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Summary record of the 1244th meeting

Topic:
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in breach of the regulations, the legal consequences would be the same as if it was prohibited.

43. Mr. RAMANGASOAVINA suggested that reference should be made to "activities not yet regulated by international law", without specifying whether the regulation entailed prohibition or authorization.

44. Mr. AGO (Special Rapporteur) observed that the effect of a regulation was to make an activity lawful when it was performed in a certain way and wrongful when it was performed in another way. For example, the transport of oil was regulated in such a way that it was lawful in certain cases and wrongful in others, in which responsibility was consequently incurred.

45. Mr. KEARNEY said that, where an activity was regulated, the problem which arose could be a matter of degree. A distinction had to be drawn between prohibited activities and activities which implied the assumption of a risk. The whole problem was that of drawing the dividing line between primary obligations and secondary obligations.

46. Mr. HAMBRO said he thought the purpose of paragraph 26 was to reflect the discussion in the Commission on the important question of what might be called the "moving frontiers" between lawful and wrongful acts. As a result of legal developments, certain actions which were at present lawful might soon become wrongful.

47. The CHAIRMAN speaking as a member of the Commission, said that it might perhaps be better to use a less categorical formula than "activities which international law may not yet have definitively prohibited". Those words were followed by a number of examples, such as activities in the atmosphere and in outer space. Many international lawyers believed that certain activities coming under those headings were already prohibited by contemporary international law.

48. Mr. AGO (Special Rapporteur) proposed that a clear distinction be made between responsibility for an internationally wrongful act and the obligation to stand surety for the possible consequences of lawful activities and other activities which, for the time being, were still lawful, but were on the point of being prohibited.

49. Mr. YASSEEN suggested the wording "activities which are still lawful, but particularly dangerous".

50. Mr. SETTE CÂMARA suggested the wording "certain activities not yet considered illicit under general international law".

51. Sir Francis VALLAT said that he would have no objection to that change of language, but was concerned at the examples given and the controversy surrounding some of them.

52. The CHAIRMAN, speaking as a member of the Commission, said he understood that concern. He suggested that the difficulty be overcome by deleting the words "such as certain maritime activities, activities in the atmosphere or in outer space, and nuclear and other activities, particularly in connexion with the protection of the environment".

53. Mr. KEARNEY supported that suggestion and proposed that the preceding words "or activities which

international law has not yet definitively prohibited" should be replaced by the words "such as those which because of their nature give rise to special hazards".

The meeting rose at 11.50 a.m.

1244th MEETING

Monday, 9 July 1973, at 3.15 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

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

(A/CN.4/L.198)

(continued)

Chapter II

STATE RESPONSIBILITY

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the introduction to chapter II of its draft report (A/CN.4/L.198).

A. INTRODUCTION

Paragraph 26 (continued)

2. The CHAIRMAN reminded the Commission that at the previous meeting, on Mr. Kearney's proposal,¹ it had agreed to replace the word "responsibility" by the word "liability" in the English text of the second sentence, where it related to the consequences of lawful activities.

3. Mr. AGO (Special Rapporteur) proposed that, in the French text, the words "*la responsabilité pour*", in that passage, should be replaced by the words "*l'obligation de réparer*".

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted that proposal.

It was so agreed.

5. The CHAIRMAN reminded the Commission that at the previous meeting Mr. Kearney had also proposed that the last part of the second sentence, from the words "or activities which", should be replaced by the words "such as those which because of their nature give rise to special hazards".²

¹ See previous meeting, para. 37.

² *Ibid.*, para. 53.

6. Mr. USTOR pointed out that it was not only activities giving rise to special hazards that were envisaged, but, in general, all activities which might cause damage, for instance pollution.

7. Mr. AGO (Special Rapporteur) proposed that, in order to cover the ideas of both hazard and damage, the passage in question should read: "especially those which because of their nature give rise to certain hazards".

It was so agreed.

8. Mr. KEARNEY proposed that the word "simultaneously", in the third sentence, should be replaced by the word "jointly", and the word "simultaneous", in the fourth sentence, by the word "joint".

9. Mr. AGO (Special Rapporteur) accepted those changes; in the French text the words "*en même temps*" would be replaced by the word "*ensemble*" and the word "*simultané*" by the word "*conjoint*".

It was so agreed.

Paragraph 26, as amended, was approved.

Paragraph 27

10. Sir Francis VALLAT proposed that the word "merely", in the second sentence, should be deleted.

It was so agreed.

