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Summary record of the 1041st meeting

Topic:
Other topics

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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 Waldoack, 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-

favoured-nation clause was now contained in document A/CN.4/L.148, which would be considered later, and since sections A and B of chapter VI had been approved at a closed meeting, only sections C to G of chapter VI remained to be approved.

C. Relations with the International Court of Justice

Section C was approved.

D. Co-operation with other bodies

4. Mr. CASTRÉN said that the words “of that Committee” should be added after the words “President of the tenth session”, in the second line of the second paragraph.

It was so agreed.

Section D, as amended, was approved.

E. Date and place of the twenty-second session

Section E was approved

F. Representation at the Twenty-fourth Session of the General Assembly

Section F was approved

G. Seminar on International Law

5. Mr. BARTOŠ said he thought that Section G ought to contain a recommendation that the General Assembly should provide increased financial assistance for the Seminar.

6. Mr. RATON (Director of the Seminar on International Law), after thanking Mr. Bartoš for his suggestion, said that the Seminar needed a larger number of scholarships rather than funds from the General Assembly. What was important was to express the hope that the countries which had offered scholarships for the Seminar which had just been held would do the same for the Seminar to be held next year, that other countries would also offer scholarships and that, in response to the wish expressed by one member of the Commission, scholarships would be offered to candidates from countries other than developing countries.

7. Mr. KEARNEY asked whether twenty-two was the largest number of students for which the Seminar could usefully be organized.

8. Mr. RATON (Director of the Seminar on International Law) said that experience had shown that the ideal number of participants to ensure both equitable geographical distribution and maximum benefit was between twenty-two and twenty-five.

9. Mr. KEARNEY said that a figure of twenty-two to twenty-four students was a reasonable one but it was undesirable that the great majority should come from developing countries, since that would mean that the advantages of the interplay of different systems of law and teaching methods were lost. A roughly equal divi-

sion of students from the developing and developed countries would be preferable.

Section G was approved

Chapter VI, as amended, was approved.

Chapter V

THE MOST-FAVOURLED-NATION CLAUSE (A/CN.4/L.148)

Paragraphs 1 to 4

Paragraphs 1 to 4 were approved.

Paragraph 5

10. Mr. EUSTATHIADES said that the word “*essentiellement*” in the French version of the second sentence gave the impression that the Special Rapporteur had been invited to base his report on the sources mentioned in that sentence, whereas he had referred to many other sources when he had described his plan of work. The word “*essentiellement*” should therefore be replaced by the words “*dans une large mesure*”, which were a better translation of the corresponding English word “largely”.

11. Sir Humphrey WALDOCK said he doubted whether that was quite enough. The text as it stood rather gave the impression that the rest of the Special Rapporteur’s work on the most-favoured-nation clause would be based on the replies from the organizations and interested agencies consulted by the Secretary-General and on the jurisprudence of the International Court of Justice in the three cases mentioned in footnote 5, whereas he presumed that the basis of the Special Rapporteur’s next study would be a much broader one. What the Commission had asked the Special Rapporteur to do was to prepare next a study based largely on that material and he accordingly suggested that the phrase “prepare next a study based primarily” be substituted for the phrase “continue his preparatory work largely on the basis”.

It was so agreed.

12. Mr. KEARNEY suggested that the phrase “and of the effects of the economic depression of the 1930s upon the clause” might be included in the first sentence, as considerable attention had been given to that aspect of the historical background during the discussion on the Special Rapporteur’s first report. He would not, however, press his suggestion.

13. Mr. USTOR, Special Rapporteur, said that the suggested insertion, though acceptable in itself, should perhaps not be incorporated because at a later stage he would need to restrict his study and draft articles to the purely legal aspects of the most-favoured-nation clause and such an addition might give the impression that the Commission was more interested in economic considerations than was really the case.

Paragraph 5, as amended, was approved.

Chapter V, as amended, was approved.

Chapter IV

STATE RESPONSIBILITY (A/CN.4/L.146)

Paragraphs 1 to 15

Paragraphs 1 to 15 were approved.

Paragraph 16

14. Mr. EUSTATHIADES said he felt that paragraph 16 neither gave the Special Rapporteur the credit which he deserved nor fully reflected the discussions in the Commission. He therefore proposed that it be completed by the addition of a passage congratulating the Special Rapporteur on having laid the foundation for its future work, then going on to state that there was general agreement on the main lines of the programme to be undertaken at future sessions, and that, after a detailed exchange of views, the Special Rapporteur had summed up the discussion and announced a plan of work which had been approved by the Commission.

15. Sir Humphrey WALDOCK said that, although he would like to congratulate Mr. Ago on his work, it was not usual to include in the Commission's report statements of the kind proposed by Mr. Eustathiades. It would also look a little conspicuous if a similar tribute to Mr. Ustor's report were not included in chapter V.

