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Summary record of the 2235th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

graph 2 of the article was, however, both necessary and acceptable, for when it came to large purchases, international organizations should be entitled to claim and to obtain a refund for indirect taxes.

20. Lastly, it would be of particular assistance at the next session of the Commission if the Special Rapporteur could prepare a brief outline of the remainder of the topic.

The meeting rose at 11.20 a.m.

2235th MEETING

Thursday, 4 July 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam.

Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/438,[1] A/CN.4/439,[2] A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 *and*

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22[3] (*continued*)

1. Mr. PELLET said that the consideration of the fifth and sixth reports on relations between States and international organizations (A/CN.4/438 and A/CN.4/439 respectively) had not sparked much reaction in the Commission. That certainly did not imply any criticism of the work of the Special Rapporteur, Mr. Díaz González, whose two reports contained a wealth of material based on a meticulous study of practice. The reasons must be sought elsewhere and he could suggest two.

2. First, many members of the Commission did not see the need for the topic because the subject-matter was already covered to a large extent by many conventions relating in particular to each international organization or category of international organizations and it was unlikely that States parties and the international organizations concerned would denounce existing agreements in order to replace them by a future convention. At first sight, therefore, it was difficult to understand the scope of the exercise. However, careful consideration of the reports showed that, although such conventions did exist, their wording was quite different and perhaps an attempt should be made to identify their common denominator, but that did not necessarily mean drafting a convention. In that connection, he welcomed the statement by the Special Rapporteur at the end of his fifth report that he was concerned not to prejudge the final form of the draft articles. However, it was not certain that the existing conventions covered every aspect of the problems which might arise. He regretted that the Special Rapporteur was a bit too cautious in dealing in the articles he was proposing with the "traditional" aspects of the subject, but avoiding newer aspects which probably involved progressive development. He was, for example, not very forthcoming about the use of satellite telecommunications or the highly sensitive problems of privileges and immunities to which the likely increase in peace-keeping operations would give rise. In such new fields, however, it would be well worthwhile to extend and supplement existing instruments by means of treaty provisions. He also thought that it would be useful for the Commission to look into the problem of the settlement of disputes which might arise and which were not given much attention in existing instruments, such as in article VIII of the Convention on the Privileges and Immunities of the United Nations.

3. The second reason for the unease felt by the members of the Commission was that the discussion of the question was probably more within the competence of the Drafting Committee than that of the Commission as a whole. It was very difficult to express general ideas on the topic at such a late stage in the discussion and drafting process. If only to indicate his own interest in the topic and in the work done by the Special Rapporteur, he wished nevertheless to draw the Commission's attention to two points which he had already touched on the previous year, although from a slightly different angle.

4. The first was that, in his view, the Special Rapporteur was rather too generous towards international organizations and too confident that they would not abuse the quite substantial privileges and immunities which they tended to be given. He was less certain than the Special Rapporteur that an international organization should be allowed to decide whether or not to make use of exceptional means of communication. Of course, States should not tell it how to act, but its conduct must

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[1] This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[3] For texts, see 2232nd meeting, para. 2.

be in conformity with certain legal principles. If exceptional means of communication were not necessary for the organization's activities, it should not only be authorized to waive their use, as stated in the fifth report, but should be duty-bound to do so. In the event of a dispute, there should be methods of settlement to ensure that an international organization did not abuse privileges which must be functional in nature. With regard to the inviolability of the communications of international organizations, the fifth report stated that: "there could be no more favourable system than that which States agree to apply to each other". He shared that view, but the real problem was whether it was right to go as far as the Special Rapporteur seemed to be recommending in the case of international organizations. It must not be forgotten that international organizations were not States, but instruments in the service of States.

5. The second point he wished to stress was that there was a need for a functional approach to the topic; that opinion was apparently shared by most of the members of the Commission and by the Special Rapporteur himself in principle, but perhaps only in principle. That idea was reflected in article 22 which was proposed in the sixth report and according to which: "the terms 'official activity' or 'official use' shall mean those relating to the accomplishment of the purposes of the international organization".

6. By placing that provision at the end of part V of the draft articles, however, the Special Rapporteur seemed to be implying that the meaning would be different in other parts, whereas, in his own opinion, the definition applied to the draft as a whole. It was not sufficient, moreover, and it should be added in general terms that all the privileges enjoyed by international organizations were granted to them in the context of their official activity, as defined. He was thus not sure that the Special Rapporteur had drawn all the necessary consequences from that basic principle. His doubts had been caused by the proposed wording of paragraph 2 of article 15, which defined the official correspondence and official communications of an organization as being all correspondence and communications relating to an organization and its functions. In the French text the verb *concerner* had been used, however, they could not just "concern" the organization; they also had to be necessary to the achievement of its purposes or at least they had to "relate to them" (*s'y rapporter*), to use the wording of article 22. Moreover, by stating in his fifth report that "All communications of international organizations are considered official in so far as the international organizations themselves confer this character upon them", the Special Rapporteur was departing quite radically from the functional approach. It was not certain that an organization could arbitrarily "confer" an official character on its correspondence or communications, which "objectively" had that characteristic if they really related to the purposes of the organization. That was perhaps only a question of terminology, but, if so, the wording used was inappropriate.

