Document:-
A/CN.4/SR.1689

Summary record of the 1689th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

Downloaded from the web site of the International Law Commission
(http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

could accept the text of the article as proposed by the Special Rapporteur.

56. Mr. ŠAHOVIĆ said he trusted that, when the Drafting Committee came to examine articles G and A, it would not overlook the reasons which had resulted in the form of wording adopted by the Commission in first reading. It was particularly important to avoid defining State archives so broadly that the special nature of such archives was no longer apparent.

57. Mr. VEROSTA said that he had nothing against the idea of specifying, in article G, that State archives were State property; he feared, however, that such a clarification and the reference to other articles might give rise to difficulties of application.

58. With regard to article A, he approved the wording proposed by Mr. Ushakov, but stressed the need to retain the condition set forth in the concluding phrase.

59. Mr. BEDJAOUI (Special Rapporteur), summing up the discussion, noted that the members of the Commission agreed that the articles relating to State archives should come immediately after those on State property.

60. Mr. Ushakov's proposed addition to article G seemed to him to be better and simpler than the wording he had himself proposed. Unlike Mr. Verosta, he considered it essential to establish a link between State archives and State property.

61. With regard to article A, he still thought that the word "*ensemble*" should be omitted, since it conveyed the idea of a collection. Indeed, it had been translated by "collection" in the English version of the article. As for the second condition laid down in article A, it seemed clear from the discussion that it should be deleted. In some countries, the notion of State archives was extremely restrictive, for it applied only to an ancient collection, preserved in an autonomous institution, and in special premises. If the condition was retained, it could give the impression that only archives of that kind would be the subject of a succession of States and that the living archives to be found in other institutions were excluded. Moreover, the concept of preservation could also be interpreted restrictively.

62. The Drafting Committee should not have any difficulty in preserving an appropriate degree of parallelism between article A and article 5.

63. Sir Francis VALLAT agreed that the articles on archives should come after those on State property.

64. In his view, it was very important that the Commission should not find itself in the position where, in respect of the same document, there was a conflict between the application of the articles on State property generally and those on State archives; he feared that some of the suggestions made would have exactly that effect. The purpose of the articles on State archives was to deal with such archives in a special way because of their special character. There was now a risk that that purpose, together with the special character of State archives, would be lost entirely.

65. In his view, it would have been more useful to discuss the question of the definition of State archives after, rather than before, the substance of the other articles had been settled.

66. Mr. BEDJAOUI (Special Rapporteur) said that there was no reason why the Commission should not refer articles G and A to the Drafting Committee, but reserve the right to revert to them after it had considered other articles on State archives.

67. The CHAIRMAN suggested that articles G and A should be referred to the Drafting Committee.

It was so decided.[8]

The meeting rose at 1.10 p.m.

[8] For consideration of the texts proposed by the Drafting Committee, see 1694th meeting, paras. 29–30 and paras. 32–33, respectively.

1689th MEETING

Monday, 13 July 1981, at 3.10 p.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–4, A/CN.4/345 and Add.1–3)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE H (Rights of the successor State to State archives passing to it),

ARTICLE I (Date of the passing of State archives),

ARTICLE J (Passing of State archives without compensation), *and*

ARTICLE K (Absence of effect of a succession of States on third party State archives)

1. The CHAIRMAN invited the Special Rapporteur to introduce articles H, I, J and K (A/CN.4/345 and Add.1–3, paras, 249, 251, 255 and 256), which read:

Article H. Rights of the successor State to State archives passing to it

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State archives as pass to the successor State in accordance with the provisions of the articles in the present Part.

Article I. Date of the passing of State archives

Unless otherwise agreed or decided, the date of the passing of State archives is that of the succession of States.

Article J. Passing of State archives without compensation

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State archives to the successor State shall take place without compensation.

