

Document:-
A/CN.4/SR.1409

Summary record of the 1409th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1976, vol. I

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"It is a fact of international life that States are more willing to support a course of conduct in a charter than is considered a statement of political intent rather than in a treaty which imposes a legal burden to take action instead of positions. The Commission's task is to draw up a set of draft articles which may be adopted in treaty form".

11. The concise, lucid and rich report submitted by the Special Rapporteur mentioned a number of multilateral instruments which could be extremely useful to the Commission in its work, including those relating to the Niger and Senegal rivers and the Chad Basin,³ the Declaration of Asunción on the use of international rivers⁴ and the European Water Charter of 1968.⁵

12. Speaking as Chairman, he said that the Commission's debate had been extremely thorough and of a very high standard. Mr. Tammes had rightly pointed out⁶ that the topic afforded a unique opportunity for the Commission to consider and develop the concept of international co-operation, while the Special Rapporteur himself, in his opening statement,⁷ had made a very convincing plea for co-operation between States to preserve the quantity and quality of the vital natural resource constituted by water. Sir Francis Vallat had addressed a moving appeal⁸ to the Commission not to lose sight of the humanitarian aspects of the matter. Mr. Sette Câmara had made a masterly statement⁹ with an approach different from that adopted by the Special Rapporteur. Further valuable statements had been made at the two previous meetings by Mr. Ushakov, Mr. Tabibi, Mr. Ramangasoavina, Mr. Quentin-Baxter, Mr. Calle y Calle and Mr. Hambro. In connexion with the question of sovereignty referred to by Mr. Hambro,¹⁰ it should be borne in mind that sovereignty, like property, was not an absolute concept, but was subject to the restrictions of the law and the interests of the community.

13. With regard to the scope of the Commission's work on the topic, the Special Rapporteur appeared to favour the drainage-basin concept, whereas Mr. Sette Câmara had proposed¹¹ that the Commission should proceed on the basis of existing practice and of the time-honoured and traditional definition of an international watercourse adopted in the Final Act of the Congress of Vienna of 1815.¹² As was pointed out, in paragraph 8 of the Special Rapporteur's report, a useful point had been made by the Government of Hungary, which had argued that there was no general geographic term that could be applied to all of the legal relations relating to

waters that were on the territory of more than one State, and that consequently the need was not to study the meaning of terms, but to consider whether a term was suitable for the regulation of certain legal relations. An equally interesting point had been made by the Special Rapporteur in paragraph 21 of his report when, commenting on the definition adopted by the Congress of Vienna in 1815, he had observed that "A definition devised for purposes of navigation is not necessarily the best choice for the requirements of the wide range of uses other than navigation". Mr. Ustor had suggested that the Commission should follow the inductive method and should take stock of existing law and practice before proceeding to formulate general rules. In his view, the Commission would be well advised to leave the question open for the time being and content itself with its thorough discussion of the topic, which would provide a basis for eliciting the views of governments.

14. With regard to the question of pollution, he wished to draw attention to the statement of the Government of Poland that "the problem of water pollution should be considered simultaneously with its cause, i.e. domestic, agricultural and commercial uses" (A/CN.4/294 and Add.1, section II, question H). He fully concurred with the view expressed by the Special Rapporteur in paragraph 46 of his report that "it would seem appropriate for the Commission to concentrate upon uses at the outset and to consider particular aspects of pollution in the context of specific uses". There was agreement that pollution should be considered eventually, if not at the outset since, not only in international watercourses but also in the seas and the oceans, it presented a grave problem which should certainly command the Commission's attention, and the process of industrialization was likely to make water pollution an even more acute problem in the future.

15. As to whether a committee of experts should be set up to assist the Commission in its work, it should be noted that it had not been considered necessary to appoint such a body for the Commission's earlier work on the much wider topic of the law of the sea, although some experts had been consulted on an individual basis. The proper course of action, he believed, would be to leave it to the Special Rapporteur to inform the Commission what kind of technical assistance and advice he required.

