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Summary record of the 2120th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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violation of international law committed by a foreign State was to request the State of which he was a national to take action in the context of diplomatic protection—something that that State might well refuse to do, as Mr. Tomuschat had just pointed out. It was therefore necessary to know whether the intention in the article was to give individuals who had suffered damage or injury the right to act directly against the foreign State to which the damage or injury could be attributed. That was, of course, a laudable approach, but it had every chance of remaining entirely theoretical. Nevertheless, if such was the purpose of the provision, paragraph 2 should be amended and, in that connection, the proposal by Spain would either go too far or not go far enough. To be perfectly clear, it should be expressly stated that, if an individual did not enjoy adequate protection and had not obtained satisfactory results through the normal channels of public international law, he could take direct action. That solution was defensible from the theoretical standpoint, for it was possible to argue, in line with the decision in the *Société européenne d'études* case, that when a State submitted a claim to secure the diplomatic protection of its nationals, it did so in order to obtain compensation for damage it had suffered itself. In any case, the Commission should review article 13, decide on the approach it wished to adopt therein and amend the text accordingly.

76. In article 14, the link between the property in question and the territory of the State of the forum should be specified in paragraph 1 (*b*) and the word "interest" should be deleted for the reasons given by Mr. Tomuschat; failing that, the word should be replaced by an expression which did not come from the vocabulary of the common law.

77. It should be made clear whether the subject of article 16 was duties, taxes and other similar charges in general or exclusively those relating to an activity or property that did not enjoy immunity. As to article 17, it would be better not to use terms from the sphere of private international law in paragraph 1 (*b*). A more general formulation stressing the links between the company and the territory of the State of the forum might be preferable.

78. A great deal of time and effort had gone into the formulation of article 18 and it was difficult to express an opinion on it without a detailed knowledge of maritime law. As to the proposed deletion of the term "non-governmental", he could see why reference might be made to the concept of purpose or object to describe certain operations, situations or entities, but believed that precision was necessary. While it was perfectly understandable, as Mr. Mahiou had suggested, that, in certain exceptional circumstances, ships should enjoy a broader form of immunity, those circumstances should be spelled out. In any case, the Commission was obliged to reconsider the article in the light of the comments made by the Federal Republic of Germany and the United Kingdom, among others.

79. Article 23, paragraph 1 (*c*), should be made more specific, for it could not be said that all the property which a State placed in banks in the territory of another State was used for commercial purposes. The property in question was the type of deposits that played a particular role as monetary guarantees in the context of the international banking system. A special definition for such deposits was probably common in banking circles.

80. In conclusion, he said that the draft articles called for a number of general comments, which applied to the new draft article 11 *bis* as well. The texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) for that article were not without merit, but he had some reservations about them. It had already been stated that the entire set of articles should enunciate rules of international law that did not yet exist, as demonstrated by the fact that the various opinions expressed primarily reflected national interests. Of course, he understood why States might want immunities that were as strict as possible, but, on hearing the advocates of the theory of absolute immunity, he wondered whether they were not primarily concerned about the problems raised by intervention. As soon as civil or commercial—in others words, contractual—matters came into play, there was a struggle to gain the power bestowed by the law: if a State were granted immunity, that would mean that only the courts of that State had jurisdiction and that only its legal system, including its basic legislation, would be applicable. Small States wanted to protect themselves, and that was perfectly understandable, but the issue was primarily one of intervention. As Mr. Bennouna (2117th meeting) had pointed out, the balance of power had to be borne in mind, even if many contracts concluded in respect of raw materials showed that countries which were weak, or which believed they were, were capable of suddenly becoming strong.

81. It was interesting to note that, so far, no one had stated that the rules to be formulated must be peremptory and absolute: he would have done so if he had had time to make comments on article 28. In any event, however, it was always the more powerful of the two parties involved that would decide whether immunity should be granted or not, whether its own courts had jurisdiction and, consequently, whether its own law was applicable. That was why he feared that the text that would finally be adopted, through sheer weight of numbers or political influence, both in the Commission and in the Sixth Committee of the General Assembly, would be highly unsatisfactory. The real rules of international law were common rules, such as those worked out in CMEA or EEC. Whatever reservations there might be with regard to international arbitration and the problems to which it could give rise, it did point to the course to be followed, for the future lay in genuine joint international legislation. The Commission should reconsider the topic in that light as soon as possible.

The meeting rose at 1 p.m.

2120th MEETING

Friday, 16 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey,

Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/410 and Add.1-5,[1] A/CN.4/415,[2] A/CN.4/422 and Add.1,[3] A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[4] ON SECOND READING (*continued*)

1. Mr. BENNOUNA said that the discussion on the topic under consideration put him in mind of the classic doctrinal debate as to whether the general principles of international law "recognized by civilized nations" were derived from domestic law or from international law. It was always a mistake to treat internal and international law as two distinct and tightly partitioned spheres. In fact, they continually interpenetrated and enriched one another. In the particular case of jurisdictional immunities, there could be no doubt that immunity was granted or refused on the basis of the internal jurisdictions of States, but in applying their internal laws States also took account of certain international rules. The draft should not attempt to impose strict and uniform rules but should confine itself to laying down general guidelines. Adoption of the draft convention would signal not the end of the ongoing dialectical process between internal law and international law, but simply the completion of a certain stage within that process. As he had suggested when speaking (2117th meeting) on articles 1 to 11, the draft should include a clause providing for the articles to be reviewed after a period of, say, five or ten years. That would make it clear that the text was not intended to be definitive and could be amended or supplemented in due course. Such an approach would make it easier to reach agreement and would help to overcome the somewhat pessimistic attitude he detected in some of the comments by members.

2. With regard to article 12, he agreed with the Special Rapporteur's recommendations in his preliminary report (A/CN.4/415, paras. 131-133). The problems in connection with article 13 were more complex. Several Governments had pointed out that the question of personal injuries and damage to property was governed by rules concerning State responsibility and was out of place in the present draft. The new paragraph 2 proposed by the Special Rapporteur (*ibid.*, para. 143) did not deal adequately with that problem, and he was therefore opposed to it. On the other hand, deletion of the phrase "and if the author of the act or omission was present in that territory at the time of the act or omission" would, he feared, make the scope of the article still wider. The phrase should be retained. In fact, the article as a whole required further in-depth consideration by the Commission.

