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Summary record of the 1805th meeting

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1805th MEETING

Friday, 15 July 1983, at 10.35 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

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

CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (continued) (A/CN.4/L.355)

1. The CHAIRMAN proposed that the Commission continue its consideration of chapter II of the draft report (A/CN.4/L.355), from paragraph 35 onwards.

Paragraphs 35 to 40

2. Sir Ian SINCLAIR, referring to paragraph 39, suggested that the second sentence should be redrafted to read: "The Commission will thus complete the work it began in 1954 by examining, with a view to their possible inclusion in the code, all the new offences that have emerged since then." He considered that it would be preferable to omit the reference to decolonization and the development of *jus cogens*. If that reference were retained, however, it should be amplified by a reference to fundamental human rights.
3. Mr. USHAKOV referred the Commission to the comments he had already made on that part of chapter II (1803rd meeting).
4. Mr. McCAFFREY, endorsing Sir Ian Sinclair's remarks on the second sentence of paragraph 39, said that the third sentence also raised a question, since it seemed to suggest that the Commission would endeavour to draw up a list of offences. That, however, had not been his understanding of the position, and he was not certain that he would be able to endorse such an approach.
5. Mr. NJENGA said that, in his view, Sir Ian Sinclair's suggestion would lead to considerable difficulty, since most members of both the Commission and the Sixth Committee of the General Assembly had stressed decolonization and *jus cogens*. To omit all reference to those two important developments would be a step backwards. Furthermore, he considered it necessary not only to establish a principle, but also to draw up a list of offences that would take account of new developments; hence he was unable to share Mr. McCaffrey's view. What was needed, in his opinion, was a definition followed by a non-exhaustive, but none the less comprehensive list of offences.
6. Mr. FLITAN said that he, too, favoured retaining the second sentence of paragraph 39. The Commission had

been invited to resume its work with a view to elaborating a draft code precisely because new offences against the peace and security of mankind had been recognized since 1954 in a number of international legal instruments. As Mr. Njenga had pointed out, repeated allusions had been made during the discussion to crimes connected with decolonization and with the development of *jus cogens*. The inclusion of the words "the development of *jus cogens*" should meet Sir Ian Sinclair's concern, although it would still be necessary to determine what was meant by *jus cogens*. Moreover, use of the word "particularly" clearly showed that other new offences could be taken into consideration.

7. Mr. DÍAZ GONZÁLEZ said he was not in favour of amending the second sentence of paragraph 39. During the discussion, most members of the Commission had referred to crimes which, as a result of the decolonization process, endangered the peace and security of mankind. If nothing was said on that subject, the Commission might give the impression that it did not wish to acknowledge the importance of certain crimes that had emerged since 1954. If the sentence in question was to be amended, it should be to add other crimes, such as the crime of *apartheid*.

8. Mr. RIPHAGEN said that paragraph 39 was not at all clear to him. In the first place, the reference to "all the new offences that have emerged . . . as a result of decolonization and the development of *jus cogens*" sounded strange; it would perhaps be better to say "in connection with developments such as decolonization and the emergence of the notion of *jus cogens*". Secondly, he was not clear about the meaning of the words "general and comprehensive criterion". What criterion? Lastly, paragraph 40 referred to the principle of the non-retroactivity of criminal law, which presupposed that criminal law was precise: the latter part of paragraph 39 should therefore be redrafted to take account of the fact that the reader of the report might not have attended the Commission's discussion.

9. Mr. JACOVIDES said he agreed with Mr. Riphagen that the wording "in connection with developments such as decolonization and the emergence of the notion of *jus cogens*" would be clearer.

10. As to Sir Ian Sinclair's suggestion, like other members he thought it would be better for the second sentence of paragraph 39 to stand, though he could accept the addition of a reference to the protection of fundamental human rights.

11. Mr. MALEK proposed that the phrase suggested by Sir Ian Sinclair should be reworded to read: "by examining, with a view to their possible inclusion in the code, all the offences considered appropriate that have emerged since then". The words that followed could be redrafted along the lines suggested by Mr. Riphagen.

