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Summary record of the 1300th meeting

Topic:
Other topics

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appropriate to say that in the last resort all rights applied to individuals, although all treaties were concluded between States and not between individuals.

22. Sir Francis VALLAT (Special Rapporteur) said that a reference to the fact that treaties were concluded between States would not meet the point either. He would, however, be prepared to try to improve the wording of the sentence.

23. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (48) on the understanding that a redraft of the sentence would be submitted by the Special Rapporteur at a later stage.

It was so agreed.

Paragraph (49)

Paragraph (49) was approved.

The commentary to articles 29 and 30, as amended, was approved.

Commentary to article 30 bis

(Questions relating to the validity of a treaty)
(A/CN.4/L.217/Add.8)

Paragraph (1)

24. Sir Francis VALLAT (Special Rapporteur) said that, at the end of the first sentence, the words "of the commentary to articles [29] and [30]" should be inserted before the word "above".

25. In reply to a remark by Mr. KEARNEY, he proposed that the concluding words of the third sentence, "it was necessarily cast in general form", should be replaced by the words: "it was cast in general form, as explained in paragraph (45) of the commentary to articles [29] and [30]".

Paragraph (1) was approved with the amendments proposed by the Special Rapporteur.

Paragraph (2)

Paragraph (2) was approved.

The commentary to article 30 bis, as amended, was approved.

Chapter V

LEGAL PROBLEMS RELATING TO THE NON-NAVIGATIONAL
USES OF INTERNATIONAL WATERCOURSES (A/CN.4/L.219)

Chapter V was approved.

Chapter VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION
(A/CN.4/L.220)

Paragraphs 1 and 2

26. Mr. BILGE said that the phrase "Owing to the lack of time", in the second sentence of paragraph 1 and the second sentence of paragraph 2, was not sufficiently explicit and might even be misleading.

27. Mr. HAMBRO suggested that in both paragraphs the phrase should be replaced by a sentence on the following lines: "Due to the recommendation made by

the General Assembly, in its resolution 3071 (XXVIII), that the Commission should complete its work on the draft articles on succession of States in respect of treaties, the International Law Commission was unable to pursue this matter further during the present session".

28. Mr. USHAKOV said the sentence proposed by Mr. Hambro should be expanded to indicate that at the present session the Commission had considered the topics of State responsibility and treaties concluded between States and international organizations or between two or more international organizations.

29. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve paragraphs 1 and 2 on the understanding that the phrase "Owing to the lack of time" would be replaced by a sentence on the lines indicated by Mr. Hambro and Mr. Ushakov.

It was so agreed.

Paragraphs 3-20

Paragraphs 3-20 were approved with a drafting change in paragraph 19.

Paragraphs 21-27

30. Mr. CALLE Y CALLE proposed that a new paragraph should be inserted before paragraph 21, explaining that the Inter-American Juridical Committee had invited the International Law Commission to be represented by an observer at its 1973 session, but that the then Chairman of the Commission had unfortunately been prevented at the last moment from attending the session and had not had time to request another member of the Commission to replace him.

It was so agreed.

Paragraphs 21-27 were approved.

Paragraphs 28-35

Paragraphs 28-35 were approved.

The meeting rose at 1 p.m.

1300th MEETING

Thursday, 25 July 1974, at 9.40 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

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

(A/CN.4/L.217 and Corr.1; A/CN.4/L.217/Add.10-14;
A/CN.4/L.218/Add.3; A/CN.4/L.223 and Add.1)

(continued)

Chapter III

STATE RESPONSIBILITY

(resumed from the 1297th meeting)

1. The CHAIRMAN invited the Commission to continue its examination of the commentaries to the draft articles on State responsibility.

Commentary to article 9

(Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization) (A/CN.4/L.218/Add.3)

The commentary to article 9 was approved.

Chapter III, as amended, was approved.

Chapter II

SUCCESSION OF STATES IN RESPECT OF TREATIES

(resumed from the previous meeting)

2. The CHAIRMAN invited the Commission to continue its examination of the commentaries to the draft articles on succession of States in respect of treaties.

Commentary to article 18

(Effects of a notification of succession)

(A/CN.4/L.217/Add.10)

Paragraphs (1)-(14)

Paragraphs (1) to (14) were approved.

Paragraph (15)

3. The CHAIRMAN, speaking as a member of the Commission, said that paragraph (15) of the commentary should make it clear that, if the parties so agreed, the treaty could be made operative retroactively from the date of the succession of States.

4. Sir Francis VALLAT (Special Rapporteur) proposed the insertion of the following additional sentence at the end of the paragraph: "If the parties so agree, the operation of the treaty may be made retroactive to the date of the succession of States".

Paragraph (15) was approved with that addition.

Paragraph (16)

Paragraph (16) was approved.