3. He agreed with the Special Rapporteur's recommendations in respect of articles 14 and 18 and noted that he proposed no amendments to articles 15, 16 and 17.

4. With regard to the alternative expressions in square brackets in article 19, the concept of a "commercial contract" was sufficiently broadly defined in article 2, on the use of terms, and should be employed consistently throughout the text in order to avoid confusion.

5. He associated himself with other members who had questioned the need to include article 20 in the draft. However, if the Commission decided to retain it, he agreed with Mr. Calero Rodrigues (2119th meeting) that the article was out of place in part III and should be transferred to part I as a safeguard clause.

6. Turning to part IV of the draft, deletion of the phrase "or property in which it has a legally protected interest" from article 21, recommended by the Special Rapporteur in accordance with the views of a number of Governments, would not resolve the problem of property of the kind envisaged. Admittedly the expression "legally protected interest" was not entirely satisfactory, and he would suggest that it be replaced by a reference to property in which the State had a right *in rem*. The same could be done in article 22. The proposed deletion of the term "non-governmental" from article 21 (*a*) was acceptable, but he was opposed to deleting the words "and has a connection with the object of the claim . . .", which would excessively broaden the scope of the provision.

7. For reasons stated earlier, he agreed to the deletion of the term "non-governmental" in article 23, paragraph 1, but did not share the Special Rapporteur's view that the words "and serves monetary purposes" should be added to paragraph 1 (*c*). Paragraph 2 was superfluous and should be deleted. The reference to article 21, which was sufficient in itself, was merely confusing.

8. Article 28 gave rise to a number of problems, as the Special Rapporteur himself appeared to acknowledge by making its retention contingent upon the adoption of the proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17). While he was opposed to article 6 *bis*, he also considered article 28 to be extremely complex and capable of endangering the draft as a whole. The Government of Australia was right in saying that the article was concerned not with the question of discrimination or non-discrimination, but with that of reciprocity of treatment. In that connection, the crucial provision in paragraph 2 (*a*) was too broadly worded. Surely the mere fact that a State considered another State to be applying a provision restrictively should not be enough to authorize the former State to do likewise. That was, no doubt, what normally took place in practice, but the draft should at least attempt to introduce some morality.

9. Lastly, he had considerable doubts about the whole of the proposed part VI of the draft and would suggest that the Commission consider the question of the settlement of disputes in greater depth at the next session.

10. Mr. ROUCOUNAS thanked the Special Rapporteur for his meticulous work, which would greatly assist the Commission in its second reading of the draft articles. It

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[1] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[2] *Ibid.*

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the texts, see 2114th meeting, para. 31.

would, however, be useful if all of the observations made on a given set of articles could in future be grouped together so that the Commission would have a full picture of the situation. Such observations were of particular value to those who had not been members of the Commission from the start of the discussion on a particular topic.

11. Article 13 laid down an exception to the rule of the jurisdictional immunity of States in certain cases of injury to the person or damage to tangible property. Under the terms of the article, individuals could seek compensation before the courts for damage caused by an act or omission attributable to a foreign State which occurred in the territory of the forum State. According to the commentary to the article (formerly article 14),[5] the provision mainly covered traffic accidents or accidents involved in the transport of goods and persons by rail, road, air or waterways, for, although such accidents were insurable risks, insurance companies might hide behind the immunity of their clients in order to create difficulties with respect to compensation. The article did not, however, apply to cases where there was no physical damage; in other words it did not apply in the case of damage to reputation or to contractual, economic or social rights. For the article to apply, two conditions had to be fulfilled. First, the act or omission must occur in whole or in part in the territory of the State of the forum; and secondly, the author of such act or omission must be present in that State at the time of the act or omission. It was the latter condition that pin-pointed the scope of article 13, since the observation in the commentary to the effect that the cases contemplated by the article were rare was valid only on a provisional basis. For instance, the commentary also stated that the article would apply to certain specific cases of damage, such as that caused by speedboats—something which did not seem to correspond exactly to the scope it might acquire in future, in view of the pace at which relations of all kinds were developing in the modern world.

12. He further noted the reference in the commentary to "cases of shooting or firing across a boundary or of spillover across the border of shelling" (para. (7)), in which connection he considered it necessary to provide that armed conflict would be an exception. Yet it was also necessary to cover the questions of the stationing of foreign armed forces on a State's territory, the passage of armed forces or military equipment through that territory, and a whole range of possible accidents connected with the use of nuclear power. He therefore wondered whether it sufficed to make reference to existing conventions, which, in any event, were not universally binding. The Special Rapporteur had stated that a *renvoi* by means of the phrase at the beginning of article 13, "Unless otherwise agreed between the States concerned", guaranteed that international conventions would not be affected. But the question was whether the intention was to enlarge upon a rule already agreed upon by the parties and recognized under a number of important conventions that dealt with the use of nuclear power.

13. As to the proposed new paragraph 2 (A/CN.4/415, para. 143), a *renvoi* to rules of State responsibility under international law was not sufficient, since what was involved was the jurisdiction of the court to inquire into a certain area of activity that was attributable to the foreign State. Clearly, the paragraph was needed, but it should be much more elaborate. The reference to the physical presence of the author of the act or omission in the territory of the forum State should be retained, at least for the time being, for that would limit the scope of the article.

14. He supported the Special Rapporteur's proposal with regard to article 14 (*ibid.*, para. 156), and also agreed that reference to certain legal systems alone, or to institutions governed by a number of legal systems, would not be advisable. The point could best be dealt with by appropriate drafting changes. In that connection, he would remind members that, in a different but related field—the adoption of the United Nations Convention on International Bills of Exchange and International Promissory Notes,[6] which had been considered at length by the Sixth Committee of the General Assembly—the question had arisen of the extent to which it was necessary to search for a balanced text that was intelligible to all and did not lean too much in favour of one legal system or another: the consideration of that question had for a time blocked the adoption of the Convention.