12. Sir Ian SINCLAIR said that, in the light of the discussion, he would withdraw his suggestion and would propose that the second sentence of paragraph 39 be redrafted along the lines suggested by Mr. Riphagen and Mr. Malek, to read: "The Commission will thus complete

the work it began in 1954 by considering for inclusion in the code all the new offences that have emerged since 1954 in connection with developments such as decolonization, the development of *jus cogens* and the growing recognition of the need to protect human rights.”

13. Mr. MAHIOU said that paragraph 39 should refer not only to crimes that had emerged as a result of decolonization and the development of *jus cogens*, but also to crimes affecting fundamental human rights. He welcomed the fact that agreement on that point seemed to be near.

Paragraphs 41 to 43

14. Mr. USHAKOV said that the problem of the implementation of the code could not be assimilated to that of sanctions. A distinction had to be made between sanctions and criminal procedure. It could be agreed, for example, that the sanctions provided for in the code would be the severest sanctions; but it would be premature to consider the introduction of international criminal procedure. Such a procedure could possibly be applied to individuals, but in no case to States.

15. Mr. McCAFFREY, referring to the first sentence of paragraph 43, said that in view of the confusion that had arisen regarding the applicability of the code to individuals and to States, it might be advisable to make it clearer that some members considered that the problem of implementation should be studied as it applied to individuals. That would more accurately reflect the tenor of the debate.

16. Mr. STAVROPOULOS said that, in addition to the references in footnotes 15 and 16, it would be advisable to include in paragraph 42 a reminder that consideration of the report of the Committee on International Criminal Jurisdiction had been pending for 30 years, despite the fact that the Definition of Aggression had been adopted.¹

17. Mr. CALERO RODRIGUES said that paragraph 41 should be redrafted to make it clear that there were not two, but three problems involved in implementation, namely the definition of offences, the determination of penalties and the application of penalties.

18. In paragraph 43, he could accept the Special Rapporteur's interpretation of the Commission's discussion as reflected in the first sentence. The last sentence, however, raised a particularly important point involving the Commission's mandate. In order to direct the attention of the General Assembly to the need for absolute precision, he would suggest that that sentence be replaced by the last paragraph of the conclusions proposed by the Special Rapporteur,² which read:

“With regard to the implementation of the code, although the Commission considers that a code unaccompanied by penalties and by a competent criminal jurisdiction would be of purely academic

interest, it has been deemed preferable to ask the General Assembly to indicate more precisely the scope of the Commission's mandate on this point.”

19. Mr. LACLETA MUÑOZ said that the three paragraphs of the report dealing with implementation needed to be supplemented and clarified. For those who, like himself, believed that crimes committed by States should be covered by the draft code, it was important to draw a distinction, in respect of implementation, between crimes committed by individuals and crimes committed by States. The former could be tried either by an international court or by a national court; for the latter, it would be necessary to set up adequate machinery to establish the existence of an international crime, since that question could not be left to be determined by the States concerned.

20. Mr. MAHIOU also considered that the part of the report relating to implementation should be expanded. As Mr. Calero Rodrigues had pointed out, the problem of defining the crimes was quite distinct from the two problems associated with implementation, namely that of the penalties to be applied and that of the court competent to impose those penalties. The penalties would not be the same for individuals as for States; some members of the Commission, however, were only considering penalties applicable to individuals. As to jurisdiction, in the case of individuals either a national or an international court could be competent. The question on which the Commission was divided was that of jurisdiction over States. If the problem was presented in that manner, the General Assembly would be able to see more clearly where the difficulties lay.

21. Mr. USHAKOV said that he did not deny the need to prepare a draft code of offences against the peace and security of mankind committed by individuals. He recognized that those crimes had to be severely punished and that criminal procedure must be applied to them. On that last point, however, the opinion of the General Assembly should be sought. Nor was he opposed to the application of sanctions against States, in particular the sanctions provided for in the Charter of the United Nations; but that was a problem which pertained to the study of another topic. In his view, it would be premature to deal with the question of the international penal responsibility of States. Moreover, if the General Assembly decided that that question should be studied, it might entrust the work to a body better qualified than the Commission.