The commentary to article 18, as amended, was approved.

New paragraph added to article 26

(Effects of a notification of succession)

force at the date of the succession of States)¹

5. Sir Francis VALLAT (Special Rapporteur) drew attention to document A/CN.4/L.223/Add.1 setting out an additional paragraph of article 26, which had been omitted from document A/CN.4/L.223 containing the draft articles as adopted in final form by the Drafting Committee. The additional paragraph, to be added at the end of the article 26, read:

3. Sub-paragraph 2(a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

That paragraph served the same purpose as paragraph 3 of article 26bis and paragraph 5 of article 26ter.

Paragraph 3 of article 26 was approved.

Commentary to article 26

(Effects of a uniting of States in respect of treaties in force at the date of the succession of States),

to article 26bis

(Effects of a uniting of States in respect of treaties not in force at the date of the succession of States),

and to article 26ter

(Effects of a uniting of States in respect of treaties signed by a predecessor State subject to ratification, acceptance or approval) (A/CN.4/L.217/Add.11)

6. The CHAIRMAN invited the Commission to consider the commentary to articles 26, 26bis and 26ter paragraph by paragraph.

Paragraph (1)

7. Mr. TAMMES welcomed the statement in the second sentence that the three articles covered the case in which "one State merges with another State even if the international personality of the latter continues after they have united". That statement was necessary, because the text of paragraph 1 of article 26 did not make the point at all clear. Unfortunately, the articles would ultimately be separated from the commentary, and he still had doubts about the clarity of article 26 itself.

8. The CHAIRMAN said that the views of Mr. Tammes would be placed on record. If there were no other comments, he would take it that the Commission approved paragraph (1) of the commentary to article 26.

It was so agreed.

Paragraphs (2)-(27)

Paragraphs (2) to (27) were approved.

Paragraph (28)

9. Sir Francis VALLAT (Special Rapporteur) proposed that in the last part of the first sentence the words "the effects of the change on the operation of the treaty" should be inserted after the words "resulting from it", which would be followed by a comma.

Paragraph (28) was approved with that amendment.

Paragraphs (29) and (30)

Paragraphs (29) and (30) were approved.

Paragraph (31)

10. Sir Francis VALLAT (Special Rapporteur) proposed that a sentence should be added to paragraph (31) to describe the effect of the new paragraph 3 of article 26.

¹ For previous discussion see 1295th meeting, para. 42.

Paragraph (31) was approved subject to that addition.

Paragraphs (32)-(35)

Paragraphs (32) to (35) were approved.

The commentary to articles 26, 26bis and 26ter, as amended, was approved.

Commentary to article 2

(Use of terms) (A/CN.4/L.217/Add.12)

The commentary to article 2 was approved.

Commentary to article 27

Succession of States in cases of separation
of parts of a State)

and to article 28

(Position if a State continues after separation of part of
its territory) (A/CN.4/L.217/Add.13)

11. Sir Francis VALLAT (Special Rapporteur) said that paragraphs (1) to (18) of the joint commentary to articles 27 and 28 contained fundamentally the same material as the 1972 commentary (A/8710/Rev.1, chapter II, section C). It had been found necessary, however, to alter the language to take account of the fact that the Commission had eliminated the concept of dissolution from the draft. References to the dissolution of a State had been replaced by references to separation. In addition, a passage had been inserted to the effect that Pakistan should be regarded as being in the same position as a newly independent State.

Paragraphs (1)-(31)

Paragraphs (1) to (31) were approved.

Paragraph (32)

12. Mr. TAMMES said he wished to express again the doubts he had expressed when the Commission had considered the text for article 27 proposed by the Drafting Committee.² He noted that the last sentence of paragraph (32) of the commentary referred to the idea of "dependency" as providing "the key to the meaning" of the term "newly-independent State". That statement was based on the assumption that the notion of "dependency" was a clear one. In fact, however, before becoming independent every territory was a "dependency" in the sense that it was dependent, even if it constituted an integral part of a unitary State. Consequently, he still questioned whether the provisions of article 27 would prove workable in practice.

13. The CHAIRMAN said that the views expressed by Mr. Tammes would be placed on record. If there were no further comments, he would take it that the Commission approved paragraph (32).

It was so agreed.

Paragraph (33)

Paragraph (33) was approved.

The commentary to articles 27 and 28 was approved.

Commentary to article 28bis

(Participation in treaties not in force at the date of the
succession of States in cases of separation of parts of a
State)

and to article 28ter

(Participation in cases of separation of parts of
a State in treaties signed by the predecessor State
subject to ratification, acceptance or approval)
(A/CN.4/L.217/Add.13)

14. Sir Francis VALLAT (Special Rapporteur) proposed that the single paragraph of the commentary should be divided into two paragraphs. Paragraph (2) would begin with the third sentence of the present paragraph.

