

Document:-
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Summary record of the 1040th meeting

Topic:
Other topics

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legal consequences of failure to comply with the special duty were.

56. Mr. BARTOŠ said that, since the Commission had taken the novel decision contained in the second sentence of paragraph 1 of the article, it was bound to give a brief explanation of its reasons. Paragraph (2) of the commentary should be deleted and it should be stated instead that the Commission had been concerned to express, in the second sentence of paragraph 1 of the article, the obligation of the sending State to take the necessary steps to relieve the host State of its special duty of protection within a reasonable time. A short explanation of the meaning of that provision should then be given, because there was none as yet in international law, to indicate how the host State could be released from its special duty. A few words would suffice to explain that the sending State must do its utmost either to transfer its property and archives to its diplomatic mission, or to entrust them to the mission of some other State.

57. Mr. REUTER said he agreed with Mr. Bartoš that it should be stated in the commentary that the sending State was bound either to withdraw its property and its archives or to entrust them to its diplomatic mission, if any, or to entrust them to a friendly diplomatic mission, and then a short sentence should be added explaining that after the expiry of a reasonable time, if the sending State had failed to discharge its obligation, the host State was still bound by any obligations that might be imposed on it by municipal law, by general international law or by any special agreement with the sending State. That would express the general view which had emerged in the Commission's discussions.

58. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the proposal by Mr. Bartoš and Mr. Reuter. It should also be explained why it was necessary to relieve the host State of its special duty even when a permanent mission was withdrawn temporarily.

59. Speaking as Chairman, he suggested that the General Rapporteur be asked to prepare a new text for paragraph (2) with the help of Mr. Kearney and Mr. Reuter.⁵

It was so agreed.

Paragraph (3)

Paragraph (3) was approved.

The meeting rose at 1.5 p.m.

⁵ For the continuation of the discussion on the commentary to article 48, see 1041st meeting, paras. 46-55.

1040th MEETING

Thursday, 7 August 1969, at 3.15 p.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney,

Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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

(A/CN.4/L.143-148 and Addenda)

(continued)

Chapter III

SUCCESSION OF STATES AND GOVERNMENTS

1. The CHAIRMAN invited the Commission to consider the part of chapter III of its draft report contained in document A/CN.4/L.145.

A. Historical background (Paragraphs 1-15)

Paragraphs 1-15

2. Mr. ROSENNE said he noted that paragraphs 1-8 were reproduced from the report on the Commission's twentieth session. It seemed unnecessary to preface a summary of its discussions at the present session with a long introduction consisting largely of material drawn from the previous year's report. As chapter II contained a footnote referring to historical background information given in the report on the twentieth session, it might be sufficient if chapter III included a similar reference to the relevant passages in that report.

3. Mr. AGO, supported by Mr. EUSTATHIADES and Sir Humphrey WALDOCK, said he was in favour of retaining the historical background, since it helped to place the rest of the chapter in perspective, and especially since delegations might not have the Commission's previous report before them when the subject was discussed in the Sixth Committee.

Paragraphs 1-15 were approved.

4. The CHAIRMAN invited the Commission to consider the part of chapter III of its draft report contained in document A/CN.4/L.145/Add.1.

B. Succession in respect of matters other than treaties (Paragraphs 16-44)

Paragraph 16

Paragraph 16 was approved.

Paragraph 17

5. Mr. AGO said that some of the wording used was inconsistent with the views expressed by the Special Rapporteur. He suggested that the beginning of the second sentence be amended to read "Even if a special status were to be accorded to the successor States, account would nevertheless have to be taken . . .".

It was so agreed.

6. Mr. KEARNEY said that the reference to the relevant General Assembly resolutions in the second sentence of paragraph 17 was sufficient without the qualifying phrase at the end of the sentence, which was unnecessary and might be confusing. He therefore suggested that either the phrase "which recognized that

all peoples are entitled to decide freely their political and economic system” or the two phrases in brackets be deleted.