Article K. Absence of effect of a succession of States on third party State archives

A succession of States shall not as such affect State archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

2. Mr. BEDJAOUI (Special Rapporteur) said that articles, H, I, J and K were closely akin to the corresponding draft articles on State property.

3. Article H, which was modelled on article 6,[1] relating to the rights of the successor State to State property passing to it, laid down the principle that, with regard to such State archives as passed to the successor State, a succession of States entailed the extinction of the rights of the predecessor State to those archives and the arising of corresponding rights for the successor State, a principle that applied even if the physical transfer did not take place immediately after the date of the succession.

4. One question was whether a successor State which received copies of archives possessed rights over them, and whether a clause should be added to article H to safeguard any such rights.

5. Article I was the counterpart of article 7,[2] relating to the date of the passing of State property. The date of the passing of State archives, like that of the passing of State property, was that of the succession of States, unless the date was otherwise agreed by the States concerned. The principle derived from State practice, which furnished many examples of treaties that provided for the "immediate" transfer of State archives or for their transfer "without delay". Sometimes time-limits had to be set for the transfer of State archives, for the purposes of drawing up an inventory or taking steps for them to be reproduced, but in principle, the passing of State archives took place at the date of the succession of States. Consequently, when there was a delay in the transfer of State archives to the successor State and a further succession of States affecting the predecessor State occurred, it was important to know that the archives in question were excluded from the second succession.

6. Article J, which corresponded to article 8,[3] laid down the principle of the passing of State archives without payment or compensation. The principle was well established by State practice and was implicitly confirmed in subsequent articles, which provided that the cost of making copies of archives should be borne by the requesting State.

7. Article K was the counterpart of article 9,[4] which related to the absence of effect of a succession of States on third party State property. In terms of State archives, it covered two eventualities in particular. The first was that in which the archives of a third State were for some reason housed within the predecessor State prior to the date of succession (it was clear in such a case that the archives should not be affected by the succession). The second eventuality concerned a further succession of States. In that case, the successor State in the first succession was regarded as a third State in the second succession; those of its archives situated within the territory of the predecessor State which it had not recovered by that time should not be affected by the second succession.

8. Sir Francis VALLAT said that he had some doubts about the proposal made by the Special Rapporteur in paragraph 250 of his thirteenth report (A/CN.4/345 and Add.1–3) to include in article H the words "Subject to the rights held by the State which obtains a copy of such State archives". Article H dealt with the extinction of the rights of the predecessor State to the State archives that passed to the successor State, but the proposed additional wording dealt with a collateral or separate right that might be held by a State which obtained a copy of the archives. His understanding was that the passing of State property would not, in principle, extinguish any collateral rights enjoyed by third parties, and that State property passed to the successor State subject to any rights to that property vested in third parties. To include in article H the additional wording proposed by the Special Rapporteur might, however, suggest that the rights of third parties could be extinguished.

9. His doubts might have been caused partly by the first sentence of paragraph 250 of the report, in which the Special Rapporteur had stated that he was drawing attention to a problem that had no equivalent with respect to State property, which was, by definition, irreproducible. There was, however, nothing at all in the definition of State that excluded the possibility that such property might be reproduced. Indeed, if account was taken of the thousands of reproductions of the bust of Nefertiti that existed throughout the world, it

[1] For the text, see 1660th meeting, para. 64.

[2] *Idem*, para. 70.

[3] *Idem*, para. 77.

[4] *Idem*, 1661st meeting, para. 1.

would be seen that it was quite incorrect to say that State property could not be reproduced.

10. Mr. VEROSTA said he too thought it better not to complicate article H by inserting a reference to copyright.

11. Mr. ALDRICH said that he had the same reservations with regard to article K as he had with regard to article 9 (1661st meeting); neither of those provisions really needed to be included in the draft. If article 9 was eventually deleted, then article K should also be deleted. He nevertheless recognized that if article 9 was retained, article K should be retained as well.

