

Document:-  
**A/CN.4/SR.1472**

**Summary record of the 1472nd meeting**

Topic:  
**Adoption of the report**

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objection, although they had been accompanied by a number of reservations.

52. The CHAIRMAN said that it was not customary to indicate the manner in which General Assembly resolutions had been adopted.

53. Mr. QUENTIN-BAXTER said that he was not sure whether Mr. Schwebel had given sufficient consideration to the change in the general tenor of the report introduced by the incorporation in paragraph (48) of the sentence suggested by Mr. Riphagen. He also drew Mr. Schwebel's attention to the very specific and accurate statement made in what had now become the second sentence of paragraph (48), namely, that "Solutions agreeable to both developing countries and industrialized creditor states ... have not been easy to achieve". Indeed, he thought that paragraph (51), which a foot-note supplemented to the effect desired by Mr. Schwebel, was the only paragraph in which any emphasis at all had been placed on the question of solutions to the debt problems of developing countries. In his opinion, no one reading the commentary to article 22 would think that the Commission had dwelt heavily on the importance of such solutions.

54. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved paragraph (49) as it stood.

*Paragraph (49) was approved.*

55. Mr. CASTAÑEDA suggested that, in the English version of the foot-note to paragraph (51), the words "has not reached" should be replaced by the words "did not reach" since the Conference on International Economic Co-operation had ended.

*It was so agreed.*

56. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved paragraph (51) and the foot-note, thereto, as amended in accordance with Mr. Castañeda's suggestion.

*Paragraph (51) and the foot-note thereto, as amended, were approved.*

57. The CHAIRMAN pointed out that Mr. Schwebel had still to propose the addition of a foot-note reserving his position with regard to paragraphs (40) to (51).

*The meeting rose at 1.10 p.m.*

## 1472nd MEETING

*Thursday, 28 July 1977, at 3.10 p.m.*

*Chairman:* Sir Francis VALLAT

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

## Draft report of the Commission on the work of its twenty-ninth session (*continued*)

### CHAPTER III. Succession of States in respect of matters other than treaties (*concluded*) (A/CN.4/L.260 and Add.1-3)

#### B. Draft articles on succession of States in respect of matters other than treaties (*concluded*) (A/CN.4/L.260 and Add.1-3)

#### 2. TEXT OF ARTICLES 17-22, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (*concluded*) (A/CN.4/L.260/Add.1-3)

#### Commentary to article 22 (Newly independent States) (*concluded*) (A/CN.4/L.260/Add.3)

#### Paragraphs (48)-(51) (*concluded*)

1. Mr. SCHWEBEL proposed the insertion of a foot-note to paragraph (51); it might be placed after the existing foot-note and should read:

"One member objected to the inclusion of paragraphs (40) to (51) of the present commentary, particularly on the grounds that they contain, in his view, economic exposition and analysis which are not within the sphere of the Commission's competence and that such exposition and analysis in some respects are debatable."

2. The CHAIRMAN said that such foot-notes had been inserted in the Commission's report on previous occasions. He suggested that, as the proposed foot-note reflected the view of only one member and was short, the Commission should not object to its insertion.

*It was so agreed.*

#### Paragraphs (52)-(62)

*Paragraphs (52)-(62) were approved.*

#### Paragraph (63)

3. Mr. SCHWEBEL said that paragraph (63) could give the impression that the Declaration on the Establishment of a New International Economic Order<sup>1</sup> and the Charter of Economic Rights and Duties of States<sup>2</sup> had been adopted unanimously. In fact, a large number of States had entered reservations in respect of the Declaration, a number of States had voted against the Charter as a whole, and virtually every industrialized democracy in the world had voted against, or abstained in the vote on, articles 2 and 16 of the Charter. He therefore proposed the insertion of the following foot-note relating to paragraph (63):

"One member believed it important to note that a number of States had voted against the Charter of Economic Rights and Duties of States as a whole, that a larger number of States had voted against articles 2 and 16 of that Charter, and that reservations to the passages quoted from General Assembly resolutions 3201 (S-VI) and 3202 (S-VI) had been entered by a number of States."

