Document:-

A/CN.4/L.444

Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 10 and 12 to 16 - reproduced in A/CN.4/SR.2191, para. 23 et seq

Topic:

Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-

1990, vol. I

did not deal with private international law. Two of the questions with which the Council of Europe was dealing were of particular interest to the Commission: the protection of the environment, a subject on which the European Ministers of Justice had already adopted a resolution, and State immunity. The Commission's Special Rapporteur for the latter topic had derived great benefit from the 1972 European Convention on State Immunity, which he had cited as the first codification effort in the matter.

18. The opting-out clauses to which the Observer for the European Committee on Legal Co-operation had referred might be very relevant to the Commission's future work, since the régime of reservations and the matter of unacceptable reservations were sensitive problems that warranted in-depth consideration.

19. Mr. BARBOZA said that his work as Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law was a specific example of co-operation between the Council of Europe and the Commission. The draft European convention on the protection of the environment was of very great interest in that regard. It was, of course, a regional instrument, but for the time being it was the only international instrument applicable to all dangerous activities, since earlier instruments had all been more restricted in scope, confined to transport, nuclear energy, etc. The Commission was therefore paying close attention to what was being done by the Council of Europe in that regard. It was at the Council's disposal if its experience could be of any assistance.

20. Mr. PAWLAK said that the approach adopted by the Council of Europe was very encouraging to countries such as his own which were undergoing great changes and might one day become part of European structures. The work of the Council of Europe could not but stimulate that of the Commission, which paid tribute to the quality of the studies by the European Committee on Legal Co-operation.

21. Mr. NJENGA stressed the close links between the work of the Commission and that of the Council of Europe in the legal field. The two bodies could not but benefit from their co-operation, which should be further intensified. He welcomed the fact that the European Committee on Legal Co-operation was taking such a great interest in the problem of the protection of the environment. That was a very sensitive issue for African countries and they were paying a great deal of attention to it at the present time. They hoped to arrive at a common position in preparation for the session which the OAU would be devoting entirely to that question.

22. The Commission would like to know what the Council of Europe intended to do to mark the United Nations Decade of International Law.

Jurisdictional immunities of States and their property (*concluded*)* (A/CN.4/415,[1] A/CN.4/422 and Add.1,[2] A/CN.4/431,[3] A/CN.4/L.444)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[4]

ARTICLES 1 TO 10 AND 12 TO 16

23. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report on draft articles 1 to 10 and 12 to 16 adopted by the Drafting Committee on second reading (A/CN.4/L.444), which the Commission had decided not to consider at the present session (see para. 90 below).

24. Mr. MAHIOU (Chairman of the Drafting Committee) said that, at the present session, the Drafting Committee had dealt with 16 of the 28 articles provisionally adopted by the Commission on first reading and that, in all probability, the second reading of the draft would be completed at the next session. The Commission would thus be able, in accordance with the intention it had expressed at previous sessions, to submit the final text of the draft articles to the General Assembly before the end of the current five-year term of office of the Commission's members in 1991.

25. Article 1 (Scope of the present articles) defined the parameters for the entire set of articles and, since the text had been widely accepted, the Drafting Committee had not made any changes except in French, in which it had replaced the words *l'immunité d'un État et de ses biens de la juridiction des tribunaux* by *l'immunité de juridiction d'un État et de ses biens devant les tribunaux*. That wording was more elegant and was used in the 1972 European Convention on State Immunity. Consequential changes had been made in article 5 (formerly article 6) and article 9 (formerly article 10).

26. In their written comments and observations, some Governments had suggested that article 2 (Use of terms) should be combined with article 3 (Interpretative provisions), which stated the criteria for determining the entities or persons that could invoke immunity and provided guidelines for ascertaining whether a contract or a transaction was of a commercial nature. Since the Special Rapporteur had accepted that proposal and the Commission had endorsed it, the Drafting Committee had worked on the text of a new article 2 combining the two articles in question. The text proposed was therefore essentially the result of the combination of the two articles, with a few changes.

27. Paragraph 1 (*a*) defined the term "court" and reproduced the text of paragraph 1 (*a*) of former article 2. That definition had been considered generally acceptable and the Drafting Committee had therefore not changed it.

28. Paragraph 1 (*b*) defined the term "State" and contained five subparagraphs. Subparagraph (i) defined the term "State" as "the State and its various organs of government", reproducing the text of paragraph 1 (*a*) of former article 3. Since that part of the definition of

* Resumed from the 2162nd meeting.

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

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

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

[4] The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook ... 1986*, vol. II (Part Two), pp. 8 *et seq.* For the commentaries, *ibid.*, footnotes 7 to 35. See also 2158th meeting, para. 1.

a State had been deemed acceptable, the Drafting Committee had not changed it.

29. Subparagraph (ii) was new and he recalled that some members of the Commission and some Governments had pointed out that the particular case of the constituent units of a federal State had not been taken into account in the definition of a State. In fact, subparagraph (iii), which dealt with the political subdivisions of the State, had been intended to take account of federal States as well. However, that subparagraph contained a clause which made its provisions applicable only to political subdivisions that were entitled to perform acts in the exercise of the sovereign authority of the State and, in practice, that excluded the constituent units of federal States from the scope of the articles. In order to solve that problem, the Drafting Committee had decided to add a subparagraph relating specifically to federal States and reading: "(ii) constituent units of a federal State".