22. Mr. EL RASHEED MOHAMED AHMED suggested that the words “implementation and procedure” or “method of implementation”, rather than simply “implementation”, would cover all aspects of the matter.

23. The CHAIRMAN, noting that there were no further speakers, said that the comments and proposals made during the discussion would be taken into account by the Special Rapporteur in preparing a revised text of chapter II of the draft report.³

¹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

² See 1804th meeting, footnote 1.

³ Subsequently issued as document A/CN.4/L.366.

Report by the Chairman of the Drafting Committee

24. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) pointed out that in paragraph 264 of its report on the work of its thirty-fourth session, the Commission had stated that at its thirty-fifth session it intended “to establish and convene its Drafting Committee at the commencement of that session so as to allow it to complete, at an early juncture, its work on the draft articles referred to it at the present session, and of which it remains seized, on State responsibility, jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier”.⁴ The Commission had accordingly decided on the composition of the Drafting Committee at the 1757th meeting, at the beginning of the second week of the current session, on 9 May 1983. The Committee had held its first meeting on 11 May and worked unceasingly until 14 July; it had held 29 meetings—the largest number for any session in the history of the Commission.

25. The Drafting Committee had concentrated its efforts on the three topics mentioned: it had examined the draft articles outstanding from the two previous sessions, as well as a number of new articles on the jurisdictional immunities of States, which had been referred to it during the current session. On that topic, as well as on State responsibility, the Committee had been able to bring its work generally up to date with respect to the articles outstanding at the beginning of the current session. The Committee had also been able to make some progress with the articles on the diplomatic courier and the diplomatic bag. At the following session, the Drafting Committee would thus have more time available to examine new articles referred to it. That result had been achieved thanks to the laudable efforts of all members of the Committee.

State responsibility (*continued*)* (A/CN.4/L.363, ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles) (*continued*)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE⁵

ARTICLES 1, 2, 3 and 5

26. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) reminded the Commission that Mr. Riphagen, the Special Rapporteur for part 2 of the topic

of State responsibility, had submitted two sets of draft articles in 1981 and 1982, respectively (ILC(XXXV)/Conf.Room Doc.5).⁶ The first set (arts. 1–5) had been proposed by the Special Rapporteur in his second report, submitted to the Commission at its thirty-third session. The five articles were subdivided into two chapters: chapter I on “General principles” (arts. 1–3) and chapter II on the “Obligations of the State which has committed an internationally wrongful act” (arts. 4 and 5). The Commission had referred those articles to the Drafting Committee.⁷ The second set of draft articles (arts. 1–6), proposed by the Special Rapporteur in his third report, submitted to the Commission at its thirty-fourth session, took into account the comments made in the Commission on the first set. After discussion, the Commission had referred those six articles to the Drafting Committee and had confirmed its referral of articles 1–3 of the first set, on the understanding that the Committee would prepare “framework provisions” and consider whether an article along the lines of the new article 6 should be included among them.⁸

27. After examining the articles of both sets, the Drafting Committee had approved the texts of articles 1, 2, 3 and 5 of the second set. The Committee had not been able to complete its examination of draft article 4, proposed by the Special Rapporteur in his second set, but had considered that it would provide a good basis for the formulation of an article 4, the text of which could be settled at the Commission’s next session. The absence of article 4 explained why the references to it in the other articles had been placed between square brackets.

28. As to article 6, the Drafting Committee had considered that, in the form in which it was drafted, it could not be included among the framework provisions, though a similar provision might be included in the chapter dealing with international crimes. The Committee had taken note of the possibility of including among the framework provisions an article of a general character, which would refer to the subsequent articles on international crimes. The members of the Committee had not been able to reach agreement on the text of that provision and had agreed to revert to it at a later stage, when the content of the chapter on international crimes was known.

