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Summary record of the 2159th meeting

Topic:
Other topics

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tion by the Commission, the draft response would become part of its report to the General Assembly.

71. He had been informed that the following members of the Commission might make up the working group: Mr. Al-Baharna, Mr. Beesley, Mr. Bennouna, Mr. Díaz González, Mr. Graefrath, Mr. Illueca, Mr. Koroma, Mr. Pawlak, Mr. Sreenivasa Rao and Mr. Roucounas. It had also been suggested, and the Bureau concurred, that the working group should include *ex officio* the Special Rapporteur and the Rapporteur of the Commission. If there were no objections, he would take it that the Commission agreed to establish the working group with the membership he had indicated.

It was so agreed.

72. Mr. KOROMA suggested that, notwithstanding the decision just taken, the Working Group should be open-ended.

It was so agreed.

The meeting rose at 1.10 p.m.

2159th MEETING

Thursday, 17 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/419 and Add.1,[2] A/CN.4/429 and Add.1-4,[3] A/CN.4/430 and Add.1,[4] A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLES 15, 16, 17, X AND Y[5] *and*

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (*concluded*)

1. Mr. THIAM (Special Rapporteur) said that mass international traffic in narcotic drugs could be regarded both as a crime against peace and as a crime against humanity. In his view, it would be preferable, rather than disturbing the structure of the draft code, to have two separate articles dealing with those two aspects. Accordingly, he submitted the following revised texts of draft articles X and Y:

Article X. Illicit traffic in narcotic drugs: a crime against peace

Any mass traffic in narcotic drugs organized on a large scale in a transboundary context by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against peace.

Article Y. Illicit traffic in narcotic drugs: a crime against humanity

Any mass traffic in narcotic drugs organized on a large scale, whether in the context of a State or in a transboundary context, by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against humanity.

2. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer to the Drafting Committee the revised draft articles 15 (Complicity), 16 (Conspiracy) and 17 (Attempt) submitted by the Special Rapporteur at the 2157th meeting (paras. 23-25), as well as the revised draft articles X and Y on illicit traffic in narcotic drugs (para. 1 above).

It was so agreed.[6]

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/415,[7] A/CN.4/422 and Add.1,[8] A/CN.4/431,[9] A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CONSIDERATION OF THE DRAFT ARTICLES[10] ON SECOND READING (*continued*)

3. Mr. RAZAFINDRALAMBO said that he would comment on the proposals concerning articles 12 to 28 made by the Special Rapporteur in his third report (A/CN.4/431).

4. Article 12 (Contracts of employment) should be retained, since it would provide local employees of

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

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

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] *Ibid.*

[5] For the texts, see 2150th meeting, para. 14, and 2157th meeting, paras. 23-26.

[6] For consideration of draft article X proposed by the Drafting Committee, see 2197th meeting, paras. 30 *et seq.*

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

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

[9] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[10] For the texts, see 2158th meeting, para. 1.

foreign States and of their official non-diplomatic agencies or offices with more effective protection. The words in square brackets in paragraph 1 of the text proposed by the Special Rapporteur, "and is covered by the social security provisions which may be in force in that other State", could be deleted. Although registration of a worker in the social security system undoubtedly afforded protection, it did not seem appropriate to allow the employer State to invoke immunity on the ground that it had failed, whether intentionally or not, to register its local employee in that system.

5. The United Kingdom had rightly noted in its written comments that paragraph 2 (*b*) seemed to be redundant, since article 26 provided for immunity from measures of coercion: thus the State could not be compelled to recruit or renew the employment of a worker, or to reinstate him in the event of dismissal. Paragraph 2 (*a*), however, was still necessary. Some countries which had adopted the French system of administrative law took the view that civil-service disputes were a matter for special administrative courts, like the Council of State, with their own case-law. It would be difficult to require the Governments of such countries to appear before the courts of the forum State having jurisdiction in respect of employment contracts, which were often ordinary courts of law. The employees protected by paragraph 2 (*a*) would not necessarily be members of a diplomatic or consular mission: the second alternative text for the subparagraph proposed by the Special Rapporteur was therefore not acceptable.