30. Subparagraph (iii) reproduced the text of paragraph 1 (*b*) of former article 3 and, as he had explained in connection with subparagraph (ii), had been intended to cover both the constituent units of a federal State and the other political subdivisions of the State which were entitled to perform acts in the exercise of the sovereign authority of the State. Now that the new subparagraph (ii) dealt specifically with federal States, subparagraph (iii) applied only to the second category. The Drafting Committee had not made any changes in the text adopted on first reading. He nevertheless pointed out that there had been certain differences of opinion in the Committee on the question whether the correct English translation of the French expression *prérogatives de la puissance publique* was "sovereign authority". He recalled that, when article 3 had been adopted on first reading, the Drafting Committee had discussed that question at length. It had wanted to explain the particular meaning of the French expression *la puissance publique* and the nuance associated with it. The commentary to article 3 reflected that intention, stating in paragraph (3) that "not every political subdivision of a State enjoys the immunity of the State, especially if it does not perform acts in the exercise of 'sovereign authority', which seems to be the nearest equivalent to the French expression *prérogatives de la puissance publique*".[5] On second reading, some members of the Drafting Committee had accepted that translation, on the grounds that the words "sovereign authority" expressed the characteristic attribute of the State which meant that it enjoyed immunity. Other members, however, had been of a different opinion. In their view, the expression "sovereign authority" was normally associated with the international personality of the State, in accordance with international law, and that was not the subject of subparagraph (iii). The problem was, rather, one of internal law, i.e. of determining how that law divided powers among the political subdivisions of the State. Consequently, "governmental authority" was a better English translation of the French expression *la puissance publique*. That translation had also been used in articles 7 and 8 of part 1 of the draft articles on State responsibility.[6] In addition, it had been pointed out that there was no equivalent of the French expression *la puissance publique* in some other languages, such as Russian, and that it might be better to use the expression "authority of the State". In the absence of a consensus on any other English expression, the Drafting Committee had decided to retain the expression "sovereign authority", which appeared in the text adopted on first reading.

31. With regard to subparagraph (iii *bis*), he recalled that, in paragraph 1 (*c*) of article 3 as adopted on first reading, the Commission had extended the definition of the term "State" to agencies or instrumentalities of the State entitled to perform acts in the exercise of the sovereign authority of the State. With a view to the second reading, the Special Rapporteur had stated at the previous session that, as a result of the introduction of the concept of "State enterprises" in draft article 11 *bis* (A/CN.4/415, para. 122), it would be necessary to make changes in the definition of the State contained in paragraph 1 (*c*).

32. The Drafting Committee had spent a great deal of time trying to reach agreement on wording to define State enterprises and their status for the purposes of the draft articles. Some members had proposed, for example, to exclude such enterprises from the definition of the State given in the new article 2 and to dispense with draft article 11 *bis*. Other members had not been entirely satisfied with that solution: in their view, the question was important and therefore had to be dealt with in a separate article. After a lengthy discussion, the Drafting Committee had concluded that, due to lack of time, it would be unable to reach agreement at the present session and recommend a text to the Commission. He himself thought that it would be advisable to consider the question again in the Drafting Committee at the next session. Since the question of State enterprises would have to be settled either in the framework of article 2, on the use of terms, or in a separate article, paragraph 1 (*b*) (iii *bis*) of the new article 2 and draft article 11 *bis* were still pending. The Drafting Committee would therefore revert to those provisions at the next session.

33. Subparagraph (iv) reproduced the text of paragraph 1 (*d*) of former article 3. That text had not given rise to any comments by Governments and seemed acceptable. The Drafting Committee had therefore not made any change in it.

34. With regard to paragraph 1 (*c*) of the new article 2, which corresponded to paragraph 1 (*b*) of the text adopted on first reading and dealt with the definition of a "commercial transaction", he recalled that, on first reading, the Commission had adopted the expression "commercial contract". Despite the lack of unanimity on that point, the Drafting Committee had considered that the term "transaction" had a technically less precise meaning than the term "contract" and therefore covered a wider range of operations. For the sake of consistency, the Committee had also replaced the word

[5] *Yearbook ... 1986*, vol. II (Part Two), p. 14.

[6] *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

accord by *transaction* in the French text of subparagraphs (i), (ii) and (iii).

35. In subparagraph (i), the Drafting Committee had deleted the words "or purchase", which had seemed unnecessary, since every sale necessarily involved a purchase.

36. In subparagraph (ii), the Drafting Committee had slightly reworded the text to take account of the fact that an obligation of guarantee could exist not only in the case of a loan, but also in that of other transactions of a financial nature. Similarly, an obligation of indemnity could exist not only in the case of a loan, but also in that of other transactions of a financial nature. That fact was, moreover, recognized in the commentary to the definition of the expression "commercial contract" adopted on first reading.[7] The Committee had therefore combined the references to an obligation of guarantee and an obligation of indemnity so that they applied both to contracts for a loan and to other transactions of a financial nature.

37. As to subparagraph (iii), the Drafting Committee had carefully reviewed the text adopted on first reading. The Committee was aware that the terms used in different languages might not cover exactly the same ground. For example, the concepts of "contract for the supply of services" and "professional contract", as used in the common-law countries, were perhaps not, when taken singly, strictly identical in meaning to the concepts of *contrat de prestation de services* and *contrat de louage d'ouvrage ou d'industrie*. The Drafting Committee had nevertheless considered that, taken together, those concepts encompassed all of the ground to be covered and that the text adopted on first reading could therefore be retained. It had made a very slight drafting change in the French text, where the word *ou* after the word *commerciale* had been replaced by a comma, on the model of the English text.

38. Paragraph 2 of the new article 2 corresponded to paragraph 2 of former article 3. It dealt with the relationship between the so-called "nature" criterion and "purpose" criterion in determining whether a contract or transaction was of a commercial character. The criteria in question were primarily those put forward under the two theories of "restricted" and "absolute" State immunity. He recalled that, during the consideration of the question on first reading, there had been lengthy discussions in the Commission on the question of which of the two criteria should prevail and the Commission had finally agreed on compromise wording. That formula specified that, in determining whether a contract or a transaction was commercial, reference should be made primarily to the nature of the contract, but that the purpose of the contract should also be taken into account if, in the practice of the contracting State, that purpose was relevant to determining the non-commercial character of the contract.