7. The CHAIRMAN suggested that the two phrases in brackets be deleted.

It was so agreed.

Paragraph 17, as amended, was approved.

Paragraphs 18 and 19

Paragraphs 18 and 19 were approved.

Paragraph 20

8. Mr. AGO suggested that the words “in principle” be inserted after the word “supported” in the first sentence.

It was so agreed.

9. Mr. CASTRÉN suggested that the word “other” be replaced by the word “some” in the second sentence.

It was so agreed.

10. Mr. KEARNEY suggested that, in the third sentence, the words “some other rule of international law” be replaced by the words “the application of a rule of general international law”, since a treaty was not a rule of international law. He also suggested that, in the fourth sentence, the word “approach” be replaced by the word “content” and the words “placed in an appropriate perspective” by the words “adequately developed”, and, in the fifth sentence, the words “on a number of legal interpretations” by the words “as to the legal analysis of a number of issues.”

It was so agreed.

11. Sir Humphrey WALDOCK suggested that, in the fourth sentence, the word “Finally” be deleted and the word “however” be inserted after the word “members”, in order to avoid giving the impression that only a small minority of members had dissented. He also suggested that the phrase “and somewhat lacking in balance” be added at the end of the sentence.

It was so agreed.

Paragraph 20, as amended, was approved.

Paragraph 21

12. Mr. AGO suggested that the phrase “that State succession implied a substitution and not a transfer of sovereignty” in the first sentence be deleted, as it was a purely theoretical concept and had not received general approval, as was stated.

13. Mr. BARTOŠ said he agreed. A substitution of sovereignty was very different from a transfer of sovereignty from the point of view of acquired rights.

14. Mr. CASTRÉN said that the concept was accepted by all modern writers.

15. The CHAIRMAN, speaking as a member of the Commission, suggested that the words “received general approval” be replaced by the words “were shared by several members”.

It was so agreed.

16. Mr. KEARNEY said that he and other members had disagreed with the Special Rapporteur’s interpreta-

tion of General Assembly resolution 1803 (XVII). He therefore suggested that the phrase “and their interpretation was controversial” be added to the last sentence.

It was so agreed.

Paragraph 21, as amended, was approved.

Paragraph 22

17. Mr. ROSENNE said that the paragraph seemed to confuse the causes of succession with its origins and types. The two subjects were quite different and it would be unwise to group them together for the purposes of study. Moreover, the chapter was primarily concerned with succession and not with decolonization. It would therefore be clearer if the word “decolonization” in the fourth sentence were replaced by the phrase “the process of succession arising from decolonization”. He also suggested that the words “It was also argued” at the beginning of the same sentence be replaced by the words “Other members thought”.

Mr. Rosenne’s proposals were adopted.

18. Sir Humphrey WALDOCK said that decolonization could in fact give rise to different types of succession. He therefore suggested that the following sentence be inserted after the fourth sentence: “Some members were of the opinion that decolonization was more a cause than a type of succession”.

It was so agreed.

19. Mr. EUSTATHIADES said that the final sentence of the paragraph might be clearer if it were amended to read: “Lastly, some members emphasized that the circumstances surrounding certain cases of succession, in particular cases of independence resulting from a freely accepted agreement, should not be overlooked.”.

Mr. Eustathiades’s proposal was adopted.

Paragraph 22, as amended, was approved.

Paragraph 23

20. Mr. ROSENNE said that, although the paragraph summed up the views expressed by the Special Rapporteur in paragraph 107 of his report (A/CN.4/216/Rev.1), no mention was made of the dissenting opinions expressed in the subsequent debate on the subject. Moreover, the presentation of the Special Rapporteur’s views at the end of the summary of general comments on his report gave the impression that they were intended as a reply to those comments. If those views, which were the basis of the Special Rapporteur’s thesis concerning the antinomy between acquired rights and decolonization and had given rise to considerable controversy, were to be reproduced in the report, the dissenting opinions should also be recorded.