6. Article 13 (Personal injuries and damage to property) was designed to protect persons and property against any act or omission attributable to a State. At first sight, that was a question of the international responsibility of the State. The scope of application of the article was, however, limited to the determination of responsibility by reference not so much to the rules of international law as to the municipal law of the court of the forum, pursuant to the *lex loci delicti commissi* rule. A more serious difficulty arose from the fact that, under the terms of the article, the State would have a narrower immunity than that conferred on its own diplomatic agents under article 31 of the 1961 Vienna Convention on Diplomatic Relations. The text adopted on first reading, which laid down the twin criteria of the place of the damage and the presence of the author of the act or omission, should be retained, since it was not as broad in scope as it seemed to be at first glance. To restrict the article to traffic accidents, as some recommended, would not be satisfactory, since it was difficult to differentiate between traffic and other accidents. That was borne out by the fact that, in some countries, damage caused by administrative vehicles was dealt with not through insurance, but in the same way as any other kind of damage caused by the State.

7. It had already been pointed out with regard to article 14 (Ownership, possession and use of property) that subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 related to the practice of common-law countries and should not appear in a convention of a general nature. Paragraph 1 (*b*) might open the door to the jurisdiction of a foreign court even if there were no link between the property and the forum State. For that reason, it should perhaps be provided, as in paragraph 1 (*a*), that the property must be "situated in the State of the forum".

8. Paragraph 2 (*a*) of article 14 seemed to contradict paragraph 3 of article 7 as adopted on first reading. The latter text provided that a proceeding before a court of a State should be considered to have been instituted against another State when it was designed to deprive that other State of its property or of the use of property in its possession or control. In such a case, under paragraph 1 of article 7, the foreign State enjoyed immunity before the courts of the forum State. Paragraph 2 (*a*) of article 14, however, provided that a court of the forum State could exercise jurisdiction in such a case, notwithstanding the fact that the proceeding was designed to deprive the foreign State of property in its possession or control. The foreign State was thus rendered powerless simply because the proceeding had not been brought against it directly. The new text proposed by the Special Rapporteur for paragraph 3 of article 7 seemed to provide a remedy for that situation.

9. Paragraph 2 (*b*) of article 14 dealt with a more likely case, but one that none the less raised problems, since it could also result in a decision being handed down against a State without the latter being able to invoke lack of jurisdiction on the part of the court of the forum, or at least defend itself.

10. He had no comment to make on articles 15 to 17 other than to express his support for the Special Rapporteur's proposal to add a reference in subparagraph (*a*) of article 15 to plant breeders' rights and rights in computer-generated works.

11. With regard to article 18 (State-owned or State-operated ships engaged in commercial service), members had questioned the use of the expression "commercial [non-governmental]" in paragraphs 1 and 4. Some members who considered that the term "non-governmental" should be deleted saw nothing wrong with the fact that, in paragraphs 2, 5 and 7 of the same article, a ship—or its cargo or a service—was characterized as "government non-commercial". If a single adjective ("commercial") sufficed in the first case, he did not see why a single adjective ("government") would not suffice in the second. In fact, "government non-commercial service" seemed to be the traditional formula and precedent was to be found for it, *inter alia*, in the 1958 Convention on the High Seas. Logically, the expression "commercial non-governmental" should be the counterpart of "government non-commercial" and there was no reason why the two expressions should not be used simultaneously. Legally, the use of two adjectives was justified because they referred respectively to the nature of the service and to the object pursued by the State in the case in point, it being understood that the criterion of object was paramount in respect of immunity. Matters would perhaps be clearer if the conjunction "and" were used, since that would underline the cumulative nature of the two

adjectives: thus, in paragraphs 1 and 4, the expressions "commercial and non-governmental service" and "commercial and non-governmental purposes" would be used and, in paragraphs 2, 5 and 7, the expression "government and non-commercial". If the word "and" was not acceptable, the term "non-governmental" in paragraphs 1 and 4 could be deleted, only the expressions "commercial service" and "commercial purposes" being retained; and, in paragraphs 2, 5 and 7, the term "non-commercial" could be deleted, only the expressions "government service" and "government character" being retained.

12. As the Special Rapporteur recommended, the question of the jurisdictional immunity of aircraft belonging to or operated by the State should not be covered, since it could raise extremely complex issues. In addition, he would prefer to reserve his position on the possibility of adding a provision on ships operated by State enterprises, since the concept of segregated State property was, in his view, still in the throes of development.