39. A number of Governments had indicated in their comments and observations that the reference to the practice of the contracting State as a criterion for taking into account the purpose of the contract was not appropriate and that they would prefer it to be deleted. The Drafting Committee had considered other possible wordings. After much discussion, it had finally been unable to reach agreement on any other formulation and had therefore decided to retain the text adopted on first reading. A few drafting amendments had become necessary because of the new position of the paragraph. The beginning had thus been reformulated so as to refer to the definition of a "commercial transaction" under paragraph 1 (*c*). In addition, the words "of that State" in the last part of the paragraph had been replaced by "of the State which is a party to it", meaning, of course, the State party to the contract or transaction. The purpose of that change was to make the wording totally unambiguous.

40. Paragraph 3 corresponded to paragraph 2 of former article 2. It embodied a commonly used saving clause and the Drafting Committee did not recommend any change, apart from a slight drafting amendment made necessary by the new position of the paragraph. At the beginning, the words "of paragraph 1" had been replaced by "of paragraphs 1 and 2", since article 2 now contained two paragraphs on definitions.

41. As a result of the combination of articles 2 and 3, the subsequent articles had been renumbered.

42. Referring to article 3 (Privileges and immunities not affected by the present articles), which corresponded to article 4 as adopted on first reading, he said that, in paragraph 1, the Drafting Committee had added the words "under international law" after the words "enjoyed by a State" to make it clear that the privileges and immunities in question were those conferred by international law. That amendment also had the advantage of establishing the necessary parallel between paragraphs 1 and 2. As to paragraph 2, the Drafting Committee had noted that it related to the privileges and immunities accorded to heads of State *ratione personae* and not to those they enjoyed as State organs. Strictly speaking, the matter should therefore not be referred to in draft articles on State immunity. The Committee had, however, observed that no Government had proposed that paragraph 2 should be deleted and had therefore considered it inadvisable to eliminate it at the second-reading stage. Finally, the word "the" before the words "privileges and immunities" had been deleted in order to make the text more flexible.

43. Article 4 (Non-retroactivity of the present articles), adopted on first reading as article 5, had been very widely accepted, although a small number of Governments had suggested different wording. The Drafting Committee had therefore considered it unnecessary to make any changes. It was obvious from the text that the non-retroactivity clause applied only to proceedings instituted in a domestic court.

44. Turning to part II of the draft, whose title, "General principles", remained unchanged, he recalled that article 5 (State immunity) had given rise to some discussion on first reading. It was a key provision, for it stated the theoretical foundation of the draft articles. The text adopted on first reading (art. 6) contained a

[7] See *Yearbook ... 1983*, vol. II (Part Two), p. 35, para. (3) of the commentary to the then paragraph 1 (*g*) of article 2.

phrase in square brackets specifying that State immunity was also subject to "the relevant rules of general international law". The purpose of the bracketed phrase had been to stress that the present articles did not prevent the development of international law and that, consequently, the immunities guaranteed to States were subject both to the present articles and to general international law. As expected, the phrase in square brackets had given rise to a number of comments, some members of the Commission favouring its deletion and others its retention. Equally divergent views had been expressed in the Drafting Committee. Finally, the Committee had decided to delete it: in the general view, any immunity or any exception to immunity accorded or denied to a State by the present articles would have no effect on general international law. If the articles became a convention, they would be applicable only as between the States which became parties to it. In that case, the deletion of the phrase in square brackets would have no effect on subject-matter not referred to in the convention or on the position of general international law on that question.

45. In the French text, the words *jouit . . . de l'immunité de juridiction des tribunaux* had been replaced by *jouit . . . de l'immunité de juridiction devant les tribunaux* for the reasons which he had explained in connection with article 1.

46. In article 6 (Modalities for giving effect to State immunity), the first part of paragraph 1 reproduced the text adopted on first reading (art. 7), except that the reference to article 6 had, of course, been changed to take account of the new numbering of the articles. That reference made it clear that the obligation to give effect to State immunity applied solely when the other State was entitled to benefit from immunity under the present articles. The second part of paragraph 1 had been added by the Drafting Committee at the Special Rapporteur's suggestion. Its purpose was to define and strengthen the obligation set forth in the first part of the provision. Respect for State immunity would be ensured all the more if the courts of the State of the forum, instead of simply acting on the basis of a declaration by the other State, took the initiative in determining whether the proceeding was really directed against that State. That was the idea reflected by the words "determine on their own initiative". The Drafting Committee had used the expression "shall ensure that its courts" to make it quite clear that the obligation was incumbent on the State, which was responsible for giving effect to it in accordance with its internal procedures. There again, the reference to article 5 indicated that the provision did not prejudge the question whether the State was actually entitled to benefit from immunity under the present articles.

47. With regard to paragraph 2, the Drafting Committee had first observed that its purpose was to lay down a criterion whereby it would be possible to determine whether or not a proceeding should be regarded as having been instituted against a State and that it left open entirely the question whether the State concerned would or would not ultimately be recognized as benefiting from immunity. The Committee had noted that the wording adopted on first reading was too condensed and seemed to allow the possibility—which was barely conceivable—that a State, although not named as a party to the proceeding, could be compelled to submit to the jurisdiction of the court. The Committee had therefore deemed it necessary to draw a clear distinction between the two cases covered by the provision, namely between the case in which the State was named as a party to the proceeding and the case in which it was not. The first of those cases was dealt with in subparagraph (*a*) and the second in subparagraph (*b*).

