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Summary record of the 1412th meeting

Topic:
Other topics

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sentences of paragraph (21) on the basis of the texts proposed by Sir Francis Vallat and Mr. Reuter.

Paragraph (21) was approved on that understanding.

Paragraphs (22) and (23)

Paragraphs (22) and (23) were approved.

Paragraph (24)

29. Mr. USHAKOV said that, to his mind, it was incorrect to draw, from the Court's elaboration of the concept of equity, the conclusion that equity was a rule of positive international law. In its judgment in the *North Sea Continental Shelf* cases, as quoted in paragraph (22) of the commentary, the Court had stated that "it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles".

30. Mr. SETTE CÂMARA agreed with Mr. Ushakov.

31. Mr. REUTER said that if rules of law based on equitable principles were established, they were still rules of law. He saw no need to philosophize about equity.

32. Mr. YASSEEN said that equity had two roles, on which he believed there was general agreement. First, it was a source of law. In fact, in certain circumstances, the judge could, and even should, rule *ex aequo et bono*, and in an international context the judge could proceed similarly if he had been so authorized by the parties to the dispute. Secondly, when a rule of positive international law provided that a matter should be settled by reference to equitable principles, a tribunal should base its decision on such principles, without the agreement of the parties being required. He considered that the Commission should confine itself to those two roles and avoid the more controversial theory that equity also had a corrective role.

33. Mr. TSURUOKA proposed that, in the first part of paragraph (24), the word "corrective" should be replaced by the word "supplementary".

It was so agreed.

34. Mr. RAMANGASOAVINA said that the expression "positive international law" was perhaps too strong, since equity was not a rule of the kind contained in conventions or generally accepted sets of regulations. It might be more appropriate to replace the word "positive" by the word "applicable".

35. Sir Francis VALLAT proposed that the words "is, when used in the present Section as part of the material content of specific provisions, a rule of positive international law, and not the notion of equity", should be replaced by the words "is also used in the present Section as part of the material content of specific provisions and not as the equivalent of the notion of equity. . ."

It was so agreed.

Paragraph (24), as amended, was approved.

The introductory commentary, as amended, was approved.

The meeting rose at 12.20 p.m.

1412th MEETING

Thursday, 22 July 1976, at 10.50 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

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

Chapter III. STATE RESPONSIBILITY (continued)* (A/CN.4/L.247 and Add.1-8)

1. The CHAIRMAN invited the Commission to continue its examination, paragraph by paragraph, of section B of chapter III of its draft report.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (continued)*

2. *Introductory commentary to chapter III of the draft and text of articles 16 to 19 with commentaries thereto, adopted by the Commission at the present session (continued)**

Commentary to article 16 [17]¹ (Irrelevance of the origin of the international obligation breached) (A/CN.4/L.247/Add.2).

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

2. Sir Francis VALLAT, referring to the last sentence, observed that customary law constituted a source of obligation at least as important as a statute or a set of regulations. He therefore suggested that the word "custom" should be added to the examples given in parentheses, and that the words "a set of regulations" be replaced by the words "or regulation".

3. Mr. AGO (Special Rapporteur) supported that suggestion.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4)-(7)

Paragraphs (4)-(7) were approved.

Paragraph (8)

4. Sir Francis VALLAT suggested that in the English text of the third sentence, and in the rest of the com-

* Resumed from the 1409th meeting.

¹ The figures in square brackets represent the numbers of the articles as they appear in the report.

mentary, the words “source of the obligation” should be replaced by the words “origin of the obligation”.

It was so agreed.

Paragraph (8) was approved.

Paragraph (9)

Paragraph (9) was approved.

Paragraph (10)

5. Mr. SETTE CÂMARA, referring to the first sentence, said he doubted whether silence really was negative action, and suggested that the beginning of the sentence should be amended to read: “Silence may also be evidence...”.

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraphs (11)-(18)

Paragraphs (11)-(18) were approved.

Paragraph (19)

6. Sir Francis VALLAT suggested that, in the last sentence of the English text, the words “peculiar to internal law” should be replaced by the words “in internal law”.

It was so agreed.

Paragraph (19), as amended, was approved.

Paragraph (20)

7. Sir Francis VALLAT suggested that the word “merely”, in the first sentence, should be deleted. In the third sentence, the use of the word “voluntary” seemed to him to be incorrect, and he suggested that the phrase in question should be amended to read “...there is no authoritative instrument...”.

It was so agreed.

Paragraph (20), as amended, was approved.

Paragraphs (21) and (22)

Paragraphs (21) and (22) were approved.

Paragraph (23)

8. Sir Francis VALLAT suggested that, in the third sentence, the word “unenforceable” should be replaced by the words “ineffective to the extent of the conflict”.

It was so agreed.

Paragraph (23), as amended, was approved.

Paragraphs (24) to (27)

Paragraphs (24) to (27) were approved.

The commentary to article 16 [17], as amended, was approved.

Commentary to article 17 [18] (Requirement that the international obligation be in force for the State) (A/CN.4/L.247/Add.3)

9. Mr. PINTO said he wished to make a comment on paragraphs 1 and 2 of article 17 [18], referring in particular

to paragraphs (11), (16) and (18) of the commentary, and to foot-note 12. He did not intend to propose any change in the text of the article or the commentary, or to go into details on the substance of the question. He simply wished to make a reservation regarding the possibility of transferring unconditionally to the sphere of international law the principle, universally accepted in internal law, that an individual cannot be held criminally liable for an act which was not prohibited at the time when he committed it (*nullum crimen sine lege praevia*).

