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Summary record of the 2237th meeting

Topic:
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thought it would be better for the Drafting Committee to continue to try to solve the outstanding problems, which were primarily of a drafting nature.

53. Mr. McCAFFREY said he took issue with the Special Rapporteur's statement that article 16 had generated majority support in the Drafting Committee. Like Mr. Bennouna, he believed a full discussion of the article in plenary was necessary before the Drafting Committee could resume its work on it.

54. Mr. KOROMA said that the Commission was entering into a substantive discussion, which would be better carried out when it took up the matter at the next session. He proposed that coverage of the discussion be expunged from the summary record.

55. Mr. BARSEGOV said he agreed with the Special Rapporteur that the Drafting Committee should continue its work on the article at the next session: a discussion in plenary would only slow down progress.

56. Mr. BARBOZA said that it was for the Drafting Committee to decide whether or not its work could be furthered by a debate in plenary.

57. Mr. BEESLEY said that he would like to know from the Chairman of the Drafting Committee whether it had been lack of time alone, and not active opposition by a number of members, that had prevented the Drafting Committee from reaching agreement on article 16.

58. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, in his introduction, he had stated that "after long discussions, the Committee had seemed prepared, despite the reservations of some members, to agree that such an article should be included in the draft code" (para. 45 above).

59. Mr. TOMUSCHAT said that the present discussion was extremely useful and he would oppose Mr. Koroma's proposal that coverage of it be expunged from the summary record.

60. Mr. REUTER said that he fully endorsed the comments made by Mr. Barsegov and the Special Rapporteur.

61. Mr. AL-QAYSI said that he could not agree to Mr. Koroma's proposal.

62. The CHAIRMAN suggested that the Commission should take note of the report by the Chairman of the Drafting Committee on the Committee's consideration of draft article 16, and that only a brief account of the ensuing debate should be incorporated in the summary record of the present meeting.

It was so agreed.

63. The CHAIRMAN said that sincere thanks were due to the Chairman of the Drafting Committee, the members of the Committee and the secretariat for all the intensive and productive work they had done during the session.

64. Mr. KOROMA said that he, too, wished to pay tribute to the Chairman of the Drafting Committee and the secretariat, without whose support not nearly as much work would have been accomplished.

The meeting rose at 11.30 a.m.

2137th MEETING

Friday, 14 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Bicentenary of the French Revolution

1. The CHAIRMAN said that the celebration of the bicentenary of the French Revolution of 1789 was an important event, not only for France, but for the entire world, including the international community of lawyers, in which the Commission must be in the vanguard. The Revolution had been a decisive stage in world history and had also accelerated the process of human emancipation; no one today would dispute the influence it had had on the progressive development of international law. The Commission was privileged to have with it, in the person of Mr. Reuter—the doyen and most experienced of its members—a perfect incarnation of the virtues and spirit of that Revolution.

2. Mr. REUTER thanked the Chairman and pointed out that, at an earlier meeting, he had emphasized the limitations of the French Revolution by noting that it had taken the doctrine of human rights and the ideal of a more just and peaceful world from America, from what had then been an English colony. Like other countries, France had not always acted well in the course of its history, and that was why French patriotism should remain humble and respectful of the homelands of others. The horrifying ordeals of world history had left him personally without any hate whatsoever in his heart: it was in that spirit that each individual could celebrate the 14th of July in perfect equality, perfect liberty and perfect fraternity.

Draft report of the Commission on the work of its forty-first session

3. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter VI.

CHAPTER VI. *Jurisdictional immunities of States and their property* (A/CN.4/L.439 and Add.1 and 2)

A. Introduction (A/CN.4/L.439)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

Paragraph 4 was adopted subject to a correction in footnote 2 bis.

Paragraph 5

4. Mr. McCAFFREY proposed that the word "presented", in the third sentence, should be replaced by "introduced" and that the words "on their basis", in the fourth sentence, should be replaced by "on the basis thereof".

It was so agreed.

Paragraph 5, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.439 and Add.1 and 2)

Paragraphs 6 to 80 (A/CN.4/L.439)

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Paragraph 8

5. Mr. McCAFFREY suggested that the phrase "their second reading . . . those made by some members", in the third sentence, should be replaced by "consideration in the light of the comments made", for it was not the Drafting Committee but the Commission that would consider the texts on second reading.

