

Document:-
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Summary record of the 2243rd meeting

Topic:
Other topics

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90. Mr. CALERO RODRIGUES, speaking on a point of order, said that the point made in paragraph 25 was the opinion of one member only.

91. Mr. BARSEGOV said that, if members of the Commission were reluctant to admit to authorship of the statements they had made in meetings, it would be better to omit those statements. Otherwise, members might be tempted to change their minds.

92. Prince AJIBOLA said that he disagreed. The member in question was not present and might object to his statement being deleted. It would be best to check the summary record.

93. The CHAIRMAN said it was to be hoped that, in future, the Commission's report would be a synthesis of the discussion, not a record of individual statements.

94. Mr. THIAM (Special Rapporteur) said that he could draft a new version of paragraph 25, in co-operation with Mr. Pellet.

95. Mr. PELLET said that his views were reflected in paragraph 26. However, the second sentence of that paragraph duplicated the statements contained in paragraph 25.

96. Mr. MAHIU said it was important to avoid ambiguity. It would be helpful if the Special Rapporteur could redraft the second sentence of paragraph 26 as well.

97. Mr. RAZAFINDRALAMBO said that the views reflected in paragraph 25 were his. He had meant that, where States rejected the jurisdiction of the international criminal court in first instance, they were unlikely to give it jurisdiction to review decisions of their own courts. Since the idea contained in paragraph 25 was repeated at the end of paragraph 26, the Special Rapporteur should be asked to redraft paragraph 26 as well.

98. Prince AJIBOLA said that, since the two paragraphs were connected, both should be redrafted.

99. Mr. PELLET proposed that the discussion on the two paragraphs should be suspended until the Special Rapporteur was ready to propose amended versions.

It was so agreed.

Paragraph 27

100. Mr. CALERO RODRIGUES said that, in order to bring the English text into line with the French text, the words "and unifying" should be added after the word "harmonizing" in the second sentence.

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

101. Mr. PAWLAK said that, for the sake of consistency in the last sentence, the reference to the United Nations General Assembly and Security Council should either be deleted or the words "main organs of" should be added before the words "other intergovernmental international organizations".

102. Mr. PELLET said that, since Article 96 of the Charter of the United Nations provided that advisory opinions could be requested by "other organs of the United Nations and specialized agencies", it would be more logical to refer to "certain organizations".

103. The CHAIRMAN said that the word "international" could then be deleted.

It was so agreed.

104. Mr. THIAM (Special Rapporteur) said that, in the French version of the last sentence, the words *droit pénal international* should be amended to read: *droit international pénal*.

Paragraph 28, as amended, was adopted.

Paragraph 29

Paragraph 29 was adopted.

The meeting rose at 1 p.m.

2243rd MEETING

Monday, 15 July 1991, at 3 p.m.

Chairman: Mr. Abdul G. KOROMA

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

Draft report of the Commission on the work of its forty-third session (continued)

CHAPTER IV. Draft Code of Crimes against the Peace and Security of Mankind (continued) (A/CN.4/L.464 and Add.1-4)

B. Consideration of the topic at the present session (continued) (A/CN.4/L.464 and Add.1-3)

1. CONSIDERATION OF THE NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued) (A/CN.4/L.464 and Add.1-3)

(b) The jurisdiction of an international criminal court (concluded) (A/CN.4/L.464/Add.2)

Paragraphs 25 and 26 (concluded)

1. Mr. THIAM (Special Rapporteur) said that, in consultation with Mr. Razafindralambo and Mr. Pellet,

whose comments were reflected in paragraphs 25 and 26, respectively, he had redrafted the sentences of paragraphs 25 and 26 that had given rise to problems.

2. The penultimate sentence of paragraph 25 now read: "But the question arose whether a State that was not prepared to relinquish its jurisdiction in favour of the international criminal court would agree to submit to the reconsideration by that court of a decision rendered by its highest judicial authority." The last sentence of paragraph 26 now read: "The conferment of review jurisdiction upon the court might, as indicated in the previous paragraph, be even more unacceptable for States than attribution to the court of direct jurisdiction."

