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Summary record of the 2387th meeting

Topic:

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the draft Code the articles on intervention, threat of aggression and recruitment of mercenaries.

10. A number of crimes remained controversial, and they were the ones the Commission should focus on at the present stage. Apartheid had been a source of outrage in the past, especially on the African continent, but the very term, synonymous with the practice of a particular African country, had now been consigned to the annals of history. If the phenomenon should ever re-emerge, a new term would have to be devised. One Government had suggested "institutionalization of racial discrimination". The Commission should give serious consideration to that phrase, and an article defining it, in the draft Code.

11. Colonial domination could also be said to be a thing of the past. The recent Iraqi invasion of Kuwait notwithstanding, in today's world it was highly unlikely that one country would dare to use its superior force to take over another. As the crime dated back principally to the sixteenth and seventeenth centuries, its perpetrators could never be brought to justice now. Colonial domination was defined in article 19 of part one of the draft on State responsibility as an international crime.[3] Was that not enough? If not, the Commission should set about drafting a better definition of the crime than he had been able to achieve.

12. He had proposed a general definition of international terrorism that had been criticized by a number of Governments on the grounds that the crime should not be subject to prosecution in general terms, but rather in specific cases and on the basis of conventions covering specific manifestations of terrorism. If the crime was to be kept in the draft Code, therefore, a more acceptable definition would have to be drafted. It appeared that there was very little support for including illicit traffic in narcotic drugs. Many writers viewed it as an international crime, but not as a crime against the peace and security of mankind. The Commission might therefore wish to exclude it.

13. Accordingly, on those four crimes—racial discrimination, colonial domination, international terrorism and illicit traffic in narcotic drugs—a further round of consultations should be instituted, with a view to determining which of them should be kept in the draft Code.

14. The CHAIRMAN thanked the Special Rapporteur for his summing up and suggested that, in order to facilitate the consultations and ensure a truly frank exchange of views, the Commission should hold an informal meeting.

The meeting rose at 10.50 a.m.

[3] See 2384th meeting, footnote 10.

2387th MEETING

Friday, 19 May 1995, at 10.30 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/464 and Add.1 and 2, sect. B, A/CN.4/466,[2] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509 and Corr.1)

[Agenda item 4]

THIRTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRMAN noted that the articles covered in the Special Rapporteur's thirteenth report (A/CN.4/466), namely, articles 15 to 25, were not currently before the Drafting Committee and that the Commission had to take a formal decision on them. Taking into consideration the consultations he had held, he suggested that the Commission should adopt the following decision:

"The Commission refers to the Drafting Committee articles 15 (Aggression), 19 (Genocide), 21 (Systematic or mass violations of human rights) and 22 (Exceptionally serious war crimes) for consideration as a matter of priority on second reading in the light of the proposals contained in the Special Rapporteur's thirteenth report and of the comments and proposals made in the course of the debate in plenary, on the understanding that, in formulating those articles, the Drafting Committee will bear in mind and at its discretion deal with all or part of the elements of the draft articles as adopted on first reading: 17 (Intervention), 18 (Colonial domination and other forms of alien domination), 20 (Apartheid), 23 (Recruitment, use, financing and training of mercenaries) and 24 (International terrorism)."

2. As to any other articles, it was his intention, subject to the Commission's agreement, to conduct informal consultations to determine the best way to deal with them.

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook... 1995*, vol. II (Part One).

3. If he heard no objection, he would take it that the Commission decided to adopt that suggestion.

It was so decided.

State succession and its impact on the nationality of natural and legal persons (*continued*)* (A/CN.4/464/Add.2, sect. F, A/CN.4/467,[3] A/CN.4/L.507, A/CN.4/L.514)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

4. Mr. BOWETT expressed his thanks to the Special Rapporteur for having drafted a first report (A/CN.4/467) that was both clear and comprehensive. He agreed with most of what was said in it and wished only to make a few comments.

5. He agreed with the Special Rapporteur that the Commission should focus on situations where there was a change of sovereignty over territory. He also agreed that the Commission should concentrate, at least initially, on natural persons, if only because it was much easier for legal persons to incorporate themselves in a foreign country than for an individual to acquire a new nationality.

6. The selection of categories of succession was a delicate task; the Special Rapporteur had already expressed certain preferences in his first report. He, however, was not convinced that the selection of categories was crucial at the present stage. Everything would depend on the course the Commission chose to follow. In most cases, there were two States, the predecessor State and the successor State, and that was the basis from which the Commission could establish an obligation for those two States to negotiate an agreement under which the individuals concerned could acquire a nationality. If there was such a thing as a human right to a nationality, there must be a concomitant obligation on States and it was in the application of that obligation that the Commission could be of service to States. The Commission could not only stress the obligation to negotiate so that the individuals concerned could acquire a nationality, but it could also list the principles that ought to be embodied in the agreements concluded among States.