21. Mr. KEARNEY said that the second sentence had nothing to do with the arguments adduced in the first and third sentences. Nor was the existence of States at different levels of economic development a “new problem”. The sentence would have to be either redrafted or deleted.

22. Mr. AGO suggested that the second and third sentences be replaced by the sentence: “This view was

shared by some members of the Commission, while others took a different view”.

It was so agreed.

23. Mr. ROSENNE suggested that the words “explained that” in the first sentence be replaced by the word “stated that, in his view”.

It was so agreed.

Paragraph 23, as amended, was approved.

Paragraph 24

24. Mr. USTOR suggested that, to avoid confusion, the word “neither” and the phrase “nor with regard to States” be deleted from the first sentence, since acquired rights with regard to States and private persons respectively were very different concepts.

It was so agreed.

25. Mr. KEARNEY said it was not clear which members held the view expressed in the third sentence: many believed that public property and public debts deserved protection even in cases of succession resulting from decolonization.

26. Sir Humphrey WALDOCK said he also found the paragraph confusing in its present form.

27. Mr. ROSENNE suggested that the third and fourth sentences be transposed; the first three sentences would then deal with private rights and the fourth with the rights of States.

It was so agreed.

Paragraph 24, as amended, was approved.

Paragraph 25

28. Mr. KEARNEY said it would be easier to distinguish between the different points of view if the second and fourth sentences were deleted and redrafted to form a new paragraph.

29. Mr. CASTRÉN and Mr. USTOR said they were opposed to that suggestion, since the paragraph clearly stated one point of view.

30. Sir Humphrey WALDOCK said that the second sentence might be more generally acceptable if it were less emphatic. He suggested that it be amended to read: “Such rights might not be absolute, their concept might be somewhat imprecise, and they could be limited, but it was not possible to accept their outright suppression”.

It was so agreed.

31. Mr. ROSENNE said he thought that the question of remedies ought to be introduced into the third sentence, since even those who recognized the concept of acquired rights also recognized that, in certain circumstances, if the successor State did not recognize the acquired rights, it must pay compensation. It was therefore an obligation and not a right which was involved.

32. The CHAIRMAN, speaking as a member of the Commission, suggested that the third sentence might end with the words “. . . including certain acquired rights; where appropriate, international law endorses such respect of acquired rights by imposing an obligation

to pay compensation”, and the fourth sentence begin with the words “Exceptions to that principle were only admitted where the predecessor State had granted the rights in bad faith . . .”.

It was so agreed.

Paragraph 25, as amended, was approved.

Paragraph 26

33. Mr. AGO suggested that, in the fourth sentence, the phrase “but to try to find the most generally acceptable basis to safeguard the rights of aliens” be replaced by the wording “but to consider whether or not it was essential that, even in the case of State succession, aliens should be granted the treatment accorded to them by international law”.

It was so agreed.

Paragraph 26, as amended, was approved.

Paragraph 27

34. Mr. AGO suggested that, in the phrase “subject to the rules of international law relating to State responsibility” at the end of the paragraph, the words “any limits laid down by” be inserted after the words “subject to”.

It was so agreed.

35. Mr. ROSENNE said he did not understand the implications of the phrase “in the name of an abstract concept” in the first sentence.

36. Mr. AGO suggested that the phrase be deleted.

It was so agreed.

Paragraph 27, as amended, was approved.

Paragraph 28

37. Mr. KEARNEY suggested that the second sentence be amended to read: “Among the reasons advanced were the principles of unjust enrichment and equity”.

It was so agreed.

38. The CHAIRMAN speaking as a member of the Commission, suggested that in the third sentence the words “rights which had the character of” be inserted after the word “property”.

It was so agreed.

Paragraph 28, as amended, was approved.

