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Summary record of the 1971st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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acceptable to Mr. Ushakov if the phrase "and the relevant rules of general international law applicable in the matter" were deleted. He would also welcome other members' views in that connection.

47. Mr. USHAKOV said that article 6 would be totally unacceptable to him unless the phrase in question were deleted. He noted that, whereas the English text used the expression "general international law", the French text spoke simply of *droit international*. Again, a better title for part II would be "General rules", since not all the articles in that part stated principles.

48. Sir Ian SINCLAIR said that article 6 had given rise to a very lengthy discussion in the Drafting Committee and it would be unwise for the Commission not to recognize that a number of members felt very strongly that the article would be acceptable only if it included the words "the relevant rules of general international law applicable in the matter". His own view was that, however the article was formulated, it expressed a single basic rule and not a rule of immunity subject to exceptions. The limitations merged, as it were, with a statement of principle, which was the only way to achieve a consensus on the article.

49. Mr. KOROMA said that, although it had been affirmed that article 6 was unitary in intent, it had a dual application. There could be no other reason for the two elements of the formulation, namely "the provisions of the present articles" and "the relevant rules of general international law applicable in the matter". The rules of jurisdictional immunity were much broader than were the latter. Hence article 6 was not acceptable.

The meeting rose at 5.25 p.m.

1971st MEETING

Thursday, 19 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN welcomed Mr. Ago, a Judge of the International Court of Justice, and thanked him on behalf of the members of the Commission for the valuable contribution he had made to the Commission's work, particularly when he had been Special Rapporteur for the topic of State responsibility.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/396,[1] A/CN.4/L.399, ILC (XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 28 (Restriction of immunities)[2] (*continued*)

2. Mr. SUCHARITKUL (Special Rapporteur) said that, in response to the wishes of certain members, he had amended the title and reworded the text of article 28 to read:

"*Article 28. Implementation provisions*

"Subject to mutual agreement or on condition of reciprocity, immunity may be granted to a State, in respect of itself and its property, in connection with a proceeding before a court of another State, to a greater [wider] or lesser [narrower] extent than is required under the present articles, provided always that no such adjustment shall deprive any State against its will [without its consent] of the immunities it enjoys in respect of acts performed in the exercise of its sovereign authority."

3. The new text dealt not only with the restriction of immunities, but also, like the former article 28 which he had submitted,[3] with the possibility of granting immunities greater than those required under the draft articles. Accordingly, the title proposed by the Drafting Committee, "Restriction of immunities", had been replaced by "Implementation provisions".

4. Should the Commission be unable to reach a decision on the revised text, he suggested that it should be placed in square brackets as had sometimes been done in the past, for example at the thirtieth session, in the case of article 36 *bis* of the draft articles on treaties concluded between States and international organizations or between international organizations.[4]

5. Mr. USHAKOV said that neither article 28 as proposed by the Drafting Committee nor the text now proposed by the Special Rapporteur was acceptable to him. The granting of wider immunities than those required by the present articles did not need to be authorized either by the articles or by another State. Since greater liberality was always possible, the words "to a greater ... extent" were pointless.

6. Moreover, the last part of the article, beginning with the words "the immunities it enjoys ...", implied that immunities were also granted to a State other than in respect of the exercise of its sovereign authority, which was inconceivable. A State might claim that another State was not exercising its sovereign authority in order to avoid applying the provisions of the articles and thus deprive that State of its immunities. Such a text

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[1] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[2] For the text proposed by the Drafting Committee, see 1969th meeting, para. 109.

[3] See 1942nd meeting, para. 10.

[4] *Yearbook ... 1978*, vol. II (Part Two), p. 134.

would enable a State party to the future convention unilaterally to restrict its scope. If *acta jure gestionis* were introduced into the articles, that would play into the hands of multinational corporations, which were always ready to encroach upon the sovereignty of young States. Hence he was absolutely unable to accept article 28 in any form whatsoever.

7. Mr. KOROMA said that he doubted whether article 28 was really necessary, since it only said what States were in a position to do in any case. It was not desirable to put the matter in the form of a general rule, which could be misinterpreted as limiting the fundamental rule of State immunity. If the Commission wished to retain an article along the lines of article 28, however, he reserved the right to submit a reformulation of the text. He suggested that the title should be "Reciprocal immunities".