48. Subparagraph (*a*) called for no explanation. Subparagraph (*b*) applied to situations in which the State was not named as a party to the proceeding, but was indirectly involved, for example in the case of an action *in rem* concerning State property, such as a warship, or an action instituted against an entity other than the State itself that fell within the definition of the term "State" laid down in article 2, paragraph 1 (*b*). The Drafting Committee had simplified the wording adopted on first reading. It had first deleted the clause "so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court", which, in the case under consideration, was meaningless. The Committee had considered that the words "to bear the consequences of a determination by the court which may affect" created too loose a relationship between the proceeding and the consequences to which it gave rise for the State in question and could thus result in unduly broad interpretations of the paragraph. To make the text more precise in that regard, it had therefore replaced those words by "to affect".

49. Lastly, the Drafting Committee had deleted paragraph 3, which, given the very elaborate definition of the term "State" contained in article 2, no longer had any purpose.

50. Article 7 (Express consent to the exercise of jurisdiction) corresponded to article 8 as adopted on first reading, to which the Drafting Committee had, on the basis of the comments made both in the Commission and by Governments, made certain additions which called for an explanation.

51. In paragraph 1, which stipulated that a State could not invoke immunity from jurisdiction before a national court with regard to a matter in respect of which it had expressly consented to the exercise of jurisdiction by that court, the Drafting Committee had been of the view that the word "matter" would not cover all eventualities. A State could, for instance, consent to the exercise of jurisdiction with regard to a particular case. Furthermore, the consent of a State with regard to a matter could be confined to a particular case only and consequently would not affect the immunity of the State with regard to a similar matter in another case. The Committee had therefore slightly amended the end of the introductory clause of the paragraph to read: "with regard to the matter or case".

52. Subparagraphs (*a*) and (*b*) remained unchanged. Subparagraph (*c*) had been amplified to take account of another possibility. As originally worded, the subparagraph had provided that the consent of the State could be expressed by a declaration before the court in

a specific case. It had, however, been pointed out that that wording would require a State wishing to make such a declaration to send a representative specially to appear before a national court, whereas it should be possible to make such a declaration in a written communication to the plaintiff or to the court. The last part of subparagraph (*c*) therefore provided that a State would have the possibility of consenting to the exercise of jurisdiction by means of such a written communication. The Drafting Committee had also replaced the words "in a specific case" by "in a specific proceeding", to ensure better co-ordination between subparagraph (*c*) and the introductory clause of the paragraph.

53. Paragraph 2 was new. It had been noted that agreement by a State for the application of the law of another State with regard to a case or a matter should not be interpreted as consent by the first State to the exercise of jurisdiction by the courts of the other State. The Drafting Committee, which had endorsed that view, had thus added paragraph 2. The title of the article remained unchanged.

54. Article 8 (Effect of participation in a proceeding before a court) corresponded to article 9 as adopted on first reading, to which there had been two substantive changes involving additions made as a result of the discussions on second reading and of comments by Governments.

55. As the title—which remained unchanged—indicated, the article dealt with the effect on a State's immunity from jurisdiction of its participation in a proceeding before a court. It thus provided for exceptions to that immunity. Those exceptions applied where the State had itself instituted the proceeding (para. 1 (*a*)) and where the State had intervened in the proceeding or taken any other step relating to it (para. 1 (*b*)). It had been pointed out that there might be circumstances in which a State would not be familiar with certain facts on the basis of which it could invoke immunity. It could happen that a State instituted proceedings or intervened in a case before it had acquired knowledge of such facts. In such cases, the State should be able to invoke immunity, on two conditions. First, the State must satisfy the court that it could have acquired knowledge of the facts justifying a claim of immunity only after it had intervened in the proceeding or taken steps relating to the merits of the case. Secondly, the State must furnish such proof at the earliest possible moment. The second part of paragraph 1 (*b*) dealt with that point.

56. Paragraph 2 was unchanged apart from certain drafting amendments in the introductory clause. The text adopted on first reading referred only to paragraph 1 (*b*), but, in view of the additions made to that subparagraph, it had been considered advisable to repeat the main idea set forth at the beginning of paragraph 1 (*b*). That change was purely one of drafting.

57. Paragraph 3 was new. It had been noted that a representative of a State might have to appear before a court as a witness, for instance to give evidence that a particular person was or was not a national of that State, or in connection with similar matters. Such appearances should not imply that that State consented to the exercise of jurisdiction by a national court. Paragraph 3 therefore had to be read in the light of the first clause of paragraph 1 (*b*), according to which such appearances before a court did not normally constitute intervention by the State in the proceeding. The reference was, of course, to the appearance of a representative of a State in his official capacity. It went without saying that, if the same person appeared in his private capacity, his appearance could not involve the State.

58. Paragraph 4 corresponded to paragraph 3 of the former text, which remained unchanged except for a few drafting amendments. For instance, in the last part of the paragraph, the words "of that State" had been replaced by "by the former State", in order to make the text clearer. In English, the word "considered" had been replaced by "interpreted" to bring the text into line with that of paragraph 3.

59. In article 9 (Counter-claims), the Drafting Committee had made only slight drafting amendments to the text adopted on first reading (art. 10). It had noted that the parallelism as to substance between paragraphs 1 and 2 was not properly reflected in the wording. It had therefore amended the introductory phrase of paragraph 1 to bring it into line with the corresponding phrase in paragraph 2, so that it read: "A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction . . .". The Drafting Committee had also considered that the words "against the State" in paragraphs 1 and 2 of the former text were unnecessary and had deleted them.

60. Turning to part III of the draft, he noted that the title, "[Limitations on] [Exceptions to] State immunity", appeared between square brackets. The Commission would take a decision on the matter when it had concluded the second reading of all the draft articles.

