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Summary record of the 1640th meeting

Topic:
Other topics

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third sentence, be replaced by the term "predecessor States".

It was so decided.

Paragraph (6), as amended, was approved.

Paragraph (7)

48. Mr. DÍAZ GONZÁLEZ proposed that the words "such as councils and viceroalties", in the second sentence, be deleted.

It was so decided.

Paragraph (7), as amended, was approved.

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

Commentary to article E (Separation of part or parts of the territory of a State) and article F (Dissolution of a State)

Paragraph (3)

49. Mr. REUTER proposed that the word "archivistique", in the third sentence of the French text, be replaced by the words "sur les archives".

It was so decided.

Paragraph (3), as amended, was approved.

Paragraph (4)

50. Mr. REUTER proposed that, in the penultimate sentence of the French text, the phrase "représentant des valeurs culturelles et historiques très élevées autant pour les uns que pour les autres" should be reworded to read "représentant, pour les uns comme pour les autres, des valeurs culturelles et historiques très élevées".

It was so decided.

Paragraph (4), as amended, was approved.

Paragraph (10)

51. Mr. VEROSTA, referring to the first sentence, proposed that the word "Empire" be replaced by the word "Monarchy" and that the words "Austro-Hungarian imperial archives" be replaced by the words "archives of the Austro-Hungarian Monarchy".

It was so decided.

52. Mr. REUTER proposed that the word "archivistiques", in the second sentence of the French text, be replaced by "sur les archives".

It was so decided.

Paragraph (10), as amended, was approved.

Paragraph (12)

53. Mr. VEROSTA pointed out that the correct spelling of the name of the second county mentioned in the fourth sentence was "Vas".

The commentary to articles E and F, as amended, was approved.

Section B as a whole, as amended, was approved.

Chapter II as a whole, as amended, was approved.

54. The CHAIRMAN said that he wished, on behalf of all members, to record the Commission's appreciation of the work of Mr. Bedjaoui, the Special Rapporteur, on the supplementary draft articles on succession of States in respect of State archives.

The meeting rose at 12.40 p.m.

1640th MEETING

Thursday, 24 July 1980, at 10.20 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

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

CHAPTER III. *State responsibility* (A/CN.4/L.320 and Add.1-4)

A. *Introduction* (A/CN.4/L.320)

Paragraphs 1-16

Paragraphs 1-16 were approved.

Section A was approved.

B. *Draft articles on State responsibility*

PART 1. *The origin of international responsibility*

Commentary to article 35 (Reservation as to compensation for damage) (A/CN.4/L.320/Add.3)

The commentary to article 35 was approved.

Part 1, as amended, was adopted.

PART 2. *The content, forms and degrees of international responsibility* (A/CN.4/L.320/Add.4)

Paragraph 18

1. Sir Francis VALLAT, referring to the second sentence, suggested that, after the words "new legal relationships", some wording in brackets should be added, to indicate the kind of relationships concerned.

2. Mr. RIPHAGEN (Special Rapporteur) proposed that the additional wording in brackets should read "new rights and corresponding obligations".

It was so decided.

Paragraph 18, as amended, was approved.

Paragraphs 19–23

3. Mr. SCHWEBEL said that, in his view, that part of the report as a whole was unduly concise and paragraphs 19, 20 and 21, in particular, should be expanded, if it was hoped to elicit some reaction from the Sixth Committee of the General Assembly.

4. Mr. ŠAHOVIĆ agreed with Mr. Schwebel.

5. Mr. RIPHAGEN (Special Rapporteur) said that, in drafting the report, he had been mindful of past criticism concerning the excessive length of the Commission's reports. Members of the Sixth Committee could, if they so wished, refer to the preliminary report on the content, forms and degrees of State responsibility (A/CN.4/330) and to the relevant summary records of the Commission's discussions.

6. Sir Francis VALLAT said he agreed that a longer report would have been preferable, but recognized that it was not practicable to expand the text at that stage. Moreover, the merit of paragraphs 23 *et seq.* was that their brevity served to highlight the points raised. At the same time, he considered that some indication should be given of the reasons for such a brief report, and he therefore proposed that, in the first line of paragraph 23, the words "which was of a preliminary character" should be added, between commas, after the word "Commission".

It was so decided.

Paragraphs 19–23, as amended, were approved.

Paragraph 24

7. Mr. SCHWEBEL, referring to the last line, proposed that the word "revisions", followed by a comma, be added before the word "rearrangements".

It was so decided.

Paragraph 24, as amended, was approved.

Part 2, as amended, was approved.