3. Mr. TOMUSCHAT said that the penultimate sentence of paragraph 25 would be clearer if the words "for the trial stage" were added after "jurisdiction". By agreeing to confer review jurisdiction on an international court, the State also relinquished part of its own jurisdiction. It was therefore logical to specify that the first part of the sentence related to the trial stage.

Paragraphs 25 and 26, as amended by the Special Rapporteur, were adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

4. Mr. RAZAFINDRALAMBO proposed that the first part of the last sentence of the French text should be amended to read: "*On pouvait raisonnablement imaginer que de tels cas se produiraient lorsqu'un Etat jugerait son propre ressortissant . . . , mais ces cas . . .*". The last part of the sentence should be amended to read: "*. . . permettant à ceux-ci d'avoir accès aux dossiers et d'avoir une connaissance exacte et précise des faits de la cause*".

Paragraph 31, as amended, was adopted.

Paragraphs 32 to 34

Paragraphs 32 to 34 were adopted.

Paragraph 35

5. Mr. TOMUSCHAT, replying to a question by Prince AJIBOLA concerning the English text, proposed that the words "learned associations" should be replaced by "learned societies".

6. Mr. THIAM (Special Rapporteur) proposed that the word *certain*s should be added before *auteurs*, in the first sentence of the French version.

Paragraph 35, as amended, was adopted.

Section B 1 (b), as amended, was adopted.

(c) *The institution of criminal proceedings (submission of cases to the court)* (A/CN.4/L.464/Add.3)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

7. Mr. PELLET suggested that the words *des organes distincts compétence pour engager*, in the second sentence of the French text, should be replaced by *des organes distincts d'exercer leur compétence pour engager* or by *des organes distincts d'engager*.

8. Mr. RAZAFINDRALAMBO proposed that the phrase should read: *système international attribuant à des organes distincts compétence pour engager*. Moreover, States were not empowered to institute proceedings, but only to lodge complaints. The words "instituting proceedings", in the third sentence, should therefore be changed to "lodging a complaint". Lastly, the words "investigating the charges", in the last sentence, should be replaced by "the preliminary investigation" or by "the preliminary proceedings".

9. Mr. THIAM (Special Rapporteur) pointed out that the preliminary inquiry was conducted by the police, whereas the investigation in the present instance was a matter for another authority, which was called upon to decide whether or not proceedings should be instituted. Consequently, the last sentence should not be amended.

10. Mr. TOMUSCHAT said that the sentence in question reflected his own statement and, since it was not known what procedure would apply, he saw no reason to change the wording.

11. Mr. CALERO RODRIGUES said he was against the suggestion to replace the words "instituting proceedings" by "lodging a complaint". It was better for the text to remain unchanged, although he had some doubt about the words "the possibility" used in that same sentence.

12. The CHAIRMAN, speaking as a member of the Commission, suggested that the word "take", in the second sentence, should be replaced by "commence".

13. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 7 taking into account the suggestions made by Mr. Pellet, Mr. Razafindralambo and himself.

Paragraph 7, as amended, was adopted.

Paragraph 8

14. Mr. McCAFFREY suggested that the words "bring cases to the notice" should be replaced by the formula used in paragraph 7, namely "bring cases to the attention".

Paragraph 8, as amended, was adopted.

Paragraph 9

15. Mr. McCAFFREY proposed that the word "start", in the second sentence, should be replaced by "initiate".

16. Mr. RAZAFINDRALAMBO proposed that, in the last sentence, the word *s'agissant* in the French text should be replaced by the words *au sujet*.

17. Mr. TOMUSCHAT suggested that any references to the Red Cross should be deleted, since it was a body that had to operate with the greatest discretion and could not play the role of prosecutor.

18. Mr. BARSEGOV said he shared that view. Instead of referring to the Red Cross it might be better to mention the International Commission of Jurists.

19. Mr. CALERO RODRIGUES said that if the reference to the Red Cross was deleted, the references to the other organizations should also be omitted. Moreover, he had doubts about the role of those organizations and wondered whether their action should be confined to lodging a complaint or whether they could also institute criminal proceedings.