4. Mr. DADZIE pointed out that it had been agreed at the previous meeting that it was not for the Commission to indicate how States had voted on resolutions adopted by other bodies. Anyone wishing to obtain such information had only to refer to the records of those bodies. Once a resolution had been adopted, it was a resolution.

<sup>1</sup> General Assembly resolution 3201 (S-VI).

<sup>2</sup> General Assembly resolution 3281 (XXIX).

5. Mr. SETTE CÂMARA agreed with Mr. Dadzie that the Commission should not go into details concerning voting on resolutions adopted by other bodies. However, if a member of the Commission wished to emphasize those details in a foot-note, he should be allowed to do so.

6. The CHAIRMAN said that, in his view, provided it was clear that the foot-note reflected the position of one member and not that of the Commission as a whole, the foot-note might be inserted.

7. Mr. DÍAZ GONZÁLEZ endorsed the comments made by Mr. Dadzie. He said he opposed the insertion of the proposed foot-note.

8. Mr. SETTE CÂMARA said that it had always been the practice of the Commission to allow any member who felt strongly about a point to express his opinion in a foot-note. Such an opinion did not commit the Commission. While he did not share Mr. Schwebel's opinion, he felt that Mr. Schwebel had a right to reserve his position in a foot-note.

9. The CHAIRMAN agreed with the observations of Mr. Sette Câmara and said that the Commission would be departing from its practice if it refused to insert the foot-note proposed by Mr. Schwebel.

10. Mr. FRANCIS endorsed the comments made by Mr. Sette Câmara.

11. Mr. DADZIE said he noted that both the Chairman and the Vice-Chairman had claimed that Mr. Schwebel was entitled to express his opinion in a foot-note. He himself considered that the contents of the foot-note in question amounted to an analysis of a vote taken in the United Nations, and that the Commission's report should not contain analyses of votes taken in other bodies.

12. Mr. BEDJAUI (Special Rapporteur) said that he regretted the re-opening of a debate which he thought had ended at the previous meeting, when the Commission had done everything possible to give satisfaction to Mr. Schwebel. The Commission could not continue to make one-way concessions, for one concession led to another. The commentary under consideration concerned an article whose time had passed—for the process of decolonization was over—and the article might at least bear the mark of generosity. Moreover, a commentary could not be so riddled with reservations as to become unreadable. Like Mr. Dadzie and Mr. Díaz-González, he could not agree to the foot-note proposed by Mr. Schwebel.

13. If, at the very outside, the Commission allowed one of its members to express his view in opposition to all the others, the ideas so expressed ought to be combined in a single note. In the case in point, such a note could be merged with the foot-note which related to paragraph (69) and contained the text of the alternative text for article 22 proposed by Mr. Schwebel. Such an approach would avoid mutilating the text of the commentary. He called for a decision by the Chairman.

14. The CHAIRMAN said that, if he were to take a decision in the matter, it would be completely to the opposite effect because the Special Rapporteur's report had now become the commentary of the Commission. The Commission was considering a request by a single member to have his view recorded in a foot-note relating to the

corresponding passage in the report. Such a request was in accordance with practice. However, it would be far better to settle the matter without the exercise of his authority.

15. Mr. SCHWEBEL said that obviously foot-notes should appear where the text to which they related appeared. If it would help the Special Rapporteur, however, he would be prepared to combine his two foot-notes into a single note.

16. Mr. AGO said that the report should as far as possible avoid recording personal opinions but he recognized Mr. Schwebel's perfect right to have his point of view correctly stated. In the present instance, the note might simply point out that the adoption of the resolution in question had been far from unanimous, particularly with regard to certain passages quoted in the report. On the other hand, an unfortunate precedent would be created if details were given of the voting on a resolution in the General Assembly. The Commission should hesitate to embark on such a course.