16. Mr. AGO said that congratulations should certainly not be included, but the other ideas contained in the additional passage proposed by Mr. Eustathiades, the General Rapporteur, could usefully be inserted. He therefore suggested that the following sentences be added to the end of the paragraph: "The Special Rapporteur, in summing up the debate, gave an account of the views of members of the Commission and announced his future plan of work. There was general agreement on the main lines of the programme to be undertaken on the subject during the next sessions."

It was so agreed.

Paragraph 16, as amended, was approved.

Paragraph 17

17. Mr. KEARNEY said that if the first sentence was intended as a definition of a primary rule of international law, it was much too narrow. Either the definition should be modified or some qualification should be inserted to indicate what type of rule was meant.

18. Mr. AGO explained that the rules referred to were the primary or substantive rules establishing rights and obligations. However, the word "primary" could be placed within quotation marks in order to indicate exactly what was meant.

19. Mr. KEARNEY said that such rules also established other legal relationships. He did not, however, wish to press the point.

20. Mr. TSURUOKA said he agreed with Mr. Kearney that the word "primary" was not clear. It was hard to tell whether it was to be understood in relation to rules governing State responsibility or in relation to other rules.

21. Mr. USTOR suggested that the word "primary" be dropped from the first sentence, since no mention

was made of secondary rules of international law which would help to explain the distinction. Instead of speaking of "the primary rules of international law: i.e. those laying obligations upon States", it might be better to say "those rules of international law which laid obligations upon States".

Mr. Ustor's proposal was adopted.

22. Sir Humphrey WALDOCK said that, whereas he found the distinction between primary and secondary rules of international law comprehensible, the somewhat technical jurisprudential concept introduced in article 17 might not have the support of all members. Moreover, it might cause confusion because of the other ways in which the term "primary rule" was sometimes used by lawyers. Mr. Ustor's amendment to the first sentence had been accepted, so the word "substantive" might perhaps be substituted for the word "primary" in the second sentence in order to satisfy Mr. Ago.

23. Mr. AGO said it was not easy to find the appropriate term to describe the rules which laid down rights and obligations in relation to those which made provision for the consequences of their violation and which were not simple rules of procedure. In view of the difficulties raised by the word "primary", he would suggest that it be dropped from the second sentence also.

It was so agreed.

Paragraph 17, as amended, was approved.

Paragraph 18

24. Mr. EUSTATHIADES suggested that the last words of the paragraph "or even between that State and the entire international community", be deleted. Although there could be a legal relationship between a guilty State and a group of States by virtue of a collective treaty guarantee, such a relationship could not exist between a guilty State and the entire international community.

25. Mr. REUTER, supported by Mr. AGO, suggested that, instead of deleting that phrase, the words "may also give rise", in the last sentence, be replaced by the word "might also give rise", and that the word "even", in the last line, be replaced by the word "eventually".

It was so agreed.

Paragraph 18, as amended, was approved.

Paragraph 19

26. Mr. EUSTATHIADES suggested that the word "putative" in the first line be deleted.

It was so agreed.

Paragraph 19, as amended, was approved.

Paragraph 20

27. Mr. KEARNEY suggested that, at the end of the first sentence, a phrase in brackets be inserted giving a few examples of lawful activities which could give rise to international responsibility; space activities could be mentioned. Such examples would be useful to many readers of the report.

28. Mr. AGO, supporting Mr. Kearney's suggestion,

said that the phrase should also refer to nuclear activities.

Mr. Kearney's proposal and Mr. Ago's proposal were adopted.

Paragraph 20, as amended, was approved.

Paragraph 21

Paragraph 21 was approved.

Chapter IV, as amended, was approved.

Chapter III

SUCCESSION OF STATES AND GOVERNMENTS (resumed from the previous meeting)

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

Paragraph 42

30. The CHAIRMAN, speaking as a member of the Commission, suggested that the opening words of the first sentence, "In conclusion, the members of the Commission", be replaced by the words "At the end of the debate, most members of the Commission", and that in the fifth sentence, the words "the Commission decided and the Special Rapporteur agreed" be replaced by the words "most members of the Commission considered, and the Special Rapporteur agreed".

It was so agreed.

31. Mr. KEARNEY said that the second sentence should be toned down; the statement that "the theoretical views were too controversial and the acquired rights involved vague and imprecise aspects" was too strong.

32. Sir Humphrey WALDOCK suggested that the second and third sentences be merged, so as to eliminate that passage. The combined sentence would then read: "The topic of acquired rights was extremely controversial and its study at a premature stage could only delay the Commission's work on the topic as a whole".

It was so agreed.