61. With regard to article 10 (formerly article 11), the title adopted on first reading, "Commercial contracts", had been replaced by "Commercial transactions", the expression used in paragraph 1 (*c*) of article 2. The same change had been made at three points in paragraph 1 and in paragraph 2 (*a*) and (*b*).

62. A further change had been made in paragraph 1 with regard to the words "the State is considered to have consented to the exercise of that jurisdiction". The Drafting Committee had noted that, in the plenary Commission, the legal fiction reflected by those words had been regarded as artificial and devoid of any foundation in case-law. It had therefore replaced those words by the formula: "the State cannot invoke immunity from that jurisdiction". The purpose of the change was merely to simplify the text and should not be interpreted as implying any change in existing positions on the doctrine of the jurisdictional immunities of States. It would be explained in the commentary that, in the view of some members of the Commission, the non-applicability of immunity in the case covered by article 10 was based on the presumed consent of the State in question.

63. With regard to paragraph 2 and, more specifically, subparagraph (*a*), the Drafting Committee had noted that the purpose of article 10 was to exclude from the benefit of jurisdictional immunity transactions effected by a State with legal persons at private law and that it might not be altogether logical to present as an exception to the rule laid down in paragraph 1 transactions between legal persons at public law which, by definition, fell outside the scope of the article. It had, however, been considered preferable to retain subparagraph (*a*) to make it quite clear that the words "foreign natural or juridical person", in paragraph 1, should not be interpreted as encompassing any of the entities covered by the definition of the term "State" in article 2, paragraph 1 (*b*).

64. Still with regard to paragraph 2 (*a*), the Drafting Committee had questioned the usefulness of the expression "or on a Government-to-Government basis", which appeared in the text adopted on first reading. Most of its members had been of the opinion that, in view of the definition of the term "State" in article 2, paragraph 1 (*b*), which included the words "the State and its various organs of government", the words "or on a Government-to-Government basis" were no longer necessary. Accordingly, it had been agreed to delete those words and, as a result, it had been possible to simplify the wording. Subparagraph (*a*) therefore now read: "in the case of a commercial transaction between States". One member of the Drafting Committee had, however, expressed a reservation concerning the deletion of the words "or on a Government-to-Government basis". He had pointed out that article 2, paragraph 1 (*b*), referred to "organs of government" and not to the Government as such and that the juxtaposition of the expressions "between States" and "on a Government-to-Government basis" would mean that the whole range of possible commercial transactions could be covered, including, for instance, transactions between ministerial departments.

65. With regard to paragraph 2 (*b*), the Drafting Committee had merely introduced a slight change in the English text, placing the word "otherwise" at the end of the sentence.

66. Article 10 was followed by points of ellipsis, for, as he had explained in connection with article 2, paragraph 1 (*b*) (iii *bis*) (see para. 32 above), the Drafting Committee was planning to reconsider at the next session the possibility of including an article 11 on State enterprises corresponding to draft article 11 *bis* submitted by the Special Rapporteur. The purpose of the points of ellipsis was to draw attention to that possibility.

67. Article 12 (Contracts of employment) set forth the second exception to the principle of the jurisdictional immunity of States. Several Governments had recommended the deletion of the article, pointing out in particular that it lacked any strong support in case-law and State practice. Although the Drafting Committee was aware of those objections, it had taken the view that it would be going beyond its mandate to propose the deletion of an article adopted on first reading, and that its efforts should rather be directed at improving the wording. Some members had, however, reserved their position with regard to the article, for the reason he had stated.

68. Article 12 covered the situation in which a contract of employment had been concluded between a State and an individual for work to be performed, in whole or in part, in the territory of another State. Since two sovereign States were involved, their respective interests had to be reconciled. The employer State had an interest in the application of its administrative law in respect of the selection, recruitment and appointment of an employee by the State itself or one of its organs acting in the exercise of governmental authority. On the other hand, the forum State had an interest in ensuring that matters of public policy relating to the protection to be afforded to persons working in its territory should be within its exclusive jurisdiction. The structure of article 12 showed that care had been taken to strike a proper balance between the interests involved. Paragraph 1 stated the rule of non-immunity in a judicial proceeding relating to a contract of employment between a State and an individual for work to be performed, in whole or in part, in the territory of another State. Paragraph 2 introduced limitations to the rule of non-immunity by indicating the cases in which the exception to immunity did not apply.

69. In paragraph 1, the Drafting Committee had replaced the words "the immunity of a State cannot be invoked" by "a State cannot invoke immunity" for the sake of terminological consistency, since the active voice was used in earlier articles, for example articles 8 and 9. The same change had been made in articles 13 to 16. As to substance, the Drafting Committee had noted that a number of Governments had found paragraph 1 too restrictive and it had therefore eliminated the two conditions to which the rule of non-immunity had been subordinated in the last part of the text adopted on first reading. In the case of the first condition, namely that the employee must have been recruited in the forum State, the Committee had noted that, according to the first part of the text, the rule of non-immunity came into play whenever work was performed or was to be performed in the territory of the forum State. In the Committee's opinion, that clause established a sufficient link between the contract and the forum State. In that connection, it should be recalled that the 1972 European Convention on State Immunity contained no reference to the place of recruitment. The Drafting Committee had therefore deleted the first condition. At the Special Rapporteur's suggestion, it had also deleted the second condition, requiring the employee to be covered by special security provisions. It had had two reasons for doing so. First, as several Governments had pointed out, some countries did not have social security systems in the strict sense of the term. Secondly, there were social security systems whose benefits did not cover persons employed for very short periods. If the reference to social security provisions were retained in article 12, such persons would be deprived of the protection of the courts of the forum State. However, it was precisely those persons who were in the most vulnerable position and who most needed effective judicial remedies. The Drafting

Committee had therefore deleted the end of paragraph 1, beginning with the words "if the employee . . .".