11. Mr. KEARNEY, referring to the expression "responsibility for risk", in the third sentence, observed that the more familiar legal expression was "assumption of risk".

12. Sir Francis VALLAT suggested that the expression "responsibility for risk" should be retained, since it was preceded by the words "so-called", which indicated that it was not used as a precise legal term.

It was so agreed.

13. The CHAIRMAN, speaking as a member of the Commission, proposed the deletion of the word "even", before the words "do so simultaneously but separately", in the last clause of the third sentence.

The proposal was adopted.

14. Mr. KEARNEY proposed that, in the last sentence of paragraph 27, the concluding words "source of that responsibility" should be amended to read "source of 'responsibility'".

It was so agreed.

Paragraph 27, as amended, was approved.

Paragraph 28

15. Sir Francis VALLAT proposed that, in the penultimate sentence, the word "means" should be replaced by the word "intends" and the comma after the word "obligations" should be deleted. Those changes affected the English text only.

Paragraph 28 was approved with those amendments to the English text.

Paragraph 29

16. Mr. KEARNEY proposed that, in the English text of the first sentence, the words "a grading of" should be

replaced by the words "a distinction between" in order to render the French original more accurately.

17. Sir Francis VALLAT proposed that, in the same sentence, the word "consequence" should be put in the plural.

Paragraph 29 was approved with those amendments to the English text.

Paragraph 30.

Paragraph 30 was approved.

Paragraph 31

18. Sir Francis VALLAT proposed that, in the English text of the first sentence, the words "may later take on the matter" should be amended to read "may take later".

19. Mr. KEARNEY observed that, in the English text of the fourth sentence, the words "determine what facts and what circumstances must be established in order to attribute to a State the existence of an internationally wrongful act" did not render the French original accurately. He proposed the following rewording: "determine on the basis of what facts and in what circumstances there exists on the part of the State an internationally wrongful act".

20. In the last sentence, the term "implementation", which was placed between quotation marks, was not a suitable rendering of the original French "*mise en œuvre*".

21. Sir Francis VALLAT proposed that paragraph 31 be approved with the changes to the English text of the first and fourth sentences proposed by Mr. Kearney and himself, and on the understanding that a more suitable rendering would be found for the expression "*mise en œuvre*", which would also be inserted, in brackets, in the English text.

It was so agreed.

Paragraph 32

22. Mr. KEARNEY proposed that paragraph 32 be approved on the understanding that a more suitable rendering than "to provide" would be found for the French "*réunir*" in the fourth sentence.

It was so agreed.

Paragraph 33

23. The CHAIRMAN, speaking as a member of the Commission, observed that the explanation of article 3 was not as full as the explanations of the other articles. He suggested that the conditions for the existence of a wrongful act by the State should be specified.

24. Mr. AGO (Special Rapporteur) agreed. He proposed that, in the sentence dealing with article 3, the words "the conditions" should be replaced by the words "the two elements, subjective and objective,".

It was so agreed.

Paragraph 33, as amended, was approved.

Paragraph 34

25. Mr. KEARNEY proposed that, in the second sentence, the words "to clear away certain theoretical difficulties caused basically by incorrect premises" should be replaced by the more modest formula: "to take into account certain theoretical difficulties".

26. He further proposed that, in the fifth sentence, the opening words "It will next be seen that other acts" should be amended to read: "The Commission will then examine whether other acts".

27. Mr. AGO (Special Rapporteur) accepted those changes. In the first amendment, the words "to take into account" would be rendered in French by "*tenir compte*". In the second, the French text would read: "*La Commission examinera ensuite si d'autres comportements...*".

28. Sir Francis VALLAT proposed that, in the sixth sentence, the words "whether of all these different types of conduct, conduct adopted in certain particular conditions" should be replaced by the words "whether conduct falling under all these different categories in certain particular conditions". The purpose of that change was to make it clear that the reference was to the author, and not to the nature, of the conduct.

29. Mr. AGO (Special Rapporteur) accepted that proposal, which affected only the English text. The meaning was clear in the French original.

30. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph 34 with the amendments proposed by Mr. Kearney and Sir Francis Vallat.

It was so agreed.

Paragraph 35

31. Mr. KEARNEY proposed that, in the last sentence, the opening words "In connexion with" should be replaced by the words "As a corollary to".