12. Mr. REUTER said that, like Sir Francis Vallat and Mr. Verosta, he thought it would be better not to amend article H as suggested by the Special Rapporteur. The Commission might none the less provide in a final article that:

> "Nothing in the present draft articles shall prejudge questions of artistic, literary, intellectual or other property to which the present articles might give rise."

13. Mr. BEDJAOUI (Special Rapporteur), referring to Article H, said that Mr. Reuter's suggestion that matters relating to copyright should be dealt with in a separate article could be referred to the Drafting Committee for consideration.

14. Article K would, of course, have to be deleted if the Commission decided to delete article 9, which was its counterpart; otherwise, it would have to be retained.

15. The CHAIRMAN suggested that articles H, I, J and K should be referred to the Drafting Committee.

It was so decided.[5]

ARTICLE B (Newly independent State)

16. The CHAIRMAN invited the Commission to consider article B, which read:

Article B. Newly independent State

1. When the successor State is a newly independent State:

(*a*) archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence, shall pass to the newly independent State;

(*b*) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those dealt with in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State which bear upon title to the territory of the newly independent State or its boundaries, or which are necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. Paragraphs 1 to 3 apply when a newly independent State is formed from two or more dependent territories.

5. Paragraphs 1 to 3 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

6. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

17. Mr. BEDJAOUI (Special Rapporteur) said that article B, which the Commission had adopted on first reading, had not given rise to any major objections or reservations in the Sixth Committee. It had been noted that the article was of great importance for newly independent States, since archives were often a significant part of their cultural heritage. Some representatives had pointed out that the destiny of many newly independent States had long been linked to that of an administering Power and that the archives of their common history constituted a common heritage that should be shared by the predecessor State and the newly independent State in the best way possible. Others had emphasized that the six paragraphs of article B did not merely reconcile the interests of the predecessor State and the newly independent State, but also preserved the cultural and historical heritage of peoples.

18. With regard to paragraph 1, one representative had taken the view that the words "archives, having belonged to the territory" were ambiguous. Another had questioned whether archives of such institutions as local missionary bodies or banks established on the territory prior to colonization should be included in that category. There had been cases, for instance, in which missions had formed very large and valuable archival collections as a result of detailed historic or geographical research. Sometimes, such archives had been offered to the newly independent States by the institutions concerned. He doubted that archives of that kind were covered by paragraph 1, and considered that it would be difficult to apply the provisions relating to State archives to archives which were, by definition, private. Some suggestions in that connection might none the less be made by the Commission or the Drafting Committee.

19. As to paragraph 6, which provided that agreements concluded between the predecessor State and the newly independent State should not infringe the right of the peoples to those States to development, to information about their history and to their cultural

[5] For consideration of the texts proposed by the Drafting Committee, see 1694th meeting, paras. 29–31.

heritage, he considered that it laid down a peremptory rule and, unlike some representatives on the Sixth Committee, he thought it entirely appropriate.

20. The provisions of paragraph 3 had been considered to be consistent with the principle of equity and capable of facilitating application of the rule *uti possidetis juris*, concerning the immutability of the frontiers inherited from the colonial era. In his opinion, the expression in that paragraph "documents from the State archives" involved some redundancy, and it would probably suffice to refer either to documents or to State archives.

21. Governments had not made any criticisms of article B in their written comments, and he therefore proposed that the wording of the article should not be altered.

22. Mr. NJENGA said that, on the whole, article B was well drafted and could be referred to the Drafting Committee. Nevertheless, if the Commission decided to maintain the two conditions set forth in subparagraph 1 (*a*)—namely, that archives must have belonged to the territory to which the succession of States related and must have become State archives of the predecessor State during the period of dependence—some State archives that should rightfully pass to the newly independent State might, in fact, be prevented from passing to it. Thus, if both of those conditions had to be met, State archives which had been considered as such before the country in question had been colonized but, on colonization of the country, had been considered by the colonizing Power, in accordance with its internal law, as no longer forming part of State archives, might not pass to the newly independent State.

