

Document:-
A/CN.4/SR.1982

Summary record of the 1982nd meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1986, vol. I

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1982nd MEETING

Monday, 7 July 1986, at 10.05 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. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

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

CHAPTER IV. State responsibility (A/CN.4/L.405 and Add.1)

A. Introduction (A/CN.4/L.405)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.405 and Add.1)

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Paragraph 9

1. Sir Ian SINCLAIR said that he had some difficulty with the expression "soft law", which referred to the residual character of the draft articles on State responsibility. It might be preferable to use a term such as "other arrangements".

2. Mr. RIPHAGEN (Special Rapporteur) said that the term "soft law" was meant to denote rules of conduct non-conformity with which did not give rise to any consequences. With regard to Sir Ian Sinclair's proposal, he said that, since paragraph 9 reflected what had been said by the Special Rapporteur during the Commission's consideration of the topic, it should either be left as it stood or be deleted, but it should not be amended.

3. Mr. LACLETA MUÑOZ also wondered what was meant by the first sentence of paragraph 9. He also had difficulties with the Spanish translation (*derecho de disposición*) of the term "soft law". It would be preferable simply to use the English term, which seemed difficult to translate.

4. Mr. REUTER said that the Special Rapporteur was, of course, free to express his personal opinion. However, in the second sentence of the paragraph, it was stated that that opinion "was already reflected in articles 2 and 4 of the draft articles of part 2". He therefore had reservations with regard to paragraph 9 as a whole. He also had reservations with regard to the use of the term "soft law": rules either were rules or they

were not. Moreover, the meaning of the expression "to establish *jus cogens*" was unclear.

5. Mr. USHAKOV said that the whole of paragraph 9, including the second sentence, simply reflected the opinion of the Special Rapporteur and therefore was not open to objection.

6. Mr. DÍAZ GONZÁLEZ said that, while he recognized that the paragraph reflected the personal opinion of the Special Rapporteur, it was difficult to establish any difference of degree between rules of law. Moreover, in the Spanish text, the use of the expression *derecho de disposición* made the second part of the first sentence incomprehensible.

7. Following an exchange of views in which Mr. NJENGA, Mr. RIPHAGEN (Special Rapporteur), Mr. KOROMA, Mr. JACOVIDES, Chief AKINJIDE and Mr. FRANCIS took part, the CHAIRMAN suggested that, in order to make it clear that the paragraph reflected the views of the Special Rapporteur, the first sentence should end at the word "responsibility" and the following text should begin with the words "In his view".

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

8. Sir Ian SINCLAIR proposed that the word "intervene", in the fourth sentence, should be replaced by "involve intervention in".

It was so agreed.

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 14

Paragraphs 11 to 14 were adopted.

Paragraph 15

9. Mr. FLITAN proposed that paragraph 15 should be replaced by the following text:

"Some members of the Commission were of the view that it was not certain that providing for obligatory referral of the dispute to the ICJ, even in the particular cases covered by draft article 4, subparagraphs (a) and (b), of part 3, was acceptable. In that connection, it was recalled that a certain number of States had not accepted as obligatory the jurisdiction of the ICJ. Those members referred to the principle of the freedom of choice by the parties of the means of peaceful settlement of their dispute."

It was so agreed.

10. Mr. LACLETA MUÑOZ said that, while he supported the principle that the parties to a dispute should be free to choose the peaceful means of settlement, that principle by no means precluded the possibility of States' choosing the means to be employed in such cases before any dispute arose. That was an important consideration which had been referred to by a number of members and which should therefore be taken into account.

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

11. Sir Ian SINCLAIR proposed that, in the second sentence, the words “assort to all international obligations a compulsory means of settlement” should be replaced by “mean that all international obligations would be provided with a compulsory means of settlement”.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraph 18

12. Sir Ian SINCLAIR said that the word “modifications” should be replaced by “notifications”.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

13. Mr. REUTER proposed that, in the second sentence of the French text, the words *l'Etat dit auteur* should be replaced by *l'Etat considéré comme auteur*.

It was so agreed.

Paragraph 19, as amended in the French text, was adopted.

Paragraphs 20 to 25

Paragraphs 20 to 25 were adopted.

Paragraph 26

14. Mr. LACLETA MUÑOZ proposed that the words *en relación con tales procedimientos*, in the second part of the first sentence of the Spanish text, should be replaced by *en tales procedimientos*.