8. Sir Ian SINCLAIR made the informal suggestion that article 28 should be replaced by a text based on article 47 of the 1961 Vienna Convention on Diplomatic Relations, which might prove more acceptable to members. That text could read:

"*Article 28*

"1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

"2. However, discrimination shall not be regarded as taking place:

"(*a*) where a court of the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

"(*b*) where by agreement States extend to each other different or more favourable treatment than is required by the provisions of the present articles.

"3. Paragraph 2 shall not be applied in such a way as to prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*)."

9. It would be noted that paragraph 2 (*b*) began with the words "where by agreement ...", unlike the corresponding provision of the 1961 Vienna Convention (art. 47, para. 2 (*b*)), which read: "where by custom or agreement ...". The formula which he proposed was thus similar to that used in the 1972 European Convention on State Immunity, which referred only to the possibility of different treatment by agreement between the States concerned.

10. Mr. USHAKOV said that the provision to be embodied in article 28 might be based on article 47 of the 1961 Vienna Convention or on similar articles of other conventions. He doubted whether courts could be referred to in that provision, because they applied internal law, even if that law followed the rules stated in the future convention or rules of customary international law. It would be preferable to refer only to the State of the forum. In any event, the proposed text was contrary to the principle *pacta sunt servanda*.

11. Sir Ian SINCLAIR said that he was prepared to remove the words "a court of" from his proposed paragraph 2 (*a*), so that the opening words would read: "where the State of the forum ...".

12. Mr. REUTER said that, although he did not object to article 28, he would prefer not to take a position on it until Governments had commented on the delicate question of the relationship between the present articles and other treaties.

13. Mr. DÍAZ GONZÁLEZ said that the discussion could serve no useful purpose, since it related not to a drafting problem, but to a question of substance. He suggested that article 28 should be placed in square brackets and reconsidered only after the views of Governments were known.

14. Mr. SUCHARITKUL (Special Rapporteur) suggested that the Commission should suspend its consideration of article 28 pending circulation of Sir Ian Sinclair's redraft.

15. Mr. KOROMA urged the deletion of article 28. The first part of the article was controversial and the second part introduced nothing new.

16. Mr. LACLETA MUÑOZ suggested that the Commission should base article 28 on article 47 of the 1961 Vienna Convention, as Sir Ian Sinclair had done in his proposal, which should be made available in writing. Since no consensus had been reached, he would not oppose the deletion of article 28; instead of submitting a specific text to the Sixth Committee of the General Assembly, the Commission should refer in its report to the problems that had arisen, thus giving Governments an opportunity to state their views on the matter. The Commission should, as it were, act as a drafting committee for the Sixth Committee.

17. Sir Ian SINCLAIR said that, since the Drafting Committee's text had attracted some criticism, it might be advisable to place it in square brackets. As the Special Rapporteur had pointed out, there was a precedent in the draft articles on treaties concluded between States and international organizations or between international organizations, in which article 36 *bis* had been placed in square brackets, with the following footnote:

> The Commission agreed at its 1512th meeting to take no decision concerning article 36 *bis* and to consider the article further in the light of comments made on the text of the article by the General Assembly, Governments and international organizations.[5]

The Commission could well follow that precedent and re-examine the article on second reading.

18. Chief AKINJIDE supported Mr. Koroma's proposal that article 28 be deleted. He had not heard a single convincing argument in favour of its inclusion in the draft, and if it were retained, the article would have economic, political and other implications that were more far-reaching than it appeared on the surface.

19. Mr. USHAKOV suggested that, since the only two possibilities were to retain or to delete article 28, a vote should be taken, even though the Commission rarely took votes on first reading.

20. Sir Ian SINCLAIR said that those two possibilities were not the only ones. The Commission also had

[5] *Ibid.*, footnote 619.

before it a proposal to put the text of article 28 in square brackets and re-examine the matter on second reading in the light of the comments of Governments. The adoption of that proposal would be a fair compromise between the position of members who favoured the deletion of the article and that of members who believed that its provisions were essential. In any case, he did not favour taking a vote, something which the Commission had not done on first reading for many years.

21. Mr. RIPHAGEN, speaking as a member of the Commission, recalled that, at the start of the consideration of the topic at the current session (1942nd meeting), he had pointed out that the provisions of article 28 affected the whole draft. In the Sixth Committee, many years previously, he had expressed doubts as to whether it was possible to frame an international convention covering all cases of immunity and non-immunity. Since then, the European Convention on State Immunity had been concluded (1972), and that Convention certainly did not achieve such a full coverage. In view of the gaps that remained, an article along the lines of article 28 was necessary in the draft.