23. He therefore suggested that, in order to make the categories of State archives to which the succession of States related as broad as possible, the word "and" in subparagraph 1 (*a*) should be replaced by "or".

24. He fully endorsed paragraph 3, which laid down the mandatory requirement that the predecessor State should provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State which bore upon the boundaries of the newly independent State. That provision would be of crucial importance to African countries. The principle it embodied had been incorporated in the Charter of the OAS,[6] but many boundaries still remained to be demarcated in Africa, not because of disregard for that principle but because of a lack of information about where those boundaries actually lay.

25. Mr. CALLE Y CALLE said that, as generally agreed in the Sixth Committee, article B was in principle satisfactory, particularly since it gave the predecessor State and the newly independent successor State full freedom to agree on the passing of State archives that were of common interest to both of them.

26. The purpose of paragraph 3, seemed to be to facilitate the application of the rule *uti possidetis juris*. In some cases, however, steps were taken to prevent newly independent States from gaining access to the State archives to which they were entitled. He therefore suggested that the words "shall provide the newly independent State with the best available evidence of documents from the State archives of the predecessor State" should be replaced by the words "shall facilitate immediate access by the newly independent State to the State archives of the predecessor State".

27. As to paragraph 6, he was of the opinion that the reference to "the right of the peoples of those States to development", which was, by implication, a reference to economic development, should be placed after the reference to the right of the peoples of those States "to information about their history and to their cultural heritage".

28. Mr. REUTER said that the phrase in article B, subparagraph 1 (*a*), "archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence" was vague and did not seem suitable for the cases which the Special Rapporteur sought to cover. It would perhaps be better to say "archives, having been formed in the territory, during the period of dependence, and having subsequently become State archives of the predecessor State".

29. Paragraph 3 did not call for any change, on the understanding that it did not refer to any theory regarding the territorial boundaries of newly independent States. He wished, however, to revert to a problem which the paragraph did not take into account, namely, of archives that remained the property of the predecessor State but were of major interest in establishing the successor State's titles to territory. The difficulties of such a situation were inevitable. It was not conceivable that all the legal documentation relating to the territorial sovereignty of the successor State should be transferred to that State: a part of it always remained the heritage of the predecessor State. Such archives should none the less be subject to a special regime. It was not enough for the successor-State to have a right to the best available evidence of such archives: it should occupy a privileged position vis-à-vis other States. The successor State might find itself in the event of an international dispute in a position in which its means of defence were in the possession of the predecessor State. In such a case, the successor State should have the privilege of agreeing to the disclosure and publication of such archives; otherwise, it would be placed at a disadvantage vis-à-vis third States.

30. He fully endorsed the rule laid down in paragraph 6, but did not think it was properly enunciated. It gave the impression that there was a rule of

[6] United Nations, *Treaty Series*, vol. 479, p. 39.

international law whereby the peoples of newly independent States had a right over all the items that constituted their cultural heritage, wherever they were located. If such was the intention of the Commission, it would follow, for example, that the Greeks could claim back the friezes from the Parthenon housed in the British Museum. Personally, he was prepared to accept such a rule, but he had the impression that it was not yet recognized in international law. If that was indeed the rule the Commission wished to lay down, it should express the rule in clear terms. If, however, the Commission preferred to make it clear that, unfortunately, such a rule did not exist for the time being—and that, moreover, it would have no place in a set of articles that dealt with State archives, rather than the subject of the cultural heritage—it should modify the wording. In any case, it was impossible for the Commission to lay down a rule of *jus cogens* or to affirm that agreements that did not comply with the terms of paragraph 6 would be contrary to a rule of *jus cogens* that was recognized in international practice and derived from customary law. It would be better to provide that the agreements concluded between the predecessor State and the newly independent State should promote the right of the peoples of those States to development, to information about their history and to the reconstitution of their cultural heritage, and it could be made clear in the commentary that many members hoped, as did he himself, that one day there would be an international rule on the restitution of State archives.