It was so agreed.

Paragraph 26, as amended in the Spanish text, was adopted.

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

15. Sir Ian SINCLAIR said that the expression “in common consent”, in the second part of the first sentence, should read “by common consent”.

It was so agreed.

16. Mr. REUTER proposed that the word *chapeau*, in the first sentence, should be replaced by “introductory clause”.

It was so agreed.

Paragraph 28, as amended, was adopted.

Paragraph 29

17. Mr. MALEK expressed uncertainty as to the meaning of the expression “as a whole” at the end of the paragraph.

18. Mr. RIPHAGEN (Special Rapporteur) acknowledged that the expression was not very clear and could be deleted.

19. Mr. FLITAN proposed that the concluding words of the paragraph, “to decide, possibly within the wider framework of a convention on State responsibility as a whole”, which were not easily understandable, should simply be replaced by “on the draft articles”.

It was so agreed.

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

20. Chief AKINJIDE proposed that the words “pressure of work” should be replaced by “lack of time”.

21. Mr. YANKOV supported Chief Akinjide’s proposal. The reduction of the length of the session by two weeks had affected the Commission’s consideration of a number of topics. That fact should be emphasized.

22. Mr. LACLETA MUÑOZ said that the wording used in the Spanish text seemed more explicit.

23. Mr. REUTER proposed that the words “owing to pressure of work” should be replaced by “due to the exceptional shortening of the Commission’s session”, in order to do justice to the Commission, which had had to make a considerable effort to consider two sets of draft articles while having two weeks less at its disposal than during previous sessions.

It was so agreed.

Paragraph 31, as amended, was adopted.

Paragraph 32 (A/CN.4/L.405/Add.1)

24. Mr. ROUKOUNAS proposed that, in the second sentence, the words “of part 2” should be inserted after “article 6”.

25. Mr. ARANGIO-RUIZ recalled that, during the Commission’s consideration of the topic, he had suggested (1955th meeting) that article 1 of part 3 of the draft articles should be made an integral part of article 6 of part 2.

26. Mr. USHAKOV proposed that the third sentence should be amended to read: “However, it should be noted that the Committee had made considerable progress in its consideration of the article”; the rest of the paragraph should be deleted.

27. Mr. RIPHAGEN (Special Rapporteur) said that he had no objection to the proposal made by Mr. Roukounas. With regard to Mr. Ushakov’s proposal, he noted that he had given considerable thought to the way in which the status of the Commission’s work on the draft articles on State responsibility should be conveyed to the Sixth Committee of the General Assembly, and that he had eventually deemed it necessary to add paragraph 32 for that purpose. He recognized, however, that the type of information

presented in that paragraph was something of a novelty in a report by the Commission and would not oppose its deletion, if that was the Commission's wish.

28. Mr. McCAFFREY, supported by Mr. CALERO RODRIGUES and Sir Ian SINCLAIR, said that it would be helpful for the Sixth Committee and for the newly elected members of the Commission at the next session to know what the Drafting Committee had achieved in its consideration of draft article 6; consequently, the paragraph should be retained.

29. Mr. FLITAN drew the Commission's attention to paragraph 9 of chapter VIII of the draft report (A/CN.4/L.409), in which it was stated that, due to lack of time, it had not been possible for the Commission at its present session to make significant progress on the topic of State responsibility, whereas the third sentence of paragraph 32 of chapter IV stated that some progress had been made in the Drafting Committee's consideration of article 6. The Commission should be careful to avoid any discrepancies in that respect.

30. However, he recognized that the Sixth Committee should be informed of the stage reached and that the new members of the Commission should be given an idea of what had been done at the present session. He therefore proposed that paragraph 32 should be retained, but that the third sentence should be deleted.

31. Mr. NJENGA said that the explanation provided in paragraph 32 was useful only for the Commission's own purposes. The text proposed by Mr. Ushakov would be adequate for the purposes of the Sixth Committee.

32. Mr. USHAKOV said that, while he would not press his proposal, he felt that the second part of paragraph 32 would be incomprehensible to anyone who had not taken part in the deliberations of the Drafting Committee.

33. Mr. LACLETA MUÑOZ supported the proposal made by Mr. Flitan.

34. Mr. REUTER said that, while the information contained in paragraph 32 was useful, it might perhaps be better to present it in a footnote.