22. Speaking as Chairman of the Drafting Committee, he said that, if the Commission was unable to agree on the article, the best solution would be to place the text in square brackets, as had been done in 1978 with the article 36 *bis* referred to by other speakers. It was interesting to note that the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations had not included that article 36 *bis* in the final text of the Convention.[6] Some participants had considered that it went too far, while others had thought that it did not go far enough.

23. Mr. ARANGIO-RUIZ urged the suspension of the discussion on article 28, in the hope that agreement might be facilitated.

24. Mr. KOROMA said that no one appeared to be satisfied with the text which the Drafting Committee had proposed for article 28. He would prefer to await circulation of the texts proposed by the Special Rapporteur and Sir Ian Sinclair.

25. Mr. TOMUSCHAT said that the text read out by Sir Ian Sinclair was much closer to what many members could accept. He suggested that the Commission should wait until it had received that text in all the working languages before proceeding with the discussion.

26. Mr. DÍAZ GONZÁLEZ said that the analysis by the Chairman of the Drafting Committee had been most judicious and his arguments quite convincing. The Commission had to take a decision either to delete article 28 or to place it in square brackets and state the reasons for doing so in its report, which meant explaining that the majority was not in favour of including such a provision in the draft.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to suspend consideration of article 28 and to resume the discussion of article 6.

It was so agreed.

ARTICLE 6 (State immunity)[7] (*concluded*)

28. Mr. SUCHARITKUL (Special Rapporteur) said that the text before the Commission was the outcome of the Drafting Committee's efforts to arrive at a compromise formula. Unfortunately, Mr. Ushakov had been absent at the time of the Committee's meetings and now found unacceptable the reference to "the relevant rules of general international law applicable in the matter". Some other members, however, believed that those words were essential, or at least useful.

29. Sir Ian SINCLAIR said that article 6 had been the subject of a long and difficult debate in the Drafting Committee, precisely because he and other members believed it was necessary to include the concluding words. Those words made it clear that the rule embodied in article 6 was stated within the framework of future developments in international law. The matter was not one that could be covered by the provisions of article 28.

30. Mr. USHAKOV said that the situations in regard to articles 6 and 28 were not quite the same, because article 28 was totally inadmissible, whereas in article 6 only the words "and the relevant rules of general international law applicable in the matter" were unacceptable. He proposed that those words should be placed in square brackets and that the report should indicate that the Commission had not been able to reach a decision on them. If the Commission had been considering article 6 on second reading, he would have asked for a vote on those words.

31. Mr. ARANGIO-RUIZ observed that the English text of article 6 referred to "general international law", whereas the French text referred only to *droit international.* If the Commission replaced the words "and the relevant rules of general international law applicable in the matter" by the words "and any relevant rule of general international law", it would avoid a *renvoi* to the existing general rules applicable in the matter at present, without neglecting the possibility of future development of international law. The deletion of the words "applicable in the matter" would clearly show that the draft articles were meant to codify international law and take precedence over any other rule. In that form, the passage in question would refer to any possible future development of general international law, which was in the hands of the international community.

32. Mr. LACLETA MUÑOZ, referring to the Spanish text, said that the words *sin perjuicio de lo dispuesto* could be interpreted in two opposite ways and should be replaced by the words *según lo dispuesto.* He shared Mr. Arangio-Ruiz's view concerning the reference to "the relevant rules of general international law applicable in the matter"; the references to customary law in many of the Commission's draft articles were only justified in so far as the Commission might doubt

[6] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted on 20 March 1986 (A/CONF.129/15).

[7] For the text, see 1968th meeting, para. 49.

whether it had attempted complete codification. If the Commission had tried to codify international law, there was no reason to refer to "the relevant rules of general international law applicable in the matter", because it was those rules that it had tried to codify. By retaining the words in question, it would give the impression that it was convinced that it had not codified general international law. He therefore suggested that the Commission should either delete those words or adopt Mr. Arangio-Ruiz's proposal.

33. Mr. KOROMA urged the deletion of the last phrase from article 6. As it stood, the article went beyond mere codification. To legislate for the future was to enter the realm of uncertainty.