31. Lastly, he assumed that the right to development referred to in article B, paragraph 6, was a right to cultural development and not to economic development, which was totally alien to the provision in that paragraph.

32. Mr. USHAKOV said that, in principle, he was prepared to accept any article relating to newly independent States that was satisfactory to those members of the Commission who came from third world countries, but he was surprised that the latter were content with provisions that placed newly independent States in a position of inferiority as compared with States to which part of the territory of a State was transferred.

33. In that connection he pointed out that, under the terms of article B, the archives that would pass to the newly independent State were simply those that had belonged to the territory to which the succession of States related and become State archives of the predecessor State during the period of dependence, together with archives which, for a proper and normal administration of the territory, should be in that territory. That was the substance of subparagraphs 1 (*a*) and (*b*) of the article. However, under subparagraphs 2 (*a*) and (*b*) of article C,[7] relating to the transfer of part of the territory of a State, the State archives that passed to the successor State were, apart from those which had to be at its disposal for the purposes of normal administration, all other archives relating exclusively or principally to the territory transferred.

34. Again, article B, paragraph 2, provided that reproduction of archives should be determined by agreement between the predecessor State and the newly independent State, whereas article C, paragraph 4, laid down a definite rule for the reproduction of archives. There too, the newly independent State was at a disadvantage compared with the State to which part of the territory of a State was transferred.

35. It was probably because the article relating to newly independent States had been drafted before the article relating to the transfer of part of the territory of a State that the provisions of the former were more restrictive. It would now be advisable to revert to article B and adapt its provisions to the less restrictive terms of article C.

36. Article B, paragraph 2, dealt with the method of determining the passing or reproduction of parts of State archives of the predecessor State other than those which passed to the successor State in accordance with paragraph 1, and that were of interest to the territory to which the succession of States related. Since paragraph 6 of the article specified the rights which such agreements should not infringe, he wondered whether the rules of paragraph 2 or those of paragraph 6, concerning the modalities of such agreements, would prevail. In his view, the two provisions were somewhat contradictory.

37. Mr. BEDJAOUI (Special Rapporteur), summing up the discussion on article B, noted Mr. Njenga's suggestion that, instead of two cumulative conditions, subparagraph 1 (*a*), should lay down only one; otherwise, archives of considerable use to the newly independent State might not be covered by the succession because they had belonged to the territory which was the subject of the succession but had not become State archives of the predecessor State during the period of dependence. Archives belonging to the territory before colonization might, for instance, subsequently have been dispersed throughout the world. He did not, however, think it was possible to lay down a principle that such archives should pass to the newly independent State; the predecessor State could not enter into an undertaking to ensure that archives which had been disseminated throughout other States during or prior to the period of dependence were returned to the newly independent State. The Drafting Committee might consider Mr. Reuter's interesting proposal, although his proposed wording would not resolve the problem of archives that had been dispersed throughout the world.

38. Referring to Mr. Ushakov's general comments, he said that he was grateful to him for having pointed out that the provisions of article B were more restrictive than those of article C. However, the

[7] See 1658th meeting, footnote 3.

difference was caused not by the order in which the articles has been adopted but by a matter of substance. Article C dealt with a special kind of succession, transfer of part of the territory of a State —a typical example being an adjustment of boundaries, which was usually made between advanced States. The rules laid down in article C, therefore, should be taken to refer not to the transfer of large amounts of archives, but to a few administrative documents; only in very exceptional cases would a treasure trove, for example, be found on a territory that was the subject of a transfer. In the case covered by article B, however, it was necessary to take account of reality: predecessor States were reluctant to deliver up to newly independent States archives which related to their *imperium* and their *dominium*, whether such archives had been formed during the colonial period or even prior to it, and which were therefore part of the cultural and historic heritage of the territories that were the subject of a succession. In view of that particular fact, the provisions of article B were not too ambitious. He would be delighted, however, if the Commission tried to enlarge the scope of the article so as to help the newly independent States not only to recover those items of their cultural heritage that were in the possession of the predecessor State, but also to reconstitute that heritage in its entirety, on a world-wide basis.