35. The CHAIRMAN suggested that the word "some", in the third sentence, should be deleted.

It was so agreed.

36. Following an exchange of views in which Mr. RIPHAGEN (Special Rapporteur), Mr. ARANGIO-RUIZ, Mr. CALERO RODRIGUES, Sir Ian SINCLAIR and Mr. LACLETA MUÑOZ took part, Mr. MAHIU proposed that the first two sentences of paragraph 32 should be retained, with the amendment to the second sentence proposed by Mr. Roukounas, and that the rest of the paragraph should be presented as a footnote.

It was so agreed.

Paragraph 32, as amended, was adopted.

Section B, as amended, was adopted.

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

CHAPTER VIII. Other decisions and conclusions of the Commission (A/CN.4/L.409)

A. Relations between States and international organizations (second part of the topic)

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Programme and methods of work of the Commission

Paragraphs 2 to 6

Paragraphs 2 to 6 were adopted.

Paragraph 7

37. Mr. CALERO RODRIGUES suggested that the words "the conclusion of the term of office of the Commission", at the end of the paragraph, should be amended to read: "the conclusion of the term of office of its members".

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Paragraph 11

38. Mr. LACLETA MUÑOZ pointed out that the words "the Drafting Committee was established", in the first sentence, had been inadequately rendered in Spanish. He therefore proposed that, in the Spanish text, the words *se creó* should be replaced by *se constituyó*.

It was so agreed.

Paragraph 11, as amended in the Spanish text, was adopted.

Paragraphs 12 to 16

Paragraphs 12 to 16 were adopted.

Paragraph 17

39. Mr. FRANCIS, recalling what had been said in paragraph 9 of the chapter regarding the duration of the session, which had been curtailed from 12 to 10 weeks, proposed that the last sentence should be amended by replacing the word "also" by "always", and by adding at the end the words "and at its thirty-eighth session virtually achieved maximum possible use of such time and services".

40. Mr. McCAFFREY proposed that the last sentence should be reformulated as follows: "The Commission has always endeavoured to make maximum use of the conference time and services made available, and at its present session virtually achieved that goal."

41. Mr. LACLETA MUÑOZ supported the drafting amendments proposed and said that, in the penultimate sentence of the Spanish text, the words *en el momento de celebración* should be replaced by *en las horas de celebración*.

42. Mr. RAZAFINDRALAMBO supported the amendment proposed by Mr. McCaffrey but suggested

that the words "in the past" should be added after "endeavoured" in that text, in order to take account of the practice of the Commission.

43. Mr. FRANCIS said that he could accept the proposal made by Mr. McCaffrey, with the sub-amendment by Mr. Razafindralambo.

44. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 17 with the amendments proposed by Mr. McCaffrey, Mr. Lacleta Muñoz and Mr. Razafindralambo.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Section B, as amended, was adopted.

C. Co-operation with other bodies

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

45. Mr. REUTER proposed that the first sentence should be amended to indicate that Mr. Jagota had attended the January 1986 session of the Inter-American Juridical Committee in his capacity as Chairman of the Commission.

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraph 21

Paragraph 21 was adopted.

Section C, as amended, was adopted.

D. Date and place of the thirty-ninth session

Paragraph 22

Paragraph 22 was adopted.

Section D was adopted.

E. Representation at the forty-first session of the General Assembly

Paragraph 23

Paragraph 23 was adopted.

Section E was adopted.

F. International Law Seminar

Paragraphs 24 and 25

Paragraphs 24 and 25 were adopted.

Paragraphs 26 and 27

46. Mr. RIPHAGEN proposed that paragraphs 26 and 27 should be combined and that mention should be made of the fact that he had addressed the Seminar.

It was so agreed.

Paragraphs 26 and 27, as amended, were adopted.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

47. Mr. KOROMA suggested the inclusion of a suitable expression of gratitude to those States which had given donations for the Seminar.

It was so agreed.

48. Mr. McCAFFREY said that, in the last sentence, it would be more appropriate to say "have participated" than "have been accepted".

49. Mr. YANKOV said that the words "have been accepted" had been used because the participants were those persons who had been admitted by the selection committee. Perhaps the words "have been admitted" might be used.

50. Sir Ian SINCLAIR proposed that the last sentence should indicate the year in which the Seminar had begun, namely 1964.

It was so agreed.