17. The CHAIRMAN, summing up Mr. Ago's suggestion, proposed that the foot-note should read:

"One member considered it important to note that the resolution was adopted with a considerable measure of dissent."

18. Mr. SCHWEBEL said that he could accept Mr. Ago's suggestion provided the foot-note stated that the observation referred to both the Charter of Economic Rights and Duties of States and the General Assembly resolution entitled "Declaration on the Establishment of a New International Economic Order".

19. Mr. DADZIE said that the foot-note read out by the Chairman was even stronger than what Mr. Schwebel had originally proposed.

20. Mr. USHAKOV reiterated that every member of the Commission was free to express his view provided that he kept to topics under discussion by the Commission and that his divergent opinion related to rules proposed by the Commission or, at the very most, to rules adopted on the proposal of the Commission. The opinion in question was not of that kind but was a personal judgment on certain things that had happened in an international organization.

21. Mr. SCHWEBEL said that he thought Mr. Dadzie might find it easier to accept the following formula:

"One member considered it important to note in connexion with paragraph 63 of the commentary that a number of States had dissented from the quoted elements of the Charter of Economic Rights and Duties of States and the Declaration on the Establishment of a New International Economic Order."

22. Mr. DADZIE said that he preferred that formulation. In actual fact, he did not like the foot-note at all, but he would not deny Mr. Schwebel the right to express his minority opinion on the subject.

23. Mr. DÍAZ GONZÁLEZ said that he agreed that a member of the Commission could express his opinion in a foot-note. He suggested, however, that it should be stated that the Charter of Economic Rights and Duties

of States had been adopted by the General Assembly despite the reservations entered by some developed States.

24. Mr. SCHWEBEL said it was not a question of reservations but of opposition. There had been negative votes. The Charter had been voted on paragraph by paragraph and as a whole. A number of States had voted against it as a whole and a larger number had voted against certain paragraphs. He was willing to omit that detail but did not consider there was any need to go further than the bland text he had proposed in reply to Mr. Dadzie's misgivings. If the quoted elements were removed from the commentary, he would not call for the insertion of a foot-note.

25. Mr. BEDJAOUI (Special Rapporteur) pointed out that there had never been any question of denying a member of the Commission the right to express his views. As could be seen from the summary records, the Commission had taken very full account of the opinions expressed by Mr. Schwebel in the course of the general discussion on article 22. Not only were Mr. Schwebel's views to be found in the summary records but he now had the opportunity of grouping all his reservations in a foot-note relating to paragraph (69). If that course was not acceptable to him, the matter would have to be put to the vote.

26. The CHAIRMAN said that, if the foot-note under discussion was added to the foot-note that had already been accepted, it would be out of context. As to the proliferation of foot-notes, the one under discussion was only the second of two short foot-notes proposed by Mr. Schwebel.

27. He proposed to put to the vote the question whether Mr. Schwebel's proposed foot-note should be added to paragraph (63).

28. Mr. QUENTIN-BAXTER said that the Commission should consider what the consequences of a vote might be. The Commission had not yet adopted the paragraph to which the foot-note referred. If there was a vote on the foot-note, anyone disagreeing with the outcome of the vote could request that the paragraph itself be put to the vote and in that way express his dissent. That would create a lamentable precedent. It was not doubted that every member of the Commission had the right to say that he did not agree with statements made in the report. Recognition of that right would obviate the need for a vote. The choice seemed to be between a foot-note which merely stated that a member did not agree and one that indicated the measure of his disagreement. In his opinion, the second type of foot-note was preferable, and was no reflection upon the paragraph as a whole. He hoped that the Commission would accept Mr. Schwebel's foot-note, which simply expressed the view of one member.

