at the workplace could be prosecuted and convicted in the event of an accident, regardless of whether there had been a wrongful intent. Gross negligence was thus, in a way, equivalent to wrongful intent. In other words, when intent could not be established, it was the consequences of the offence that had to be taken into consideration.

18. But however serious it might be, damage to the environment was not always a crime against humanity; for such crimes had racial, religious or political motives which could not always be ascribed to serious damage to the environment. That question required more thorough study.

19. With regard to the content of certain notions, and more particularly war crimes, some members had said that the customs of war could not be codified and should therefore not be referred to in the definition of war crimes. But it should not be forgotten that, in the matter of war crimes, customary law had often come before treaty law. The 1907 Hague Convention respecting the Laws and Customs of War on Land,¹⁰ which had been applied before it had been ratified, contained a provision stating:

Until a more complete code of the laws of war has been issued ... the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Since then, there had been little progress on codification of the laws and customs of war, and Additional Protocol I to the 1949 Geneva Conventions, adopted in 1977, contained a similar provision reading:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from *established custom* ... (Art. 1, para. 2.)

In its Judgment, the Nürnberg Tribunal had stated:¹¹

The law of war is to be found ... in the customs and practices of States which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. ... in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

20. Hence he did not think that the reference to the “customs of war” could be deleted from the definition of war crimes. The Commission would have to revert to the question whether the expression “laws or customs of war” should be retained as it stood in that definition or whether it should be expanded.

21. The concepts of “complicity”, “conspiracy” and “attempt” had also been much discussed during the Commission’s debate. The practice of transposing those internal law concepts to international law without indicating their content was particularly dangerous because, in internal law, their content varied from one country to another. Some members of the Commission had said that they would have liked him to have pro-

¹⁰ See 1958th meeting, footnote 7.

¹¹ See United Nations, *The Charter and Judgment of the Nürnberg Tribunal*. ..., p. 64.

vided examples taken from African comparative law. But although, since their independence, the penal codes of African countries had gradually moved away from the penal codes of the former metropolitan powers to reflect African realities, the general principles of law on which they were based and which were of universal scope had fortunately remained the same. Moreover, since the offences covered by the draft code were well-known offences, most of which had been defined in international conventions, it was difficult to see how they could be any different in Africa. Thus, instead of making a comparative law study—which was in any case not within his terms of reference—he had tried to define the content of those concepts.

22. With regard to complicity, whose content in internal law could be either limited or extended, the discussion seemed to show that most members of the Commission believed that it should be given an extended content, so that a charge of complicity could be brought not only for acts committed prior to or concurrently with the offence, but also for certain subsequent acts, such as concealment of malefactors and receiving stolen goods.

23. The same problem arose with regard to *complot*. According to Continental law, *complot*, whether with a view to insurrection, civil war or action against the territorial integrity of a State, was solely a crime against the State. But in international law there were cases in which *complot* had a broader meaning and was regarded not only as a crime against the State, but also as an offence against the peace and security of mankind. That raised the question of “conspiracy”. If *complot* were defined as a crime against the State, it would certainly not include all the elements of conspiracy; but if it were considered that *complot* could also be directed against mankind or result in an act constituting a war crime, and if it were further recognized that it could engage the collective responsibility of those who had instigated it, the concept of *complot* could then be assimilated to that of conspiracy.

24. Opinions on that important question were still divided. He noted, however, that conspiracy was expressly referred to in conventions designed to prevent and punish certain offences against the peace and security of mankind, such as the 1948 Convention on genocide and the 1973 Convention on *apartheid*. If conspiracy was recognized for genocide and *apartheid*, it could hardly be ruled out for other crimes against humanity. The main characteristic of such crimes was that they were usually committed through participation in groups within which it was difficult to distinguish a principal perpetrator from accomplices. Since the crimes in question were extremely serious and had to be effectively prevented and punished, some writers had taken the view that it was not unreasonable to recognize conspiracy in certain cases. At the current stage in the work, however, he had no very definite opinion on the question.

25. As to “attempt”, members of the Commission generally appeared to take the view that it should not include preparatory acts. For there to be an attempt, there must be commencement of execution.

26. Comments had also been made on the term *auteur* (“person who commits”). Some members had said that draft article 3 should refer not to *l'auteur*, but to *l'auteur présumé* (“person presumed to have committed”). He did not entirely agree, because the *auteur* was the person whose guilt had been established by the competent court. Moreover, the idea of an *auteur présumé* was contrary to the principle of criminal law whereby any person being prosecuted was presumed innocent. While benefiting from the presumption of innocence he could not, at that stage, be presumed to have committed the offence.

27. It had also been argued that the term *auteur* was too vague and that a minister or even a head of State might not have taken part in an act of aggression against another State or might not even have been informed of it. But that theory was not acceptable. It was contrary to the principle of government solidarity. The members of a Government were jointly responsible for its acts. They could be relieved of their responsibility only by publicly expressing disapproval of the act or by resigning. Silence made them accomplices. Moreover, if the Nürnberg Tribunal had accepted that theory, it would have had to acquit most of the major Nazi war criminals.

28. Referring to the position of certain offences in the draft code, some members had taken the view that the provisions relating to complicity, conspiracy and attempt should appear in chapter I, part II, on general principles. But complicity, conspiracy and attempt were not principles; they were offences, and if they were not included in the list of offences, it would be impossible to determine what penalties were applicable to them. Besides, complicity, conspiracy and attempt were characterized as offences in national penal codes, which specified the penalties to be imposed on anyone found guilty of them.

29. There might also be some doubt about the place to be assigned to terrorism and the category in which it should be included. As a recent example had shown, hostilities might well break out as a result of terrorism carried out by one State against another State, which was referred to in the draft code. That type of terrorism was thus a crime against peace; but since not all terrorist acts were directed against a national, ethnic, racial or religious group, it was more difficult to affirm that they were also crimes against humanity.

30. Turning to the question of method, he observed that there were two ways of defining an offence. One was to formulate a general definition, as the Commission had done for war crimes in the 1954 draft code. If the Commission chose that method, simply stating that a war crime was a violation of the laws and customs of war—that term being used in a very broad sense—and leaving it to the competent court to determine whether the act complained of was in fact a violation of the laws and customs of war, it would avoid having to deal with a number of sensitive issues.

31. The other way was to make a non-limitative enumeration. But if it were decided to refer, by way of example, to a certain number of acts constituting war crimes, they would have to be the most representative acts. It was difficult to see how the Commission could

refer to the use of asphyxiating gases, for example, and omit the use of nuclear weapons, as some members wished.

32. That was an issue on which both politicians and lawyers were divided. The advocates of positive law maintained that, since it was not prohibited by any international convention, the use of nuclear weapons could not be classed as a war crime. On the basis of *lex lata*, they distinguished between the first use of force, which was assimilated to aggression, and the second use of force, which, unless the response was disproportionate to the attack, was simply equivalent to the exercise of the right of self-defence provided for in Article 51 of the Charter of the United Nations. But it was not possible to disregard the political considerations underlying that reasoning. Politically, it could well be argued that, if States undertook never to make first use of nuclear weapons, it was because they had a large enough stock of conventional weapons to make that unnecessary. So if a *lex lata* position was adopted, it was extremely difficult to decide one way or the other.

33. But according to the advocates of normative law, that was to say on the basis of *lex ferenda*, the situation was quite different. Relying on the fact that the law of war had always aimed at protecting civilian populations and that other types of weapon had already been prohibited, they maintained that prohibition of the use of nuclear weapons should be the subject of a peremptory norm of international law. But if that thesis prevailed, it would be necessary, as some members of the Commission had suggested, to condemn not only the use of nuclear weapons in general, without any distinction between first and second use, but also the manufacture and possession of nuclear weapons. That was a good illustration of the problems posed by the enumerative method. If the Commission decided to list some acts constituting war crimes, it could not omit the use of nuclear weapons.

34. With regard to general principles, there had been no real objection to the definition of offences against the peace and security of mankind in draft article 1. Some members had made proposals designed to improve the wording of that article, but they would be mainly for the Drafting Committee to consider. Other members had suggested that "seriousness" should be added to the criteria adopted. He was willing to include that criterion, even though unanimous agreement had not been reached on it, since some members of the Commission regarded it as a subjective idea that would add nothing to the text. He was also quite willing to specify that the offences referred to in the draft code were offences committed by individuals.

35. Draft article 3 (Responsibility and penalty) and draft article 4 (Universal offence) had been favourably received, and there seemed to have been no objections to draft article 5, which provided for the non-applicability of statutory limitations to offences against the peace and security of mankind. Nevertheless, some members had raised the questions whether, after a lapse of time, it might not be difficult to obtain evidence, and whether the principle of imprescriptibility might not cause difficulties. That problem also arose in internal law; for some countries had a 10-year period of

prescription in criminal matters, and there might well be doubts about the possibility of producing evidence 10 years after an offence had been committed and about the value of testimony taken so long after the event. In any case—as was too often forgotten—it was for the competent court to decide whether the evidence produced was admissible or not.

36. The principle of non-retroactivity stated in draft article 7 had also been accepted. No one had disputed the fact that, in the maxim *nullum crimen sine lege*, the word *lex* referred not only to treaty law, but also to custom and the general principles of law.

37. Although agreement in principle had been reached on exceptions, a number of reservations had been made on draft article 8. The first had related to the use of the negative form. But he had drafted the article in that form only in order not to leave the door too wide open for exceptions. Since the draft code related to the most serious offences, it could not provide for the exceptions applicable under ordinary law without imposing specific limits on them.

38. It had also been said that coercion should be accepted as a defence for certain crimes against humanity. He had doubts on that point, because a crime against humanity presupposed a specific motive, and a person acting under coercion had no motive. It was true that international courts had recognized the exception of coercion, but only in very few cases and subject to such conditions that very few persons had invoked it successfully.

39. In fact the solution might be to make a distinction between justifying facts and non-responsibility. In the case of offences against the peace and security of mankind, it could hardly be said that coercion was a justifying fact, but it might be said that it was a factor precluding or attenuating responsibility. For although it would be difficult to find any fact that could justify an offence against the peace and security of mankind, it was possible to find causes of non-responsibility, such as coercion, or factors attenuating responsibility. That, too, was a question that needed deeper study.

40. Some members of the Commission considered that certain subjective elements such as insanity and minority should also be taken into account. But the concept of insanity must be handled with great caution, for how was it possible to determine where it began and ended? As to minority, it was inconceivable that a minor could commit a war crime, since minors were not required to do military service; and it was also difficult to see how a minor could commit a crime against humanity.

41. The most controversial question was that of the criminal court that would be competent to try offences against the peace and security of mankind. Some members had objected to the principle of universal competence, while others had expressed reservations about the possibility of establishing an international criminal jurisdiction. At the present stage in the development of the law it would be difficult to establish an international criminal jurisdiction or to secure acceptance of the principle of universal competence, but that was no reason for not going forward. It would, indeed, be irrespon-

sible not to do so. There were, of course, many difficulties, but the Commission must try to surmount them.

42. The solution proposed in draft article 4, which stated the principle of universal competence without excluding the possibility of establishing an international criminal jurisdiction, was doubtless not perfect; but although it could easily be criticized, it was much more difficult to suggest acceptable alternatives. He himself was not an ardent supporter of that principle and he would be prepared to support any proposal that was more satisfactory.

43. It had been said that the applicable rule in criminal matters was that of territoriality. That was indeed so in internal law, but there was no justification for affirming that it was so in international law as well. The Nürnberg Tribunal and the other international tribunals set up at the end of the Second World War under Law No. 10 of the Allied Control Council had not had exclusive jurisdiction. War crimes had been tried by German and French courts, which had exercised concurrent jurisdiction. In fact, there had always been a combination of several systems and it was difficult to see how the position could be different today.

44. The 1948 Convention on genocide did not anywhere provide that the principle of territoriality was an absolute rule. According to article VI of that Convention:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction ...

The Convention thus recognized that there could be two jurisdictions.

45. The 1973 Convention on *apartheid* also did not recognize the principle of exclusive territorial jurisdiction. Article V provided:

Persons charged with the acts enumerated in article II ... may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction ...

Similarly, principle 2 of the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity¹² provided:

Every State has the right to try its own nationals for war crimes or crimes against humanity.

while principle 5 provided:

Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, *as a general rule** in the countries in which they committed those crimes. ...

46. It had also been argued that, if the principle of universal competence were applied, courts might take contradictory decisions. But that often happened in internal law; there was nothing more inconsistent than the judgments of national criminal courts, which, depending on the circumstances, imposed heavier or lighter penalties for the same crime. The problem of the

pressure to which judges might be subject arose both in internal law and in international law.

47. Attention had also been drawn to extradition, which, although subject to very specific rules, was not a simple procedure; even in internal law, cases of extradition were relatively rare. Contrary to what had been said during the debate, however, offences against the peace and security of mankind were not political offences; they were ordinary crimes. Consequently, States were required to extradite anyone who had committed such an offence. But it was not only the rule that offences against the peace and security of mankind were ordinary crimes that had been laid down. All the relevant conventions contained provisions on extradition. Article XI, paragraph 1, of the 1973 Convention on *apartheid*, for example, provided:

Acts enumerated in article II ... shall not be considered political crimes for the purpose of extradition.

and article VII of the 1948 Convention on genocide provided:

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. ...

