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Summary record of the 2317th meeting

Topic:
Programme of work

Extract from the Yearbook of the International Law Commission:-
1993, vol. I

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decision of principle taken in that regard at the beginning of the session.

87. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer draft articles 1 to 10, contained in the first report, to the Drafting Committee.

It was so agreed.

The meeting rose at 1.10 p.m.

2317th MEETING

Wednesday, 7 July 1993, at 11.10 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Gudmundur EIRIKSSON

Present: Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/446, sect. E, A/CN.4/L.479)

[Agenda item 6]

1. The CHAIRMAN said that, at its meeting which had just ended, the Enlarged Bureau had taken note of the report of the Planning Group (A/CN.4/L.479) and had decided to transmit it to the Commission. The Commission had to determine whether the views and recommendations of the Planning Group were acceptable and should be submitted to the General Assembly as part of the Commission's report.

2. Mr. EIRIKSSON (Chairman of the Planning Group) said that the report contained three groups of recommendations. First, on the planning of the activities for the remainder of the quinquennium, the Planning Group recommended in paragraph 7 that the Commission should endeavour to complete by 1994 the draft statute of an international criminal court and the second reading of the draft articles on the law of the non-navigational uses of international watercourses, and by 1996 the second reading of the articles of the draft Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. It also recommended that the Commission should endeavour to make substantial progress on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Paragraph 10 referred to a tentative schedule of work for the 1994, 1995 and 1996 sessions that was annexed to the report.

3. The second group of recommendations concerned the long-term programme of work. In paragraph 13 of the report, the Planning Group noted that the Working Group on the long-term programme of work had recommended the incorporation in the agenda of two new topics: "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". In paragraph 26 of the report, the Planning Group recommended the inclusion of the two topics and, in paragraph 27, it referred to the question of whether the Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses should undertake a study on the feasibility of incorporating the question of "confined underground water" in the topic. In paragraph 28 it recommended that such a request should be addressed to the Special Rapporteur.

4. The third group of recommendations concerned the Commission's contribution to the United Nations Decade of International Law,¹ and the Planning Group recommended that the Commission should approve the arrangements proposed by the Working Group as set out in paragraph 31.

5. If the Commission endorsed the three groups of recommendations, together with the other recommendations contained in the report under "Other matters", they would appear as the final chapter of the Commission's report.

6. Mr. SZEKELY said that the report was an excellent one and provided guidance for the Commission. However, the two new topics proposed in paragraph 13 were extremely technical and, while no doubt of interest to experts, were not perhaps the most urgent in terms of the Commission's contribution to international law. Their selection illustrated a trend in the Commission to give preference to more technical topics, a trend that would be offset to a considerable extent if the Commission decided to include the very topical question of confined underground water in the topic of the law of the non-navigational uses of international watercourses. If it did so decide, the title of the topic might have to be changed.

7. Mr. MAHIOU said that he endorsed Mr. Szekely's comments on the proposed new topics. The Commission ran the risk of giving the impression that certain important topics could not be codified and that it preferred to stick to the subjects of the greatest interest to itself. The Planning Group was correct in arguing that consideration of the two topics could provide useful guidelines, but the guidelines would not amount to the codification of international law as such. He was not sure how the General Assembly would react to the proposal; it might conclude that, if the Commission could not propose topics requiring codification, it had no more work to do.

8. Mr. KOROMA said that the Planning Group had apparently not taken into account a thought-provoking report on the Commission's work produced a few years ago by UNITAR,² which had recommended that the Commission should enter new territory. He was in general agreement with the comments made on the new topics by Mr. Szekely and Mr. Mahiou. The topic of State

¹ Proclaimed by the General Assembly in its resolution 44/23.

