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Summary record of the 1354th meeting

Topic:
Other topics

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the article, had stressed the fact that it represented progressive development and not codification.

108. The commentary should also state that the adoption of article 0 was without prejudice to the consideration of customs unions and free trade areas, subjects in respect of which progressive development had gone further than in respect of developing countries. The question of customs unions and free trade areas was, in any case, just as relevant to the developing countries as to other countries. Customs unions were likely to play an important part in assisting developing countries in the future.

109. Mr. BILGE said he shared the view of Mr. Sette Câmara that, in the present instance, the square brackets were not being used for their usual purpose. He suggested that an asterisk be placed after article 0 and a foot-note added explaining that the contents of the article represented the minimum on which the Commission had so far been able to agree, but that other supplementary provisions would be included later.

110. Mr. KEARNEY said he supported the proposal by Mr. BILGE. There had not been any great difference of opinion in the Commission with regard to the substance of article 0, but it had been considered desirable to review its provisions at the Commission's next session.

111. Mr. USHAKOV said that, in accordance with the Commission's practice, square brackets were used to indicate the intention of re-examining a text on first reading.

112. Sir Francis VALLAT said that he was prepared to support Mr. Bilge's proposal on the understanding that the asterisk would be used to indicate that article 0 was subject to further discussion on first reading.

113. Mr. USHAKOV said that he was prepared to take the same view.

114. Mr. PINTO said that the Commission should indicate in some way that article 0 was being set aside as the first of a series of articles. That result could be achieved either by means of square brackets or by means of an asterisk.

115. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 0 and the proposal by Mr. Bilge to replace the square brackets by an asterisk and an explanation.

It was so agreed.

The meeting rose at 6 p.m.

1354th MEETING

Tuesday, 22 July 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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

(A/CN.4/L.232/Add.3 and 4; A/CN.4/L.235)

(resumed from the 1351st meeting)

Chapter II

STATE RESPONSIBILITY

(continued)

B. DRAFT ARTICLES ON STATE RESPONSIBILITY

1. The CHAIRMAN invited the Commission to continue consideration of chapter II of the draft report, paragraph by paragraph, commencing with the commentary to article 12.

Commentary to article 12

(Conduct of organs of another State)

(A/CN.4/L.232/Add.3)

Paragraphs (1)-(3)

Paragraphs (1)-(3) were approved.

Paragraph (4)

2. Mr. KEARNEY proposed the deletion, in the penultimate sentence of the English version, of the word "hypothetical" before the word "cases".

Paragraph (4) was approved with that amendment.

Paragraph (5)

3. Mr. KEARNEY proposed that, in the antepenultimate sentence, the words "prevail over" be replaced by a more suitable wording such as "outweigh"; also, that the words "on the grounds that" be replaced by the words "on such grounds as that".

4. Mr. AGO (Special Rapporteur) said that the first of those proposals did not involve any change in the French version.

5. Sir Francis VALLAT proposed that, in the English version of the last sentence, the words "appears diminished" be replaced by the words "appears less significant". The change would not affect the French original.

6. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (5) with the changes proposed by Mr. Kearney and Sir Francis Vallat.

It was so agreed.

Paragraph (6)

7. Mr. USTOR said that the statement in the last sentence that the territorial State "was blamed only for a breach of its own obligations to protect third States" was not appropriate. The previous sentence made it clear that the territorial State was really being blamed for placing its territory at the disposal of others to commit wrongful acts, not for any failure "to protect third States".

8. Mr. AGO (Special Rapporteur) said that the reference was to obligations in respect of the protection of third States (*obligations de protection des Etats tiers*).

9. Mr. USTOR said that there was a discrepancy between the statement in the last sentence and the statements which preceded it.

10. Mr. AGO (Special Rapporteur) suggested that the problem might be solved simply by dropping the concluding words "to protect third States" (*de protection des Etats tiers*).

Paragraph (6) was approved with that amendment.

Paragraph (7)

Paragraph (7) was approved.

Paragraph (8)

11. Mr. TSURUOKA suggested that the opening words of the penultimate sentence, "In all the last-mentioned cases", be replaced by a more suitable formula, such as "In all the above-mentioned cases".

12. Sir Francis VALLAT suggested that the words in question be replaced by the words "In all these cases".

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were approved.

Paragraph (11)

13. Sir Francis VALLAT proposed that, in the first sentence of the English version, the words "conduct adopted in the territory of a State by organs of a foreign State" be replaced by the following more suitable wording: "conduct of organs of a foreign State in the territory of a State". He further proposed that a similar change be made wherever the formula "conduct adopted . . ." was used.

It was so agreed.