7. He was nevertheless not trying to defend the interests of States at all costs against international organizations. Their interests had to be balanced and, in that connection, he felt that article 17 gave too much weight to the interests of the State in the sense that the principle it enunciated was not counterbalanced by the parallel principle of the protection of the interests of the international organization itself. That principle should be combined with the principle that States must respect and promote the objectives of international organizations.

8. In conclusion, he had two comments which related more to the form than to the substance of the proposed draft articles. The words "in force" in the expression "multilateral conventions in force" in draft article 16 were ill-chosen, since those conventions might be in force without necessarily being binding on all States. If the draft became a convention, States which ratified it would be obliged to accept other treaties which might not be to their liking and, in order to avoid having to do so, they might refrain from becoming parties to the proposed convention. In any event, the end result would be unfortunate. His second comment related to the proposed wording of draft article 21, paragraph 1, which, although taken from or inspired by existing instruments, did not seem very well chosen. It was not appropriate to state that international organizations would not, in principle, claim exemption from consumer taxes. In any case, the expression "in principle" was unnecessary, since organizations either did or did not have the right to claim exemption. Moreover, why should those organizations "claim" a tax exemption? Either they had that right and could therefore exercise it or they did not have it and therefore had no reason to claim anything at all. Those problems were, however, within the competence of the Drafting Committee, which would consider them as and when appropriate, if, as he hoped, draft articles 13 to 22 were referred to it.

9. Mr. PAWLAK said he joined other members of the Commission in congratulating the Special Rapporteur on his fifth and sixth reports on relations between States and international organizations, which contained some very useful and thought-provoking material. He would be grateful, however, if the Special Rapporteur could present an outline of the final set of articles envisaged for the topic so that the Commission might form a general idea of the entire text of the convention or international instrument, to which its work might lead.

10. At the Commission's preceding session, he had already had the opportunity to express his views on the topic under consideration and to emphasize the growing importance of international organizations and of multilateral diplomacy in general in contemporary international relations. He had also said that he supported the main criterion applied by the Special Rapporteur: that the privileges and immunities granted to international organizations and to their staff should reflect only their functional requirements.[4] He now wished to make some specific comments on articles 12 to 22 proposed by the Special Rapporteur in his two latest reports.

11. Article 12 as proposed in the fifth report was based on similar provisions in existing legal instruments and reflected the main concerns with regard to the required

[4] *Yearbook ... 1990*, vol. I, 2177th meeting, para. 29.

inviolability of the archives and documents of international organizations. In his view, two further questions must be taken into consideration. First, archives should include not only documents and other means of conveying information and the necessary files and furniture, but also the premises where they were located, which must have greater protection than other premises of international organizations. Secondly, it would be advisable to consider adding a general description to paragraph 2 of all ways and means of storing and transmitting information rather than giving a list of the various kinds of documents, which in any case would not be exhaustive. Furthermore, he was not convinced by the comparison the Special Rapporteur had drawn between the situation and needs of international organizations and those of States. In his view, international organizations were created by States for particular purposes and their status was defined and limited by States whose tools they were. It was therefore overstating the case to say, that "Like States, international organizations are in permanent communication with member States and with each other", or that "Like States, international organizations are subjects of international law and therefore enjoy inviolability of their archives". International organizations had the right to inviolability of their archives because, without it, they would not be able to fulfil their functions as defined for them by States in documents such as the Charter of the United Nations and the Convention on the Privileges and Immunities of the United Nations.

12. Turning to the question of the diplomatic bag and the diplomatic courier, he endorsed the position of the Special Rapporteur, who had suggested that article 1 should contain an additional paragraph 2 relating to them. In his view, there was a great deal of similarity between the legal status of diplomatic couriers and bags of international organizations and that of diplomatic bags and couriers of States. International organizations should at least enjoy the same privileges as States in that regard.

13. With regard to draft articles 18 and 22 as proposed in the sixth report, he said that he agreed with the Special Rapporteur's general conclusion that:

> ... international organizations should, and do enjoy, in the same way as States and the diplomatic missions that represent them, the fiscal immunities indispensable to the effective performance of their official functions.

He would therefore be in favour of the deletion of the last part of article 18 and, if necessary, of the drafting of another article to deal with the obligation of international organizations to cover the costs of public utility services.

14. He had no general comment on article 19 except that paragraph 2 might be unnecessary, since it actually related more to the activities of individuals working for an international organization than to the organization itself.

15. Article 20, on exemption from customs duties, was very important and very much needed. However, the sensitivity of States in that regard must be borne in mind and it might be helpful to use even stronger wording to make it clear that only publications intended solely for official use benefited from the exemption. He also questioned whether it was really necessary to state that international organizations were exempt "in accordance with the laws and regulations promulgated by the host State". That might lead to abuses, since Governments might adopt such provisions without consulting international organizations, thereby drastically limiting their privileges in that area.

