

Document:-  
**A/CN.4/SR.1938**

**Summary record of the 1938th meeting**

Topic:  
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*Paragraph 57 was deleted.*

Paragraphs 58 to 60

*Paragraphs 58 to 60 were adopted.*

*Section A, as amended, was adopted.*

**B. Draft articles on State responsibility (part 2 of the draft articles)**  
(A/CN.4/L.390/Add.1)

*Commentary to article 5*

Paragraph (1)

69. Mr. ARANGIO-RUIZ, noting that the "author" State was referred to in the singular throughout the paragraph while the "injured" State was mentioned in both the singular and the plural, proposed that, in order to make the contrast less striking, the words "or States" should be added after "author State" in the second sentence.

*It was so agreed.*

70. Mr. LACLETA MUÑOZ said that, in the third sentence of the Spanish text, the words *al Estado* should be altered to *el Estado*.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

71. Mr. YANKOV proposed that, in the interests of uniformity of style, underlining of words solely for the purpose of emphasis should be dispensed with throughout the commentary.

*It was so agreed.*

Paragraphs (2) to (5)

*Paragraphs (2) to (5) were approved.*

Paragraph (6)

72. Mr. ARANGIO-RUIZ proposed that the words "what the States, as creators of the 'primary' rules, intended" should be replaced by "the content and scope of the 'primary' rules involved". He saw no need to go as far back as the creation of "primary" rules, especially where customary rules were concerned.

*The meeting rose at 6.10 p.m.*

## 1938th MEETING

*Friday, 26 July 1985, at 10 a.m.*

*Chairman: Mr. Satya Pal JAGOTA*

*Present:* Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Ogiso, Mr. Riphagen, Mr. Roukounas, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

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

**CHAPTER III. State responsibility** (concluded) (A/CN.4/L.390 and Add.1)

**B. Draft articles on State responsibility (part 2 of the draft articles)**  
(concluded) (A/CN.4/L.390/Add.1)

*Commentary to article 5* (concluded)

Paragraph (6) (*concluded*)

1. The CHAIRMAN recalled that the Commission had before it a proposal by Mr. Arangio-Ruiz to replace the phrase reading "what the States, as creators of the 'primary' rules, intended" by "the content and scope of the 'primary' rules involved".

2. Mr. RIPHAGEN (Special Rapporteur) said that the only difficulty with regard to that proposal was that the term "rebuttable presumptions" related to secondary, not primary, rules.

3. Mr. LACLETA MUÑOZ, agreeing with the Special Rapporteur, said that he did not know exactly what the term "rebuttable presumptions" covered, since there were in law only two categories of presumptions: presumptions *juris tantum* and presumptions *juris et de jure*. He therefore proposed that that term should simply be replaced by the word "presumptions".

4. Mr. ARANGIO-RUIZ supported that proposal.

5. Mr. CALERO RODRIGUES suggested that, to take account of the point made by the Special Rapporteur, the paragraph could be modified so as to refer not to the content and scope of the primary rules but to the intention expressed therein.

6. Following a brief discussion in which Mr. ARANGIO-RUIZ, Mr. RIPHAGEN (Special Rapporteur) and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that paragraph (6) should be amended to read:

"(6) Accordingly, article 5 can only make presumptions as to what legal consequences are intended by the scope and content of the 'primary rule', involved."

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

Paragraphs (7) to (9)

*Paragraphs (7) to (9) were approved.*

Paragraph (10)

7. Mr. CALERO RODRIGUES proposed the deletion, in the first part of the paragraph, of the word "bilateral", since it did not appear in article 36 of the 1969 Vienna Convention on the Law of Treaties to which paragraph (10) made reference.

*It was so agreed.*

*Paragraph (10), as amended, was approved.*

Paragraph (11)

8. Mr. LACLETA MUÑOZ, supported by Mr. DÍAZ GONZÁLEZ, proposed that in the

Spanish text the words *El fallo* should be replaced by *La parte dispositiva*. The same remark applied to paragraph (12) and to the penultimate sentence of paragraph (13).

*It was so agreed.*

*Paragraph (11), as amended, was approved.*

Paragraph (12)

9. Mr. ARANGIO-RUIZ said that the words "independent 'source'" and "create rights", in the penultimate sentence, were too strong. The aim should be to achieve a formulation which better reflected the relationship between the rule and the judgment under which the rule was applied.