CHAPTER VI. Jurisdictional immunities of States and their property (A/CN.4/L.322)

A. Introduction

Paragraph 10

8. Mr. SCHWEBEL proposed that the word "recovering", in the penultimate sentence, be replaced by the word "receiving".

It was so decided.

Paragraph 10, as amended, was approved.

Paragraph 11

9. Mr. ŠAHOVIĆ suggested that it would be advisable to indicate the number or names of the States that had replied to the questionnaire formulated by the Special Rapporteur.

10. Sir Francis VALLAT proposed that a foot-note, giving the names of the States in question, be added.

It was so decided.

Paragraph 11 was approved subject to that addition.

Paragraph 14

11. Mr. REUTER proposed that, in the last sentence, the words "In order not to prejudge" should be replaced by the words "Without prejudice to", and their equivalent in the other language versions.

It was so decided.

Paragraph 14, as amended, was approved.

Paragraph 23

12. Mr. SCHWEBEL proposed that, in the fifth sentence, the words "some sympathy" should be replaced by the word "support" and the words "many members" by the word "others".

It was so decided.

Paragraph 23, as amended, was approved.

Section A, as amended, was approved.

B. Draft articles on jurisdictional immunities of States and their property

PART I. Introduction

Commentary to article 1 (Scope of the present articles)

The commentary to article 1 was approved.

PART II. General principles

Commentary to article 6 (State immunity)

Paragraphs (1)–(4)

13. Mr. ŠAHOVIĆ said that the expression "some-what problematical", in the first sentence of paragraph (1), was not very felicitous: possibly some more elegant turn of phrase could be found.

14. Mr. REUTER, agreeing with Mr. Šahović, said that, in French, the word "*problématique*" was decidedly pejorative. He would therefore suggest that the expression "*est quelque peu problématique*" be replaced by "*pose des problèmes*" (in English: "poses problems").

15. Sir Francis VALLAT proposed, as an alternative, that the words "poses serious problems" should be used, in order to underline the nature of the problems involved.

It was so decided.

16. Mr. USHAKOV said that paragraphs (1) and (3) suggested that article 6 laid down a general rule of State immunity. In fact, the article laid down no such rule, as was apparent from its reference to "the provisions of the present articles".

17. After an exchange of views in which Mr. RIPHAGEN, Mr. SCHWEBEL and Sir Francis

VALLAT took part, the CHAIRMAN suggested, to meet Mr. Ushakov's point, a change in paragraph 14 of Section A of chapter VI; the penultimate sentence should end with the words "adopted those draft articles", the remainder of the sentence being deleted, and, as a consequential amendment, the words "in Part I", in the last sentence of the same paragraph should also be deleted.

It was so decided.

Paragraphs (1)–(4), as amended, were approved.

Paragraph (5)

18. Mr. USHAKOV proposed that the words "the present article", at the end of the first sentence, should be replaced by the words "the present articles".

It was so decided.

Paragraph (5), as amended, was approved.

Paragraph (7)

19. Mr. SCHWEBEL proposed that the word "appreciable", in the third sentence, be replaced by the word "apparent".

It was so decided.

20. Sir Francis VALLAT, referring to foot-note 22, suggested that the words "United Kingdom", which were used in reference to the Statute of 7 Anne, should be deleted.

21. Mr. FRANCIS proposed that they be replaced by the word "British" to show that the statute in question was European.

It was so decided.

Paragraph (7), as amended, was approved.

Paragraph (9)

22. Sir Francis VALLAT, referring to the second sentence, proposed that, to reflect the content of the report more accurately, the words "especially in the United Kingdom of Great Britain and Northern Ireland" should be replaced by "especially in England and the United States".

It was so decided.

Paragraph (9), as amended, was approved.

Paragraph (23)

23. Mr. VEROSTA proposed that the words "A further distinction", at the beginning of the last sentence, be replaced by "Another distinction".

It was so decided.

Paragraph (23), as amended, was approved.

Paragraph (32)

24. Mr. RIPHAGEN said that since the Commission appeared to disagree as to the existence of a

general rule of international law establishing State immunity, the words "as a general rule of international law" should be deleted from the second sentence. Furthermore, in view of the dearth of judicial decisions on the subject, the conclusion drawn in the third sentence was only tentative, so that sentence should also be deleted.

25. Mr. USHAKOV said that the conclusion drawn in paragraph (32) followed logically from what had been stated in the preceding paragraphs. Consequently, the commentary should either be left as it stood or deleted altogether.

26. Mr. REUTER said that, while he could accept a reference to a trend towards the establishment of rules of customary international law governing State immunity, he was unable to accept a reference to a single general rule of State immunity.

27. Mr. SCHWEBEL proposed that the paragraph should be left intact and that a qualification similar to that contained in the third sentence of paragraph (27) should be added.