The principle of extradition was thus well established in the case of offences against the peace and security of mankind and the possible difficulties in applying that principle in practice could not be advanced as an argument for rejecting the system of universal competence.

48. The only really difficult problem was that of offences against the peace and security of mankind committed by members of a Government. Some members of the Commission had questioned whether that case should be dealt with in the draft code. According to some writers, the establishment of an international criminal jurisdiction would help to solve the problem. In their view, if the perpetrator of the act did not appear before the court, he would be convicted *in absentia*. There would thus be condemnation by the international community; but he realized that that was a matter requiring further reflection.

49. The last difficulty pointed out had related to the rule *non bis in idem*. Some members of the Commission feared that a plurality of competent courts might jeopardize that rule. But that was a matter that could be settled by agreement; there was nothing to prevent States from concluding a convention providing that crimes tried by a court of one State could not be retried by a court of another State. Moreover, as early as 1883, the Institute of International Law had stated the principle that:

Sentences pronounced after fair trial by the courts of any State ... shall prevent any further prosecution of the guilty person for the same act.¹³

50. If an international criminal jurisdiction were established, the difficulty would arise from the fact that the same act was not characterized in the same way in international law and in internal law. By virtue of the principle of the autonomy of international law, an international criminal court would not, in principle, be bound to respect a judgment of a national court. But,

¹² General Assembly resolution 3074 (XXVIII) of 3 December 1973.

¹³ Resolution on conflict of criminal laws, art. 12 (*Annuaire de l'Institut de droit international, septième année* (Brussels), 1885, p. 158).

there again, there were a number of possible solutions. First, States could conclude agreements; but it might also be provided in the statute of the international court that, where there had already been a conviction for an offence, the court, by virtue of the principle of the autonomy of international law, would pronounce a purely declaratory judgment without any sentence.

51. Thus, although there certainly were difficulties, they should not be an insurmountable obstacle to the elaboration of the draft code.

52. He realized that the Commission would one day have to deal with the question of penalties, but it might perhaps be better to wait until its work was much further advanced and the members of the international community had taken a clear-cut position on the implementation of the code.

53. Mr. USHAKOV said that, under the penal codes of some States, such as the Soviet Republics, conspiracy was not recognized only in connection with crimes against the State. It also meant association of persons to commit any crime jointly. He did not think that government solidarity could be referred to in criminal matters, since it could exist only as a result of a particular political philosophy.

54. Mr. FRANCIS said that three questions deserved further consideration by the Special Rapporteur. The first concerned *apartheid*. The Special Rapporteur, in chapter II, part II, of the draft articles, appeared to assume that *apartheid* could be committed only by a State. But in his own view, while the State would establish the general framework for *apartheid*, the State alone could not make that policy effective. Therefore any private individual who helped to implement the policy in any way would be committing the crime of *apartheid* and, depending on the circumstances, would be punishable as an accomplice or a conspirator, for example. The second question concerned terrorism. He believed that the Special Rapporteur had conceded, in a previous debate,¹⁴ that individuals could commit the crime of terrorism, and Mr. Malek had vividly illustrated such a possibility. Lastly, the Special Rapporteur held that crimes against humanity could be committed only with respect to groups, which might be ethnic, racial or religious. He doubted whether that was entirely true, since the world was currently witnessing an abundance of crimes against humanity which were not based on race or religion. Crimes committed in a country populated by a single race naturally did not have the same connotation as crimes committed in a country having a plurality of races.

55. Mr. CALERO RODRIGUES, noting that the debate had been concluded, said that the time had come for the Commission to decide how to proceed. He had previously made three suggestions: first, that the Special Rapporteur should present revised draft articles at the next session, without a new analysis; secondly, that the Planning Group should draw up a plan for future study of the topic; and thirdly, that the Commission should remind the General Assembly that it had not yet replied

to the questions previously put to it by the Commission, and that its replies were necessary for the orderly continuation of the Commission's work. Those questions were whether the Commission should proceed with the preparation of an instrument for the establishment of an international jurisdiction, and whether it should proceed on the basis that only individuals would be responsible under the code.

56. Chief AKINJIDE said that he endorsed Mr. Francis's views on *apartheid* and would have liked more attention to have been paid to that matter in the Special Rapporteur's summing-up. It was not enough to say that *apartheid* was a crime by a State: the tap-root of *apartheid* lay outside South Africa and was primarily economic. If the economic basis for *apartheid* were removed, the political basis would collapse. Those benefiting economically from *apartheid* should also be treated as criminals for the purposes of the draft code.

57. Mr. THIAM (Special Rapporteur), replying to the comments made and questions raised by several members of the Commission, said that he had dealt with the concept of conspiracy precisely because its meaning varied from one country to another. The members of a Government were obviously bound by political solidarity; it would be unthinkable for a minister to dissociate himself from aggression after the act, and if he did not resign before the act had been committed, he would, of course, also be responsible for it.

58. He saw no objection to the idea of broadening the concept of a crime against humanity: in the broader sense, a crime against humanity would be committed when one ethnic group massacred another or when a minority was the target of criminal acts. The 1954 draft code did not mention *apartheid*, and he would welcome any specific proposals that members of the Commission might wish to make on that subject. But he did not see how it would be possible to prosecute the Government of a Western country which benefited from *apartheid*. Moreover, it would be rather difficult to add new elements to the relevant conventions, of which he had taken due account. He warned members of the Commission against the dangers of drafting the code from a political point of view.

59. Although slavery had been dealt with in draft article 12, paragraph 3, he planned to devote a separate article to it in his next report.

60. He thought it was for the Commission to pronounce on the proposals made by Mr. Calero Rodrigues. The Commission could, of course, make suggestions to the Sixth Committee of the General Assembly, but it would be difficult to take decisions on future work that would be binding on the new members of the Commission.

61. Mr. KOROMA said he agreed with the Special Rapporteur that it was not desirable to bind the future members of the Commission to a schedule of work. Nevertheless, he endorsed Mr. Calero Rodrigues's suggestions concerning revision of the draft articles and a reminder to the General Assembly.

¹⁴ See *Yearbook ... 1985*, vol. I, p. 81, 1889th meeting, para. 19.

62. Sir Ian SINCLAIR suggested that a decision on the reminder to the General Assembly could be taken immediately. The replies to the questions submitted were central to the continuation of the Commission's work on the topic, and the reminder should be included in the Commission's report to the General Assembly. Mr. Calero Rodrigues's suggestion regarding the plan for future study of the topic was sound, but the Special Rapporteur should be allowed full freedom of action. He might, for example, wish to include in his next report an indication of how the topic should be studied in the future.

63. Mr. DÍAZ GONZÁLEZ said that it would be very useful if the Special Rapporteur could submit revised draft articles at the Commission's next session, but it might not be entirely appropriate for the Commission to draw up a programme of work for that session. Any suggestions to be made should be formulated by the Planning Group. Similarly, it was for the Special Rapporteur to indicate in his next report how he wished the questions dealt with in the draft code to be considered. It was quite right to urge the Sixth Committee to answer the questions already put to it, particularly with regard to an international criminal jurisdiction.

64. Mr. THIAM (Special Rapporteur) said that he would formulate the questions to be put to the Sixth Committee in the chapter of the Commission's report dealing with the draft code. He had taken note of the proposals made by Mr. Calero Rodrigues, but thought that it would be better to leave it to the Commission to decide, at its next session, what course of action was to be followed, so that it would not be prematurely bound by one method or another.

65. Mr. KOROMA said that the discussion had left him wondering how the Commission would proceed with the draft code at its next session.

66. Mr. CALERO RODRIGUES pointed out that a programme of work would be extremely useful to the new members of the Commission in proceeding with the study of the topic. He therefore urged the Planning Group to propose a tentative plan.

67. The CHAIRMAN said there appeared to be agreement that the Special Rapporteur should submit, at the next session, revised draft articles based on his own wisdom and on the wishes of the Commission, and that the Planning Group should prepare a programme of work for the Commission's next session. The Special Rapporteur would draft, for the Commission's report, the questions that should be put to the Sixth Committee.

It was so agreed.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/396,¹⁵ A/CN.4/L.399, ILC
(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (continued)

ARTICLE 24 [26] (Service of process)

68. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 24 [26] which read:

Article 24 [26]. Service of process

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

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

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

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

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

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

(ii) by any other means.

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

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

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

69. Article 24 was the first article in part V of the draft, entitled "Miscellaneous provisions". As he had said at the previous meeting, the elements included in the former article 25 (Immunities of personal sovereigns and other heads of State) had been either deleted or incorporated in earlier articles. The present text was based on paragraphs 1 and 2 of the former article 26,¹⁶ dealing with service of process. Paragraphs 3 and 4 of that article, concerning default judgment, formed the basis of the new article 25.

70. Paragraph 1 had been amplified and spelt out the various means by which service of process could be effected. It employed the word "shall" instead of "may". It should be noted that a hierarchy of such means was provided, beginning first with special arrangements. Transmission by registered mail addressed to the head of a foreign ministry, or by any other means, was possible as the last means available, if permitted by the law of the forum State and that of the defendant State.

71. Paragraphs 2 and 3 were new and were taken from similar provisions in the 1972 European Convention on State Immunity.¹⁷ Paragraph 4 was based on paragraph 2 of the former article 26, which had been modified to make it clear that the appearance in question related to the merits and was not, of course, an appearance for the sole purpose of challenging the jurisdiction of the court.

¹⁶ See 1942nd meeting, para. 10.

¹⁷ *Ibid.*, footnote 6.

¹⁵ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

72. Sir Ian SINCLAIR said that he was content in principle with article 24. At the Commission's 1944th meeting, he had expressed concern about the provision on service by registered mail. His concern had been partly allayed by the Drafting Committee's decision to make that method very subsidiary and to qualify it, in paragraph 1 (d), with the words "if permitted by the law of the forum State and the law of the State concerned".

73. He suggested a minor amendment to the text of paragraph 2. In the last part of the paragraph, the reference to "their" receipt by the Ministry of Foreign Affairs was ambiguous, since it was not clear what the word "their" referred to. He therefore suggested that the words "their receipt" should be replaced by the words "receipt of the documents".

74. Mr. KOROMA proposed that, in paragraph 1 (b) and (c), the words "failing such arrangement" should be replaced by the words "in the absence of such an arrangement".

75. Mr. SUCHARITKUL (Special Rapporteur) suggested that that proposal should be held over until the second reading. The Drafting Committee had already considered it, but had retained the present wording, among other reasons because the formula suggested could not be introduced into paragraph 1 (d), which began with the words "failing the foregoing".

76. Mr. KOROMA said that he would not press his proposal but wished his preference to be placed on record. If the wording of paragraph 1 (d) was the only reason for not accepting his proposal, consideration could be given to improving that wording.

77. Mr. RAZAFINDRALAMBO, referring to the suggestion made by Sir Ian Sinclair, proposed that, in the French text of paragraph 2, the words *au ministère* should be replaced by the words *par le ministère*.

78. Mr. BALANDA suggested that paragraph 1 (a) should be shortened by deleting the words "for service". With regard to paragraph 1 (d), he did not think that the law of the forum State and the law of the State concerned need both permit transmission by registered mail; such a requirement would be excessive. In order to simplify matters, paragraph 1 (d) should be amended to read: "... if permitted by the law of the forum State or the law of the State concerned ...".

79. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the question raised by Mr. Balanda had been discussed at length in the Drafting Committee. The problem was that the document to be served had legal force. It was a matter of performing an act of authority in another State, whose consent was obviously required. Clearly, therefore, the law of that State would have to permit service by registered mail. Similarly, the law of the forum State would have to permit that method. That was why the Drafting Committee had specified that the method of service must be permitted by the law of both countries.

80. Mr. BALANDA pointed out that the Special Rapporteur had not established any hierarchy for the various procedures and that the order proposed in

paragraph 1 had been established during the debate, with diplomatic channels coming first and transmission by registered mail as a last resort. In his opinion, the nature of the document required should be determined in accordance with the law of the forum State.

81. Chief AKINJIDE propounded the hypothetical example of two States, of which State A permitted service by registered mail and State B did not. If a plaintiff in State A tried to serve process upon State B, the legal adviser of State B would advise that no service had taken place and that the communication should be ignored. Clearly, therefore, the method of service by registered mail had to be lawful in both the States concerned.

82. Mr. USHAKOV said that, because procedures varied from country to country, there was a significant difference between the English and French titles of article 24. On second reading, the Commission should therefore choose more general and neutral terms, which should be defined in article 2; otherwise, persons unfamiliar with the legal systems on which the draft was based might have some difficulty in understanding the provisions of article 24, as it would be difficult to use different texts concurrently.

83. Mr. TOMUSCHAT observed that, in the French text, the term "service" had been rendered as *signification ou notification*, which gave the impression that article 24 contained a general rule applicable to all notifications—of judgments, for example—and a special rule for the service of documents instituting proceedings. The English text contained no such ambiguity; it simply dealt with service of process.

84. Mr. SUCHARITKUL (Special Rapporteur) pointed out that the 1972 European Convention on State Immunity, which was a bilingual instrument, used "service" in English and *signification ou notification* in French as equivalent terms.