² United Nations publication, Sales No. 81.XV.PE/1.

succession was of course relevant in the present world situation and might appeal to the General Assembly, but the technical "reservations" topic was not urgent and should not be taken up by the Commission. It would be better to propose other topics, such as the effects of General Assembly resolutions or the question of international migration, or to give further consideration to the other alternatives submitted to the Planning Group, which might be more suitable for codification. As in the past, the Commission must strike a balance between technical topics and topics of great current concern to the international community.

9. Mr. KUSUMA-ATMADJA said that he agreed to some extent with what the previous speakers had said. The urgency of a topic depended on the view taken of the Commission's function. If that function was still the codification and progressive development of international law, then the Commission might run out of topics unless it took up the ones just suggested by Mr. Koroma, or perhaps the question of the environment. But such topics were not yet ripe for codification or progressive development. In any event, the Commission should not express a view about its own continuing relevance.

10. It must be remembered that even the uncompleted work on some topics had provided useful guidelines for parties in litigation. That benefit might also accrue from the consideration of the two new topics. Furthermore, no one could say that the question of State succession was not topical, and the common practice of entering reservations had resulted, for example, in some provisions of the Vienna Convention on the Law of Treaties being circumvented. The topic now needed clarification, although a formal instrument might not be required.

11. Mr. ROSENSTOCK said that he broadly agreed with Mr. Kusuma-Atmadja. The work on the proposed new topics would be useful and could be achieved within a finite period. Taking up such topics did not mean that the Commission was turning away from the drafting of formal instruments. Moreover, it should not take on tasks it could not complete within a reasonable time.

12. Mr. SZEKELY said that he now realized that he had been too timid in his earlier statement. There was certainly no clamour from the international community or the academic world for the Commission to take up the proposed new topics. The key consideration was that the new tasks should be useful and achievable. Perhaps the best course would be for the Commission to adopt one of the topics and take a fresh look at the other in 1994. However, he was not making a formal proposal to that effect.

13. Mr. CALERO RODRIGUES said that, as a member of the Planning Group, he endorsed the recommendation concerning the two new topics. However, he agreed with Mr. Mahiou that the Commission should not depart too much from its task of the codification and progressive development of international law. The recommendation to request the Special Rapporteur to consider the inclusion of "confined underground water" in the topic of the law of the non-navigational uses of international watercourses was a good one. If the Special Rapporteur came out against inclusion, the question would still have to be addressed, perhaps as a new topic

specifically on groundwater, which certainly required international regulation. The Special Rapporteur should perhaps comment on the general question of groundwater and its regulation.

14. Mr. VERESHCHETIN said that, as a member of the Planning Group, he naturally endorsed its recommendations. He agreed to a large extent with the comments of previous speakers and in particular with the view that the Commission ought in future to include in its agenda topics that were impressive both from the theoretical and practical points of view. At the same time, the two topics currently being recommended by the Planning Group for incorporation in the Commission's agenda had been selected as a result of a thorough, unbiased and lengthy process involving a methodical review of all the information pertaining to the list of possible topics.

15. He recognized that the two recommended topics were not as impressive as some others and that, in addition, they were being regarded as topics for study rather than for codification. However, he objected categorically to Mr. Szekely's assertion that the two topics were technical and academic and failed to meet the criterion of topicality. State succession and its impact on the nationality of natural and legal persons was clearly a subject that did not fit Mr. Szekely's categorization. It was, unfortunately, all too relevant, particularly with regard to the situation in the former Soviet Union, where in some of the newly independent States more than one-third of the population had been deprived of citizenship. Those were issues on which current international law failed to give clear guidance. The topic was relevant not only to the former Soviet Union but to some European countries as well and, in his opinion, the Commission should begin considering it immediately, regardless of the final form of its work. Even a study of the issue would be valuable, given the current state of international affairs.

16. The topic entitled "The law and practice relating to reservations to treaties" was indeed academic; however, it might turn out to be more topical in the future. Furthermore, it was relevant to current State practice. For example, the members of the Commonwealth of Independent States were making so many reservations and declarations of interpretation that the legal force of the treaties concerned was in question.