33. Mr. CASTRÉN suggested that the word "common" be deleted from the phrase "a common firm foundation" in the fourth sentence.

It was so agreed.

34. The CHAIRMAN suggested that, to avoid giving the impression that the Commission had imposed the subject of his next report on the Special Rapporteur, the word "preferably" be inserted after the word "commencing" in the fifth sentence.

It was so agreed.

35. Mr. YASSEEN suggested that the word "completely", before the word "empirical" in the fifth sentence, be deleted.

It was so agreed.

36. Mr. KEARNEY said he saw no need to include the words "and the Special Rapporteur agreed" in the

fifth sentence. The paragraph was intended to reflect the views of the Commission and it was not customary to refer in such a context to the approval which the Special Rapporteur might give to those views.

37. Sir Humphrey WALDOCK said that, in that particular case, there was some value in mentioning the concurrence of the Special Rapporteur. The Commission had examined at the present session a report on acquired rights which the Special Rapporteur had decided to submit on his own initiative. Following the Commission's discussion, the Special Rapporteur had accepted the view of the majority of the members on the manner of dealing with the question of acquired rights.

38. Mr. YASSEEN said that he would prefer to drop the reference to the Special Rapporteur. It was for the Commission to take decisions and for the Special Rapporteur to carry them out.

39. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed that the words referred to by Mr. Kearney should be deleted.

It was so agreed.

40. Mr. REUTER suggested that the last sentence be reworded to read: "Not until the Commission had made sufficient progress, or perhaps had even exhausted the entire topic, would it be in a position to deal directly with the problem of acquired rights".

It was so agreed.

Paragraph 42, as amended, was approved.

Paragraph 43

41. The CHAIRMAN said that paragraph 43, as it stood, did not accurately reflect the outcome of the Commission's discussion and should be based more closely on the provisional decision taken by the Commission at its 1009th meeting.¹ The first sentence should be deleted and the second sentence amended in the light of that provisional decision, which gave the Special Rapporteur a greater freedom of choice regarding the subject of his next report. In order to remove any misunderstanding, however, reference would have to be made to the paragraph of the Commission's report setting out its later decisions also to give priority to the reports of other Special Rapporteurs.

42. Mr. CASTRÉN said the Special Rapporteur should also be requested to take account of the comments made by the Commission at its twentieth session.

43. Mr. KEARNEY said that, as he understood it, paragraph 43 expressed the substantial agreement in the Commission that work on the topic should begin with a report containing a set of draft articles on "public property and public debts". He would therefore urge that those words be retained and not be replaced by a reference to succession in respect of economic and financial matters.

¹ See 1009th meeting, paras. 54-62.

44. Mr. BARTOŠ said that, in order to avoid giving the Special Rapporteur a false impression, it would be preferable to make no reference in the report to the Commission's provisional decision but simply to say that the Commission had requested the Special Rapporteur to submit another report to it, without specifying for which session.

45. After a further exchange of views the CHAIRMAN suggested that paragraph 43 be worded as follows:

"Referring to the provisional decision adopted at its 1009th meeting and to paragraph 93 of this report, the Commission requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters, taking into account the comments of members of the Commission on the reports he had already submitted at the Commission's twentieth and twenty-first sessions. The Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts. It thanked the Special Rapporteur for his second report on succession of States in respect of matters other than treaties, and confirmed its decision to give that topic priority at its twenty-second session, in 1970."

It was so agreed.

Paragraph 44

Paragraph 44 was approved

Chapter III, as amended, was approved.

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

(resumed from the 1039th meeting)

COMMENTARY TO ARTICLE 48 (Protection of premises and archives) *(continued)*

Paragraph (2)

46. The CHAIRMAN said that, in accordance with the Commission's request, the General Rapporteur, with the help of Mr. Reuter and Mr. Kearney, had prepared a new text to replace paragraph (2) of the commentary to article 48 (A/CN.4/L.144/Add.3). The new text read:

"The second sentence of paragraph 1 differs from the corresponding provision of article 47, paragraph 1, of the draft articles on special missions, which reads: 'The sending State must withdraw that property and those archives within a reasonable time'. The Commission considered that this provision was required because of the difference in character between a permanent mission and a diplomatic mission. Following a breach, diplomatic relations are normally resumed after a reasonable period. Withdrawal from an international organization, on the other hand, may be due to a wide variety of causes, ranging from the application of the organization's own rules to a decision by the sending State to reduce its expenditure. The host State is not directly involved in the factors which may determine such a recall or its