10. Mr. TOMUSCHAT, agreeing with Mr. Arangio-Ruiz, proposed that the phrase "as an independent 'source' of rights and obligations", in the penultimate sentence, should be deleted and that the word "create" should be replaced by "establish".

11. Mr. YANKOV considered that there was little material difference between the words "establish", "create", and "determine". He would, however, propose that the word "only", in the same sentence, should be moved and placed before the words "as between".

*It was so agreed.*

12. Mr. LACLETA MUÑOZ suggested that the Commission should accept the amendments proposed by Mr. Arangio-Ruiz and Mr. Tomuschat, unless the Special Rapporteur had any objection.

13. Mr. CALERO RODRIGUES suggested that the word "entail", which was more neutral, should be used in place of "create", "establish" or "determine".

14. Mr. RIPHAGEN (Special Rapporteur) suggested that the Latin expression "*dictum*" should be used in the first sentence in all the language versions.

15. Mr. BALANDA, referring to the French text of the first sentence, said that he favoured the retention of the original word *dispositif*.

16. He also supported the suggestion made by Mr. Calero Rodrigues concerning the penultimate sentence.

17. Mr. FLITAN proposed, further to the suggestion made by Mr. Calero Rodrigues, that the word *établir* should be used in the French text of the penultimate sentence, since it covered the case of the creation of a rule and also that of the recognition of a rule.

18. Mr. LACLETA MUÑOZ said that he, too, was opposed to the use of the word "*dictum*" in the Spanish text of the first sentence, as Latin terms did not always have the same meaning in different legal systems.

19. He proposed that, to bring the Spanish text into line with the English, the first sentence should be reworded to read: *Normalmente, de la parte dispositiva se deducirá claramente cuál es el Estado autor y cuál es el Estado lesionado.*

20. Following further suggestions by Mr. CALERO RODRIGUES, Mr. KOROMA and Mr. RIPHAGEN (Special Rapporteur), the CHAIRMAN suggested that the penultimate sentence of paragraph (12) should be amended to read: "It follows that the judgment can determine rights and obligations only as between the parties to the dispute."

*It was so agreed.*

*Paragraph (12), as amended, was approved.*

Paragraph (13)

21. Further to a comment by Mr. KOROMA, Mr. RIPHAGEN (Special Rapporteur) explained that the words "the *dictum* of the judgment", in the penultimate sentence, should be understood to refer to the findings or conclusions of the court as set forth at the end of the judgment.

22. Mr. ARANGIO-RUIZ said that it would be preferable to avoid the word "*dictum*", since in international jurisprudence one judgment could contain a number of *dicta*.

23. Chief AKINJIDE said that, in the legal system with which he was most familiar, the word "*dictum*" did not have the meaning attributed to it by the Special Rapporteur.

24. Mr. TOMUSCHAT proposed that the word "*dictum*", in the penultimate and last sentences, should be replaced by "operative part", in line with the French and Spanish texts.

*It was so agreed.*

25. Mr. CALERO RODRIGUES wished it to be placed on record that the word "*dictum*" was perfectly acceptable to him. However, he had no objection to "operative part", although it was not as clear as *dispositif* in French.

26. Mr. KOROMA said that while he, too, was prepared for the time being to accept the term "operative part", the Commission should none the less revert to the matter on second reading.

*Paragraph (13), as amended, was approved.*

Paragraphs (14) to (16)

*Paragraphs (14) to (16) were approved.*

Paragraph (17)

27. Further to a comment by Mr. CALERO RODRIGUES, Mr. RIPHAGEN (Special Rapporteur) said that the phrase in the first sentence reading "where more than two States participate in the formation of a rule of international law" should be amended to read "where more than two States are bound by a rule of international law".

28. Mr. ARANGIO-RUIZ referring to the third sentence, said that he wished to place on record his doubts regarding the term "sovereign equality", since what was involved seemed to be more in the nature of "sovereignty" or "territorial sovereignty".

29. Mr. BALANDA said that "sovereign equality" was a recognized term of international law and should be retained. To avoid any confusion, he would propose deleting the word "sovereign" in the

term “sovereign rights” at the end of the third sentence. He did not believe it was the special Rapporteur’s intention that only violations of rights involving the sovereignty of States should constitute an internationally wrongful act.