20. Mr. MAHIU said he endorsed Mr. Calero Rodrigues' remarks and suggested that the last sentence should speak only of "non-governmental humanitarian organizations".

21. Prince AJIBOLA said he had doubts as to whether the proposals made by Mr. Calero Rodrigues and Mr. Mahiou really reflected what had been said during the discussion.

22. Mr. TOMUSCHAT suggested that the word "start", in the second sentence, should be replaced by "suggest initiating", which better reflected the idea contained in the French text than did the word "initiate" proposed by Mr. McCaffrey.

23. Mr. THIAM (Special Rapporteur) pointed out that paragraph 9 reflected not the opinion of the Commission but that of Mr. Solari Tudela, who both at the previous session and at the present session had laid much stress on the role of non-governmental organizations. As to whether a complaint could be lodged by non-governmental organizations, the Commission had finally concluded that they could actually do so in the same way as individuals. That was, moreover, the position in France, where non-governmental organizations could initiate proceedings before the criminal courts.

24. Mr. CALERO RODRIGUES said that, in general, he preferred the Commission's report to reflect as accurately as possible the statements by members. In the present instance, however, if the reference to the Red Cross was to be deleted, then it was obviously necessary to eliminate the references to other non-governmental organizations. Besides, a distinction had to be drawn between the right to lodge a complaint and the right to initiate criminal proceedings. The right to initiate criminal proceedings lay not with the State or individuals or organizations but, in the domestic legal system, with the office of public prosecutions. In the case of the international criminal court, it would in due course have to be provided with the equivalent of such an office. However, he supported Mr. Tomuschat's proposal concerning the second sentence. The idea of suggesting the initiation of proceedings went together with the right to bring cases

to the attention of the competent body, mentioned in paragraph 8.

25. Mr. TOMUSCHAT said it was always delicate to correct what had actually been said by a member of the Commission. Nevertheless, it was perhaps sometimes advisable to avoid entering into details. A good example was the reference to the Red Cross: ICRC's mission would be jeopardized if it had to act as prosecutor.

26. Prince AJIBOLA said he shared Mr. Calero Rodrigues' view that non-governmental organizations could only lodge a complaint and could not in any way be entitled to institute criminal proceedings, a right which belonged only to the office of public prosecutions.

27. Mr. GRAEFRATH suggested that paragraphs 8, 9 and 10 should be merged. The first sentence of paragraph 9 and the whole of paragraph 10 would be added to the single sentence of paragraph 8. Those three sentences would thus reflect three different positions and it was unnecessary to mention in the draft report the reasons behind them.

28. Mr. McCAFFREY said that Mr. Graefrath's proposal posed a problem: in all fairness, it would then be necessary to delete from the following paragraphs the lengthy explanations given in support of one position or another.

29. Mr. THIAM (Special Rapporteur) said that, for Mr. Solari Tudela, the essential point was that non-governmental organizations should be entitled to take action, in other words, to bring a case to the attention of the competent authorities with a view to criminal proceedings. He did not believe that Mr. Solari Tudela's thinking would be misrepresented if the examples he had given in support of his ideas were not quoted. Mr. Calero Rodrigues had made an extremely fine distinction between the right to lodge a complaint and the right to institute criminal proceedings, but in French law, for example, when the Public Prosecutor refused to institute proceedings the victim of the offence could always take action as a civil claimant.

30. Mr. MAHIU pointed out that the English translation of the second sentence of paragraph 9 departed from the French original, so it would probably be enough to bring the English text into line with the French in order to meet the concern about the shade of difference between the right to lodge a complaint and the right to institute proceedings. The French wording should make it possible to meet the requirements of any judicial system.

31. The CHAIRMAN suggested that the Commission should adopt the proposals to delete the references to the various non-governmental organizations, to alter the second sentence as suggested by Mr. Tomuschat, and, in the last sentence, to speak of "non-governmental humanitarian organizations".

Paragraph 9, as amended, was adopted.