32. In the interests of clarity he further proposed that the words "but that these factors are irrelevant to the attribution of its conduct to the State" should be deleted and that the same idea, should be transferred to the first part of the sentence, which would then read: "... states that for purposes of attribution, it is immaterial whether the organ in question is part of the main branches of the State structure, whether its functions concern international relations or are of a purely internal character, or whether it holds a superior or subordinate position...".

33. Mr. AGO (Special Rapporteur) accepted those changes. The first would be rendered in French by the words: "*En tant que corollaire*". The second was a matter of English drafting which did not affect the French text.

34. The CHAIRMAN said that, if there were no comments, he would take it that the Commission approved paragraph 35 with the changes proposed by Mr. Kearney.

It was so agreed.

Twenty-fifth anniversary of the International Law Commission

STATEMENT BY THE REPRESENTATIVE OF THE SECRETARY-GENERAL

35. The CHAIRMAN welcomed Mr. Stavropoulos, Legal Counsel of the United Nations representing the Secretary-General, and invited him to address the Commission.

36. Mr. STAVROPOULOS (Representative of the Secretary General) said that, when the Commission had been founded twenty-five years previously—an occasion on which he had been present—doubts had been expressed about the future of the new organ, because it was thought in some quarters that governments were not prepared to establish rules binding them in international law. He was happy to note that those doubts had proved groundless and that the Commission had succeeded in drawing up new international laws which had gained general acceptance.

37. In its resolution 2927 (XXVII) the General Assembly had commended the Commission and its distinguished members and had recommended that the Commission's twenty-fifth anniversary should be observed in an appropriate manner by the General Assembly during its twenty-eighth session. He had been informed that the Commission had decided to commemorate that anniversary at its next regular session. He wished to express personally his satisfaction at that decision, which would enable the Secretariat to organize the commemoration in an appropriate manner.

38. He had learned with great interest of the work done by the Commission at its present session. The Commission had a heavy agenda and it had accomplished substantial work in considering the reports of four Special Rapporteurs and adopting several draft articles on three of the topics before it. He had also noted with pleasure that the Commission had found time to hold a general exchange of views on its programme of work, on the basis of the Survey of International Law which had been prepared by the Secretary-General pursuant to a decision of the Commission, and which he had had the honour to introduce to the Commission on the Secretary-General's behalf in 1971.³

39. As they had done in the past, the Office of Legal Affairs and, in particular, its Codification Division would continue to render, within the means at their disposal, all assistance that might be required by the Commission or its Special Rapporteurs.

40. The CHAIRMAN thanked the representative of the Secretary-General for his statement and, on behalf of the Commission, expressed its appreciation of the efficient contribution which the Secretariat had made to the present session.

³ See *Yearbook of the International Law Commission, 1971*, vol. I, p. 360, 1141st meeting, para. 2 *et seq.*

Organization of future work

[Item 7 of the agenda]

41. The CHAIRMAN said that at their last meeting the officers and former chairmen of the Commission had reached a number of conclusions about the organization of the Commission's future work. First, they had decided that at its next session the Commission should concentrate on two major topics: succession in respect of treaties and State responsibility. Secondly, they had agreed that the Commission should attempt to persuade the General Assembly to increase the length of its sessions to 14 weeks or, if that was not possible, to at least 12 weeks. That would enable the Commission to devote six or seven weeks to the topic of succession in respect of treaties and five or six weeks of State responsibility. It would thus be possible to complete two whole topics, rather than merely parts of several topics. The grounds for the extension should be stated clearly in the Commission's report and he, as Chairman, would do his best to persuade the General Assembly of the need for it. It was, of course, desirable that the Commission's next session should not overlap with the preparatory meeting for the coming conference on the law of the sea which was to be held at Santiago.

42. Mr. STAVROPOULOS (Representative of the Secretary-General) said he feared that, if the length of the Commission's session was increased to 14 weeks, some clash with the Santiago conference might be inevitable. However, he acknowledged the pertinence of the argument that such an extension would enable the Commission to complete its work on two major topics.

43. Mr. SETTE CÂMARA asked whether the date for the opening of the next session had been discussed.

44. The CHAIRMAN replied that the normal date for the opening of the Commission's session was the first Monday in May. Several members had expressed the wish that the date should be set as early as possible, but in view of the Santiago conference he thought it would be difficult to start the session earlier than 4 or 5 May 1974.

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

(A/CN.4/L.198 and Add.1)

(resumed)

Chapter II (continued)

A. INTRODUCTION (A/CN.4/L.198)

Paragraphs 36 and 37

Paragraphs 36 and 37 were approved.