16. He was likewise concerned that the words "in principle" contained in article 21, paragraph 1, might lead States to interpret that provision in various ways and to accord different treatment to international organizations. Furthermore, while international organizations were normally subject to consumer taxes or sales taxes on movable property, with the possible exception of costly modern technical equipment and official vehicles, they should be exempt from that obligation in respect of immovable property because, in such cases taxation would represent a factual limitation on the exercise of their essential functions by the host country, which would thus also be benefiting from the budget contributions paid by the member States to those organizations. He therefore proposed that any reference to the obligation of international organizations to pay taxes on immovable property transactions should be deleted. Lastly, like Mr. Pellet, he considered that article 22 did not belong in part V of the draft, since it enunciated a general principle.

17. Mr. AL-BAHARNA said that international law had long recognized the inviolability of the archives of diplomatic and consular missions. Like States, international organizations were subjects of international law and, accordingly, their archives should also enjoy inviolability. There did not seem to be any reason not to extend the rule in question to international organizations. Moreover, the inviolability of archives was of practical significance to international organizations: if their archives were not confidential, those organizations might not be able to function effectively in international relations. In his fifth report, the Special Rapporteur rightly stated that:

> Respect for privacy and the preservation of secrecy constitute the very basis of independence of international organizations, to which they must be entitled if they are to fulfil properly the purposes for which they were established.

It was therefore hardly surprising that the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies and the various headquarters agreements included provisions on the inviolability of the archives of the organizations concerned.

18. The principle of the inviolability of archives required States to protect archives from any external interference. The principle protected international organizations against any order for discovery of documents in the same way as it protected diplomatic missions. The statement by C. W. Jenks, which was quoted in the fifth report, according to which "no order for discovery of documents can be made against an international body corporate which is entitled to inviolability of archives" seemed to be a logical corollary of that principle. It was thus very satisfying to learn, as pointed out by the Special Rapporteur in his fifth report, that "the United Nations interprets strictly the principle of the absolute inviolability of its archives".

19. In respect of draft article 12, as proposed by the Special Rapporteur in that report, he was concerned that the words "in general" in paragraph 1 might give the impression that the documents of international organizations were not always inviolable. He therefore suggested that those words should be deleted. He also proposed that the words "to mean" in paragraph 2 should be replaced by the words "to include". He endorsed the Special Rapporteur's decision to include the definition of archives in the body of the draft article itself instead of in the section on the definition of terms. Except for those drafting amendments, he supported the text of article 12.

20. In chapter III of his fifth report, the Special Rapporteur surveyed the law and practice concerning the publications and communications of international organizations and presented a fairly well rounded and balanced picture of the matter, which called for only a few comments. First, it was clear that publications constituted the lifeblood of international organizations, since it was through publications that international organizations carried out their daily functions. Consequently, international organizations should enjoy freedom of publication. By the same reasoning, they should be exempted from any duties or restrictions whatsoever and he was somewhat dismayed to learn from that report that some countries levied import duties on the publications and documents of international organizations and that there were sometimes restrictions or long delays in clearing them through customs. Arrangements should be made which would avoid delays of that kind and the imposition of import duties on the publications of international organizations.

21. Secondly, in respect of communications, international organizations were generally accorded treatment which was not less favourable than that accorded to the official communications of diplomatic missions. That was clear from the provisions of the multilateral treaties on the privileges and immunities of international organizations cited in the fifth report. However, that report also stated that "The scope of the obligations assumed by the United States towards the United Nations is much more vague". The Commission should thus consider eliminating the "vagueness" in that regard so that the obligations assumed by the Government of the United States of America would be in conformity with the norms of article III, section 9 of the Convention on the Privileges and Immunities of the United Nations.

22. With regard to the means of communication of international organizations, it was evident from the applicable multilateral treaties that their position was identical to that of diplomatic missions. International organizations also could use codes, the diplomatic bag, couriers and telecommunications. Although the majority of the specialized agencies did not use codes, their right to use them could not be denied, as pointed out by the Special Rapporteur.

23. He took it that, in future, the status of the diplomatic bag and the diplomatic courier in international organizations would be governed by optional protocol two to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier relating to the status of the courier and the bag of international organizations of a universal character.[5] Accordingly, the proposed draft articles on the status of the diplomatic bag would apply only if the State concerned was a party to that protocol. That situation might not be altogether satisfactory. On that issue, the Special Rapporteur stated in his fifth report that:

> The International Law Commission did not consider it appropriate ... to close the loopholes in the Vienna Convention in this area. After extensive discussions, it decided to include the exception to the principle, but only in the case of the consular bag, in the same terms as this is provided for in article 35, paragraph 3, of the Convention on Consular Relations.

As a result, the question whether a diplomatic bag could be opened in certain circumstances remained unanswered. In that connection, he drew attention to the opinion of the Legal Counsel of the United Nations cited in the fifth report. That opinion related to the status of the diplomatic bag in international law, but not to that of the pouch of the United Nations. It was possible that the status of the pouch was analogous, but the question whether the pouch of an international organization was inviolable could not be settled conclusively by reference to the status of the diplomatic bag. In that particular case, it was up to the Commission to define the legal status of the diplomatic bag of international organizations.

24. Draft articles 13 to 17, proposed by the Special Rapporteur in his fifth report, called for several comments.

25. He found the text of article 13 on free circulation and distribution of the publications of international organizations acceptable in principle. He nevertheless wondered whether it would unequivocally cover high-technology materials which were currently used in modern means of communications. If not, it might be desirable to refer to that category of materials in appropriate wording in the draft article.