14. Mr. KEARNEY proposed that, in the fifth sentence, the words "in the presence of local authorities" be replaced by the words "in its territory", and that in the seventh sentence, the words "to disown" be replaced by the words "to dissociate itself from the conduct of".

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

15. Mr. KEARNEY proposed the deletion of the fourth, fifth, sixth and seventh sentences, commencing with the words "In a recent incident" and ending with the words "failure by the State against which the operation was directed?"

It was so agreed.

Paragraph (12), as amended, was approved.

Paragraph (13)

16. Mr. KEARNEY said that some of the examples given in the last sentence of the paragraph, of territories, spaces, zones, places or things under the jurisdiction of a State, were somewhat doubtful. Thus, the concept of an "exclusive economic zone" was still unsettled.

17. Sir Francis VALLAT suggested that all the examples be deleted, commencing with the words "for instance". The sentence would then conclude with the words. "acts

committed in any other territory, space, zone, place or thing under the jurisdiction of such other State".

18. Mr. AGO (Special Rapporteur) said that, during the discussion of article 12 in the Commission, he had been specifically asked to include some examples in order to make the meaning more precise.

19. Mr. TSURUOKA said that he was in favour of retaining the examples, since they helped to make clearer and more precise the reference to certain areas and things under the jurisdiction of the State concerned, a reference which would otherwise be rather vague. Perhaps the difficulty could be removed by eliminating the example of the exclusive economic zone.

20. Mr. CASTAÑEDA said that the example of the exclusive economic zone was correct and should be retained with a clarification regarding its exact scope. The coastal State had exclusive jurisdiction in that zone only in respect of certain matters, such as conservation of fishery resources. In certain other matters, such as pollution control, its jurisdiction was concurrent with that of the other States concerned.

21. Mr. AGO (Special Rapporteur) said that it would be cumbersome to try to enter into such distinctions. He suggested that the words "in an exclusive economic zone" be dropped, leaving the last sentence of the paragraph otherwise unchanged.

22. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (13) with the amendment suggested by the Special Rapporteur.

It was so agreed.

Paragraph (14)

Paragraph (14) was approved.

Paragraph (15)

23. Mr. ŠAHOVIĆ suggested that, in the second sentence, the word "circumstances" before the word "enviaged" be replaced by the word "situation". That change would only affect the English version.

24. Sir Francis VALLAT suggested that, in the third sentence of the English version, the word "either" be inserted after the word "exhibit" and that the word "else" be deleted.

Paragraph (15) was approved with those amendments to the English version.

The commentary to article 12, as amended, was approved.

Commentary to article 12 bis [13]¹

(Conduct of organs of an international organization)

(A/CN.4/L.232/Add.4)

25. The CHAIRMAN invited the Commission to consider the commentary to article 12 bis [13], paragraph by paragraph.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

¹ The figures in square brackets represent the numbers of the articles as they appear in the report.

Paragraph (3)

26. Mr. KEARNEY said that he had serious doubts regarding the statement in the second sentence of paragraph (3). It appeared to suggest the possibility of holding a State responsible for decisions of a collective body of an international organization, such as the General Assembly of the United Nations. It also referred to the possibility of attaching responsibility to the "State of nationality of the person or persons constituting the organ in question". Nationality did not seem to be always a relevant factor. To give an example, the World Health Organization might send a team of doctors to deal with an epidemic and there would appear to be no valid reason for attributing any responsibility for the actions of such a team to the States of which the doctors happened to be nationals.

27. Mr. AGO (Special Rapporteur) said that the sentence in question rightly reserved a number of special situations. He had in mind particularly the presence of the United Nations armed forces in Cyprus; an internationally wrongful act committed by them could have involved either the responsibility of the United Nations or that of the United Kingdom, since the forces were composed of British troops. If a collective organ, such as the Security Council, were guilty of an internationally wrongful act, the act could be attributed either to the organization to which that organ was subordinate or to the States members of the organ. For that reason no hard and fast rule should be laid down concerning the question of the attribution of an internationally wrongful act to an international organization, since that question was more delicate than that of the attribution of an internationally wrongful act to a State.

28. Mr. KEARNEY said that he found the example rather alarming. The explanation just given would seem to indicate that the language was broad enough to cover a Security Council decision, and that a decision taken by the Council as such could give rise to the responsibility of the States members of the Security Council which had voted in favour of the decision. Any attempt to deal with such delicate matters would mean entering into vast problems which required much study before a position could be taken.