34. Mr. CALERO RODRIGUES said that he would welcome the deletion of the concluding phrase, which he had accepted in the Drafting Committee only in a spirit of compromise, because other members had pressed for it. In view of the continuing division of opinion on the matter, he supported the proposal by Mr. Ushakov that the phrase should be placed in square brackets.

35. Mr. USHAKOV said that, in his opinion, the reference to "the relevant rules of general international law applicable in the matter" implied that the Commission had not found all the exceptions provided for by international law. It would be ridiculous to provide that the future convention would be subject to customary international law. From those few words it could be concluded that the Commission had not been able to analyse and codify the rules of customary international law. The words in question should therefore be placed in square brackets and the report should explain the differences of opinion that had emerged during the debate.

36. Mr. BALANDA said he had always thought that the draft articles should constitute a *corpus juris* intended to govern jurisdictional immunities and nothing else. He considered that, if the phrase in question were not deleted, it should at least be placed in square brackets.

37. Chief AKINJIDE said that very few members wished to retain the controversial concluding phrase of article 6. If it were taken to relate to existing international law, it would constitute an admission that the Commission had not fulfilled its task of codification. But at the same time, it would not be possible to take account of an unknown future. Thus the phrase did not appear to serve any purpose. If the Commission could not agree to delete it, it should at least be placed in square brackets.

38. Mr. BARBOZA said that he shared the views of Mr. Calero Rodrigues, Mr. Lacleta Muñoz, Mr. Ushakov, Mr. Balanda and Chief Akinjide. If the Commission was engaged in codification, there was no need for it to refer to general international law unless the future convention was to be an instrument of a residuary nature and the rules of general international law were to take precedence over its provisions. Thus the last phrase of article 6 was entirely unnecessary. If general international law applicable in the matter developed in the future, the same would happen to the future convention as to other conventions, namely one or other of its provisions would fall into desuetude and be replaced by a new rule of general international law. But the Commission was not obliged to provide for that situation. If the words in question could not be deleted, the compromise solution of placing them in square brackets would be acceptable to him.

39. Mr. REUTER said that he was categorically in favour of retaining the concluding phrase. All the draft articles prepared by the Commission testified to remarkable work that could not be called into question by a few words. His conception of the advantages of a very detailed text was not the same as that of other members of the Commission. He warned them against the tendency to reason as though texts were perfect and had the simplicity and clarity of mathematical operations. However detailed it might be, the text under consideration contained gaps and ambiguous wording that was open to different interpretations. In his view, the Commission had not laid down the principle of immunity in absolute terms; it had drafted a moderate and wise text which took account of the realities of immunity, but also took other factors into consideration and was thus a work of conciliation. Hence he could not accept the idea that the Commission had established a presumption of general immunity apart from a strict interpretation of the texts.

40. The interpretation and application of the articles and the solution of the other problems they raised should benefit from the same spirit of conciliation as had prevailed during the elaboration of the draft. The Commission should keep faith with its work and take account of factors other than the rule of immunity. It had been said that the immunities of a head of State were purely functional; he was one of those who thought that the State could enjoy only functional immunities and did not believe in immunity by divine right. He did not approve of the idea of replacing the concept of the sovereign by that of the State. The phrase to which objection had been raised had no other purpose than to show that a spirit of conciliation and compromise had prevailed during the preparation of the draft, which relied on other realities than that of an immunity by divine right.

41. Mr. TOMUSCHAT said he agreed that, in view of the objections of some members, the concluding phrase should be placed in square brackets. For his part, he had some difficulty in understanding the meaning of that phrase. It could be interpreted as meaning that States had a choice between following the provisions of the present articles and following those of the relevant rules of general international law. Such an interpretation would undermine the whole future convention.

42. There would inevitably be some gaps in the rules set out in the draft articles, so there was room for a provision along the lines of the contested phrase; but the present wording could cause misunderstanding. The best course would therefore be to place it in square brackets.

43. Mr. ARANGIO-RUIZ recalled that, unlike the English-speaking countries, his country and others had long since adopted the principle of relative rather than absolute State immunity. At the time when the English-

speaking countries had begun to adopt a more sensible approach to the issue, which had a human rights aspect, there had been a different, entirely respectable exigency in the international community. That was the need, in view of the gap between North and South, to protect the southern countries from the theory of restricted immunity. It was a positive step to widen the scope of immunity in the draft articles, which codified general international law and which he believed would become written law.