26. He agreed with the first sentence of article 14, since it was in keeping with the corresponding principles of both the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. He nevertheless had some difficulty in accepting the second sentence, which required the consent of the host State for the installation or use by an international organization of a wireless transmitter. Since the two above-mentioned Conventions did not provide for such a restrictive condition, the Commission could, on the basis of those precedents, consider eliminating it.

27. He welcomed the fact that draft article 15 sought to broaden the protection accorded to international organizations. He nevertheless proposed that paragraph 2 of draft article 15, which defined the expression "official correspondence and official communications", should be deleted and that the draft article should be reformulated to read: "The official correspondence and other official communications relating to an international organization and its functions shall be inviolable."

[5] See 2232nd meeting, footnote 4.

28. Although he agreed in principle with the text of draft article 16, he questioned whether it was necessary to include the phrase "under the provisions of the multilateral conventions in force governing matters relating to the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", which was found neither in the Convention on the Privileges and Immunities of the United Nations nor in the Convention on the Privileges and Immunities of the Specialized Agencies. If the Commission considered that there should be a reference to some standard, he suggested that the phrase in question should be replaced by the words "under international law". Moreover, as the law stood at present, there was no universally approved multilateral convention on the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The draft articles on that topic were still in embryonic form. That was why it was safer to refer to international law.

29. In his view, article 17 was more restrictive than the corresponding provision of the Convention on the Privileges and Immunities of the Specialized Agencies. For the reason stated previously, he preferred that provision to the proposed draft article.

30. The sixth report, which was as illuminating and comprehensive as the fifth report, called for a few general comments.

31. The first related to the rationale for fiscal immunities. Why should international organizations be accorded such immunities? The answer to that question had been provided by the Committee of the United Nations Conference on International Organization, which was reproduced in the sixth report, and which stated:

> ... if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or take any measure the effect of which might be to increase its burdens financial or otherwise.[6]

That was the main reason why international organizations should benefit from fiscal immunities. Without them, international organizations might not be able to perform the functions for which they had been established.

32. Secondly, with regard to the extent of fiscal immunities, it was important to know precisely which taxes could be imposed on international organizations and what type of exemptions should be accorded to them. Although international law did not answer that question unequivocally, Article 105, paragraph 1 of the Charter of the United Nations provided a general yardstick for regulating the extent of fiscal immunities of international organizations. It read:

> The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

The key words of that provision were "as are necessary for the fulfilment of its purposes". The Commission should bear that in mind in formulating the legal rules relating to fiscal immunities.

33. His third comment related to the relative importance of the various sources of international law. There were, for example, international conventions containing uniformly applicable rules on the subject, headquarters agreements between international organizations and host States specifying the fiscal immunities to be enjoyed by the organizations; and judicial decisions of national courts interpreting the law on the topic. Those sources did not all have the same normative character and significance. The Commission should therefore be careful in deriving rules from those sources and international conventions should naturally be given pride of place. Article 105 of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies should constitute the primary sources; the other sources could be considered as complementary. The cardinal importance of Article 105 in that connection had been confirmed by the opinions of the Legal Counsel of the United Nations, cited in the Secretariat's supplementary study on the practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities.[7]

34. In that light, while the wording of draft articles 18 to 22 was in general satisfactory, there was none the less room for drafting changes. Article 18, for instance, laid down the principle that the property and income of an international organization intended for official activities were exempt from direct taxation, but questions had arisen as to the precise meaning of "direct" and "indirect" taxes and of "official activities". The Commission might wish to consider explaining the meaning of those terms in the commentary.

35. With regard to article 19, he would like to have some clarification as to the distinction between the expression "for public utility services", in article 18, and the expression "for specific services rendered", in article 19. Unless those two expressions referred to quite distinct services, they should be harmonized. He also wondered whether the benefit of article 19 extended to the premises of an organization which were not used for official purposes and functions. In his view, such an extension might not be warranted under the terms of Article 105 of the Charter of the United Nations.

36. Draft article 20 appeared to conform to the rules laid down in international conventions on the privileges and immunities of international organizations. From time to time, however, difficulties had arisen with regard to the meaning of the term "official use" and fears had also been expressed that international organizations might abuse their privileges. That was apparent from the sixth report. Accordingly, it might be desirable to explain fully the meaning and scope of the expression "official use" in the commentary and to indicate how the abuse of privileges by international organizations could and should be prevented. If necessary, a new paragraph could be added to article 20 to indicate the measures of

[6] See *Documents of the United Nations Conference on International Organization*, San Francisco, 1945, vol. XIII, p. 705.

[7] *Yearbook ... 1985*, vol. II (Part One), Addendum, pp. 151 *et seq.*, document A/CN.4/L.383 and Add. 1-3.

control a State could exercise to prevent the abuse of privileges by international organizations.

37. He welcomed the text of article 21 except for the word "large" in paragraph 2. The corresponding provisions in the conventions on the privileges and immunities of the United Nations and the specialized agencies used the word "important", which was preferable, since it provided for a qualitative test.

