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Summary record of the 1247th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
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47. Mr. BARTOŠ said that the second sentence did not imply any decisions by the Commission, since it stated that the matters in question had simply been "referred to during the discussions". He therefore opposed its deletion.

48. Mr. USTOR supported Mr. Ushakov's proposal.
The proposal was adopted.

Paragraph 27, as amended, was approved.

Paragraphs 28 and 29

Paragraphs 28 and 29 were approved.

Paragraph 30

49. Sir Francis VALLAT objected to the expression "property belonging to the territory", at the end of the third sentence; in his opinion, a territory could not own property.

50. Mr. RYBAKOV (Secretary to the Commission) said that the Special Rapporteur had wished to draw a distinction between State property situated in the territory and property belonging to a territory which had some measure of legal personality, as Algeria had had.

51. Mr. AGO agreed with Sir Francis Vallat that the expression "property belonging to the territory" was unacceptable.

52. Mr. SETTE CÂMARA endorsed that view.

53. Mr. BARTOŠ said that there were forms of property belonging to a territory, such as territorial waters, which were not property of the State, but were in the public domain in the broad sense of the term.

54. Mr. THIAM said he found it difficult to see what difference there could be between property belonging to the territory and property of territorial authorities or of the State.

55. Mr. USHAKOV proposed the deletion from the last sentence, of the words "has for the time being given up the idea of formulating rules governing all these categories of public property *en bloc* and it".

56. Sir Francis VALLAT proposed that the last sentence should be replaced by the following text: "After full discussion, and on the proposal of the Special Rapporteur, the Commission has decided to begin its study with State property, to which part I of the draft articles is devoted". He reminded the Commission that it had taken that decision after a very long discussion.⁴

Sir Francis Vallat's proposal was adopted.

Paragraph 30, as amended, was approved.

Paragraph 31

Paragraph 31 was approved.

Paragraph 32

57. Mr. AGO proposed that the last part of the first sentence, beginning with the word "namely", should be deleted.

Paragraph 32 was approved with that amendment.

Paragraph 33

Paragraph 33 was approved.

Paragraph 34

Paragraph 34 was approved with some minor drafting amendments.

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

The meeting rose at 6.30 p.m.

1247th MEETING

Wednesday, 11 July 1973, at 10.15 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Hambro, 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.

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

(A/CN.4/L.195/Add.2; A/CN.4/L.198 and Add.6-7; A/CN.4/L.200/Add.1; A/CN.4/L.201)

(continued)

Chapter III

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

(continued)

B. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

1. The CHAIRMAN invited the Commission to examine the commentaries to the draft articles on succession of States in respect of matters other than treaties (A/CN.4/L.195/Add.2).

Commentary to the introduction

The commentary to the introduction was approved without comment.

Commentary to article 1 (Scope of the present articles)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

2. The CHAIRMAN, after reminding the Commission of the changes it had made the previous day in the draft introduction to chapter III of the report (A/CN.4/

⁴ See 1230th meeting, para. 41 *et seq.*

L.195/Add.1), suggested that the penultimate sentence of paragraph 2 should be deleted and that the opening words of the last sentence, "At the same time, the Commission considered" should be replaced by the words "It considered".

Paragraph (2) was approved with those amendments.

Paragraph (3)

Paragraph (3) was approved.

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

Commentary to article 2

(Cases of succession of States covered by the present articles)

The commentary to article 2 was approved without comment.

Commentary to article 3

(Use of terms)

The commentary to article 3 was approved without comment.

Part I.

Succession to State property

Commentary to the title of part I

3. The CHAIRMAN suggested that the Commission should follow up the changes made the previous day in the draft introduction to chapter III of the report (A/CN.4/L.195/Add.1) and replace the commentary to the title of part I by the following text: "As stated above, the Commission decided to consider separately the three categories of public property envisaged by the Special Rapporteur and to begin its study with property in the first category, namely, State property. Part I of these draft articles is therefore concerned with State property."

It was so agreed.

The commentary to the title of part I, as amended, was approved.

Commentary to section 1

(General provisions)

4. After an exchange of views in which Mr. USHAKOV, Mr. AGO and Mr. BARTOŠ took part, the CHAIRMAN suggested that the commentary to section 1 should be deleted, since it was not very clear and duplicated the commentary to article 4.

It was so agreed.