28. Mr. ŠAHOVIĆ said that in view of the different opinions held by members of the Commission of the existence of a principle of State immunity in customary international law, the last sentence of the paragraph might be amended so as to avoid any reference to a definite conclusion on the matter.

29. Sir Francis VALLAT observed that much of the judicial practice referred to in the commentary related to the nineteenth century, when the functions of the State had not included commercial and trading activities. It could no longer be said that the general rule of State immunity was generally accepted as a rule of customary international law. He proposed that the word "the" preceding the words "general rule" in the last sentence, should be replaced by the word "a".

It was so decided.

30. Mr. REUTER said he could not accept the proposed wording of the last sentence.

31. Mr. QUENTIN-BAXTER proposed that, in the second sentence, the words "general rule" should be replaced by the word "concept".

It was so decided.

Paragraph (32), as amended, was approved.

Paragraph (33)

32. Mr. SCHWEBEL proposed that the underlining of the words "executive branch of the government" should be deleted.

It was so decided.

Paragraph (33), as amended, was approved.

Paragraph (36)

33. Sir Francis VALLAT proposed that the words “the Legal Adviser or” in the first sentence, should be deleted.

It was so decided.

Paragraph (36), as amended, was approved.

Paragraph (37)

34. Mr. SCHWEBEL, referring to the first sentence, said that while the judiciary should be independent of the executive in matters of adjudication, in some countries that was not the case. Moreover, the doctrine of the separation of powers was not a universal doctrine. He proposed, therefore, that the word “normally” should be replaced by the word “generally” and that the words “due to the doctrine of separation of powers” should be deleted.

It was so decided.

35. Mr. REUTER said that he wished to express a formal reservation regarding the developments reflected in paragraph (37) which were based exclusively on English and United States common law and took no account of European judicial decisions, so that they could not form a basis for international law.

Paragraph (37), as amended, was approved.

Paragraph (38)

36. Mr. REUTER expressed the reservation that the developments reflected in paragraph (38) related to the field of comparative constitutional law and had nothing to do with public international law.

37. Sir Francis VALLAT endorsed the view.

38. Mr. SCHWEBEL proposed that, in order to facilitate the work of the Commission, members should be given more time to study the commentary as a whole, before considering it further.

It was so decided.

The meeting rose at 12.55 p.m.

1641st MEETING

Thursday, 24 July 1980, at 3.20 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

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

CHAPTER VI. *Jurisdictional immunities of States and their property* (*concluded*) (A/CN.4/L.322)

B. *Draft articles on jurisdictional immunities of States and their property* (*concluded*)

PART II (General principles) (*concluded*)

Commentary to article 6 (State immunity) (*concluded*)

1. Mr. THIAM observed that there had been many reservations on the Special Rapporteur's second report on jurisdictional immunities of States and their property (A/CN.4/331 and Add.1); he thought it would be wiser to defer consideration of the topic until the following year.

2. The CHAIRMAN said that Mr. Thiam's comment would be recorded in the summary records of the session.

3. Sir Francis VALLAT said it would be less than justice not to send forward to the General Assembly the paragraphs which had already been considered in connexion with articles 1 and 6, indicating very clearly the provisional nature of article 6. Paragraphs (36) and (37) of the commentary were repetitive and tended to give the impression of extending the practice in the matter, which was largely United States of America practice, and presenting it as if it applied on a much wider basis than it actually did. Those difficulties might be removed by adding the following sentence to paragraph (6) of the commentary: “Accordingly, it is considered useful to set out the following information, which is based upon the second report submitted by the Special Rapporteur”.

4. Paragraphs (36) and (37), in turn, needed to be cut down in order to narrow their scope to some extent, which could best be done by merging them into a single paragraph. He proposed, therefore, that the first sentence of paragraph (36) should be revised to read as follows: “Apart from the determination of the question of fact or of status, the executive may also have the right to intervene *amicus curiae*, through a responsible governmental agency such as the Attorney General, for example, by making a suggestion to the effect that in a given case immunity should be accorded or denied”.

5. The next sentence should be deleted. Paragraph (36) should then continue with the first sentence of the former paragraph (37), amended to read as follows: “Since the judiciary, in principle as well as in practice, is generally independent of the executive in matters of adjudication, it appears that the courts are not always bound to follow the lead of the executive in every case”. Foot-note 77 should be placed after the words “to follow suit” in the next sentence, and foot-note 78 after the word “instance” at the end of that sentence. In the following sentence, the words “the courts could still grant jurisdictional immunity” should be amended to “the courts may still grant jurisdictional immunity”.