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Summary record of the 1245th meeting

Topic:
Other topics

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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.

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

(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

was whether the federal State or the member state, or both of them, would have international responsibility for the wrongful act of the member state.

9. Mr. AGO (Special Rapporteur) said that he did not share Mr. Kearney's view on the problem. However, he proposed that the last two sentences be deleted, which would be the simplest solution.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

10. Mr. THIAM proposed that, in the fifth sentence, the words "committed an act or omission" should be replaced by the words "render themselves guilty of an act or omission".

Paragraph (6) was approved with that amendment.

Paragraph (7)

11. Mr. KEARNEY proposed that, in the first sentence, the words "circumstances precluding wrongfulness" should be amended to read "circumstances which might preclude wrongfulness". That amendment would be consistent with the changes already made in the commentary to article 1.

Paragraph (7) was approved with that amendment.

Paragraph (8)

Paragraph (8) was approved.

Paragraph (9)

12. Mr. SETTE CÂMARA proposed that the word "evading", in the first sentence, should be replaced by the word "escaping". That change would affect the English text only.

It was so agreed.

13. Mr. KEARNEY proposed that, in the seventh sentence, the words "whatever the State" should be expanded so as to convey the idea that the conduct of the State would be regarded as an internationally wrongful act regardless of whether the State was large or small, new or old.

14. Sir Francis VALLAT suggested that the point might be met by using some such wording as "whatever the strength or stature of the State".

15. Mr. AGO (Special Rapporteur) said that an expression of that type would perhaps be too specific. The original French wording "*quel que soit l'Etat*" adequately rendered Mr. Kearney's idea.

16. The CHAIRMAN, speaking as a member of the Commission, proposed that the words "whatever its conditions" should be used in the English text; the French original would remain unchanged.

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

Paragraph (10) was approved.

Paragraph (11)

17. Sir Francis VALLAT proposed that, in the last sentence, the words "the wrong idea" should be replaced by the words "the wrong impression". That change would affect the English text only.

Paragraph (11) was approved with that amendment to the English text.

The commentary to article 2, as amended, was approved.

Commentary to article 3

(Elements of an internationally wrongful act of a State)

(A/CN.4/L.198/Add.3)

Paragraph (1)

18. Sir Francis VALLAT said he wished to make a reservation regarding the description, in the last sentence, of the "subjective element" as consisting of "conduct that must be capable of being attributed not to the human being or collectivity of human beings which has actually engaged in it, but to the State as a subject of international law". As it stood, that passage could be read as excluding the possibility of personal liability once the conduct in question was attributed to the State. He wished to make it clear that there were cases in which conduct attributed to the State as a subject of international law could be attributed to individuals as well.

19. Mr. HAMBRO supported those remarks.

20. Mr. AGO (Special Rapporteur) said that in his opinion no change should be made in the text of the commentary. The general purpose of the article was to attribute to the State wrongful conduct which was physically the act of human beings.

21. The CHAIRMAN noted that no proposal for amendment was being pressed. He would therefore take it that the Commission agreed to approve paragraph (1) as it stood.

It was so agreed.

Paragraph (2)

22. Mr. KEARNEY proposed that paragraph (2) be deleted. Its contents largely duplicated material already contained in the commentaries to articles 1 and 2.

23. Mr. AGO (Special Rapporteur) said that the exceptional circumstances in which an act should not be characterized as internationally wrongful had in fact been mentioned during the discussion on each of the three articles. Nevertheless, he saw no objection to the proposed deletion.

24. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to delete paragraph (2) from the commentary to article 3.

It was so agreed.

Paragraph (3)

25. Mr. SETTE CÂMARA proposed the deletion of the word "these" before the words "terminological

questions” in the first sentence. That amendment would affect the English text only. The French original did not use the equivalent of the word “these”, which gave the false impression that the opening words of paragraph (3) referred back to the contents of the now deleted paragraph (2).

Paragraph (3) was approved with that amendment.

Paragraph (4)

26. Sir Francis VALLAT said that the concluding words of the ante-penultimate sentence, “material or psychological imputation”, were not clear. He proposed that the word “material” should be replaced by the word “factual”. That change would affect the English text only.

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

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

27. Mr. KEARNEY found the opening statement of the second sentence excessive. Instead of “The State is an absolutely real organized entity”, it would be sufficient to say “The State is a real entity”.

28. Mr. AGO (Special Rapporteur) considered that the word “organized” should be retained as it supplied a useful shade of meaning. He proposed that, to meet Mr. Kearney’s objection, the word “absolutely” should be deleted.

Paragraph (6) was approved with the amendment proposed by the Special Rapporteur.

Paragraph (7)

29. Mr. KEARNEY said that the expression “natural causality”, used in the first, second and third sentences, was quite unfamiliar to lawyers in his country and would also be difficult for many other readers to understand.