Commentary to article 4

(Scope of the articles in the present Part)

The commentary to article 4 was approved without comment.

Commentary to article 5

(State property)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

5. Sir Francis VALLAT proposed that the heading "Criterion for the determination of State property", before paragraph (2), should be deleted. It did not serve much purpose and interrupted the commentary unnecessarily.

It was so agreed.

6. Mr. USHAKOV referred to the reservations he had expressed during the discussion of article 5.¹ The defect of the provision was that it confused the notion of State property in general with that of State property of the predecessor State. That being so, the commentary to article 5 could not be satisfactory to him.

7. The CHAIRMAN observed that Mr. Ushakov's reservations were duly reflected in paragraph (13) of the commentary.

8. Mr. BARTOŠ said that the Special Rapporteur had sought to show that several criteria could be used to determine State property. One criterion was the fact of belonging to the public domain and another was belonging to the predecessor State. The Special Rapporteur had cited several treaties in that connexion. It could not be said that a general conception of State property existed.

9. Mr. AGO stressed that article 5 referred to State property of the predecessor State only; it obviously had nothing to do with State property of other States. The examples given by the Special Rapporteur were intended to show what property of the predecessor State passed to the successor State. They were not in any way intended to illustrate how State property in general was determined.

10. Sir Francis VALLAT said it was generally recognized that the text of article 5 needed improvement. As it stood, it did not clearly state the intended meaning.

11. He suggested that the first sentence of paragraph (2) of the commentary should be amended to refer to examples of treaty provisions determining State property for the purpose of succession of States. The treaty provisions in question did not define State property in the abstract; what they did was to determine—not to define—what property passed from the predecessor State to the successor State upon a succession.

12. The CHAIRMAN, noting that the general opinion of members of the Commission was that paragraph (2) of the commentary to article 5 should not be changed, suggested that the paragraph should be kept as it stood in the draft.

It was so agreed.

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved.

¹ See 1231st meeting, paras. 22-24.

Paragraph (4)

13. Mr. USHAKOV found the expression "general rule" unsatisfactory. It was not to be expected that a general rule of international law would make it possible to determine State property in general.

14. Mr. AGO agreed with Mr. Ushakov and proposed that the words "No general rule", at the beginning of the paragraph, should be replaced by the words "No generally applicable criteria". He also proposed that the second sentence be deleted; it merely emphasized the mistaken idea to which Mr. Ushakov had drawn attention. The third sentence should begin with the word "Moreover" instead of the word "However".

15. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the changes proposed by Mr. Ago.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

16. Mr. AGO proposed that the first two sentences of the paragraph should be deleted. He did not think the Commission had had to choose between the internal law of the predecessor State and that of the successor State.

17. Mr. USHAKOV said he thought the sentences in question reflected a discussion which had actually taken place in the Commission.

18. Mr. RAMANGASOAVINA warned the members of the Commission against the temptation to prune the draft report too much. The choice in question had been mentioned by the Special Rapporteur more than once.

19. The CHAIRMAN said he thought there would be no harm in deleting the first two sentences, and also the words "in fact" in the third sentence. If there were no objections, he would take it that the Commission accepted those changes.

It was so agreed.

20. Sir Francis VALLAT said that the last sentence, "Such a decision is therefore not covered by these articles", was unsatisfactory in that it referred to articles which were yet to be drafted.

21. Mr. AGO proposed that the sentence should be amended to read: "Such a decision is therefore outside the scope of State succession".

It was so agreed.

Paragraph (5), as amended, was approved

Paragraph (6)

22. Mr. USHAKOV questioned the accuracy of the first sentence. If it referred to the characterization of a piece of State property in general, it was surprising that the successor State should apply its own internal law for that purpose. If it referred to the characterization of a piece of State property of the predecessor State, it was even more surprising that the successor State should apply its own law.

23. The CHAIRMAN said that the sentence did not reflect the opinion of the Commission, but simply recorded an observed fact.

24. Mr. AGO suggested that the sentence should state that in several cases in diplomatic practice the successor State had disregarded the characterization given by the predecessor State and applied its own internal law to determine what property would be State property after the succession. As it stood, paragraph (6) gave the impression that the successor State attributed to the predecessor State property which it had not owned.

25. Mr. BARTOŠ observed that successor States sometimes made a characterization unilaterally, disregarding the characterization given by the predecessor State.