44. Referring to remarks by Mr. Ushakov, he said there was no danger that his suggestion might be taken to imply that the future convention might be modified by the general international law of the future. The deletion of the words "applicable in the matter" would leave open the possibility of future developments, such as an eventual limitation of the degree of immunity when the gap between North and South had been reduced.

45. Mr. DÍAZ GONZÁLEZ said that he had been opposed from the outset to the inclusion in article 6 of the words "and the relevant rules of general international law applicable in the matter", to which he had agreed only so that the Drafting Committee might reach a compromise. Although he would not go into all the pertinent arguments advanced in favour of deleting that phrase, he wished to remind the Commission that law, like society, was constantly changing. What was true today might no longer be true tomorrow. Legal rules had to be adapted and amended according to the international situation, development, and social change.

46. The best solution would therefore be to delete the phrase in question, thereby strengthening the principle of the jurisdictional immunity of States enunciated in the first part of the article. If the Commission decided to retain it, however, he too would be in favour of placing it in square brackets and deleting the words "applicable in the matter".

47. Mr. MAHIOU said that, in his opinion, the words "and the relevant rules of general international law applicable in the matter" could well be deleted; but since the Commission was still divided on the issue, the best solution might be to place those words in square brackets.

48. Sir Ian SINCLAIR said that, for the reasons given by Mr. Reuter, he was in favour of retaining the whole text of article 6. He agreed with Mr. Díaz González that the law was in a constant state of evolution; that applied both to general international law and to other systems. In the circumstances, it was important for article 6, which stated the basic principle of immunity within the concept of a unitary rule, to include the possibility of further developments in general international law in that context. He had no objection to the deletion of the words "applicable in the matter", as proposed by Mr. Arangio-Ruiz, since they were largely covered by the phrase "relevant rules of general international law".

49. Mr. KOROMA said that he was not certain which of the several suggested explanations of article 6 would be included in the commentary.

50. Mr. REUTER pointed out that the French text needed to be brought into line with the English by adding the word *général* after the words *droit international.*

51. The CHAIRMAN, noting that a considerable number of members of the Commission appeared to be in favour of placing the phrase "and the relevant rules of general international law" in square brackets, and of deleting the words "applicable in the matter", suggested that article 6 should be amended in that way.

It was so agreed.

52. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 6 proposed by the Drafting Committee, as amended.

Article 6 was adopted.

TITLE OF PART II (General principles)

53. The CHAIRMAN, noting that Mr. Ushakov had proposed that part II should be entitled "General rules" rather than "General principles" (1970th meeting, para. 47) and that Mr. Francis had proposed the title "General provisions" (1968th meeting, para. 53), invited members to take a decision on those two proposals.

54. Mr. FRANCIS said that his main objection to the title "General principles" had been that the text, from article 7 through to the end of part II, appeared to be wider in scope than that title implied. However, he thought that the title could be left to the discretion of the Drafting Committee.

55. The CHAIRMAN suggested that, for the time being, the present title should be retained and that Mr. Francis's comments should be reported in the summary record of the meeting.

It was so agreed.

TITLE OF PART III (Limitations on State immunity) (*concluded*)*

56. The CHAIRMAN invited the members of the Commission to take a decision on the title of part III, in which it had been proposed that the words "Limitations on" should be replaced by "Exceptions to".

57. Sir Ian SINCLAIR said that there had been a long discussion in the Drafting Committee concerning the title of part III. The conclusion had been that the word "limitations" was preferable given the general understanding that what was sought in article 6 was a unitary rule susceptible of the interpretation given to article 6 of the 1958 Convention on the Continental Shelf in the *Case concerning the delimitation of the Continental Shelf* between the United Kingdom and France (1977).[8] The Court of Arbitration had found that article 6 of the Convention was a single rule, and that the exception formed part and parcel of the rule itself. The Drafting Committee had considered that the same

* Resumed from the 1968th meeting, paras. 57 *et seq.*

[8] United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 3.

reasoning applied to the articles under consideration and that it was therefore preferable not to use the word "exceptions" in the title of part III.

58. Mr. SUCHARITKUL (Special Rapporteur) said that he had no strong objections to the use of the word "limitations".

59. Mr. BARBOZA said that it would be preferable to use the word "exceptions", for if the word "limitations" were retained, the title would apply more to the provisions of article 6 of part II than to those of the articles in part III.