30. The CHAIRMAN suggested that, for the sake of clarity, the last sentence should be amended to read: “Subparagraph (e) (i) of paragraph 2 deals with this type of situation.”

*It was so agreed.*

31. Mr. KOROMA appealed to Mr. Balanda not to insist on the deletion of the word “sovereign” from the term “sovereign rights” in the third sentence. He proposed that the word “universal”, in the same sentence, should be deleted, and that the term “sovereign equality” should be replaced by “sovereignty”.

32. The CHAIRMAN suggested that, in view of the lack of time, the Commission should take note of Mr. Koroma’s proposal and review it at a later date.

*It was so agreed.*

33. Mr. LACLETA MUÑOZ said that he supported Mr. Balanda’s proposal to delete the word “sovereign” from the term “sovereign rights”. Again, he had no objection to using the expression “sovereign equality”, even though it was incorrect and commonly employed. In actual fact, it was not equality that was sovereign but sovereignty that was equal: States were equal in their sovereignty, at least in law. States were equal and they were sovereign.

*Paragraph (17), as amended, was approved.*

Paragraph (18)

*Paragraph (18) was approved.*

Paragraph (19)

34. Mr. OGISO noted that the provisions of the 1969 Vienna Convention on the Law of Treaties as cited in paragraph (19) referred to relations between the parties to a multilateral treaty. Paragraph 2 (e) (ii) of draft article 5, however, dealt solely with the legal relations that would arise in the event of an “act of a State” rather than of an act of a State party. Furthermore, the expression “State party”, which had been included in article 5 as originally submitted by the Special Rapporteur,<sup>1</sup> had been replaced by “a State”, without any explanation. If, therefore, he was correct in assuming that the expression “act of a State”, in article 5, paragraph 2 (e) (ii), referred to the act of a State party, he would propose that the following be inserted at the end of paragraph (19): “Since articles 41, 58 and 60 of the Vienna Convention on the Law of Treaties apply to relations only as between States parties to a multilateral treaty, paragraph 2 (e) (ii) should likewise be considered only in respect of the relations of States parties to a multilateral treaty. Consequently, the words ‘act of a State’ in paragraph 2 (e) (ii) should be interpreted as the ‘act of a State party’.”

35. Mr. RIPHAGEN (Special Rapporteur) said that it was clear from the the expressions “any other State party” and “the other States parties”, appearing respectively in paragraph 2 (e) and paragraph 2 (e)(ii) of article 5, that the reference was to a group of States which were either parties to the multilateral treaty or bound by the relevant rule of customary international law. To meet Mr. Ogiso’s point, however, the following passage could be included at the end of paragraph (19) of the commentary: “As is apparent from the use of the word ‘other’ in the *chapeau* of paragraph 2 (e) and in paragraph 2 (e) (ii), the expression ‘act of a State’ in that *chapeau* and in subparagraph (e) (ii) must be understood as meaning the act of a State party to the multilateral treaty or bound by the relevant rule of customary international law.”

36. Mr. TOMUSCHAT wished it to be placed on record that, in his view, it was also important to refer in paragraph (19) to paragraph 2 (b) of article 60 of the 1969 Vienna Convention on the Law of Treaties, which was particularly relevant in that connection. He would not, however, insist on an additional reference.

37. The CHAIRMAN said that the Commission could discuss the point raised by Mr. Tomuschat on second reading.

*Paragraph (19), as amended, was approved.*

Paragraphs (20) and (21)

*Paragraphs (20) and (21) were approved.*

Paragraph (22)

38. Mr. ARANGIO-RUIZ, referring to the second sentence, proposed that the words “and other relevant instruments” should be inserted after “Universal Declaration of Human Rights”.

39. Mr. TOMUSCHAT, also referring to the second sentence, said that the words “and recognized by treaty or customary law” should be inserted after the words “this Declaration”. Again, a comma should be inserted between the phrase in parentheses and the word “must”, near the end of the sentence.

40. Mr. ARANGIO-RUIZ said that he had some doubts about including a reference to customary law, which could give rise to lengthy discussion.

41. Mr. RIPHAGEN (Special Rapporteur) said that he shared the doubts expressed by Mr. Arangio-Ruiz, but considered that a reference could be added in the first part of the second sentence to United Nations conventions.