39. Paragraph 3 of article B dealt with the question of boundaries and, in particular, with documents of a political nature relating to the sovereignty of the colonial Power over the territory that was the subject of the succession—for instance, multilateral treaties such as the General Act of the Conference of Berlin (1885), which had led to the dismemberment of Africa. Such documents, which remained in the possession of the colonial Powers of the time and to which the newly independent States did not have access, were sorely needed by the latter when they were grappling with boundary problems. He did not, however, think it would be desirable to favour a newly independent State in the way Mr. Reuter had suggested. A newly independent State that wished to secure from the former administering Power evidence relating to its titles to territory or boundaries generally had to enlist the other successor States of that administering Power in the steps that it took, for they might consider such steps prejudicial to their interests. Paragraph 3 was satisfactory because it enjoined the predecessor State to provide all the successor States with the best available evidence.

40. With regard to Mr. Calle y Calle's comments, the effect of his suggested amendments to paragraph 3 would be to restrict its scope. The requirement that the predecessor State should provide the newly independent State with the best available evidence, as laid down in paragraph 3, meant that the former had to anticipate the wishes of the latter. The concept of the right to development, as set forth in paragraph 6, related not to economic development but to the social, cultural, political and other aspects of development.

41. Mr. Reuter's proposed new wording of paragraph 6 implied recognition of a rule of restitution which he (the Special Rapporteur) was not ready to accept. Admittedly, newly independent States were entitled to obtain items belonging to their cultural and historic heritage, but the obligation to return such items to them was not incumbent on the former administering Power alone, since it could not undertake to return to the newly independent State archives that were not in its possession. For example, a former colonial Power other than Great Britain could not be asked to return to Greece the friezes from the Parthenon that were housed at the British Museum. Problems of that kind were a matter not of State succession, but of returning to their countries of origin works of art that had been dispersed throughout the world; the Director-General of UNESCO had launched an appeal to that end in 1978.

42. The CHAIRMAN suggested that article B should be referred to the Drafting Committee.

It was so decided.[8]

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

[Item 11 of the agenda]

Statement by the observer for the Inter-American Juridical Committee

43. The CHAIRMAN invited Mr. Aja Espil, observer for the Inter-American Juridical Committee, to speak before the Commission.

44. Mr. AJA ESPIL (Observer for the Inter-American Juridical Committee) said that the annual exchange of observers, documentation and programmes of work between the Inter-American Juridical Committee and the Commission enabled each body to keep abreast of the work of the other. In that connection, it was hoped that the Commission's observer at the next session of the Committee would be able to deliver a lecture to the annual course in international law organized by the Committee. The report by the previous Chairman of the Commission, Mr. Pinto, had provided an excellent insight into the work of the Commission.

45. He expressed the hope that the present Chairman would be able to attend the Committee's next session or, if he were unable to do so, that he would appoint another member of the Commission for that purpose.

46. Over the past ten years, the work of the Inter-American Juridical Committee had focused on strengthening the effectiveness of the OAS. Conse-

[8] For consideration of the text proposed by the Drafting Committee, see 1694th meeting, paras. 40–48.

* Resumed from the 1687th meeting.

quently, the Committee's reports and drafts were designed to establish the future conditions necessary to facilitate the operation of the machinery for international co-operation.

47. While it was true that, over the past decade, international law had been enriched by further codification and progressive development, by the conclusion of important multilateral conventions and by the decisions of international courts, the problems of the Inter-American community appeared to be unchanged, although they presented themselves in a different form. The special and continuing concerns of the Committee, as a regional juridical body, included the safeguarding of fundamental human rights and the international problems affecting the development of States. At recent sessions, the Committee had studied more particularly the question of torture and the legal aspects of the transfer of technology.