30. Mr. AGO (Special Rapporteur) explained that the expression “*causalité naturelle*” had been used in contradistinction to purely legal causality, which was a fiction created by the law.

31. Mr. KEARNEY suggested that, in the English text only, the words “natural causality” should be replaced throughout by the words “factual causality”.

32. Mr. QUENTIN-BAXTER proposed that Mr. Kearney’s formula should be used in the English text, followed by the French expression “*causalité naturelle*” in brackets. The useful idea expressed in the original would then become more familiar to English-speaking lawyers.

Paragraph (7) was approved with the amendment to the English text proposed by Mr. Quentin-Baxter.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were approved.

Paragraph (11)

33. Mr. KEARNEY proposed that the third, fourth and fifth sentences be deleted. As a consequential amend-

ment, the words “for its part”, after the opening words “The Commission”, would be dropped from the sixth sentence.

34. He saw no reason why the very speculative theory of abuse of rights should be discussed in the commentary. It was impossible to deal in such a short passage with that very difficult problem, which raised the whole question whether it was possible to have rights without corresponding obligations.

35. Mr. AGO (Special Rapporteur) pointed out that in his report he had not mentioned the theory of abuse of rights. But the problem had been broached in the Commission’s discussions and he had felt bound to mention it in the commentary. However, he would not oppose the proposed deletions.

Paragraph (11) was approved with the amendments proposed by Mr. Kearney.

Paragraph (12)

36. Sir Francis VALLAT said that the meaning of the expression “an internationally wrongful act of conduct”, used in the fourth sentence, was not at all clear, especially in the context of article 3.

37. Mr. AGO (Special Rapporteur) observed that the problem arose from the difficulty of translating into English the original French expression *un fait internationalement illicite de comportement*.

38. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraph (12) on the understanding that the Languages Division would try to find a better English rendering for that French expression.

It was so agreed.

Paragraph (13)

39. Mr. KEARNEY said that he was not at all sure of the accuracy of the statement in the fourteenth sentence that, if an international labour convention was violated, the breach thus committed did not “cause any prejudice of an economic nature to the other countries parties to the convention”. A breach of that kind might give the defaulting State an economic advantage by enabling it to produce goods more cheaply.

40. Mr. AGO (Special Rapporteur) said that the fourteenth sentence should be read in conjunction with the previous sentence, which referred to “the conventions on human rights or most of the international labour conventions”. The idea intended was that a State which violated a human right, such as the freedom of speech or association, did not normally derive an economic advantage from that breach. He proposed that the words “does not cause any prejudice” should be amended to read “does not normally cause any prejudice”.

Paragraph (13) was approved with that amendment.

Paragraph (14)

41. Mr. SETTE CÂMARA proposed that, in the first sentence, the quotation marks round the word “schematic” should be deleted.

Paragraph (14) was approved with that amendment.

Paragraph (15)

Paragraph (15) was approved.

Paragraph (16)

42. Mr. KEARNEY said that there was a risk that English-language readers, and in particular Americans, might have difficulty in understanding the third sentence, in which terms were used in a sense different from that attached to them in Anglo-Saxon law. He acknowledged, however, that it would be difficult to alter the form of the sentence without altering its substance.

43. Mr. AGO (Special Rapporteur) suggested that the Commission might accept paragraph (16) on the understanding that the meaning of the third sentence would be made clearer in the English text.

Paragraph (16) was approved on that understanding.

The commentary to article 3, as amended, was approved.

Commentary to article 4

(Characterization of an act of a State
as internationally wrongful)

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

The commentary to article 4 was approved without comment.

Chapter II

The act of the State according to international law

Introductory commentary (A/CN.4/L.198/Add.5)

The introductory commentary to chapter II was approved without comment.

44. The CHAIRMAN said that since the next part of chapter II, containing the commentary to article 5 (A/CN.4/L.198/Add.6), was so far available only in French, he would invite the Commission to take up chapter IV on the most-favoured-nation clause (A/CN.4/L.199).

Chapter IV

THE MOST-FAVOURLED-NATION CLAUSE

A. INTRODUCTION (A/CN.4/L.199)

1. Summary of the Commission's proceedings

Paragraphs 1 to 16

Paragraphs 1 to 16 were approved.

Paragraph 17

45. Mr. AGO proposed that, in the French text of the third sentence, the words "*matière de la clause*" should be amended to read "*matière couverte par la clause*".

Paragraph 17 was approved with that amendment to the French text.

Paragraph 18

46. Mr. USTOR (Special Rapporteur) reminded the Commission that during the discussion Mr. Tamme, as General Rapporteur, had suggested that the Special Rapporteur should submit a note to the Commission setting out the problems with which he proposed to deal in future draft articles.³ That matter was dealt with in paragraph 18.

