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Summary record of the 1084th meeting

Topic:
Other topics

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Mr. Ushakov and Mr. Reuter, since as an Ecuadorian he was unable to accept the four Conventions on the law of the sea, which did not meet the realities of the present time. If a vote were taken on the reference to those Conventions, therefore, he would have to abstain.

85. Mr. ROSENNE said he did not think that the principle of the universality of international law was in issue in the present case; the only real issue was the participation of States in certain conventions, and he would have thought that the Commission ought to have expressed its opinion on that matter before submitting draft articles to conferences.

86. With respect to the third preambular paragraph, he could accept the compromise formula proposed by Mr. Castrén.

87. Valid criticisms had been directed at the operative paragraph, but he thought that it would be a pity to exclude the references to all those conventions. He suggested that the words "such as" in that paragraph should be replaced by the word "including".

88. Mr. SETTE CÂMARA said that he had no difficulty in accepting the substance of the draft resolution, although he agreed with Mr. Ushakov concerning the language of the operative paragraph. The verb "*Recommends*" had a specific meaning in the United Nations and he did not think that the Commission could make recommendations to the General Assembly; perhaps it could be replaced by "*Requests*".

89. He agreed with Mr. Reuter that the operative paragraph should not include specific references to conventions, since that might give the impression that the Commission was the only body which prepared draft articles for conventions.

90. He had some doubts about the final phrase in the operative paragraph, since ratification had nothing to do with the final stage of the codification of international law. He proposed, therefore, that that phrase be replaced by the wording "in order to shorten the entry into force of treaties which were the result of codification".

91. Mr. TSURUOKA said that the Commission wished to see the largest possible number of States ratify or accede to the codification conventions in order to give its work practical meaning. The third preambular paragraph might therefore be redrafted in clearer, simpler and less controversial form, to read: "*Recalling also* that conventions dealing with the codification and progressive development of international law should have a wider participation than hitherto". That was a statement which no one disputed and which could appropriately be followed by the recommendation that the largest possible number of States should ratify or accede to the conventions.

92. Mr. THIAM proposed that either the draft resolution should be adopted without change, since it already represented a compromise and the principles enunciated in the preamble were not taken up in the operative part, or a small working group should be set up to draft a compromise text acceptable to everyone.

93. After a brief discussion, the CHAIRMAN suggested that the Commission appoint a small drafting committee to work out a new text for the third preambular paragraph and the operative paragraph of the draft resolution in the light of the various suggestions made during the debate. He further suggested that the committee be composed of Mr. Kearney, Mr. Ago, Mr. Castrén, Mr. Reuter, Mr. Ustor and Mr. Yasseen.

It was so agreed.

The meeting rose at 6.20 p.m.

1084th MEETING

Wednesday, 8 July 1970, at 10.15 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

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

(A/CN.4/L.156-160 and Addenda)

(continued)

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (*resumed from the previous meeting*)

PART IV. Delegations of States to organs and to conferences (continued)

1. The CHAIRMAN invited the Commission to consider the part of chapter II of the draft report contained in document A/CN.4/L.157/Add.2.

2. Mr. USHAKOV noted that the title of section 2 was "Facilities, privileges, immunities and obligations", whereas the title of section 2 of the draft articles on permanent missions was "Facilities, privileges and immunities". He proposed that the word "obligations" should be deleted.

It was so agreed.

3. Mr. AGO said he thought that the titles should not be changed at that stage. It should be understood, however, that the Commission intended to revise the title "Relations between States and international organizations" on second reading at the next session, as it was too broad in scope.

GENERAL COMMENTS

Paragraph (1)

4. Mr. KEARNEY said that the word "substantive" was a mistake; it should be "substantial".

Paragraph (1) was approved with that correction.

Paragraph (2)

5. Mr. ROSENNE, supported by Mr. ALCÍVAR, proposed that the first sentence of paragraph (2) should be deleted, since it was obviously unnecessary.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

6. Mr. USTOR proposed that the numbers of the resolutions mentioned should be given in a footnote.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

7. Mr. ROSENNE said that, as a matter of principle, the Commission did not generally include references to legal literature in its reports. He proposed, therefore, that footnote 30 should be deleted.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

8. Mr. ROSENNE proposed, first, that references to the relevant passages in the United Nations *Treaty Series* should be included in a footnote, and secondly, that the first sentence should be amended to read: "In addition to the General Convention and the Specialized Agencies Convention, headquarters agreements have been concluded between the United Nations or the specialized agency concerned on the one hand, and the various States on whose territory headquarters are maintained on the other hand".

