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Summary record of the 1751st meeting

Topic:
Other topics

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proposal, which would also meet Mr. Koroma's point. However, as it would perhaps be premature to broaden the definition, it might be preferable to delete the whole of paragraph (2).

74. Mr. KOROMA thought, like Mr. Díaz González, that it would suffice simply to delete the final sentence of the paragraph.

75. The CHAIRMAN said that, in the absence of any objection, he would take it that the Commission agreed to delete paragraph (2) of the commentary to article 2, in the light of the comments made.

It was so decided.

Paragraph (3) (new paragraph (2))

Paragraph (3) was approved.

The commentary to article 2, as amended, was approved.

Part I, as amended, was adopted.

The meeting rose at 1 p.m.

1751st MEETING

Thursday, 22 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

Draft report of the Commission on the work of its thirty-fourth session (*continued*)

CHAPTER V. *Jurisdictional immunities of States and their property* (concluded) (A/CN.4/L.345 and Add.1)

B. Draft article on jurisdictional immunities of States and their property (concluded) (A/CN.4/L.345/Add.1)

PART II (GENERAL PRINCIPLES)

1. Mr. SUCHARITKUL (Special Rapporteur) said that the commentaries to draft articles 7, 8 and 9 were of necessity long because they related to articles which the Commission had provisionally adopted on first reading, at its present session. Those commentaries were to some extent a restatement of the Special Rapporteur's previous reports.

2. An additional paragraph should be added to the commentary to article 8, reading:

“(12). Consent to the exercise of jurisdiction in a proceeding before a court of another State covers the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review, but not execution of judgement.”

Commentary to article 7 (Modalities for giving effect to State immunity)

Paragraphs (1) and (2)

3. Sir Ian SINCLAIR, speaking on a point of order, said that at its present session the Commission had made no change in article 6 (State immunity), which was to be reconsidered and reworded at a later session. It was therefore pointless to reproduce, in the body of the Commission's report, the text of that article and paragraphs (1) and (2) of the commentary to article 7, both of which related to article 6.

4. Mr. McCAFFREY said that he agreed with Sir Ian, particularly since paragraph (1) of the commentary did not altogether reflect the current state of the Commission's work on article 6.

5. Mr. LACLETA MUÑOZ said that, while he shared the views of Sir Ian Sinclair and Mr. McCaffrey, he considered that the Commission, instead of deleting article 6 and paragraphs (1) and (2) of the commentary to article 7, should state in the report that article 6 had not been the subject of detailed consideration and that some members had reservations about it and about paragraphs (1) and (2) of the commentary to article 7. His own reservations related to the conception of the two paragraphs of article 6 and to the meaning of the term “*hacer efectivo*”.

6. Mr. USHAKOV said once more that he had reservations regarding the title of Part II, “General principles”. Only article 6—whose title he also found unsatisfactory—seemed to lay down general principles, and not articles 7, 8 and 9.

7. Mr. DÍAZ GONZÁLEZ said that he endorsed the reservations expressed by Mr. Lacleta Muñoz, in regard in particular to article 6, paragraph 2, and paragraphs (1) and (2) of the commentary to article 7, which both related to article 6.

8. Mr. YANKOV said that, although he had reservations about certain concepts underlying article 6, it would complicate matters if the text of the article was not included in the report. He therefore proposed that it should be reproduced, if not in the body of the report, then at least in a footnote, and that it should be followed by a few brief explanations.

9. Mr. CALERO RODRIGUES supported the suggestion of Mr. Lacleta Muñoz and Mr. Yankov that the Commission should summarize the discussions on article 6 in a footnote, with an indication that it had been provisionally found acceptable as a basis for article 7 and the following articles.

10. Sir Ian SINCLAIR said he could agree to the Commission reproducing the text of article 6 in its report, on the understanding that the existing footnote 2 would be amplified so as to reflect the discussions that had taken place at the present session, and would make it clear that the Commission was still considering article 6 and would continue to seek a more satisfactory form of wording.