Paragraph 10

32. Mr. BARSEGOV said he believed paragraph 10 reflected his own opinion. If no other member of the Commission claimed authorship for the observations in

question, he proposed that the phrase "and since States could not be prosecuted under the draft Code" should be deleted. He might have said it in some other context, but in the present instance it had no connection either with what went before or with what came after.

Paragraph 10, as amended, was adopted.

Paragraph 11

33. Mr. McCaffrey said that, since criminal proceedings were at issue, it was preferable, from the point of view of the common law, to replace the word "damages" by the word "compensation".

Paragraph 11, as amended, was adopted.

Paragraphs 12 to 16

Paragraphs 12 to 16 were adopted.

Paragraph 17

34. Mr. Pellet said that paragraph 17 gave rise to three problems which, as he saw it, were essentially connected with the translation of the observations mentioned. In the first place, the second sentence of the French text was meaningless whereas the English sentence was perfectly clear. The translation could be improved by saying for example: "Or, un droit international coupé de la justice internationale ne saurait être l'expression d'un idéal". In the second place, in the last sentence, after the words *menace d'agression* the words *ou d'un acte d'agression* appeared to have been omitted. They would therefore have to be inserted. Again, the phrase *indépendamment du bien-fondé juridique de l'affaire* in the last sentence, was meaningless in French and it should be replaced by *indépendamment du bien-fondé juridique des positions en présence*.

It was so agreed.

Paragraph 17, as amended in the French text, was adopted.

Paragraph 18

35. Mr. Barsegov said he could not accept the word "eclectic", in the first sentence. It was a word that had a pejorative connotation, at least in Russian. He proposed that the first sentence should be deleted and that the first three words of the second sentence should be replaced by "Another member observed that".

Paragraph 18, as amended, was adopted.

Paragraph 19

36. Mr. McCaffrey, supported by Mr. Pellet and Mr. Barsegov, said that, as one of the "Some other members" whose opinion was reflected in paragraph 19 he would propose that the second sentence, according to which "An individual could be tried on the ground of aggression only if a State, had been found guilty of that crime by the Security Council" should be changed. A State could not be found guilty of the crime of aggression by the Security Council and, for his part, he had never said such a thing. The end of the sentence should

read "... only if a State had been found by the Security Council to have committed aggression".

Paragraph 19, as amended, was adopted.

Paragraphs 20 to 25

Paragraphs 20 to 25 were adopted.

Section B 1 (c), as amended, was adopted.

37. The Chairman said that the Commission would consider the remainder of chapter IV at subsequent meetings. In the meantime, he invited the Commission to consider chapter II of its draft report.

CHAPTER II. Jurisdictional immunities of States and their property (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

A. Introduction

B. Recommendation of the Commission and

C. Tribute to the Special Rapporteur, Mr. Motoo Ogiso (A/CN.4/L.462)

Sections A, B and C were adopted.

D. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.462/Add.1 and Corr.2 and 3)

Commentary to article 1 (Scope of the present articles)

Paragraph (1)

38. Mr. Eiriksson said that the proposed text was too wordy.

39. Mr. Calero Rodrigues said he shared that view. What, for example, were the "additional rules" supposed to "supplement and accelerate" the process of "crystallization of norms" on the subject?

40. Mr. Shi said he did not believe the purpose of the articles was, as stated in the first sentence, "to codify rules of international law". In actual fact, the Commission had worked on a compromise solution between codification and progressive development of the law. He proposed that "formulate" should be used instead of "codify".

41. Mr. Mahiou, supported by Mr. Calero Rodrigues and Mr. Graefrath, said it was possible to dispense with paragraph (1) which was not balanced. It was first claimed that the aim was to "codify rules of international law", but then a reference was immediately made to "progressively developing additional "rules", as though the work had not been finished.

42. Mr. Njenga, supported by Mr. Pawlak and Mr. Tomuschat proposed that paragraph (1) should be replaced by the following sentence: "The purpose of the present articles is to formulate rules of international law on the topic of jurisdictional immunities of States and their property."