26. Mr. RAMANGASOAVINA pointed out that the cases referred to in paragraph (6) were exceptional. Perhaps it would suffice to say that it was only in cases of dispute that some international tribunals had not taken the internal law of the predecessor State into consideration in characterizing its property as State property.

27. Mr. BARTOŠ supported the formulation proposed by Mr. Ago. He cited as an example the dispute which had arisen between Yugoslavia and France, after the annexation of part of Macedonia, about the status of the railway in that territory as State property.

28. Sir Francis VALLAT said that in the first sentence of paragraph (6) the verb "to categorize" should be replaced by the verb "to characterize". The Commission had decided that the latter term should be used throughout.

29. The CHAIRMAN said that the Secretariat would ensure that the verb "to characterize" was used throughout the draft.

30. Mr. AGO proposed that paragraph (6) should be amended so as to emphasize the exceptional nature of the cases to which it referred. He proposed the following text: "The Commission notes, however, that there are several cases in diplomatic practice where the successor State has not taken the internal law of the predecessor State into consideration in characterizing State property. Some decisions by international courts have done the same in relation to the property in dispute".

Mr. Ago's proposal was adopted.

Paragraph (6), as amended, was approved.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were approved.

Paragraph (9)

31. The CHAIRMAN suggested that the sub-heading before paragraph (9), reading "Text of article 5", and paragraph (9) itself should be deleted. That paragraph was only concerned with the structure of the commentary.

It was so agreed.

Paragraph (10)

Paragraph (10) was approved.

Paragraph (11)

32. After an exchange of views in which Mr. USHAKOV, Mr. BARTOŠ, Mr. AGO, Mr. TSURUOKA and

Mr. RAMANGASOAVINA took part, the CHAIRMAN suggested that the last sentence of paragraph (11) should be deleted, since it was not very clear. Moreover it was stated in the preceding sentence that the Commission proposed to consider whether there was a better expression to designate the whole of a State's tangible and intangible property.

33. Sir Francis VALLAT strongly urged the deletion of the last sentence. The paragraph could very well end with the previous sentence, which indicated that the Commission would endeavour to find a better expression than "property, rights and interests". It was both misleading and unwise to attempt to define that expression.

34. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to delete the last sentence of paragraph (11).

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

35. Mr. AGO said he found the first sentence rather ambiguous. He proposed that it should be amended to read: "In article 5, the expression 'internal law of the predecessor State' refers to rules of the legal order of the predecessor State which are applicable to State property".

The proposal was adopted.

Paragraph (12), as amended, was approved.

Paragraph (13)

Paragraph (13) was approved.

The commentary to article 5, as amended, was approved.

Mr. Castañeda took the Chair.

Chapter II

STATE RESPONSIBILITY

(resumed from the 1245th meeting)

B. DRAFT ARTICLES ON STATE RESPONSIBILITY *(continued)*

Commentary to article 5

(Attribution to the State of the conduct of its organs)
(A/CN.4/L.198/Add.6)

36. Sir Francis VALLAT said that the only problems presented by the commentary to article 5 seemed to be points of translation; he proposed, therefore, that unless questions of substance arose the Commission should merely call the Secretariat's attention to such points.

37. Mr. BARTOŠ said he could accept that procedure provided that the points in question really were only matters of translation.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved without comment.

Paragraph (3)

38. Sir Francis VALLAT said that the word "offences" in the first sentence of the English text was not appropriate;

it might perhaps be replaced by the expression "wrongful acts".

39. Mr. AGO (Special Rapporteur) reminded the Commission that it had been agreed that the French word "*infracción*" should be translated into English as "breach of obligation".²

40. Mr. HAMBRO observed that minor changes in translation often necessitated changes in the original text. If Sir Francis Vallat's suggestion was adopted, that would call for some slight modification of the original French version.

Paragraph (3) was approved.

Paragraphs (4) to (12)

Paragraphs (4) to (12) were approved.

Paragraph (13)

41. The CHAIRMAN, speaking as a member of the Commission, said he doubted whether a person could be described as an organ, especially in administrative law. It would be more normal to speak of the agent of an organ. It was not the organ which acted, but the agent or official. Moreover, those were the terms which the Special Rapporteur had used in describing several cases he had cited: for example, in paragraph (3) of the document under consideration. It was true that the Commission had agreed to use the term "organ", as stated in paragraph (13), but perhaps the Special Rapporteur could find wording to indicate that there was a difference of opinion on that point and that it could also be maintained that the organs was not necessarily the person who committed the act.

