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**Summary record of the 1775th meeting**

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that Committee and the Commission, which had very similar functions. He congratulated the Committee on its work on the topic of the jurisdictional immunities of States and their property. The material produced by the Committee had proved very useful to the Commission in its own work on the topic, as evidenced by the references made to it by the Special Rapporteur and other members of the Commission. Co-operation between the two bodies was very important, and he would follow with close interest the work of the Committee on all the topics with which it was currently occupied.

36. Mr. DÍAZ GONZÁLEZ paid tribute to Mr. Galo Leoro, who was well known in Latin America both for his legal work and for his multilateral and bilateral diplomatic activities. His statement had been of the greatest interest. The condensation of inter-American practice regarding jurisdictional immunity contained in the draft convention introduced by Mr. Galo Leoro was evidence of the work done by the Committee since its establishment with a view to the progressive development and codification of American international law: that law had constantly gained in authority and now set an example to the whole world of the primacy of law over the use of force. Even when the American continent had been subjected to attacks by foreign Powers, it had always sought peaceful settlements and given precedence to the rule of law. In that connection, he referred to the Congress of Panama convened by Simón Bolívar in 1826, which had been the precursor of the OAS and even of the United Nations. For President Wilson, when proposing the establishment of the League of Nations, had acknowledged the 1826 agreements as his inspiration, and some articles of the League of Nations Covenant had been based on the treaty signed by the American States at Panama.

37. Mr. Galo Leoro's presence was doubly welcome, both for his own reputation and because he represented the Inter-American Juridical Committee, which had, over the years, been cultivating the Latin-American conception of law.

38. Mr. FLITAN, speaking also on behalf of Mr. Ushakov and Mr. Yankov, warmly welcomed and congratulated the representative of the Inter-American Juridical Committee. Co-operation had developed over the years between the Commission and the Committee, which worked unceasingly for the predominance of law and justice over the use of force in relations between States. Mr. Galo Leoro's detailed account of the Committee's activities showed that such co-operation should be strengthened.

39. Mr. CALERO RODRIGUES associated himself with previous speakers and said that it was extremely important to maintain the closest contact with regional bodies such as the Committee, whose fruitful work was based on Latin-American tradition. He thanked Mr. Galo Leoro for his account of the Committee's activities and for his comments on the inter-American draft convention, which would make a substantial contribution to the Commission's own work on the jurisdictional immunities of States.

40. Mr. MAHIOU said that the African members of the Commission also wished to pay tribute to the representative of the Inter-American Juridical Committee, whose statement had been all the more valuable in that the Commission was concerned with many of the same problems. The Commission's co-operation with other learned bodies such as the Committee enabled its members better to understand and grasp those problems.

41. Mr. LACLETA MUÑOZ welcomed Mr. Galo Leoro and said that he envied the Committee, which had just completed its work on jurisdictional immunity of States, whereas the Commission was still deeply immersed in that topic.

42. Mr. JAGOTA, speaking also on behalf of Mr. Al-Qaysi, Mr. Jacovides, Mr. Ni and Mr. Ogiso, thanked the representative of the Inter-American Juridical Committee for his statement on the Committee's work. A professional complementarity existed between the Commission and regional bodies, since whatever the Commission proposed must be based on an understanding of State practice in the various continents and was put to the test of soundness and practicality by the regional bodies. The information provided by the Committee concerning its work on the topic of jurisdictional immunities of States and their property had been particularly useful.

43. Mr. GALO LEORO (Observer for the Inter-American Juridical Committee) thanked the members of the Commission and, in particular, those from Latin-American countries, whose contribution to the Commission's work he commended. He suggested that even closer co-operation might be established between the Committee and the Commission and said it was regrettable that, for practical reasons, it took so long for the Commission's documents to be made available to the Committee.

44. The CHAIRMAN thanked the representative of the Inter-American Juridical Committee for having addressed the Commission and helped to strengthen the links between the two bodies. In particular, the information and materials received in connection with the Committee's work on the topic of jurisdictional immunities of States and their property, on which the Commission itself was currently working, were greatly appreciated.

*The meeting rose at 1.15 p.m.*

## 1775th MEETING

*Monday, 6 June 1983, at 3 p.m.*

*Chairman:* Mr. Laurel B. FRANCIS

*Present:* Mr. Al-Qaysi, Mr. Balandá, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr.

McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

**State responsibility (continued)\* (A/CN.4/354 and Add.1 and 2,<sup>1</sup> A/CN.4/362,<sup>2</sup> A/CN.4/366 and Add.1,<sup>3</sup> ILC(XXXV)/Conf.Room Doc.5)**

[Agenda item 1]

**Content, forms and degrees of international responsibility (part 2 of the draft articles)<sup>4</sup> (continued)**

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. AL-QAYSI expressed appreciation to the Special Rapporteur for his fourth report (A/CN.4/366 and Add.1) on a very complex topic. The topic of State responsibility was one of vital importance, encompassing virtually all aspects of international law. Dealing as it did with breaches of the law by sovereign States and the ensuing consequences, it assumed intense practical and political significance. The speedy elaboration of the remaining parts of the draft articles was hardly an easy task, not only because of the scope of the topic but also because of the urgent need to evaluate its every component in terms of the past political behaviour and the current and future expectations of States.

2. Referring to chapter II of the fourth report, he noted that, in paragraph 32, the Special Rapporteur had stated that the aim of the report was to concentrate on an "outline" of the possible contents of parts 2 and 3 of the draft articles and to discuss the difficult choices with which the Commission was faced. Clearly, the Commission's task in making those difficult choices would not be facilitated by presentation of the substance of the choices in bulk and in highly abstract terms. In the absence of any headings or subheadings, and of a clear correlation between the conclusions and the draft articles to be submitted, the overall shape of the intended outline had become somewhat blurred.

3. In paragraph 35, the Special Rapporteur observed that there was an abundance of primary rules of conduct, but a relative scarcity of secondary rules, and a virtual absence of tertiary rules. In paragraph 36, it was stated that part 1 of the draft articles had been relatively easy to elaborate, since it concentrated on the author State, in other words on the conditions under which an act of a State existed and constituted a breach of an international obligation of that State; part 2, however, must concentrate on the "injury" to a particular State, to several

States, or to the community of States, since it dealt with new rights and obligations arising out of the commission of an internationally wrongful act, rather than out of the time-honoured basis of consent.

4. In paragraph 37, it was emphasized that, since in most cases a State charged with an internationally wrongful act would deny responsibility, on the basis of either fact or law, and since other States could "maintain their interpretations of fact and law and act accordingly", a dispute would arise. If the dispute remained unsettled, it could "give rise to an escalation of the conflict" and each move and countermove could not be "definitively appreciated legally otherwise than on the basis of a settlement of the original dispute of fact and law relating to the primary rules". In paragraph 39, however, the point was clearly made that it was hardly worth while talking about secondary rules without knowledge of the contents of the applicable tertiary rules; indeed, the secondary rules were "only a transition from the primary to the tertiary rules". The Special Rapporteur had thus set out the framework for the first choice that the Commission had to make.

5. In paragraph 45, the Special Rapporteur submitted that the Commission should give early consideration to the possible content of part 3 of the draft articles, namely the question of dispute settlement, since it would decisively influence the way in which part 2 was to be elaborated. In that connection, three options were presented in paragraphs 42-44. The first option was to isolate a number of legal questions in the articles on State responsibility and to subject them to a limited procedure for the settlement of disputes "in the perspective of a general convention on State responsibility comparable with the Vienna Convention on the Law of Treaties". However, the Special Rapporteur expressed considerable doubt as to the willingness of States generally to accept the isolation of questions relating to the interpretation and application of secondary rules from those relating to the interpretation and application of the primary rules concerned.

6. The second option was to give the final outcome of the work the form of an "endorsement of the rules on State responsibility as 'guidance' for States and international bodies". Finally, the third option, which the Special Rapporteur described as an "intermediary solution", was the acceptance of those rules by States in a convention, only to the extent that a dispute between them (which necessarily involved the interpretation and application of primary rules) was submitted to an international procedure for the settlement of disputes. That would seem to constitute a comprehensive approach to the settlement of disputes.

7. It was not difficult to perceive the plausibility of the Special Rapporteur's analysis. For example, with regard to proportionality, as envisaged in draft article 2 presented in the third report (A/CN.4/354 and Add.1 and 2),<sup>5</sup> the question of who would be the judge of

\* Resumed from the 1773rd meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>5</sup> See 1771st meeting, para. 2.

proportionality would immediately arise. If such a question were left unregulated, each State would be the judge of its own responses, and the efficacy of the rule would be adversely affected. At the same time, however, it must be admitted that it would be virtually impossible to consider the matter at the current stage or to opt for the model of dispute settlement that would best fit State responsibility until a sufficient number of draft articles had been submitted. Only then would the Commission be better able to assess, in practical terms, what was needed. For the time being, the second option, namely the "guidance" approach, was too drastic a departure from the basis on which the elaboration of the draft articles had proceeded, and was therefore unacceptable. As to the third option, he wondered whether it was realistic to believe that, at the current stage, a comprehensive procedure for dispute settlement embodied in a convention on a topic as sensitive as State responsibility would make the convention widely acceptable to States.