13. Article 19 (Effect of an arbitration agreement) called for reservations concerning the extension of the scope of the arbitration implicit in the words "civil matter", which appeared in the bracketed expression "civil or commercial matter". At best, it would be possible to agree to replace the bracketed words "commercial contract" by "commercial matter", with the addition, if need be, of the word "accessory" or "assimilated" to cover, for instance, disputes that might arise in connection with the salvage of commercial ships. Furthermore, as the Special Rapporteur had suggested in his second report (A/CN.4/422 and Add.1, para. 33), rather than qualifying the court in question by the phrase "which is otherwise competent", it would be better to revert to the wording proposed by the previous Special Rapporteur, namely "a court of another State on the territory or according to the law of which the arbitration has taken or will take place".

14. Also in his second report (*ibid.*, paras. 35 *et seq.*), the Special Rapporteur had included some particularly instructive information on the problem of the recognition and enforcement of an arbitral award. The question was whether recourse to arbitration, which involved waiver of immunity from jurisdiction, would also entail waiver of immunity from enforcement, which meant that the powers of supervision of the court would include the power to authorize the enforcement of the arbitral award. The Special Rapporteur rightly considered that it was preferable not to refer in article 19 to the procedure for the enforcement of arbitral awards, including the procedure to secure a preliminary order of *exequatur*. The reasons he gave in that connection were convincing.

15. The Special Rapporteur thus proposed that a new subparagraph (*d*) be added to article 19, reading: "(*d*) the recognition of the award", complementing the list of questions referred for decision to the court of the forum State. As indicated in the second report (*ibid.*, para. 39), recognition was the "normal complement of the binding character of the arbitration agreement". Thus, although immunity applied to the enforcement process, it could not affect prior recognition of the arbitral award.

16. Turning to part IV of the draft (State immunity in respect of property from measures of constraint), whose importance for the developing countries he had already stressed, he noted that, in his third report, the Special Rapporteur proposed combining articles 21 and 22, introducing a number of amendments to the texts adopted on first reading. For example, the bracketed phrase "or property in which it has a legally protected interest" would not appear in the new article 21.

17. The reference to "property in its possession or control" would also not appear in the new text. While that was a welcome simplification, he wondered whether it did not leave a gap that it would be difficult to fill. The concept of "interest" was distinct from that of "property", as the Special Rapporteur had not failed to underline and as the Commission itself had recognized in its final draft articles on succession of States in respect of State property, archives and debts, adopted in 1981. In the commentary to article 8 of that draft, the Commission had stressed that the expression "property, rights and interests" referred to "rights and interests of a legal nature".[11] That was the meaning attached to the expression "legally protected interest" used in articles 21 and 22 of the present draft as adopted on first reading. In any event, it would be possible to revert to the original wording and to speak of "property in which [the State] has an interest".

18. Paragraph 1 (*c*) of the proposed new article 21 was so worded that it appeared to lay down two cumulative conditions: use for commercial purposes, and connection with the object of the claim. To avoid such a limitation, the word "and" linking those two conditions should perhaps be replaced by "or", since a single condition would suffice. Furthermore, as in the case of article 18, the use both of the expression "commercial purposes" and of the bracketed term "non-governmental" would seem to refer both to the object and to the nature of the operation in question. Thus what would be involved was recourse to a "government" operation for a "commercial" object. Conversely, it was conceivable that a government operation might be used for a non-commercial object. The words "intended for use by the State for commercial purposes" would, however, be acceptable.

19. Paragraph 1 (*b*) of the new text seemed to duplicate the second condition in paragraph 1 (*c*), referring to "a connection with the object of the claim". If that was so, it should be deleted.

20. He was in general agreement with the proposals in the third report concerning part V of the draft (Miscellaneous provisions). However, the proposed amendment to paragraph 2 of article 27 (Procedural immunities), exempting the defendant State alone from the requirement with respect to security, seemed to be ill-advised as its effect would be to restrict significantly any proceedings, no matter how legitimate, of potential plaintiff countries with limited financial resources, such

[11] *Yearbook ... 1981*, vol. II (Part Two), p. 26, para. (10) of the commentary.

as the developing countries. That would run counter to the trend that had emerged in the General Assembly in favour of helping such countries financially to appear before the ICJ.

21. Article 28 (Non-discrimination) should not be included in the draft, as it provided for a restrictive application of the articles contrary to the very purpose of the present codification. Morever, the opening clause of many articles ("Unless otherwise agreed between the States concerned") already permitted limitations or extensions of immunity by way of agreement or reciprocity.