70. The Drafting Committee had brought the English text of paragraph 1 into line with the French by replacing the word "services" by "work", the term used in the corresponding provision of the 1972 European Convention. That change made it clear that reference was being made to contracts which gave rise to the payment of wages, not to transactions concluded between a State and an entrepreneur; such transactions were commercial transactions within the meaning of article 2, paragraph 1 (*c*), and were, under article 10, already outside the scope of the principle of immunity.

71. With regard to paragraph 2, the Drafting Committee had noted that several Governments had recommended the deletion of subparagraphs (*a*) and (*b*) of the text adopted on first reading. It had nevertheless found that those subparagraphs had been criticized mainly because their scope had been considered broad. The Committee had therefore tried to make the texts more precise in order to prevent unduly extensive interpretations which would reduce the rule stated in paragraph 1 to nothing. In subparagraph (*a*), the expression "services associated with the exercise of governmental authority" might lend itself to such an interpretation, since a contract of employment concluded by a State stood a good chance of being "associated with the exercise of governmental authority", even very indirectly. The Drafting Committee had noted that the commentary to the text adopted on first reading encouraged that type of interpretation by stating that persons performing services associated with the exercise of governmental authority could include librarians of an information service and security guards.[8] In the Committee's opinion, the exception provided for in subparagraph (*a*) was justified only if there was a close link between the work to be performed and the exercise of governmental authority. The words "associated with" had therefore been replaced by "closely related to". In order to avoid any confusion with contracts for the performance of services which were dealt with in the definition of a "commercial transaction" and were therefore covered by article 10, the Drafting Committee had replaced the word "services" by "functions".

72. In subparagraph (*b*), the same concern for accuracy had prompted the Drafting Committee to replace the words "the proceeding relates to" by "the subject of the proceeding is". Even a proceeding concerning the performance of a contract of employment could be regarded as "relating to" the contract, and that would defeat the purpose of the exception stated in paragraph 1. The words "the subject of the proceeding is" made it clear that the scope of the exception was restricted to the specific acts which were referred to in subparagraph (*b*) and which were legitimately within the discretionary power of the employer State. Moreover, paragraph (12) of the commentary[9] explained that the rule in subparagraph (*b*) was without prejudice to the possible recourse which might still be available in the forum State for compensation for wrongful dismissal, for example.

73. The Drafting Committee had not made any changes in subparagraphs (*c*), (*d*) and (*e*) of the text adopted on first reading, but a mistake in the Russian translation of the expression "public policy" had been corrected.

74. He recalled that, when article 13 (Personal injuries and damage to property) had been discussed in the plenary Commission, differing views had been expressed as to its relevance. Some members would have preferred to delete it, while others wished to retain it. The Governments which had made observations on the article had also been divided. The article was basically intended to cover situations such as traffic accidents which involved a diplomat or a State official in the exercise of his functions and which caused injury to innocent persons in other States. It had been considered that compensation should be paid in such cases and that States should not be able to avoid their obligations by invoking immunity. That principle, namely the obligation to compensate innocent injured parties, had not been questioned. The point at issue was how the compensation should be provided. Some members had expressed the view that the kind of motor-vehicle insurance now commonly held by States automatically covered such situations and that whatever matter was not covered by the insurance should preferably be settled through diplomatic channels. Other members had taken the opposite view that, in such cases, States should not, in principle, be able to avoid their obligations by invoking immunity.

75. There had, of course, been the same differences of views in the Drafting Committee. Two points had, however, been taken into account by the members of the Committee: first, the members of the Commission who wanted to delete article 13 were fewer in number than those who wanted to retain it; and, secondly, in such circumstances, the Drafting Committee could not delete on second reading an article which had been referred to it by the Commission. The Drafting Committee had therefore redrafted the text of the article. Apart from the replacement of the passive voice by the active voice at the beginning of the text, only five lines in the middle of the article had been modified in order to make the text clearer. The text adopted on first reading had contained two references to death or injury to the person and the connection between death or injury to the person and the act or omission attributable to the State had not been established directly enough. In the present wording, the words "death or injury to the person" were used only once and were linked more directly to the act or omission attributable to the State.

76. Comments had also been made on the very broad scope of article 13 and on the consequences that might have for State responsibility. It had been stated, for example, that the word "compensation" might be misinterpreted as including non-pecuniary forms of compensation. The Drafting Committee had therefore added the word "pecuniary" before the word "compensation".

[8] See *Yearbook . . . 1984*, vol. II (Part Two), p. 65, para. (11) of the commentary to the then article 13.

[9] *Ibid.*

77. To make it clear that article 13 referred to acts performed by agents or officials of a State in the exercise of their official functions and not necessarily by the State itself as a legal person, the Drafting Committee had considered it necessary to explain in the commentary that the words "author of the act" referred to such persons. The expression "attributable to the State" was also intended to establish a distinction between acts by such persons which were not attributable to the State and those which were attributable to the State.

78. It had been pointed out that it must be made clear that the reference to an act or omission attributable to the State did not affect the rules of State responsibility. In the Drafting Committee's view, the entire set of draft articles on the present topic dealt with the question of State immunity, i.e. whether a State should or should not appear before the courts of another State. The articles therefore did not deal with the substantive question whether a State was or was not responsible for the act attributed to it. That question could be settled only when the court had examined the merits of the case. To make that point clear, the Drafting Committee had taken the view that it should be explained in the commentary.

79. Whenever possible and whenever the text would not be less clear, the Drafting Committee had tried to avoid using the expression "the State of the forum". It had not always succeeded. In article 13, however, it had been able to use the expression "that other State" rather than "the State of the forum". The title of the article remained unchanged.