85. Mr. LACLETA MUÑOZ said that the Spanish text of article 24 was very clear and referred only to *notificación*. He did not think that the words *signification* and *notification*, as used in the French text, referred to two different things. They would seem, rather, to be synonymous.

86. Mr. KOROMA proposed the deletion of paragraph 4 as being unnecessary. Objection to service could be raised at any point in a proceeding.

87. Mr. DÍAZ GONZÁLEZ suggested that, in order to make the Spanish text of paragraph 4 clearer, the words *Ningún Estado que comparezca en relación con el fondo en un proceso promovido contra él podrá* should be replaced by *El Estado que comparezca en relación con el fondo en un proceso promovido contra él no podrá*.

88. Mr. SUCHARITKUL (Special Rapporteur) said that paragraph 4 reflected the existing practice. Once a court was seized of the merits of a case, it was too late to raise any procedural objection.

89. Mr. KOROMA pointed out that, in some cases, a court could join the procedural objection to the merits and consider them both together.

90. Mr. BALANDA said that the words "Any State that enters an appearance on the merits" in paragraph 4 were not very clear. Despite the rather awkward wording of paragraph 4, however, there was no doubt that the members of the Commission unanimously agreed on the principle that objections could be raised only at the start of a proceeding, *in limine litis*. Consequently, once a State had begun to defend itself in a proceeding instituted against it, it could no longer claim that service of process had not been properly effected.

91. Chief AKINJIDE said that the Nigerian rules of procedure contained a rule expressed in exactly the same terms as paragraph 4. Upon being sued, a defendant could appear in court in either of two ways: he could appear on the merits, in which case no procedural issues could be raised; or he could appear on protest and could raise any procedural objections. Of course, it was open to the court to join the procedural objections to the merits.

92. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 24 [26] with the amendments proposed by Sir Ian Sinclair, by Mr. Razafindralambo for the French text, and by Mr. Díaz González for the Spanish text.

It was so agreed.

Article 24 [26] was adopted.

ARTICLE 25 [26] (Default judgment)

93. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 25 [26], which read:

Article 25 [26]. Default judgment

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

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

94. Article 25 was based on paragraphs 3 and 4 of the former article 26.¹⁸ The earlier text had been redrafted in the light of the discussion and paragraph 1 now specified a minimum time-limit of three months from the date of service of process before a default judgment could be rendered. It had been considered preferable to specify a time-limit, rather than rely on the subjective notion of a period of time subject to a reasonable extension.

95. Paragraph 2 similarly specified a minimum period of time to be allowed for applying to have a default

judgment set aside, if such a time-limit was set by the court under internal law. That part of the provision assumed that procedures existed under internal law for setting aside or appealing against a default judgment. Such procedures might not exist, or might be at the discretion of the court, depending on the applicable rules of civil procedure of the forum State. Finally, provision had been made for transmission of a translation of the judgment, if necessary.

96. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission agreed provisionally to adopt article 25 [26].

Article 25 [26] was adopted.

ARTICLE 26 [27] (Immunity from measures of coercion)

97. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 26 [27], which read:

Article 26 [27]. Immunity from measures of coercion

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

98. The new text was based on paragraph 1 of the former article 27.¹⁹ The rule had been modified, however, to make it relate only to measures of coercion requiring a State to perform, or refrain from performing, a specific act, on pain of suffering a monetary penalty. The Drafting Committee believed that it was not advisable or realistic to prohibit a court from exercising its usual power to order a party to perform or refrain from performing a specific act. The enforcement of such an order against a State was, of course, a different question and was covered by part IV of the draft. Thus article 26 was limited to providing immunity from a court order for specific performance that carried with it the coercive measure of a monetary penalty for non-compliance with the order. In some legal systems, including the French system, the penalty was termed *astreinte*.

99. It had been thought preferable to formulate the provision as a separate article, instead of including it in article 27, since it related to something more than a "procedural immunity".

100. Mr. RAZAFINDRALAMBO proposed that, at the end of the French text, the word *financière* should be replaced by *pécuniaire*.

101. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 26 [27] with the amendment to the French text proposed by Mr. Razafindralambo.

It was so agreed.

Article 26 [27] was adopted.

¹⁸ *Ibid.*, para. 10.

¹⁹ *Ibid.*

ARTICLE 27 (Procedural immunities)

102. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 27, which read:

Article 27. Procedural immunities

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

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

103. The two paragraphs of the new text were based on paragraphs 2 and 3 of the former article 27.²⁰ Those paragraphs had been reformulated in the light of the debate. Paragraph 1 first spoke of “no consequences” being entailed by the conduct in question, although it stated that the consequences which might ordinarily result from such conduct in relation to the merits of the case would still obtain. That wording preserved the applicability of any relevant rules of the internal law of the forum State. The second sentence of paragraph 1 specified that no fine or penalty could be imposed. Paragraph 2 drew on paragraph 3 of the former article 27 and a corresponding provision of the 1972 European Convention on State Immunity. It should be noted that both paragraphs applied whether a State was plaintiff or defendant.

104. Sir Ian SINCLAIR said that he wished to place on record his reservation on paragraph 2 with regard to the position of the State as a plaintiff. He could accept the provisions of paragraph 2 when the State was a defendant.

105. Mr. TOMUSCHAT made the same reservation. In his view, the rule set out in paragraph 2 had no justification when the State was involved in a proceeding as plaintiff; it would then confer a privilege on the defendant. It should also be borne in mind that, in many cases, it was very difficult to recover monies deposited as security.

106. Mr. BALANDA proposed that, in paragraph 2 of the French text, the word *caution*, which referred to a person, should be replaced by *cautionnement*.

107. Mr. MAHIU said that security was required of a plaintiff, not of a defendant, for if a defendant were required to provide security, he would not appear. Thus article 27, paragraph 2, would make sense only if it referred to the plaintiff. It was in the light of his own country's internal law that he made that comment.

108. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 27 with the amendment to the French text proposed by Mr. Balanda.

It was so agreed.

Article 27 was adopted.

²⁰ *Ibid.*

ARTICLE 28 (Restriction of immunities)

109. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 28, which read:

Article 28. Restriction of immunities

A State may restrict in relation to another State the immunities provided in the present articles to such extent as appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or as required by any international agreement applicable in the matter between them. However, no such restriction shall prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*).

110. The former article 28²¹ had been modified in a number of respects. The reference to “extension” of immunities had been deleted as being unnecessary. Such extension was possible in any case and to make provision for it would add nothing to the draft. Thus the new article referred only to “restriction” of immunities.

111. The first sentence contained the essential elements of the original text, with appropriate drafting improvements. The second sentence was new and incorporated what was considered to be an essential element, namely that in no event could restriction of immunities prejudice the immunities of a State in respect of acts performed by it in the exercise of its sovereign authority (*acta jure imperii*). That provision was intended to protect the “hard core” of State immunities and to draw a line beyond which restrictions were not permitted.

112. The wording of that provision had, of course, been the subject of some discussion. The French expression *les prérogatives de la puissance publique* seemed to express the basic idea most accurately. Again drawing on the 1972 European Convention on State Immunity, the Drafting Committee had decided to include in all language versions, after the phrase “exercise of sovereign authority”, the Latin expression *acta jure imperii* in parentheses, in order to bring out within the context of that particular article the fundamental nature of the sovereign authority in question.

113. The CHAIRMAN suggested that the discussion on article 28 should be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

²¹ *Ibid.*

1970th MEETING

Wednesday, 18 June 1986, at 3.15 p.m.

Chairman: Mr. Motoo OGISO

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr.

Mahiou, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/396,¹ A/CN.4/L.399, ILC
(XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (continued)

ARTICLE 28 (Restriction of immunities)² (continued)

1. Mr. USHAKOV said that he was utterly opposed to article 28. It contained an alarming and preposterous proposition, for under its terms two States parties to the future convention would be able to decide, unilaterally or bilaterally, not to abide by the rules set forth in that convention.

2. The expression "for reasons of reciprocity" signified, as he read it, that if one State unilaterally violated its obligations with respect to the immunities provided for in the articles, another State could then decide that a tacit agreement existed to commit such a violation. Where would that lead? Again, as though it were not bad enough to imply that violating its obligations under the articles was the "standard practice of that other State", the expression was further qualified by the phrase "to such extent as appears to it to be appropriate", which was quite absurd. And what on earth was meant by an "international agreement applicable in the matter"?

3. Furthermore, the first sentence of the article, which laid down that "the immunities provided in the present articles" could be restricted, did not accord with the second, which specified that the obligations under the articles were not affected. In addition, the words "sovereign authority" in the second sentence meant no more nor less than the exercise of governmental authority; it was therefore quite wrong to add, by way or explanation, the Latin term *acta jure imperii*, which meant something entirely different.

4. Rather than permit violations of the obligations under the future convention, article 28 should provide for the imposition of restrictions in the form of lawful countermeasures. As drafted, the article completely upset the established order of things and was therefore totally unacceptable.

5. Mr. FLITAN said that article 28 posed no major problem of substance so far as he was concerned, although the wording could be improved to bring it into line with the draft as a whole. In his view, under the terms of article 8, States could give their consent to restrictions of immunity other than those specified in the draft articles. It would none the less be preferable to speak of exceptions to, rather than restrictions of, immunity.

6. With those points in mind, he proposed that the title of article 28 should be amended to read "Other exceptions to immunities". Furthermore, the two sentences of the article should form two separate paragraphs. He agreed that the phrase "to such extent as appears to it to be appropriate", which was somewhat arbitrary, could be deleted from the first sentence, but favoured retention of the reference to reciprocity. The word "standard" should be deleted from the phrase "standard practice of that other State", in keeping with the wording of article 3, paragraph 2. The first sentence would thus read: "A State may introduce exceptions other than those provided in the present articles to the immunities of another State for reasons of reciprocity or conformity with the practice of that other State ...".

7. At the beginning of the second sentence, the words "However, no such restriction shall" should be replaced by "The introduction of other exceptions to immunities on the basis of paragraph 1 shall not". It could be left to the Drafting Committee to decide whether to retain the Latin expression *acta jure imperii*.

8. Chief AKINJIDE said that, after hearing Mr. Ushakov's remarks, he had come to the conclusion that, if it was allowed to stand, article 28 could render any future convention inoperative. As was apparent from the Special Rapporteur's commentary to the article in his eighth report (A/CN.4/396, para. 42), article 28 served little purpose. Also, it might create more problems than it solved, since it could be used in bad faith. In the circumstances, he considered that article 28 should be deleted in its entirety.

9. Sir Ian SINCLAIR said that a number of connecting factors had been inserted in articles 11 to 20 to indicate that, if a case was covered by those factors, immunity could not be invoked, and that, if the case was not, the residual rule of immunity in article 6 would operate. The problem was that the Commission was not required to harmonize the rules of civil jurisdiction applied by States. Consequently, there might be certain rules of civil jurisdiction applied in a particular State that went slightly beyond those connecting factors. Some degree of flexibility was therefore necessary to cope with what was recognized, under the 1972 European Convention on State Immunity, as a kind of grey zone. An added reason for introducing a measure of flexibility into the draft was that the Commission could not predict future developments.

10. To take an example pertaining to contracts of employment, the jurisdiction of United Kingdom courts extended to any contract of employment entered into in the United Kingdom, even if the services under the contract were to be performed wholly outside the United Kingdom. Under article 12 [13], paragraph 1, immunity could of course be invoked, but only in respect of a contract of employment between a State and an individual for services performed or to be performed, in whole or in part, in the territory of the State of the forum. In the case of a contract of employment for services to be performed not even in part in the territory of the State of the forum, the position might well be that, since the case was not covered by the particular connecting factor under article 12 [13], paragraph 1, the rule of immunity would prevail. Yet that might not necessarily be the

¹ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

² For the text, see 1969th meeting, para. 109.

right solution in terms of the overall economy of the draft. In his view, therefore, some provision along the lines of article 28 was highly desirable.

11. While the wording of the article was open to some criticism, he would point out, in response to Mr. Ushakov, that a State acting in good faith in pursuance of an article like article 28 that was designed to introduce an element of flexibility would not necessarily be committing an internationally wrongful act in relation to the other articles of the draft. Some of Mr. Ushakov's arguments therefore fell to the ground.

12. His own difficulty with article 28 was that it was not at all clear what was meant by "for reasons of reciprocity". That expression would thus have to be explained in the commentary, but he did not think it referred to reciprocity as a countermeasure within the meaning of the draft articles on State responsibility.

13. He believed very strongly that the second sentence of article 28, including the reference to the concept of *acta jure imperii*, should be retained, since it represented the "bottom line" and set the limits beyond which immunities could not be restricted.

14. Mr. KOROMA said that he had some objections to article 28 as formulated, but understood the Special Rapporteur's intention. Accordingly, he proposed that the title of the article should be changed to "Reciprocal immunities" and that the body of the text should be amended to read:

"States may agree between themselves, on the basis of reciprocity and in conformity with the practice of those States or as may be required by an international agreement applicable in the matter, to modify the immunities provided in the present articles."