duration. It would, therefore, mean imposing an unjustified burden on that State to require it to provide special guarantees concerning the premises, archives and property of a permanent mission for an unlimited period. It was therefore decided in article 48 that, in case of the recall of its permanent mission, the sending State must relieve the host State of its special duty within a reasonable time. This means that the sending State must withdraw its property and archives within such a time. It is, however, free to discharge its obligation in various ways, for instance, by removing its property and archives from the territory of the host State, or by entrusting them to its diplomatic mission or to the diplomatic mission of another State. The second sentence of paragraph 1 of article 48 has been drafted in the most general terms in order to cover all these possibilities. The premises similarly cease to enjoy special protection from the time the property and archives situated in them have been withdrawn or, after the expiry of a reasonable period, have ceased to enjoy special protection. Where the sending State has failed to discharge its obligation within a reasonable period, the host State ceases to be bound by the special duty laid down in article 48, but, with respect to the property, archives and premises, remains bound by any obligations which may be imposed upon it by its municipal law, by general international law or by special agreements."

47. He said he noticed that the first sentence of the new text drew attention to the difference from the draft on special missions, but the provision in question also differed from the corresponding provision of the Vienna Convention on Diplomatic Relations.

48. Mr. KEARNEY suggested that, in the second sentence of the new text, the words "this provision" be replaced by the words "this addition".

It was so agreed.

49. Mr. KEARNEY said that the opening words of the fourth sentence "Withdrawal from an international organization" were not accurate; it was the permanent mission that was withdrawn. The words "of a permanent mission" should be inserted after the word "withdrawal".

It was so agreed.

50. Mr. AGO said that, in the same sentence, the use of the term "on the other hand" made it necessary to specify that the withdrawal of a permanent mission could be final. He accordingly suggested that the examples of causes be deleted and that after the words "a wide variety of causes" the phrase "and may even be final" be added.

It was so agreed.

51. Mr. USTOR suggested that in the sixth sentence the words "which has been recalled" be inserted after the words "permanent mission" in order to make the meaning clearer.

It was so agreed.

52. Mr. REUTER suggested that the words "even on a temporary basis" be added at the end of the same sentence which would then read: "It would, therefore, mean imposing an unjustified burden on that State to require it to provide, for an unlimited period, special guarantees concerning the premises, archives and property of a permanent mission which has been recalled, even on a temporary basis".

It was so agreed.

53. Mr. AGO said that the eighth sentence was too vague. It would be better to combine it with the following sentence, to read: "This means that the sending State must either withdraw its property and archives within a reasonable time by removing them from the territory of the host State, or entrust them to its diplomatic mission or to the diplomatic mission of another State."

54. Mr. YASSEEN said it was important that the means of relieving the host State of its obligations should not be limited. The property and archives of the sending State might not only be removed by the sending State, they might conceivably be sold or destroyed.

55. Sir Humphrey WALDOCK suggested that the simple solution would be to delete the whole of the eighth sentence and the word "however" in the following sentence, which would then read: "It is free to discharge that obligation in various ways . . .".

Sir Humphrey Waldoack's proposals were adopted.

The new text for paragraph (2) of the commentary to article 48, as amended, was approved.

The commentary to article 48, as amended, was approved.

Chapter II of the draft report as a whole, as amended, was approved

The draft report of the Commission on the work of its twenty-first session as a whole, as amended, was adopted

Closure of the session

56. Mr. AGO said he wished to pay a tribute to the competence, courtesy and firmness with which the Chairman had conducted the Commission's deliberations. He also wished to express his thanks to the Chairman of the Drafting Committee, the First Vice-Chairman, the General Rapporteur and the members of the Secretariat.

57. Mr. BARTOŠ said he wished to compliment the Chairman on his grasp of the topics that had been before the Commission. He was certain that the Chairman's eminent qualities would make him an excellent representative of the Commission to the Sixth Committee of the General Assembly.

58. Mr. YASSEEN, Mr. USTOR, Mr. CASTRÉN, Sir Humphrey WALDOCK, Mr. REUTER and Mr. KEARNEY associated themselves with the tributes paid by the previous speakers.

59. Mr. EUSTATHIADES (Rapporteur) said he wished to thank the members of the Commission for their kind words and to associate himself with the tribute they had paid to the Chairman, the two Vice-Chairmen, and the Secretariat.

60. The CHAIRMAN said it was a great honour for him to have presided over the twenty-first session of the Commission, and he was grateful to the Commission for its kindness.

61. It had been suggested to him that a telegram should be sent to Mr. Amado, who had been unable to attend the Commission's session, expressing the sympathy of members. He took it that that suggestion was unanimously approved.

62. He wished to thank the two Vice-Chairmen and the Rapporteur for their help and support. He had greatly appreciated the work of the Secretariat and its competent staff and wished to thank all those who had assisted the Commission in its work.

63. He declared the twenty-first session of the International Law Commission closed.

The meeting rose at 2 p.m.