Paragraph (1), as amended, was approved.

Paragraph (2)

43. Mr. MAHIU pointed to a serious material error in the French version: the fourth and fifth sentences of paragraph (2) had been mistakenly placed at the end of paragraph (3).

44. In addition, the words "The Drafting Committee recommended . . .", in the penultimate sentence, should be changed to "The Commission recommended . . .". The commentary was by the Commission itself.

45. Mr. TOMUSCHAT proposed that the words "in relation to a judicial proceeding" should be added at the end of the third sentence.

46. Mr. BEESLEY proposed that the word "questions", in the first sentence, should be replaced by "issues".

47. Mr. EIRIKSSON proposed that the first sentence should be simplified so as to read: "Article 1 indicates the questions to which the articles should apply."

48. Furthermore, it seemed inappropriate to give a detailed account in the commentary of the proceedings of the Drafting Committee and in particular the discussions on the use of terms "a State" and "another State" or the terms "a foreign State" and "a State of the forum". He therefore suggested that the antepenultimate and penultimate sentences, which contained unnecessary explanations, should be deleted.

49. Mr. NJENGA said it was undesirable to try to shorten a paragraph that was intended to enlighten those who would be participating in a conference of plenipotentiaries. They should be given as complete a picture as possible of the elaboration of the draft submitted to them for approval.

50. Mr. PAWLAK said he, too, was opposed to deletion of the two sentences in question, since it would upset the balance of a very carefully prepared text.

51. Mr. BEESLEY and Mr. TOMUSCHAT said they advised caution.

52. Mr. CALERO RODRIGUES said that, actually, the two sentences were unnecessary because they merely highlighted the Commission's hesitations. Moreover, the text finally adopted on second reading was identical with the one the Commission had adopted on first reading.

53. Mr. OGISO (Special Rapporteur) said he could confirm that remark.

54. Mr. BARSEGOV urged that the two sentences should be retained. The choice between the various formulas mentioned in those sentences had been made in response to the points raised in the Sixth Committee by some Governments, which could thus see that the Commission had taken their concerns into account.

55. Mr. EIRIKSSON proposed that the sentences in question should be replaced by a text reading: "The draft articles refer generally to 'a State' and to 'another State' but it has been found useful to use 'foreign State' and 'State of the forum' in certain articles for the sake of clarity".

56. The CHAIRMAN said he would take it that the Commission was prepared to accept that new formulation, along with the amendments of detail proposed by Mr. Eiriksson for the first sentence and by Mr. Tomuschat, Mr. Mahiou and Mr. Beesley.

Paragraph (2), as amended, was approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (Use of terms)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

57. Mr. EIRIKSSON proposed that, in the interests of clarity, the last sentence should be replaced by a text reading: "Although the draft articles do not define the term 'proceeding', it should be understood that they do not cover criminal proceedings."

It was so agreed.

58. In reply to a question by Mr. TOMUSCHAT, Mr. OGISO (Special Rapporteur) said that the expression "appellate court" meant any higher judicial body to which a case might be referred. In any case, it was not related to any particular legal system.

59. After a discussion in which Mr. TOMUSCHAT, Mr. McCAFFREY, Prince AJIBOLA, Mr. ALBAHARNA, Mr. SHI and Mr. OGISO (Special Rapporteur) took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to amend the second sentence to read: "In the context of the present articles, any organ of a State empowered to exercise judicial functions is a court, regardless of the level and whatever nomenclature is used."

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

60. Mr. TOMUSCHAT said it would be best to delete the fourth and fifth sentences, reading: "In some countries, for example, the comptroller of customs is empowered by statute in certain circumstances to confiscate property without reference to a court. Such acts would normally come under administrative powers". Was it to be said that the comptroller of customs was a court? Would he be acting subject to control by the courts? He thought that was certainly not the case. The customs was an administrative service, and even if it was not subject to judicial control, that did not make it a court.