29. Mr. AGO (Special Rapporteur) said that the meaning of the sentence under discussion was that it was not always absolutely certain that the action of an organ of an international organization acting in that capacity would in all cases be attributed to the international organization as such. There was a possibility that it might be attributed to the States members of the organ. He had no intention of affirming that responsibility would attach to those States; he had merely indicated that the attribution would not always be to the international organization as such.

30. He had not been thinking so much of the Security Council, which would certainly not commit an internationally wrongful act, as of some lesser collective body.

31. Mr. USHAKOV said that it was he who had urged that no rule should be laid down on the question of the responsibility of international organizations. It should be indicated, as was in fact apparent from the passage

under consideration, that the Commission had not considered that question in detail. An internationally wrongful act of the Security Council could involve either its own responsibility, or that of its member States, or the joint responsibility of the Security Council and its member States.

32. Mr. KEARNEY said that he fully understood the position of Mr. Ushakov. In order to take it into account, he suggested that the sentence under discussion be reworded on the following lines: "On the other hand, the Commission is not at this point taking any position regarding the question whether responsibility can be attributed to States whose representatives are serving on a collective organ".

33. Mr. AGO (Special Rapporteur) said that one possible solution would be to delete the concluding portion of the sentence commencing with the words "rather than, for example . . .".

34. Mr. CASTAÑEDA said that he was not in favour of deleting that passage, which was very useful. He would prefer to use some wording which would make the meaning clearer in the English version and show that there were two possibilities: first, that the action might be attributed to the international organization as such; secondly, that the action might be attributed to the States members of the organ. The attribution to the organization or to the States concerned would depend on the circumstances of each case.

35. Mr. ŠAHOVIĆ said that he supported that solution.

36. Mr. AGO (Special Rapporteur) said that the sentence in question was not intended as a statement of the Commission's position; it merely envisaged certain conceivable cases.

37. Mr. ŠAHOVIĆ said that the following sentence clearly indicated that the Commission had in no way taken a position on the question of the attribution of an internationally wrongful act to an international organization.

38. Mr. AGO (Special Rapporteur) suggested that the sentence be reworded to read: "On the other hand, it is not always sure that the action of an organ of an international organization acting in that capacity will always be purely and simply attributed . . .".

39. Mr. KEARNEY suggested that the words "for example" be replaced by the words "in appropriate circumstances".

40. Sir Francis VALLAT suggested that it might help to overcome the difficulties which had arisen if the words "States members of the organ in question" were replaced by the words "States members of the organization".

41. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (3) with the changes suggested by the Special Rapporteur, Mr. Kearney and Sir Francis Vallat.

It was so agreed.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

42. Mr. KEARNEY said that it was inaccurate to describe as "a belief" the proposition that the acts of the organs of an international organization were attributable to the organization. The sentence simply stated a generally accepted rule of international law to the effect that, if an organ of an organization committed a breach of an obligation assumed by the organization, the breach would involve the organization's responsibility.

43. Mr. AGO (Special Rapporteur) suggested that the opening words of the paragraph be amended to read: "the fact that acts of organs of an international organization . . .".

Paragraph (5), as amended, was approved.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were approved.

Paragraph (8)

44. Mr. KEARNEY said that he was not satisfied with the last sentence of the paragraph, and more particularly with its opening words "Where the organization is not in that situation". Since the previous sentence concluded with the words "an international organization possessing an international personality of its own", the opening words of the last sentence suggested that there could exist international organizations without an international personality of their own.

45. Mr. AGO (Special Rapporteur) said that there did in fact exist international organizations which had no international personality. Nevertheless, he would be prepared to delete the last sentence.

46. Sir Francis VALLAT said that he was not in favour of deleting the last sentence, for the problem was a very real one and should not be ignored. A better solution would be to replace the opening words of the last sentence by a formula on the following lines: "If the organization were not considered to be in that situation . . .". Wording of that kind would have the advantage of indicating that the question was an open one, while at the same time recognizing the theoretical possibility of an international organization not having international personality.

47. Mr. CASTAÑEDA said that the difficulty arose perhaps from the use of the word "organization" in the opening words of the last sentence. A body which did not have international personality would not properly be an international organization. He suggested that the beginning of the sentence in question be amended to read: "Where the entity is not in that situation . . .".

48. Mr. HAMBRO said that an "international organization" was already clearly defined as "an intergovernmental organization" in paragraph 1 (i) of article 2 (Use of terms) of the Vienna Convention on the Law of Treaties, in paragraph 1 (1) of article 1 (Use of terms) of the 1975 Convention on the Representation of States in their Relations with International Organizations of a Universal Character, and in numerous drafts drawn up by the International Law Commission. In the circumstances, it did not seem necessary to discuss any other organizations.