Organization of work of the session (*concluded*)*

[Agenda item 1]

38. The CHAIRMAN recalled that, when the Commission had organized its work at the start of the session, it had been envisaged that the Drafting Committee would devote some time to the topic of State responsibility. In the interests of efficiency, however, he suggested, on behalf of the Bureau and with the agreement of the Special Rapporteur, that the Commission should devote some time to the topic in plenary. The report of the Special Rapporteur had been distributed in a number of languages and could be introduced, for instance, at the meeting on Tuesday, 9 July.

39. The Commission had also left in abeyance the question of the action to be taken following the completion of the discussion on the seventh report on international liability for injurious consequences arising out of acts not prohibited by international law. Following consultations with the members of the Bureau, he recommended that, in the time remaining, the Drafting Committee should take up the articles on that topic which had already been referred to it. He invited members' comments on that recommendation.

40. Mr. DÍAZ GONZÁLEZ said that the Drafting Committee was currently working on the draft Code of Crimes against the Peace and Security of Mankind, which had received priority in accordance with the wishes of the General Assembly so that its consideration on first reading could be completed at the current session. The Drafting Committee had still not completed that work and it was not certain that it would be able to do so before the end of the session. He therefore wondered how the Committee could examine other articles, particularly when not all of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law had been examined in sufficient detail in plenary to be referred to the Drafting Committee. The Commission should keep to the programme of work it had adopted. He would none the less like to hear the views of the Chairman of the Drafting Committee on what was feasible for the Committee in that regard.

41. Mr. PELLET said that he shared Mr. Díaz González' concern, though only in part, since he understood that the Drafting Committee needed only a day or two more to complete its work on the draft Code of Crimes. He therefore considered that it could take up another topic. The Bureau's proposal was, however, open to question, in his view. Why should the Drafting Committee take up international liability for injurious consequences arising out of acts not prohibited by international law before State responsibility? The latter provided the framework on the basis of which liability could be considered. It would be illogical to proceed along the lines proposed by the Bureau. What was more, the debate on the seventh report on the topic showed that it was perhaps not ripe for consideration by the Drafting Committee. He therefore did not support the Bureau's proposal.

42. Mr. CALERO RODRIGUES asked the Chairman of the Drafting Committee how many meetings the Committee could allocate to international liability for injurious consequences arising out of acts not prohibited by international law.

43. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Secretary to the Commission would certainly be in a better position to give an exact reply to that question, but there were five meetings left at most. The Drafting Committee was the Commission's working body and it used whatever time was available to it to review any topic that the Commission might refer to it. The progress it could achieve depended, of course, on the topic and the draft articles it had to consider.

44. Speaking as a member of the Commission, he said that he agreed with Mr. Pellet: it would be preferable for the Drafting Committee to take up State responsibility rather than international liability for injurious consequences arising out of acts not prohibited by international law, even if the draft articles on the latter were awaiting consideration by the Drafting Committee. Without seeking to pass judgement on the relative importance of the two topics, he remembered that, before he had become a member of the Commission, he had criticized it, in the Sixth Committee of the General Assembly, for its inefficiency so far as the consideration of the topic of State responsibility was concerned. There was a risk that the same criticism might be expressed at the forthcoming session of the General Assembly.

45. Mr. CALERO RODRIGUES said it did not seem to have been taken into account that part of the five meetings that were apparently still available to the Drafting Committee would have to be devoted to the Planning Group.

46. The Drafting Committee had worked intensively at the current session and had adopted an unprecedented number of articles, but it did not really have the time to take up the consideration of such a delicate topic as State responsibility except in a very superficial way. He therefore suggested that the meetings scheduled for the Drafting Committee should be reserved for the Planning Group and for the consideration of the Commission's long-term programme of work.

47. Mr. ARANGIO-RUIZ said that, having noted that a number of members had stressed the importance of the topic of State responsibility and had proposed that it should be given priority, he felt bound to intervene as Special Rapporteur for the topic. He had long emphasized to the Chairman of the Drafting Committee and the Chairman of the Commission that the Drafting Committee should devote a number of meetings, as a matter of urgency, to the consideration of five articles in

* Resumed from the 2208th meeting.

his report which, in his view, constituted a whole and dealt with all the substantive consequences of an internationally wrongful act. He had, however, realized that the consideration of those articles would require a certain amount of time and that a brief review of them by the Drafting Committee would not be very helpful from the standpoint of the development of the law on international responsibility. He appreciated the good will which the Chairman of the Drafting Committee had shown in proposing that the topic should be taken up, but it was a very delicate subject which obviously could not be dealt with in three or four meetings and it would therefore be better to abandon the idea. As to the possibility of devoting those meetings to the consideration of the articles on international liability for injurious consequences arising out of acts not prohibited by international law, that topic was, in his view, no less important than State responsibility; those two aspects of responsibility formed part of the same monograph—and a huge one at that—of international law. The meetings in question would therefore not be enough to consider that topic any more than they would be to consider the topic of State responsibility. He would, however, leave that choice to the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law.

48. Mr. EIRIKSSON noted that the question whether the Drafting Committee should consider the draft articles on State responsibility no longer arose, the Special Rapporteur having replied to it in the negative. He would therefore return to the topic of international liability for injurious consequences for acts arising out of acts not prohibited by international law. The Commission was not giving the Drafting Committee any additional work by requesting it to consider draft articles on the topic, since those articles had already been before the Committee for a long time. The only question, in his view, was whether it was a good idea to consider them at the current stage. There was no doubt that it would be useful for the Drafting Committee at least to take stock of the situation, but it would be preferable not to reopen the debate on the matter in plenary.