The meeting rose at 11.25 a.m.

1409th MEETING

Monday, 19 July 1976, at 3 p.m.

Chairman: Mr. Paul REUTER
later: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

³ See A/CN.4/295, paras. 31-35.

⁴ *Ibid.*, paras. 37-40.

⁵ *Ibid.*, para. 41.

⁶ See 1407th meeting, para. 28.

⁷ See 1406th meeting.

⁸ See 1407th meeting, para. 22.

⁹ See 1406th meeting.

¹⁰ *Ibid.*, para. 39.

¹¹ *Ibid.*, para. 15.

¹² For the text of the Final Act, see A. Oakes and R. B. Mowat, eds., *The Great European Treaties of the Nineteenth Century* (Oxford, Clarendon Press, 1918), p. 37.

The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/294 and Add.1, A/CN.4/295, A/CN.4/L.241)

[Item 6 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on agenda item 6.
2. Mr. KEARNEY (Special Rapporteur) said that he thought the Commission had held an excellent discussion, which represented substantial research, preparation and study by the members who had taken part in it. The main objective had been to clarify positions and determine the extent of possible differences of opinion. The basic issue the Commission had dealt with had been that of determining the underlying principles which should be applied to the non-navigational uses of international watercourses and of deciding what ethical and political considerations should be taken into account in formulating the applicable rules.
3. The discussion had revealed some diversity of views on those matters, but there had also been substantial agreement on a number of issues. For example, all the members of the Commission had agreed that the acceptability of the concept of an international drainage basin, as a basis for the scope of the Commission's work, was a matter which went well beyond the problem of defining an international watercourse. In that connexion, Mr. El-Erian had referred to Wolfgang Friedman's division of the principles of international law into the two classifications of the settlement of disputes and international co-operation. That division aptly illustrated the wide range of views on, and the different approaches to, the problem of international watercourses. Some members of the Commission considered that one part of that division should predominate over the other, although the view had been expressed that the two parts had to be harmonized and were both essential to the Commission's work. He believed there were precedents for the latter view and that it would, in some situations, be necessary to go beyond what might be called the limits of State responsibility in regard to the consequences of the uses of water.
4. Sir Francis Vallat had pointed out¹ that what might seem to be a reasonable agricultural development upstream might have disastrous consequences downstream. That was a very good description of what had happened on the Colorado River and of the effects of the development of an irrigation system on an irrigation district in Mexico, when the water to which the United States was entitled had passed into some underground aquifers containing saline water. That water had moved down into Mexico and had adverse effects on crop production because it had been too salt. In the circumstances of that particular case, ordinary rules for restitution or reparation for injury had not been applicable. The two States concerned had therefore had to co-operate in finding a solution to the problem. Various remedies had been tried, but none had been successful until it had been agreed that the United States would build a desaliniza-

tion plant to remove the salt from the water flowing into Mexico. That was an example of a situation in which co-operation, rather than recourse to adversary proceedings, had been successful.

5. He believed that the scope of the Commission's work must go beyond the issue of what the rules of State responsibility might be in regard to the uses of international watercourses. He disagreed with Mr. Sette Câmara's² view that, if an upstream State diverted water for irrigation or for industry, the effects of its activities could simply form the subject of a claim for reparation. There was a wide variety of cases in which reparation was not enough and in which it was therefore necessary to rely on established co-operation between the riparian States concerned. Of course, the formulation of rules relating to the primary aspects of State responsibility must be an important part of the Commission's work, but there were also other principles to be taken into account. For example, Mr. Calle y Calle had referred³ to the principle of sovereign control over natural resources and to the principle of ecological good neighbourliness. Clearly, both those principles had to be taken into account, although some adjustments would have to be made as between them, so that both would apply to the uses of international watercourses. Although the process of harmonizing those two principles would certainly be very difficult, he thought it would be defeatist for the Commission to say that it must concentrate only on one or the other.