8. In dealing with the question of the legal consequences of the international crime of aggression, the Special Rapporteur noted, in paragraph 52 of his report, that those consequences were dealt with in the Charter of the United Nations, although in a way that left room for divergent interpretations. The report went on to state that the one legal consequence that was not in dispute was that of self-defence and that, in any event, part 3 of the draft articles would contain procedure for the implementation of State responsibility resulting from aggression. The Special Rapporteur concluded that no useful purpose could be served by elaborating on the notion of self-defence, because the Commission itself had been divided on the matter at its previous session and because no suggestion had been made that would allow the Commission to undertake the drafting of rules on the measures to be taken by the Security Council to maintain international peace and security and on the consequences of failure to take effective measures.

9. Having dismissed the legal consequences of aggression as defined in a draft convention on State responsibility prepared by Graefrath and Steiniger,<sup>6</sup> the Special Rapporteur concluded, in paragraph 55 of his report, that there was no place in part 2 for an article or articles on the special legal consequences of the category of internationally wrongful acts called "acts of aggression". The Special Rapporteur maintained that in fact the failure of the most fundamental primary rule prohibiting such acts created a situation which, subject to the application of the United Nations machinery for the maintenance of international peace and security, justified any demand and any countermeasure; only the rule of quantitative proportionality and the protection of *jus cogens* remained. Those three limitations were intended to be covered by draft articles 2, 4 and 5, as proposed by the Special Rapporteur in his third report.<sup>7</sup>

10. In considering international crimes other than aggression, the Special Rapporteur stated, in paragraph 58 of the fourth report, that the difficulty was that, "while the international community as a whole may well recognize certain acts of a State as international crimes, there seems to be less consensus as regards the punishment to be meted out". That assertion was based on the fact that the progressive development of international law had resulted in primary and sometimes tertiary rules on implementation, but had produced no special secondary rules different from those applying to internationally wrongful acts in general, no doubt because in those fields the primary rules concerned entities other than States, whereas the secondary rules, by definition, concerned States as such. The final conclusion of the Special Rapporteur, in paragraph 67, was that, as the Commission had recognized progressive development of international law by provisionally adopting article 19 of part 1 of the draft articles, it should carry that development to its logical conclusion by proposing secondary and tertiary rules. That conclusion was based on the premise that there was little chance that article 19 would be accepted by States generally without the fulfilment of three conditions: a legal guarantee of independent and authoritative establishment of the facts and the applicable law; a collective duty of applying sanctions; and a collective discussion and decision on the sharing of the burden of implementation.

11. In the records of the Commission's discussions on the topic at its thirty-fourth session,<sup>8</sup> he had been unable to find anything that appeared to support the drastic conclusion reached by the Special Rapporteur regarding the special legal consequences of the crime of aggression, in particular self-defence. The main question under consideration had been the legal consequences of international crimes, in connection with draft article 6 submitted by the Special Rapporteur. All members who had addressed themselves to that question had been in favour of thorough, detailed and cautious consideration of the subject-matter of the draft article. They had called for further elaboration and amplification, and some had even gone so far as to suggest that a whole chapter be devoted to the subject. But while no member had underestimated the difficulties involved, none had raised the categorical doubts and disclaimers contained in the fourth report. As to the notion of self-defence, the records of the Commission's discussions revealed that five members had been clearly in favour of further elaboration, while one had stated that, since the Commission was concerned with progressive development, it should perhaps tone down references to self-defence as a remedy and emphasize the peaceful settlement of the original dispute. Another member had not regarded self-defence as punitive or afflictive, but as a measure designed to meet a threat or to guard against a danger, and had therefore wondered whether it should really have a place in part 2 of the draft articles. Finally, two members had questioned

<sup>6</sup> See B. Graefrath, E. Oeser and P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), pp. 231 *et seq.*

<sup>7</sup> See 1771st meeting, para. 2.