49. Mr. BARSEGOV said that none of the topics before the Commission was without interest and, during the next five years, it would have the opportunity to give all the importance that it merited to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. For the immediate future, however, it would, in his view, be advisable for the Commission to give priority to State responsibility, since the principles that would be laid down and the concepts that would emerge in the matter would in fact influence the consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

50. The Drafting Committee had only a few more meetings. Bearing in mind that, whenever it took up a new topic, it had to start by clearing the ground, it would be more logical for it to devote the remaining time to the consideration of the draft articles on State responsibility. In fact, the Drafting Committee had still not worked on the topic of international liability for injurious consequences arising out of acts not prohibited by international law and, in all probability, it would have to start afresh, in view of the arrival of new members of the Commission.

51. Mr. SHI said that he attached great importance to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. For the reasons stated by Mr. Calero Rodrigues and other members, however, he considered that the Bureau's proposal that the Drafting Committee should take up the consideration of the topic was unrealistic. In previous years, no afternoon meeting had been held in the penultimate week of the session. There were added reasons for following the same course in 1991, as the Commission's report to the General Assembly was very voluminous. It dealt with three topics at length: jurisdictional immunities of States and their property, the law of the non-navigational uses of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind. The members of the Commission should have the time to study that particularly important report carefully. If the Drafting Committee was to meet to consider the topic proposed by the Bureau, that time would not be available and the discussion on the adoption of the report would suffer.

52. Mr. JACOVIDES said that he agreed with Mr. Pellet, Mr. Pawlak and Mr. Barsegov on the importance of the topic of State responsibility. He was disappointed to note that, once again, the Commission had not made any progress on a question that had been under consideration for such a long time. If he had understood correctly, the Special Rapporteur for the topic would simply introduce his report and there would be no substantive discussion in plenary. He would therefore have liked the question at least to have been taken up in the Drafting Committee. Since the Commission had a very full report to adopt at the current session and would also have to consider in plenary the question of the long-term programme of work, however, he realized, but very much regretted, that that would not be feasible.

53. The CHAIRMAN, speaking as a member of the Commission, said he had always stressed that the Commission should complete its work on State responsibility as quickly as possible. He trusted that it would be able to do so during the next quinquennium.

54. Mr. BEESLEY, after giving some technical details concerning the organization of work of the Planning Group, said that it was absolutely essential to complete the work on the topic of State responsibility, in which the Commission had been engaged for over 25 years, as quickly as possible. If the Special Rapporteur for the topic considered that the Drafting Committee did not have time to consider properly the five substantive articles he had proposed, however, he would abide by that decision. It was none the less a matter of regret to him that, on a topic of such importance, the Commission would have to be content with the introduction of the Special Rapporteur's report in plenary.

55. As to whether the Drafting Committee should start its consideration of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he suggested that the Commission should request the view of the Special Rap-

porteur on that topic. The Special Rapporteur apparently felt that the members were largely in agreement on the substantive articles that he regarded as fundamental. In that case, it should not be too difficult for the Drafting Committee to arrive at a consensus on those articles, unless they had to be redrafted. Whatever decision was taken, however, he reminded the Commission that those articles were currently before the Drafting Committee. In 1988, the Commission had referred draft articles 1 to 10 proposed by the Special Rapporteur to the Drafting Committee. In 1989, the Special Rapporteur had submitted a revised version of those articles, reduced in number to nine, and the Commission had again referred them to the Drafting Committee.

56. Since the Drafting Committee already had before it the key articles on the subject, in both the original and the amended versions, it did not seem impossible to him that the Drafting Committee could do useful work on them during its five remaining meetings.

57. Mr. MAHIOU pointed out that the Drafting Committee had an extremely heavy workload because it had to finish preparing the text of the draft Code of Crimes against the Peace and Security of Mankind, a task which was turning out to be more difficult than anticipated. If the Commission wanted to complete its consideration of those draft articles on first reading, it had to avoid reopening the debate in plenary because of flaws in the text.

58. Time for the Planning Group also had to be taken into consideration. As Mr. Barsegov had rightly pointed out, moreover, each new subject referred to the Drafting Committee required a preliminary clearing of the ground and, under those conditions, he doubted whether the Drafting Committee would be able to complete its consideration of even a single article on international liability for injurious consequences arising out of acts not prohibited by international law. It was therefore not physically possible to begin considering that subject.

59. Mr. HAYES said he agreed with Mr. Mahiou that it was better not to adopt anything at all rather than to consider only one or two articles. The Chairman of the Drafting Committee had shown great dedication in proposing that the Committee should consider State responsibility, but he shared the view of the Special Rapporteur on that topic, namely, that there was not enough time left for any real work to be done. The reason the Commission had been unable to make progress on the topic of State responsibility at its current session was that it had had to give priority to other issues on which it had been requested to focus in particular. He drew attention to a point which seemed important to him: the Commission had been invited to submit a progress report in 1991, an "overall assessment of the current status of the topic" of international liability for injurious consequences arising out of acts not prohibited by international law. How much work had been done on that report? How did the Special Rapporteur intend to prepare it? Would he be assisted in his task by a special group? Would it be adopted by the plenary and would it be included in the Commission's annual report?