15. Mr. CALERO RODRIGUES said that an objective examination of the matter revealed that Mr. Ushakov's interpretation of article 28 was mistaken. The purpose of the article was in fact to make provision for any possible grey areas in the application and interpretation of the draft articles. For instance, if on the basis of its own interpretation a State applied the articles restrictively, another State was entitled to interpret and apply the articles in the same way, either by reason of reciprocity or because such interpretation was the standard practice of the other State, or again because it was the result of an international agreement between the States in question. In all such cases there was no collective right to violate a treaty, but merely a right to interpret the treaty restrictively. That was quite clear from the second sentence of article 28, which was not preposterous but simply the logical consequence of the need to acknowledge in the draft articles that there would always be grey areas in which States had some freedom of movement and that such freedom should apply both ways.

16. Mr. MAHIU said that he had no strong position concerning article 28, although he did have doubts about its utility. Even if it were retained in the light of the explanations given by Sir Ian Sinclair and Mr. Calero Rodrigues, a drafting problem still remained and certain ambiguities would have to be removed. He thus fully agreed about the need to cater for grey areas in

the interpretation of the draft, provided that the actual wording of the article did not itself create such areas.

17. Although Mr. Ushakov's comments regarding the phrase "for reasons of reciprocity, or conformity with the standard practice of that other State" were perhaps somewhat harsh, they contained more than a grain of truth. It might be as well to replace the conjunction "or" by "and" in order to make a stronger connection between the two elements. Such a course would also help to eliminate any ambiguity or difficulties of interpretation. Reciprocity was of course already recognized under international law, along with the right of two States to conclude an agreement with a view to modifying a particular aspect of their relations. Admittedly, it might be useful to state the self-evident, but that in itself could also create ambiguity.

18. There was no need whatsoever for the Latin term *acta jure imperii* at the end of the second sentence. First of all, it would be difficult to render into other languages, such as Arabic. In addition, the expression "sovereign authority" appeared elsewhere in the draft articles without being accompanied by the term *acta jure imperii*. The sudden inclusion of the latter in article 28 could only add to the inherent ambiguity.

19. Mr. USHAKOV said that some members seemed to take the view that any State party to the future convention or to bilateral treaties could interpret the convention or the treaties as and how they wished. Interpretation, in their opinion, was a grey area. Never before in the Commission had he heard such a startling proposition. The fact of the matter was that a difference as to interpretation involved a dispute between two States that fell to be decided in the manner provided for under international law, namely by negotiation, conciliation or arbitration, or, if need be, by invoking Article 33 of the Charter of the United Nations. That was abundantly clear from all international conventions, but it would suffice to refer members to article 84 of the 1975 Vienna Convention on the Representation of States.

20. The draft articles provided for State immunity on the one hand, yet on the other proposed that such immunity could be restricted and even violated. It was something quite unheard of.

21. Mr. ARANGIO-RUIZ said that, as a matter of principle, the legislator should avoid deliberately introducing grey areas into a legal text. It was for those who interpreted the text, whether academics or practitioners, to ascertain whether such grey areas existed. Accordingly, any member of the Commission who considered that a grey area did exist should try to remove it. However, given the differences of opinion, he would suggest that a small working group, which could be composed, *inter alia*, of Chief Akinjide, Mr. Calero Rodrigues, Mr. Flitan, Mr. Mahiou, Sir Ian Sinclair and Mr. Ushakov, should be appointed to deal with the matter.

22. Mr. LACLETA MUÑOZ said that article 28 was the outcome of lengthy and complex negotiations and reflected a compromise, one which, like all compromises, was unsatisfactory in certain respects. While

he shared Mr. Calero Rodrigues's views to a large extent, he had been impressed by Mr. Ushakov's initial submission, the main point of which, if he had understood correctly, was that the other State might perhaps not have violated the convention. A degree of flexibility was none the less important in order to take account of the minor differences between the connecting factors which appeared from article 11 onwards. The problem was that the first sentence of article 28 imposed no limitation at all. Hence the solution would be to adopt some wording similar to that in article 47 of the 1961 Vienna Convention on Diplomatic Relations, so as to provide for flexibility in interpretation.

23. Mr. TOMUSCHAT said that article 28 should be aligned with article 47 of the 1961 Vienna Convention to allow for a measure of flexibility to be built into the draft convention. Accordingly, he proposed that the opening clause of article 28 should be reworded to read: "A State may in relation to another State apply restrictively the immunities provided in the present articles ...".

24. There were also certain points of drafting that required examination, particularly in the French text, which used the word *limitation* in the title but the word *restriction* in the second sentence.

25. Mr. FRANCIS, agreeing that the article under discussion should be brought more into line with article 47 of the 1961 Vienna Convention, said that the main problem was one of drafting and he therefore supported Mr. Arangio-Ruiz's suggestion for a small working group to be appointed. If that suggestion were adopted, the best course would then be to place the article between square brackets and revert to it later.

26. Mr. SUCHARITKUL (Special Rapporteur) said that the original intention had been that article 28 should give an indication of the relative nature of immunity. A State could waive immunity at any stage in a proceeding, which meant that the same rule could be applied in different ways, depending on the jurisdiction. Consequently, there was a certain lack of harmony, which in turn called for a measure of flexibility. At the same time, there was a limit to flexibility, since a State could extend or restrict immunity only if certain conditions were met. Those conditions related to reciprocity, conformity with standard practice, and the existence of bilateral conventions for example, such as those concluded within the framework of EEC, OAS or ASEAN. He recognized that there were a number of inherent difficulties in the draft and was prepared to accept, for instance, Mr. Flitan's proposal as one way of dealing with them. The term *acta jure imperii* in the second sentence was a matter of formulation, not substance, and could be dealt with in the commentary. He was willing to prepare a revised text of the draft article with the assistance of Sir Ian Sinclair and Mr. Ushakov.

27. Mr. REUTER said that article 28 raised the delicate problem of the relationships between treaties and called for very careful drafting, but it was not a provision of basic substantive importance. In view of the lack of time at the Commission's disposal, it would be more prudent to delete the article altogether for the time

being. He would, however, have no objection if some other method of proceeding were adopted.

28. The CHAIRMAN said that the Chairman of the Drafting Committee might wish to hold a meeting of the Committee to reconsider article 28. If no agreement was reached in the Drafting Committee, then perhaps Mr. Reuter's proposal to delete the article could be adopted.

29. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that it was apparent from the wide divergence of opinion in the Commission that points of substance as well as drafting were involved. One point of substance concerned the need to recognize whether there was a grey area. If so, it would necessarily relate not only to interpretation, but also to matters not covered by the draft, and the difficulty could not be resolved by using the formula contained in the 1961 Vienna Convention. Consequently, there was no sense in discussing article 28 further until a decision was taken on article 6.

30. Mr. EL RASHEED MOHAMED AHMED said that the extreme positions taken by members were not conducive to compromise. For that reason he supported the proposal to place article 28 between square brackets; it could then be taken up on second reading.

31. Mr. DÍAZ GONZÁLEZ said that he was not convinced of the utility of article 28 but, so far as the Spanish text was concerned, it would be preferable to replace the word *limitar* in the first sentence by *restringir*. As to the second sentence, the meaning was already quite clear from the terms of article 3, namely that only acts performed in the exercise of the sovereign authority of the State enjoyed immunity. Consequently, the question of a grey area was not at issue: such areas would always exist. A decision on article 28 should be deferred until it was known what form article 6 would take. In that way, an interminable discussion would be avoided.

32. Sir Ian SINCLAIR said that he was very much opposed to deleting article 28 at the present stage. The best solution would be to place the article between square brackets and refer it to the General Assembly. It could then be transmitted to Governments for comment and, on that basis, be considered more closely on second reading.

33. Mr. USHAKOV said that, so far as he was concerned, the main point was not whether there was a so-called grey area. Obviously, if two States parties believed that there was a grey area, nothing prevented them from concluding a special agreement to regulate the matter. But that was not what was being proposed in article 28, for, under the terms of that article, a State could unilaterally restrict immunity, simply because it appeared "to be appropriate" to do so in certain circumstances, and hence it could violate the provisions of the future convention. What was more, some members held that another State could do likewise for reasons of reciprocity—reciprocity that might well take the form of an international crime. Countermeasures, on the other hand, were something quite different and could be

taken until such time as the first State ceased its violation.

34. Mr. KOROMA said that the question whether two or more States could agree among themselves to apply immunities restrictively was not in doubt. What was unacceptable was for one State to restrict immunity unilaterally and, in the process, compel another State to do likewise and classify it as reciprocity. He therefore strongly urged that the Special Rapporteur be allowed to work out a new text which would reflect members' reservations. If that was not possible, the article could be placed between square brackets and referred to the General Assembly.

35. Chief AKINJIDE said his fear was that article 28, which provided for a subjective test of reciprocity, could be used by a powerful State for punitive purposes. Of course there were certain grey areas, as everybody was only too well aware, but they had already been dealt with in, for instance, articles 12 [13], 13 [14], 16 [17], 17 [18] and 18 [19], all of which contained the introductory clause: "Unless otherwise agreed between the States concerned". Consequently, there was little point in retaining article 28, with or without square brackets. It might even do more harm than good, as had proved to be the case with various instruments of national legislation on immunity. The manner in which the courts had applied the United Kingdom *State Immunity Act 1978* and the United States *Foreign Sovereign Immunities Act of 1976* in cases in which he had been involved on behalf of his Government had been quite devastating. He therefore maintained the view that article 28 should be deleted.

36. Sir Ian SINCLAIR said that he wished to make it clear for the record that the Nigerian cement cases³ in the United Kingdom had been determined not under the *State Immunity Act 1978*, but according to the common law of England, which had reflected the views of the English courts on the trend in international law towards the restrictive doctrine.

37. The Commission was dealing with a very complicated area involving interactions between principles of public international law and the rules of civil jurisdiction under national systems of law. Many of the problems in international relations were caused by the lack of harmonization of those rules, although some progress in that direction had been achieved by the member States of EEC in the context of the 1968 Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments.

38. Article 28 also raised an important point of principle, for the obvious cases were regulated but certain limited instances still remained in which it simply was not possible to perceive all the kinds of cases involving foreign States that might arise before national courts in the future. As he saw it, therefore, article 28 related solely to the exceptions and limitations in part III of the draft which contained certain connecting factors, the effect of which would be virtually to establish a rule of immunity if a particular case was not fully covered by

³ *Trendtex Trading Corporation v. Central Bank of Nigeria* (1976) (*The Law Reports 1977, Queen's Bench Division*, p. 529); on appeal (1977) (*The All England Law Reports 1977*, vol. 1, p. 881).

those factors. He was willing to endeavour to narrow the terms of article 28 along those lines. Nevertheless, it might not prove possible to reach agreement in the short time available, in which case the article could, as he had already suggested, be placed between square brackets and forwarded to States for comment, with an indication in the commentary that there was a sharp division of views in the Commission on the need for the article.

39. Mr. SUCHARITKUL (Special Rapporteur) said that he was quite willing to prepare a revised version of article 28 for the Commission's consideration at the next meeting. Alternatively, he would be content to place the article between square brackets with an indication in the report on the present session that the Commission would revert to the article on second reading, at which time the question of deletion could be considered if necessary.

40. Mr. USHAKOV said that placing the article between square brackets would not be acceptable in any way. He requested that it be placed on record that he had not been able to participate in the Drafting Committee's work on article 28.

41. Mr. DÍAZ GONZÁLEZ said that he had no objection to the suggestion to place article 28 between square brackets or to incorporate some appropriate reference in the commentary. It should none the less be made quite clear that, if article 28 was referred to the General Assembly, it was precisely because the Commission had so decided and not because the Drafting Committee had approved the article. He wished his position in the matter to be placed on record.

42. Mr. KOROMA proposed that a decision on article 28 be deferred until the following day.

43. The CHAIRMAN suggested that article 28 should be placed within square brackets and that an appropriate explanation should be included in the Commission's report. In addition, if the Special Rapporteur prepared a revised version which received general acceptance in informal consultations, that version could be examined by the Commission after it had completed its consideration of article 6.

44. Chief AKINJIDE, supporting Mr. Koroma's proposal, said that the first issue to be decided was whether any revised draft of article 28 submitted by the Special Rapporteur was acceptable to the Commission. If it were, the question of square brackets would not arise. The two issues should in any event be discussed together at the Commission's next meeting.

45. Following a brief exchange of views in which Chief AKINJIDE, Mr. FRANCIS, Mr. KOROMA, Sir Ian SINCLAIR and Mr. SUCHARITKUL (Special Rapporteur) took part, the CHAIRMAN suggested that a decision on article 28 should be deferred until the following day.

It was so agreed.

ARTICLE 6 (State immunity) (*continued*)*

46. Mr. SUCHARITKUL (Special Rapporteur) said that he would like to know whether article 6 would be

* Resumed from the 1968th meeting, paras. 49 *et seq.*

acceptable to Mr. Ushakov if the phrase “and the relevant rules of general international law applicable in the matter” were deleted. He would also welcome other members’ views in that connection.

47. Mr. USHAKOV said that article 6 would be totally unacceptable to him unless the phrase in question were deleted. He noted that, whereas the English text used the expression “general international law”, the French text spoke simply of *droit international*. Again, a better title for part II would be “General rules”, since not all the articles in that part stated principles.