<sup>8</sup> *Yearbook . . . 1982*, vol. I, pp. 199 *et seq.*, 1731st–1734th meetings, and pp. 230 *et seq.*, 1736th–1738th meetings.

the Commission's competence to interpret the right of self-defence as provided for in article 51 of the Charter of the United Nations.

12. The question whether self-defence was a sanction or a measure was largely one of semantics. The essence of the matter was the scope, extent and limits of the right of self-defence, which was a direct consequence of the particularly grave internationally wrongful act of aggression, defined as an international crime in article 19 of part 1 of the draft.

13. With regard to the Commission's competence to interpret Article 51 of the Charter, which was clearly the prerogative of the Security Council, the substance of the matter was not the interpretation of the relevant Charter provisions in a given case, but identification of the elements of the concept as a legal consequence of an internationally wrongful act. Besides, the undisputed competence of the Security Council to determine the existence of an act of aggression under Article 39 of the Charter had not prevented the elaboration of a Definition of Aggression and its adoption by the General Assembly at its twenty-ninth session.<sup>9</sup> Consequently, and in view of the fact that the Special Rapporteur, in his summing up of the previous year's discussion, had himself admitted that draft article 6 was "an attempt to start a discussion",<sup>10</sup> the conclusion reached in the report under consideration appeared unwarranted.

14. The Special Rapporteur had not explained the grounds for his conclusion concerning the provisions that States would or would not accept, and it was open to question whether such a political conclusion should be drawn before further draft articles had been prepared and the views of Governments thereon had been sought. Moreover, even assuming that the Special Rapporteur's conclusion was correct, it was not clear whether it applied to all the categories of international crimes listed in article 19 of part 1 of the draft or only to crimes other than aggression. Given his conclusion that, having accepted article 19 as progressive development of the law, the Commission should elaborate secondary and tertiary rules on that matter, how could the Special Rapporteur rule out the definition of the legal consequences of aggression—one of which, as he appeared to agree, was certainly self-defence—when aggression was one of the international crimes referred to in that same article?

15. He respectfully disagreed with the Special Rapporteur and submitted that the Drafting Committee should carefully consider draft article 6 and elaborate on it. Moreover, article 19 of part 1 of the draft should not be tampered with for the time being. The necessary conclusions from that article must be drawn in the context of part 2, since it would look rather odd if the Commission prepared provisions on the legal consequences of the less grave internationally wrongful acts and failed to do so in the case of the most grave. Nor should the Commission leave a gap in part 2 on the assumption of there being a

link with the draft Code of Offences against the Peace and Security of Mankind. Each topic should follow its own course of elaboration, since the attempts to forge links at the current stage appeared to be predicated on political rather than technical grounds. It was for Governments and the Sixth Committee of the General Assembly to make a political assessment of the Commission's work.

16. In paragraph 72 of his report, the Special Rapporteur distinguished three elements of the legal consequences of an international delict. The first such element concerned the question of which State or States could be considered "injured" by the delict, which created new legal relationships between the author State and the injured State. In paragraph 75, the Special Rapporteur stated that in many cases there was no difficulty in legally identifying the injured State, since

... The States which are parties to the creation of the rule of international law (or, in the terminology of part 1, of the "obligation") are also parties to the primary legal relationships under that rule and, at the same time, parties to the breach ...

That was most often true in the case of bilateral treaties. But if a multilateral treaty was the source of the obligation, the problem of identifying the injured State became more difficult. Instead of pursuing the identification of the injured State, the Special Rapporteur observed that the first element was clearly related to the other two elements, namely the content of the new legal relationships and the question of a possible "phasing" in the content of those relationships. In paragraph 78, it was noted that the three "parameters" of the legal consequences might involve different States and correspond to different "phases".

17. As to the second element—the content of the new legal relationships—the Special Rapporteur distinguished three types, the first of which was reparation. In that connection, paragraph 111 referred members of the Commission to the Special Rapporteur's second report and, in particular, to draft articles 4 and 5 proposed therein.<sup>11</sup> It was also stated in that paragraph that, since those draft articles had been referred to the Drafting Committee, the Special Rapporteur would suggest improvements to their wording in that Committee. But in his third report (A/CN.4/354 and Add.1 and 2, paras. 151–153), he clearly stated that draft articles 4 and 5 as proposed in the second report had been withdrawn. Moreover, at its thirty-fourth session, the Commission had decided, on the proposal of the Special Rapporteur, to refer the new articles 1–6 and the former articles 1–3 to the Drafting Committee.<sup>12</sup> The status of draft articles 4 and 5 of the second report was therefore unclear.