61. Mr. SHI said he fully agreed with Mr. Tomuschat and unreservedly supported his proposal.

62. Mr. MAHIU pointed out that some organs which were normally administrative bodies were authorized by law to exercise functions of a judicial character in some instances, for example for the customs administration and the police. The fact remained, however, that the

wording of the sentences in question left something to be desired.

63. Mr. AL-BAHARNA said that the two sentences served simply as examples and, what was more, unquestionably reflected the facts, as observed by Mr. Mahiou. They should therefore be retained.

64. Mr. BEESLEY suggested use of the term "quasi-judicial functions".

65. Mr. McCAFFREY said that the difficulty lay partly in the third sentence, which ought to be reworded so as to indicate that, in some exceptional cases and in some countries, administrative authorities were empowered to exercise quasi-judicial functions.

66. Mr. MAHIU said that the third sentence indicated the real situation under some legal systems. The fourth sentence, on the other hand, was wrong: the comptroller of customs could no doubt be empowered to confiscate property as a provisional measure but had to refer the case to the courts. The last part, "without reference to a court", should therefore be replaced by the phrase: "before referring the case to a court". The fifth sentence had to be deleted because, contrary to what it said, the measures in question normally came under the powers of the court and it was only in exceptional cases that they could be exercised by an administrative authority.

67. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, the fourth sentence contained a legally correct statement.

68. Mr. OGISO (Special Rapporteur) pointed out that paragraph (4) dealt with quasi-judicial functions, but he recognized that paragraphs (3) and (4) did involve some duplication. He was prepared to accept Mr. Mahiou's proposals.

69. Mr. PELLET said that he did not entirely share Mr. Mahiou's views. In the first place, it was not at all certain that the third sentence, in its present form, made sense. In French law, for example, it was very difficult to contrast judicial powers with administrative powers in such a way: that could only be done in regard to jurisdiction—in other words judicial or administrative. It would be hard to admit a distinction based on whether jurisdiction lay with the administrative courts or with the ordinary courts.

70. He would be prepared to support Mr. Mahiou's proposal to amend the fourth sentence, provided the next sentence was retained. It was not possible to take note of a fact without drawing the consequences. In reality, however, he failed to see what conclusions could be drawn from that fifth sentence for the purposes of the draft articles.

71. Mr. AL-BAHARNA said that the fourth sentence was factual. It did not mean that the administrative decision by the customs authorities to confiscate property could not be challenged in court.

72. Mr. TOMUSCHAT said that the fourth sentence, in the wording proposed by Mr. Mahiou, was correct but took the form of a mere declaration. Thus, it did not fit into the logic of paragraph (3), which explained the no-

tion of "judicial functions". Even if the customs comptroller did confiscate property, he was not acting in that case in the capacity of a judge—regardless of whether or not a recourse was available. In fact, the question was whether the Commission intended, in regard to judicial functions, simply to refer the matter to national legislations or else to define an autonomous notion of international law. Nothing in paragraph (3) of the commentary provided an answer to that question. The point therefore needed to be clarified.

73. Prince AJIBOLA said the discussion provided a good illustration of the fact that administrative and judicial functions varied from one country to another and in some countries overlapped in certain cases. It was precisely for that reason that paragraph (3) specified, and explained, that there was no question of defining the expression "judicial functions". He did not believe that Mr. Tomuschat's proposal to delete the fourth and fifth sentences would provide an answer to the problem. For his part, he proposed that the fourth sentence should be retained because it reflected, perhaps clumsily, the actual situation in some countries, and that the fifth sentence should be deleted.

74. Mr. CALERO RODRIGUES said that, as he saw it, paragraph (3) was both understandable and rational: it stated that, in certain cases that were therein defined, the comptroller of customs was a court for the purposes of the draft. It was understood that the term "court" was construed as any organ of a State entitled to exercise judicial functions, which was the case of the customs comptroller. Accordingly, a State could invoke immunity in the event of its property being confiscated by the customs.

75. Mr. RAZAFINDRALAMBO said that the difficulty lay in the different interpretations of the expression "judicial functions". Actually, it was enough to refer to the definition of the term "court" in paragraph 1 (a) of article 2 and in paragraph (2) of the commentary.