Paragraph 29

39. Mr. KEARNEY suggested that the word “adjusted” in the first sentence be replaced by the word “equitable”.

It was so agreed.

40. Mr. ROSENNE suggested that the word “humble” in the second sentence be replaced by the word “modest”.

It was so agreed.

Paragraph 29, as amended, was approved.

Paragraph 30

41. Mr. KEARNEY suggested that the paragraph be divided into two sentences, the first ending with the words “arrangements or agreements” and the second

beginning with the words "It was also suggested that the problem of compensation . . .".

It was so agreed.

Paragraph 30, as amended, was approved.

Paragraph 31

42. Sir Humphrey WALDOCK suggested that paragraphs 31 and 32 be included in section 2 and that the title "3. Legal basis for the protection of existing rights other than the concept of acquired rights", which appeared before paragraph 31, be deleted.

It was so agreed.

43. Sir Humphrey WALDOCK suggested that the words "existing rights", at the end of the first sentence, be replaced by the words "rights existing prior to the succession".

It was so agreed.

Paragraph 31, as amended, was approved.

Paragraph 32

44. Sir Humphrey WALDOCK suggested that the words "in this respect" in the first sentence be deleted and the words "for his part" inserted after the words "Special Rapporteur", and that the words "pointed out" in the second sentence be replaced by the words "voiced the opinion".

It was so agreed.

45. The CHAIRMAN, speaking as a member of the Commission, suggested that a sentence be added at the end of the paragraph reading: "These opinions of the Special Rapporteur were not shared by some members of the Commission".

46. Mr. ROSENNE said that the Commission ought not to accept the paragraph in its present form. It would be unwise for it to include in its report a statement to the effect that both such a well-established concept of international law as good faith and United Nations jurisprudence on human rights were unsatisfactory. The Commission had itself given prominence to the concept of good faith in the articles on the law of treaties recently adopted at the Vienna Conference. Special Rapporteurs were free to express their individual views, but the Commission was responsible for the contents of its own report. He therefore suggested that paragraph 32 be deleted and the following sentence added to paragraph 31: "Replying in the debate on this point, the Special Rapporteur considered that these notions were insufficient in the case of State succession arising out of decolonization, if only because they could give rise to difficult international controversies which would not serve the cause of good relations between the predecessor and successor States".

47. Mr. REUTER said he felt that, if the Special Rapporteur's views were to be included in the report, they should be recorded as he had expressed them. He accordingly suggested that the following sentence be added at the end of the paragraph: "The Special Rapporteur's position on these points was the subject of lively controversy in the Commission".

48. Sir Humphrey WALDOCK and Mr. TSURUOKA said they both supported that suggestion.

Mr. Reuter's proposal was adopted.

Paragraph 32, as amended, was approved.

Paragraph 33

49. Mr. AGO suggested that the words "and developing countries" be deleted from the title before paragraph 33, where they were redundant, and that in the second sentence they be replaced by the words "as of all other States", since the right in question was not confined to new States.

It was so agreed.

Paragraph 33, as amended, was approved.

Paragraph 34

50. Mr. EUSTATHIADES suggested that in the first sentence the words "it is an exaggeration to say" be deleted and that the words "not necessarily" be inserted before the word "contradictory".

It was so agreed.

51. Mr. AGO suggested that the words "In their view" be inserted at the beginning of the second sentence.

It was so agreed.

Paragraph 34, as amended, was approved.

Paragraph 35

52. Mr. KEARNEY said he could not accept paragraph 35 in its present form. The wording of the first sentence was offensive while the rest of the paragraph repeated a point already made in paragraph 33. He therefore suggested that the paragraph be replaced by the following text:

"Other members shared the view that compensation and terms of payment for expropriation of property could be calculated so as to take into account losses suffered by the former colony in connexion with that property. Benefits derived in the past under the colonial régime would have to be taken into consideration to avoid unjust enrichment."

It was so agreed.