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

9. Mr. ROSENNE proposed that the first sentence should read "Pursuant to Article 105 of the Charter and corresponding provisions applicable to the specialized agencies, the privileges and immunities . . .".

10. He also pointed out that the words "Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, of 1946" were redundant. He proposed that they should be replaced by the words "headquarters agreements referred to in paragraph (7) above".

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraphs (10) to (14)

Paragraphs (10) to (14) were approved.

Paragraphs (15) and (16)

11. Mr. KEARNEY asked whether, in view of Mr. Rosenne's comment on paragraph (6), it was necessary to cite the individual authors.

12. Mr. ROSENNE said that he would not object to deleting paragraph (15) altogether, though he felt that it was logical to include those quotations since they showed how the Commission had reached its conclusions.

13. Mr. TSURUOKA suggested that the first sentence of paragraph (15) should be retained and the rest deleted. It would then show the general trend in legal theory without going into detail.

14. Mr. ROSENNE proposed that paragraph (15) should be combined with paragraph (16) and that all the quotations in those two paragraphs should be deleted.

It was so agreed.

The combined paragraphs (15) and (16), as amended, were approved.

Paragraph (17)

Paragraph (17) was approved.

COMMENTARY TO ARTICLE 68 (Status of the Head of State and persons of high rank)

15. Mr. KEARNEY (Chairman of the Drafting Committee) said it had been found unnecessary to make any changes in article 68. Changes had been made in articles 69, 74 and 77, and the Drafting Committee was proposing new articles 76 *bis*, 77 *bis*, 81 *bis* and 82 *bis*.

16. Mr. ROSENNE proposed that the words "of the United Nations and corresponding general representative organs of the specialized agencies" should be added at the end of the fourth sentence, reading "For instance, such high level representation is quite common in delegations to the General Assembly". He further proposed that after that sentence the following passage should be added:

"also, Article 28, paragraph 2, of the Charter provides as follows:

"The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative."

It was so agreed.

The commentary to article 68, as amended, was approved.

COMMENTARY TO ARTICLE 69 (General facilities, assistance by the Organization and inviolability of archives and documents)

The commentary to article 69 was approved.

COMMENTARY TO ARTICLE 70 (Premises and accommodation)

The commentary to article 70 was approved.

COMMENTARY TO ARTICLE 70-B (Inviolability of the premises)

17. Mr. ROSENNE proposed that the words "A similar decision" in footnote 41 should be replaced by the words "Such a decision".

It was so agreed.

The commentary to article 70-B, as amended, was approved.

COMMENTARY TO ARTICLE 71 (Exemption of the premises of the delegation from taxation)

The commentary to article 71 was approved.

COMMENTARY TO ARTICLE 72 (Freedom of movement)

The commentary to article 72 was approved.

COMMENTARY TO ARTICLE 72 bis (Freedom of communication)

The commentary to article 72 bis was approved.

COMMENTARY TO ARTICLE 72 ter (Personal inviolability)

The commentary to article 72 ter was approved.

COMMENTARY TO ARTICLE 72 quater (Inviolability of the private accommodation)

The commentary to article 72 quater was approved.

COMMENTARY TO ARTICLE 73 (Immunity from jurisdiction)

The commentary to article 73 was approved.

COMMENTARY TO ARTICLE 74 (Waiver of immunity)

The commentary to article 74 was approved.

COMMENTARY TO ARTICLE 75 (Exemption from dues and taxes)

The commentary to article 75 was approved.

COMMENTARY TO ARTICLE 76 (Exemption from customs duties and inspection)

The commentary to article 76 was approved.

COMMENTARY TO ARTICLE 76 bis (Exemption from social security legislation, personal services and laws concerning acquisition of nationality)

The commentary to article 76 bis was approved.

COMMENTARY TO ARTICLE 77 (Privileges and immunities of other persons)

The commentary to article 77 was approved.

COMMENTARY TO ARTICLE Z (Privileges and immunities in case of multiple functions)

The commentary to article Z was approved.

COMMENTARY TO ARTICLE 78 (Duration of privileges and immunities)

The commentary to article 78 was approved.

COMMENTARY TO ARTICLE 78 bis (Property of a member of a delegation or of a member of his family in the event of death)

The commentary to article 78 bis was approved.