Mr. Eiriksson took the Chair.

17. The CHAIRMAN, speaking in his capacity as Chairman of the Planning Group, said the Planning Group was suggesting that the Commission should decide at its next session how the proposed topics would be dealt with. No specific recommendations were being made with regard to the selection of a special rapporteur or the establishment of a working group to consider those topics.

18. If the Commission decided that it was not feasible to incorporate the question of confined underground water in the topic of the law of the non-navigational uses of international watercourses, it would subsequently have to decide whether to include that question as a separate topic in its agenda.

19. The Planning Group had recommended that the outlines prepared by members of the Commission on se-

lected topics of international law,³ should be included in the *Yearbook* of the International Law Commission for 1993.

20. In the report on its forty-second session, the Commission had referred to certain criteria for the selection of topics for its agenda.⁴ Those criteria had subsequently received general endorsement from the General Assembly and had more recently formed part of the basis on which the Working Group had chosen the two topics currently being recommended for inclusion in the Commission's programme of work.

21. Mr. ROSENSTOCK said that it was for the Commission and not for the Special Rapporteur to decide how to treat the question of confined underground water. If the Special Rapporteur were to conclude—something he was not likely to do—that the question could not be incorporated in the topic of the law of the non-navigational uses of international watercourses, he would strongly recommend that it should be taken up separately by the Commission as a matter of priority.

Mr. Barboza resumed the Chair.

22. Mr. SZEKELY said that he welcomed Mr. Rosenstock's open-mindedness with regard to the issue of confined underground water.

23. He agreed with Mr. Vereshchetin that the two recommended topics were of interest and were relevant to international law; in particular the topic on State succession was of practical relevance and any work the Commission did in that area would certainly be valuable. Nevertheless, both topics still gave the impression of being rather technical and it had to be recognized that they were not of the highest priority in terms of current international concerns. He hoped, therefore, that the choice of those two "modest" topics was not final. It would be more appropriate for the Commission to communicate to the General Assembly that consideration of new topics for its agenda was still open and that the Assembly was also welcome to offer suggestions in that regard.

24. Mr. TOMUSCHAT said that he had participated in the task of identifying topics which might be recommended for inclusion in the Committee's programme of work. Many of the "flashier" topics which had initially attracted interest had, on closer consideration, turned out to be problematic: either they had not been amenable to the identification of juridical features or they had posed problems at the political level.

25. In his view, the two subjects recommended by the Planning Group were indeed topical. He agreed with Mr. Vereshchetin that State succession was an issue of great importance for the former Soviet Union and for certain European countries; it might even at some point become relevant to the African countries. Current international law simply did not provide enough guidance on the question of newly emerging States and the right of residents to citizenship. Disputes in that matter could even threaten the application of multilateral treaties. The topic was thus well-suited for consideration by the Commission.

26. Mr. KOROMA said that, in his earlier statement, he had had no intention of impeding adoption of the Planning Group's report. He had simply wished to stress that the Commission must be responsive to the wishes of the international community.

27. The topic of the law and practice relating to reservations to treaties could be tied in with a well-defined objective: reservations to a treaty must not be contrary to the object and purpose of that treaty. Furthermore, reservations and declarations of interpretation were beginning to represent a real threat to quite a number of treaties, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. At the same time, the subject was rather "modest" in comparison with other more topical issues, such as mass migration, which was currently receiving coverage in the press and on which considerable research had already been done.

28. The topic of State succession and its impact on the nationality of natural and legal persons was clearly relevant to the current political situation. Moreover, it encompassed such issues as human rights and the application of the principles of equity and justice.

29. In his opinion, the Commission should adopt the Planning Group's recommendations on a provisional basis, while remaining open to suggestions from the Sixth Committee and the General Assembly about other topics that might be more suitable for the Commission's programme of work.