22. Lastly, the question of the settlement of disputes should be the subject of an optional additional protocol and should, in any event, be dealt with by the future diplomatic conference.

23. Mr. MAHIOU said that, since he had spoken at length at the previous session on the Special Rapporteur's preliminary and second reports, he would limit his comments to the new ideas proposed in the third report (A/CN.4/431) in the light of the discussion in the Commission and in the Sixth Committee of the General Assembly.

24. With regard to article 12 (Contracts of employment), he noted that the Special Rapporteur had tempered his position and reconsidered his proposal to delete paragraph 2 (*a*) and (*b*). Moreover, both the text of subparagraph (*a*) adopted on first reading and the new second alternative were acceptable. The purpose of subparagraph (*b*) was to give an employee the power to defend himself against a State once he had been hired. The recruitment itself, however, could not be challenged in court, for the State's freedom to decide whether or not to hire or to renew employment should not be questioned. Only a case of failure to respect the rights granted to the employee by the contract of employment could be referred to the court. It should therefore be clear that recruitment should be understood to mean the State's agreement to recruit an individual. For that reason, the Special Rapporteur's explanations in paragraph (4) of his comments on article 12 did not seem convincing. Perhaps it should be made clear that the act of recruitment must be protected from any challenges.

25. In subparagraph (*a*) of article 15 (Patents, trade marks and intellectual or industrial property), the Special Rapporteur recommended adding a reference to "a plant breeder's right". He himself wondered whether such an addition was justified. Neither the State that had proposed it nor the Special Rapporteur had adduced enough evidence in support of the addition. Would not that aspect of intellectual or industrial property come within the field of patents? If special mention were made of that concept, why not also mention other concepts of the same nature? In his view, it would be better to refrain from any type of listing, which would open a Pandora's box, and find general wording which would also cover plant breeding. Furthermore, assuming the addition were to be retained, he wondered whether it was satisfactorily worded, for the term "right" used with no other explanation might also be understood to mean a right having nothing to do with intellectual or industrial property and would thus create a risk of departing from the purpose of article 15. What was more, the concept of *domaine* in the French text was quite broad and opened the door to all kinds of assumptions. Under those circumstances, what was the compelling reason for the reference?

26. In article 19 (Effect of an arbitration agreement), the Special Rapporteur proposed adding a new subparagraph, reading: "(*d*) the recognition of the award". However, in paragraph (2) of his comments on the article, the Special Rapporteur appeared to indicate that he had doubts about the need for such an addition and he himself shared those doubts. The recognition procedure did not fall directly within the purview of that part of the draft and would rather concern the part relating to enforcement; above all, it appeared to be specific to certain legal systems.

27. He supported the Special Rapporteur's suggestion that article 20 (Cases of nationalization) be deleted.

28. In the proposed new article 21 (State immunity from measures of constraint), the Special Rapporteur had made a number of changes to the texts of articles 21 and 22 adopted on first reading, the first being to eliminate the concept of "property in which [the State] has a legally protected interest". He himself was not in favour of deleting that phrase, for the reasons he had stated at the previous session. Secondly, in paragraph 1 (*c*) of the new text, the Special Rapporteur suggested the deletion of the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed"—a phrase to which he (Mr. Mahiou) attached even greater importance. That phrase was well-founded, for courts, especially lower courts, often confused State property with property of other agencies and even with the property of public enterprises, or confused completely different kinds of State property. The phrase in question would make it possible to avoid mistakes by lower courts, which were, moreover, occasionally censured by higher courts. It would thus be both a clarification and a guarantee.

29. He would like further explanations concerning the proposed new article 23. In his view, it related to draft article 11 *bis*, which the Drafting Committee was currently considering, and he therefore had doubts about whether it was needed. He would nevertheless reserve his position until a decision had been taken on article 11 *bis*, for that decision might make the scope of article 23 clearer.

30. The Special Rapporteur's suggestions concerning article 24 (Service of process) were useful and simplified the drafting by making the article shorter without affecting its interpretation. They improved the text adopted on first reading.