29. Mr. AGO urged the Chairman not to yield in despair to the temptation to decide the matter by a vote. Such an outcome to the discussion would create a precedent even worse than a plethora of foot-notes. Moreover, Mr. Schwebel had not yet replied to the offer to combine his views in a single note, which could carry even greater weight.

30. The CHAIRMAN said that he was not prepared to allow a long procedural discussion. If the Special Rapporteur agreed, the Commission could add the proposed foot-note. A vote seemed the only way to settle the question. He appealed to the Special Rapporteur to realize that the foot-note did not distort his text.

31. Mr. SCHWEBEL said that he would not object to his statement being inserted in paragraph (69).

32. He suggested that, in the first sentence of that paragraph, the word "thereon" should be followed by a comma and the words: "and one member expressed reservations on certain paragraphs of the commentary to this article as well", followed by a foot-note indicator. There would then be a foot-note, the first sentence of which would consist of the foot-note to paragraph (51), which had already been accepted, the second sentence being the text he had read out in reply to Mr. Dadzie's objections.<sup>3</sup>

33. The CHAIRMAN suggested that the Commission should accept those changes to paragraph (69).

*It was so agreed.*

*Paragraph (63) was approved.*

Paragraphs (64)-(68)

*Paragraphs (64)-(68) were approved.*

Paragraph (69)

*Paragraph (69), as amended, was approved.<sup>4</sup>*

Paragraph (70)

34. Mr. BEDJAOUI (Special Rapporteur) proposed the insertion, at the end of paragraph (70), of the words "unless both States otherwise agree". In addition, it should be made clear that the member of the Commission referred to in the paragraph had considered that the rule expressed in article 22 was self-evident.

*Paragraph (70), as amended, was approved.*

*The commentary to article 22, as amended, was approved.*

*Chapter III as a whole, as amended, was approved.*

## **CHAPTER II. State responsibility (A/CN.4/L.259 and Add. 1-4)**

### **A. Introduction (A/CN.4/L.259)**

35. Mr. QUENTIN-BAXTER suggested that, in the interests of accuracy, the first line of paragraph 18 should be amended to read: "At the end of the present session, the Commission received a Secretariat document ...".

*It was so agreed.*

*The introduction, as amended, was approved.*

### **B. Draft articles on State responsibility (A/CN.4/L.259 and Add.1-4)**

#### **1. TEXT OF ALL THE DRAFT ARTICLES ADOPTED SO FAR BY THE COMMISSION (A/CN.4/L.259)**

*Subsection 1 was approved.*

#### **2. TEXT OF ARTICLES 20-22, WITH COMMENTARIES THERETO, ADOPTED BY THE COMMISSION AT ITS TWENTY-NINTH SESSION (A/CN.4/L.259/Add.1-4)**

<sup>3</sup> See para. 21 above.

<sup>4</sup> See para. 32 above.

*Commentary to article 20* (Breach of an international obligation requiring the adoption of a particular course of conduct) (A/CN.4/L.259/Add.1)

*The commentary to article 20 was approved.*

*Commentary to article 21* (Breach of an international obligation requiring the achievement of a specified result) (A/CN.4/L.259/Add.2)

*The commentary to article 21 was approved.*

**CHAPTER V. Other decisions and conclusions of the Commission (continued)\*** (A/CN.4/L.262 and Add.1-2)

**E. Programme and methods of work of the Commission** (A/CN.4/L.262/Add.2)

36. The CHAIRMAN pointed out, with regard to paragraph 3 and subsequent paragraphs of section E of chapter V, that some decisions and observations of the Planning Group and the Enlarged Bureau had been attributed to the Commission in order to save time, but the Commission as a whole had not considered many substantive points in the text now before it.

Paragraph 1

*Paragraph 1 was approved.*

Paragraph 2

37. Mr. ŠAHOVIĆ stressed the value, for the future work of the Commission, of the recommendations which had been made by the Planning Group and approved by the Enlarged Bureau. The Commission should in turn approve those recommendations and its approval should be recorded in paragraph 2.