30. Mr. EIRIKSSON (Chairman of the Planning Group) pointed out that paragraph 26 of the Planning Group's report made it clear that its recommendations were subject to the approval of the General Assembly. It followed that the Commission would certainly be open to suggestions by the Assembly regarding other topics.

31. Mr. RAZAFINDRALAMBO said that it might be appropriate to delete paragraph 25 of the report, since it specified that the final form of the Commission's work on the topic of State succession and its impact on the nationality of natural and legal persons should be a study or a draft declaration.

32. Mr. ROSENSTOCK said that the text of paragraph 25 had been carefully formulated by the Planning Group and did not actually preclude the possibility that work on the topic might take other forms. He was in favour of maintaining the text as it stood.

33. Mr. KOROMA suggested that the paragraph should be amended to read: "The form of the Commission's work on that topic would be decided by the Commission at a later time".

34. Mr. EIRIKSSON (Chairman of the Planning Group) said that the wording of paragraph 25 had been carefully thought out and should remain as it stood. However, it might be appropriate to add a sentence along the lines proposed by Mr. Koroma.

35. Mr. KOROMA indicated that he was in agreement with Mr. Eiriksson's suggestion.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission had concluded its consideration of the report of the Planning Group and agreed that the Commission's views would

³ Subsequently issued as document A/CN.4/454; reproduced in *Yearbook* . . . 1993, vol. II (Part One).

⁴ *Yearbook* . . . 1990, vol. II (Part Two), p. 107, footnote 366.

be duly reflected in the draft of the final chapter of its report to the General Assembly.

It was so agreed.

37. The CHAIRMAN recalled that members had been invited to indicate whether they would be willing to participate in preparing a publication as part of the Commission's contribution to the United Nations Decade of International Law.⁵ He reminded members that few replies had been received and that the deadline was 15 July.

The meeting rose at 12.20 p.m.

⁵ See footnote 1 above.

2318th MEETING

Tuesday, 13 July 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

State responsibility (concluded)* (A/CN.4/453 and Add.1-3,¹ A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Room Doc.1)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.480 and Add.1).
2. Mr. MIKULKA (Chairman of the Drafting Committee), said that at the forty-fourth session of the Commission (1992), the Drafting Committee had adopted articles 6, 6 *bis*, 7, 8, 10² and 10 *bis*, on reparation, as well as a new paragraph 2 for article 1.³ Those articles, which had

* Resumed from the 2316th meeting.

¹ Reproduced in *Yearbook... 1993*, vol. II (Part One).

² The substance of article 9 (Interest), as proposed by the Special Rapporteur in his second report in 1989, was incorporated in paragraph 2 of article 8. Hence the gap in the sequence of articles.

³ For the text, see *Yearbook... 1992*, vol. I, 2288th meeting, para. 5.

not been acted on at the previous session in the absence of commentaries, had now been adopted at the present session.⁴

3. At the present session, the Drafting Committee had considered the articles of part 2, proposed by the Special Rapporteur in his fourth report⁵ and adopted articles 11 to 14, concerning countermeasures. The titles and texts of those provisions read as follows:

Article 11. Countermeasures by an injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled, subject to the conditions and restrictions set forth in articles . . . , not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary to induce it to comply with its obligations under articles 6 to 10 *bis*.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 12. Conditions relating to resort to countermeasures

1. An injured State may not take countermeasures unless:

(a) it has recourse to a [binding/third party] dispute settlement procedure which both the injured State and the State which has committed the internationally wrongful act are bound to use under any relevant treaty to which they are parties; or

(b) in the absence of such a treaty, it offers a [binding/third party] dispute settlement procedure to the State which has committed the internationally wrongful act.

2. The right of the injured State to take countermeasures is suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

Article 13. Proportionality

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 14. Prohibited countermeasures

An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

⁴ For the adoption of article 1, paragraph 2, and article 6, see 2314th meeting; for the adoption of articles 6 *bis*, 7, 8, 10 and 10 *bis*, see 2316th meeting.

⁵ For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook... 1992*, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.