6. Mr. CALERO RODRIGUES pointed out that, if that was the case, then the sentence could end after the phrase "for their second reading".

7. The CHAIRMAN proposed that the fourth and fifth sentences should be deleted: the fifth sentence attributed to him a view that properly was that of the Commission.

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraph 9

8. Mr. EIRIKSSON pointed out that the beginning of the second sentence was ambiguous and might give the impression that the "draft articles" were draft articles 12 to 28, mentioned in the first sentence.

9. Mr. MAHIOU endorsed that remark and suggested transposing the first sentence of paragraph 9 to the end of paragraph 8.

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

10. Mr. McCAFFREY proposed that the word "entity", in the second sentence, should be replaced by "status".

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

11. Mr. BARSEGOV said he was afraid that the phrase "on the basis of the brief analysis of State practice from the nineteenth century to the present period", in the first sentence, might create the impression that only the Special Rapporteur's conclusion was well founded and that the views of members who did not agree with him were not. Hence he would suggest that that phrase be deleted.

12. Mr. McCAFFREY said he thought that the remainder of paragraph 13 gave an appropriate account of the views of members who did not agree with the Special Rapporteur's conclusion and of the reasons for those views. He had no objection to the text being amended, but believed that the deletion proposed by Mr. Barsegov would create an imbalance that did not exist in the text as currently worded.

13. Mr. OGISO (Special Rapporteur) said that he had striven to reflect as faithfully as possible the observations made by members of the Commission during the discussion. While he had stated that, in his opinion, recent State practice reflected a trend towards restriction of immunity, he had also indicated that some members had disagreed, and he had stated their reasons. He therefore believed he had set out both points of view in a balanced manner, and he was reluctant, at the present stage, to amend the text.

14. Mr. AL-QAYSI said that he endorsed the remarks made by Mr. McCaffrey and the Special Rapporteur. Paragraph 13 reflected the discussion correctly and the proposed deletion would introduce an imbalance.

15. Mr. MAHIOU said that one solution might be to replace the words "State practice" by "the practice of certain States".

16. Mr. BARSEGOV said it was obvious from the discussion that he had misinterpreted the text of paragraph 13: he would therefore withdraw his proposal.

17. Mr. KOROMA said that he endorsed Mr. Mahiou's suggestion. He would not request that paragraph 13 be revised at the current late stage, but it was unfortunate that it implied that the Commission had still not resolved the old and purely theoretical conflict between absolute immunity and restricted immunity. He would also suggest that the words "in Western Europe", in the second sentence, be deleted, for the decisions referred to had not all been taken by national courts in that area of the world.

18. Mr. CALERO RODRIGUES said that he supported Mr. Koroma's proposal.

19. Mr. BENNOUNA (Rapporteur) said that he endorsed the comments made by the Special Rapporteur, and believed the draft report gave a very faithful account of the discussion.

20. Mr. BARSEGOV said that he could accept paragraph 13 as it stood if the word "the", before the words "brief analysis" in the first sentence, were replaced by "his".

21. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 13 as amended by Mr. Mahiou, Mr. Koroma and Mr. Barsegov (paras. 15, 17 and 20 above).

It was so agreed.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

22. Mr. THIAM suggested that, for strictly stylistic reasons, the words "intended to stress the fact", in the first sentence, should be deleted.

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 16

23. Mr. AL-QAYSI said he wondered whether it was necessary to indicate that the Commission had been able to complete its consideration of only part of the draft articles, since two documents on the articles had been submitted to it.

24. Mr. BARSEGOV recalled that the Commission had decided to examine only articles 1 to 11 and to defer consideration of articles 12 to 28 until its next session. That was why, like many of his colleagues, he had refrained from speaking on articles 12 to 28. The draft report, however, summarized the views of those who had chosen to speak on the second set of articles as well as on the first set, and the debate as represented in the report was not complete. He would like that to be made perfectly clear, and proposed that the following sentence should be added to paragraph 16: "The report does not reflect the opinions of those members who did not speak on draft articles 12 to 28."