49. Mr. AGO (Special Rapporteur) suggested that the phrase "Where the organization is not in that situation" be replaced by the phrase "In other situations". The international organizations referred to in that passage were clearly intergovernmental organizations but it should not be concluded therefrom that every international organization possessed an international personality separate from that of its member States. For many of them that was not the case.

50. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission approved paragraph (8), with the amendment to the opening phrase of the last sentence suggested by the Special Rapporteur.

It was so agreed.

Paragraph (9)

Paragraph (9) was approved.

Paragraph (10)

51. Mr. KEARNEY asked whether article 12 *bis* did in fact presuppose that the organ of the international organization in question acted in both the ways mentioned in the first sentence of paragraph (10). In his view, article 12 *bis* could presuppose that the organ performed functions common to two or more organizations and was not necessarily under the exclusive control of its parent organization.

52. Mr. AGO (Special Rapporteur) said he agreed with Mr. Kearney. He suggested that the words "and under its exclusive control" in the first sentence be replaced by the phrase "and not under the control of the territorial State".

It was so agreed.

53. Mr. KEARNEY suggested that the phrase "functions peculiar to the organization" in the first sentence be amended to read "functions of the organization".

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

54. Sir Francis VALLAT suggested that the word "genuine" in the first sentence of the paragraph be deleted.

It was so agreed.

55. Mr. SETTE CÂMARA said that, so far as he could recall, the "legal status of a United Nations peace-keeping force", to which reference was made in the third sentence of the paragraph, was always the same. What varied was the legal arrangements under which the force was employed.

56. Mr. AGO (Special Rapporteur) said that the legal status of United Nations forces had varied considerably from one case to another. In some cases they had been considered as national forces, and in others as United Nations forces, depending on the command under which they had been placed. Thus, in the case of the Congo, they had been considered as United Nations forces. In the case of Cyprus, on the other hand, they had been United Kingdom contingents under the United Nations

flag: the responsibility had therefore been a national responsibility.

57. Mr. SETTE CÂMARA said that the problem of peace-keeping forces was extremely complex. Under the Charter of the United Nations, peace-keeping forces could be constituted only in the way laid down in Article 43, but there had been cases in which that rule had not been followed. Efforts had long been in progress within the United Nations to establish rules for the operation of peace-keeping forces, but the situation in that respect was still nebulous. Since no one knew exactly what was meant by the expression "legal status" of a United Nations peace-keeping force, it would be preferable to replace the relevant part of the third sentence by a phrase such as "legal arrangements for the functioning of a United Nations peace-keeping force".

58. Mr. AGO (Special Rapporteur) said that it was not a question of stating what was the nature of the forces in question, because no definition had yet been worked out. It was simply a question of noting that the legal status of such forces could vary from one situation to another, because such variation had an effect on the attribution of responsibility.

59. Mr. SETTE CÂMARA said that he would not press his amendment, but the remarks of the Special Rapporteur only strengthened his doubts concerning the present language. In his view, responsibility for the acts of members of a United Nations peace-keeping force lay not with the State which had contributed the contingent involved but, since the troops were under the United Nations flag, with the United Nations itself.

Paragraph (11), as amended, was approved.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were approved.

The commentary to article 12 bis [13], as amended, was approved.

Chapter IV

THE MOST-FAVoured-NATION CLAUSE

A. INTRODUCTION

60. The CHAIRMAN invited the Commission to consider the introduction to chapter IV of its draft report (A/CN.4/L.235), paragraph by paragraph.

1. *Summary of the Commission's proceedings* (paragraphs 1-24)

Paragraphs 1-8

Paragraphs 1-8 were approved.

Paragraph 9

61. Mr. BILGE suggested that the words "Owing to lack of time", at the beginning of paragraph 9, be deleted.

It was so agreed.

Paragraph 9, as amended, was approved.

Paragraphs 10-24

Paragraphs 10-24 were approved.

2. *Scope of the draft articles* (paragraphs 25-28)

Paragraphs 25 and 26

Paragraphs 25 and 26 were approved.

Paragraph 27

62. Mr. SETTE CÂMARA said it seemed inappropriate to retain the phrase "in the field of international trade", which appeared in the final sentence of the paragraph, since the Commission had decided to delete from draft article 0, to which the paragraph referred, the restrictive phrase "trade advantages".

63. Mr. USTOR (Special Rapporteur) said that the deletion to which Mr. Sette Câmara referred had not changed the essence of article 0, the scope of which was still governed by the reference in that article to the "generalized system of preferences". Accordingly, he thought that the phrase "in the field of international trade", which had appeared in a similar context in the report of the Commission on the work of its twenty-fifth session, could be retained.