Paragraph 38

45. Mr. KEARNEY proposed that the beginning of the second sentence should be amended to read: "In principle, for the purposes of State responsibility, section 8 excludes the possibility...".

Paragraph 38 was approved with that amendment.

Paragraph 39

46. Mr. AGO (Special Rapporteur), referring to the second sentence, said that in his opinion the word "violation" was an incorrect translation of the French word "infraction".

After a brief discussion in which Mr. AGO, the CHAIRMAN, Sir Francis VALLAT and Mr. SETTE CÂMARA took part, it was decided to replace the word "violation" in the English text by the words "breach of obligation".

47. Mr. KEARNEY proposed that the fourth sentence should be amended to read as follows: "It will first be necessary to examine whether the source of the international legal obligation (customary, treaty or other) had any implication when it comes to determining whether the breach is an internationally wrongful act". He further proposed that the definite article "The" at the beginning of the sixth sentence should be replaced by the indefinite article "An".

It was so agreed.

48. Sir Francis VALLAT pointed out that, if the words "the violation of an international obligation" were replaced by "breach of obligation", that would necessarily involve a number of consequential amendments to the remainder of the paragraph.

49. Mr. AGO (Special Rapporteur) suggested that wherever the word "infraction" appeared in the French text it should be translated by "breach".

It was so agreed.

Paragraph 39, as amended, was approved.

Paragraph 40

50. Mr. AGO (Special Rapporteur) proposed that, in the first sentence, the words "criteria proposed" should be replaced by "criteria followed".

51. Sir Francis VALLAT said that, for criteria, the word "applied" would be more appropriate than "followed".

It was so agreed.

Paragraph 40, as amended, was approved.

Paragraphs 41 to 46

Paragraphs 41 to 46 were approved.

Section A of chapter II of the draft report, as amended, was approved.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (A/CN.4/L.198/Add.1)

Chapter I. General principles

Introductory paragraph

52. Mr. USTOR proposed that the third sentence should be amended to read: "The term 'general principles' is used in this context as meaning rules of the most general character applying to the draft articles as a whole". He further proposed that the next sentence should be amended to read: "Other expressions such as

'fundamental rules' or 'basic principles' appear in other chapters of the draft articles as meaning rules having a less general character but still of fundamental importance".

It was so agreed.

53. Sir Francis VALLAT proposed that the word "clearly" in the fifth sentence should be deleted.

It was so agreed.

The introductory paragraph of chapter I, as amended, was approved.

Commentary to article 1

(Responsibility of a State for its internationally wrongful acts)

Paragraph (1)

54. Mr. SETTE CÂMARA, supported by Mr. AGO, proposed that the word "classifies" should be replaced by the word "considers".

Paragraph (1) was approved with that amendment.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

55. Mr. KEARNEY said he had objections of principle to the words "the accomplishment by a State of any internationally wrongful act" in the first sentence; such an act could hardly be described as an "accomplishment".

56. The CHAIRMAN suggested that the word "accomplishment" should be replaced by the word "commission".

It was so agreed.

57. Sir Francis VALLAT said he failed to understand the meaning of the eighth sentence which read: "The obligation to make the reparation would thus be no more than a subsidiary duty placed, by the law in municipal law and by a possible agreement in international law, between the wrongful act and the application of coercion". He suggested that the Secretariat should check that wording against the original French text.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

58. Mr. KEARNEY said he was not sure what the subject of the first sentence was. Was it "the unanimity of views" or "the existence of the principle"?

59. The CHAIRMAN suggested that the sentence would be clearer if the first phrase was amended to read: "... the unanimity of views that prevails in State practice...".

Paragraph (7) was approved with that amendment.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were approved.

Paragraph (12)

60. Mr. KEARNEY said he had not realized that in accepting article 1 the Commission had also accepted the thesis propounded in paragraph (12). He hesitated to accept the conclusion stated in the third sentence, because he did not think that the matter had ever been discussed by the Commission.

61. Mr. AGO (Special Rapporteur) said that the Commission had discussed that point at length and some members had even proposed that the words "except in certain circumstances" should be added at the end of article 1; they had dropped that addition after receiving an assurance that those circumstances had the effect of precluding not only responsibility, but also wrongfulness.⁴

62. Mr. THIAM said that the Commission had not discussed the question thoroughly and had left it for further consideration when it came to examine the provision specifying the circumstances in which responsibility was not incurred.

63. Mr. YASSEEN said it had been agreed in the Commission that the circumstances in question precluded wrongfulness, not responsibility.