25. The CHAIRMAN suggested that a more objective formulation might be: "The report reflects only the opinions of those members who had the opportunity to speak on articles 12 to 28".

26. Mr. McCAFFREY said that he endorsed Mr. Barsegov's comment, for he, too, had refrained from speaking on articles 12 to 28. It might be better to refer in the report only to the Special Rapporteur's comments on the observations received from Governments.

27. Mr. FRANCIS said that he also endorsed the comment made by Mr. Barsegov and would propose adding the following sentence to paragraph 16: "Many members deliberately did not speak on articles 12 to 28." The words "Due to lack of time", in the second sentence, were not in line with what had really happened.

28. Mr. KOROMA said that, if the phrase "Due to lack of time" were retained, it should be transposed to the beginning of the last sentence.

29. Mr. DÍAZ GONZÁLEZ said it was unfortunate that the draft report gave the impression that the Commission was resubmitting to the General Assembly the comments made by Member States on the draft articles.

30. Mr. BENNOUNA (Rapporteur) replied that the report clearly indicated that the consideration of articles 12 to 28 had not been concluded, and that the General Assembly did not have the entire draft before it. It had been decided to postpone consideration of articles 12 to 28 to the next session: in the mean time, the report merely gave an account of the discussion in the Commission on the conclusions drawn by the Special Rapporteur from the comments and observations of Governments.

31. Mr. OGISO (Special Rapporteur) proposed that the second sentence of paragraph 16 should be amended to read: "Due to lack of time, some members were not able to express their views fully and, therefore, articles 12 to 28 were not referred to the Drafting Committee."

32. Mr. Sreenivasa RAO said that, in order to meet the concern expressed by Mr. Barsegov, it would be sufficient to indicate, at the end of the last sentence of paragraph 16, that articles 12 to 28 "... remain to be further discussed".

33. Mr. THIAM said it was not a good idea to stress that some members of the Commission had been unable to speak "due to lack of time", thereby giving the impression that all members of the Commission were always required to take the floor on each and every topic. In reality, many preferred not to do so because their colleagues had expressed what they themselves would have stated. The Commission was composed of a great many more members than in the past, and anything in paragraph 16 that might make the reader think that each member had to give his opinion on everything should be deleted.

34. Mr. CALERO RODRIGUES said that, if the idea to be conveyed was that the report did not reflect the opinions of all members on articles 12 to 28, the last sentence of paragraph 16 could be reformulated as follows: "Articles 12 to 28, as well as the related proposals . . . were therefore not fully discussed, as indicated in paragraph 8, and the present report does not reflect the views of all members."

35. Mr. EIRIKSSON said he could endorse that proposal as long as the words "Due to lack of time", in the second sentence, which were no longer necessary because of the reference to paragraph 8, were deleted.

36. Mr. AL-QAYSI said that paragraph 16 seemed merely to repeat the decision referred to at the end of paragraph 8, as amended (see para. 9 above).

37. Mr. BENNOUNA (Rapporteur) pointed to the content of paragraph 8, which had already been adopted, and proposed that the last two sentences of paragraph 16 be replaced by the formulation: "Since the Commission was unable thoroughly to examine articles 12 to 28, the present report does not reflect the opinions of all the members of the Commission on those articles."

38. Mr. BARSEGOV, supported by Mr. KOROMA and Mr. AL-BAHARNA, said the Commission should simply say that it had not had the opportunity to complete its consideration of the draft articles before it, because it was true that some members had not had the time to express their views. He proposed that, in the sentence suggested by the Rapporteur, the word "thoroughly" should be deleted, as the Commission had purely and simply stopped its work on the matter for the time being.

39. Mr. McCAFFREY suggested that the words "thoroughly to examine articles 12 to 28", in the sentence proposed by the Rapporteur, should be replaced by "to complete its consideration of articles 12 to 28".

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 16 as amended by the Rapporteur and Mr. McCaffrey (paras. 37 and 39 above).

It was so agreed.

Paragraph 16, as amended, was adopted.