76. The real problem was whether a comptroller of customs did in fact exercise judicial functions. In that connection, he was inclined to believe, as did Mr. Tomuschat, that a comptroller of customs could not be a court: if he confiscated property, it was with powers of constraint that had nothing to do with judicial functions. He believed that the purpose of paragraph (3) of the commentary was to stress the difference, that existed in certain countries, between judicial jurisdiction and the administrative jurisdiction. He accordingly proposed that the third sentence should be amended to read as follows: "The scope of judicial functions, however, should be understood to cover not only judicial jurisdiction but also in some countries, administrative jurisdiction."

77. The CHAIRMAN, speaking as a member of the Commission, said that the fourth sentence was acceptable, since it did not make any general statement. It did, in fact, correspond to reality.

78. Mr. AL-BAHARNA said he shared that view. As he understood it, the differences of opinion related only to the example given in the sentence, and he therefore supported the proposal to delete the fourth and fifth sentences.

79. Mr. GRAEFRATH said that he was prepared to agree to deletion of the fourth and fifth sentences and proposed in addition that the third sentence should be amended to read as follows: "The scope of 'judicial functions', however, should be understood to cover judicial powers, whether exercised by courts or by administrative organs."

80. Mr. BEESLEY said he believed Mr. Graefrath's proposal would solve the problem.

81. Mr. PELLET said that he could not accept the notion that the draft articles should also cover immunity from execution: if confiscation by customs was to be considered as related to immunity from jurisdiction, then every act of authority by the State—whether performed by the police or by the customs—would be covered by the draft, something which would be inadmissible.

82. He supported the proposal to delete the fourth and fifth sentences and proposed that the third sentence should be completely recast so as to indicate very clearly that it was the nature of the functions which mattered and not the nature of the organ exercising them.

83. Mr. McCAFFREY said that he was prepared to accept the proposal by Mr. Graefrath, which took into account the concern voiced by Mr. Pellet.

84. The CHAIRMAN suggested that the Commission should resume the discussion at the following meeting.

It was so agreed.

The meeting rose at 6.15 p.m.

2244th MEETING

Tuesday, 16 July 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

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

Draft report of the Commission on the work of its forty-third session (continued)

CHAPTER II. Jurisdictional immunities of States and their property (continued) (A/CN.4/L.462 and Add.1 and Corr.2 and 3, Add.2 and Corr.1, Add.3 and Corr.1)

D. Draft articles on jurisdictional immunities of States and their property (continued) (A/CN.4/L.462/Add.1 and Corr.2 and 3)

Commentary to article 2 (Use of terms) (concluded)

Paragraph (3) (concluded)

1. The CHAIRMAN drew attention to the proposed amendment of the third sentence of paragraph (3) of the commentary to article 2, to read: "The scope of judicial functions, however, should be understood to cover judicial functions whether exercised by courts or by administrative organs." The fourth and fifth sentences of paragraph (3) would be deleted.

2. Prince AJIBOLA said that the repetition of the word "judicial" should be avoided, and suggested instead: "such functions whether exercised . . .".

3. Mr. CALERO RODRIGUES observed that the sentence was tautological, for according to the definition in article 2, paragraph 1 (a), any organ of a State which exercised judicial functions was a court. However, he did not object to the proposal.

Paragraph (3), as amended, was approved.

Paragraph (4)

4. Mr. MAHIU suggested that, to avoid difficulties of interpretation, the paragraph should end simply with the words "by administrative organs".

5. Mr. RAZAFINDRALAMBO proposed the expression "by some administrative organs of a State". Not all such organs had quasi-judicial functions.

It was so agreed.

6. Mr. TOMUSCHAT pointed out that there was no equivalent of the words "or agencies" in the French version.

Paragraph (4), as amended, was approved.

Paragraph (5)

7. Prince AJIBOLA proposed that the word "understanding", in the first sentence, should be replaced by "meaning".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

8. Mr. CALERO RODRIGUES queried the meaning of the phrase "entities that are sometimes not completely foreign". Did it refer to the dependencies of colonial powers?