COMMENTARY TO ARTICLE 79 (Transit through the territory of a third State)

The commentary to article 79 was approved.

COMMENTARY TO ARTICLE 80 (Non-discrimination)

The commentary to article 80 was approved.

COMMENTARY TO ARTICLE 81 (Respect for the laws and regulations of the host State)

18. Mr. USHAKOV said he thought that the commentary to articles 81 and 81 bis should explain that the Commission intended to put those articles in a separate section when it considered them on second reading, because they did not concern privileges and immunities.

19. Mr. ROSENNE said that, in the interests of symmetry, Part II should be divided into four sections, in the same way as Part II of the draft articles on permanent missions. He therefore proposed that article 81 should be preceded by the heading "Section 3: Conduct of the delegation and its members".

It was so agreed.

The commentary to article 81 was approved.

COMMENTARY TO ARTICLE 81 bis (Professional activity)

The commentary to article 81 bis was approved.

COMMENTARY TO ARTICLE 82 (End of the functions of a member of a delegation)

The commentary to article 82 was approved.

COMMENTARY TO ARTICLE 82 bis (Facilities for departure)

20. Mr. ROSENNE proposed that a commentary to article 82 bis should be inserted, on the lines of paragraph 2 of the commentary to article 48. The commentary would read: "The Commission considered the possibility of including in the draft, as a counterpart to article 82 bis, a provision on the obligation of the host State to allow members of delegations to enter its territory to take up their posts. However, in view of the decision taken

at the twenty-first session,¹ the Commission postponed its decision on the matter, in the context of Part IV, until the second reading of the draft".

It was so agreed.

The commentary to article 82 bis proposed by Mr. Rosenne was approved.

COMMENTARY TO ARTICLE 83 (Protection of premises and archives)

The commentary to article 83 was approved.

Chapter IV

STATE RESPONSIBILITY

21. The CHAIRMAN invited the Commission to consider chapter IV of the draft report (A/CN.4/L.159).

22. Mr. AGO said that, throughout the English text, the expression "internationally wrongful act" would be used to render the French "*acte illicite international*".

Paragraphs 1 and 2

Paragraphs 1 and 2 were approved.

Paragraph 3

23. Mr. KEARNEY suggested that the last three sentences of sub-paragraph (c), beginning with the words "Consideration of the various kinds of obligation . . ." should be deleted.

24. Mr. AGO said that the passage was useful because it reiterated essential points of agreement.

25. The CHAIRMAN said that if there were no further comments he would assume that the Commission agreed to retain the passage.

It was so agreed.

26. Mr. ROSENNE said that sub-paragraph (a) needed to be expanded. It should say that the Commission intended to confine its study to the responsibility of States towards States. It was necessary to exclude not only the responsibility of organizations towards States, but also that of States towards organizations.

27. Mr. AGO said it was only for the time being that the Commission had excluded from its study the responsibility of subjects of international law other than States. To restrict the topic of State responsibility as Mr. Rosenne proposed would be to prejudge the Commission's future position on the possibility of a State which had committed an internationally wrongful act against another State being responsible, for example, to the United Nations.

28. Mr. ROSENNE said he had very strong reservations on the idea just suggested by Mr. Ago. The Commission could not consider the responsibility of States

towards organizations without also studying the responsibility of organizations towards States.

29. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph 3 without change.

Paragraph 3 was approved.

Paragraph 4

Paragraph 4 was approved.

Paragraph 5

30. Mr. NAGENDRA SINGH proposed that, in the third sentence, the word "actual" before the word "principle" should be deleted.

It was so agreed.

Paragraph 5, as amended, was approved.

Paragraphs 6 and 7

Paragraphs 6 and 7 were approved.

Paragraph 8

31. Mr. ROSENNE proposed that the last two sentences should become a separate paragraph.

It was so agreed.

Paragraph 8 was approved with that change.

Paragraph 9

32. Mr. REUTER proposed that, in the last sentence of paragraph 9, the words "It is accepted that" should be deleted, and the word "possibly" should be replaced by the word "perhaps". That was only a drafting amendment. The Commission had not ruled out the possibility of responsibility towards the international community as a whole, but it had not discussed that difficult subject, which it might study in detail later.

It was so agreed.

Paragraph 9, as amended, was approved.

Paragraph 10

Paragraph 10 was approved.