The commentary to articles 28bis and 28ter was approved with that amendment.

Commentary to article 31

(Cases of State responsibility and outbreak
of hostilities)

and to article 31bis

(Cases of military occupation) (A/CN.4/L.217/Add.14)

The commentary to articles 31 and 31bis was approved with a minor drafting change in paragraph (1).

Commentary to article 31ter

(Notification) (A/CN.4/L.217/Add.14)

Paragraph (1)

Paragraph (1) was approved.

Paragraphs (2)-(6)

15. Sir Francis VALLAT (Special Rapporteur) said that the words "notification of succession" should be corrected to read "notification" throughout paragraphs (2) to (6). In paragraph (5) a sentence should be inserted to the effect that paragraph 5 of article 31ter did not affect the operation of paragraph 3 of that article.

16. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraphs (2) to (6) with the changes indicated by the Special Rapporteur.

It was so agreed.

The commentary to article 31ter, as amended, was approved.

A. INTRODUCTION

17. The CHAIRMAN invited the Commission to consider the introduction to chapter II (A/CN.4/L.217 and Corr.1).

1. *Summary of the Commission's proceedings* (paragraphs 1-27)

Paragraphs 1-27 were approved.

2. *State practice* (paragraphs 28-30)

Paragraphs 28-30 were approved.

3. *The concept of "succession of States" which emerged from the study of the topic* (paragraphs 31-33)

² See 1296th meeting, paras. 15 and 16.

Paragraphs 31-33 were approved.

4. *Relationship between succession in respect of treaties and the general law of treaties (paragraphs 34-37ter)*

Paragraphs 34-37bis

Paragraphs 34-37bis were approved.

Paragraph 37ter

18. After an exchange of views between Mr. KEARNEY and Sir Francis VALLAT (Special Rapporteur) on the wording of the last part of the first sentence, Sir Francis VALLAT (Special Rapporteur) proposed that that part of the sentence should be reworded to read: "in accordance with the rules of interpretation as stated in the Vienna Convention, and in particular taking into account the relevant rules of international law applicable in the relations between the parties, as provided in sub-paragraph 3(c) of article 31 of the Convention".

19. Mr. HAMBRO said that he would accept that wording, though with some reluctance, because he thought that readers might find it difficult to understand why one particular sub-paragraph of the Vienna Convention on the Law of Treaties had been singled out.

Paragraph 37ter was approved with the amendment proposed by the Special Rapporteur.

5. *The principle of self-determination and the law relating to succession in respect of treaties (paragraphs 38-41)*

Paragraph 38

Paragraph 38 was approved, subject to correction of the Spanish text.

Paragraph 39

Paragraph 39 was approved.

Paragraph 40

20. Mr. BILGE said he had already expressed the hope that the introductory commentary would explain the relationship between the clean slate principle and the continuity principle. Paragraph 40 not only said nothing about that relationship, but gave too much prominence to the clean slate principle.

21. Sir Francis VALLAT (Special Rapporteur) said that in his opinion Mr. Bilge's point was met by the penultimate sentence of the paragraph.

22. Mr. USHAKOV thought it would be useful for the commentary to emphasize that continuity was the general principle, whereas the clean slate principle was only an exception in favour of newly independent States.

23. Sir Francis VALLAT (Special Rapporteur) said he would prepare a new text which would take into account the observations made by Mr. Bilge and Mr. Ushakov.

Paragraph 40 was approved subject to revision by the Special Rapporteur.

Paragraph 41

24. Mr. KEARNEY, referring to the first sentence, said that, in his opinion, there was a difference between devolution agreements and unilateral declarations.

25. Sir Francis VALLAT (Special Rapporteur) pointed out that paragraphs 40 and 41 reproduced the text of paragraphs 37 and 38 of the 1972 introduction (A/8710/Rev.1, chapter II, section A); he questioned whether any change should be made.

Paragraph 41 was approved.

6. *General features of the draft articles*

(a) *Form of the draft (paragraphs 42-45).*

Paragraph 42

Paragraph 42 was approved.

Paragraph 43

26. In reply to a comment by Mr. KEARNEY, Sir Francis VALLAT (Special Rapporteur) proposed that the words "method of adhesion and the retroactive effect of consent" in the first sentence of the addition to paragraph 43 (A/CN.4/L.217/Corr.1) should be amended to read: "method of giving, and the retroactive effect of consent".

It was so agreed.

27. Mr. KEARNEY proposed that the word "touches" in the second sentence of the added passage should be replaced by some such expression as "deals with an aspect of" or "raises an aspect of".

28. Sir Francis VALLAT (Special Rapporteur) said that he had used the word "touches" deliberately; he thought it would be incorrect to say that the Commission was "dealing" with the problem at the present stage.