42. Mr. BARTOŠ said he shared Mr. Castañeda's view. In most countries, contemporary constitutional law made a distinction between an "organ" and an "agent". In certain cases, the person was merged with the organ—for example, a Head of State or *juge d'instruction*—but not always. The Commission had decided to make a distinction between the two terms and it should abide by that decision.

43. Mr. AGO (Special Rapporteur) said that in practice there was some confusion in the use of the two terms, but judicial decisions and diplomatic practice most often spoke of an "act or omission of an organ". That was tantamount to saying that it was the person having the status of an organ who acted. It would not be wise to introduce distinctions which could only lead to difficulties. However, in order to take account of the opinion of Mr. Castañeda and Mr. Bartoš, he proposed that the following phrase should be inserted after the word "Finally" at the beginning of paragraph 13: "without prejudice to the different meanings which the term 'organ' may have, particularly in the internal public law of different legal systems,".

It was so agreed.

Paragraph (13), as amended, was approved.

The commentary to article 5, as amended, was approved.

² See 1244th meeting, paras. 46-49.

Commentary to article 6
(Irrelevance of the position of the organ
in the organization of the State)
(A/CN.4/L.198/Add.7)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

44. Sir Francis VALLAT proposed that, in the English text, the words "On this view" at the beginning of the second sentence, should be replaced by "On that theory".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) to (17)

Paragraphs (4) to (17) were approved.

The commentary to article 6, as amended, was approved.

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

A. INTRODUCTION (*resumed from the 1244th meeting*)

45. Mr. TORRES-BERNARDEZ (Secretariat), referring to the discussion which had arisen concerning the translation of the French expression "*mise en œuvre*" into English by "implementation" in paragraph 31 of the introduction to the chapter on State responsibility (A/CN.4/L.198),³ said that the same English rendering had been used by the Commission in its 1970 report.⁴ Perhaps, therefore, the term "implementation" might be retained in the English text and followed by the French expression "*mise en œuvre*" in brackets.

It was so agreed.

Chapter I

ORGANIZATION OF THE SESSION
(*resumed from the 1243rd meeting*)

F. LETTER FROM THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION TO THE PRESIDENT OF THE ECONOMIC AND SOCIAL COUNCIL (A/CN.4/L.200/Add.1)

46. The CHAIRMAN drew the Commission's attention to the letter he had prepared, in collaboration with the officers and former chairmen of the Commission, in response to the request received from the Economic and Social Council for comments on the report of the *Ad hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid*.⁵ The text of the letter had been compiled, after careful thought, by a group specially appointed for the purpose and presided over by Mr. Yasseen.

³ See 1244th meeting, paras. 20 and 21.

⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66 (d).

⁵ See 1201st meeting, paras. 1 and 4-6.

47. Mr. BILGE said he did not think the text before the Commission exactly answered the question which had been put to it. The African States wished to know the Commission's opinion on certain specific points.

48. The CHAIRMAN pointed out that the reasons why the Commission had confined itself to general observations were clearly stated in paragraph 3.

49. He suggested that the Commission should approve the conclusions expressed in the letter and decide to transmit it to the President of the Economic and Social Council.

It was so agreed.

Chapter I as a whole, as amended, was approved.

Chapter V

QUESTION OF TREATIES CONCLUDED BETWEEN STATES
AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO
OR MORE INTERNATIONAL ORGANIZATIONS

50. The CHAIRMAN invited the Commission to examine chapter V of its report (A/CN.4/L.201) paragraph by paragraph.

Paragraphs 1 to 7

Paragraphs 1 to 7 were approved.

Paragraph 8

51. Sir Francis VALLAT said that the question of the capacity of international organizations to conclude international agreements was one of the most important questions that had arisen during the discussion. To the best of his recollection, the Special Rapporteur had promised to prepare one or more draft articles on the subject of capacity, and he therefore proposed that a short sentence to that effect should be added at the end of the paragraph.

It was so agreed.

Paragraph 8 was approved subject to that amendment.

Paragraphs 9 and 10

Paragraphs 9 and 10 were approved.

Chapter V as a whole, as amended, was approved.

The meeting rose at 1 p.m.

1248th MEETING

Thursday, 12 July 1973, at 9.30 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

later: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Hambro, 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.