31. Lastly, the Special Rapporteur's proposal for article 25 (Default judgment), which consisted of the addition at the end of paragraph 1 of the words "and if the court has jurisdiction in accordance with the present articles", was well-founded. It made the text clearer by avoiding the assumption that a State accepted a court's competence and waived its immunity by

failing to appear after being served process. The Special Rapporteur was therefore correct in retaining the addition proposed by one Government, which made it easier to understand the concept of default judgment.

32. Mr. NJENGA said that, having discussed all the draft articles in detail at the previous session, he would comment only on the changes proposed by the Special Rapporteur in his third report (A/CN.4/431). The Special Rapporteur's proposals, which were based on the discussion in the Commission and in the Sixth Committee of the General Assembly, as well as on the written comments by Governments, would certainly facilitate the task of the Commission, which was continuing its consideration of articles 12 to 28, and that of the Drafting Committee, which had before it articles 1 to 11 and the new draft articles 6 *bis* and 11 *bis*.

33. He was particularly happy with the proposed new text of draft article 11 *bis*, which put the question of the immunity or lack of immunity of the State and State enterprises in its proper perspective. The proposed new article 23 was fully justified, for it was the corollary to draft article 11 *bis*. However, he did not agree with the concept of "segregated State property" and did not think anything would be lost by omitting it from the article.

34. As to the title of part III of the draft, the neutral formulation suggested by the Special Rapporteur, "Activities of States to which immunity does not apply", and Mr. Shi's suggestion at the previous meeting, "Activities of States in respect of which States agree not to invoke immunity", were both acceptable.

35. With regard to the proposed new text of article 12, on contracts of employment, he endorsed the Special Rapporteur's suggestion that the phrase "and is covered by the social security provisions which may be in force in that other State", in paragraph 1, should be deleted. The reference to social security provisions was not justified, for, as the Special Rapporteur himself had said, they were not common in all States.

36. He was, however, not convinced by the Special Rapporteur's reasoning in favour of the second alternative proposed for paragraph 2 (*a*) of article 12. In his view, the existing subparagraph (*a*) was broad enough to cover diplomatic and consular staff.

37. For the reasons he had given at the previous session, he would prefer the deletion of article 13. His main objection to the article was that it would make the State indictable in cases of personal injuries and damage to property, while its diplomatic agents enjoyed immunity for similar occurrences under customary and conventional law. Furthermore, the same cases might be dealt with by insurance companies. However, if the Commission decided to retain article 13, he would support the suggestion made by the Special Rapporteur in his preliminary report that the following new paragraph 2 be added:

> "2. Paragraph 1 does not affect any rules concerning State responsibility under international law."

38. He hoped that the Commission would follow the Special Rapporteur's recommendation and decide to delete subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 of article 14, which did not reflect universal practice and might open the door to foreign jurisdiction even in the absence of any link between the property in question and the forum State.

39. The proposed addition in article 15 (*a*) of the phrase "including a plant breeder's right and a right in computer-generated works" was a definite improvement and met the needs of the modern world.

40. He fully endorsed articles 16 and 17 as adopted on first reading and supported the Special Rapporteur's suggestion that the words "State" and "another State" be replaced by "foreign State" and "forum State", as appropriate, in both articles. The same amendment should be introduced in other articles, where required.

41. Concerning article 18, he continued to believe that the deletion of the bracketed term "non-governmental" in paragraphs 1 and 4 would constitute a serious derogation from the principle of the jurisdictional immunity of States and frustrate the efforts of many developing countries to develop national shipping lines as a matter of national policy and not merely for commercial purposes.

42. He urged the Commission to be cautious in adopting article 19, in which the Special Rapporteur proposed the inclusion of a new exception to the rule of immunity. Arbitration, which the parties often preferred to judicial proceedings in order to save both time and money, would lose much of its interest if the validity or interpretation of the arbitration agreement, the arbitration procedure, the setting aside of the award and even, as the Special Rapporteur now proposed, the recognition of the award were open to adjudication in the forum State.

43. He fully endorsed the proposed deletion of article 20, which had no place in the draft articles and could lead to serious differences of opinion.

44. Turning to part IV of the draft, he said that there should be no exception to the principle of State immunity in respect of property from measures of constraint. Measures of constraint would simply strain relations between States and be used mainly by strong States against weak States. The recent tendency in some developed countries to restrict immunity from execution subject to certain safeguards for protected State property, to which the Special Rapporteur referred in paragraph (1) of his comments on articles 21 to 23, was a dangerous departure from the rules of international law relating to the sovereign immunity of States and should be curbed rather than encouraged by the Commission.