Paragraph 11

33. Mr. USHAKOV, noting that the first sentence of paragraph 11 stated the opinion of the majority of the Commission, requested that it should also mention the contrary opinion held by some members. He proposed that the following sentence be added at the end of paragraph 11: "However, some members expressed doubt about the existence of this concept in international law".

It was so agreed.

Paragraph 11, as amended, was approved.

Paragraph 12

34. Mr. ROSENNE made the following proposals: in the second sentence, the concluding words "the idea of an omission as well as of an act" should be replaced by the words "the idea of an act of commission as well as

¹ See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 9*, p. 17, commentary to article 48, para. (2).

an act of omission”; in the penultimate sentence, the concluding words “that would be employed” should be replaced by “the Commission intends to employ”; in the last sentence, the words “were” and “was” should be replaced by “are” and “is” respectively and the words “it would be possible” should be replaced by “it will then be possible”.

It was so agreed.

Paragraph 12, as amended, was approved.

Paragraph 13

35. The CHAIRMAN proposed that, in the first sentence, the word “both” should be introduced before the words “a subjective element”.

It was so agreed.

36. Mr. REUTER proposed that the fourth sentence of the paragraph should be replaced by the following: “This will obviate the ambiguities inherent in the notions of imputation and imputability, which can have entirely different connotations in certain internal systems of criminal law”.

It was so agreed.

37. Mr. ROSENNE proposed that, throughout the paragraph, the words “municipal law” should be replaced by “internal law”.

It was so agreed.

Paragraph 13, as amended, was approved.

Paragraph 14

38. The CHAIRMAN proposed that paragraph 14 should be split up into three paragraphs: the first would consist of the first two sentences, the second of the third, fourth and fifth sentences and the third of the last two sentences.

It was so agreed.

39. Mr. ROSENNE proposed that, at the end of the second sentence, the words “under international law” should be introduced after the words “ought not to have done”.

It was so agreed.

40. Mr. KEARNEY proposed that the opening words of the second sentence “It is this expression” should be replaced by the words “This idea”.

It was so agreed.

Paragraph 14, as amended, was approved.

Paragraph 15

41. Mr. ROSENNE proposed that, in the last part of the second sentence, the words “was part and parcel of the law of aliens which” should be replaced by the words “might be part of the rule which”, and that the word “express” before “obligation” should be deleted. In the third sentence, the words “the prerequisites for the affirmation that an internationally wrongful act has been committed” should be replaced by “a condition which is

indispensable for establishing the existence of an internationally wrongful act”.

It was so agreed.

42. Mr. KEARNEY said that the meaning of the expression “subjective right”, which was used in the third sentence, was not clear to him.

43. Mr. AGO replied that the word “subjective” was unnecessary in the English text, since the French expression “*un droit subjectif*” could be adequately rendered in English as “a right”.

44. Mr. KEARNEY proposed that the word “subjective” be deleted from the English text.

45. He also proposed that in the last sentence the words “*inter alia*” should be inserted before the words “for the purpose” and that the concluding words “the existence of an internationally wrongful act” should be replaced by “the determination that an internationally wrongful act has been committed”.

It was so agreed.

Paragraph 15, as amended, was approved.

Paragraph 16

46. The CHAIRMAN proposed that, in the first sentence, the word “entirely” before “agreed” should be deleted.

It was so agreed.

47. Mr. KEARNEY proposed that, in the second sentence, the words “a material rather than a legal capacity” should be replaced by “a physical ability rather than a legal capacity”.

It was so agreed.

48. Mr. YASSEEN proposed that, in the third sentence of the French text, the words “*ont été perplexes quant à l'opportunité*” should be replaced by the words “*ont contesté l'opportunité*”.

It was so agreed.

49. Mr. ROSENNE proposed that the last sentence, with its reference to the new concept of the “delictual capacity” of States, should be dropped.

50. Mr. AGO proposed that the words “what is termed the ‘delictual capacity’ of States” should be replaced by the words “the notion referred to here”.

It was so agreed.

Paragraph 16, as amended, was approved.

Paragraph 17

51. Mr. ROSENNE proposed that, in the first sentence, the word “urged” should be replaced by “encouraged” and the concluding words “his work on the draft” by “the preparation of the draft articles”.

It was so agreed.

Paragraph 17, as amended, was approved.

Chapter IV, as amended, was approved.

The meeting rose at 12.45 p.m.