48. In accordance with a resolution adopted by the General Assembly of the OAS in 1978, the Committee had embarked on a study with a view to preparing a draft convention defining torture as an international crime. In doing so, the Committee had considered once again the distinction between an international crime and an international delict, a subject which had been discussed some years earlier by the Commission in connection with the topic of State responsibility. The majority of the members of the Committee had been of the view that the General Assembly had assigned to it an imperative mandate to declare torture to be an international crime and that, consequently, rather than take issue with that assertion, it must confine itself to translating it into legal terms. Other members had expressed the view that, given the eminently technical and juridical nature of its mandate, the Committee was required, in all cases, to deliver an opinion on matters within its competence.

49. Another question discussed in the course of the debate on torture was whether it was possible to attribute to a State an act committed by a public official acting in excess of his authority or contrary to his instructions. While some members considered that such acts could not be attributed to the State, others maintained that, in the event, State responsibility would be illusory, since it was exceptional for a public official to receive instructions to commit an unlawful act. The main thrust of the draft convention was based on a new element, namely, international control of State obligations, by virtue of which the individual would be protected even against his own State authorities.

50. The controversial question of whether individuals could be subjects of international law had arisen during the discussion of the draft. The touchstone of the international legal personality of the individual lay not only in the granting of rights, but in ensuring their observance. Once an individual had access to the procedure established by the Statute of the Inter-American Commission on Human Rights and of the Inter-American Court of Human Rights, he could be said to have acquired the character of a subject of international law. Articles 9 and 14 of the draft convention on torture established the appropriate machinery. The wording of the draft was in fact so far-reaching in scope that mistreatment of a child by its mother or of one spouse by another could be regarded as international crimes.

51. In a number of topics before the Inter-American Juridical Committee, socio-economic considerations often became superimposed on exclusively juridical considerations. That had been the case in respect of the Committee's work on the legal aspects of the transfer of technology, a question referred to it in 1977 by the General Assembly of the OAS. The transfer of technology from the developed to the least developed countries was a question of the utmost importance to advocates of a new international economic order. The Committee had focused its attention on two main topics: first, the system for international protection of industrial property and the review work undertaken by WIPO, and second, the draft international code of conduct on the transfer of technology currently being negotiated within the United Nations. The work done by the Inter-American Juridical Committee on transfer of technology fell within the field of comparative law, rather than public international law. The results of consultations concerning the harmonization of legislation had not always been gratifying. Experience showed that co-operation was achieved not by a straightforward juxtaposition of different points of view, but by selecting areas of common interest. The report submitted by the Committee to the OAS General Assembly in 1980 had included recommendations concerning prevention of restrictive practices in the transfer of technology, a common phenomenon in Latin America. The interpenetration of two disciplines always called for considerable efforts at harmonization. Accordingly, the Committee had attempted to devise a legal regime which made international economic relations subject to rules that reflected the principles of more equitable distribution.

52. The fact that four members of the Committee were eminent specialists in private international law had enabled the Committee to take up a number of problems concerning the two main legal systems existing in that sphere on the American continent. The rules of private international law were laid down basically in the internal law of each State, but unification of such rules through conventions designed to resolve conflicts of laws was a constant aim of the regional system.

53. The first Meeting of experts on private international law, held in Washington, D.C., in April 1980, which had been attended by a number of members of the Committee, as well as by a number of distinguished scholars, had produced two documents, one concerning the bases of international jurisdiction for the extra-territorial effectiveness of foreign judgements, and the other a draft additional protocol to the

1975 Inter-American Convention on the taking of evidence abroad. Those preliminary drafts had been considered by the Committee at its latest session in 1980, at which it had made amendments designed to strengthen international co-operation in judicial proceedings. The Committee had also sought ways of harmonizing the common law and Roman law systems. The 1975 Inter-American Convention embodied the principle of the civil law systems that only the jurisdictional organs of the requested State were competent to execute letters rogatory. The common law system was quite different, and an attempt had been made to resolve the conflict by means of an additional protocol authorizing a commissioner duly appointed by the judicial authority of a State to take evidence abroad, but without making use of coercive measures.