48. Sir Ian SINCLAIR said that article 6 had given rise to a very lengthy discussion in the Drafting Committee and it would be unwise for the Commission not to recognize that a number of members felt very strongly that the article would be acceptable only if it included the words “the relevant rules of general international law applicable in the matter”. His own view was that, however the article was formulated, it expressed a single basic rule and not a rule of immunity subject to exceptions. The limitations merged, as it were, with a statement of principle, which was the only way to achieve a consensus on the article.

49. Mr. KOROMA said that, although it had been affirmed that article 6 was unitary in intent, it had a dual application. There could be no other reason for the two elements of the formulation, namely “the provisions of the present articles” and “the relevant rules of general international law applicable in the matter”. The rules of jurisdictional immunity were much broader than were the latter. Hence article 6 was not acceptable.

The meeting rose at 5.25 p.m.

1971st MEETING

Thursday, 19 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitul, Mr. Tomuschat, Mr. Ushakov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Ago, a Judge of the International Court of Justice, and thanked him on behalf of the members of the Commission for the valuable contribution he had made to the Commission’s work, particularly when he had been Special Rapporteur for the topic of State responsibility.

Jurisdictional immunities of States and their property (continued) (A/CN.4/396,¹ A/CN.4/L.399, ILC (XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (continued)

ARTICLE 28 (Restriction of immunities)² (continued)

2. Mr. SUCHARITKUL (Special Rapporteur) said that, in response to the wishes of certain members, he had amended the title and reworded the text of article 28 to read:

“Article 28. Implementation provisions

“Subject to mutual agreement or on condition of reciprocity, immunity may be granted to a State, in respect of itself and its property, in connection with a proceeding before a court of another State, to a greater [wider] or lesser [narrower] extent than is required under the present articles, provided always that no such adjustment shall deprive any State against its will [without its consent] of the immunities it enjoys in respect of acts performed in the exercise of its sovereign authority.”

3. The new text dealt not only with the restriction of immunities, but also, like the former article 28 which he had submitted,³ with the possibility of granting immunities greater than those required under the draft articles. Accordingly, the title proposed by the Drafting Committee, “Restriction of immunities”, had been replaced by “Implementation provisions”.

4. Should the Commission be unable to reach a decision on the revised text, he suggested that it should be placed in square brackets as had sometimes been done in the past, for example at the thirtieth session, in the case of article 36 *bis* of the draft articles on treaties concluded between States and international organizations or between international organizations.⁴

5. Mr. USHAKOV said that neither article 28 as proposed by the Drafting Committee nor the text now proposed by the Special Rapporteur was acceptable to him. The granting of wider immunities than those required by the present articles did not need to be authorized either by the articles or by another State. Since greater liberality was always possible, the words “to a greater ... extent” were pointless.

6. Moreover, the last part of the article, beginning with the words “the immunities it enjoys ...”, implied that immunities were also granted to a State other than in respect of the exercise of its sovereign authority, which was inconceivable. A State might claim that another State was not exercising its sovereign authority in order to avoid applying the provisions of the articles and thus deprive that State of its immunities. Such a text

¹ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

² For the text proposed by the Drafting Committee, see 1969th meeting, para. 109.

³ See 1942nd meeting, para. 10.

⁴ *Yearbook ... 1978*, vol. II (Part Two), p. 134.

would enable a State party to the future convention unilaterally to restrict its scope. If *acta jure gestionis* were introduced into the articles, that would play into the hands of multinational corporations, which were always ready to encroach upon the sovereignty of young States. Hence he was absolutely unable to accept article 28 in any form whatsoever.

7. Mr. KOROMA said that he doubted whether article 28 was really necessary, since it only said what States were in a position to do in any case. It was not desirable to put the matter in the form of a general rule, which could be misinterpreted as limiting the fundamental rule of State immunity. If the Commission wished to retain an article along the lines of article 28, however, he reserved the right to submit a reformulation of the text. He suggested that the title should be "Reciprocal immunities".

8. Sir Ian SINCLAIR made the informal suggestion that article 28 should be replaced by a text based on article 47 of the 1961 Vienna Convention on Diplomatic Relations, which might prove more acceptable to members. That text could read:

"Article 28

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

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

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

"(b) where by agreement States extend to each other different or more favourable treatment than is required by the provisions of the present articles.

"3. Paragraph 2 shall not be applied in such a way as to prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*)."

9. It would be noted that paragraph 2 (b) began with the words "where by agreement ...", unlike the corresponding provision of the 1961 Vienna Convention (art. 47, para. 2 (b)), which read: "where by custom or agreement ...". The formula which he proposed was thus similar to that used in the 1972 European Convention on State Immunity, which referred only to the possibility of different treatment by agreement between the States concerned.

10. Mr. USHAKOV said that the provision to be embodied in article 28 might be based on article 47 of the 1961 Vienna Convention or on similar articles of other conventions. He doubted whether courts could be referred to in that provision, because they applied internal law, even if that law followed the rules stated in the future convention or rules of customary international law. It would be preferable to refer only to the State of the forum. In any event, the proposed text was contrary to the principle *pacta sunt servanda*.

11. Sir Ian SINCLAIR said that he was prepared to remove the words "a court of" from his proposed

paragraph 2 (a), so that the opening words would read: "where the State of the forum ...".

12. Mr. REUTER said that, although he did not object to article 28, he would prefer not to take a position on it until Governments had commented on the delicate question of the relationship between the present articles and other treaties.

13. Mr. DÍAZ GONZÁLEZ said that the discussion could serve no useful purpose, since it related not to a drafting problem, but to a question of substance. He suggested that article 28 should be placed in square brackets and reconsidered only after the views of Governments were known.

14. Mr. SUCHARITKUL (Special Rapporteur) suggested that the Commission should suspend its consideration of article 28 pending circulation of Sir Ian Sinclair's redraft.

15. Mr. KOROMA urged the deletion of article 28. The first part of the article was controversial and the second part introduced nothing new.

16. Mr. LACLETA MUÑOZ suggested that the Commission should base article 28 on article 47 of the 1961 Vienna Convention, as Sir Ian Sinclair had done in his proposal, which should be made available in writing. Since no consensus had been reached, he would not oppose the deletion of article 28; instead of submitting a specific text to the Sixth Committee of the General Assembly, the Commission should refer in its report to the problems that had arisen, thus giving Governments an opportunity to state their views on the matter. The Commission should, as it were, act as a drafting committee for the Sixth Committee.

17. Sir Ian SINCLAIR said that, since the Drafting Committee's text had attracted some criticism, it might be advisable to place it in square brackets. As the Special Rapporteur had pointed out, there was a precedent in the draft articles on treaties concluded between States and international organizations or between international organizations, in which article 36 *bis* had been placed in square brackets, with the following footnote:

The Commission agreed at its 1512th meeting to take no decision concerning article 36 *bis* and to consider the article further in the light of comments made on the text of the article by the General Assembly, Governments and international organizations.⁵

The Commission could well follow that precedent and re-examine the article on second reading.

18. Chief AKINJIDE supported Mr. Koroma's proposal that article 28 be deleted. He had not heard a single convincing argument in favour of its inclusion in the draft, and if it were retained, the article would have economic, political and other implications that were more far-reaching than it appeared on the surface.

19. Mr. USHAKOV suggested that, since the only two possibilities were to retain or to delete article 28, a vote should be taken, even though the Commission rarely took votes on first reading.

20. Sir Ian SINCLAIR said that those two possibilities were not the only ones. The Commission also had

⁵ *Ibid.*, footnote 619.

before it a proposal to put the text of article 28 in square brackets and re-examine the matter on second reading in the light of the comments of Governments. The adoption of that proposal would be a fair compromise between the position of members who favoured the deletion of the article and that of members who believed that its provisions were essential. In any case, he did not favour taking a vote, something which the Commission had not done on first reading for many years.

21. Mr. RIPHAGEN, speaking as a member of the Commission, recalled that, at the start of the consideration of the topic at the current session (1942nd meeting), he had pointed out that the provisions of article 28 affected the whole draft. In the Sixth Committee, many years previously, he had expressed doubts as to whether it was possible to frame an international convention covering all cases of immunity and non-immunity. Since then, the European Convention on State Immunity had been concluded (1972), and that Convention certainly did not achieve such a full coverage. In view of the gaps that remained, an article along the lines of article 28 was necessary in the draft.

22. Speaking as Chairman of the Drafting Committee, he said that, if the Commission was unable to agree on the article, the best solution would be to place the text in square brackets, as had been done in 1978 with the article 36 *bis* referred to by other speakers. It was interesting to note that the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations had not included that article 36 *bis* in the final text of the Convention.⁶ Some participants had considered that it went too far, while others had thought that it did not go far enough.

23. Mr. ARANGIO-RUIZ urged the suspension of the discussion on article 28, in the hope that agreement might be facilitated.

24. Mr. KOROMA said that no one appeared to be satisfied with the text which the Drafting Committee had proposed for article 28. He would prefer to await circulation of the texts proposed by the Special Rapporteur and Sir Ian Sinclair.

25. Mr. TOMUSCHAT said that the text read out by Sir Ian Sinclair was much closer to what many members could accept. He suggested that the Commission should wait until it had received that text in all the working languages before proceeding with the discussion.

26. Mr. DÍAZ GONZÁLEZ said that the analysis by the Chairman of the Drafting Committee had been most judicious and his arguments quite convincing. The Commission had to take a decision either to delete article 28 or to place it in square brackets and state the reasons for doing so in its report, which meant explaining that the majority was not in favour of including such a provision in the draft.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to

suspend consideration of article 28 and to resume the discussion of article 6.

It was so agreed.

ARTICLE 6 (State immunity)⁷ (concluded)

28. Mr. SUCHARITKUL (Special Rapporteur) said that the text before the Commission was the outcome of the Drafting Committee's efforts to arrive at a compromise formula. Unfortunately, Mr. Ushakov had been absent at the time of the Committee's meetings and now found unacceptable the reference to "the relevant rules of general international law applicable in the matter". Some other members, however, believed that those words were essential, or at least useful.

29. Sir Ian SINCLAIR said that article 6 had been the subject of a long and difficult debate in the Drafting Committee, precisely because he and other members believed it was necessary to include the concluding words. Those words made it clear that the rule embodied in article 6 was stated within the framework of future developments in international law. The matter was not one that could be covered by the provisions of article 28.

30. Mr. USHAKOV said that the situations in regard to articles 6 and 28 were not quite the same, because article 28 was totally inadmissible, whereas in article 6 only the words "and the relevant rules of general international law applicable in the matter" were unacceptable. He proposed that those words should be placed in square brackets and that the report should indicate that the Commission had not been able to reach a decision on them. If the Commission had been considering article 6 on second reading, he would have asked for a vote on those words.

31. Mr. ARANGIO-RUIZ observed that the English text of article 6 referred to "general international law", whereas the French text referred only to *droit international*. If the Commission replaced the words "and the relevant rules of general international law applicable in the matter" by the words "and any relevant rule of general international law", it would avoid a *renvoi* to the existing general rules applicable in the matter at present, without neglecting the possibility of future development of international law. The deletion of the words "applicable in the matter" would clearly show that the draft articles were meant to codify international law and take precedence over any other rule. In that form, the passage in question would refer to any possible future development of general international law, which was in the hands of the international community.

32. Mr. LACLETA MUÑOZ, referring to the Spanish text, said that the words *sin perjuicio de lo dispuesto* could be interpreted in two opposite ways and should be replaced by the words *según lo dispuesto*. He shared Mr. Arangio-Ruiz's view concerning the reference to "the relevant rules of general international law applicable in the matter"; the references to customary law in many of the Commission's draft articles were only justified in so far as the Commission might doubt

⁶ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted on 20 March 1986 (A/CONF.129/15).

⁷ For the text, see 1968th meeting, para. 49.

whether it had attempted complete codification. If the Commission had tried to codify international law, there was no reason to refer to “the relevant rules of general international law applicable in the matter”, because it was those rules that it had tried to codify. By retaining the words in question, it would give the impression that it was convinced that it had not codified general international law. He therefore suggested that the Commission should either delete those words or adopt Mr. Arangio-Ruiz’s proposal.

33. Mr. KOROMA urged the deletion of the last phrase from article 6. As it stood, the article went beyond mere codification. To legislate for the future was to enter the realm of uncertainty.

34. Mr. CALERO RODRIGUES said that he would welcome the deletion of the concluding phrase, which he had accepted in the Drafting Committee only in a spirit of compromise, because other members had pressed for it. In view of the continuing division of opinion on the matter, he supported the proposal by Mr. Ushakov that the phrase should be placed in square brackets.

35. Mr. USHAKOV said that, in his opinion, the reference to “the relevant rules of general international law applicable in the matter” implied that the Commission had not found all the exceptions provided for by international law. It would be ridiculous to provide that the future convention would be subject to customary international law. From those few words it could be concluded that the Commission had not been able to analyse and codify the rules of customary international law. The words in question should therefore be placed in square brackets and the report should explain the differences of opinion that had emerged during the debate.

36. Mr. BALANDA said he had always thought that the draft articles should constitute a *corpus juris* intended to govern jurisdictional immunities and nothing else. He considered that, if the phrase in question were not deleted, it should at least be placed in square brackets.