64. Mr. USHAKOV suggested that the phrase to which Mr. Sette Câmara had referred be amended to read "in the field of economic relations".

It was so agreed.

Paragraph 27, as amended, was approved

Paragraph 28

Paragraph 28 was approved.

3. *The most-favoured-nation clause and the national treatment clause* (paragraphs 29-32)

Paragraphs 29-31

Paragraphs 29-31 were approved.

Paragraph 32

65. Mr. KEARNEY said that the Commission should also mention in the paragraph the fact that it had decided to include in its draft what were now articles 13 and 14, concerning the interrelationship between the most-favoured-nation clause and national treatment.

66. Mr. USTOR (Special Rapporteur) said that he would amend the paragraph accordingly.

Paragraph 32, as amended, was approved.

4. *The most-favoured-nation clause and the principle of non-discrimination* (paragraphs 33-36)

Paragraphs 33-36

Paragraphs 33-36 were approved.

5. *The most-favoured-nation clause and the different levels of economic development* (paragraphs 37-39)

Paragraphs 37 and 38

Paragraphs 37 and 38 were approved.

Paragraph 39

67. Mr. BILGE suggested that, in the second sentence, the words "in the sphere of international trade" be replaced by the words "in the sphere of economic relations", in conformity with the Commission's decision on paragraph 27.

It was so agreed.

Paragraph 39, as amended, was approved.

68. Mr. USTOR (Special Rapporteur) said that he would shortly be circulating the text of three paragraphs to be added to the introduction to chapter IV of the report.² Those paragraphs would deal respectively with the relationship between the draft articles on the most-favoured-nation clause and the Vienna Convention on the Law of Treaties, and the residual and the general character of the rules contained in the draft articles.

B. DRAFT ARTICLES ON THE MOST-FAVOURLED-NATION CLAUSE

Commentary to articles 6 [8]

(Unconditionality of most-favoured-nation clauses), 6 bis [9] (Effect of an unconditional most-favoured-nation clause) and 6 ter [10] (Effect of a most-favoured-nation clause conditional on material reciprocity) (A/CN.4/L.235/Add.2)

69. The CHAIRMAN invited the Commission to examine the commentary to articles 6 [8], 6 bis [9] and 6 ter [10] paragraph by paragraph.

Paragraphs (1)-(10)

Paragraphs (1)-(10) were approved.

Paragraph (11)

70. Mr. KEARNEY proposed that the phrase "for the purposes of international commerce" be added to the end of the second sentence of the paragraph, since conditional most-favoured-nation clauses still existed in consular treaties.

71. Mr. USTOR (Special Rapporteur) said that the most-favoured-nation clauses found in consular treaties were conditional on material reciprocity and were thus not of the type referred to in paragraph (11). He suggested that, in order to clarify the paragraph in the way desired by Mr. Kearney, the first sentence be amended to read "Because of the general abandonment of this conditional form of the clause, it is now . . .".

It was so agreed.

Paragraph (11) was approved with that amendment.

Paragraphs (12)-(14)

Paragraphs (12)-(14) were approved.

Paragraph (15)

72. Mr. KEARNEY proposed that the effect of the Hull interpretation be made clear by the addition at the end of the paragraph of a sentence reading "The consequence of this change in interpretation was to produce a system in which conditional treatment was merged to a certain extent with unconditional treatment."

73. Mr. USTOR (Special Rapporteur) said that he would like time to consider that proposal.

Paragraph (15) was approved, subject to the decision of the Special Rapporteur, concerning the proposal by Mr. Kearney.

Paragraphs (16)-(22)

Paragraphs (16)-(22) were approved.

Paragraph (23)

74. Mr. KEARNEY suggested that the word "completely" be deleted from the second sentence of the paragraph.

It was so agreed.

Paragraph (23), as amended, was approved.

Paragraphs (24)-(31)

Paragraphs (24)-(31) were approved.

Paragraph (32)

75. Mr. KEARNEY suggested that the mention of his name should be replaced by the expression "one member", in accordance with the practice of the Commission.

It was so agreed.

Paragraph (32), as amended, was approved.

Paragraphs (33)-(43)

Paragraphs (33)-(43) were approved.

The commentary to articles 6 [8], 6 bis [9] and 6 ter [10] was approved.

The meeting rose at 1 p.m.

1355th MEETING

Wednesday, 23 July 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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

(A/CN.4/L.232 and Add.5 and 6; A/CN.4/L.233 and Add.1-3)

(continued)

Chapter III

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

A. INTRODUCTION

1. The CHAIRMAN invited the Commission to consider section A of chapter III of its draft report (A/CN.4/L.233/Add.2).

² See 1356th meeting, para. 1.