11. Mr. NI endorsed the comments of Mr. Laclea Muñoz, Mr. Díaz González and Mr. Calero Rodrigues. It would suffice to mention members' views and suggestions on article 6 in a footnote.

12. Mr. SUCHARITKUL (Special Rapporteur) said he agreed that paragraphs (1) and (2) of the commentary to article 7, which had been taken from an earlier report, no longer reflected the state of work and that they might therefore be deleted. On the other hand, paragraphs 24, 27 and 28 of section A (Introduction) of chapter V, adopted by the Commission at its 1749th meeting, provided an adequate record of the discussions at plenary meetings. So far as the document under consideration was concerned, the Commission might therefore adopt the suggestions of Mr. Yankov and Sir Ian Sinclair. In other words, the title "*Article 6. State immunity*" would appear in the body of the report, while the text of article 6, together with a summary of paragraphs (1) and (2) of the commentary to article 7 and a reference to the summary of the discussions appearing in section A of chapter V, would be given in a footnote.

It was so decided.

Paragraph (3)

13. Mr. McCAFFREY said that, since paragraph (3) would become the first paragraph in the commentary to article 7, it would be advisable to specify, at any rate in the English text, that the obligation in question was an obligation to give effect to State immunity. He therefore suggested the addition of the words "to give effect to State immunity" after the words "the content of the obligation".

14. To dispel the impression which the commentary might give that article 7 stated the obligation to give effect to State immunity irrespective of any exception to the rule of State immunity, he proposed that the following sentence be added between the fourth and fifth sentences:

"Of course, the obligation to give effect to State immunity stated in article 7 applies only to those situations in which the State claiming immunity is entitled thereto, that is, where it has not consented to the exercise of jurisdiction over it as provided in Part II and the case does not fall within one of the exceptions in Part III."

A new paragraph could then start with the next sentence.

15. Sir Ian SINCLAIR proposed that, to simplify the second sentence of the paragraph, it should be amended to read:

"The rule of State immunity is turned the other way round and is viewed from the standpoint of the State giving or granting jurisdictional immunity."

16. He supported Mr. McCaffrey's proposals, which improved the text significantly.

17. Mr. ILLUECA supported Sir Ian Sinclair's proposed amendment to the second sentence of the paragraph.

18. Mr. CALERO RODRIGUES said that he supported Mr. McCaffrey's proposal but thought that the proposed sentence was a little too long; the first proposal would no doubt suffice.

19. Mr. LACLETA MUÑOZ said that he doubted the need for the words "the rule of State immunity is turned the other way round" in the second sentence. There was only one rule, and it could be perceived either from the standpoint of the State giving or granting jurisdictional immunity or from the standpoint of the State benefiting from that immunity. Accordingly, the sentence might be amended to read "The rule of State immunity is perceived from another standpoint, namely, that of the State ...". The sentence that followed could then be deleted.

20. He supported Mr. McCaffrey's proposal for the inclusion of a new sentence in the paragraph.

21. Mr. SUCHARITKUL (Special Rapporteur) said that all the proposals made were acceptable.

22. With regard to drafting amendments, it would be best if members submitted them to the Special Rapporteur or the Secretariat instead of formulating them at the present stage.

With that reservation, paragraph (3), as amended, was approved.

Paragraph (4)

23. Sir Ian SINCLAIR proposed the addition at the end of the paragraph of the following sentence:

"It should, however, be emphasized that the Commission is not concerned in the consideration of this topic with the compatibility of a State's internal law with general international law on the *extent* of jurisdiction."

the word "extent" should be underlined.

It was so decided.

24. Mr. McCAFFREY proposed that the words "unwilling to submit to its jurisdiction" at the end of the first sentence should be replaced by the words "that is entitled to immunity and is unwilling to submit to the jurisdiction of the former". He further proposed that the first sentence of footnote 7 should be amended to read: "While this obligation to refrain from exercising jurisdiction against a foreign State may be regarded as a general rule it is not unqualified."