64. Mr. AGO (Special Rapporteur) considered that it was that aspect of the matter which should now be stressed in the report. It was, of course, true that the circumstances in question would have to be considered specifically later on.

65. Mr. BARTOŠ said that those circumstances gave the measure of the State's responsibility. They made it possible, for example, to determine the extent to which the injured State had given its consent. In the past it had been possible for a State to relinquish its right to sovereignty; that would now be contrary to the Charter of the United Nations. However, since the circumstances in question were to be considered later, the Commission should not at the present stage, adopt a form of words which implied that the question had been finally settled.

66. Mr. KEARNEY said he was concerned about the type of case in which there might be a plurality of causes of the injury sustained. One of the causes might be excusable, while another might not. There were also situations in which there could be contributory factors to fault on both sides.

67. The CHAIRMAN suggested that Mr. Kearney's difficulty might be overcome by adding some such sentence as "Some members of the Commission were of a different opinion".

68. Mr. AGO (Special Rapporteur), referring to the objections raised by Mr. Thiam and Mr. Bartoš, proposed that the words "insofar as they affected the matter" should be inserted in the third sentence after the words "the existence of those circumstances". Mr. Bartoš had, indeed, appeared to be thinking of cases in which the circumstances in question would perhaps have no effect.

⁴ See 1204th meeting, para. 11.

69. The enumeration of the circumstances had not been drawn up by the Commission; it had been gleaned from the literature.

70. Mr. USHAKOV proposed that, after the third sentence, a new sentence should be inserted reading: "The real effect of those circumstances will be considered by the Commission at a later stage".

The meeting rose at 6.30 p.m.

1245th MEETING

Tuesday, 10 July 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

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(A/CN.4/L.198/Add.1-5; A/CN.4/L.199)

(continued)

Chapter II

STATE RESPONSIBILITY

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (continued)

Commentary to article 1

(Responsibility of a State for its internationally wrongful acts) (A/CN.4/L.198/Add.1)

Paragraph (12) (continued)

1. Mr. AGO (Special Rapporteur) proposed that, in order to meet the objection raised by Mr. Kearney at the previous meeting,¹ the words "felt bound to reject" in the first sentence should be replaced by the words "felt unable to accept" and that the word "etc." at the end of the sentence should be deleted.

It was so agreed.

2. Mr. AGO (Special Rapporteur), referring to the comments made by Mr. Thiam and Mr. Bartoš at the previous meeting,² said that the second sentence of paragraph (12) expressed the opinion of certain writers, not that of the Commission, and should therefore be retained. He proposed that the rest of the paragraph should be replaced by a new text, which he read out in French, and suggested that he should hand that text to the Secretariat for translation into the other languages.

It was so agreed.

Paragraph (12), as amended, was approved.

¹ See para. 60.

² See paras. 62 and 65.

Paragraph (13)

3. Mr. AGO (Special Rapporteur) proposed that the words "international responsibility" in the second sentence should be placed in inverted commas.

Paragraph (13) was approved with that amendment.

Paragraph (14)

Paragraph (14) was approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2

(Possibility that every State may be held to have committed an internationally wrongful act)

(A/CN.4/L.198/Add.2)

Paragraph (1)

4. Mr. KEARNEY said that the last part of the last sentence was imprecise. The reference should be, not to "its conduct", that was to say the conduct of the State in question, but to the conduct of a State in general. He therefore proposed that the word "its" before "conduct" should be deleted and that the words "if committed by any State" should be inserted after the words "considered internationally wrongful".

Paragraph (1) was approved with those amendments.

Paragraph (2)

5. Mr. SETTE CÂMARA proposed that the unsatisfactory metaphor "States come of age" should be dropped from the sixth sentence, which should be reworded to read: "States establish themselves as equal members of the international community as soon as they achieve an independent and sovereign existence".

Paragraph (2) was approved with that amendment.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

6. Mr. KEARNEY proposed that the word "evade", at the end of the second sentence, should be replaced by the word "escape". That change would affect the English text only.

Paragraph (4) was approved with that amendment to the English text.

Paragraph (5)

7. Mr. HAMBRO proposed that, in the first sentence, the words "à avoir été" should be deleted from the French text, as they were unnecessary. That change would not affect the text in other languages.

It was so agreed.

8. Mr. KEARNEY said that the last two sentences of the paragraph did not adequately express the real position. The case referred to in the previous sentences did not represent an exception to the principle that every internationally wrongful act of a State entailed the international responsibility of that State. The real question