6. The Commission's discussion had also shown that there must be a clear understanding of what was meant by sovereignty over a natural resource such as water, which was in a particular State only on a transitory basis. If the Commission decided that sovereignty meant that the State had complete authority over the water, could deprive the downstream riparian State of any share of it or could, by pollution, destroy its quality as usable water, it would be accepting the absurd opinion which had become known as the Harmon doctrine,⁴ and was the very heart of imperialism. As a matter of fact, the United States had never adopted that doctrine as part of its foreign policy, and the difference which had arisen with Mexico over the Rio Grande in 1875 had been settled by agreement on the good neighbour basis.

7. Mr. Tabibi had referred to the Harmon doctrine in connexion with the view that sovereignty was being limited by the rise of "involuntary obligations in international law",⁵ which seemed to be a way of referring to yet another area of law which the Commission should take into account in its future work. He himself believed that there was substantial concurrence between "involuntary obligations in international law" and Professor Tammes's reference to the concept of "abuse of right",⁶ and that the developing doctrine of "abuse of right"

² See 1406th meeting, para. 19.

³ *Ibid.*, para. 34.

⁴ See *Yearbook... 1974*, vol. II (Part Two), p. 78, document A/5409, part two, chap. III, paras. 201-205 and foot-note 175.

⁵ See 1406th meeting, para. 25.

⁶ See 1407th meeting, para. 28.

¹ See 1407th meeting.

might, in fact, become the nexus between the principle of sovereignty over natural resources and the principle of co-operation. Other members of the Commission had also referred to various aspects of the concept of co-operation. For instance, Mr. Yasseen had said that co-operation was a principle of humanity⁷ and Mr. Ushakov had said that water must be dealt with as a social resource for the use of humanity.⁸

8. Another issue on which the members of the Commission seemed to agree was that the rules to be formulated should be general, and of a residual character. Mr. Ustor had said that the adoption of the general principle of "*sic utere tuo ut alienum non laedas*" would be a great step forward,⁹ that was no doubt true, but it was not unreasonable to hope that something more in the way of general principles might be achieved. As Mr. Ushakov,¹⁰ Mr. Calle y Calle¹¹ and Mr. Quentin-Baxter¹² had said, the Commission should confine itself to the formulation of general rules, because detailed rules for individual river systems must be formulated by the riparian States themselves. That view was certainly correct, because every river system was different and the requirements for regulation were also different. The Commission's policy of formulating general and residual rules must therefore be accepted as a matter of necessity.

9. Nevertheless, the Commission would have to decide to what extent a rule could be general and still be adequate for the problems of river use. One example was to be found in flood control, which required co-operation between all the States concerned, so that any general rules would have to include a requirement of co-operation in gathering the necessary information. Moreover, if it did not go into details of the type of information required, a general rule might be so general that it would not be useful in practice. The Commission must therefore make every effort to devise rules which maintained a delicate balance between being too detailed to be generally applicable and being so general that they amounted to nothing more than an expression of hope that the riparian States would not behave too badly towards each other.

10. The general rules to be formulated by the Commission should be designed to promote the adoption of régimes for individual international rivers, not to hinder the development of such rivers. In addition, they should be acceptable to all States and should take account of the sensitivity of States regarding rivers. It was, for example, perfectly understandable that a State which had a river system the size of the Amazon almost completely within its borders should be reluctant to give to another State, in which only a small proportion of the Amazon headwaters rose, a voice in determining the uses to which the waters of the entire Amazon basin

might be put. It was also perfectly understandable that some States should be concerned about references to the hydrographic unity of rivers or to international drainage basins, because acceptance of such concepts might adversely affect their interests. It should be noted, however, that the words "international drainage basin" were used merely to refer to the effects that activities in one part of the basin might produce in other parts of the basin; and expressing the unity of the water in a river in that way did not prejudice the content of the rules of co-operation to be adopted. Moreover, recognition of the unity of the water in a basin did not mean that there was common ownership of the water or that there must be common control over the water. The concept of unity merely implied efforts, made in good faith, to avoid causing downstream injury and to promote co-operation between riparian States to reduce adverse downstream effects. The task the Commission now faced was that of determining what the content of the rules should be and how the rules would be used to promote co-operation.