60. Mr. KOROMA said that, despite the explanation given by Sir Ian Sinclair, he believed the word "exceptions" would be more appropriate in the title of part III. A rule had been stated, albeit restrictively, in article 6 and exceptions to that rule were set out in the following articles.

61. Mr. MAHIOU said that he preferred the word "exceptions", which had, moreover, been used in the text originally submitted by the Special Rapporteur.

62. Mr. RIPHAGEN (Chairman of the Drafting Committee), supported by Mr. KOROMA and Chief AKINJIDE, suggested that the best course would be to include both proposals in the title in square brackets.

63. Mr. USHAKOV said that he, too, thought it would be better to use the word "exceptions", which corresponded to the content of the articles of part III; but he would not press the point.

64. Mr. MAHIOU observed that none of the members of the Commission who had stated a preference for the word "exceptions" had requested that it should be substituted for the word "limitations" forthwith or that the word "limitations" should be placed in square brackets. There was thus no need to go as far as the Chairman of the Drafting Committee had suggested. The word "limitations" could be retained without being placed in square brackets. It would suffice if the views of members who were in favour of using the word "exceptions" were reported in the summary record of the meeting.

65. Mr. RAZAFINDRALAMBO said that he was one of the members of the Drafting Committee who had agreed to the compromise solution of retaining the word "limitations", even though he preferred the word "exceptions". But if article 28 were adopted, even in square brackets, he would prefer the word "exceptions" to be used in the title of part III, in order to avoid confusion with the title of article 28.

66. Mr. BARBOZA proposed that, instead of replacing the word "limitations" by "exceptions", both words should be placed in square brackets, as the Chairman of the Drafting Committee had suggested. That solution appeared to be more in keeping with the Commission's wishes.

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that the words "exceptions" and "limitations" were to be placed in square brackets in the title of part III, in accordance with the wishes of many members.

It was so agreed.

ARTICLE 28 (Restriction of immunities) (*continued*)

68. Sir Ian SINCLAIR proposed the following text:

"*Article 28*

"1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

"2. However, discrimination shall not be regarded as taking place:

"(*a*) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

"(*b*) where by agreement States extend to each other different or more favourable treatment than is required by the provisions of the present articles.

"3. Paragraph 2 shall not be applied in such a way as to prejudice the immunities which a State enjoys in respect of acts performed by it in the exercise of sovereign authority (*acta jure imperii*)."

69. Mr. USHAKOV said that, subject to minor drafting changes, paragraphs 1 and 2 of the proposed text were acceptable. But the same was not true of paragraph 3, which, not to mention the reference to *acta jure imperii*, was unacceptable because it nullified the provisions of paragraph 2.

70. Under paragraph 3, the State of the forum, referred to in paragraph 2 (*a*), could not apply a provision of the articles restrictively because of a restrictive application of that provision by the other State if that other State had acted in the exercise of sovereign authority. If that other State violated a provision of the articles, but did so in the exercise of sovereign authority, the forum State could not take countermeasures, for they would prejudice the exercise of sovereign authority by the other State.

71. Again, under paragraph 3, two States which wished to extend to each other different treatment, in accordance with paragraph 2 (*b*), could do so only if such treatment did not prejudice the exercise of sovereign authority.

72. Paragraph 3 would thus prevent States from concluding agreements that were in their interests, and was therefore unacceptable. States were free to conclude any agreement they wished, whether in respect of *acta jure imperii* or in respect of *acta jure gestionis*, and the draft articles, which did not enunciate peremptory norms of international law, could not restrict their freedom to do so.

73. Mr. FRANCIS, referring to remarks made by Mr. Tomuschat, said that the text proposed by Sir Ian Sinclair represented an excellent attempt to align the Commission's approach with article 47 of the 1961 Vienna Convention on Diplomatic Relations, and for that reason paragraphs 1 and 2 were completely accept-

able to him. But inasmuch as paragraph 3 introduced a new dimension to article 47 of the Vienna Convention, by removing from the area of restriction immunities relating to the exercise of sovereign authority, he would reserve his position on that paragraph.

74. Mr. KOROMA pointed out that the main objection to article 28 had been the fact that it could be interpreted unilaterally and therefore encourage violation of the principle *pacta sunt servanda*. The new text proposed by the Special Rapporteur (para. 2 above) met that objection by making immunity subject to mutual agreement or reciprocity and should therefore be given close attention by the Commission. Sir Ian Sinclair's draft had not removed that objection, since it left open the possibility of forcing a respondent State to act likewise in relation to a State which unilaterally violated the principle *pacta sunt servanda*.

