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Summary record of the 1411th meeting

Topic:
Other topics

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from the one originally intended by the Special Rapporteur.

59. The CHAIRMAN suggested that it should be left to the Special Rapporteur whether or not to find less abstract wording for the third sentence of paragraph (2).

It was so agreed.

Paragraph (2) was approved on that understanding.

Paragraphs (3)-(5)

Paragraphs (3)-(5) were approved.

The commentary to article 24 was approved.

Commentary to article 25 (Non-retroactivity of the present articles)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

60. Mr. SETTE CÂMARA pointed out a typographical error at the end of the paragraph: the Latin words should be corrected to read: "*ex abundanti cautela*".

Paragraph (2) was approved with that correction.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 25 was approved.

Commentary to article 26 (Freedom of the parties to agree to different provisions)

61. Mr. PINTO said that in his opinion article 26 did not fulfil the promise of the article D originally proposed by the Special Rapporteur (A/CN.4/293 and Add.1, para. 30); it should therefore be given careful consideration on second reading.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

The commentary to article 26 was approved.

Commentary to article 27 (The relationship of the present articles to new rules of international law in favour of developing countries)

Paragraphs (1)-(7)

Paragraphs (1)-(7) were approved.

Paragraph (8)

62. Mr. PINTO said he had doubts about the need to include article 27 in the draft. He was aware that the Commission considered that such an article should be included, but article 27 seemed inadequate to meet the wishes of the Sixth Committee, as expressed in paragraph (1) of the commentary. Moreover, he thought that the penultimate sentence of paragraph (8) should be deleted.

63. Mr. USTOR (Special Rapporteur) said that Mr. Pinto's comments were justified, but he did not think the penultimate sentence should be deleted. He therefore

suggested that it should be amended to read: "The Commission, however, with a view to the possibility of the development of such new rules, decided to include in the draft articles a general reservation concerning the possible establishment of new rules of international law in favour of developing countries".

It was so agreed.

Paragraph (8), as amended, was approved.

The commentary to article 27, as amended, was approved.

Section C of chapter II, as a whole, as amended, was approved.

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

The meeting rose at 1 p.m.

1411th MEETING

Wednesday, 21 July 1976, at 10.50 a.m.

Chairman: Mr. Abdullah EL-ERIAN

later: Mr. Paul REUTER

Members present: Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, 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 I. ORGANIZATION OF THE SESSION (A/CN.4/L.245 and Corr.1)

1. The CHAIRMAN invited the Commission to examine, paragraph by paragraph, chapter I of its draft report, on the organization of the session (A/CN.4/L.245 and Corr.1).

2. Mr. CALLE Y CALLE suggested that, in the list of abbreviations at the beginning of chapter I, the abbreviation "ILC" and the corresponding title should be added after the abbreviation "I.C.J. Reports".

It was so agreed.

The list of abbreviations, as amended, was approved.

Paragraph 1

3. Mr. ŠAHOVIĆ pointed out that, in the first sentence of the French text, the words "*vingt-septième session*" should be corrected to read "*vingt-huitième session*".

With that correction, paragraph 1 was approved.

Paragraphs 2 and 3

Paragraphs 2 and 3 were approved.

Paragraph 4

4. The CHAIRMAN drew attention to document A/CN.4/L.245/Corr.1 relating to the first sentence of

paragraph 4 in the English and Russian texts, in which the words "twenty-seventh session" should be corrected to read "twenty-eighth session".

5. Sir Francis VALLAT, supported by Mr. ŠAHOVIĆ, said that the statement made in the second sentence was not entirely correct, because some members had been unable to attend meetings for other reasons, such as illness. He therefore suggested that that sentence should be deleted.

6. Mr. SETTE CÂMARA, supported by Mr. HAMBRO, said that he thought the second sentence should be retained as it stood.

7. The CHAIRMAN suggested that, since the summary records showed the attendance of members at meetings, it would be sufficient to say that "All members attended meetings during the twenty-eighth session of the Commission".

It was so agreed.

Paragraph 4, as amended, was approved.

Paragraphs 5 to 7

Paragraphs 5 to 7 were approved.

Paragraph 8

8. Mr. HAMBRO asked when the Commission had discussed item 8 of the agenda (Organization of future work).

9. The CHAIRMAN said that that item had been discussed by the Enlarged Bureau of the Commission.

Paragraph 8 was approved.

Paragraph 9

Paragraph 9 was approved.

Chapter I of the draft report, as a whole, as amended, was approved.