42. Mr. TOMUSCHAT suggested that the words “the rights enumerated in this Declaration” might be replaced by “the rights enumerated in these instruments”.

43. The CHAIRMAN suggested that, in order to save time, members who had any reservations regarding a particular paragraph should place them on record, so as to avoid discussion on possible amendments to the report. In addition, any suggestions for editing changes or corrections relating to translation problems should be conveyed directly to the Secre-

<sup>1</sup> See 1890th meeting, para. 3.

tariat for action. If there were no objections, he would take it that the Commission agreed to adopt those arrangements.

*It was so agreed.*

44. Mr. ARANGIO-RUIZ handed the Secretariat the French text of amendments to paragraph (22) prepared by Mr. Calero Rodrigues, Mr. Lacleta Muñoz and himself.

45. Mr. RIPHAGEN (Special Rapporteur) said that the amendments thus proposed would be reflected in the English text of the second sentence of paragraph (22) as follows: first, the words "is certainly relevant" would be replaced by "and other relevant instruments are certainly pertinent"; secondly, the words "in this Declaration" would be replaced by "in these instruments"; lastly, the words "the respect of such a right" would be replaced by "the respect of such rights".

*Paragraph (22), as amended, was approved.*

Paragraphs (23) to (27)

*Paragraphs (23) to (27) were approved.*

Paragraph (28)

46. Mr. YANKOV said that, in his view, a statement should be included in the commentary to article 5 to explain why the phrase in paragraph 3 of the article reading "and in the context of the rights and obligations of States under articles 14 and 15" had been placed in square brackets.

47. Mr. FLITAN proposed that the following sentence should be added at the end of paragraph (28) of the commentary: "When the relevant draft articles are taken up, the Commission will examine the extent of the difference between the rights of the directly injured State and those of the indirectly injured State."

48. Mr. RIPHAGEN (Special Rapporteur) said that the following sentence should be inserted at the end of paragraph (28): "For this reason, the words 'and in the context of the rights and obligations of States under articles 14 and 15' are provisionally placed in square brackets."

49. Mr. MAHIOU, supported by Mr. LACLETA MUÑOZ, said that Mr. Flitan's proposal was interesting, but might lead to a substantive debate on the concepts of "directly injured State" and "indirectly injured State".

50. The CHAIRMAN said that due note would be taken of Mr. Flitan's proposal. If there were no objections, he would take it that the Commission agreed to approve paragraph (28) as amended by the Special Rapporteur.

*It was so agreed.*

*Paragraph (28), as amended, was approved.*

*The commentary to article 5, as amended, was approved.*

*Section B, as amended, was adopted.*

*Chapter III of the draft report, as amended, was adopted.*

#### CHAPTER VI. *Relations between States and international organizations (second part of the topic)* (A/CN.4/L.391)

51. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), referring to paragraph 18 of chapter VI, said that the phrase following the reference to footnote 11 should be reworded to read: "on the basis of replies received to the questionnaire sent by the Legal Counsel of the United Nations to the legal counsels of the specialized agencies and IAEA, on the practice of those organizations concerning their status, privileges and immunities (A/CN.4/L.383 and Add.1-3)".

52. Also, further to a suggestion made by Sir Ian Sinclair, he said that a new subparagraph (f) should be added at the end of paragraph 20, reading:

"(f) It would be useful if the Secretariat could submit to the members of the Commission, at its thirty-eighth session, copies of the replies to the questionnaire referred to in paragraph 17 (f) above."

The questionnaire, which was to be sent to the legal counsels of regional organizations, was similar to the one circulated to the legal counsels of the specialized agencies and IAEA.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt chapter VI as amended by the Special Rapporteur.