47. Mr. TSURUOKA asked whether it was correct to give the name of the member in question in the foot-note to paragraph 18.

48. The CHAIRMAN said it was the established practice of the Commission, in its report, to refer simply to a "member" or "members" and not to give their names. He suggested that the beginning of the first sentence should be amended to read: "The General Rapporteur suggested. . .", and that the foot-note should give only the symbol of the relevant summary record.

It was so agreed.

Paragraph 18, as amended, was approved.

Paragraph 19

Paragraph 19 was approved.

2. Scope of the draft articles

Paragraphs 20 to 23

Paragraphs 20 to 23 were approved.

*3. The most-favoured-nation clause
and the principle of non-discrimination*

Paragraph 24

49. Mr. AGO, referring to the French text of the second sentence, said that there was no "*droit à la non-discrimination*", but a principle of non-discrimination. The word used in the English text was "claim". He therefore suggested that the sentence should be amended to read: "*Elle s'est demandé, en particulier, si le principe de la non-discrimination n'impliquait pas la généralisation du traitement de la nation la plus favorisée*".

50. Mr. BARTOŠ said that, in Soviet doctrine and in that of a few other countries, there was a right to non-discrimination, and it had been violated by States on several occasions.

51. Mr. USTOR (Special Rapporteur) said that he accepted the wording proposed by Mr. Ago. However, the fact that a principle existed did not preclude the existence of a right.

52. The CHAIRMAN noted that the members of the Commission accepted the wording suggested by Mr. Ago. The Secretariat would find a corresponding form of words for the English text.

Paragraph 24, as amended, was approved.

Paragraphs 25 to 27

Paragraphs 25 to 27 were approved.

³ See 1217th meeting, para. 76.

4. *The most-favoured-nation clause and the different levels of economic development*

Paragraphs 28 and 29

Paragraphs 28 and 29 were approved.

Paragraph 30

53. In reply to a question put by Mr. AGO, Mr. USTOR (Special Rapporteur) said that treaties sometimes contained a most-favoured-nation clause specifying certain particular advantages which could not be claimed by the beneficiary State. Those were exceptions which would have to be specified in detail. But there was also the problem of customary rules of international law which had to be taken into account when including a most-favoured-nation clause in a treaty. That applied, for example, to treaties concluded with developing countries, which might enjoy certain trade advantages that could not be claimed by a developed country.

54. Mr. TABIBI supported that view and cited as an example the 1965 Convention on Transit Trade of Land-locked States.⁴

55. Mr. USTOR (Special Rapporteur) said that Convention was a good example of an exceptional case in which preferential treatment could not be claimed by a beneficiary State. Most exceptions would in fact be of a conventional nature, although it was not always clear whether they were based on a convention or on some customary rule of international law.

Paragraph 30 was approved.

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

The meeting rose at 1 p.m.

⁴ United Nations, *Treaty Series*, vol. 597, p. 42.

1246th MEETING

Tuesday, 10 July 1973, at 3.30 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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

(A/CN.4/L.195 and Add.1; A/CN.4/L.199/Add.1)

(continued)

Chapter IV

THE MOST-FAVOURLED-NATION CLAUSE

(continued)

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

B. DRAFT ARTICLES ON THE MOST-FAVOURLED-NATION CLAUSE (A/CN.4/L.199/Add.1)

Commentary to article 1
(Scope of the present articles)

The commentary to article 1 was approved.

Commentary to article 2
(Use of terms)

The commentary to article 2 was approved.

Commentary to article 3
(Clauses not within the scope of the present articles)

The commentary to article 3 was approved.

Commentary to article 4
(Most-favoured-nation clause)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

Paragraph (6)

2. Mr. USTOR (Special Rapporteur) drew the Commission's attention to the explanations given in brackets in paragraph (6).

Paragraph (6) was approved.

Paragraphs (7) to (10)

Paragraphs (7) to (10) were approved.

Paragraph (11)

3. Sir Francis VALLAT proposed that the words "attached to", in the second sentence, should be replaced by the words "in a particular relationship with".

Paragraph (11) was approved with that amendment.

Paragraph 12

4. Mr. AGO proposed that the words "is a constitutive element of", in the first sentence, should be replaced by the words "is the constitutive element of".

Paragraph (12) was approved with that amendment.

Paragraphs (13) to (17)

Paragraphs (13) to (17) were approved.

The commentary to article 4, as amended, was approved.

Commentary to article 5
(Most-favoured-nation treatment)

Paragraph (1)

5. Mr. USHAKOV pointed out that the concept of "nation" had been reintroduced into the Russian expression equivalent to "most-favoured-nation treatment".

6. Mr. USTOR (Special Rapporteur) said that paragraph (1) would be amended accordingly.

Paragraph (1) was approved subject to that amendment.