38. Likewise, in paragraph 12, which acted as an introduction to the interim conclusions reached by the Enlarged Bureau and its Planning Group on possible topics for study following the implementation of the current programme of work, it should be made clear that the Commission would, where necessary, consider those conclusions in the light of the discussions of the General Assembly at its thirty-second session.

39. Mr. SETTE CÂMARA said that, in drafting the text, the Planning Group had been mindful, for the reason mentioned by the Chairman, of the fact that the contents had to be approved by the Commission and then by the General Assembly, especially with regard to paragraphs 13 and 15, which proposed the inclusion of two new topics in the Commission's programme of work.

40. Mr. TABIBI said that he had observed in the Enlarged Bureau that the Commission had not in fact had time to discuss all the questions that arose. He felt sure, however, that the Sixth Committee would appreciate the situation and would debate those questions fully at the General Assembly's thirty-second session so that the Commission would receive the requisite directives for its future programme of work in good time for its thirtieth session.

41. The CHAIRMAN said that it had been proposed, subject to the Commission's approval, to complete the last sentence of paragraph 2 by the words "on the basis of those recommendations, adopted the following

paragraphs of this section for inclusion in the present report".

*Paragraph 2, amended as proposed, was approved.*

42. The CHAIRMAN suggested that, from paragraph 3 onwards, the references to the Planning Group and the Enlarged Bureau should be replaced by references to the Commission.

*It was so agreed.*

Paragraph 3

43. Mr. QUENTIN-BAXTER, referring to the implications of the paragraph for the Commission's schedule of work, said that the Commission must bear in mind the need to give high priority to the preparation of a first set of draft articles on State responsibility for internationally wrongful acts, as mentioned in paragraph 11.

44. He also wondered whether the Commission was giving sufficient attention to the increase in its workload, which, as things now stood, seemed too much for the 12-week session to be held in 1978.

45. The CHAIRMAN said that the Enlarged Bureau had been conscious of the problem. The difficulty lay not only in the question of priorities but in deciding how much time would have to be given to the various topics. For example, the time required for the second reading of the draft articles on the most-favoured-nation clause would depend on outside factors such as the extent and promptness of replies from Governments. It had been thought that, for the time being, the topics should all be selected for consideration, subject to the priorities which the General Assembly would set when it had seen the Commission's report and heard the explanations which the Chairman of the Commission would furnish to the Sixth Committee.

46. Mr. AGO said that he was of the same opinion as the Chairman but shared the concern expressed by Mr. Quentin-Baxter. The Commission must be flexible in its forecasting because some difficulties were unforeseeable. As Special Rapporteur for a topic to which the General Assembly attached great importance, he intended to submit a number of articles to the Commission at its thirtieth session, and their consideration would probably take more than three weeks. The Planning Group had taken a wise decision in recommending a heavy programme of work for it was better for the Commission to have too much work than not enough.

47. Mr. QUENTIN-BAXTER expressed the fear that, at its thirtieth session, shortage of time might lead the Commission to give priority to certain topics at the expense of a second reading of the draft articles on the most-favoured-nation clause. For instance, the General Assembly could not have foreseen the progress the Commission would make at the present session on the first reading of the draft articles on succession of States in respect of matters other than treaties. It might therefore decide that the Commission should give priority to that or other topics instead of to the most-favoured-nation clause, particularly if the question of replies from Governments complicated work on the latter topic, the consideration of which might then be deferred to a subsequent session.

*Paragraph 3 was approved.*

\* Resumed from the 1470th meeting.

## Paragraphs 4-10

*Paragraphs 4-10 were approved.*

## Paragraph 11

48. Mr. AGO said that it was not appropriate to speak of "the preparation of a first set of draft articles on State responsibility for internationally wrongful acts" when a good number of articles on that topic had already been adopted. It would be better to use the words "the preparation of the draft articles on State responsibility for internationally wrongful acts".