75. Sir Ian SINCLAIR said that he had no pride of authorship in his proposed text for article 28, which he had put forward only because the Special Rapporteur's proposal seemed to be drawing some criticism. If there was a consensus to accept the Special Rapporteur's draft, he would certainly not oppose it.

76. As to Mr. Ushakov's objection to paragraph 3, that paragraph was an integral part of the proposal, since it attempted to indicate a bedrock limit beyond which a State could not apply a restrictive approach to the present articles or by agreement extend treatment different from that required by them. That issue had nothing to do with what would happen if a State violated the future convention, in which case countermeasures could be taken within the framework of the articles on State responsibility. That possibility was not precluded by paragraph 3 and, indeed, was an entirely different issue.

77. Mr. LACLETA MUÑOZ said that the advantage of the text submitted by Sir Ian Sinclair was that paragraph 2 (*a*) provided that the State of the forum could, by way of reciprocity, restrictively apply any provision of the articles which the other State concerned had applied restrictively, while allowing it to claim that there had been a violation of the articles. Thus it could not be said that the State which had been the first to apply a provision restrictively was telling the other State how it must act. The other State had a choice of two possible courses: it could either decide to interpret the provision restrictively itself, or claim that there had been a violation of the articles and act accordingly.

78. The problem that arose was whether paragraph 3 should also apply to the case covered by paragraph 2 (*b*). That was in the realm of *jus cogens*. In his view, States were free to modify the provisions of the draft articles as they saw fit. The wording of paragraph 3 should therefore be amended to make it clear that it applied only to paragraph 2 (*a*).

79. Mr. TOMUSCHAT, replying to Mr. Koroma's objections to Sir Ian Sinclair's draft, pointed out that the first two paragraphs were based on universally recognized and accepted treaty practice, since article 47 of the 1961 Vienna Convention was the model followed in the new version of article 28. He believed that a distinction must be made between violation of a treaty and restrictive application of its provisions, which was the language now used in paragraph 2 (*a*). Since all members of the international community had accepted article 47 of the Vienna Convention, it was quite normal to include a similar provision in the draft articles on State immunities.

80. Referring to Mr. Lacleta Muñoz's remarks, he agreed that paragraph 3 should not apply to paragraph 2 (*b*) because, as Mr. Ushakov had pointed out, States were free to regulate their mutual relations as they saw fit and to extend to each other more liberal or more restrictive treatment than that required by the present articles. He had no objection to the deletion of paragraph 3, however, because it introduced the concept of *acta jure imperii*, which did not appear anywhere else in the draft articles and could give rise to difficulties of interpretation.

81. Mr. USHAKOV said that article 47, paragraph 2 (*a*), of the 1961 Vienna Convention on Diplomatic Relations, which stated that discrimination would not be regarded as taking place

> (*a*) Where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;

certainly did not provide that the sending State was entitled to apply the provisions of that Convention restrictively. A sending State which had ratified the Convention and applied one of its provisions restrictively was not respecting the obligations it had undertaken and was committing a breach. It was true that, although there certainly was a breach in such a case, article 47 did not expressly say so; but it could not therefore be concluded that a State which had ratified the Convention was free to apply its provisions restrictively. The article simply provided that it was not discriminatory for a State to apply one of the provisions of the Convention restrictively by way of a countermeasure.

82. Mr. KOROMA said it was obvious that the Commission was not going to come to a conclusion easily; there appeared to be a fundamental objection to article 28 as presently drafted. He wondered whether it might not be preferable to delete article 28 and submit both the new proposals to the Sixth Committee of the General Assembly. He suggested that, in the first part of the new text proposed by the Special Rapporteur (para. 2 above), the words "in connection with a proceeding before a court of another State" should be deleted.

83. Mr. SUCHARITKUL (Special Rapporteur) said that he agreed with Mr. Koroma: it was time for the Commission to decide not to take a decision. The Drafting Committee's text should be placed in square brackets and the new proposals included in the commentary and footnotes to article 28. He agreed to the deletion of the phrase mentioned by Mr. Koroma.

84. Chief AKINJIDE said he thought that the Special Rapporteur's proposal was a retrograde step. If the three drafts were to be included in the report, they should all be placed on an equal footing.

The meeting rose at 1.05 p.m.