25. Mr. SUCHARITKUL (Special Rapporteur), referring to Mr. McCaffrey's second proposal, said that the obligation to give effect to immunity obviously applied only in cases where a State was entitled to immunity. To spell that out on each and every occasion would make the text unduly heavy.

26. Mr. USHAKOV, agreeing with the Special Rapporteur, said that if it was really necessary to state on each occasion that there were exceptions to the rule of immunity, he could see no reason why the Commission was considering the subject.

27. The CHAIRMAN suggested that the definitive wording of the first sentences of paragraph (4) and of footnote 7 should be agreed jointly between the Special Rapporteur and Mr. McCaffrey.

It was so decided.

Paragraph (4), as amended, was approved in the light of that decision.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

28. Mr. McCAFFREY said that the sense in which the word “implead” was used caused him difficulty, and he proposed that it should be replaced by the word “implicated” and that the paragraph should be reworded to read:

“A State is indubitably implicated in litigation before the courts of another State if a legal proceeding is instituted against it in its own name. The question of immunity arises only when the defendant State is unwilling or does not consent to be proceeded against. It does not arise if a State agrees to become a party to the proceeding.”

29. Sir Ian SINCLAIR said that the paragraph created considerable difficulty in regard to the common law system. He therefore favoured Mr. McCaffrey’s proposal.

30. Mr. CALERO RODRIGUES said that the word “implead” caused difficulty not only in the common law system but in other systems of law as well. Moreover, it was not properly rendered into French by the expression “*mettre en cause*”. He therefore considered that the word “implead” should be avoided, and Mr. McCaffrey’s proposal went a long way towards solving the problem.

31. Mr. MAHIOU said that the intention of the paragraph was to say that the immunity of a State was at issue (*mise en cause*) if the State appeared before the court against its will, but not at issue if it agreed to submit to the jurisdiction. In his view, that should be spelt out to avoid ambiguity.

32. Mr. THIAM said that he fully agreed with Mr. Mahiou. In actual fact, he wondered whether the paragraph was necessary and whether it would not be best to delete it.

33. Mr. LACLETA MUÑOZ agreed with the comments which had just been made. He said that the difficulty in conveying the meaning of the word “implead” in Spanish was illustrated by the fact that it had been translated in two places by the word “*implicado*” and in a third place by the word “*emplazamiento*”. What was

at issue was not the State itself but the immunity of the State. He therefore favoured the adoption of Mr. Mahiou’s suggestion, or alternatively, the deletion of the paragraph.

34. Mr. SUCHARITKUL (Special Rapporteur) explained that he had used the word “implead” somewhat in the sense given it by Lord Atkin in *The “Cristina”* case¹ to mean that a foreign sovereign could not be impleaded “against his will”. One solution to the problem might be to add those three words to the paragraph.

35. Mr. KOROMA said that, in his view, the word “impleaded” was acceptable in the first sentence of the paragraph but not in the second.

36. Mr. CALERO RODRIGUES said he would not like to see the paragraph deleted simply because the Commission was unable to agree on the wording.

37. Mr. THIAM said that he could accept most of the paragraph but not the third sentence, which was quite incorrect and should be deleted.

38. The CHAIRMAN suggested that the Special Rapporteur should be invited to consult with Mr. McCaffrey and Mr. Mahiou with a view to arriving at a text that was acceptable in all working languages.

It was so decided.

Paragraph (7) was approved on that understanding.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were approved.

Paragraph (10)

39. Mr. McCAFFREY proposed that the first sentence should be amended to read: “A foreign sovereign or a head of State of a foreign State, often considered as a principal organ of a State, is also entitled to immunity to the same extent as the State itself on the ground that the crown, the reigning monarch, the sovereign head of State or indeed a head of State may be assimilated to the central government.”