60. Mr. Sreenivasa RAO said that the Commission's procedural debate might be regarded by some as a waste of time, but, in fact, it was a very important discussion which the Commission should engage in more often.

61. It was true that, at the start of the current quinquennium, he had been the first to say that the members of the Commission should not think that they had a lifelong mandate and to stress that the Commission had to carry out as much work as possible on each of its agenda items. In view of its workload, however, the Commission had had to make choices. State responsibility was, of course, a very important issue, but the Commission should not feel guilty that the topic had been under consideration for so long. It had decided to speed up its work on the draft Code of Crimes against the Peace and Security of Mankind, jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses and, in those areas, had done a great deal of work of which it could be proud. The Drafting Committee did in fact have little time left and it could be asked how that time should best be used, but account also had to be taken of the adoption of the report, which would be very long in 1991 because of the very detailed commentaries accompanying each article. The 10 or so meetings originally set aside for the consideration of the report would, in his view, not be nearly enough to produce a document which would not simply summarize contradictory viewpoints, but would be both detailed and concise and genuinely represent the essence of the joint efforts that had been made. If there was any time left, he therefore suggested that it should be used for the adoption of the report.

62. Mr. BARBOZA, speaking as Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that, in the first place, he had not made the proposal that the Drafting Committee should begin consideration of the draft articles which had been referred to it. He was of course at the Commission's disposal: if it felt that the Drafting Committee was able to consider those articles, he would not fail to offer it all possible assistance. It nevertheless seemed to him that, in view of the extremely limited number of meetings that might be available to the Drafting Committee before the end of the session and the amount of work it had already done at the current session, there was no point in it undertaking that task.

63. At the same time, he very much hoped that, at the next session, the Drafting Committee would at least begin its consideration of the draft articles in question. That did not mean that the topic which had been entrusted to him was more or less urgent than that of State responsibility. Both were important, the first by its very nature and the second because it had been on the Commission's agenda for many years. Both topics should therefore be given priority during the next term of office. It should be recalled that that had not been the case during the current quinquennium because the Commission had decided to focus on work that was already well advanced on the status of the diplomatic courier and the diplomtic bag not accompanied by diplomatic courier, jurisdictional immunities of States and their property, the draft Code of Crimes against the Peace and Security of Mankind and the law of the non-navigational uses of international watercourses.

64. In reply to Mr. Hayes, he said that it might be useful if, in addition to the customary summary of the debate on the topic, the Commission's report to the General Assembly included an analysis of the outcome of that debate. He was willing to collaborate with any working group which might be entrusted with that task.

65. Mr. DÍAZ GONZÁLEZ, referring to the working methods of the Commission provided for under its Statute, said that, in considering a topic, the Commission first set up a working group responsible for submitting a report to the Commission on such matters as the scope of the topic in question and the plan of work, and it then appointed a special rapporteur who acted as a kind of adviser. At the same time, each member of the Commission became in his turn an adviser to the special rapporteur through the comments he made during the consideration of the reports. A detailed summary of the Commission's work on the topic, prepared by the special rapporteur himself, was considered in depth by the Commission before being incorporated in its annual report to the General Assembly.

66. He personally had full confidence in the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law, who had demonstrated his mastery of the topic and his skill in advising the Commission in that regard. He also had full confidence in the Special Rapporteur's ability to decide whether there was a need to consult with experts in the field, either from within or outside the Commission, as provided for under the Commission's Statute. He therefore saw no reason, whatever arguments had been put forth, to appoint a working group to draft the relevant chapter of the Commission's report to the General Assembly or any other report to the General Assembly on the topic, which would in any case first have to be approved by the Commission. That would simply be a waste of the Commission's time, which was in such short supply.

67. He did not mean that the topic, which was closely linked to that of State responsibility, was not important enough to warrant special attention. All the topics were important at one time or another; however, it was States which attached importance to a topic, not the Commission.

68. Mr. PAWLAK proposed that, in view of the comments made by Mr. Shi and Mr. Mahiou, among others, the original programme of work should be amended by moving up the consideration of the draft report to the General Assembly to Thursday, 11 July 1991, in order to give the Commission two additional meetings for that purpose.

69. Mr. BARSEGOV said that the Commission's working methods had thus far been very effective. He emphasized that every special rapporteur was entirely free to assess the Commission's work on his topic by availing himself, if he so wished, of the services of a particular member of the Commission. However, it was that assessment which would be included in the Commission's report to the General Assembly, not the opinion of a working group of any kind, because, otherwise, an unacceptable precedent would be set.

70. He was therefore formally opposed to the establishment of a working group to submit conclusions, which would not be those of the entire Commission, to the General Assembly.

71. Mr. SOLARI TUDELA said that, since he had understood that the Special Rapporteur had withdrawn his proposal to establish a working group, he was puzzled by the discussion.

72. Mr. BARBOZA said he wished to make it clear once again that he was not the author of the proposal to set up a working group to assist him in evaluating the debate on the topic. If he had accepted the proposal, it was solely in order to submit an indisputably objective evaluation to the General Assembly.