*It was so agreed.*

49. Mr. YANKOV said that the words "the active subjects" in the last sentence seemed peculiar.

50. The CHAIRMAN suggested that they should be replaced by the words "the topics".

*It was so agreed.*

*Paragraph 11, as amended, was approved.*

## Paragraph 12

*Paragraph 12 was approved.*

## Paragraph 13

51. Mr. AGO said that he welcomed the Enlarged Bureau's recommendation that the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law" should be placed on the active programme of the Commission at the earliest possible time. He had frequently emphasized that it was a topic which, although entirely different from that of State responsibility for internationally wrongful acts, should be studied concurrently with it. However, he wondered whether the Enlarged Bureau had envisaged specific steps in that respect, more particularly the question of entrusting one or more persons with preparing the study of the topic.

52. The French version of the title of the new topic would be more in keeping with the English version if the words *de l'accomplissement* were deleted. Moreover, the words *pour faits internationalement illicites* should be added at the end of paragraph 13 since the French language, unlike English, made no distinction between liability and responsibility.

53. The CHAIRMAN said that it would perhaps be as well, with regard to the preparation of the topic in question, for the Commission not to take any decision which might prejudice the General Assembly's views.

54. With regard to the French version of the title of the topic, it had been established by General Assembly resolution 3071 (XXVIII).

55. He suggested that the words "for internationally wrongful acts" be added at the end of the paragraph.

*It was so agreed.*

*Paragraph 13, as amended, was approved.*

## Paragraph 14

*Paragraph 14 was approved.*

## Paragraph 15

56. Mr. SUCHARITKUL said that he was pleased to see the topic of jurisdictional immunities of States and

their property included in the Commission's programme of work, since its codification was long overdue. He thought that the topic should be considered side by side with that of the capacity and immunities of international organizations.

*Paragraph 15 was approved.*

## Paragraph 16

*Paragraph 16 was approved.*

## Paragraph 17

57. Mr. AGO suggested that the third sentence should not speak of the distinction "embodied" but of the distinction "drawn perhaps too rigidly" in the Statute of the Commission between the codification and the progressive development of international law, a distinction which had not been maintained, as a methodological standard, in the practice of the Commission. In actual fact, the Commission decided in each instance how it would take account of that distinction.

58. Following an exchange of views in which Mr. TSURUOKA, Mr. BEDJAOU, Mr. ŠAHOVIĆ and Mr. AGO took part, Mr. VEROSTA proposed that the third and fourth sentences of the paragraph should be replaced by the following sentence: "However, out of the need to incorporate elements of both *lex lata* and *lex ferenda* in the rules to be formulated, the Commission follows, generally speaking, a single consolidated method, which incorporates the various procedures set forth in articles 16 to 23 of its Statute".

*It was so agreed.*

59. Mr. AGO said that, in the French version, the use of the nominative form required that the definite article *la* should be placed before each of the expressions "*lex lata*" and "*lex ferenda*".

60. Mr. SETTE CÂMARA said that, while he had no objection to the more flexible wording, he did not feel that the Commission had ever been too rigid in its interpretation or approach.

*Paragraph 17, as amended, was approved.*

## Paragraphs 18-34

*Paragraphs 18-34 were approved.*

## Paragraph 35

61. Mr. YANKOV said that, because of the need for a certain amount of flexibility, the third sentence of paragraph 35 should be amended to read: "The Commission will provide headings and subheadings within each individual chapter or section and reflect them in the table of contents so as to make consultation of the report by Governments and delegations easier, and it may also consider, whenever practicable, the provision of summaries". A distinction would thus be made between the helpful and relatively easy provision of headings and subheadings and the preparation of summaries, which required more thought.

*Paragraph 35, amended as proposed, was approved.*

*Section E, as amended, was approved.*

*The meeting rose at 6.05 p.m.*