18. In paragraph 79 of his report, the Special Rapporteur indicated that the division between the three types of content of the new legal relationships was not a sharp one, since they related roughly to "modifications" in the three fields of jurisdiction, namely the jurisdiction of the author State, international jurisdiction and the

<sup>9</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>10</sup> *Yearbook* . . . 1982, vol. I, p. 240, 1737th meeting, para. 34.

<sup>11</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 101, document A/CN.4/344, para. 164.

<sup>12</sup> *Yearbook* . . . 1982, vol. I, p. 242, 1738th meeting, paras. 5–6.

jurisdiction of other States. While the second type of content, namely suspension or termination of existing relationships at the international level, did not seem to have been discussed separately, the third type—measures of self-help—was described as obviously “the most dubious”, since such measures necessarily involved an infringement of the rights of the author State. In that area, there were a number of limitations, such as the admissibility of reprisals involving the use of force, a question that the Special Rapporteur said was dealt with in draft articles 4 and 5 proposed in the third report. The Special Rapporteur concluded in paragraph 81 that, in the case of most internationally wrongful acts, “armed reprisals” would be manifestly disproportional in the sense of article 2 as proposed in the third report.

19. In so far as other limitations were concerned, it was stated in paragraph 83 that there was room for a special draft article dealing with reprisals, subject to the provisions of draft article 3 as proposed in the third report and provided that such a special draft article were without prejudice to the eventual adoption of a general draft article recognizing the limited possibility of derogation from the legal consequences to be defined in part 2.

20. Paragraph 84 stated another limitation on reprisals, namely that “a reprisal which is in itself another international crime can never be justified even in response to an international crime committed by another State”. The conceptual grounds for that “obvious truth” were, first, that protection of the fundamental interests of the international community was involved and, secondly, that the directly injured entities were not individual States. Both those grounds, according to the Special Rapporteur, applied *mutatis mutandis* to reprisals that were not international crimes. Such was the case with regard to the “objective régimes” defined in paragraph 99. It was pointed out that such régimes were distinguished in essence by their normative character; the parties to the régime created the collective interest which required each of them to fulfil its obligations irrespective of the fulfilment of the obligations by another party. To clarify the notion of objective régimes, the Special Rapporteur stated that, in a sense, the presence within an objective régime of machinery for effective dispute settlement or, *a fortiori*, decision-making machinery for the management of the collective interest, underpinned the normative character of the objective régime. The relevance of that concept of objective régimes in the context of reprisals was clarified in paragraph 85 of the report, where it was stated that, given the existence of primary legal relationships between States under such a régime, one of those States might, by way of reprisal, act in a manner that was not in conformity with its obligations under the régime.

21. Within the framework of that concept of objective régimes, the report discussed at some length the admissibility of reprisals in connection with various types of régime. He noted from paragraphs 89–91 that some of the conclusions reached by the Special Rapporteur were covered by draft articles 3 and 4 as proposed in the third report. However, in view of the general character of the

text of those articles and the detailed abstract legal analysis in the report, it was clear that the provisions in question fell far short of covering all the required points, particularly in the light of paragraphs 124–130, in which the Special Rapporteur attempted to sum up his conclusions.

22. Moreover, a reading of the pertinent sections of the report suggested that the Special Rapporteur considered that the draft articles so far proposed, with the addition of a draft article on reprisals, would cover the whole scope of part 2. However, the Special Rapporteur’s conclusions in paragraphs 124–130 gave a different impression, and some clarification was needed. Again, the third element of the legal consequences of an international delict, although dealt with adequately in paragraphs 102–108, was not reflected with sufficient clarity in paragraphs 124–130.

23. The Special Rapporteur was well equipped to go forward. He had received sufficient directions from both the members of the Commission and the Sixth Committee. At the end of his third report (A/CN.4/354 and Add.1 and 2, para.154), he had stated that, in subsequent reports, he intended to elaborate, in the form of draft articles, the approach set out in the third report and to present draft articles for part 3, concerning the “implementation” of State responsibility. The fourth report did not fulfil that promise. A substantial measure of progress would have been achieved if the conclusions formulated in paragraphs 124–130 of the report had been presented in the form of draft articles, the legal analysis contained in the report being used as commentaries thereto. But it seemed that the Commission would have to wait another year before knowing the direction in which it was proceeding. He fervently hoped that there was no intention of administering the last rites to an area of legal codification that was most vital from both the practical and the political viewpoints.