11. The Governments which had replied to the questionnaire (see A/CN.4/294 and Add.1) and the members of the Commission had agreed that work should proceed on the uses of international watercourses, the different aspects of pollution being dealt with in conjunction with the consequences of the various uses. The Commission had also agreed that the new Special Rapporteur should continue to develop contacts with the various international organizations concerned with the uses of international watercourses and that, if more formal arrangements were needed at a later stage, they could be made when the need arose.

12. He thought the Commission had thus agreed on most aspects of the topic under consideration and on the scope of its future work. It seemed to have gone a long way towards clarifying its approach.

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

13. The CHAIRMAN invited the Commission to consider the draft report on the work of its twenty-eighth session paragraph by paragraph, beginning with chapter III.

Chapter III. STATE RESPONSIBILITY (A/CN.4/L.247 and Add.1-3)

A. INTRODUCTION (A/CN.4/L.247)

Paragraphs 1 and 2

Paragraphs 1 and 2 were approved.

Paragraph 3

14. Mr. KEARNEY, referring to the first part of the first sentence, said that, technically, it was the General Assembly which had adopted the conclusions in question.

15. The CHAIRMAN suggested that the beginning of paragraph 3 should read: "These conclusions having

⁷ *Ibid.*, para. 25.

⁸ *Ibid.*, para. 2.

⁹ *Ibid.*, para. 15.

¹⁰ *Ibid.*, para. 4.

¹¹ See 1406th meeting, para. 33.

¹² See 1408th meeting, para. 2.

been approved by the members of the Sixth Committee and adopted by the General Assembly.”

It was so agreed.

Paragraph 3, as amended, was approved.

Paragraph 4

16. The CHAIRMAN suggested that a similar amendment should be made in the first sentence of *paragraph 4*.

It was so agreed.

17. Mr. ŠAHOVIĆ suggested that in the second sentence of the French text the expression “*question séparée*” should be replaced by the expression “*question distincte*”, since the latter expression was used in the relevant General Assembly resolutions.

It was so agreed.

Paragraph 4, as amended, was approved.

Paragraph 5

Paragraph 5 was approved.

Paragraph 6

18. Sir Francis VALLAT suggested the insertion, in the last sentence, of the dates of adoption of the General Assembly resolutions mentioned in it.

It was so agreed.

Paragraph 6, as amended, was approved.

Paragraphs 7 and 8

Paragraphs 7 and 8 were approved.

Paragraph 9

19. After an exchange of views in which Mr. KEARNEY, Mr. AGO (Special Rapporteur), Sir Francis VALLAT and Mr. ROSSIDES took part, the CHAIRMAN suggested that the words “the aims they pursue”, in the fourth sentence, should be replaced by the words “their objectives”.

It was so agreed.

20. Mr. ROSSIDES suggested that the expression “peace-keeping”, in the third sentence, should be replaced by the words “maintenance of peace and security”.

It was so agreed.

Paragraph 9, as amended, was approved.

Paragraph 10

21. After an exchange of views in which Sir Francis VALLAT, Mr. ŠAHOVIĆ and the CHAIRMAN took part, Mr. AGO (Special Rapporteur) suggested that in the last sentence the words “The international responsibility of the State is a situation which results” should be replaced by the words “The international responsibility of the State is made up of a set of legal situations which result”; that formula would cover both the obligation to make reparation and subjection to a sanction, for example.

It was so agreed.

Paragraph 10, as amended, was approved.

Paragraph 11

22. Mr. KEARNEY proposed that, in the third sentence, the words “in different hypothetical cases” should be replaced by the words “on the basis of different hypotheses”.

It was so agreed.