73. Mr. Solari Tudela's hesitation was probably the result of the fact that the establishment of two different working groups had been proposed. In introducing his report at the 2221st meeting, he himself had suggested that, with a view to UNCED, a working group should be set up to study the articles on principles referred to the Drafting Committee and to submit a report to the Commission for approval. When that suggestion had been taken up at a later stage, it had been too late to give effect to it. There had also been a proposal to establish a working group to assess the status of the work on the topic and that was the proposal to which he had objected.

74. The CHAIRMAN, summing up the discussion, said, first, that the Drafting Committee would devote its scheduled time to the draft Code of Crimes against the Peace and Security of Mankind and the time not normally used for the plenary would be allotted to the Planning Group or to the Working Group on the long-term programme of work of the Commission. Secondly, Mr. Pawlak's proposal appeared to be acceptable, subject to technical considerations. Thirdly, it was understood that, during the next quinquennium, priority would be given to the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law.

75. Mr. KOTLIAR (Secretary to the Commission) said that Mr. Pawlak's proposal did not give rise to any particular problems.

Jurisdictional immunities of States and their property (*concluded*)* (A/CN.4/L.457, A/CN.4/L.462 and Add.1, Add.2 and Corr.1 and Add.3 and Corr.1, ILC/XLIII/Conf.Room Doc.1)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING[8] (*concluded*)

76. The CHAIRMAN proposed that, in accordance with article 23 of its Statute, the Commission should recommend to the General Assembly the convening of an international conference of plenipotentiaries to review

* Resumed from the 2221st meeting.

[8] For texts of draft articles adopted by the Commission on first reading, see *Yearbook ... 1986*, vol. II (Part Two), pp. 7-22.

the draft articles on jurisdictional immunities of States and their property and to draw up a convention on that topic. If he heard no objection, he would take it that the Commission wished to adopt a recommendation to that effect and to entrust the drafting of the recommendation to the secretariat, on the understanding that the Commission would take a decision on that text during its consideration of the chapter on that topic contained in its draft report to the General Assembly.

It was so agreed.

The meeting rose at 12.30 p.m.

2236th MEETING

Friday, 5 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (*concluded*) (A/CN.4/438,[1] A/CN.4/439,[2] A/CN.4/L.456, sect. F, A/CN.4/L.466)

[Agenda item 7]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*concluded*)

PART III OF THE DRAFT ARTICLES:

ARTICLE 12

PART IV OF THE DRAFT ARTICLES:

ARTICLES 13 TO 17 *and*

PART V OF THE DRAFT ARTICLES:

ARTICLES 18 TO 22[3] (*concluded*)

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), summing up the discussion on his fifth and sixth reports (A/CN.4/438 and A/CN.4/439), thanked members who had participated in the debate for their objective and helpful comments. He said that all those who had spoken had, by and large, agreed, both with the contents of the reports and with the draft articles proposed. Practically all the changes suggested were drafting improvements and would be referred to the Drafting Committee for any necessary action.

2. The idea had been advanced that communications facilities should also cover computers and electronic equipment. As he saw it, the reference to "and other communications" in article 14 covered the matter. Possibly the point might be made clearer by using the formula "and other means of communication". One member had commented on the use of the terms "secret" and "secrecy" in the fifth report. There was of course no intention of introducing any idea of mystery. The purpose was simply to refer to confidential matters, knowledge of which was confined to a very restricted circle. For example, a State secret, sometimes described in English as "top secret", was not known to the public in general.

3. Mr. Roucounas (2234th meeting) had suggested that the draft articles should refer to the use of a flag or emblem by an organization. It was doubtful whether all intergovernmental organizations required a flag. As to the use of an emblem, the cases that had arisen had been solved, curiously enough, by applying the Paris Convention for the Protection of Industrial Property. His own intention had been to deal with the subject along with the right to issue laissez-passer, at the end of the whole draft.

4. Two members had spoken on the content of the topic and on the future work on it. In that connection, he drew attention to the outline adopted by the Commission in its report to the General Assembly at its forty-second session.[4] The outline established the content and thrust of the topic and was reproduced in a footnote to his sixth report.

5. One member had criticized the use of the words "in principle" in paragraph 1 of draft article 21. Actually, that restrictive wording ran counter to his own more liberal approach to the matter of the privileges and immunities of international organizations, but he had retained it because it was in conformity with State practice. A similar restriction was found, for example, in article II, section 8 of the Convention on the Privileges and Immunities of the United Nations and in article III, section 10, of the Convention on the Privileges and Immunities of the Specialized Agencies. The Drafting Committee could decide whether to retain the words "in principle".

6. Lastly, as all the other comments had concerned drafting points, he suggested that the best course would be to refer articles 12 to 22 to the Drafting Committee for consideration in the light of the discussion.

7. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer draft articles 12 to 22 to the Drafting Committee.

It was so agreed.

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[1] This document supersedes the partial report previously issued at the forty-second session of the Commission, in 1990, as document A/CN.4/432, which was not introduced or discussed at that session for lack of time, and is reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[3] For texts, see 2232nd meeting, para. 2.

[4] *Yearbook ... 1987*, vol. II (Part Two), document A/42/10, p. 52, footnote 182.