10. The Special Rapporteur had, admittedly, based his position on many examples drawn from the international sphere, but he thought that those examples were perhaps not sufficient to establish the principle in question as a principle of international law. The situation in internal law was not the same as that in international law. In internal law, there was a very clear distinction between the government and the legislators, on the one hand, and the individual governed on the other; but in the international sphere the entities which established the rules were also those which had to apply them. Thus the legislators could establish rules which were in conformity with their own interests. He therefore considered that the principle stated in paragraph 1 of article 17 [18], while perfectly justified in internal law, could not be transferred, in that form, to international law.

Paragraphs (1)-(20)

Paragraphs (1)-(20) were approved.

Paragraph (21)

11. Sir Francis VALLAT suggested that, in the second sentence, the word “improper” should be replaced by the word “unjustified”; and that in the fifth and sixth sentences the word “expropriation” should be replaced by the word “confiscation”, since an act of expropriation was not necessarily wrongful.

12. Mr. USTOR suggested that the expression “wrongful confiscation” should be used, because in his view an act of confiscation was not necessarily wrongful either.

13. Mr. AGO (Special Rapporteur) accepted Sir Francis Vallat’s suggestion, at the same time observing that the reference was only to an act of the State, not to a wrongful act of the State.

Paragraph (21), as amended, was approved.

Paragraphs (22)-(26)

Paragraphs (22)-(26) were approved.

The commentary to article 17 [18], as amended, was approved.

Commentary to article 18 [19] (International crimes and international delicts) (A/CN.4/L.247/Add.4-8)

Paragraphs (1)-(48) (A/CN.4/L.247/Add.4-6)

Paragraphs (1)-(48) were approved.

Paragraphs (49) and (50) (A/CN.4/L.247/Add.6)

14. Mr. ROSSIDES said that the conclusions reached in paragraphs (49) and (50) of the commentary were

wholly satisfactory, stressing as they did the extent to which international law relating to matters of State responsibility had developed since the Second World War and the adoption of the United Nations Charter. Before the Second World War, State responsibility had been restricted to responsibility for damages; but now, wrongful acts by States could have far wider, and even global implications, rendering more compelling the need for the progressive development of international law.

Paragraphs (49) and (50) were approved.

**Chapter VI. OTHER DECISIONS AND CONCLUSIONS
OF THE COMMISSION**

(A/CN.4/L.250 and Add.1 and 2)

15. The CHAIRMAN invited the Commission to consider sections A, D, E, F, G and H of chapter VI of its draft report (A/CN.4/L.250).

**A. QUESTIONS OF TREATIES CONCLUDED BETWEEN STATES
AND INTERNATIONAL ORGANIZATIONS OR BETWEEN
TWO OR MORE INTERNATIONAL ORGANIZATIONS**

16. Mr. BILGE said that the explanation "due to the lack of time", in the second sentence, should be expanded.

17. Sir Francis VALLAT suggested that the words in question should be replaced by the words "due to the time required for other items".

It was so agreed.

Section A, as amended, was approved.

**D. PUBLICATION OF A NEW REVISED EDITION OF THE
HANDBOOK *The work of the International Law
Commission.***

Section D was approved.

E. DATE AND PLACE OF THE TWENTY-NINTH SESSION

18. The CHAIRMAN said that the next session of the Commission would be held from 2 May to 22 July 1977. The blank spaces in section E should be filled in accordingly.

Section E, as thus completed, was approved.

**F. REPRESENTATION AT THE THIRTY-FIRST SESSION OF
THE GENERAL ASSEMBLY**

Section F was approved.

G. GILBERTO AMADO MEMORIAL LECTURE

Section G was approved.

H. INTERNATIONAL LAW SEMINAR

19. Mr. TABIBI said that a reference might be included in section H to the view expressed by a number of representatives in the Sixth Committee of the General Assembly,² and held by members of the Commission, that

the time had come for the very useful International Law Seminar programme to be financed out of the United Nations regular budget. As stated in paragraph 12 of section H, several selected candidates had been unable to attend the twelfth session of the Seminar for lack of funds.

20. Mr. USHAKOV observed that a proposal to finance the International Law Seminar out of the United Nations regular budget would have to be accompanied by a statement of financial implications.

21. Mr. REUTER said that it was not within the Commission's competence to do more than make a recommendation on the matter.

22. Mr. SETTE CÂMARA said that the inclusion of such a recommendation might lead voluntary contributors to withhold their support, pending a decision by the General Assembly.

23. The CHAIRMAN said he would raise the matter in his statement on behalf of the Commission to the Sixth Committee at the thirty-first session of the General Assembly. If the proposal was taken up, the Secretariat would submit the required statement of financial implications. At the same time, he would explore with other bodies, such as UNITAR, the possibility of obtaining funds from sources outside the regular budget.

Section H was approved.

The meeting rose at 12.45 p.m.

1413th MEETING

Friday, 23 July 1976, at 9.45 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Njenga, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

**Draft report of the Commission on the work
of its twenty-eighth session (concluded)**

**Chapter III. STATE RESPONSIBILITY (concluded)
(A/CN.4/L.247 and Add.1-8)**

1. The CHAIRMAN invited the Commission to complete its examination, paragraph by paragraph, of chapter III of its draft report.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (concluded)

2. *Introductory commentary to chapter III of the draft and text of articles 16 to 19, with commentaries thereto, adopted by the Commission at the present session (concluded)*

² See *Official Records of the General Assembly, Thirtieth Session, Annexes*, agenda item 108, document A/10393, para. 212.