37. Chief AKINJIDE said that very few members wished to retain the controversial concluding phrase of article 6. If it were taken to relate to existing international law, it would constitute an admission that the Commission had not fulfilled its task of codification. But at the same time, it would not be possible to take account of an unknown future. Thus the phrase did not appear to serve any purpose. If the Commission could not agree to delete it, it should at least be placed in square brackets.

38. Mr. BARBOZA said that he shared the views of Mr. Calero Rodrigues, Mr. Lacleta Muñoz, Mr. Ushakov, Mr. Balandá and Chief Akinjide. If the Commission was engaged in codification, there was no need for it to refer to general international law unless the future convention was to be an instrument of a residuary nature and the rules of general international law were to take precedence over its provisions. Thus the last phrase of article 6 was entirely unnecessary. If general international law applicable in the matter developed in the future, the same would happen to the future convention as to other conventions, namely one

or other of its provisions would fall into desuetude and be replaced by a new rule of general international law. But the Commission was not obliged to provide for that situation. If the words in question could not be deleted, the compromise solution of placing them in square brackets would be acceptable to him.

39. Mr. REUTER said that he was categorically in favour of retaining the concluding phrase. All the draft articles prepared by the Commission testified to remarkable work that could not be called into question by a few words. His conception of the advantages of a very detailed text was not the same as that of other members of the Commission. He warned them against the tendency to reason as though texts were perfect and had the simplicity and clarity of mathematical operations. However detailed it might be, the text under consideration contained gaps and ambiguous wording that was open to different interpretations. In his view, the Commission had not laid down the principle of immunity in absolute terms; it had drafted a moderate and wise text which took account of the realities of immunity, but also took other factors into consideration and was thus a work of conciliation. Hence he could not accept the idea that the Commission had established a presumption of general immunity apart from a strict interpretation of the texts.

40. The interpretation and application of the articles and the solution of the other problems they raised should benefit from the same spirit of conciliation as had prevailed during the elaboration of the draft. The Commission should keep faith with its work and take account of factors other than the rule of immunity. It had been said that the immunities of a head of State were purely functional; he was one of those who thought that the State could enjoy only functional immunities and did not believe in immunity by divine right. He did not approve of the idea of replacing the concept of the sovereign by that of the State. The phrase to which objection had been raised had no other purpose than to show that a spirit of conciliation and compromise had prevailed during the preparation of the draft, which relied on other realities than that of an immunity by divine right.

41. Mr. TOMUSCHAT said he agreed that, in view of the objections of some members, the concluding phrase should be placed in square brackets. For his part, he had some difficulty in understanding the meaning of that phrase. It could be interpreted as meaning that States had a choice between following the provisions of the present articles and following those of the relevant rules of general international law. Such an interpretation would undermine the whole future convention.

42. There would inevitably be some gaps in the rules set out in the draft articles, so there was room for a provision along the lines of the contested phrase; but the present wording could cause misunderstanding. The best course would therefore be to place it in square brackets.

43. Mr. ARANGIO-RUIZ recalled that, unlike the English-speaking countries, his country and others had long since adopted the principle of relative rather than absolute State immunity. At the time when the English-

speaking countries had begun to adopt a more sensible approach to the issue, which had a human rights aspect, there had been a different, entirely respectable exigency in the international community. That was the need, in view of the gap between North and South, to protect the southern countries from the theory of restricted immunity. It was a positive step to widen the scope of immunity in the draft articles, which codified general international law and which he believed would become written law.

44. Referring to remarks by Mr. Ushakov, he said there was no danger that his suggestion might be taken to imply that the future convention might be modified by the general international law of the future. The deletion of the words "applicable in the matter" would leave open the possibility of future developments, such as an eventual limitation of the degree of immunity when the gap between North and South had been reduced.

45. Mr. DÍAZ GONZÁLEZ said that he had been opposed from the outset to the inclusion in article 6 of the words "and the relevant rules of general international law applicable in the matter", to which he had agreed only so that the Drafting Committee might reach a compromise. Although he would not go into all the pertinent arguments advanced in favour of deleting that phrase, he wished to remind the Commission that law, like society, was constantly changing. What was true today might no longer be true tomorrow. Legal rules had to be adapted and amended according to the international situation, development, and social change.

46. The best solution would therefore be to delete the phrase in question, thereby strengthening the principle of the jurisdictional immunity of States enunciated in the first part of the article. If the Commission decided to retain it, however, he too would be in favour of placing it in square brackets and deleting the words "applicable in the matter".

47. Mr. MAHIOU said that, in his opinion, the words "and the relevant rules of general international law applicable in the matter" could well be deleted; but since the Commission was still divided on the issue, the best solution might be to place those words in square brackets.

48. Sir Ian SINCLAIR said that, for the reasons given by Mr. Reuter, he was in favour of retaining the whole text of article 6. He agreed with Mr. Díaz González that the law was in a constant state of evolution; that applied both to general international law and to other systems. In the circumstances, it was important for article 6, which stated the basic principle of immunity within the concept of a unitary rule, to include the possibility of further developments in general international law in that context. He had no objection to the deletion of the words "applicable in the matter", as proposed by Mr. Arangio-Ruiz, since they were largely covered by the phrase "relevant rules of general international law".

49. Mr. KOROMA said that he was not certain which of the several suggested explanations of article 6 would be included in the commentary.

50. Mr. REUTER pointed out that the French text needed to be brought into line with the English by adding the word *général* after the words *droit international*.

51. The CHAIRMAN, noting that a considerable number of members of the Commission appeared to be in favour of placing the phrase "and the relevant rules of general international law" in square brackets, and of deleting the words "applicable in the matter", suggested that article 6 should be amended in that way.

It was so agreed.

52. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 6 proposed by the Drafting Committee, as amended.

Article 6 was adopted.

TITLE OF PART II (General principles)

53. The CHAIRMAN, noting that Mr. Ushakov had proposed that part II should be entitled "General rules" rather than "General principles" (1970th meeting, para. 47) and that Mr. Francis had proposed the title "General provisions" (1968th meeting, para. 53), invited members to take a decision on those two proposals.

54. Mr. FRANCIS said that his main objection to the title "General principles" had been that the text, from article 7 through to the end of part II, appeared to be wider in scope than that title implied. However, he thought that the title could be left to the discretion of the Drafting Committee.

55. The CHAIRMAN suggested that, for the time being, the present title should be retained and that Mr. Francis's comments should be reported in the summary record of the meeting.

It was so agreed.

TITLE OF PART III (Limitations on State immunity) (*concluded*)*

56. The CHAIRMAN invited the members of the Commission to take a decision on the title of part III, in which it had been proposed that the words "Limitations on" should be replaced by "Exceptions to".

57. Sir Ian SINCLAIR said that there had been a long discussion in the Drafting Committee concerning the title of part III. The conclusion had been that the word "limitations" was preferable given the general understanding that what was sought in article 6 was a unitary rule susceptible of the interpretation given to article 6 of the 1958 Convention on the Continental Shelf in the *Case concerning the delimitation of the Continental Shelf* between the United Kingdom and France (1977).⁸ The Court of Arbitration had found that article 6 of the Convention was a single rule, and that the exception formed part and parcel of the rule itself. The Drafting Committee had considered that the same

* Resumed from the 1968th meeting, paras. 57 *et seq.*

⁸ United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 3.

reasoning applied to the articles under consideration and that it was therefore preferable not to use the word "exceptions" in the title of part III.

58. Mr. SUCHARITKUL (Special Rapporteur) said that he had no strong objections to the use of the word "limitations".

59. Mr. BARBOZA said that it would be preferable to use the word "exceptions", for if the word "limitations" were retained, the title would apply more to the provisions of article 6 of part II than to those of the articles in part III.

60. Mr. KOROMA said that, despite the explanation given by Sir Ian Sinclair, he believed the word "exceptions" would be more appropriate in the title of part III. A rule had been stated, albeit restrictively, in article 6 and exceptions to that rule were set out in the following articles.

61. Mr. MAHIU said that he preferred the word "exceptions", which had, moreover, been used in the text originally submitted by the Special Rapporteur.

62. Mr. RIPHAGEN (Chairman of the Drafting Committee), supported by Mr. KOROMA and Chief AKINJIDE, suggested that the best course would be to include both proposals in the title in square brackets.

63. Mr. USHAKOV said that he, too, thought it would be better to use the word "exceptions", which corresponded to the content of the articles of part III; but he would not press the point.

64. Mr. MAHIU observed that none of the members of the Commission who had stated a preference for the word "exceptions" had requested that it should be substituted for the word "limitations" forthwith or that the word "limitations" should be placed in square brackets. There was thus no need to go as far as the Chairman of the Drafting Committee had suggested. The word "limitations" could be retained without being placed in square brackets. It would suffice if the views of members who were in favour of using the word "exceptions" were reported in the summary record of the meeting.

65. Mr. RAZAFINDRALAMBO said that he was one of the members of the Drafting Committee who had agreed to the compromise solution of retaining the word "limitations", even though he preferred the word "exceptions". But if article 28 were adopted, even in square brackets, he would prefer the word "exceptions" to be used in the title of part III, in order to avoid confusion with the title of article 28.

66. Mr. BARBOZA proposed that, instead of replacing the word "limitations" by "exceptions", both words should be placed in square brackets, as the Chairman of the Drafting Committee had suggested. That solution appeared to be more in keeping with the Commission's wishes.

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that the words "exceptions" and "limitations" were to

be placed in square brackets in the title of part III, in accordance with the wishes of many members.

It was so agreed.

ARTICLE 28 (Restriction of immunities) (*continued*)

68. Sir Ian SINCLAIR proposed the following text:

"Article 28

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

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

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

"(b) where by agreement States extend to each other different or more favourable treatment than is required by the provisions of the present articles.

"3. Paragraph 2 shall not be applied in such a way as to prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*)."

69. Mr. USHAKOV said that, subject to minor drafting changes, paragraphs 1 and 2 of the proposed text were acceptable. But the same was not true of paragraph 3, which, not to mention the reference to *acta jure imperii*, was unacceptable because it nullified the provisions of paragraph 2.

70. Under paragraph 3, the State of the forum, referred to in paragraph 2 (a), could not apply a provision of the articles restrictively because of a restrictive application of that provision by the other State if that other State had acted in the exercise of sovereign authority. If that other State violated a provision of the articles, but did so in the exercise of sovereign authority, the forum State could not take countermeasures, for they would prejudice the exercise of sovereign authority by the other State.

71. Again, under paragraph 3, two States which wished to extend to each other different treatment, in accordance with paragraph 2 (b), could do so only if such treatment did not prejudice the exercise of sovereign authority.

72. Paragraph 3 would thus prevent States from concluding agreements that were in their interests, and was therefore unacceptable. States were free to conclude any agreement they wished, whether in respect of *acta jure imperii* or in respect of *acta jure gestionis*, and the draft articles, which did not enunciate peremptory norms of international law, could not restrict their freedom to do so.

73. Mr. FRANCIS, referring to remarks made by Mr. Tomuschat, said that the text proposed by Sir Ian Sinclair represented an excellent attempt to align the Commission's approach with article 47 of the 1961 Vienna Convention on Diplomatic Relations, and for that reason paragraphs 1 and 2 were completely accept-

able to him. But inasmuch as paragraph 3 introduced a new dimension to article 47 of the Vienna Convention, by removing from the area of restriction immunities relating to the exercise of sovereign authority, he would reserve his position on that paragraph.

74. Mr. KOROMA pointed out that the main objection to article 28 had been the fact that it could be interpreted unilaterally and therefore encourage violation of the principle *pacta sunt servanda*. The new text proposed by the Special Rapporteur (para. 2 above) met that objection by making immunity subject to mutual agreement or reciprocity and should therefore be given close attention by the Commission. Sir Ian Sinclair's draft had not removed that objection, since it left open the possibility of forcing a respondent State to act likewise in relation to a State which unilaterally violated the principle *pacta sunt servanda*.

75. Sir Ian SINCLAIR said that he had no pride of authorship in his proposed text for article 28, which he had put forward only because the Special Rapporteur's proposal seemed to be drawing some criticism. If there was a consensus to accept the Special Rapporteur's draft, he would certainly not oppose it.

76. As to Mr. Ushakov's objection to paragraph 3, that paragraph was an integral part of the proposal, since it attempted to indicate a bedrock limit beyond which a State could not apply a restrictive approach to the present articles or by agreement extend treatment different from that required by them. That issue had nothing to do with what would happen if a State violated the future convention, in which case countermeasures could be taken within the framework of the articles on State responsibility. That possibility was not precluded by paragraph 3 and, indeed, was an entirely different issue.

77. Mr. LACLETA MUÑOZ said that the advantage of the text submitted by Sir Ian Sinclair was that paragraph 2 (a) provided that the State of the forum could, by way of reciprocity, restrictively apply any provision of the articles which the other State concerned had applied restrictively, while allowing it to claim that there had been a violation of the articles. Thus it could not be said that the State which had been the first to apply a provision restrictively was telling the other State how it must act. The other State had a choice of two possible courses: it could either decide to interpret the provision restrictively itself, or claim that there had been a violation of the articles and act accordingly.

78. The problem that arose was whether paragraph 3 should also apply to the case covered by paragraph 2 (b). That was in the realm of *jus cogens*. In his view, States were free to modify the provisions of the draft articles as they saw fit. The wording of paragraph 3 should therefore be amended to make it clear that it applied only to paragraph 2 (a).