51. Mr. LACLETA MUÑOZ said that he had been invited at the present session to be a member of the selection committee, which accepted a given number of persons depending on the number of places available. Consequently, he could see no objection to the use of the word "accepted" in the last sentence of paragraph 29.

52. Mr. RAZAFINDRALAMBO proposed the following wording: "Of the 495 candidates ... accepted as participants in the Seminar since its inception ..."

It was so agreed.

Paragraph 29, as amended, was adopted.

Paragraph 30

53. Mr. McCAFFREY noted that, in the penultimate sentence, it was stated that, if adequate contributions were not forthcoming, the holding of the 1987 session of the Seminar "may become difficult". Although similar language had already been used in the Commission's report on its previous session, he understood that the situation had become much more serious. He therefore proposed that the words "may become difficult" should be replaced by "may be in doubt".

It was so agreed.

Paragraph 30, as amended, was adopted.

Section F, as amended, was adopted.

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

CHAPTER I. Organization of the session (A/CN.4/L.402)

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Paragraph 9

54. Mr. DÍAZ GONZÁLEZ said that the opening words of paragraph 9 gave a wrong impression. In fact, the Commission had given proper consideration to only two of the topics on its agenda, namely items 3 and 4.

Apart from not dealing at all with agenda item 8, the Commission had dealt only superficially with the various other items, due to lack of time.

55. Mr. YANKOV, while agreeing with the observation made by Mr. Díaz González, drew attention to paragraph 9 of chapter VIII of the draft report, where it was explained at length that the Commission had been short of time and had therefore been unable to give full treatment to many of the topics on its agenda.

56. Mr. FRANCIS said that he, too, agreed with Mr. Díaz González. The matter could perhaps be dealt with by means of a footnote referring to paragraph 9 of chapter VIII.

57. Mr. ARANGIO-RUIZ said that, in view of the importance of the matter, it would be better to stress the point again in paragraph 9 of chapter I.

58. Mr. KOROMA also supported the comments by Mr. Díaz González.

59. Mr. McCAFFREY proposed that the valid point made by Mr. Díaz González should be dealt with by adding, at the end of the first sentence of paragraph 9, the words “but as explained in the same chapter (paragraph 9), it was unable to give adequate consideration to several topics due to lack of time”.

It was so agreed.

Paragraph 9, as amended, was adopted.

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

The meeting rose at 12.45 p.m.

1983rd MEETING

Tuesday, 8 July 1986, at 10.05 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. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Laclata Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

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

CHAPTER VI. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.407 and Add.1)

A. Introduction (A/CN.4/L.407)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

1. Mr. McCAFFREY proposed that, in the second sentence, the word “however”, which was redundant because the word “but” had been used in the same sentence, should be deleted.

It was so agreed.

Paragraph 4, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.407/Add.1)

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

2. Mr. MALEK suggested that the first part of the second sentence should be amended to read: “Owing to the lack of available time, only just over three meetings were devoted to consideration of the topic and several members were unable to make statements ...”

3. Mr. BALANDA suggested that the words “Owing to the lack of available time”, in the second sentence, should be replaced by “Owing to the shortening of the present session”, in order to make it clear why the Commission had had so little time to consider the topic. He also suggested that, in the last sentence of the French text, the words *nuances d'opinion* should be replaced by *opinions*.

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7

4. Mr. MALEK said that he did not understand the meaning of the words “of its dynamics”, at the end of the second sentence.

5. Mr. BARBOZA (Special Rapporteur) said that, as he had indicated in his introductory statement (1972nd meeting, para. 33), his analysis had focused mainly on the dynamics of the schematic outline, in other words on the way it operated, and it was in that sense that the expression “of its dynamics” should be understood.

Paragraph 7 was adopted.

Paragraph 8

6. Mr. FLITAN said that, contrary to the Commission's usual practice, some sentences of the French text of chapter VI had been drafted in the first person plural. He therefore proposed that, in the last sentence of paragraph 8, the words *nous permet de nous démarquer de manière encore plus nette du domaine* should be replaced by *permet de démarquer de manière encore plus nette ce sujet du domaine*. The words *a cessé d'être nécessaire* should, moreover, be replaced by *n'est pas nécessaire*.

7. Sir Ian SINCLAIR said that, in the last sentence, the words “In the view of the Commission itself” wrongly gave the impression that a conclusion reached by the Commission was being expressed.