80. In the French text, it had been considered that the words *qui est présumé attribuable* were an incorrect translation of the words "which is alleged to be attributable". The English wording did not establish a presumption, but merely indicated a statement or claim by one of the parties. The words *qui est présumé attribuable* had therefore been replaced by *prétendument attribuable*.

81. In Article 14 (Ownership, possession and use of property), the Drafting Committee had put the introductory clause in the active voice, for the reasons already explained. The words "otherwise competent" were particularly important. As they indicated, the provision was based on the assumption that the court before which the case had been brought actually had jurisdiction under the rules applicable to conflicts of jurisdiction; it was not intended to confer jurisdiction on a court when such jurisdiction did not exist.

82. As to the subparagraphs of the former paragraph 1, the Drafting Committee had noted that reservations had been expressed with regard to the concept of an "interest", which was not known in some legal systems. However, it had taken the view that, if no reference were made to that concept, problems would arise in countries where the concept was in customary use, whereas the reverse would not be true. It had therefore decided to retain the formula "right or interest".

83. The Drafting Committee had made no changes in subparagraphs (*a*) and (*b*). Subparagraphs (*c*), (*d*) and (*e*) had been replaced, in accordance with the Special Rapporteur's suggestion, by a single subparagraph (*c*), which read:

> "(*c*) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding-up."

The new wording was less detailed than subparagraphs (*c*), (*d*) and (*e*) as adopted on first reading, but it kept the essence of those subparagraphs in more condensed form.

84. Paragraph 2 of the text adopted on first reading had given rise to some reservations. As indicated in the commentary, one member of the Commission had expressed the view that the paragraph was neither useful nor justified.[10] Another had reserved his position, taking the view that the content and formulation of the paragraph were likely to give rise to serious difficulties, particularly in seeking to deprive a State of property as a result of a proceeding from which the State was absent. The Drafting Committee had taken account of the link between paragraph 2 of article 14 and paragraph 2 of article 6 (formerly article 7), under which a proceeding could be considered to have been instituted against a State even if the State was not named as a party. The Committee had nevertheless considered it self-evident that the presence of a State should not be an obstacle to a proceeding between two private individuals, since the State would be able to invoke immunity only if the proceeding had been instituted against it. The Drafting Committee had therefore deleted paragraph 2.

85. Article 15, now entitled "Intellectual and industrial property", was unchanged except for certain drafting amendments. First, the introductory clause had been put into the active voice. In subparagraph (*a*), the word "similar" had been considered superfluous and had been deleted, so that the text now read: "... any other form of intellectual or industrial property ...". The Drafting Committee had taken the view that "intellectual or industrial property" was a generic expression covering a range of rights relating to new forms of property which enjoyed a measure of legal protection. New forms of property resulting from scientific, technical and industrial progress and from new genetic engineering techniques were constantly being recognized and accepted. It would therefore be impossible, and unwise, to try to list such forms of property in the text of the article. It would be better to have an article that was general in scope and to give examples in the commentary.

86. To make subparagraph (*b*) clearer, the Drafting Committee had added the words "of the nature" after the words "of a right", so that the phrase now read: "of a right of the nature mentioned in subparagraph (*a*)". It was thus understood that the rights in question were rights in a patent, an industrial design, a trade name, etc. The Drafting Committee had also deleted the word "above" after "subparagraph (*a*)", since it was unnecessary.

[10] See *Yearbook ... 1983*, vol. II (Part Two), pp. 37-38, para. (10) of the commentary to the then article 15.

87. The title of the article had been shortened. Since the article dealt with various forms of intellectual and industrial property, the Drafting Committee had considered that it was enough to use those terms in the title.

88. It should be pointed out that some members of the Drafting Committee had said that article 15 had no place in the draft and that they would have preferred it to be deleted.

89. In article 16 (Fiscal matters), the Drafting Committee had made no change to the text adopted on first reading, except that it had replaced the passive voice by the active voice. One member of the Committee had expressed a reservation concerning the article.

90. The CHAIRMAN recalled that the Commission had decided that the draft articles adopted by the Drafting Committee on second reading would be introduced by the Chairman of the Drafting Committee, but not discussed or decided on in the plenary Commission at the current stage (see 2183rd meeting, paras. 69-73). Before deciding on individual articles, the Commission would wait until it had before it the entire set of articles proposed on second reading. However, members who had statements to make on the general orientation of the work on the topic were invited to take the floor.

91. Prince AJIBOLA said that the draft articles proposed by the Drafting Committee, which had been considerably slimmed down, were an improvement on the former texts. Nevertheless he had two general comments to make. First, the word "State", which appeared in many places in the text, required some qualification in order to avoid confusion. In article 8, paragraph 4, for example, the lack of an adjective had made it very difficult for the Drafting Committee to distinguish between the States concerned. In that connection, the draft articles on most-favoured-nation clauses[11] might be used as a model and reference could be made to the "granting" State or to the "beneficiary" State, as appropriate, in order to make it quite clear which State was meant. Secondly, article 5, which enunciated the general principle of State immunity that was subsequently worn down by a great many exceptions, should have been placed earlier in the text.

92. Mr. Sreenivasa RAO said that he agreed with Prince Ajibola on the need to qualify the State in question by means of an adjective. He would also like some clarifications as to the meaning of the following words used at the end of paragraph 1 of article 6: "and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected".

93. Mr. MAHIOU (Chairman of the Drafting Committee) recalled that the Commission had decided not to hold a debate on the articles. In reply to the question by Mr. Sreenivasa Rao, however, he explained, as he had already done in introducing his report (see para. 46 above), why the Drafting Committee had added the second part of paragraph 1 of article 6 at the suggestion of the Special Rapporteur.