79. Mr. TOMUSCHAT, replying to Mr. Koroma's objections to Sir Ian Sinclair's draft, pointed out that the first two paragraphs were based on universally recognized and accepted treaty practice, since article 47 of the 1961 Vienna Convention was the model followed in the new version of article 28. He believed that a

distinction must be made between violation of a treaty and restrictive application of its provisions, which was the language now used in paragraph 2 (a). Since all members of the international community had accepted article 47 of the Vienna Convention, it was quite normal to include a similar provision in the draft articles on State immunities.

80. Referring to Mr. Lacleta Muñoz's remarks, he agreed that paragraph 3 should not apply to paragraph 2 (b) because, as Mr. Ushakov had pointed out, States were free to regulate their mutual relations as they saw fit and to extend to each other more liberal or more restrictive treatment than that required by the present articles. He had no objection to the deletion of paragraph 3, however, because it introduced the concept of *acta jure imperii*, which did not appear anywhere else in the draft articles and could give rise to difficulties of interpretation.

81. Mr. USHAKOV said that article 47, paragraph 2 (a), of the 1961 Vienna Convention on Diplomatic Relations, which stated that discrimination would not be regarded as taking place

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

certainly did not provide that the sending State was entitled to apply the provisions of that Convention restrictively. A sending State which had ratified the Convention and applied one of its provisions restrictively was not respecting the obligations it had undertaken and was committing a breach. It was true that, although there certainly was a breach in such a case, article 47 did not expressly say so; but it could not therefore be concluded that a State which had ratified the Convention was free to apply its provisions restrictively. The article simply provided that it was not discriminatory for a State to apply one of the provisions of the Convention restrictively by way of a countermeasure.

82. Mr. KOROMA said it was obvious that the Commission was not going to come to a conclusion easily; there appeared to be a fundamental objection to article 28 as presently drafted. He wondered whether it might not be preferable to delete article 28 and submit both the new proposals to the Sixth Committee of the General Assembly. He suggested that, in the first part of the new text proposed by the Special Rapporteur (para. 2 above), the words "in connection with a proceeding before a court of another State" should be deleted.

83. Mr. SUCHARITKUL (Special Rapporteur) said that he agreed with Mr. Koroma: it was time for the Commission to decide not to take a decision. The Drafting Committee's text should be placed in square brackets and the new proposals included in the commentary and footnotes to article 28. He agreed to the deletion of the phrase mentioned by Mr. Koroma.

84. Chief AKINJIDE said he thought that the Special Rapporteur's proposal was a retrograde step. If the three drafts were to be included in the report, they should all be placed on an equal footing.

The meeting rose at 1.05 p.m.

1972nd MEETING

Friday, 20 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

later: Mr. Alexander YANKOV

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Laclea Muñoz, Mr. Malek, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Jurisdictional immunities of States and their property (concluded) (A/CN.4/396,¹ A/CN.4/L.399, ILC (XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

ARTICLE 28 (Restriction of immunities) (concluded)

1. Mr. SUCHARITKUL (Special Rapporteur) thanked members for their co-operation over the past 10 years. Twenty-seven of the draft articles had been adopted, and only one remained. He hoped that the Commission could take a decision that would make it possible to transmit the draft articles to Governments in accordance with the Commission's statute.

2. A new draft of article 28 had been prepared by several members on the basis of Sir Ian Sinclair's proposal (1971st meeting, para. 68), and that was encouraging. Speaking as a member of the Commission, he was glad to be able to say that any one of the proposed versions of article 28 would be acceptable to him.

3. Mr. REUTER said that, after informal consultations, he and several other members of the Commission wished to propose a new text for article 28 which largely reproduced the first two paragraphs of the text proposed by Sir Ian Sinclair. That text read:

"Article 28

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

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

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

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

Since the informal group which had drafted the text had not chosen a title, members of the Commission might perhaps make suggestions.

4. Mr. USHAKOV said that he could accept the text read out by Mr. Reuter.

5. Mr. EL RASHEED MOHAMED AHMED said that he had been authorized by Chief Akinjide and Mr. Koroma to say that they joined him in accepting the text just read out by Mr. Reuter. Adopting that text would be an appropriate way to conclude the Commission's work on State immunity and to express gratitude to the Special Rapporteur.

6. Sir Ian SINCLAIR said that he had no objection to the new text, which was largely based on his own proposal. He would like to put on record, however, that deleting paragraph 3 of his draft meant that the Commission would have to concentrate more closely on the concluding phrase of article 6, which had been placed in square brackets. Any restrictive application pursuant to article 28 would have to take into account the "relevant rules of general international law".

7. Mr. USHAKOV said that the rules of general international law referred to in the last phrase of article 6 related not to the principle of immunity, but to exceptions to that principle. Hence the comment made by Sir Ian Sinclair was not valid.

8. Mr. DÍAZ GONZÁLEZ said that, although he would certainly have preferred article 28 to be deleted, he had no objection to the new compromise text.

9. Mr. RAZAFINDRALAMBO, speaking also on behalf of Mr. Mahiou, said that he would join the majority of the members of the Commission who were in favour of the new draft article 28, even though he had some reservations about paragraph 2 (a). It was to be feared that the provisions of that subparagraph might be applied in a manner prejudicial to third world countries, which always appeared as plaintiffs in the courts of industrialized investor countries.

10. Mr. LACLETA MUÑOZ said that he supported the text read out by Mr. Reuter.

11. Mr. BALANDA said that he would support the general opinion, even though he thought that paragraph 2 (a) could not be interpreted as implicitly authorizing States parties to evade their obligations by violating any provision of the future convention on jurisdictional immunities.

12. Mr. FRANCIS said that he endorsed the points made by Mr. Razafindralambo and Mr. Balanda; if paragraph 3 of Sir Ian Sinclair's text had been retained, paragraph 2 (a) would have been made much tighter.

13. The CHAIRMAN, noting that there was general agreement, suggested that the Commission should provisionally adopt the text of article 28 submitted by the informal group of members.

It was so agreed.

14. The CHAIRMAN invited the Commission to decide on the title of article 28.

¹ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

15. Sir Ian SINCLAIR proposed that the title should be "Non-discrimination", which was the title of article 49 of the Convention on Special Missions.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Sir Ian Sinclair's proposal for the title of article 28.

It was so agreed.

Article 28 was adopted.

ADOPTION OF THE DRAFT ARTICLES ON FIRST READING

17. The CHAIRMAN, noting that the first reading of the draft articles on jurisdictional immunities of States and their property had been completed, suggested that the Commission should adopt the whole set of draft articles as amended during the discussions, on the understanding that the comments made by members of the commission would be reflected in the summary records.

It was so agreed.

The draft articles on jurisdictional immunities of States and their property were adopted on first reading.

TRIBUTE TO THE SPECIAL RAPPORTEUR

18. Mr. REUTER speaking also on behalf of many other members of the Commission, proposed the following draft resolution:

"The International Law Commission,

"Having adopted provisionally the draft articles on jurisdictional immunities of States and their property,

"Desires to express to the Special Rapporteur, Mr. Sompong Sucharitkul, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on jurisdictional immunities of States and their property."

19. The CHAIRMAN invited the Commission to adopt that draft resolution.

The draft resolution was adopted.

20. Mr. SUCHARITKUL expressed his deep gratitude to the members of the Commission, and in particular to Mr. Reuter. What he had learned with the Commission he would cherish for the rest of his life. He believed that the measure of a man's greatness was not his ability to create or destroy, but his capacity to endure the hardship and suffering so often visited upon human beings.

21. The CHAIRMAN said that Mr. Sucharitkul had performed a task of great historical significance. His merit was all the greater because the topic entrusted to him, being at the confluence of public international law, private international law and other legal disciplines, was extremely complex and delicate. His wisdom and level-headedness, and the spirit of conciliation and compromise that he had displayed throughout the work, had enabled him to achieve remarkable results.

Mr. Yankov took the Chair.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,² A/CN.4/394,³ A/CN.4/402,⁴ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf.Room Doc.5⁵)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

22. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the topic (A/CN.4/402).

23. Mr. BARBOZA (Special Rapporteur) said that, in his preliminary report (A/CN.4/394), he had begun with a review of the work that had been done thus far, and had noted that the discussion of the topic had been divided into two stages: one before and one after the submission of the schematic outline.

24. During the first stage, when basic problems had been discussed, the previous Special Rapporteur's main concern had been to dissociate his topic from that of State responsibility for wrongful acts. That had been essential, because the question of prevention also seemed to be part of the topic of State responsibility. He had not found it satisfactory to base the whole draft on strict liability, partly because he had not thought that such liability really had a basis in international law and partly because, if he had followed that course, he would have had to leave aside obligations of due care.

25. In order to find a broader legal foundation for the two components of prevention and reparation, the previous Special Rapporteur had adopted the principle reflected in the maxim *sic utere tuo ut alienum non laedas*. Since that principle was very general, it had had to be adapted to the two objectives of minimizing the possibility of loss or damage and, where necessary, providing means of redress without restricting the freedom of States to undertake, in their territory, activities which might be useful.

26. The previous Special Rapporteur had used two means of separating the present topic from that of State responsibility: he had confined it to the realm of primary rules and treated obligations of prevention as consisting only in the duty to take account of the interests of other States.

27. After the submission of the schematic outline, the previous Special Rapporteur had, with the approval of the Commission and the General Assembly, undertaken to define the content of the topic. The survey of State practice with regard to transboundary loss or injury arising out of acts not prohibited by international law, prepared by the Secretariat (A/CN.4/384), had shown

² Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

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

⁴ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

⁵ The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

that there was abundant State practice and had confirmed that, despite all the difficulties encountered, work on the topic should continue. In his fifth report, the previous Special Rapporteur had submitted five draft articles,⁶ but it had not been possible to refer them to the Drafting Committee.

28. In his own preliminary report, after reviewing the work done so far, he had said that what he intended to do in the immediate future was to avoid reopening the general discussion and work on the basis of the raw material provided by the schematic outline, by making comments and proposing changes he considered necessary in the light of State practice.

29. He had also said that he intended to give detailed consideration to such questions as causality, shared expectations, the incomplete obligations of prevention envisaged in the schematic outline, the duty to make reparation and the role of international organizations, which had all been commented on during the discussions, and to leave open the question of the final scope of the topic. He had also indicated that he intended to re-examine the five draft articles submitted by the previous Special Rapporteur.

30. Except for the questions of causality and the role of international organizations, which he preferred to consider at a later stage, he had dealt with all those matters in his second report (A/CN.4402), which began with three preliminary questions. The first concerned the use of the terms "responsibility" and "liability" in English. He would not go into the complexities of common-law legal terminology, but it should be noted that, like the French term *responsabilité* and the Spanish term *responsabilidad*, those two terms referred both to the consequences of wrongfulness—secondary obligations—and to the obligations incumbent on any person living in society. Thus, if the Commission took account of both meanings of those terms, which included obligations of prevention, it would not be going beyond the scope of the topic.

31. The second question concerned the unity of the topic, which the previous Special Rapporteur had endeavoured to preserve by linking the concepts of prevention and reparation, so as to overcome that dichotomy. In order to strengthen the unity of the topic, he himself was proposing "injury" as a unifying agent. Injury which had already occurred, in the case of reparation, and potential injury, in the case of prevention, constituted the cement of the prevention-reparation continuum. Moreover, by emphasizing the concept of injury, the Commission would be moving further away from the sphere of State responsibility for wrongful acts, since, in part I of the draft articles on that topic, injury had not been taken into account in defining the conditions for the existence of an internationally wrongful act.

32. The third question concerned the scope of the topic. He had taken as a point of departure the idea put forward by the previous Special Rapporteur that the source State had a duty to avoid, minimize or repair any

"appreciable" or "tangible" physical transboundary loss or injury when it was possible to foresee a risk of such loss or injury associated with a specific activity; but he did not intend to disregard the possibility of revising or changing that idea, if necessary.

33. In his second report, which dealt only with the schematic outline as revised by the previous Special Rapporteur in his fourth report,⁷ he made a critical analysis of the dynamics of the outline, but left aside for the time being the factors set out in section 6, the matters dealt with in section 7, and the settlement of disputes. He did not refer to the five draft articles submitted later by his predecessor, and that explained why such important questions as whether the topic covered "situations" as well as "activities" were not discussed.

34. The schematic outline consisted of two parts. The first dealt with treaty régimes to govern hazardous activities, while the second related to the rights and obligations which arose when loss or injury occurred and no treaty régime existed.

35. Two obligations were provided for in the first part: the obligation of States to supply information on the kinds and degrees of loss or injury that might be caused by any hazardous activity carried out in their territory, and the obligation to propose remedial measures. The obligation to provide information differed from the obligation to propose remedial measures in that, although failure to fulfil the first could entail adverse procedural consequences—without prejudice to those provided for by general international law—the second did not give rise to any right of action. If the measures proposed did not satisfy the affected State, that second obligation became an obligation to enter into negotiations for the establishment of fact-finding and conciliation machinery, which also did not give rise to any right of action.