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

[Agenda item 9]

#### STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

24. The CHAIRMAN welcomed the Observer for the Asian-African Legal Consultative Committee and invited him to take the floor.

25. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) expressed the Committee’s regret at having been unable to be represented at the Commission’s two previous sessions. He was glad to report, however, that during the past two years, interest in the Commission’s work had been increasing in the countries of the region represented by the Committee. That had been due partly to the enlargement of the Commission, half of whose total membership was now drawn from the countries of Asia and Africa, and partly perhaps to the Committee’s own efforts.

26. The items on the Commission’s agenda that were of

particular interest to the Governments of the Asian-African region were the law of the non-navigational uses of international watercourses, jurisdictional immunities of States and their property, and international liability for injurious consequences arising out of acts not prohibited by international law. On the first of those topics, the Committee's secretariat fully endorsed the approach adopted by the Commission's second Special Rapporteur and considered that any general principles formulated by the Commission would be more readily acceptable if they were made adaptable to the needs of specific situations. The Committee intended to resume its work on the topic in order to assist the Commission and to supplement its work in areas that might not be fully covered. He requested the Commission to give top priority to the topic in view of its urgency.

27. With regard to the jurisdictional immunities of States and their property, many Governments of the region had been deeply concerned about recent legislation adopted in the United Kingdom (1978) and the United States of America (1976), which introduced a number of restrictions on sovereign immunity, whereas several developing countries in the Asian-African region continued to accord immunity from jurisdiction on traditional lines to all States. The question therefore arose whether an element of reciprocity ought not to be introduced in the application of State immunity. The provision in the United States legislation compelling a foreign Government to resort to a court of law to establish its immunity from jurisdiction had added to the difficulties experienced by developing countries. In the past practice of the United States, since 1952 a certificate or suggestion issued by the Department of State had been treated as conclusive, and that had provided a satisfactory means of resolving conflicts on questions of State immunity. Quite apart from the financial burden of litigation, the fact that the Government of a sovereign State must submit to the jurisdiction of the local courts to establish its immunity was felt by many to be repugnant to the concept of State immunity itself. It was therefore particularly important that the Commission should complete its work on the topic, so that authoritative rules and guidelines became available as soon as possible. It would also be helpful if, when formulating its recommendations, the Commission would consider whether the concept of reciprocity was appropriate in the matter of jurisdictional immunities of States and whether the determination of the issue of sovereign immunity might not be appropriately left to the executive, to be communicated to the judicial authorities in the form of a certificate or suggestion.

28. As to international liability for injurious consequences arising out of acts not prohibited by international law, a possible legal approach to the study of that topic could well be through an extension of the doctrine of the "duty to take care", *sic utere tuo ut alienum non laedas*, as a part of substantive "primary" rules. Another approach might be to develop new rules, as part of progressive development to promote international co-operation in preventing harm or damage

arising from lawful activities, in the context of the principles of the United Nations Charter and the interdependence of nations. It might perhaps be preferable to adopt that second approach in the Commission's study; but in either case it would be essential to take account of realities such as the need for industrial development in developing countries, the absence of technical expertise to detect or monitor harmful effects arising from acts that were otherwise lawful, and the fact that in some cases control of the activities in question rested with contractors or multinational agencies. The interests of the State undertaking the activity would have to be balanced against those of neighbouring States.

29. Another matter requiring consideration was whether it was necessary or practicable to develop general principles in the form of rules applicable to all types of acts which, although not prohibited by international law, might cause harm or injury to other States, since the consequences of such acts varied and their injurious effects could also vary very widely, depending on the circumstances of the case. It might be advisable to develop "primary" rules concerning the duties of States, at least in major areas such as non-navigational uses of international watercourses, outer space, environmental law, etc. The scope of the Commission's study on the topic might well have to be limited to matters relating to international co-operation in avoiding or minimizing damage through the exchange of information, consultations and other suitable procedures.

30. Turning to the Committee's current programme of work, he said that, in addition to advising Governments on matters of international law and other areas of common interest, the Committee had gradually expanded its activities in two important directions: it was supporting the work of the United Nations in a number of ways, such as preparatory work for United Nations conferences, and was focusing attention on technical infrastructure, including the legal framework for economic co-operation. In the economic field, the Committee's work related particularly to those areas where legal norms and practices were inextricably interwoven with economic considerations, such as preparation of model contracts for commodities, investment protection, the framework for co-operation in joint-venture arrangements, organization of arbitration centres, and preparation of technical studies on certain aspects of economic co-operation within the framework of the United Nations.