40. The CHAIRMAN suggested that the Special Rapporteur should be invited to agree the wording of the first sentence in consultation with Mr. McCaffrey.

It was so decided.

Paragraph (10) was approved on that understanding.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were approved.

Paragraph (13)

41. Mr. NI proposed the deletion, in the English text, of the words “elements of” in the first sentence. The same proposal applied to the first sentence of paragraph (15).

It was so decided.

¹ *Annual Digest and Reports of Public International Law Cases, 1938-1940* (London, 1942), case No. 86, p. 250.

42. Mr. LACLETA MUÑOZ, referring to the first sentence, proposed that the words “*elementos de autoridad gubernamental*” should be replaced by the words “*prerrogativas del poder público*” in the Spanish text and that a corresponding change should be made, if necessary, in the French text. He further proposed that the words “proceedings may be brought” should be replaced by the words “proceedings are brought”.

It was so decided.

Paragraph (13), as amended, was approved.

Paragraph (14)

43. Sir Ian SINCLAIR said he had some difficulty with the words “it should be permissive, and to some extent obligatory” in the second sentence. In his view, it might be permissible for States to exercise jurisdiction over political subdivisions, but he did not think there was any rule of law to that effect.

44. Mr. McCAFFREY said that Sir Ian’s point might perhaps be met if the second sentence were reworded to read:

“Despite the rarity of such cases, it would appear logical that when a political subdivision of a State acts in one of these activities it should enjoy immunity to the same extent as the central government would in similar circumstances.”

That wording also had the advantage of dispensing with the expression “withhold jurisdiction”, which seemed somewhat strange to him.

45. He further proposed that the word “impleads” in the penultimate sentence should be replaced by the word “implicates”.

46. Mr. SUCHARITKUL (Special Rapporteur) proposed the deletion of the second sentence of the paragraph. The paragraph would still contain the footnotes 22 and 23 which referred to the kind of case he had had in mind. He accepted Mr. McCaffrey’s second proposal.

Paragraph (14), as amended, was approved.

Paragraph (15)

47. Following a point raised by Mr. Thiam, Mr. SUCHARITKUL (Special Rapporteur) proposed that, in the French text, the word “*mécanismes*” should be replaced by the word “*institutions*”.

It was so decided.

Paragraph (15), as amended, was approved.

Paragraph (16)

48. Sir Ian SINCLAIR, referring to the last sentence, proposed that in the English text the word “legislative” should be replaced by the word “legislature” and that the words “in their sovereign capacity” should be replaced by the words “in respect of their public or official acts”.

It was so decided.

Paragraph (16), as amended, was approved.

Paragraph (17)

Paragraph (17) was approved.

Paragraph (18)

49. Mr. McCAFFREY, referring to the first sentence, proposed that the words “in this study” should be omitted and that the word “applies” should be replaced by the words “may apply”. Also, he had some difficulty in accepting the word “particularly” in the last sentence; he did not think that the phrase which it introduced really added anything to what was stated at the beginning of the sentence. He therefore proposed that the phrase should be deleted.

50. Mr. SUCHARITKUL (Special Rapporteur) said that the phrase was important since the representatives which it referred to enjoyed two kinds of immunity: *ratione personae* and *ratione materiae*.

51. Mr. LACLETA MUÑOZ said there was justification for deleting the word “particularly”, since the immunity of the State came into play when certain persons began to act in the exercise of their functions.

52. The CHAIRMAN suggested that the Special Rapporteur should be invited to consult with Mr. McCaffrey with a view to agreeing on the definitive text of the paragraph.

It was so decided.

Paragraph (18) was approved on that understanding.

Paragraphs (19) to (23)

Paragraphs (19) to (23) were approved.

The commentary to article 7, as amended, was approved.

Commentary to article 8 (Express consent to the exercise of jurisdiction)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

53. Mr. McCAFFREY suggested that the words “*inter alia*” should be added after the word “qualified” in the last sentence of paragraph (3).