15. He concurred with the Special Rapporteur that a more detailed explanation should be included in the commentary regarding the scope of article 15 as it related to computer-generated works. More detailed explanations with regard to plant breeders' rights would also be welcome. He further agreed that specific aspects of the question should not be cited, since that would lead to considerations relating to other activities that were not envisaged.

16. Article 18 was, of course, of a residual nature. Historically, the question of the jurisdictional immunities of States had arisen with regard to ships, because ships in a foreign port were a point of contact between the legal systems of at least two States. Thus the question was already widely regulated by treaty, and a wealth of jurisprudence dating back to the nineteenth century confirmed the rule concerning the submission of ships not engaged in government service to the courts of the forum State. The expression "ship engaged in commercial [non-governmental] service" was therefore an innovation and was not founded on practice. Moreover, it was clear from article 236 of the 1982 United Nations Convention on the Law of the Sea that immunity flowed from the non-commercial character of the ship and not from its non-governmental character. As to the cases contemplated in paragraph 2 of article 18, it would be useful if the Commission could confine itself more or less to parallel provisions and not go beyond the 1926 Brussels Convention on the immunity of State-owned vessels. In particular, it should be careful not to overburden the text and so make it difficult to interpret.

17. The question of pollution must be covered. Also, the statement in the commentary to the article (formerly article 19) that the production of a certificate signed by the diplomatic representative of the State to which the ship or cargo belonged was of course governed by the rules of procedure applicable in the State of the forum[7] called for

[5] *Yearbook . . . 1984*, vol. II (Part Two), pp. 66-67.

[6] General Assembly resolution 43/165 of 9 December 1988, annex.

[7] *Yearbook . . . 1985*, vol. II (Part Two), p. 63, para. (18) of the commentary.

fuller explanation, failing which he was not certain whether such a provision could be accommodated in the article. Further explanations were also required with regard to the new paragraph 1 *bis* proposed by the Special Rapporteur (A/CN.4/422 and Add.1, para. 26), which should be discussed as a matter of priority at the Commission's next session. If it were decided to include such a provision in the draft, however, it should be incorporated in the new article 11 *bis*.

18. The choice between the expressions "commercial contract" and "civil or commercial matter" in article 19 should not give rise to undue controversy. The difficulty could perhaps be removed by wording along the following lines: "a legal act which, under the present articles, falls within the jurisdiction of the court of the forum".

19. Lastly, with regard to article 20, he would point out that, some 40 years before, Lauterpacht had said, in a well-known article in the *British Year Book of International Law*, that the court of the forum had nothing to do with the legislative acts of foreign States, since when the controversy over that matter had been never-ending. He would, however, have no major objection to the provision if members favoured an express reservation with regard to the extraterritorial effects of measures of nationalization. The word "cases", in the title of the article, required further reflection; possibly what was meant was the "effects" of nationalization.

20. The CHAIRMAN, speaking as a member of the Commission, joined previous speakers in thanking the Special Rapporteur for his excellent reports, which were distinguished by the effort to develop proposals that offered solutions suitable for a compromise.

21. In endeavouring to achieve a generally acceptable result, the Commission should continue to be guided by the need to reaffirm the principle that, in accordance with their sovereign equality, States and their property enjoyed jurisdictional immunity. Only on that basis was it possible to define clearly the exceptions to immunity which, to a large extent, obviated the need for more far-reaching restrictions on the basic principle and thus helped to ensure unequivocal administration of the law. A legal régime governing the jurisdictional immunities of States and their property should strike a careful balance between the international legal principle of the immunity of States, the exceptions to that principle and the legal remedies for preventing improper use of the relevant rules. Only in that way would it be possible to arrive at an instrument which served peaceful international co-operation among States that were equal in rights but different in economic strength.

22. As a general remark regarding the bracketed phrase "and the relevant rules of general international law" in article 6, it was gratifying to note that the Special Rapporteur had followed the thinking of those who favoured deleting it. He personally did not think that the phrase should be reintroduced, even in the preamble. To do so would be to open the door to unwarranted restrictions on immunity and would, indeed, be tantamount to a reservation that would lead to the dissolution of the entire future convention. That would undermine the desired legal guarantees. An international agreement which contained such a sweeping reservation could not serve its purpose of stabilizing international relations, particularly in such a complex area as the immunity of States and their property. Also, there was no need for such a proviso, since under the draft articles States could agree to depart from their terms. It would acquire meaning only in cases where the parties disagreed on the interpretation of the convention, in which case they could seek an agreed solution by recourse to suitable means. It would be unfortunate if the convention itself were to open the way for a one-sided interpretation.

23. To meet the position of States which favoured further restrictions, the Special Rapporteur had, in his second report (A/CN.4/422 and Add.1, para. 17), proposed a sort of disclaimer in the form of the new article 6 *bis*, whereby States would be able to narrow the immunity of foreign States in a formal declaration which would not, however, take effect against States which objected within 30 days. If that proposal were adopted, it would destroy the unity of the rules laid down in the draft. It was also clear from that proposal that the additional exceptions contemplated were not a matter of "general international law" but of specific agreement between the States concerned. He did not think that article 6 *bis* would solve the problem.

24. His second general remark also concerned legal equality. Although the Special Rapporteur had taken account of the reservations expressed by the socialist States in an attempt to ensure that they would not be at a disadvantage, the proposed new article 11 *bis* (A/CN.4/415, para. 122) did not take sufficient account of the practical problems involved. The draft must be formulated in unambiguous terms so that an individual socialist foreign trade enterprise could not be identified with the State; otherwise the draft would be of no value to socialist States.