36. If the two States concerned were unable to establish fact-finding machinery, if such machinery was ineffective or if it so recommended, the obligation would then become an obligation to enter into negotiations to determine whether a régime should be established between those two States and, if so, what form it should take. Those were combined obligations: they would lead to the establishment of a régime and contribute to prevention, because they would allow the affected State to take measures unilaterally for that purpose and because such a régime would promote prevention.

37. In addition to those obligations, there appeared to be a pure obligation of prevention. Since the compulsory nature of prevention was not entirely clear from the wording of section 2, paragraph 8, of the schematic outline, which was identical with that of section 3, paragraph 4, it could and should be explained when draft articles came to be formulated. The source State was under an obligation to keep the hazardous activity under review and to take any measures it deemed necessary and feasible to safeguard the interests of the affected State. The schematic outline did not contain any indication of a possible right of action in respect of that obligation.

⁶ For the texts of draft articles 1 to 5 submitted by the previous Special Rapporteur, see *Yearbook ... 1984*, vol. II (Part Two), p. 77, para. 237.

⁷ See footnote 5 above.

38. The second part of the schematic outline dealt with reparation for injury in the absence of a treaty régime. It provided for an obligation of reparation, so that, subject to certain conditions, an innocent victim would not be left to bear his loss or injury. Reparation was subject to two conditions, namely shared expectations and actual negotiation, during which a number of factors had to be taken into account in determining the amount of compensation.

39. There were two types of shared expectation. They could derive from some prior understanding between the parties to the negotiation, from common principles, or from patterns of conduct defined at the bilateral, regional or international levels.

40. In view of the arguments that might be taken into account during negotiations relating to reparation, such reparation might be different from that made, for example, as a result of a wrongful act. In the latter case, it would be necessary either to restore the situation that had existed at the time the injury had occurred or to compensate the affected State. In the case of the negotiations under consideration, however, account would be taken of other elements, such as the reasonable nature of the conduct of the source State, the expenses it had incurred to prevent injury and the usefulness of the activity in question to the affected country. Such a system was, moreover, quite close to the practice of States, which often set a limit on the amounts of compensation, and to what was provided for *mutatis mutandis* in the internal law of some countries.

41. The most important principle was that enunciated in section 5, paragraph 1, which was based on Principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration)⁸ and was intended to ensure that all human activities in the territory of a particular State were conducted with as much freedom as was compatible with the interests of other States. That principle was associated with two other principles: the principle of prevention—standards of prevention always being determined in the light of the means available to the source State and the importance and economic viability of the activity in question (sect. 5, para. 2)—and the principle of reparation (sect. 5, para. 3). There was also a principle relating primarily to legal procedure, which was based on a rule stated by the ICJ in the *Corfu Channel* case (merits).⁹ According to that principle, the affected State would be allowed liberal recourse to inferences of fact and circumstantial evidence or proof in order to establish whether the activity in question might give rise to loss or injury.

42. In his critical analysis of the schematic outline, he had noted that, whereas the English and Spanish titles of the topic referred to “acts”, the outline referred only to “activities” which might have injurious consequences. It was the latter term that should be adopted.

43. The activities in question were those which gave rise or might give rise to transboundary injury, whether

they were ultra-hazardous—with a low risk of catastrophic damage—or simply involved a high risk of minor damage. According to some writers, the topic did not cover activities which caused pollution, because States knew, or were in a position to know, the causes of such pollution, which was, moreover, prohibited beyond a certain threshold. Although he would not take a position in the matter, he must point out that activities which might accidentally cause serious pollution would come within the scope of the topic under consideration and that, in any event, the affected State would have two possible courses of action: either it could claim that the activity in question was wrongful and require that its effects should cease, or it could rely on the articles the Commission would prepare and require not only the establishment of a treaty régime between the parties concerned, but also compensation for the damage caused.

44. There were also some heterogeneous activities whose wrongfulness was precluded under articles 29, 31, 32 and 33 of part 1 of the draft articles on State responsibility.¹⁰ Although such activities were not wrongful, compensation had to be paid for any injury they might cause.

45. The obligations were complete obligations whose breach entailed consequences, and he had reached the conclusion that a right of action must not be ruled out. Otherwise, the affected State might not be in a position to take action, as it might be permitted to do under general international law, to compel the source State to perform its obligations.

46. Three possible approaches had been considered in the report. He had ruled out the first, which was to leave things as they were, and the second, which was to provide for sanctions, since it would oblige the Commission to venture into the realm of secondary rules. The third approach was to delete the first sentence of section 2, paragraph 8, and of section 3, paragraph 4, of the schematic outline, concerning the absence of a right of action, and that was the solution he recommended.

47. Injury caused in the absence of a treaty régime gave rise to an obligation to negotiate with a view to making reparation (sect. 4, para. 1, *in fine*) and raised the question of the obligation of reparation and its justification. It had been recognized in earlier reports that, despite the objections to what was known as “strict liability” in international law, that liability formed the basis of the obligation of reparation, although efforts had been made to strengthen that obligation so that it would not derive exclusively from strict liability, and to base it on the quasi-contractual and quasi-customary aspects of “shared expectations”. Although the normative content of international liability might thus be diluted, as Gunther Handl had observed (see A/CN.4/402, para. 43, *in fine*), he did not see any other acceptable solution. With regard to the idea of mitigating the effects of strict liability, the purpose of the draft was to establish a general régime, not a régime that would be applicable to a particular activity. Strict liability was not monolithic: it involved different degrees of strictness, as was shown by various treaty

⁸ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

⁹ Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4, at p. 18.

¹⁰ *Yearbook ... 1980*, vol. II (Part Two), p. 33.

régimes, such as the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy,¹¹ which provided for very strict liability by introducing the innovative concept of “channelling” and tracing liability back to the nuclear operator, and the 1972 Convention on International Liability for Damage Caused by Space Objects,¹² which provided for a lesser degree of strictness. The essential need was to design a régime of liability for risk that would be flexible enough to apply not to a particular activity, but to any of the activities in question.

48. Strict liability did have a basis in general international law and to say that it did not would mean that an activity which was not prohibited by international law and which was carried out within the territory of a State could cause transboundary damage without entailing any obligation to provide compensation. Such a position could be based only on a theory of sovereignty which did not take account of the interdependence that characterized the modern community of nations and would, moreover, be contrary to the principle of the sovereign equality of States, because it would overlook the other aspect of sovereignty, namely that a State was entitled to use its own territory without any outside interference. An activity which was socially useful, but which created a risk, had to take account of foreign interests if it was to be carried out freely.

49. Although there had been some criticism of the concept of “shared expectations”, they did have a role to play. In any event, they might be a factor that would be difficult to interpret and to prove if the burden of proof lay on the affected State. While there was no need to establish a category that would be difficult to define, an objective element might be found in the ideas contained in section 4, paragraph 4, of the schematic outline, such as the existence in the internal law of the States concerned of the principle of strict liability or the principle of reparation for injury. There he was referring simply to the principle embodied in the internal law of many countries, and not—for it was too early for that—to implementation rules. The absence of that principle in the internal law of the source State or the affected State might be claimed as an exception by the former.

50. Consideration might also be given to the possibility of providing for exceptions to the rule of reparation, by adopting either the concept of *force majeure* as such or a restricted form of *force majeure*, as in certain conventions under which *force majeure* applied to certain political situations or to a particular type of disaster. Another exception might be negligence on the part of the affected State or the fact that third parties acted with intent to harm. There was also the possibility of not allowing any exceptions when the source State had failed to fulfil its obligations to provide information or to negotiate. The Commission would have to choose between all those options, on the clear understanding that the aim was to establish a general régime which did not have to include strict liability in the narrow sense of the term. That concept would,

rather, have to be mitigated to protect it from undue automatism, which would alarm many countries.

51. He had already reached the conclusion that the only obligation of prevention was the one referred to in section 2, paragraph 8, and section 3, paragraph 4, which was the obligation to keep a hazardous activity under constant review and to take any measures necessary to prevent injury. That obligation involved a duty of care and it meant that States had to determine whether the methods of prevention used were reasonable and, in general, whether they met the standards of modern technology.

52. In a treaty régime, such as those governing certain activities involving risk, provision might be made for dual protection, as had been done in the régime established by the arbitral tribunal in the *Trail Smelter* case,¹³ in which rules and procedures had been laid down to reduce pollution to an acceptable level. The tribunal had stated that any failure to follow those rules and procedures would be a wrongful act and, at the same time, that reparation must be made in the event of pollution accidentally reaching a higher level than foreseen, in which case there would be strict liability.

53. Obligations of prevention might therefore be regarded as obligations of conduct combined with a régime of strict liability. But such a combination did not seem possible in a general régime such as that which he was trying to establish, for the primary effect of the obligation of due care, which would come into play only after injury had occurred, would be to aggravate the position of the source State with regard to compensation.

54. It had only been by way of example that he had compared that obligation with obligations to prevent a given result, which came into play under a régime of strict liability, where reparation must in principle be made in every case, since it was governed by a primary rule. But the obligations to provide information and to negotiate, which were not only of a preventive nature and which were autonomous, would not depend on the occurrence of injury, and their breach would constitute a wrongful act. They would, for all that, not be excluded from his study, for it was intended to deal with the injurious consequences of activities not prohibited by international law, which would include the consequences of acts that could not be dissociated from those activities and might be wrongful. An injury caused by a wrongful act would become an injurious consequence of a lawful activity from which that act was inseparable.

55. It was entirely appropriate to follow the reasoning of the previous Special Rapporteur, who had been trying to separate international liability from State responsibility; but that was a distinction of a purely conceptual nature and there was no reason not to take account, in a future convention, of those two forms of responsibility, which were intended to prevent damage from occurring and, if it did, to mitigate the consequences as much as possible. The principles referred to in the schematic outline appeared to be well-founded and necessary to

¹¹ United Nations, *Treaty Series*, vol. 956, p. 251.

¹² *Ibid.*, vol. 961, p. 187.

¹³ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

the development of the study. When the study had reached a more advanced stage, however, other principles might have to be brought into play and those already taken into account might have to be reviewed.

The meeting rose at 11.25 a.m.

1973rd MEETING

Monday, 23 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Ushakov, Mr. Yankov.

Organization of work of the session (concluded)*

[Agenda item 1]

1. The CHAIRMAN suggested that the meeting should be suspended to enable the Enlarged Bureau to meet and consider matters of importance for the continuation of the Commission's work.

The meeting was suspended at 10.05 a.m. and resumed at 11.50 a.m.

2. The CHAIRMAN informed members that the Commission would consider agenda item 7 (International liability for injurious consequences arising out of acts not prohibited by international law) until 25 June inclusive, after which it would consider item 6 (The law of the non-navigational uses of international water-courses) until 1 July inclusive. One further day would be allocated for the consideration of item 3 (Jurisdictional immunities of States and their property) and another for the consideration of item 4 (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier).

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/384,¹ A/CN.4/394,² A/CN.4/402,³ A/CN.4/L.398, sect. H.1, ILC(XXXVIII)/Conf.Room Doc.5⁴)

[Agenda item 7]

* Resumed from the 1955th meeting.

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

² Reproduced in *Yearbook ... 1985*, vol. II (Part One).

³ Reproduced in *Yearbook ... 1986*, vol. II (Part One).

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

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

3. Mr. USHAKOV congratulated the Special Rapporteur on his second report (A/CN.4/402), which contained valuable information on the general theory and development of contemporary international law. He nevertheless had some doubts as to the merits of the schematic outline proposed by the previous Special Rapporteur and adopted in some measure by the present Special Rapporteur. He feared that, if the Commission adopted the outline as the starting-point for its work, it would succeed neither in codifying the existing rules of general international law—which in the present case were to be found more in customary law than in treaty law—nor in legislating by proposing rules that had yet to come into being. The schematic outline was defective in two respects: it did not specify which activities would be covered by the draft articles and it made no distinction between injurious consequences of limited scope and those that affected all of mankind.

4. With regard to section 1 of the schematic outline, which related to scope and definitions, he wondered whether it was advisable to refer first to activities within the control of a State—and it would in any event be preferable to use the word “jurisdiction”—and, thereafter, to activities conducted on ships or aircraft. The main point in that regard was not to define, but to specify clearly, the activities to be covered. Given that any human activity had some harmful consequences, section 1 added nothing to the study of the topic, for its scope was too vast.

5. He would draw a distinction between activities which had minor consequences and were of concern only to the States adjacent to those on whose territory they were conducted, and activities whose consequences could have repercussions from one end of the Earth to the other. In the first case, even though it was open to question whether the source State should inform the neighbouring States of its intention to carry out an activity or of the technical aspects of the activity itself, it was comparatively easy to decide about which matters the first State should inform the others and, if need be, hold discussions with them, as was sometimes the practice with regard to the use of “shared resources”. An example had been provided by France and Spain in connection with Lake Lanoux.

6. In the second case, however, the question that arose concerned the obligation to inform and negotiate that would be incumbent on the source State. To which items would the information relate? Was all of mankind to engage in negotiations on a technical project? The really major problems with which mankind was now confronted were caused by air and marine pollution. Such pollution, which was also governed by such imponderable factors as winds, was not always limited to countries situated in any particular direction by reference to the source State, and could affect the entire planet. The problem was further aggravated by the fact that it was not always possible to foresee the consequences of a particular activity. The inventor of DDT, for example, had received the Nobel prize for the insecticide's benefits to the development of agriculture, but