Paragraph 35, as amended, was approved.

Paragraph 36

53. Mr. AGO suggested that the first sentence be amended to read: "Stress was laid on the difficulties which might arise in cases of decolonization where an enormous volume of rights became aliens' rights overnight".

It was so agreed.

Paragraph 36, as amended, was approved.

Paragraph 37

54. Mr. KEARNEY suggested that the phrase "Regardless of past exploitation of developing countries by foreign interests", in the last sentence, be deleted.

It was so agreed.

Paragraph 37, as amended, was approved.

Paragraph 38

55. Mr. AGO suggested that, since the legal situations mentioned in the first sentence had not always been

established by the predecessor State, the phrase "which the predecessor State had legally established" be replaced by the words "lawfully constituted on the basis of the legal order of the predecessor State". He also suggested that the word "eventual" be inserted between the words "the" and "exceptions" in the third sentence.

Mr. Ago's proposals were adopted.

Paragraph 38, as amended, was approved.

Paragraph 39

56. Mr. ROSENNE suggested that the words "outside it" in the first sentence be replaced by the words "in other contexts".

It was so agreed.

57. Mr. KEARNEY suggested that the word "feared" in the third sentence be replaced by the word "considered".

It was so agreed.

Paragraph 39, as amended, was approved.

Paragraph 40

58. Mr. KEARNEY said he did not understand the meaning of the phrase "to the different nature of the diplomatic protection and the old capitulation régime".

59. Sir Humphrey WALDOCK suggested that the phrase be deleted. He also suggested that the word "delicate" in the preceding phrase "delicate questions of nationality" be replaced by the word "difficult".

It was so agreed.

Paragraph 40, as amended, was approved.

Paragraph 41

60. Mr. ROSENNE, referring to the first sentence, said it was the violation of acquired rights and not acquired rights as such that belonged to the topic of State responsibility.

61. Sir Humphrey WALDOCK said he agreed. He suggested that the words "the study of" be inserted before the words "acquired rights".

It was so agreed.

62. Mr. KEARNEY suggested that the third sentence be deleted and the words "The Special Rapporteur stated that" inserted at the beginning of the fourth sentence.

It was so agreed.

63. Mr. ROSENNE suggested that, in order to avoid confusion, the words "for the topic of succession of States in respect of matters other than treaties" be inserted after the words "The Special Rapporteur", at the beginning of the sentence, since the paragraph referred to two topics as well as the current study.

It was so agreed.

Paragraph 41, as amended, was approved.¹

¹ For the continuation of the discussion on chapter III of the draft report, see 1041st meeting, paras. 29-45.

Other business

(Item 8 of the agenda)

INDEX OF THE COMMISSION'S DOCUMENTS

64. Mr. TESLENKO (Deputy Secretary to the Commission) said he had been asked to inform the Commission that the United Nations Library at Geneva had begun the preparation of an index of all the documents issued by the Commission.

65. The CHAIRMAN suggested that, in its report, the Commission should record its appreciation of that undertaking by the United Nations Library at Geneva.

It was so agreed.

The meeting rose at 8 p.m.

1041st MEETING

Friday, 8 August 1969, at 9.45 a.m.

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Reuter, Mr. Tsuruoka, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

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

(A/CN.4/L.143-148 and Addenda)

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of its draft report.

Chapter I

ORGANIZATION OF THE SESSION (A/CN.4/L.143)

Paragraphs 1 to 6

Paragraphs 1 to 6 were approved.

Paragraph 7

2. Mr. CASTRÉN said that the words "and the most-favoured-nation clause" at the end of the paragraph were no longer applicable, as the Commission had in fact considered Mr. Ustor's report, and so should be deleted.

It was so agreed.

Chapter I, as amended, was approved.

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (A/CN.4/L.147 and Corr.1)

3. The CHAIRMAN pointed out that, since the part of the Commission's report dealing with the most-