25. The practice in all socialist States was for certain clearly delimited parts of socialist property to be transferred to independent juridical persons exclusively for the exercise of commercial activities. Such persons acted on their own behalf, were liable to the extent of their own assets, did not act for the State and could not therefore claim or waive immunity. Consequently, the State could not be equated with such juridical persons and was not answerable for liabilities incurred by them. Nor, of course, could one State enterprise be held accountable for the liabilities of another.

26. Regrettably, it was the practice of some States to withhold immunity from the enterprises of socialist States while treating them as instrumentalities of the State, claiming that a socialist State was liable to the extent of all its assets for the obligations of its individual juridical persons. That led to situations in which the State concerned first had to appear before the courts of the forum State in order to secure respect for its legal order. Even if it succeeded, which was not always the case, the proceedings frequently cost a great deal of money. Care should be taken to ensure that the future convention would not be interpreted to mean that the legal order of some States in foreign trade was recognized only if they had paid an appropriate fee to a law firm of the forum State. He knew of a number of cases in which the German Democratic Republic had been held liable in the United States of America as a secondary defendant in proceedings involving foreign trade enterprises of the German Democratic Republic that were regarded as agencies or instrumentalities of the State. It had been a complicated and costly way to explain that, as a State, the German Democratic Republic was in no way answerable for the business transactions of such enterprises.

27. It was contrary to the principle of the sovereign equality of States to deny a State the right to invoke immunity for commercial transactions yet make it liable, in disregard of its legal order, for any commercial transaction performed by its legally independent enterprises. No State could accept such a situation. Accordingly, the German Democratic Republic had suggested that the following new paragraph 2 be incorporated in article 3:

> "2. The expression 'State' as used in the present articles does not comprehend instrumentalities established by the State to perform commercial transactions as defined in article 2, if they act on their own behalf and are liable with their own assets." (A/CN.4/410 and Add.1-5.)

Such a provision could help to make the draft articles more acceptable to many States and, moreover, was not unusual. Article 27, paragraph 1, of the 1972 European Convention on State Immunity, for instance, provided that "the expression 'Contracting State' shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions". That, too, could provide a possible basis for a clear-cut arrangement. In that connection, the Special Rapporteur had proposed, in the light of the comments made by the Federal Republic of Germany and the United Kingdom on article 3, that the following text be added at the end of paragraph 1 (*b*) (iii) of the new article 2 (A/CN.4/415, para. 29):

> ". . . provided that a State enterprise which is distinct from the State, which has the right to possess and dispose of segregated State property and which is capable of suing or being sued shall not be included in the agencies or instrumentalities of that State, even if that State enterprise has been entrusted with public functions".[8]

That was an amendment that would remove the doubts of many States.

28. He endorsed the Special Rapporteur's efforts to harmonize articles 2 and 3 and considered that the wording proposed for paragraph 3 of the new article 2 would facilitate balanced application of the "nature" and "purpose" criteria in determining the commercial character of a contract.

29. The notions of "interests of a State" and "property in the control of a State", in article 7, caused some difficulty and should be either deleted or precisely defined. He welcomed the introduction of the expressions "forum State" and "foreign State" and trusted that they would be consistently used in other articles for ease of comprehension. The use of the terms "agencies" and "instrumentalities" would be appropriate only if they were more precisely defined in article 2. It would be advisable for courts to be required *ex officio* to examine whether or not there was immunity.

30. Adoption of the suggestion by Thailand with respect to article 10 would weaken the very foundation of the article, and the proposed new paragraph 4 (*ibid.*, para. 107) might open the door to abuse of the right to make a counter-claim. It should either be made more specific or be deleted.

31. The title of part III of the draft again reflected the divergent interests of States, which should, however, ultimately be reconcilable. For his own part, he considered it important to use the word "exceptions", since immunity was the rule and limitations were the exception. He would not favour deferring the question, for it was a key issue, although he appreciated the fact that the Special Rapporteur's proposal to do so was made in the hope that the issue might lose significance if consensus could be reached on the various rules.

32. The wording of article 11—on the main exception to the principle of State immunity—was particularly important and it might be a good idea to begin with the phrase "Unless otherwise agreed . . .". The words "If a State enters into a commercial contract . . ." were vague and should be replaced by more precise language in order to underline the obligation arising for a State out of a commercial contract and also the legal relationship with the forum State. In his view, such a provision, which had been proposed by the previous Special Rapporteur in his fourth report,[9] was essential, particularly since some States tended to establish jurisdiction on the basis of extremely vague premises. It was therefore regrettable that the Special Rapporteur had not followed the suggestion that it be made clear that there must be a link between a given dispute and the forum State. Care should be taken to ensure that the future convention would not be used to support the practice of a unilateral extension of jurisdiction in a way that was attractive for the plaintiff but disadvantageous to the defendant. He would propose a reformulation along the following lines:

> "Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State if a proceeding is based on an obligation of the State arising out of a commercial contract between the State and a foreign natural or juridical person and the commercial activity is partly or wholly conducted in the State of the forum."

33. While he appreciated the Special Rapporteur's efforts to overcome certain problems by means of the proposed new article 11 *bis* (*ibid.*, para. 122), a number of questions still remained. The matter would perhaps be resolved if the proposed addition to paragraph 1 (*b*) (iii) of the new article 2 (see para. 27 *in fine* above) were adopted. Article 11 *bis* covered only the exceptional case in which an enterprise acted on behalf of the State, and did not cover—or even excluded—the typical case in which an enterprise acted on its own behalf and claimed no immunity at all. The proposal with regard to article 2, therefore, would not be rendered superfluous by article 11 *bis*. The texts proposed by Mr. Shi (2115th meeting, para. 24) and Mr. Barsegov (2117th meeting, para. 1) seemed to pave the way for a similar solution. In view of the concept underlying the draft, the question of segregated State property should be dealt with not in part III but in part I, the basic idea being to prevent any unnecessary broadening of the notion of the State. That applied both to the invoking of immunity and to the denial of respect for juridically independent parts of a State's property.

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[8] See *Yearbook . . . 1988*, vol. II (Part Two), p. 100, para. 508.

[9] *Yearbook . . . 1982*, vol. II (Part One), p. 229, document A/CN.4/357, para. 121.