54. In conclusion, he thanked the members of the Commission and the Secretariat for the courtesy extended to him during his visit. The learned presentations and analyses of the Special Rapporteurs would enable him to take to the next session of the Committee new contributions to doctrine and background information which would be invaluable for its future work.

55. Mr. CALLE Y CALLE, speaking on behalf of the members of the Commission from countries within the Inter-American system, expressed appreciation to Mr. Aja Espil for his brilliant report on the work on the Inter-American Juridical Committee. Mr. Aja Espil was not only an outstanding diplomat, but also a distinguished jurist who did honour to the great Argentine legal tradition.

56. It was of the utmost importance for the Commission to be provided with an insight into the work carried out by the Committee. In some respects, the topics dealt with by the Committee coincided with matters taken up in the OAS General Assembly, such as the question of torture and the transfer of technology. With regard to torture, his own view was that any physical abuse of children by their parents or of one spouse by the other constituted a crime against humanity.

57. Questions such as the legal aspects of the transfer of technology and the protection of industrial property were of crucial importance for the growth of the developing countries and the establishment of a new international economic order. The time had come for harmonization of the various relevant national legislation.

58. He expressed the hope that the Chairman of the Commission would be able to continue the fruitful co-operation between the Inter-American Juridical Committee and the Commission by attending the next session of the Committee, in order to observe its work at first hand.

59. Mr. BEDJAOUI, speaking on behalf of the African members of the Commission, expressed his appreciation and admiration for the work carried out by the Inter-American Juridical Committee.

60. The exchanges between the Commission and Committee were particularly fruitful and should be strengthened, since Latin American legal science was fed by various currents of thought that often enabled it to come forward with original solutions to universal problems. For example, certain contributions made by Latin American law had assisted the African countries in resolving their own problems, particularly those relating to boundaries. The Committee's work was also of special interest because of the original methods that it followed.

61. He commended the courage with which the members of the Committee had considered the highly sensitive issue of human rights, and thanked the Committee for the efforts it had made to eradicate torture, which was a disgrace to mankind. He also thanked the Committee for its work on the transfer of technology, which was one of the keys to development, for science transcended frontiers and was the heritage of all mankind.

62. Mr. SUCHARITKUL, speaking on behalf of the Asian members of the Commission, expressed his sincere appreciation to Mr. Aja Espil for his comprehensive report on the work of the Inter-American Juridical Committee.

63. He recalled that in 1965 he had attended the meeting of the Inter-American Council of Jurists, as it then was called, as the observer for the Asian-African Legal Consultative Committee. One of the main questions being discussed at that time had been the application of minimum standards for the treatment of aliens. As a representative of Asia, he had been unable to understand why opposition had been expressed in some quarters to the application of such standards, something which demonstrated the usefulness of exchanges of views between regions.

64. He had been most interested to learn of the advanced stage reached by the Inter-American Juridical Committee on various aspects of public international law, including the elaboration of practical machinery for the protection of the rights of individuals.

65. Sir Francis VALLAT, speaking on behalf of members of the Commission from Western European and other countries, expressed his warm appreciation to Mr. Aja Espil for his brilliant report on the report on the work of the Inter-American Juridical Committee.

66. Mr. USHAKOV thanked the Inter-American Juridical Committee's observer, who was an eminent Latin American jurist, for his statement and expressed the hope that the Commission would maintain continued and fruitful ties with the Committee.

67. The CHAIRMAN expressed the appreciation of the Commission to the observer for the Inter-American Juridical Committee for his statement, from which the Commission would derive great benefit.

The meeting rose at 6.05 p.m.