23. Sir Francis VALLAT suggested that, in the fourth sentence, the incidental clause “if it sees fit” should be deleted, and that the words “*the settlement of disputes and the ‘implementation’ (‘mise en œuvre’) of international responsibility*” should be replaced by the words “*the ‘implementation’ (‘mise en œuvre’) of international responsibility and the settlement of disputes*”.

It was so agreed.

Paragraph 11, as amended, was approved.

Paragraph 12

24. Sir Francis VALLAT, referring to the third sentence of paragraph 12, suggested that, in the English text, the article “a” before the words “particular conduct” should be deleted.

It was so agreed.

Paragraph 12, as amended, was approved.

Paragraph 13

25. Sir Francis VALLAT suggested that the commas in the last sentence should be deleted.

It was so agreed.

Paragraph 13, as amended, was approved.

Paragraph 14

26. Sir Francis VALLAT suggested that the word “possibly” in the penultimate line should be deleted, because it made the text too tentative.

It was so agreed.

Paragraph 14, as amended, was approved.

Paragraphs 15 to 17

Paragraphs 15 to 17 were approved.

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

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (A/CN.4/L.247).

Paragraph 18

Paragraph 18 was approved.

1. *Text of all the draft articles adopted so far by the Commission*

Section 1 was approved.

2. *Introductory commentary to chapter III of the draft and text of articles 16 to 19, with commentaries thereto, adopted by the Commission at the present session*

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

27. Mr. KEARNEY said that the fourth sentence was not clear and meant very little in common law.

28. Sir Francis VALLAT said he agreed with Mr. Kearney that the sentence was very difficult for jurists from common law countries to understand. Moreover, the reference in paragraph 4 to a "subjective right" complicated the issue still further.

29. The CHAIRMAN suggested that the difficulties of some members of the Commission with regard to the concepts of an "obligation" and a "subjective right" should be reflected in the summary record of the meeting.

It was so agreed.

30. Mr. ROSSIDES suggested that, in the last part of the fourth sentence, the word "is" should be replaced by the word "be", so that that phrase would read "whether it be in compliance with the obligation or in breach of it".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Mr. El-Erian took the Chair.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

31. Mr. KEARNEY suggested that the first clause of the third sentence should be amended to read: "If one admits the existence in international law of a rule limiting the exercise by a State of its rights and capacities and prohibiting their *abusive exercise*,".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

32. Mr. KEARNEY suggested that, in the first sentence, the word "first" after the word "considered" should be deleted, and that the words "has any bearing on" should be replaced by the words "does not affect".

It was so agreed.

33. Mr. USTOR suggested that the word "contractual" in the first sentence should be replaced by "conventional".

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were approved.

Paragraph (11)

34. Mr. KEARNEY suggested that the word "plausible", in the second sentence, should be replaced by the word "acceptable".

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

35. Mr. REUTER suggested that, in the first sentence, the words "be read" should be replaced by the words "be understood".

It was so agreed.

36. Mr. KEARNEY suggested that the word "always", in the first sentence, should be deleted.

It was so agreed.

Paragraph (12), as amended, was approved.

Paragraph (13)

37. Mr. SETTE CÂMARA questioned whether it was necessary to include the words "pure and simple" in the final sentence.

38. Mr. AGO (Special Rapporteur) pointed out that codification as such covered both the codification pure and simple of already existing rules and their transformation and development. It should therefore be made clear that what was meant was codification "pure and simple".

39. Mr. REUTER suggested that the words "codification pure and simple" should be replaced by the words "codification in the strict sense".

40. Mr. KEARNEY said that, in its consideration of the topic of State responsibility, the Commission was concerned with both the codification and the progressive development of international law. It might therefore be preferable to delete the last sentence entirely.

41. Mr. AGO (Special Rapporteur) said that the last sentence was not merely a general observation, in chapter III of the draft, the Commission was concerned with the progressive development of international law.

42. Sir Francis VALLAT said he favoured the deletion of the last sentence. The less the Commission called attention to the distinction between codification and progressive development, the better. It was for those who would interpret and apply the rules devised by the Commission to decide, at the appropriate time, what constituted codification and what progressive development. The Commission was constantly contributing to the development of international law by indirect means. To stress in any particular context that it was concerned with progressive development might have a harmful effect on its work.