34. Provisions on labour-law disputes, as envisaged in article 12, were unnecessary, since such disputes were normally settled by mutual agreement or insurance coverage. He did not understand, however, why the Special Rapporteur had agreed to delete paragraph 2 (*b*): a foreign State could not, for example, be compelled by the State of the forum to employ a particular individual. Article 12 would therefore have to be reconsidered.

35. Article 13, too, was open to serious objections, as could be seen from the comments made by several States. It seemed to prejudge questions of international responsibility that fell outside the scope of immunity. Whenever States accepted a waiver of immunity, they usually did so in a specific agreement. Cases in point were article 31 of the 1969 Convention on Special Missions and article 43 of the 1963 Vienna Convention on Consular Relations. The present wording of article 13 seemed to be unacceptable to many States, and it conflicted with article 31 of the 1961 Vienna Convention on Diplomatic Relations because it implied a general waiver of immunity. Such a far-reaching restriction of immunity was hitherto unknown in State practice. If, however, as the Special Rapporteur suggested in his second report (A/CN.4/422 and Add.1, para. 22), the application of the provision could be narrowed down to traffic accidents for which insurance coverage would normally be sought, States might be prepared to accept such an approach, which was more in line with article 31 of the Convention on Special Missions and article 43 of the 1963 Vienna Convention.

36. The form of language used in article 14 could be made much clearer if paragraph 1 (*a*) alone were retained. The reference to immovable property would then denote unambiguously the requisite juridical link between the forum State and the property concerned.

37. Article 18 gave rise to questions similar to those he had discussed in connection with article 2. The problems largely stemmed from the fact that the terms "owned" and "operated" were treated as equivalents. If, in the case of government ships engaged in commercial service, it was left to the plaintiff to decide whether to take action against the State owning the ship or against the company operating the vessel, that was only because no account was taken of the fact that a shipping company was a juridically independent entity and acted as the sole operator of its ships. In the German Democratic Republic, shipping companies were nationally owned enterprises having their own legal personality. They, and not the State, were the "operator". They were liable to the extent of their assets and acted in their own name, and an action could be brought by or against them. Hence they could not invoke immunity. A subsidiary liability of the State, as might be conceivable under article 18 due to a parallel reference to the "owner", was not acceptable.

38. The problem was not to ensure an advantage for States which had a large sector of State property, but to protect them against discrimination and to prevent them from being disadvantaged inasmuch as they could be held liable for the obligations of enterprises of theirs which none the less were separate legal entities and had no right to claim immunity. Something in the guise of immunity actually affected sovereign equality and came close to intervention in the internal legal order of a foreign State. It was a matter of general international law, not a problem peculiar to socialist States. Socialist States respected legal entities based in foreign legal systems and expected the same respect to be accorded to legal entities established under their legal systems. The Special Rapporteur was right to assume (*ibid.*, para. 24) that there was no reason to hold a State, as the owner of a ship, responsible if it allowed the separate operator, the shipping company, to answer a claim arising out of the operation of the ship. The solution would be to rely on the operator and not on the owner: that would be an easier way to reach the same result as that proposed by the Special Rapporteur in the new paragraph 1 *bis* of article 18 (*ibid.*, para. 26).

39. The main problem with article 19 lay not in the choice between the expressions "commercial contract" and "civil or commercial matter" but in the more complicated question whether the conclusion of an arbitration agreement could always be seen as a waiver of immunity in respect of disputes about the agreement or about the validity of the arbitration award. He agreed that the waiver of immunity which might be implied in an arbitration agreement could not be interpreted as implying, at the same time, a waiver of immunity from execution.

40. With regard to article 20, cases of nationalization were not exceptions to State immunity. On the contrary, they were, as a rule, sovereign acts of a State which were not subject to review by foreign courts. Even though the article was formulated merely as a safeguard clause, it did not exclude an interpretation which would impair the discretion of peoples to determine their political status and to pursue their economic, social and cultural development without external interference. The example given by the Special Rapporteur (*ibid.*, para. 41) did not alter that position. Indeed, it demonstrated the extent to which problems of self-determination and intervention were involved in such cases. The survival in a foreign country of a legal entity which had been legally dissolved in the State of origin signified far-reaching interference in the legal system of the country that had, for whatever reasons, decided to dissolve that entity. He continued to believe firmly that article 20 should be deleted.

41. It would be preferable to have a general provision rather than exceptions at the beginning of part IV of the draft, as in part II, and it would be more in line with modern law if article 21 were to refer generally to immunity from measures of constraint. On the other hand, there could well be a provision obligating States to follow final court decisions passed against them on the basis of the future convention. Since the 1972 European Convention on State Immunity already contained a similar provision, it should be possible to find a solution that would endorse the internationally recognized prohibition of execution against the property of other States. One conceivable arrangement might also be a provision based on reciprocity, or an introductory phrase, "Unless otherwise agreed . . . ", as proposed by the Special Rapporteur (*ibid.*, para. 46). But he could not agree to the proposal to eliminate in subparagraph (*a*) the link between the property in question and the proceedings. In view of the practice followed by a few countries *vis-à-vis* socialist countries, there would be a danger that the property structure of socialist States would be disregarded and that execution would be levied against any parts of their property. It was not very realistic to imagine that a State would agree to leave it to a creditor to decide,

in disregard of the country's statutory property structure, from which parts of property he wished to satisfy his claim or claims. If the aim was to prevent a defendant from evading his obligations by abuse of the law, then other solutions would have to be found. Indiscriminate execution against any property assets of a State did not seem to be an approach likely to command consensus.

42. As to article 24, he endorsed the suggestion made by several States to establish some order regarding service of process: there was no reason why it should not be done exclusively through diplomatic channels, which were available even if no diplomatic relations were maintained. Service of process through diplomatic channels would guarantee in every case that the foreign ministries of the States concerned were notified of action pending and could take appropriate steps within their own countries to bring about an extrajudicial settlement of a dispute by mutual agreement that would meet the concerns of all sides. As to the reliability of transmittal by post, personal experience showed that some doubt was justified.