45. He had no objection to the new text proposed for article 22, in which the Special Rapporteur had added the words "and used for monetary purposes" in paragraph 1 (*c*).

46. He supported the miscellaneous provisions in part V of the draft. However, although he endorsed the Special Rapporteur's suggestion that the words "if necessary", in paragraph 3 of article 24, could be deleted, he proposed that that paragraph be reworded as follows:

"3. These documents shall be accompanied by a translation into the official language, or one of the official languages, of the State concerned, or at least by a translation into one of the official languages of the United Nations in use in that State."

That formulation might go some way towards meeting the concerns expressed by Mr. Tomuschat at the previous meeting.

47. The proposed addition at the end of paragraph 1 of article 25 of the phrase "and if the court has jurisdiction in accordance with the present articles" was commendable. It was judicious to make it a general provision that, when a State chose not to appear, courts should investigate their competence under the present articles before rendering a default judgment.

48. With regard to article 27, he preferred the text adopted on first reading to the new text suggested by the Special Rapporteur. He did not see why exemption from the requirement to provide any security, bond or deposit should be restricted to the defendant State. In his view, the plaintiff State should also enjoy that exemption.

49. He had no objection to article 28, which definitely had a place in the draft articles.

50. In conclusion, he said he hoped that the Drafting Committee would be given adequate time to consider the draft articles it had before it and that the Commission would be able to complete the second reading of the draft articles during the term of office of its current members.

51. Mr. GRAEFRATH, reviewing the proposals concerning articles 12 to 28 made by the Special Rapporteur in his third report (A/CN.4/431), said that the second alternative for paragraph 2 (*a*) of article 12 was more acceptable than the text adopted on first reading. As for paragraph 2 (*b*), he was convinced of its importance and of the need to retain the word "recruitment". It was not acceptable for the forum State to be able to compel a foreign State to recruit a particular person.

52. He again suggested that article 13 should either be deleted or that its scope should be limited to compensation arising from traffic accidents, as the Special Rapporteur himself had suggested in his second report. The text of the article was in complete contradiction with article 31 of the 1961 Vienna Convention on Diplomatic Relations, because mostly persons enjoying diplomatic immunities would be involved.

53. Concerning article 14, he supported the Special Rapporteur's suggestion to delete subparagraphs (*c*), (*d*) and (*e*) of paragraph 1.

54. With regard to article 18, he noted that the problems raised could not be solved by a mere referral to draft article 11 *bis*. An article that covered both State-owned and State-operated ships engaged in commercial service, as did article 18, failed to take account of legal systems in which State-owned ships could be operated for commercial purposes by independent legal entities. Since the article referred only to commercial activities, only State-operated ships should be taken into account. An examination of the relevant conventions cited in the third report revealed that they generally mentioned both the owner and the operator only when they dealt with ships used in non-commercial government service. When they dealt with ships used strictly for commercial purposes, only the operator was mentioned.

55. He had serious doubts about the Special Rapporteur's proposal to add a new subparagraph (*d*) to article 19, under which a State could not invoke immunity from jurisdiction in a proceeding relating to recognition of an arbitral award. Such a provision might even be dangerous, for it might lead States to question the binding nature of the arbitration procedure.

56. Article 20 did not belong in an instrument on jurisdictional immunities and should be deleted.

57. In the proposed new article 21, on State immunity from measures of constraint, the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in paragraph 1 (*c*), should be retained; otherwise, measures of constraint might be taken against any property of a foreign State if it was used for commercial purposes.

58. Article 25 should be worded most carefully. In particular, it could not be presumed that the various documents mentioned in the article had been received. Like Mr. Tomuschat (2158th meeting), he believed the court could not issue a default judgment against a State until it had examined *ex officio* the question of the sovereign immunity of that State. In fact, courts should be bound in all cases to verify whether or not State immunity excluded their competence and a provision to that effect should be included in the draft articles. Since such a provision was a general one that went beyond the framework of article 25, it might be included in article 7, which dealt with modalities for giving effect to State immunity.

59. Lastly, he suggested that article 28, which was superfluous at the very least, should be deleted.

The meeting rose at 11.25 a.m. to enable the Drafting Committee to meet.

2160th MEETING

Friday, 18 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.