43. Mr. ŠAHOVIĆ said that the last sentence of paragraph (13) had a very precise meaning, which the Special Rapporteur had explained. He was in favour of retaining the sentence with the amendment suggested by Mr. Reuter.

44. Mr. ROSSIDES said that any attempt to reduce the importance of the Commission's work on the progressive development of international law would be contrary to its Statute, which gave such development precedence over codification. In a rapidly changing world, it was more than ever essential that the Commission should perform its proper function in that regard. He thought the last sentence of paragraph (13) was most helpful and necessary.

45. Mr. BILGE also supported the retention of the last sentence.

46. The CHAIRMAN observed that the last sentence helped to focus the idea expressed in the remainder of the paragraph and, thanks to the use of the word "sometimes", did not prejudice the approach to be adopted in formulating certain rules.

47. Mr. TSURUOKA said that in the past the Commission had made every effort not to over-emphasize the distinction between progressive development of international law and codification pure and simple.

48. Mr. YASSEEN said that he thought the last sentence of paragraph (13) reflected the discussion which had taken place in the Commission on the basis of the report submitted by the Special Rapporteur. In his introductory statement¹³ the Special Rapporteur had said that there were not many precedents or rules, but that the Commission need not adhere to the inductive method and could, through the progressive development of international law, formulate new rules. Hence it was necessary to prepare States for that mode of procedure.

49. Mr. USTOR said he was inclined to agree with Sir Francis Vallat about the final sentence.

50. Since the Commission had already done part of the work on chapter III of the draft, it was inappropriate to use the future tense in paragraph (13).

51. Mr. ROSSIDES said that the words "to be included in", in the first sentence, should be replaced by the words "which is the subject-matter of".

52. Mr. AGO (Special Rapporteur) agreed that, in the English text, the words "to be included" were an inaccurate rendering of the French expression "*qui fait l'objet*". He suggested that throughout paragraph (13) the present tense should be used instead of the future tense.

It was so agreed.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved paragraph (13) together with the amendment just adopted and the amendments suggested by Mr. Reuter and Mr. Rossides.

It was so agreed.

Commentary to article 15 bis [16]¹⁴ (Existence of a breach of an international obligation) (A./CN.4/L.247/Add.1)

Paragraph (1)

54. Mr. KEARNEY suggested that the words "according to" in the first sentence should be replaced by the words "in the light of".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraph (5)

55. Mr. SETTE CÂMARA said that he had some doubts about the use of the words "whose breach is defined" in the first sentence.

56. Mr. REUTER suggested that the word "defined" should be replaced by the word "envisaged".

It was so agreed.

57. Mr. ROSSIDES said that it was not clear whether the expression "norms of international law", in the second sentence, was intended to cover the obligations imposed on States by the United Nations Charter, particularly in matters relating to international peace and security.

58. The CHAIRMAN confirmed that the Charter contained norms of international law.

59. Mr. SETTE CÂMARA suggested that the words "for example" in the second sentence should be deleted.

60. Mr. AGO (Special Rapporteur) said it was necessary to retain these words so as to cover other possible obligations of a non-legal nature.

61. Mr. ROSSIDES said that the way the second sentence was phrased made it appear that moral obligations were negligible, whereas in fact they were extremely important.

62. Mr. AGO (Special Rapporteur) said he agreed that moral obligations were extremely important. Under the draft articles, however, only the breach of a legal obligation constituted an internationally wrongful act.

63. Sir Francis VALLAT proposed that the words "for example" in the second sentence should be placed before the words "obligations of a moral nature".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

64. Mr. KEARNEY said that there were a great many agreements and contracts concluded between States; consequently, the words "in rare cases", in the first sentence, seemed inappropriate. It might also be more accurate to refer to "commercial matters" rather than to "economic matters".