94. Mr. Sreenivasa RAO said that his understanding was therefore that the courts must first determine whether a State was entitled to immunity before dealing with the merits of a case.

95. He also had some comments to make on other articles. In article 9, he could not see the difference between paragraph 1 and paragraph 2. In article 12, he thought that the scope *ratione personae* of paragraph 2 (*b*) could be explained in the commentary. With regard to article 14 (*c*), he wished to know whether "the estate of a bankrupt" was a standard expression.

96. Mr. BENNOUNA, supported by Mr. CALERO RODRIGUES, recalled that it had been decided to postpone consideration of the articles until the following session.

97. Mr. SEPÚLVEDA GUTIÉRREZ commended the Chairman of the Drafting Committee on his outstanding presentation and also congratulated the Special Rapporteur.

98. Mr. BEESLEY said that problems might be caused by using the word "State" to refer both to a sovereign State and to the constitutive units of a federal State, as, for example, in article 1 and article 5. He would like the Chairman of the Drafting Committee to provide some clarification on that point.

99. Mr. NJENGA asked whether the draft articles which had just been introduced would be referred to the Sixth Committee of the General Assembly. If they were, the Sixth Committee would discuss them before the Commission did.

100. Mr. MAHIOU (Chairman of the Drafting Committee) said that the draft articles proposed by the Drafting Committee would not be included in the Commission's report to the General Assembly because they were incomplete and might give the wrong idea of the draft as a whole. The texts would be referred to the General Assembly only after all the articles had been considered on second reading.

101. In reply to Mr. Beesley, he repeated the explanations on the particular case of federal States which he had given in introducing his report (see para. 29 above).

Date and place of the forty-third session

[Agenda item 11]

102. The CHAIRMAN announced that the Enlarged Bureau had decided to recommend that the Commission's forty-third session should take place from 29 April to 19 July 1991.

103. Mr. BENNOUNA, Mr. AL-QAYSI, Mr. MAHIOU, Mr. PELLET, Mr. BARSEGOV and Mr. TOMUSCHAT expressed reservations about those dates. If the Commission decided to begin its work as early as April, it might be depriving itself of the assistance of several of its members, who would be detained by other professional obligations.

104. Mr. NJENGA, supported by Prince AJIBOLA, said that the sooner the Commission began its work,

[11] *Yearbook ... 1978*, vol. II (Part Two), pp. 16 *et seq.*

the sooner it would be able to complete its report to the General Assembly.

105. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the recommendation by the Enlarged Bureau that the forty-third session should be held from 29 April to 19 July 1991.

It was so agreed.

The meeting rose at 6.10 p.m.

2192nd MEETING

Thursday, 12 July 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/429 and Add.1-4,[2] A/CN.4/430 and Add.1,[3] A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (*continued*)

CHAPTER III (The Commission's discussion of the question at the present session) (*continued*)

Paragraph 28 (concluded)

1. Mr. GRAEFRATH proposed that paragraph 28 should be reworded as follows:

> "Some States see the establishment of an international criminal court as a useful alternative to overcome their difficulties in implementing universal jurisdiction. It would, however, be illusory to believe that an international prosecuting mechanism could relieve States of the problems associated with the national administration of [criminal] justice."

If the Commission did not agree, the paragraph could perhaps be deleted, because it was not really necessary.

2. Mr. SEPÚLVEDA GUTIÉRREZ said that Mr. Graefrath's proposal solved many problems and he would therefore withdraw his own objections to the paragraph.

3. Mr. AL-QAYSI said that Mr. Graefrath's proposal might help to overcome difficulties that had emerged in the discussion, but he wondered whether it was appropriate to speak of the "national administration of criminal justice" and proposed instead the phrase "national administration of justice in relation to criminal matters".

4. Mr. BENNOUNA said that the expression "criminal matters" proposed by Mr. Al-Qaysi was too broad. He would suggest the formula "the prosecution of international crimes".

5. Mr. McCAFFREY said that he agreed with Mr. Bennouna's suggestion, which also read well in English, and proposed replacing the words "relieve States of" by "alleviate" or "eliminate".

6. Mr. RAZAFINDRALAMBO said that he, too, agreed with the suggestion made by Mr. Bennouna and supported by Mr. McCaffrey, because he had reservations about the original paragraph 28 and about Mr. Graefrath's proposed rewording.

7. Mr. KOROMA suggested replacing the word "illusory", which was too negative, by the words "unduly optimistic".

8. Mr. NJENGA said that he supported Mr. Koroma's suggestion. As to Mr. McCaffrey's proposal, the word "eliminate" was preferable to "alleviate".

9. Mr. EIRIKSSON (Rapporteur) endorsed Mr. Koroma's suggestion and proposed that the end of the paragraph should be amended to read: "... could eliminate all problems associated with the prosecution of international crimes".

10. Mr. HAYES said that he had reservations about Mr. Bennouna's proposed amendment. The Commission was not simply attempting to cover the internal prosecution of international crimes, but also the internal prosecution of what technically would be national crimes. The phrase "prosecution of international crimes" was therefore too restrictive. Perhaps it would be better to say: "the national prosecution of similar crimes".

11. Mr. DÍAZ GONZÁLEZ said that he was in favour of deleting paragraph 28, because it was in contradiction with paragraph 29. Its deletion would not detract from the report.

12. Mr. AL-QAYSI said that he had no objection to deleting the paragraph, but if it was to be retained, it was important to bear in mind the context. Some States considered that they would encounter difficulties in implementing universal jurisdiction and they were therefore advocating the alternative of an international criminal court. The second sentence could thus be worded: "It would, however, be unduly optimistic to

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* Resumed from the 2189th meeting.

[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 ... 1990*, vol. II (Part One).

[3] *Ibid.*