It was so decided.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were approved.

Paragraph (8)

54. Mr. McCAFFREY, referring to the fourth sentence, said that, in order to dispel the impression that consent must be expressed in writing or by a statement, the words “including the means provided in article 9” should be added at the end of the sentence.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were approved.

Paragraph (11)

55. Sir Ian SINCLAIR, referring to the third sentence, said that according to the jurisprudence of his country, once the courts of the State concerned had concluded that their jurisdiction was valid, there was no basis on which they could refrain from exercising it. He therefore proposed that the phrase “subject, of course, to any rule deriving from the internal law of the State concerned” should be added at the end of the sentence.

It was so decided.

56. Mr. RIPHAGEN proposed that the phrase “for reasons it is not obliged to disclose” should be deleted from the sentence. In all countries, whatever the system was, judges were obliged to give the reasons for their decisions.

It was so decided.

57. Mr. McCAFFREY suggested that, on second reading, paragraphs (9) to (11) should be arranged to indicate that they related specifically to subparagraphs (a) to (c) of article 8.

It was so decided.

Paragraph (11), as amended, was approved.

The commentary to article 8, as amended, was approved.

Commentary to article 9 (Effect of participation in a proceeding before a court)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were approved.

Paragraph (7)

58. Mr. McCAFFREY, referring to the third sentence, said that in the Drafting Committee Mr. Ushakov, among others, had pointed out that there might be positive participation in a proceeding but it might not have the force of consent. He therefore proposed that the sentence should be amended to read:

“Any positive action by way of participation in the merits of a proceeding by a State on its own initiative and not under compulsion is inconsistent with a subsequent contention that the volunteering State is being impleaded against its will.”

It was so decided.

Paragraph (7), as amended, was approved.

Paragraph (8)

59. Mr. McCAFFREY, supported by Mr. RIPHAGEN, said that in his view it was not clear that an appearance by a State *amicus curiae* would constitute a waiver of immunity or a consent to the exercise of jurisdiction. The words in the second sentence, “as *amicus curiae* or otherwise in the interest of justice”, should therefore be deleted.

It was so decided.

Paragraph (8), as amended, was approved.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were approved.

The commentary to article 9, as amended, was approved.

Part II, as amended, was adopted.

Section B, as amended, was adopted.

Chapter V of the draft report, as amended, was adopted.

CHAPTER I. Organization of the session (A/CN.4/L.343)

Chapter I of the draft report was adopted.

CHAPTER VI. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (ACN.4/L.348)

60. Mr. McCAFFREY said that he reserved the right to speak on chapter VI of the report later, since it had not been circulated on time and he had been unable to study it fully.

A. Introduction

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 8 to 11

Paragraphs 8 to 11 were adopted.

Paragraph 12

61. Mr. RIPHAGEN proposed that the word “valuable” should be deleted, since it was not seemly for the Commission to describe the comments of its own members as valuable.

It was so decided.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 17

Paragraphs 13 to 17 were adopted.

Paragraph 18

62. Mr. THIAM, supported by Mr. MAHIU, pointed out that the paragraph should begin with the words “several members thought” instead of “one member thought”.

It was so decided.

63. Sir Ian SINCLAIR proposed that the words “the communication concerning the national liberation movements” should be replaced by the words “the communications of national liberation movements”.

It was so decided.

Paragraph 18, as amended, was adopted.

Paragraph 19

64. In response to a request for information from Sir Ian Sinclair, Mr. YANKOV (Special Rapporteur) said that during the discussions the question had been raised of the case of a delegation which participated in the work of an international conference although diplomatic relations did not exist between the sending State and the host State. It was even possible to envisage the case of a special mission sent to a State with which the

sending State did not have diplomatic relations. In view of such possibilities, it would be advisable to replace the words "diplomatic delegations" by the words "official delegations or special missions".