41. Mr. EIRIKSSON said that, before continuing its consideration of the draft report, the Commission should give some thought to ways of reducing its length. For example, it was unnecessary to reproduce the texts of the draft articles. Again, the section entitled "Summary of comments and observations of Governments", which was repeated in connection with each article, was inappropriate, because it seemed to imply that the Commission was repeating to delegations to the Sixth Committee of the General Assembly what it had been told by their Governments.

42. Mr. FRANCIS said he shared that view, although he also believed that drawing attention to the comments and observations of Governments had the merit of reminding the reader what the discussion had actually been about. If only to reduce documentation, however, it was a practice not to be encouraged and should be avoided in the future.

43. Mr. OGISO (Special Rapporteur) said that his second report (A/CN.4/422 and Add.1) had essentially been devoted to the comments and observations of Governments, and it was on that basis that the Commission had discussed the topic. It therefore seemed important that the Sixth Committee should be informed about those comments, the Special Rapporteur's analysis of them and the opinions expressed within the Commission. Since some delegations to the Sixth Committee would certainly be aware of what Governments had had to say on the draft articles, it would probably be simpler just to refer to the documents in which those observations were to be found, but the format used in the draft report had the advantage of offering the reader an overview of the various issues discussed.

44. Mr. McCAFFREY said that the paragraphs in the draft report which followed the heading "Summary of comments and observations of Governments" were really summaries not of what Governments had said, but of what the Special Rapporteur thought about their comments. He would therefore propose that the heading be amended to read: "Response of the Special Rapporteur to the comments and observations of Governments".

45. Mr. BENNOUNA (Rapporteur) said that the format used in the draft report was perfectly clear and in any case it was too late to change it. It might be useful in the future for the special rapporteurs and the Rapporteur to decide on a uniform structure at the beginning of the session.

46. In reply to Mr. McCaffrey, he said that the most accurate way to refer to the part of the draft report in question was not as the Special Rapporteur's analysis of comments and observations of Governments, but as the Commission's discussion of that analysis. The best formulation might simply be: "Comments and observations of Governments".

47. Mr. EIRIKSSON said that the report was well structured, but a clear distinction had to be drawn between what members of the Commission had said, what the Special Rapporteur had said and what Governments had said.

48. Mr. RAZAFINDRALAMBO said he thought that a more concise format could have been adopted: the texts of the draft articles might have been incorporated in footnotes, for example. It might also have been possible to do without the headings, thereby making it clear that the entire text came from the Commission. While it was useful to recall the comments of Governments, it must be made clear that they had only been the subject-matter considered by the Commission and that the summary was only a sort of introduction to the paragraphs in which they were analysed. The headings could thus be deleted.

49. Mr. CALERO RODRIGUES said that there were many ways of chronicling the Commission's discussions, and the one that had been adopted was by no means the worst. It had the merit of setting out the material in full. He believed it should remain unchanged, although the

headings should be amended as suggested by Mr. McCaffrey.

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following wording for the heading appearing after each of the draft articles in chapter VI of its report: "Response of the Special Rapporteur to the comments and observations of Governments".

It was so agreed.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

51. Mr. McCAFFREY proposed that, in the first sentence of the English text, the preterite should be changed to the pluperfect, and that the same change should be made whenever the report referred to comments received from Governments.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 18 bis

52. Mr. OGISO (Special Rapporteur) said that the following sentence should be added at the end of the paragraph: "A further drafting proposal was made by one member that the expression 'one State' should be replaced by 'a foreign State' and the expression 'another State' by 'a forum State'."

Paragraph 18 bis, as amended, was adopted.

53. Mr. FRANCIS said that he had serious reservations about paragraph 18. The conclusions the Commission drew from the comments and observations of Governments were material to its consideration of a topic. The Commission was paying too much attention to questions of marginal interest and lingering over problems of presentation. The two sentences that made up paragraph 18 should in fact have been incorporated in paragraph 18 bis.

54. Mr. KOROMA said that he endorsed the comments made by Mr. Francis. Once the Commission had accepted the views of the Special Rapporteur, they became its own views, and it would be dangerous to draw a distinction between the Special Rapporteur's opinions and those of the Commission. In subscribing to the Special Rapporteur's point of view, the Commission gave him a kind of protective shield. It would not be judicious to create the impression that the Special Rapporteur's opinions took precedence over those of a particular Government, for example.