65. Mr. AGO (Special Rapporteur) said that the words "in rare cases" might be replaced by "sometimes"; but the replacement of the word "economic" by "commercial" might have an unduly restrictive effect.

66. Mr. REUTER suggested that, in the first line of the paragraph, the word "sometimes" appearing after the word "States" should be deleted, and that in the second line the words "in rare cases" should be replaced by "sometimes".

It was so agreed.

67. Mr. USTOR suggested that the word "individuals", in the first sentence of the English text, should be replaced by the word "persons".

It was so agreed.

68. Mr. REUTER said that a State was always entitled to require that all the agreements it concluded with another State be governed by international law. That

¹³ See 1361st meeting, para. 13.

¹⁴ Figures in square brackets represent the numbers of the articles as they appear in the report.

fact was confirmed by judicial decisions. For example, the charter agreements concluded between the United Kingdom and Greece had been the subject of international arbitration, in the course of which the question whether they were agreements under international law or agreements under internal law had been examined. Thus there were cases in which States exercised a choice, and that was what the Special Rapporteur had wished to emphasize by using the expression "in rare cases".

69. Mr. USHAKOV said that, in his opinion, every agreement between States was governed by international law. A State could agree to be bound by the internal law of another State, but only of its own free will.

70. Mr. USTOR said he could not conceive of a case in which an obligation assumed under a contract between two States was not in some degree governed by international law.

71. Mr. HAMBRO said that the wording of the final clause of the first sentence appeared to discount the possibility of obligations deriving from the international legal order. It would therefore be preferable to replace the words "international legal order" by the words "international public law in the ordinary sense".

72. Mr. AGO (Special Rapporteur) said that the idea expressed by Mr. Hambro was precisely that contained in the text: what was involved was a legal order which was neither public international law nor internal law.

73. Mr. KEARNEY suggested that foot-note 3 should be deleted.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were approved.

The commentary to article 15 bis [16], as amended, was approved.

The meeting rose at 6.15 p.m.

1410th MEETING

Tuesday, 20 July 1976, at 10.10 a.m.

*Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Paul REUTER*

Members present: Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-eighth session (continued)

Chapter II. THE MOST-FAVOURLED-NATION CLAUSE (A/CN.4/L.246 and Add.1-3)

1. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, chapter II of its draft

report, relating to the most-favoured-nation clause (A/CN.4/L.246 and Add.1-3).

A. INTRODUCTION (A/CN.4/L.246)

1. Summary of the Commission's proceedings

Paragraphs 1-27

Paragraphs 1-27 were approved.

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

Paragraphs 28 and 29

Paragraphs 28 and 29 were approved.

Paragraph 30

2. Mr. KEARNEY said he was not sure that the first sentence accurately reflected the Commission's deliberations. Since the most-favoured-nation clause was based on the theory that a State selected its partners, it might be more appropriate to say that the clause "may be used as a technique or means for promoting the equality of States or non-discrimination".

3. Mr. USTOR (Special Rapporteur) pointed out that the same wording had been used in previous reports.

4. Mr. REUTER suggested that the French version of the passage should be amended to read *comme une des techniques ou un des moyens de promouvoir...*

It was so agreed.

Paragraph 30 was approved.

Paragraph 31

5. Mr. CALLE y CALLE said he had the impression that an article similar to that quoted in paragraph 31 was also contained in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. If that was the case, a reference to the latter Convention might be included.

6. The CHAIRMAN said that a similar provision might also be contained in the Convention on Special Missions. He suggested that the Secretariat should be requested to look into that matter and to insert a reference to those two Conventions in paragraph 31, if they proved to be relevant.

Paragraph 31 was approved on that understanding.

3. The most-favoured-nation clause and the different level of economic development

Paragraphs 32 and 33

Paragraphs 32 and 33 were approved.

Paragraph 34

7. Mr. ŠAHOVIĆ, referring to the penultimate sentence of paragraph 34, said he was not sure that article 21 should be considered as resulting from progressive development of international law.