It was so decided.

Paragraph 19, as amended, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Organization of work (concluded)*

65. The CHAIRMAN, noting that the only documents available in all working languages were those containing chapter VII of the draft report, "Other decisions and conclusions of the Commission" (A/CN.4/L.349 and Add.1 and 2), asked whether members would be prepared to consider documents that had not been circulated in all the working languages.

66. Mr. DÍAZ GONZÁLEZ said he would find it very difficult, as would Mr. McCaffrey, to take part in a discussion on documents that had not been issued in his working language. If the documents that still had to be considered could not be circulated in Spanish until the following day, it would be necessary either to envisage convening an extraordinary session to consider them or to defer their consideration until the following session.

67. Mr. LACLETA MUÑOZ said that, while he agreed with Mr. Díaz González, he would be prepared to participate in a discussion on texts worded in English. In that event, it should be clearly understood that the Spanish-speaking members of the Commission would not be bound by any texts that were adopted.

68. Mr. DÍAZ GONZÁLEZ said that in that case the summary record of the meeting should make it clear that those members had been unable to take part in the discussion.

69. Mr. QUENTIN-BAXTER, speaking as Special Rapporteur for the topic which was agenda item 4 (International liability for injurious consequences arising out of acts not prohibited by international law), said he regretted that the part of the report dealing with that topic had not been circulated to members on time. He had deliberately given his duties as a member of the Drafting Committee priority over his duties as Special Rapporteur. He had however endeavoured to include in the documents drafted first—which it should be possible to circulate in all working languages before the next meeting—the most controversial questions and those which called for decisions of principle.

70. Mr. ROMANOV (Secretary of the Commission) informed the Commission that, at the present session, the Secretariat had noted a certain deterioration in performance on the part of the services responsible for ensuring that documents were circulated on time. In at least one case—that of addenda 3 and 5 to document A/CN.4/L.344—the translations had been distributed

before the original. That was an unacceptable and inexcusable procedure. Reluctantly, the Secretariat had raised the matter in the Planning Group and the Enlarged Bureau, and it was to be hoped that at the next session the Commission would find time to consider it.

71. The CHAIRMAN said that it would be most regrettable if the consideration of certain parts of the draft report had to be postponed until the following year. In principle, each member should have at least half a day to study documents in his working language; in the present case, however, it would undoubtedly be best to apply that principle flexibly so as not to detract from the spirit of friendly co-operation which should characterize the meetings of the Commission.

The meeting rose at 1.05 p.m.

1752nd MEETING

Friday, 23 July 1982, at 9.30 a.m.

Chairman: Mr. Paul REUTER

Statement by Mr. Cottafavi, Director-General of the United Nations Office at Geneva

1. Mr. COTTAFAVI (Director-General of the United Nations Office at Geneva) underlined the importance of the session of the International Law Commission that was drawing to a close. When the session had begun, the consequences of the enlargement of the Commission had been uncertain. Even though all the outgoing members who had stood for election by the General Assembly had been re-elected, the majority of the Commission was composed of members who had been elected for the first time. The conclusion, after twelve weeks' work, was that the decision to expand the Commission had been beneficial; it had done much to enhance the Commission's vitality while ensuring continuity in its work.

2. The Commission's particularly heavy agenda had been dominated by the second reading of the draft articles on the law of treaties between States and international organizations or between international organizations. In that connection, he warmly congratulated Mr. Reuter, who had distinguished himself both as Special Rapporteur and as Chairman of the session. On behalf of the Secretary-General of the United Nations, he thanked all members of the Commission and wished Mr. Flitan a speedy recovery.

3. The closure of the Commission's session was an important moment in the life of the United Nations Office at Geneva. The Commission, which had chosen Geneva as its seat, occupied a special place at the Palais des Nations, to which the nature of its work, the earnestness of its deliberations and the high competence of its

*Resumed from the 1745th meeting.