Chapter IV. SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES (A/CN.4/L.248 and Add.1-4)

10. The CHAIRMAN invited the members of the Commission to examine, paragraph by paragraph, chapter IV of the draft report, on the succession of States in respect of matters other than treaties (A./CN.4/L.248 and Add.1-4).

A. INTRODUCTION (A/CN.4/L.248)

1. *Historical review on the work of the Commission Paragraphs 1-17*

Paragraphs 1-17 were approved.

2. *General remarks concerning the draft articles*

Paragraphs 18-25

Paragraphs 18-25 were approved.

Paragraph 26

11. Mr. SETTE CÂMARA pointed out that, in order to bring the English text into line with the French text

of the sub-title preceding paragraph 26, the word "characters" should be in the singular.

It was so agreed.

Paragraph 26, as amended, was approved.

Section A of chapter IV, as a whole, as amended, was approved.

B. DRAFT ARTICLES ON SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES (A/CN.4/L.248 and Add.1-4)

Paragraph 27 (A/CN.4/L.248)

Paragraph 27 was approved.

1. *Text of all the draft articles adopted so far by the Commission (A./CN.4/L.248)*

Section I was approved.

2. *Introductory commentary to section 2 of Part I of the draft and text of articles 12 to 16 and of article 3, subparagraph (f), with commentaries thereto, adopted by the Commission at the present session (A/CN.4/L.248/Add.1)*

Section 2. Provisions relating to each type of succession of States

Paragraph (1)

12. Mr. USHAKOV, referring to the last sentence, suggested that, after the words "a change of sovereignty", the words "or a change in the responsibility for the international relations of the territory to which the succession of States relates" should be inserted, so as to conform with the wording used in article 3, subparagraph (d).

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

13. Mr. QUENTIN-BAXTER observed that the reservations in the second sentence were excessive, and suggested that the words "the parallelism... should be sought whenever possible as a desirable objective" should be replaced by the words "the parallelism... should be regarded as a desirable objective."

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved.

Paragraph (7)

14. Mr. USHAKOV said that the question whether archives were State property had not yet been settled. He therefore suggested that, in the penultimate sentence, the words "that kind of State property" should be replaced by the words "that matter" and that, in the last

sentence, the words “of State property” should be deleted.

It was so agreed.

Paragraph (7), as amended, was approved.

Mr. Reuter, First Vice-Chairman, took the Chair.

Paragraph (8)

15. Mr. SETTE CÂMARA suggested that in order to tone down the statement in the English text of the penultimate sentence, the words “has nothing to do with” should be replaced by the words “differs from”.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were approved.

Paragraph (11)

16. Mr. USHAKOV pointed out that the slight difference in drafting between paragraph 2 (a) of article 12 and paragraph 2 of article 13, on the one hand, and paragraph 1 (a) of articles 15 and 16, on the other hand, to which attention was drawn in paragraph (11), was not due to the different nature of the various types of succession. He therefore suggested that the penultimate sentence should be deleted.

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

17. The CHAIRMAN* suggested that the French text of the sub-title preceding paragraph (12) should be brought into line with the English text by replacing the words “*spécificités dues*” by the words “*aspects spécifiques liés*”.

It was so agreed.

18. Mr. QUENTIN-BAXTER pointed out that, in the second sentence, there was some confusion between the legal situation and the physical situation of movable property. What the Commission intended to convey was that the moving of movable property had no effect on a succession of States. He therefore suggested that the words “to place it out of reach of any succession” should be replaced by the words “to place it physically out of reach of any succession”.

19. Mr. SETTE CÂMARA said he too believed that, as it stood, that sentence did not reflect the Commission’s opinion. Even Mr. Quentin-Baxter’s proposal was not entirely satisfactory because what the Commission had had in mind was a change in the location of the movable property involved in the succession.

Mr. El-Erian resumed the Chair.

20. Sir Francis VALLAT suggested that the last part of the second sentence of paragraph (12) should be

amended to read “makes it easy to change the control over the property”.

It was so agreed.

21. Mr. QUENTIN-BAXTER proposed that the fourth sentence should be amended to read “In order for the predecessor State to retain or the successor State to receive such property, other conditions must be fulfilled.”

It was so agreed.

22. Mr. USTOR proposed that the words “‘natural’ limits”, in the last sentence, should be replaced by the words “limits imposed by good faith”.

It was so agreed.

Paragraph (12), as amended, was approved.

Paragraphs (13)-(15)

Paragraphs (13)-(15) were approved.