29. Whereas the first set of articles had been grouped in two chapters, the second set gave no indication in that regard. Moreover, no titles had been given to the draft articles of either set proposed by the Special Rapporteur. The Drafting Committee had decided to follow his example and defer a decision on the titles of the articles and of the chapters in which they would be grouped. The texts of the draft articles adopted by the Drafting Committee appeared in document A/CN.4/L.363.

* Resumed from the 1780th meeting.

⁴ *Yearbook* . . . 1982, vol. II (Part Two), p. 122.

⁵ For the initial consideration of the draft articles by the Commission at the current session, see 1771st-1780th meetings.

⁶ For the texts of the two sets of draft articles, see 1771st meeting, para. 2.

⁷ *Yearbook* . . . 1981, vol. II (Part Two), p. 145, para. 161.

⁸ *Yearbook* . . . 1982, vol. II (Part Two), p. 82, para. 103.

30. The Drafting Committee proposed the following text for article 1:

Article 1

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in the present part.

31. Article 1 corresponded substantially to draft article 1 of the second set. In the opinion of the Drafting Committee, the text approved made it unnecessary to retain articles 1 and 3 of the first set, the contents of which were covered. In article 1 of the second set, the emphasis had been on the internationally wrongful act and the rights and obligations arising therefrom. The Drafting Committee had considered it advisable to replace the reference to rights and obligations, which raised problems of interpretation, by a reference to "legal consequences". Since article 1 was intended to be a link between parts 1 and 2 of the draft, that amendment had been considered justified, since part 2 dealt with the content, forms and degrees of international responsibility, in other words determination of the consequences attached by international law to an internationally wrongful act of the State. Besides, the Drafting Committee had considered that it would be more in keeping with the content of part 1 to refer to the international responsibility of a State which, according to the provisions of that part, arose from an internationally wrongful act committed by that State, than merely to refer to that wrongful act, as in the Special Rapporteur's text. Lastly, for stylistic reasons the phrase "in conformity with the provisions of the present part 2" had been replaced by the words "as set out in the present part".

32. One member of the Drafting Committee had thought that article 1 should give a fuller indication of the contents of part 2 and to that end had proposed a text, which the Committee had not adopted.

33. The Drafting Committee proposed the following text for article 2:

Article 2

Without prejudice to the provisions of articles [4] and 5, the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

34. Article 2 gave expression to one of the two elements contained in article 3 of the second set of articles, namely determination of the legal consequences of an internationally wrongful act by rules of international law distinct from those contemplated in part 2. The second element related to customary international law, and the Drafting Committee had decided that it merited a separate provision, which was the present article 3.

35. Article 2 substantially reproduced the provision in article 3 of the second set of articles. As in article 1, the reference to an "obligation", or more specifically to its "breach", had been replaced by a reference to "legal consequences", an expression which had already been used in article 3 of the second set of articles. The order of the words in the introductory phrase had been reversed to give it more force and the words "except where and" had

been inserted before the words "to the extent that", in order to make the sentence more precise. Lastly, the phrase "the rule or rules of international law establishing the obligation or by other applicable rules of international law" had been replaced by the words "other rules of international law relating specifically to the internationally wrongful act in question". It had been considered that the latter wording had the same effect, but was clearer and more precise, and more consistent with the new terminology and the change of emphasis in the article.

36. In order to take into account the hierarchy of legal norms, both article 2 and article 3 began with the necessary saving clause concerning the provisions of a future article 4 on peremptory norms of general international law, and of article 5 on the provisions and procedures of the Charter of the United Nations.

37. The Drafting Committee proposed the following text for article 3:

Article 3

Without prejudice to the provisions of articles [4] and 5, the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part.

38. Article 3 gave expression to the second element underlying draft article 3 of the second set of articles, namely the rules of customary international law. The wording of the article closely followed that of similar provisions in the preambles to codification conventions such as the 1969 Vienna Convention on the Law of Treaties and the 1978 Vienna Convention on Succession of States in Respect of Treaties. The adoption of article 3 would make it unnecessary to retain article 2 of the first set of articles.

39. The Drafting Committee proposed the following text for article 5:

Article 5

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

40. Article 5 corresponded essentially to draft article 5 of the second set of articles. As in the previous cases, the former reference to rights and obligations had been replaced by a reference to the "legal consequences of an internationally wrongful act of a State". In addition, it had been considered advisable to specify that the provisions and procedures of the Charter of the United Nations which took precedence were those relating to the maintenance of international peace and security.

CONSIDERATION BY THE COMMISSION

41. The CHAIRMAN invited members of the Commission to adopt the draft articles on State responsibility proposed by the Drafting Committee (A/CN.4/L.363).

42. Mr. MALEK said that, as the texts of those articles had only just been circulated, he had not had time to study

them. He proposed that the adoption of the articles should be deferred until the next meeting.

43. Mr. QUENTIN-BAXTER said that he understood Mr. Malek's position. The Commission had been faced on a number of occasions with delays in the production of its documents. The resulting inconvenience varied, of course, with the nature of the document: in the present instance, the document under discussion contained draft articles, the formulation of which was of the very essence of the Commission's work. Moreover, those articles represented the result of years of work by the Commission, the Special Rapporteur and, finally, the Drafting Committee. The fact that they had only come before the Commission that morning created serious difficulties for those members who were not members of the Drafting Committee.

44. He had listened with interest to the introductory remarks by the Chairman of the Drafting Committee but thought that those necessarily brief explanations were insufficient to enable members like himself, who had not participated in the work of that Committee, to embark on an immediate discussion of the articles.

45. In conclusion, he believed that an important problem of a general character had been raised by Mr. Malek; perhaps it could be examined by the Commission's Planning Group.

46. Mr. DÍAZ GONZÁLEZ associated himself with the remarks of the two previous speakers and urged that the necessary time to examine the draft articles be allowed for those members who did not belong to the Drafting Committee. He much admired the work of that Committee and, having once been a member, understood its difficulties; but it was essential to remember that the articles proposed by the Drafting Committee had to be fully discussed by the Commission itself, which was the body responsible for adopting them.

47. Sir Ian SINCLAIR said that he understood the concern of the three previous speakers. The problem was one which ought to be considered by the Commission's Planning Group. In the present instance, a dilemma had been created because the Drafting Committee had worked until very late in the session, with the result that the draft articles could not have come before the Commission any earlier.

48. That being so, he agreed that the full Commission should have an adequate opportunity to consider carefully all the draft articles which were the outcome of the Drafting Committee's work. As far as the draft articles in document A/CN.4/L.363 were concerned, he suggested that the best solution might be to discuss them at once, but to defer any decision on them until the next meeting.

49. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) suggested that the whole discussion on document A/CN.4/L.363 should be deferred until the next meeting. To save time, he could now proceed to introduce the draft articles on jurisdictional immunities of States and their property.

50. Mr. NJENGA said that he shared Mr. Malek's concern and supported the suggestion that the discussion

on document A/CN.4/L.363 should be deferred until the next meeting. He did not favour the idea of deferring only the decisions and would much prefer to hear any statements by his colleagues after he had had time to study the draft articles carefully.

51. Mr. RIPHAGEN supported the suggestion to postpone the discussion on the draft articles on State responsibility, for which topic he was the Special Rapporteur. He, too, believed that comments by members on the draft articles could only be appreciated by those who had read and pondered them.

52. Mr. BALANDA said he fully agreed with those members of the Commission who had asked for time to examine the texts of the draft articles on State responsibility adopted by the Drafting Committee. He asked whether it would not be possible to distribute the text of the statement by the Chairman of the Drafting Committee, in order to give members a better understanding of the reasons for the amendments made. He hoped that in future it would be possible for the Commission to have all the necessary documentation in good time for the adoption of articles proposed by the Drafting Committee.

53. Mr. USHAKOV said that, for his part, he was quite prepared to comment on the draft articles on State responsibility proposed by the Drafting Committee.

54. The CHAIRMAN, speaking as a member of the Commission, said that from his seven years' experience of its work—a period during which he had attended all the meetings, except for one short absence—he could say that there was nothing unprecedented in the present situation. Because of the circumstances in which the Drafting Committee worked, draft articles often reached the Commission on the very morning of the meeting at which they were due to be adopted. Consequently, the procedure suggested by Mr. Lacleta Muñoz had already been followed quite frequently in the past.

55. Undoubtedly, the ideal arrangement would be for members to have ample time to study all draft articles submitted to them, so that they could give their considered response. It should be remembered, however, that the articles in document A/CN.4/L.363 would only be adopted provisionally on first reading. The Commission would be examining them again on second reading.

56. Speaking as Chairman, he noted that it was clearly the wish of the Commission to defer consideration of the draft articles on State responsibility until the next meeting. He would therefore take it that the Commission agreed to that postponement.

It was so agreed.

**Jurisdictional immunities of States and their property
(continued)* (A/CN.4/L.364, ILC(XXXV)/Conf.
Room Doc.1)**

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE

* Resumed from the 1770th meeting.

ARTICLES 10, 12, 2, para. 1 (g), 3, para. 2, and 15

57. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) said that, at the beginning of the present session, draft articles 10, 11 and 12 (ILC(XXXV)/Conf.Room Doc.1) on jurisdictional immunities of States and their property had been pending in the Drafting Committee. Draft articles 7, 8, 9 and 10 in part II (General principles), which constituted a reformulation of the set of draft articles proposed by the Special Rapporteur in his third report, had been referred to the Drafting Committee at the Commission's thirty-third session. Of these, the Commission had provisionally adopted, at its thirty-fourth session, only draft articles 7, 8 and 9.⁹

58. Draft articles 11 and 12, which belonged in part III (Exceptions to State immunity), were a new version of the draft articles proposed by the Special Rapporteur in his fourth report and referred to the Drafting Committee at the Commission's thirty-fourth session.¹⁰ At the present session, the Commission had referred to the Drafting Committee articles 13, 14 and 15 proposed by the Special Rapporteur in his fifth report.

59. The Drafting Committee had approved the titles and texts of articles 10, 12 and 15. In connection with article 12, it had approved a definition of the term "commercial contract" for inclusion in article 2 (Use of terms) as paragraph 1 (g), as well as an interpretative provision for inclusion in article 3, paragraph 2. It had been considered advisable to set aside article 11 for the time being; articles 13 and 14 would be examined by the Drafting Committee at the Commission's next session. The articles adopted by the Drafting Committee were reproduced in document A/CN.4/L.364.

60. The Drafting Committee proposed the following text for article 10:

*Article 10. Counter-claims*¹¹

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

61. Article 10 corresponded substantially to draft article 10 as proposed by the Special Rapporteur. To make the rule more easily understandable, however, the Drafting Committee had considered it advisable to set out in three separate paragraphs the three cases which appeared to be

mixed together in the two paragraphs of the original text. Accordingly, paragraph 1 dealt with the case of a counter-claim arising out of the same legal relationship or facts as the principal claim, where a State had itself instituted a proceeding before a court of another State. Paragraph 2 dealt with the case of a counter-claim against a State and arising out of the same legal relationship or facts as the claim presented by that State, where that State had intervened to present a claim in a proceeding before a court of another State. Paragraph 3 concerned a counter-claim made by a State in a proceeding instituted against it before a court of another State.

62. In order to bring the language of article 10 into line with that of the articles already provisionally adopted, the Drafting Committee had used the formula "A State . . . cannot invoke immunity from jurisdiction" in all three paragraphs. Other minor drafting changes had been introduced only to make the text clearer and more precise.

63. The Drafting Committee proposed the following text for article 12:

*Article 12. Commercial contracts*¹²

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(a) in the case of a commercial contract concluded between States or on a government-to-government basis;

(b) if the parties to the commercial contract have otherwise expressly agreed.

64. Although the basic principle remained the same, the drafting of article 12 was appreciably different from that of draft article 12 submitted by the Special Rapporteur. The drafting changes made had been unavoidable because of the change of focus given to the article: the original text referred to "trading or commercial activity" whereas the new text referred to "commercial contracts". In the original text, moreover, the Special Rapporteur had stressed two elements which did not need any specific mention in the new text: the fact that the activity was conducted wholly or partly in the territory of another State, as a basis for jurisdiction; and the fact that the activity was conducted by the State itself or by one of its organs or agencies, whether or not organized as a separate legal entity. In the new text, a simple reference to the State had replaced the former enumeration. As to the relationship between the activity and the territory of the other State, since the new article related to commercial contracts instead of trading or commercial

⁹ *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*

¹⁰ *Ibid.*, p. 99, para. 198.

¹¹ For the text submitted by the Special Rapporteur, *ibid.*, p. 95, footnote 218; for the Commission's consideration thereof at its thirty-fourth session, see *Yearbook* . . . 1982, vol. I, pp. 104-119, 1716th meeting, paras. 15-47, 1717th meeting and 1718th meeting, paras. 1-39.

¹² For the revised text submitted to the Drafting Committee by the Special Rapporteur, see *Yearbook* . . . 1982, vol. II (Part Two), p. 99, footnote 237; for the Commission's consideration of the original text (*ibid.*, footnote 221) at its thirty-fourth session, see *Yearbook* . . . 1982, vol. I, pp. 183-199, 1728th meeting, paras. 7-45, and 1729th-1730th meetings.

activity, the important point was to stress, as did paragraph 1 of the new text, that the applicable rules of private international law determined whether differences relating to commercial contracts fell within the jurisdiction of a court of the other State.

65. The article specified that one of the parties to the contract had to be a foreign natural or juridical person and stressed the importance of consent to the exercise of foreign jurisdiction in a proceeding arising out of the contract, the natural consequence being that in those circumstances the contracting State could not invoke immunity of jurisdiction in that proceeding. That was the accepted formula used throughout the draft.

66. To achieve a more systematic presentation, the exceptions stated in the two paragraphs of the original text had been repeated in the two subparagraphs of the new paragraph 2. Subparagraph (a) corresponded to paragraph 2 of the draft article submitted by the Special Rapporteur and subparagraph (b) expressed the possibility of derogation by agreement provided for in the original text by the introductory phrase of paragraph 1, "Unless otherwise agreed".

67. Having introduced the concept of a "commercial contract" into article 12, the Drafting Committee had found it necessary to adopt a definition of that term for inclusion in article 2 as paragraph 1 (g), where it would replace the definition of the expression "trading or commercial activity" in the original text of article 2 submitted by the Special Rapporteur in his second report. The proposed new definition did not call for any comment and read:

*Article 2. Use of terms*¹³

1. For the purposes of the present articles:

...

(g) "commercial contract" means:

- (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
- (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

...

68. The following new interpretative provision had been introduced to replace, as paragraph 2 of article 3, the provision originally proposed by the Special Rapporteur in his second report, concerning the commercial character of a trading or commercial activity. According to the new text, in determining whether a contract was commercial, reference should be made primarily to its nature, but the purpose of the contract should also be taken into account if it was relevant to determining the non-commercial character of the contract.

*Article 3. Interpretative provisions*¹⁴

...

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

69. The Drafting Committee proposed the following text for article 15:

*Article 15. Ownership, possession and use of property*¹⁵

1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or the protection of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission.

70. Article 15 corresponded substantially to draft article 15 submitted by the Special Rapporteur in his fifth report and referred to the Drafting Committee during the current session. In order to make the text clearer and more precise, and thus to facilitate understanding of the rule, the Drafting Committee had decided to rearrange the contents of the four subparagraphs of the original paragraph 1, dividing them between the new paragraphs 1 and 2. Paragraph 3 of the new text corresponded to the former paragraph 2.

71. In the introductory clause of paragraph 1, the Drafting Committee had deleted the proviso "Unless otherwise agreed". Furthermore, in the interests of the harmony of the draft as a whole, it had used the formula

¹³ For the original text, see *Yearbook . . . 1982*, vol. II (Part Two), pp. 95-96, footnote 224. For the Commission's decision to modify the definition of "trading or commercial activity", see *Yearbook . . . 1982*, vol. I, p. 199, 1730th meeting, paras. 28-29.

¹⁴ For the original text, see *Yearbook . . . 1982*, vol. II (Part Two), p. 96, footnote 225. For the Commission's decision to modify paragraph 2, see *Yearbook . . . 1982*, vol. I, p. 199, 1730th meeting, paras. 28-29.

¹⁵ For the text submitted by the Special Rapporteur, see 1762nd meeting, para. 1; for the Commission's consideration thereof at the current session, see 1767th meeting, paras. 9-47, and 1768th-1770th meetings.

appearing in other articles: "The immunity of a State cannot be invoked". In order to avoid problems of interpretation, the Committee had felt justified in specifying that the court referred to was "a court of another State which is otherwise competent". Lastly, it had specified that the proceeding in which that court exercised its jurisdiction had to relate to the determination of one of the rights or interests enumerated in subparagraphs (a)–(e) of paragraph 1.

72. Subject to some drafting amendments made in the interests of uniformity and precision, subparagraphs (a) and (b) of the new paragraph 1 corresponded to subparagraphs (a) and (b) of the former paragraph 1, and subparagraphs (c), (d) and (e) of the new paragraph 1 dealt with the three matters covered by subparagraph (c) of the original paragraph 1.

73. The provisions of subparagraph (d) of the former paragraph 1 were reflected, with changes in drafting and presentation, in the new paragraph 2 of the article. Lastly, a new paragraph 3 set out in greater detail the provision in the former paragraph 2.

74. One member of the Drafting Committee had been opposed to paragraph 2, which he considered unnecessary because its contents were partly covered by the provisions of other articles or related to cases outside the scope of the draft. As for paragraph 3, several members had regarded it as a provisional text subject to the approval of article 4 or other additional articles which might prove necessary.

The meeting rose at 1 p.m.

1806th MEETING

Monday, 18 July 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)*

* Resumed from the 1799th meeting.

(A/CN.4/L.365 and Add.1, ILC(XXXV)/Conf. Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE

ARTICLES 1 to 8¹

1. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee), continuing the report on the work of the Drafting Committee which he had begun at the previous meeting, said that articles 1 to 8 on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which had been adopted by the Drafting Committee (A/CN.4/L.365 and Add.1) corresponded to draft articles 1 to 8 submitted by the Special Rapporteur. He recalled that the original texts of draft articles 1 to 6 were contained in the second report of the Special Rapporteur. Those draft articles had been examined by the Commission at its thirty-third session and had been referred to the Drafting Committee, but it had not considered them at that time.² Draft articles 1, 3, 4 and 5, as reformulated, had been reproduced in the third report of the Special Rapporteur which had also contained, without modification, the texts of draft articles 2 and 6. Draft articles 7 to 14 had constituted a new set of articles submitted by the Special Rapporteur in his third report. The 14 draft articles submitted in the third report of the Special Rapporteur had been examined by the Commission at its thirty-fourth session and referred to the Drafting Committee which, for lack of time, had been unable to consider them.³ At the current session, the Commission had also referred to the Drafting Committee draft articles 15 to 19 submitted in the Special Rapporteur's fourth report (A/CN.4/374 and Add.1–4). Articles 9 to 19 would therefore have to be considered by the Drafting Committee at the Commission's next session. The Special Rapporteur had grouped together articles 1 to 6 in part I, entitled "General provisions", and articles 7 to 19 in part II, entitled "Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag". The Drafting Committee had decided to postpone its decision on the various parts into which the draft might be divided until it had made considerably more progress in its examination of the proposed articles.

2. The Drafting Committee proposed the following text for article 1:

Article 1. Scope of the present articles⁴

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

¹ For the consideration of these draft articles by the Commission at its thirty-fourth session, see *Yearbook . . . 1982*, vol. I, pp. 293–312, 1745th meeting, paras. 7–37, and 1746th–1747th meetings.

² *Yearbook . . . 1981*, vol. II (Part Two), p. 162, para. 249.

³ *Yearbook . . . 1982*, vol. II (Part Two), p. 120, para. 249.

⁴ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 115, footnote 314.