55. Mr. DÍAZ GONZÁLEZ said that he agreed with Mr. Francis and Mr. Koroma. The Special Rapporteur's opinions on the comments of Governments, which were formulated at the Commission's request, were naturally of the greatest importance, but it was not the reports of special rapporteurs that the Commission sent to the Sixth Committee of the General Assembly: it sent its own decisions. The Commission's report should not convey the impression that it was sending the Special Rapporteur's opinions to the Sixth Committee to be discussed in the light of observations made by members of the Commission.

56. Mr. BENNOUNA (Rapporteur) said that the Special Rapporteur had sought to describe the discussion in the Commission as thoroughly and as accurately as possible.

Since the Commission seemed reluctant to use the heading "Response of the Special Rapporteur to the comments and observations of Governments", the best course might be to delete all the headings, which were not indispensable.

57. Mr. AL-BAHARNA said that the heading in question, as amended (para. 50 above), should be retained.

58. Mr. OGISO (Special Rapporteur) said that he had no objection to the headings being deleted.

59. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the headings throughout section B of chapter VI.

It was so agreed.

Paragraphs 19 to 21

Paragraphs 19 to 21 were adopted.

Paragraph 22

60. Mr. McCAFFREY said that, in the second sentence, the word "constituents", should be replaced by the words "the constituent parts", and the comma and the word "and", after the letter "(c)", should be replaced by a semi-colon.

It was so agreed.

61. Mr. KOROMA said he thought that the expression "segregated State property", in the second sentence, should be placed in quotation marks.

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraphs 23 to 26

Paragraphs 23 to 26 were adopted.

Paragraph 27

62. Mr. RAZAFINDRALAMBO proposed that the words "referred to section 3 of the State Immunity Act of Australia as a useful guide", in the second sentence, should be replaced by "mentioned that section 3 of Australia's *Foreign States Immunities Act 1985* could usefully serve as a guide".

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

63. Mr. OGISO (Special Rapporteur) proposed that the second sentence should end with the words "in that subparagraph", the remainder of the paragraph to read as follows: "One member, noting that the component States ... application of present subparagraph (b) (ii), stated that he preferred ...".

64. Mr. BARSEGOV said that, if he had understood correctly, the Special Rapporteur's proposal was designed to correct an inaccuracy. In his own statement during the consideration of the matter, he had associated himself with the comments of a number of Governments, including the Australian Government. With regard to the reasons for granting all the component States of a federal State the same immunity the federal State enjoyed, other members of the Commission had also been of the opinion that, in view of the definition of the term "State", it would be appropriate to insert in article 2 provisions to guarantee the protection of component States by granting them the status of a State. Naturally, such problems would be solved as a

function of the constitution of each federal State, but the question was an extremely important one for a country like the Soviet Union, whose component republics played a role in the international arena.

65. Mr. MAHIOU said that the amendment proposed by the Special Rapporteur only made the French text obscure: it was no longer very clear who had suggested that the wording of subparagraph (b) (ii) be revised. Perhaps the proposal should be redrafted to make the meaning clearer in English and in French.

66. Mr. AL-BAHARNA said that the amended third sentence proposed by the Special Rapporteur was too long and it would be preferable to divide it into two by breaking it up after the words "application of present subparagraph (b) (ii)". The next sentence would begin with the words: "He therefore preferred ...".

67. Mr. OGISO (Special Rapporteur) said that he could accept the sub-amendment proposed by Mr. Al-Baharna and pointed out that Mr. Barsegov's position was reflected in the first part of the second sentence, where it was stated that "several members supported the suggestion made by one Government ...". The second part of that sentence reflected what had been said by Mr. Tomuschat, for which reason it had seemed preferable to him to divide the sentence into two.

68. Mr. BARSEGOV said that it could nevertheless be made clear that several members had supported the suggestion made by one Government concerning the protection of the component States of federal States.

69. Mr. OGISO (Special Rapporteur) drew attention to the first sentence of paragraph 28, which said that many members had considered that the definition of the term "State" in paragraph 1 (b) of the new draft article 2 required a thorough review. In order to avoid prolonging the debate, he was prepared to consider, with the secretariat, any editorial amendment Mr. Barsegov might wish to make to paragraph 28 in order to clarify his point of view.

70. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 28, as amended by the Special Rapporteur and Mr. Al-Baharna (paras. 63 and 66 above), on that understanding.

It was so agreed.

Paragraph 28, as amended, was adopted.

Paragraphs 29 to 33

Paragraphs 29 to 33 were adopted.

Paragraph 34

71. Mr. SHI said that the words "post-Second World War", which more accurately reflected what he had said and were important, should be inserted between the words "since" and "State practice", in the third sentence.

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted.

Paragraph 36

72. Mr. McCAFFREY said that paragraph 36 was largely about the views of members who had opposed the Special

Rapporteur's proposal, while only a few lines were given to the views of those who had stressed the primacy of the nature of a contract as a criterion for determining its commercial character. The paragraph should therefore be divided into two. The second paragraph would begin after the phrase "Some other members felt that both the nature and purpose tests could be given equal importance", and would read:

"Other members insisted on the primacy of the 'nature' test (or criterion), which was an objective one. In the opinion of some of those members, the 'purpose' test could only have a subsidiary character, coming into play only if the application of the 'nature' test did not lead to a clear interpretation of the contract. In the view of other members, the 'purpose' test was unworkable and had no place in the draft articles."

He wished to stress that the purpose of that amendment was to set out clearly, in two separate paragraphs, the various points of view expressed.

73. Mr. BARSEGOV said that he could agree to the paragraph reflecting the point of view of members who had opposed the "purpose" criterion, as long as the opposing view, namely that of members who thought that the "purpose" criterion should be applied in the first instance, was also reflected. His own opinion was that both criteria should be given equal importance.

74. Mr. OGISO (Special Rapporteur) said that, if his memory served him, most members of the Commission had accepted his proposal, with a few amendments or improvements. If any members had stated that they opposed the use of any criterion other than the purpose of a contract, he would be grateful to be so informed.

75. Mr. BENNOUNA (Rapporteur) said he thought that no one had proposed that the "purpose" criterion alone should be taken into account.

76. Mr. MAHIOU said the summary records showed that Mr. Al-Khasawneh had proposed using purpose as the sole criterion.

77. Mr. BARSEGOV said that, although Soviet doctrine attached great importance to the "purpose" criterion, he himself had declared that he would favour both criteria being given the same treatment. Several members of the Commission had also been of that view.

78. The CHAIRMAN said that that was precisely the interpretation to be given to the first sentence of paragraph 36, where it was stated that paragraph 3 of the new draft article 2, which contained the proposal of the Special Rapporteur, had been supported by several members.

79. Mr. McCAFFREY proposed that the word "could", in the fifth sentence, be replaced by "should".

It was so agreed.

80. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 36 as amended by Mr. McCaffrey (para. 72. above).

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraphs 37 and 38

Paragraphs 37 and 38 were adopted.

Paragraph 39

81. Mr. OGISO (Special Rapporteur) said that "(ii) and" should be inserted between "subparagraph (b)" and "(iii)", at the end of the first sentence.

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41

Paragraphs 40 and 41 were adopted.

Paragraph 42

82. Mr. McCAFFREY said that, since paragraph 42 covered two separate matters, it would be better to divide it into two. The second paragraph would begin after the sentence reading: "He suggested that the question should be referred to the Drafting Committee".

It was so agreed.

Paragraph 42, as amended, was adopted.

Paragraphs 43 to 51

Paragraphs 43 to 51 were adopted.

Paragraphs 52 and 53

83. Mr. BENNOUNA (Rapporteur) said that, since the headings had been deleted, paragraph 53 was no longer necessary and its content could be incorporated in paragraph 52.

84. Mr. KOROMA endorsed that suggestion and asked whether it was not contrary to the Commission's usual practice to specify the number of members who had supported the views of Governments referred to.

85. The CHAIRMAN said that it would indeed be preferable to say "Some members". He suggested that the sentence in question be inserted at the end of paragraph 52 and that it end with the words "referred to above".

It was so agreed.

Paragraphs 52 and 53, as amended, were adopted.

Paragraph 54

Paragraph 54 was adopted.

Paragraph 55

86. Mr. McCAFFREY suggested that the words "future convention", in the first sentence, should be replaced by "draft articles" or "draft", in accordance with the Commission's usual practice.

It was so agreed.

Paragraph 55, as amended, was adopted.

Paragraphs 56 and 57

Paragraphs 56 and 57 were adopted.

Paragraph 58

87. Mr. McCAFFREY proposed that, in the first sentence, the words "draft convention" should again be replaced by "draft articles" or "draft".

It was so agreed.

Paragraph 58, as amended, was adopted.

Paragraph 59

Paragraph 59 was adopted.

Paragraph 60

88. Mr. MAHIOU proposed that the last sentence should be replaced by the following text:

“One member also pointed out that it would be questionable to interpret the phrase as referring only to the restrictive doctrine, inasmuch as the rules of general international law still prevailed in the majority of States and they rather reflected the absolute doctrine of State immunity.”

It was so agreed.

Paragraph 60, as amended, was adopted.

Paragraph 61

Paragraph 61 was adopted.

Paragraph 62

89. Mr. TOMUSCHAT proposed that the first part of the second sentence should be amended to read: “One member pointed out that the legal effect of a reservation was to restrict the obligations a State would otherwise undertake under a treaty . . .”.

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 68

Paragraphs 63 to 68 were adopted.

Paragraph 69

90. Mr. McCAFFREY proposed that the word “requirement” should be replaced by “effect”.

It was so agreed.

Paragraph 69, as amended, was adopted.

Paragraphs 70 to 73

Paragraphs 70 to 73 were adopted.

Paragraph 74

91. Mr. McCAFFREY proposed that the words “*force majeure*”, in the first sentence, should be replaced by “*rebus sic stantibus*”.

It was so agreed.

Paragraph 74, as amended, was adopted.

Paragraphs 75 to 79

Paragraphs 75 to 79 were adopted.

Paragraph 80

92. Mr. BARSEGOV said that he thought he recalled hearing the idea put forward that the representative of a State could appear before a court of another State not only as a witness, as indicated in article 9, paragraph 3, but also in carrying out his consular obligations. He would like to hear the Special Rapporteur’s opinion on that matter.

93. The CHAIRMAN said it was true that that question had been the subject of a discussion that could be summarized in paragraph 81. He would suggest that Mr. Barsegov give him a written proposal to that effect.

Paragraph 80 was adopted.

The meeting rose at 1 p.m.

2138th MEETING

Friday, 14 July 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-first session (*continued*)

CHAPTER VI. Jurisdictional immunities of States and their property
(continued) (A/CN.4/L.439 and Add.1 and 2)

B. Consideration of the topic at the present session (*continued*) (A/CN.4/L.439 and Add.1 and 2)

Paragraphs 81 to 87 (A/CN.4/L.439)

Paragraph 81

1. Mr. BARSEGOV proposed the addition of the following sentence at the end of paragraph 81: “The opinion was furthermore expressed that the new paragraph 3 should also cover the case of fulfilment of consular relations.” The new paragraph 3 contemplated only the case in which a consul had to appear before a court of another State as a witness. Actually, a consul was often called upon to take part in legal proceedings other than as a witness, in order to perform the obligations of his office.

Mr. Barsegov’s amendment was adopted.

Paragraph 81, as amended, was adopted.

Paragraphs 82 to 87

Paragraphs 82 to 87 were adopted.

Paragraphs 88 to 167 (A/CN.4/L.439/Add.1)

Paragraphs 88 to 92

Paragraphs 88 to 92 were adopted.

Paragraph 93

2. Mr. BENNOUNA (Rapporteur) proposed that, with suitable drafting adjustments, paragraph 93 should be transferred to its proper place immediately before paragraph 100, for it concerned draft article 11 *bis*.

It was so agreed.

Paragraph 93, as amended, was adopted.

Paragraphs 94 to 99

Paragraphs 94 to 99 were adopted.

Paragraph 100

3. Mr. AL-BAHARNA proposed the addition of the following sentence at the end of paragraph 100: “One member suggested that State enterprises, not being subject to State immunity, should be dealt with under a separate heading.”

It was so agreed.

Paragraph 100, as amended, was adopted.