*It was so agreed.*

*Chapter VI of the draft report, as amended, was adopted.*

#### CHAPTER IV. *Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier* (A/CN.4/L.388 and Add.1)

##### A. *Introduction* (A/CN.4/L.388)

Paragraphs 1 to 11

*Paragraphs 1 to 11 were adopted.*

*Section A was adopted.*

##### B. *Consideration of the topic at the present session* (A/CN.4/L.388)

Paragraphs 12 to 18

*Paragraphs 12 to 18 were adopted.*

Paragraph 19

54. Mr. OGISO said that a fuller account should be given of the discussion on the proposal by Sir Ian Sinclair (1906th meeting, para. 7), referred to in paragraph 18. In particular, mention should be made of the question of the effect of an objection to a declaration, and of Sir Ian Sinclair's response in that regard (1910th meeting). Accordingly, three additional sentences along the following lines should be inserted at the end of paragraph 19: "One member raised the question of a possible objection to a declaration which might complicate legal relations within the new treaty régime. It was explained that the type of declaration which he had in mind was an option that would be contained in the draft articles themselves; such an option would be accepted in advance by the negotiating States and there could be no ques-

tion of any objection to it. Under general international law, objections were possible only to a unilateral reservation and not to a declaration accepted in advance by all the negotiating States.” That formulation could well be shortened; he was simply concerned that the substance should be inserted in paragraph 19, so as to draw the attention of the Sixth Committee of the General Assembly to the matter.

55. After a brief discussion in which Mr. YANKOV (Special Rapporteur), Mr. OGISO and Mr. CALE-RO RODRIGUES took part, the CHAIRMAN proposed that paragraph 19 should be provisionally adopted on the understanding that Mr. Ogiso’s proposal would be incorporated by the Special Rapporteur in a shortened form.

*It was so agreed.*

Paragraphs 20 to 28

*Paragraphs 20 to 28 were adopted.*

Paragraph 29

56. Mr. RIPHAGEN drew attention to the inaccuracy of the opening words of the third sentence, “In such cases”. The practice mentioned in that sentence was not relevant to the second case mentioned in the previous sentence, namely that of non-recognition of a State.

57. Mr. YANKOV (Special Rapporteur) agreed that the practice in question applied only to the first case, namely that of absence of diplomatic or consular relations. He said that the words “In such cases” should be replaced by “In the first case”.

*Paragraph 29, as amended, was adopted.*

Paragraphs 30 to 38

*Paragraphs 30 to 38 were adopted.*

*The meeting rose at 1 p.m.*

## 1939th MEETING

*Friday, 26 July 1985, at 3.05 p.m.*

*Chairman: Mr. Satya Pal JAGOTA*

*Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleata Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Riphagen, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov*

### **Draft report of the Commission on the work of its thirty-seventh session (concluded)**

CHAPTER IV. *Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier* (concluded) (A/CN.4/L.388 and Add.1)

### **C. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.388/Add.1)**

Subsection 1 (Texts of the draft articles provisionally adopted so far by the Commission)

*Section C.1 was adopted.*

Subsection 2 (Articles and commentaries provisionally adopted by the Commission at its thirty-seventh session)

*Commentary to paragraph 2 of article 12* (The diplomatic courier declared *persona non grata* or not acceptable)

*The commentary to paragraph 2 of article 12 was approved.*

*Commentary to article 23 [18]* (Immunity from jurisdiction)

*The commentary to article 23 [18] was approved.*

*Commentary to article 28 [21]* (Duration of privileges and immunities)

Introductory paragraph

*The introductory paragraph was approved.*

Paragraph (1)

1. Mr. LACLETA MUÑOZ, referring to the penultimate sentence of paragraph (1) of the commentary to paragraph 1 of article 28 [21], observed that not all members of the Commission had been in agreement as to the exact point in time at which the diplomatic courier started to enjoy immunity. The sentence did not properly reflect the differences of view among the members.

2. Mr. FLITAN proposed that, to avoid the difficulties to which Mr. Lacleata Muñoz had referred, the first part of the penultimate sentence, reading “It was stressed in the Commission that”, should be replaced by “Certain members of the Commission expressed the view that”.

3. Mr. YANKOV (Special Rapporteur) said that his intention had been to reflect views expressed both in the Commission and in the Drafting Committee. Some members had insisted on the interpretation in question.

4. Mr. LACLETA MUÑOZ considered Mr. Flitan’s amendment to the penultimate sentence acceptable and proposed its adoption.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraphs (2) to (6)

*Paragraphs (2) to (6) were approved.*

*The commentary to article 28 [21], as amended, was approved.*

*Commentary to article 29 [22]* (Waiver of immunities)

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were approved.*

Paragraph (8)

5. Mr. OGISO proposed the addition, at the end of the paragraph, of the words “and communicated in