31. The Committee's sessions during the past 10 years had been attended by an increasing number of observer delegations from all over the world. While remaining primarily a regional forum, the Committee recognized the importance of sharing its views and experiences with other regions, especially on issues of world-wide importance. That process had been of particular value in connection with the topic of the law of the sea, which had dominated the Committee's work programme for more than a decade. At the Committee's twenty-third session, held in Tokyo in May 1983, discussions had taken place on the legal position once the United Nations Convention on

the Law of the Sea<sup>13</sup> came into force, on the position during the interim period, and on the Committee's future role in implementing that Convention. The programme which had emerged from those discussions covered three major areas: assistance to Governments in the implementation of the provisions of the Convention in matters falling within national jurisdiction; studies on specific issues of practical importance to the Governments of member States; and assistance to Governments in regard to the work of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. Work in the first of those areas would include exchange of information, assistance in preparing legislation or schemes for regional or subregional arrangements, and advice on the interpretation of provisions of the Convention. In the second area, the Committee intended to start with the question of delimitation of the exclusive economic zone and the continental shelf between States with opposite or adjacent coasts. In the third area, work was to be carried out in two ways: examination of the draft rules prepared from time to time by the Preparatory Commission, and formulation of a draft framework for co-operative assistance between pioneer investors and the Enterprise (referred to in article 170 of the Convention), including joint-venture arrangements.

32. A matter directly related to the implementation of the United Nations Convention on the Law of the Sea on which considerable progress had already been made was that of optimum utilization of fishery resources in the exclusive economic zone. In the light of discussions at three inter-sessional expert group meetings, the Committee's secretariat had formulated a tentative draft of a national legislation, a model for bilateral agreements on fishing by foreign nationals, and models for two possible types of joint-venture arrangement for fishery activities. The Government of Sri Lanka had requested the Committee to undertake a study on economic, scientific and technical co-operation in the use of the resources of the Indian Ocean and to make recommendations.

33. Another important subject discussed at the Tokyo session had been the promotion and protection of investments. The secretariat had prepared draft formulations for three different types of bilateral agreement on the promotion and protection of investments. Those model agreements had been discussed at the session and further consultations were envisaged before they were recommended for use by Governments.

34. In connection with the settlement of disputes arising out of investments and other economic or commercial matters, he reminded members of the Commission of the integrated scheme adopted by the Committee to ensure stability and confidence in economic and commercial transactions by providing adequate procedures in which North-South as well as South-South conflicts could be resolved. Two regional centres, one in Kuala Lumpur and

one in Cairo, had already been established, and the International Centre for the Settlement of Investment Disputes, in Washington, D.C., had already concluded formal agreements with the Committee on co-operation with those centres. Arrangements had also been made under the scheme for maritime arbitrations to be administered by the Tokyo Maritime Arbitration Commission.

35. A matter of almost equal importance in bringing about co-operation between countries of the Asian-African region was reciprocal assistance in honouring commitments under service and trade contracts. The Committee's secretariat had prepared drafts of two model bilateral arrangements on the service of process, the issue of letters rogatory and the recording of evidence, one relating to civil matters and the other to the issue of letters rogatory in criminal cases. Those drafts had been examined by a working group meeting in August 1982 and again during the Tokyo session. The work on that project had been undertaken in association with The Hague Conference on Private International Law.

36. Another important subject which remained on the Committee's programme was protection of the environment. An extended working group, with the participation of experts from major oil and shipping interests, had met in July 1982 and discussed the general legal framework for combating marine pollution from land-based sources and ways of dealing with emergency situations arising out of accidental oil pollution. It was intended to provide opportunities for full discussion of the 1969 International Convention on Civil Liability for Oil Pollution Damage<sup>14</sup> and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage<sup>15</sup> before the diplomatic conference to be convened by the International Maritime Organization in 1984 for revision of those Conventions.

37. A matter that would be of particular interest to the Commission was the promotion of multilateral conventions adopted under the auspices of the United Nations. Long periods often elapsed before such conventions could be brought into force through accession or ratification by the requisite number of States, and that frustrating situation should be remedied. Governments needed to be informed in plain language of the advantages they would derive from acceding to or ratifying a convention, and the Committee was in the process of consulting the Legal Counsel of the United Nations about the assistance it could render in that sphere as part of its arrangements for co-operation with the United Nations.