Paragraph 43, as amended, was approved.

Paragraph 44

29. Sir Francis VALLAT (Special Rapporteur) said he would expand paragraph 44 to take account of an observation by the Chairman regarding final clauses on participation.

Paragraph 44 was approved, subject to revision by the Special Rapporteur.

Paragraph 45

Paragraph 45 was approved subject to a change in the Spanish text.

(b) *Scope of the draft (paragraphs 46-51).*

Paragraph 46

Paragraph 46 was approved.

Paragraph 47

30. Mr. AGO suggested that in the third sentence of paragraph 47 the word "large", before the words "majority of cases", should be deleted, and that in the fourth sentence the phrase "In other words" should be deleted and the words "falls within" should be amended to read "then falls within".

It was so agreed.

Paragraph 47, as amended, was approved.

Paragraph 48

Paragraph 48 was approved.

Paragraph 49

31. Sir Francis VALLAT (Special Rapporteur) proposed that the third sentence should be amended to read: "Such unions might obtain an exclusive right to enter into certain types of agreement, as in the case of the European Economic Community under the Treaty of Rome".

It was so agreed.

Paragraph 49, as amended, was approved.

Paragraphs 50 and 51

Paragraphs 50 and 51 were approved.

(c) *Scheme of the draft* (paragraphs 52-63) (A/CN.4/L.217/Corr.1).

Paragraphs 52-55

Paragraphs 52-55 were approved.

Paragraph 56

Paragraph 56 was approved, with a change in the positions of the footnotes.

Paragraph 57

32. In reply to comments made by Mr. USHAKOV, Sir Francis VALLAT (Special Rapporteur) said he would amend the text of paragraph 57 to take account of the concern expressed about treaties of a general or universal character.

Paragraph 57 was approved, subject to revision by the Special Rapporteur.

Paragraph 58

33. Mr. AGO suggested that the first sentence should be divided into two sentences, the first ending with the words "Red Cross". The second sentence would begin with the words: "Unfortunately, the Commission was unable to find...".

34. Sir Francis VALLAT (Special Rapporteur) said that paragraph 58 should be divided into two paragraphs, the second beginning at the words "Nevertheless, the attention paid to this matter...".

35. After a discussion on the last sentence, in which Mr. AGO, Mr. ŠAHOVIĆ, Mr. SETTE CÂMARA, Mr. USHAKOV and Mr. KEARNEY took part, Sir FRANCIS VALLAT (Special Rapporteur) suggested that the sentence should be retained, but that the word "positive", before the word "solution", should be deleted.

Paragraph 58 was approved with the amendments suggested by Mr. Ago and the Special Rapporteur.

Paragraph 59

36. Mr. KEARNEY proposed that the last sentence should be amended to read: "The provisions are based on article 66 of the Vienna Convention on the Law of Treaties and the proposed annex is identical with the annex to the Vienna Convention."

It was so agreed.

Paragraph 59, as amended, was approved.

Paragraphs 60-63

Paragraphs 60-63 were approved.

B. RECOMMENDATION OF THE COMMISSION (A/CN.4/L.217/Corr.1)

Paragraph 64

37. Mr. KEARNEY proposed that the Secretariat should draft a text for paragraph 64 stating that the Commission recommended that the draft articles should be submitted to States for their comments and then be submitted to a diplomatic conference.

38. Mr. TSURUOKA supported that proposal.

39. The CHAIRMAN said that, as had been suggested earlier by Mr. El-Erian, the Commission wished to express its appreciation of the work done by the Special Rapporteur in so brief a period, which had enabled it to submit a much improved version of the draft articles on succession of States in respect of treaties.

40. Sir Francis VALLAT (Special Rapporteur) said he was grateful for that tribute. He wished to thank the Secretariat for the help he had received in connexion with the work of the Drafting Committee and with the preparation of the commentaries to the draft articles.

The meeting rose at 1 p.m.

1301st MEETING

Friday, 26 July 1974, at 10.20 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

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

(A/CN.4/L.216/Add.1; L.220/Add.1 and 2; L.223 and Add.1; L.224)

(continued)

Chapter I

ORGANIZATION OF THE SESSION *(resumed from the 1297th meeting)*

H. COMMEMORATION OF THE TWENTY-FIFTH ANNIVERSARY OF THE OPENING OF THE COMMISSION'S FIRST SESSION

1. The CHAIRMAN reminded the Commission that it had been agreed that paragraph 15 of chapter I should be revised.¹ He invited members to consider the new paragraphs 15*bis* and 15*ter* in document A/CN.4/L.216/Add.1.

2. Mr. EL-ERIAN thought that, in referring to the Commission's influence on legal opinion, para-

¹ See 1297th meeting, para. 21.