43. He was not quite sure about the actual outcome of the modification of article 25, but it would be useful if the comments made by States on default judgments were duly taken into account, regardless of how such judgments were transmitted. Documents should not simply be assumed to have been received.

44. The title of article 28 did not entirely correspond to its content. The actual point was not non-discrimination, but the legalization of State practice that diverged from the rules of the future convention. That, however, would call into question the purpose of codification and would justify unilateral and divergent regulations. Article 28 was not needed to cover agreed or reciprocal extensions or limitations of immunity. States were always free to make such arrangements, as could be seen from the fact that almost all exceptions began with the phrase "Unless otherwise agreed . . .". It therefore seemed that the article could be dispensed with.

45. Mr. McCAFFREY said that Mr. Bennouna's suggestion concerning periodic review and revision of the future convention merited serious consideration. It was clear that the draft was still taking shape and intensive discussion was still required both in the Commission and in the Drafting Committee.

46. The remarks made by Mr. Tomuschat (2119th meeting) had covered most of the points he himself had wished to raise about articles 12 and 13. Article 12 was necessary. State practice in the matter did exist: while the United States *Foreign Sovereign Immunities Act of 1976* did not have separate provisions on contracts of employment, such contracts were included in the Act's commercial activities exception clause. Contracts of employment were an exception recognized in the legislation of several countries, in the 1972 European Convention on State Immunity and in the decisional law of a number of States.

47. Mr. Tomuschat had adverted to a case involving a radio and telegraph operator, and he, too, knew of a similar case. It had involved a Swiss switchboard operator who had worked at the United States Mission in Geneva for some 20 years, but who, owing to changes in working conditions and work requirements, had decided that she did not wish to remain in the Mission's employ. Upon leaving, she had contended that she was entitled to certain separation benefits. They had been denied, and the subsequent dispute had ended up in the Swiss courts, which had found that the United States could not invoke immunity. In making its decision, the court had actually referred to the proceedings of the Commission and to statements by some of its members.

48. He wished to re-emphasize Mr. Tomuschat's point that diplomatic protection was in effect unavailable in such cases: the same was true for cases arising under article 13. For example, the case now before the ICJ involving the requisitioning of an Italian-based subsidiary of a United States company had originated in the 1960s and had been winding its way through the Italian courts ever since. Exhaustion of local remedies had been required, there had been the inevitable bureaucratic delays, and so forth. The claim, which was worth millions of dollars, had thus taken 20 years to be espoused. Normal contract-of-employment claims and tort claims under article 13 were certainly not of such magnitude and in all likelihood would simply not be espoused. Individuals who were aggrieved by the actions of States must, as a matter of international human rights law, have some effective recourse available to them.

49. The Special Rapporteur had proposed deleting the second territorial requirement under article 13, but the best course would be to retain it, otherwise the door might be opened to a profusion of transfrontier tort cases. As a matter of fact, the non-commercial tort exceptions to the United States *Foreign Sovereign Immunities Act of 1976* had given rise to a number of suits for recovery for injuries resulting from transfrontier torts, notwithstanding the requirement in the Act that the injury or damage must occur in the United States, and despite the statement in the legislative history of the Act that the tortious act or omission must also occur in the United States.

50. The Special Rapporteur had remarked in his oral introduction (2114th meeting) that *Letelier* v. *Republic of Chile* (1980) appeared to be an exceptional case, but that was not true. Such suits might not be as numerous as those arising out of the commercial activities exception, but they did exist, and they caused problems with respect to the defendant State. In the past five or six years, at least two cases concerning Argentina had been brought in the United States: the *Siderman* case, involving alleged confiscation of property and human rights violations in Argentina, and the *Amerada Hess* case, concerning a vessel that had strayed too close to the war zone during the Falklands (Malvinas) conflict and had been bombed. In the latter case, the bomb had not exploded, but had remained in the hold, and it had been necessary to scuttle the ship. There had been cases involving Mexico as well—one arising out of an oil spill in the Gulf of Mexico which had damaged the Texas shoreline, and another in which a wrongful death suit had been brought against Mexico for alleged negligence in the transport of prisoners in the context of a prisoner-exchange treaty.

51. In a number of cases, the defendant Government had defaulted. As other members of the Commission had pointed out, making an appearance in a proceeding involved expenditure to retain an attorney, etc. But default also had its dangers: the damages awarded had often been in millions of dollars. Some countries, after encouragement from the United States Department of State, had entered an

appearance to request that the default judgment be reopened and had succeeded in having it overturned. The entire problem led him to believe that the Commission should consider specifically stating, perhaps in article 25 or in the commentary thereto, that the court must *ex officio* determine that the relevant provisions had been complied with prior to rendering a judgment. That would obviate the situation that frequently arose in the common-law system, where the mere presentation of a brief by a plaintiff, and failure of the defendant to submit one, were enough to decide a case in favour of the plaintiff.

52. In his second report (A/CN.4/422 and Add.1, para. 21), the Special Rapporteur quoted the commentary to article 13 (formerly article 14), which stated (para. (2)): "This exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*. . . ." That was true to a certain extent, but there had been something of a revolution in private international law whereby it was no longer possible to assume that the law of the place where the harm had been committed would be applied. In the United States, many states used interest analysis or the most significant relationship approach to determine the applicable law. In Europe as well, the *lex loci* rule did not apply strictly to all tort cases. The statement he had just cited should be interpreted to mean that the *lex loci delicti commissi* included the rules of the forum State on the choice of law; it should not be construed as referring only to the local law of the forum State.

53. The Special Rapporteur had perhaps raised the possibility of confining article 13 to traffic accidents because awards of very high damages, especially in the United States, were a major source of irritation. It was a commendable effort to address the problem, but it did not do enough to give an aggrieved individual meaningful recourse, and the Commission should give further consideration to the matter. The advantage of confining the article's application to traffic accidents was that it was possible to incorporate the requirement that the individual be insured, and the insurance would then cover the liability.

54. The Special Rapporteur's proposal for a new paragraph 2 of article 13 (A/CN.4/415, para. 143), to preserve the rules concerning State responsibility, was unnecessary. No problems along those lines had arisen in State practice; nevertheless, the question might be looked into in a subsequent report.

55. Article 14 should indeed be simplified. It had rightly been pointed out that the article took too much account of the common-law system and its peculiar ways of referring to property. The Special Rapporteur's recommendations for streamlining paragraph 1 (*c*) to (*e*) (*ibid.*, paras. 152-154) were constructive. Yet the problems dealt with in those subparagraphs were practical ones and should not be entirely ignored. The fact that a State claimed to have an interest in a property, perhaps because, under its law, real property reverted to it, should not prevent a court from continuing with a proceeding and determining the rights and interests of individuals over property or assets. As for paragraph 2, he shared the view that the Commission should consider reformulating or deleting it.

56. Articles 15 to 17 were, he was convinced, essential components of the draft. As to article 18, the term "non-governmental" should be deleted, otherwise it would imply that State vessels were immune if used for commercial government service. Mr. Mahiou (2119th meeting) and other members had suggested that new formulations should be sought. Mr. Roucounas had drawn attention to the terms used in the 1982 United Nations Convention on the Law of the Sea. Personally, however, he believed that a reference to "commercial purposes" would suffice.

57. With regard to the proposed new paragraph 1 *bis* of article 18 (A/CN.4/422 and Add.1, para. 26), it did not seem necessary to provide specifically for a particular system. In that connection, his remarks on the proposed new article 11 *bis* (2117th meeting) could be applied to paragraph 1 *bis* of article 18 as well. He agreed that there was no need to cover State aircraft in the draft, but he could not concur with the Special Rapporteur's statement (A/CN.4/422 and Add.1, para. 31) that there was no uniform rule of customary international law concerning the immunity of State-owned or State-operated aircraft. One could indeed discern that a rule had emerged in that area: it was closely related to those in the relevant conventions and analogous to rules governing State vessels.

58. Article 19 was extremely important in view of the increasing use of arbitral clauses in contracts between States and State entities on the one hand, and individuals on the other. As noted in the commentary to the article (formerly article 20)[10] and pointed out by members, it dealt with supervisory jurisdiction over arbitration proceedings. The necessity of such an article had been illustrated by the *Pyramids* case, referred to by Mr. Mahiou and Mr. Reuter. Moreover, it was essential for the article to spell out quite clearly that State immunity could not be invoked in a proceeding to enforce an arbitration agreement.

59. On the question whether article 19 should refer to recognition and enforcement of arbitral awards, the previous Special Rapporteur had taken the view that all questions of recognition and enforcement would come under part IV of the draft, and that part III would deal only with immunity, or lack of immunity, from jurisdiction. Since article 21 spoke of "any" measures of execution, it presumably covered measures of execution or enforcement of arbitral awards. But the Commission might wish to address the question more directly and expressly provide for recognition and enforcement of arbitral awards somewhere in the draft, perhaps in article 19 or article 21. Some countries, including the United Kingdom and the United States, did not require a connection between the property against which enforcement was sought and the cause of the action or object of the claim in enforcing arbitral awards. That practice was in line with the Special Rapporteur's thinking about deleting the requirement in article 21 (*a*) that the property should have a connection with the object of the claim.

60. Concerning the expressions in square brackets in article 19, he greatly preferred "civil or commercial matter" to "commercial contract". There was no reason to narrow down the situations in which the court could exercise supervisory jurisdiction. After all, the State had agreed to arbitration, and that agreement should not be illusory: it should be binding on and enforceable by both parties to the agreement.

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[10] *Yearbook . . . 1985*, vol. II (Part Two), pp. 63-64.

61. Lastly, article 20 on nationalization was not strictly necessary. If it was to be kept, however, it should be moved to part V of the draft.

62. In his opinion, the Commission should reserve time at the next session for careful consideration of articles 11 to 20, as well as of parts IV and V of the draft, especially in view of the many important suggestions for amendments made by the Special Rapporteur and by Governments.

63. Prince AJIBOLA congratulated the Special Rapporteur on his brilliant introduction of his reports on a most difficult topic.

64. Paradoxically, he shared the view of members who had called for a cautious approach to the topic and of those who had urged that the Commission's work be speeded up. The topic was one of great importance in international relations, with regard to various types of transactions. The subject should therefore be approached with prudence. Yet the present position was that many countries objected to the actions of certain forum States which undermined their sovereignty. The well-established rule of international law, *par in parem imperium non habet*, was being disregarded by those forum States and the ships of other States were being attached, the accounts of their central banks or national banks were being frozen with impunity and execution was being levied against their assets, including buildings and aircraft. For all those reasons, a definite conclusion must be reached on the topic before the situation degenerated any further. In short, the Commission should make haste slowly, so as to ensure that the final draft stood the maximum chance of commanding general approval by States.

65. The principle of the jurisdictional immunity of States and their property was universally accepted and recognized in international law. It flowed logically from the sovereignty, and the sovereign equality, of States. As so aptly stated by the Government of Bulgaria in its comments and observations, those principles provided for the "non-submission of one State to the jurisdictional authority of another" (A/CN.4/410 and Add.1-5).

66. He did not concur that there were two schools of thought regarding the jurisdictional immunity of States, namely an absolute theory and a restrictive theory of immunity. The truth of the matter was that there existed only one principle. Of course, every rule had some exceptions to it, and the so-called restrictive or functional postulate constituted a mere expression of possible and practical exceptions to the principle of immunity which had emerged in the recent past. As pointed out by the Government of the German Democratic Republic, the Commission's task was "to work out a set of rules which, taking into account the legitimate interests of all States, will put an end to what has been an increasing number of attempts in the last few years to minimize the immunity of States and their property through unilateral acts" (*ibid.*). Hence the true position was that unilateral acts by certain States were in fact negating the rules of international law on State immunity to the detriment of some of the world's poorer countries, especially those of the third world. The restrictive or functional theory was being propagated and encouraged by a few, mostly industrialized, countries, and as a consequence the sovereignty of third-world States was being rendered purely nominal.

67. As already pointed out, only a few States had submitted comments on the draft articles. Such a small number of replies could not be regarded as a consensus of opinion on the part of the Members of the United Nations. It should also be borne in mind that a number of the States which had replied had expressed views clouded by the provisions of the 1972 European Convention on State Immunity. It was essential to remember that the draft articles now under discussion were much greater in dimension than the 1972 European Convention.

68. He was certainly not oblivious to the question of *acta jure gestionis*, but unfortunately it was *acta jure imperii* that were being marginalized, and in some cases one wondered whether anything was left of them. His own country had recently been the victim of such a situation. In the early 1970s, after the civil war, the needs of national reconstruction and rehabilitation had led the Nigerian State to purchase large quantities of cement, purchases which had been treated as *acta jure gestionis*. Consequently, the country's assets had been attached in many parts of the world and the adverse effects were still being felt. A typical example in that connection was provided by *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977), a case in the United Kingdom to which reference had already been made during the discussion. That issue would arise also in connection with the question of commercial contracts. By and large, all States recognized the jurisdictional immunity of foreign States and their property, with exceptions in only a very few instances—exceptions which could not be extended unilaterally or subjectively. He therefore welcomed the fact that the Special Rapporteur had never allowed restrictive theories to override or confuse his conceptualization of the aim and object of the present topic, and had adopted a pragmatic and realistic approach.

69. Article 1 was acceptable in substance, but he agreed with the proposal by Australia to clarify the text by replacing the words "a State" and "another State" by "a forum State" and "a foreign State", respectively. His own suggestion would be to reword the article along the following lines:

> "The present articles apply to the immunity of one State and its property (referred to herein as the 'foreign State') from the jurisdiction of the courts of another State (referred to herein as the 'forum State')."

That clarification, made from the outset in article 1, would remove all the uncertainties and ambiguities in other articles, such as articles 6, 7 and 11.

70. The Special Rapporteur's proposal to merge articles 2 and 3 in a single new article 2 entitled "Use of terms" (A/CN.4/415, para. 29) was acceptable. The definition of the term "court" in paragraph 1 (*a*) was wide enough to include all State judicial organs and conferred very wide jurisdiction. It could, however, be interpreted to include both the civil and the criminal jurisdiction of courts. His suggestion would be to confine the provision to civil cases only. Accordingly, the words "entitled to exercise judicial functions" should be amended to read: "entitled to exercise judicial functions in civil matters". That proposal was in line with the comment made by the German Democratic Republic (A/CN.4/410 and Add.1-5) that the definition of the term "court" should include a precise explanation of the expression "judicial functions".

71. As to the definition of a "commercial contract", there had not been any comments on the "nature" criterion, but objections had been raised to the "purpose" test. In his own view, both criteria should be retained. In the example he had cited earlier of the purchase of cement, the purpose of the purchase had not been commercial but had related to the welfare of the State, in other words it had been a purpose connected with the public interest. There was an entity in his country which purchased commodities from abroad and was in part commercially motivated, namely the Nigerian National Supply Company Limited. He therefore endorsed the comments made by Mexico and Spain (*ibid.*) on paragraph 1 (*b*) of the adopted article 2 and paragraph 2 of article 3, respectively, as well as the Special Rapporteur's recommendation to retain the provision now contained in paragraph 3 of the new article 2. Similarly, the Federal Republic of Germany had rightly said (*ibid.*) that the draft articles should make provision for federal States.

72. It had been suggested, by the United Kingdom among others, that specific reference should be made in article 4 to the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and other relevant treaties on diplomatic law. In that respect, he would point out that not all of those instruments had been ratified by all States. Actually, the 1961 and 1963 Conventions, as well as the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, made express provision for the jurisdictional immunity of diplomatic missions, consular posts, special missions, international organizations and international conferences. Generally speaking, however, he was satisfied with the wording proposed by the Special Rapporteur (A/CN.4/415, para. 50).

73. He also supported article 5, a provision on non-retroactivity which was customary in drafts of the present type. Nevertheless, the Government of Mexico had pointed out that some of the articles should apply retroactively because they set forth current principles of international law.

74. Article 6 was a core provision of the whole draft. The words "and the relevant rules of general international law", between square brackets, should be deleted. He was opposed to any suggestion that the draft should be made subordinate to the "general rules of international law", something which could open the door to restrictions on the principle of State immunity. Under its statute, the Commission was called upon to work on the progressive development and codification of international law. In the work in hand, care should be taken not to weaken all of the draft articles by making them subject to the principles of general international law.

75. The Special Rapporteur's reformulation of paragraph 1 of article 7 (*ibid.*, para. 79) removed the ambiguities in the adopted text. Paragraphs 2 and 3 should be transferred to the article on the use of terms, as should the provisions of article 11. As for the title of part III of the draft, it should be "Exceptions to State immunity", not "Limitations on State immunity".

76. Lastly, he had an open mind on the proposed new article 11 *bis* (*ibid.*, para. 122), for the same reasons as those given by Mr. Al-Baharna (2118th and 2119th meetings).

77. The CHAIRMAN, in reply to a question by Mr. BARSEGOV, said that articles 12 to 28 would be discussed at the next session.

The meeting rose at 1.05 p.m.

2121st MEETING

Tuesday, 20 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*)* (A/CN.4/384,[1] A/CN.4/413,[2] A/CN.4/423,[3] A/CN.4/L.431, sect. B)[4]

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

Articles 1 to 17[5] (*concluded*)

1. Mr. BARBOZA (Special Rapporteur), summing up the debate and replying to Mr. Reuter's question (2110th meeting), "What's it all about?", said that, first, it was about fulfilling the Commission's mandate from the General Assembly: to prepare draft articles on international liability for the injurious consequences of acts not prohibited by

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* Resumed from the 2114th meeting.

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

[5] For the texts, see 2108th meeting, para. 1.