38. In conclusion, he expressed gratification at the fact that the Commission had been represented at almost every session of the Committee during the past 20 years. The Commission's continuing interest had been a source of considerable satisfaction to the members of the Committee, and he hoped that the close and increasing

<sup>13</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

<sup>14</sup> IMCO publication, Sales No. 77.16.E.

<sup>15</sup> IMCO publication, Sales No. 1972.10.E.



links between the two bodies would be maintained in the coming years.

39. Mr. RAZAFINDRALAMBO, speaking on behalf of the African members of the Commission, referred to the impressive activities carried out by the Asian-African Legal Consultative Committee in the field of international law. The participation of African jurists in that work might not be as extensive as it should be, but it must be borne in mind that they had entered the international arena only recently and were not yet fully informed of the Committee's activities. In the future, however, co-operation between the Committee and African jurists could only increase.

40. Mr. DÍAZ GONZÁLEZ, speaking on behalf of the Latin-American members of the Commission, thanked the Observer for the Asian-African Legal Consultative Committee for all the information he had provided on the activities of the Committee, which was not only engaged in formulation of the law, but also performed consultative functions. It had, for example, advised the Governments of the region on matters relating to the law of the sea. He himself was convinced that close co-operation between the Commission and regional committees concerned with international law benefited the United Nations as much as those committees.

41. Mr. SUCHARITKUL, speaking on behalf of the Asian members of the Commission, thanked Mr. Sen for his excellent statement and expressed the hope that the very close co-operation between the Committee and the Commission would continue in the future. The Commission deeply appreciated the Committee's interest in its work and remained keenly interested in the Committee's views and activities.

42. Mr. USHAKOV, speaking also on behalf of Mr. Flitan, commended Mr. Sen for his brilliant presentation of the Committee's work. Since the Committee's membership had been expanded, its work had assumed greater importance, not only for the countries of the region but also for the codification and development of international law. The Committee was still concerned to give priority to the consideration of items on the Commission's agenda and, conversely, it was not unusual for members of the Commission, including its special rapporteurs, to refer to the Committee's work. It was therefore in the Commission's interest to strengthen its co-operation with the Committee.

43. Mr. QUENTIN-BAXTER said that the ties between the Commission and regional bodies such as those whose representatives were attending the present session as observers were far more than merely formal. The effectiveness of law-making at the international level depended on such collaboration. The excellent work done by the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee was reflected, *inter alia*, in the quality of the work of the Sixth Committee of the General Assembly and of the Commission itself. On behalf of the members of the Commission belonging to the group of Western European and other countries, as well as of his own country, which by its geographical position belonged to the region of the

Asian-African Committee, he thanked Mr. Sen for his extremely informative and interesting statement and expressed the continuing interest of those countries in the Committee's activities and the documents emanating from them.

44. Mr. JAGOTA said that he had been closely associated with the Committee since 1966 and had witnessed its gradual development from a consultative role to that of the premier intergovernmental legal group of Asia and Africa. Not only had its membership increased from the original seven or eight to well over 40, but the range of its interests and activities had grown immensely, starting with the substantial contribution it had made to the work of the Commission on diplomatic and consular law, continuing with its contribution to the codification of the law of treaties in 1968 and 1969, and reaching a climax in the work on the law of the sea, to which the Committee had devoted special attention between 1970 and 1982. In the economic sphere, too, especially in matters of economic co-operation, in protecting interests in commodity trade, in preparing model export and import contracts, in providing forums for the settlement of economic disputes and, most recently, in elaborating the legal framework for South-South co-operation, the Committee's contribution had been extremely impressive. Mr. Sen deserved a special tribute for having been instrumental in building up the Committee's activities and its mutually valuable relationship with the Commission.

45. The CHAIRMAN, speaking on behalf of the Commission as well as in his personal capacity, thanked Mr. Sen for his statement, which showed in a most gratifying manner how deeply the Committee was involved in the consideration of issues being examined by the Commission. The Committee also deserved congratulations on the vigorous manner in which it was tackling the legal aspects of economic issues affecting the countries of the Asian-African region, and on its efforts to accelerate the process of accession to, and ratification of, multi-lateral conventions by its member countries. In conclusion, he reiterated the Commission's regret at having been unable to send one of its members to the Tokyo session of the Committee, which had unfortunately coincided with the Commission's current session.

*The meeting rose at 5.45 p.m.*

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## 1776th MEETING

*Tuesday, 7 June 1983, at 10 a.m.*

*Chairman:* Mr. Edilbert RAZAFINDRALAMBO

*Present:* Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr.