

Document:-  
**A/CN.4/SR.2138**

**Summary record of the 2138th meeting**

Topic:  
**Other topics**

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“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.*

Paragraph 101

4. Mr. BENNOUNA (Rapporteur) proposed the deletion of the word "sovereign", before "States", in the first sentence. The adjective was unnecessary, since all States were sovereign.

*It was so agreed.*

5. Mr. FRANCIS said that he wished to propose the reformulation of the second sentence in order to clarify what he had said about the developing countries. He would submit his proposal in writing.

6. The CHAIRMAN said that the Commission would revert to paragraph 101 at the next meeting.

Paragraph 102

*Paragraph 102 was adopted.*

Paragraph 103

7. Mr. BARSEGOV proposed that the first sentence of paragraph 103 should be amended so as to remove, in the Russian text, the word "new", which qualified the words "draft article 11 bis". In the English text, the change would consist of replacing the word "reformulation" by "formulation". The wording for article 11 bis which he had proposed and which appeared in paragraph 103 was not a reformulation of, or an amendment to, the proposal by another member set forth in paragraph 102. It was a separate proposal.

*Mr. Barsegov's amendment was adopted.*

*Paragraph 103, as amended, was adopted.*

Paragraphs 104 to 106

*Paragraphs 104 to 106 were adopted.*

8. Mr. Sreenivasa RAO said that he wished to make a procedural suggestion, namely to dispense with the remainder of chapter VI of the draft report contained in documents A/CN.4/L.439/Add.1 and 2, which consisted of 35 pages dealing with the discussion on articles 12 to 28. That discussion, however, had not been conclusive and it had been agreed that the Commission would revert to those articles at the next session. The Commission should confine chapter VI to an account of the debate on articles 1 to 11. A footnote could be added to explain that there had been an exchange of views on articles 12 to 28.

9. Mr. CALERO RODRIGUES said that he was strongly opposed to that suggestion. The Commission had discussed articles 12 to 28 at length and chapter VI should faithfully reflect the proceedings on the topic of jurisdictional immunities of States and their property. There was no valid reason for leaving out any part of the discussion.

10. The CHAIRMAN said that, in view of the objection which had been raised, the Commission would proceed with its consideration of chapter VI.

Paragraphs 107 to 109

*Paragraphs 107 to 109 were adopted.*

Paragraph 110

11. Mr. BENNOUNA (Rapporteur) pointed out that the second sentence of paragraph 110 dealt with two different questions. He therefore proposed that it should be divided into two sentences, the second one beginning with the words "The scarcity of judicial decisions or evidence".

*It was so agreed.*

*Paragraph 110, as amended, was adopted.*

Paragraph 111

*Paragraph 111 was adopted.*

Paragraph 112

12. Mr. McCAFFREY proposed, as a drafting improvement, that the penultimate word "it" should be replaced by the words "the condition".

*It was so agreed.*

*Paragraph 112, as amended, was adopted.*

Paragraph 113

13. Mr. McCAFFREY proposed that, in the last sentence, the somewhat ambiguous wording "concerned with the deletion" should be replaced by "concerned about the deletion".

*It was so agreed.*

14. Mr. BENNOUNA (Rapporteur) pointed out that the problem of harmonizing the various terms used in English arose largely from the difficulty of rendering the French expression *puissance publique*. He suggested a form of words for the French text of paragraph 113 which would make that point clear.

15. Mr. BARBOZA stressed that the Spanish text of paragraph 13 was perfectly clear. The problem was that of harmonizing the terminology used in English, and it did not affect any other language.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to align the French text of paragraph 113 with the Spanish text, if necessary.

*It was so agreed.*

*Paragraph 113, as amended, was adopted.*

Paragraph 114

17. Mr. TOMUSCHAT, supported by Mr. OGISO (Special Rapporteur), proposed that, in the last sentence, the abbreviation "EC" should be replaced by "Commission of the European Communities". Moreover, the word "regulations" should be inserted between the words "labour" and "to protect", in the second sentence.

*It was so agreed.*

*Paragraph 114, as amended, was adopted.*

Paragraph 115

18. Mr. McCAFFREY proposed that the phrase "caused by an act or omission attributable to a foreign State, which occurred in the territory of a forum State" should be deleted.

*It was so agreed.*

*Paragraph 115, as amended, was adopted.*

Paragraph 116

*Paragraph 116 was adopted.*

Paragraphs 117 and 118

19. Mr. BENNOUNA (Rapporteur) pointed out that the third sentence of paragraph 116 spoke of "public

international law". The word "public" should therefore be inserted before the words "international law" in the last sentence of paragraph 117 and the first sentence of paragraph 118.

20. Mr. CALERO RODRIGUES said that the purpose of harmonizing the language of the three paragraphs might be achieved more simply by deleting the word "public" before the words "international law" in paragraph 116.

21. The CHAIRMAN suggested that the words "international law" in the last sentence of paragraph 117 should be replaced by "State responsibility" and that the remainder of the sentence should be deleted.

22. Following a discussion in which Mr. AL-QAYSI, Mr. EIRIKSSON, Mr. RAZAFINDRALAMBO, Mr. AL-BAHARNA and Mr. BENNOUNA (Rapporteur) took part, the CHAIRMAN suggested that paragraphs 117 and 118 should be adopted without change.

*It was so agreed.*

*Paragraphs 117 and 118 were adopted.*

Paragraph 119

*Paragraph 119 was adopted.*

Paragraph 120

23. Mr. McCAFFREY proposed the replacement of the word "solicit", at the end of the first sentence, by "command" and the insertion of the word "traffic" before "accidents" in the second sentence.

*It was so agreed.*

*Paragraph 120, as amended, was adopted.*

Paragraph 121

24. Mr. RAZAFINDRALAMBO proposed that the words *les actes souverains*, at the end of the last sentence of the French text, should be replaced by *les actes de la puissance publique*.

*It was so agreed.*

*Paragraph 121, as amended in the French text, was adopted.*

Paragraph 122

*Paragraph 122 was adopted.*

Paragraph 123

25. Mr. McCAFFREY proposed that the paragraph should be devoted in its entirety to reflecting the views of members who had supported the retention of article 13. The wording of the first sentence should be slightly amended and a new sentence should be inserted. The paragraph would then read:

"Other members supported the retention of article 13.

They pointed out that disputes of this nature were not uncommon and considered that the provision was a necessary safeguard for the protection of individual victims. In their view, diplomatic protection was not a viable alternative as a practical matter."

The remaining sentence of paragraph 123, beginning with the words "Some other members", should be set apart in a separate paragraph.

*It was so agreed.*

*Paragraph 123, as amended, was adopted.*

Paragraph 124

*Paragraph 124 was adopted.*

Paragraph 125

26. Mr. BENNOUNA (Rapporteur) said that the second sentence of the French text should be aligned with the English by replacing the words *en y renvoyant* by *en faisant référence*.

27. The CHAIRMAN, responding to a comment by Mr. MAHIOU, suggested that the words "a large body of treaty law", in the second sentence, should be replaced by "provisions of treaty law".

*It was so agreed.*

*Paragraph 125, as amended, was adopted.*

Paragraph 126

28. Mr. TOMUSCHAT proposed that the paragraph should be divided into two sentences after the word "criterion", the second sentence beginning with the words "At any rate".

*It was so agreed.*

*Paragraph 126, as amended, was adopted.*

Paragraphs 127 to 129

*Paragraphs 127 to 129 were adopted.*

Paragraph 130

29. Mr. EIRIKSSON said that the word "three", in the last sentence, should be replaced by "four".

*It was so agreed.*

*Paragraph 130, as amended, was adopted.*

Paragraphs 131 to 138

*Paragraphs 131 to 138 were adopted.*

Paragraph 138 bis

30. Mr. McCAFFREY said that the word "is" should be replaced in the third sentence by "was", and in the fourth sentence by "were".

*It was so agreed.*

31. Mr. CALERO RODRIGUES suggested that the word "however", in the first sentence, should be deleted.

*It was so agreed.*

*Paragraph 138 bis, as amended, was adopted.*

Paragraph 139

32. Mr. SHI said that paragraph 139 did not fully reflect all the views expressed during the Commission's discussion. He would therefore propose that a new sentence be added at the end of the paragraph, reading: "In the opinion of one member, the article should be deleted altogether as it was derogatory to sovereignty and the sovereign equality of States."

33. Mr. AL-BAHARNA said that, if Mr. Shi's amendment were adopted, the phrase "though some other members doubted its necessity" would be redundant and could be deleted.

34. Mr. McCAFFREY said that the latter phrase should be retained because it drew a distinction between the position of some members who did not think that article 16 was particularly necessary, and the position of Mr. Shi, who was strongly opposed to the article. If the phrase was

to be retained, Mr. Shi's amendment might begin with the words "In the opinion of one member in particular".

*Mr. Shi's amendment, as modified by Mr. McCaffrey, was adopted.*

*Paragraph 139, as amended, was adopted.*

Paragraphs 140 to 142

*Paragraphs 140 to 142 were adopted.*

Paragraph 143

35. Mr. OGISO (Special Rapporteur) said that the last phrase of the paragraph, "in a more general language", should be replaced by "in more general terms".

*Paragraph 143, as amended, was adopted.*

Paragraph 144

*Paragraph 144 was adopted.*

Paragraph 145

36. Mr. AL-BAHARNA proposed that the words "for commercial but also governmental", in the second sentence, should be replaced by "not only for commercial, but also for governmental". His concern was to improve the drafting, not alter the intent, of the paragraph.

37. Mr. MAHIU said that the sentence in question reflected the position of one particular Government, as set forth in the Special Rapporteur's preliminary report, and should therefore remain as drafted.

38. Following a brief discussion in which Mr. BENNOUNA (Rapporteur), Mr. AL-QAYSI, Mr. BARSEGOV, Mr. EIRIKSSON, Mr. KOTLIAR (Secretary to the Commission), Mr. McCAFFREY, Mr. OGISO (Special Rapporteur) and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that paragraph 145 should remain as drafted.

*It was so agreed.*

*Paragraph 145 was adopted.*

Paragraph 146

39. Mr. BENNOUNA (Rapporteur) said that the phrase "discouraging private parties in the developed as well as other developing countries from engaging in commercial service with such ships", in the last sentence, was not very clear. It would be better to say ". . . from using the commercial services of such ships" or ". . . from engaging in commercial relations with such ships".

40. Mr. OGISO (Special Rapporteur) said that the idea which needed to be expressed was that private parties in the developing as well as developed countries might be discouraged from using such ships for commercial services. If the French text was not clear, it should by all means be brought into line with the English.

41. The CHAIRMAN suggested that the word "other", which appeared to be redundant, should be deleted from the phrase under discussion.

42. Mr. BENNOUNA (Rapporteur) said that the entire phrase "in the developed as well as other developing countries" was redundant and should be deleted.

43. Mr. MAHIU said that he endorsed the Rapporteur's proposal that the words "engaging in commercial service with" should be replaced by "using the commercial services of".

44. Mr. Sreenivasa RAO said the idea was that, even in developing countries, there were private parties who might be engaged in a certain type of commercial relations, and it might be in their own interests not to press for immunity.

45. Mr. OGISO (Special Rapporteur) said that the point he wished to make in paragraph 146 was straightforward. The view had been expressed that the operation by States of ships in commercial service would contribute to the development of the developing countries. His own opinion, however, was that private parties in the developing countries might not welcome that kind of activity: such operation would not necessarily contribute, therefore, to the development of the developing countries. He would prefer the text of the paragraph to remain unchanged.

46. Mr. AL-QAYSI said that the Special Rapporteur was absolutely right. Those who had defended the addition of the term "non-governmental" to the text of article 18 had been motivated by a concern to protect the interests of the developing countries. The Special Rapporteur had been of the view that the term "non-governmental" should be deleted, otherwise the interests of the developing countries would not necessarily be protected. Private parties, when they saw that State-owned vessels used for public non-governmental service were claiming immunity, might decline to engage the services of such vessels. He agreed that the text of paragraph 146 should be left intact, although he thought, like the Rapporteur, that the words "engaging in commercial service" were awkward: the word "service" should perhaps be replaced by "transactions".

47. Mr. CALERO RODRIGUES said he agreed that the words "engaging in commercial service with such ships" were not very clear. They should perhaps be replaced by "utilizing the services of such ships".

48. Mr. OGISO (Special Rapporteur) pointed out that the same formula was used in the title and paragraphs 1 and 4 of article 18. Presumably, therefore, it was readily understandable.

49. Mr. AL-QAYSI said that there was nevertheless a difference between a ship engaged in commercial service and a private party engaging the commercial services of a ship. It might be appropriate to replace the words in question by "using the services of such ships".

50. Mr. McCAFFREY said that he endorsed the proposals by Mr. Calero Rodrigues and Mr. Al-Qaysi.

51. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the phrase "from engaging in commercial service with such ships", at the end of paragraph 146, by "from using the services of such ships".

*It was so agreed.*

52. Mr. EIRIKSSON said that, for additional clarity, paragraph 146 should incorporate wording used in the Special Rapporteur's second report on the topic (A/CN.4/422 and Add.1, para. 25). The last sentence of the paragraph would end after the words "interests of developing countries", and the remaining part of that sentence would be replaced by a new sentence, incorporating the amendment already made and the additional language he was proposing, reading: "In his view, if States were not answerable for claims in respect of the operation of ships and cargoes on board those ships, private parties in the developed as

well as developing countries would hesitate to use the services of such ships.”

53. Mr. OGISO (Special Rapporteur) said that, in order not to prolong the debate, he would agree to that amendment.

*Mr. Eiriksson's amendment was adopted.*

*Paragraph 146, as amended, was adopted.*

Paragraphs 147 to 149

*Paragraphs 147 to 149 were adopted.*

Paragraph 150

54. Mr. MAHIU proposed that the first sentence should be amended to read: “During the Commission’s discussion of the topic, many members supported the Special Rapporteur’s proposal to delete the term ‘non-governmental’ in paragraphs 1 and 4, but some others held a contrary view.”

55. Mr. BARSEGOV said that it was hardly possible to speak, as did the first sentence, of “all” members: he, for one, had not spoken at all in the discussion on the subject.

56. Mr. McCAFFREY proposed that, to meet Mr. Barsegov’s point, the first part of the sentence should read: “During the Commission’s discussion of the topic, many of the members who addressed the issue supported . . .”.

*Mr. Mahiou's amendment, as modified by Mr. McCaffrey, was adopted.*

57. The CHAIRMAN, speaking as a member of the Commission, proposed that the following text should be added at the end of paragraph 150:

“Another member stressed that article 18 raised questions similar to those addressed in connection with the definition of the term ‘State’ in the new draft article 2 and of ‘segregated State property’ in draft article 11 *bis*. The question was not to ensure an advantage for States which had a large sector of State property, but to protect them against discrimination.”

*It was so agreed.*

*Paragraph 150, as amended, was adopted.*

Paragraph 151

58. Mr. CALERO RODRIGUES proposed, in line with Mr. McCaffrey’s proposal for paragraph 150, that the words “who spoke on the issue” should be added after the words “Members of the Commission”, at the beginning of the paragraph.

59. Mr. BENNOUNA (Rapporteur) said that he saw no need for those words, which, if constantly repeated, would make the text cumbersome. In any event, chapter VI of the draft report stated at the outset that not all the members of the Commission had had an opportunity to speak on the topic, and it was implicit in that statement that only the views of those members who had spoken were reflected.

60. The CHAIRMAN said that, in such a long report, the reader might have difficulty in recalling exactly what had been stated at the outset. Moreover, where there had been agreement on particular points, it was advisable to make it clear that such agreement had been reached only among those members who had actually taken part in the debate. To avoid any misunderstanding, therefore, he would suggest that Mr. Calero Rodrigues’s proposal be adopted.

*It was so agreed.*

*Paragraph 151, as amended, was adopted.*

Paragraphs 152 to 156

*Paragraphs 152 to 156 were adopted.*

Paragraphs 157 and 158

61. Mr. McCAFFREY pointed out that the word “arbitrary”, in the second sentence of paragraph 157 and in the first and second sentences of paragraph 158, should read “arbitral”.

*It was so agreed.*

*Paragraphs 157 and 158, as amended, were adopted.*

Paragraphs 159 to 167

*Paragraphs 159 to 167 were adopted.*

Paragraphs 168 to 178 (A/CN.4/L.439/Add.2)

Paragraph 168

*Paragraph 168 was adopted.*

Paragraph 169

62. Mr. OGISO (Special Rapporteur) said that the words “intended use”, in the third sentence, should read “intended for use”.

63. Mr. EIRIKSSON proposed that the word “only”, in the second sentence, should be deleted.

*It was so agreed.*

*Paragraph 169, as amended, was adopted.*

Paragraphs 170 to 170 *ter*

*Paragraphs 170 to 170 *ter* were adopted.*

Paragraph 171

*Paragraph 171 was adopted.*

Paragraph 172

64. Mr. BENNOUNA (Rapporteur) proposed that, in order to convey the discussion on the subject more accurately, the last sentence should be replaced by the following text: “Some members proposed replacing the notion of a ‘legally protected interest’ by that of a ‘real right’, which was equivalent, thereby following the judgment in the *Barcelona Traction* case.”

*It was so agreed.*

*Paragraph 172, as amended, was adopted.*

Paragraphs 173 and 174

*Paragraphs 173 and 174 were adopted.*

Paragraph 175

65. Mr. OGISO (Special Rapporteur) said that the words “article 21, in particular subparagraph (a), put a significant limitation on”, in the first sentence, should be replaced by “article 21 should spell out”.

*Paragraph 175, as amended, was adopted.*

Paragraph 176

*Paragraph 176 was adopted.*

Paragraph 177

66. The CHAIRMAN proposed that paragraph 177 should be deleted.

*It was so agreed.*

Paragraph 178

*Paragraph 178 was adopted.*

*The meeting rose at 6 p.m.*