Paragraph (16)

23. Sir Francis VALLAT, referring to paragraph (16) and to the subsequent paragraphs, said he thought that the viability of the territory was one of the equitable considerations to be taken into account; he was not happy about the contradistinction between equity, on the one hand, and the viability of the territory on the other. But since it would be difficult to alter the draft at the present stage, he would be satisfied if that point was included in the summary record.

24. Mr. QUENTIN-BAXTER suggested that the words “principles subjacent”, in the first sentence of paragraph (16), should be replaced by the words “underlying principles”.

It was so agreed.

Paragraph (16), as amended, was approved.

Paragraphs (17)-(20)

Paragraphs (17)-(20) were approved.

Paragraph (21)

25. Mr. REUTER said he did not think that the last two sentences accurately reflected the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases.

26. Sir Francis VALLAT said that he had the same impression. Without having the exact wording of the Court’s judgment to hand, he suggested that the last two sentences of the paragraph should be replaced by a text on the following lines: “In its judgment, the Court decided that the parties should apply equitable principles in their subsequent negotiations.”

27. Mr. REUTER said that, while he could accept that suggestion, he himself had drafted a text which read: “In its judgment, the Court considered that, in the cases before it, international law referred back to equitable principles, which the parties should take into account in their negotiations”.

28. The CHAIRMAN suggested that the Secretariat should be requested to examine the exact wording of the Court’s judgment and to reformulate the last two

* Mr. Reuter.

sentences of paragraph (21) on the basis of the texts proposed by Sir Francis Vallat and Mr. Reuter.

Paragraph (21) was approved on that understanding.

Paragraphs (22) and (23)

Paragraphs (22) and (23) were approved.

Paragraph (24)

29. Mr. USHAKOV said that, to his mind, it was incorrect to draw, from the Court's elaboration of the concept of equity, the conclusion that equity was a rule of positive international law. In its judgment in the *North Sea Continental Shelf* cases, as quoted in paragraph (22) of the commentary, the Court had stated that "it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles".

30. Mr. SETTE CÂMARA agreed with Mr. Ushakov.

31. Mr. REUTER said that if rules of law based on equitable principles were established, they were still rules of law. He saw no need to philosophize about equity.

32. Mr. YASSEEN said that equity had two roles, on which he believed there was general agreement. First, it was a source of law. In fact, in certain circumstances, the judge could, and even should, rule *ex aequo et bono*, and in an international context the judge could proceed similarly if he had been so authorized by the parties to the dispute. Secondly, when a rule of positive international law provided that a matter should be settled by reference to equitable principles, a tribunal should base its decision on such principles, without the agreement of the parties being required. He considered that the Commission should confine itself to those two roles and avoid the more controversial theory that equity also had a corrective role.

33. Mr. TSURUOKA proposed that, in the first part of paragraph (24), the word "corrective" should be replaced by the word "supplementary".

It was so agreed.

34. Mr. RAMANGASOAVINA said that the expression "positive international law" was perhaps too strong, since equity was not a rule of the kind contained in conventions or generally accepted sets of regulations. It might be more appropriate to replace the word "positive" by the word "applicable".

35. Sir Francis VALLAT proposed that the words "is, when used in the present Section as part of the material content of specific provisions, a rule of positive international law, and not the notion of equity", should be replaced by the words "is also used in the present Section as part of the material content of specific provisions and not as the equivalent of the notion of equity. . ."

It was so agreed.

Paragraph (24), as amended, was approved.

The introductory commentary, as amended, was approved.

The meeting rose at 12.20 p.m.

1412th MEETING

Thursday, 22 July 1976, at 10.50 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, 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 III. STATE RESPONSIBILITY (continued)* (A/CN.4/L.247 and Add.1-8)

1. The CHAIRMAN invited the Commission to continue its examination, paragraph by paragraph, of section B of chapter III of its draft report.

B. DRAFT ARTICLES ON STATE RESPONSIBILITY (continued)*

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 (continued)**

Commentary to article 16 [17]¹ (Irrelevance of the origin of the international obligation breached) (A/CN.4/L.247/Add.2).

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

2. Sir Francis VALLAT, referring to the last sentence, observed that customary law constituted a source of obligation at least as important as a statute or a set of regulations. He therefore suggested that the word "custom" should be added to the examples given in parentheses, and that the words "a set of regulations" be replaced by the words "or regulation".

3. Mr. AGO (Special Rapporteur) supported that suggestion.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4)-(7)

Paragraphs (4)-(7) were approved.

Paragraph (8)

4. Sir Francis VALLAT suggested that in the English text of the third sentence, and in the rest of the com-

* Resumed from the 1409th meeting.

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