7. If there was a right of nationality as a human right, there was still a need for a genuine link to be established between the person and the State of his nationality before that right could be recognized. In that connection, he shared the view of the Special Rapporteur that the Commission could usefully give more definition to the concept of a genuine link than ICJ had done in the *Nottebohm* case.[4]

8. However, he had definite reservations about unrestricted free choice of nationality or right of option. The Special Rapporteur referred to the position of the Arbitration Commission of the Conference on Yugoslavia, which he found to be extremely dubious and according to which every individual could choose to belong to whatever ethnic, religious or language community he or she wished. In his view, the Commission should itemize those factors which would indicate that a choice was *bona fide* and must therefore be respected and given effect by the State through the granting of nationality.

9. If agreements on the granting of nationality were to be negotiated, that could take time and the negotiations could well continue even after the formal transfer of sovereignty over the territory had taken place. It was therefore necessary to provide for a transitional status to be applied while an agreement was being negotiated, while legislation was being prepared in the State concerned or while the individual was exercising his right of option—that is to say during what the Special Rapporteur had referred to as "interim arrangements".

10. The Special Rapporteur had also referred to the effect of change of nationality on the right of diplomatic protection. Although that problem was incidental, it was of some importance. The normal rule required that, in order to enjoy the protection of a State, a person must have held the nationality of that State continuously from the time of injury to the time of the claim. However, that continuity could be broken and the right of protection lost when a change of nationality occurred through a transfer of territory. It would therefore be appropriate to make the rule apply only to situations where a change of nationality came about through the free choice of an individual and not as a result of a transfer of territory.

11. Mr. TOMUSCHAT, congratulating the Special Rapporteur on an excellent report, said he too believed that it was unnecessary to think in terms of drafting an international treaty. In the first place the Commission had in the past already produced declarations and works of codification which did not rank as international treaties and that was therefore in line with good practice. More particularly, however, it was now that some States had need of rapid legal assistance from the international community to help them decide by which criteria they should be guided. The drafting of a treaty could take about 10 years, at the end of which time, however, the topic might have lost all interest.

12. Also the study should, in his view, focus on natural persons, with a separate study being justified in the case of legal persons, since they did not necessarily have the same nationality in all their legal relations.

13. He endorsed the Special Rapporteur's idea of a study of the limits imposed by international law on internal law, whose sphere of activity must not be extended in the absence of a genuine link with the State concerned. With regard to the Special Rapporteur's statement that internal law and international law were independent of each other, he wondered whether, in cases of extreme gravity, it should not be possible to claim that acts carried out at the national level were null and void. He had in mind the case where the decision to divest certain natural persons of their nationality was an element in the persecution of an ethnic minority. In Germany, for instance, the Act by which the Third Reich had deprived the Jews of their nationality had subsequently been

* Resumed from the 2385th meeting.

[3] Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

[4] See 2385th meeting, footnote 15.

declared unconstitutional by the Constitutional Court. Furthermore, in a lengthy article, Mr. F. A. Mann defended the proposition that consideration should be given, in the context of responsibility, to making the consequences of the commission of an internationally wrongful act null and void.[5]

14. The centre of the Commission's discussions would be the right to nationality, the principle of which had been stressed by the Special Rapporteur. In that connection, article 24 of the International Covenant on Civil and Political Rights carefully said very little about recognizing a right to nationality. Paragraph 3 did, however, stipulate that "Every child has the right to acquire a nationality". Perhaps, therefore, a distinction should be drawn between adults and children so that children would have to be born with a nationality and could not be stateless from birth. Moreover, State succession could not leave millions of people without a nationality and it was therefore up to the international community to introduce rules whereby any person involved in a State succession would be recognized as having a nationality. In that connection, he agreed that an obligation should be imposed on States to negotiate a solution that would avoid such a deplorable situation.

15. Another instrument, the International Convention on the Elimination of All Forms of Racial Discrimination, was also very careful in that, in the case of prohibited grounds of discrimination, it expressly excluded from the Convention questions of nationality. Consequently, it was not absolutely prohibited to take account of certain links of origin, history and civilization with a view to recognizing the nationality of persons.

16. He wished to underline the need to move ahead with the study and, in particular, to propose a certain number of choices to the General Assembly and the members of the Commission, for the General Assembly had not requested an academic study on the state of the law of nationality. In that connection, it would be extremely useful to have information on the practice followed by the Baltic States and especially the Russian Federation on the objections and criticisms expressed with regard to such practice—such as the Russian criticisms of the practice of the Baltic States—and on the reaction to those criticisms. The Commission could then endeavour to arrive at the right balance.

17. Mr. de SARAM said he agreed that the main focus should be on the nationality of natural persons, who were more likely to suffer from the merger or division of States or from the attachment of one part of the territory of a State to another. The right of a State to determine the conditions governing the acquisition or loss of nationality was not unlimited because there were treaties which were applicable. It was important for the States concerned to enter into negotiations, but the individuals concerned also had rights, which, as pointed out by Mr. Bowett, did not any longer allow complete freedom of choice. The Commission would therefore be greatly assisted in its discussions if it had before it documentation that would enable all of its members to gain an accurate idea of the relevant provisions of the law of treaties and of their practical application.

18. Mr. BENNOUNA said that the academic side of the question of nationality was well known. Consequently, it was a knowledge of practice that was lacking. Only on the basis of practice could the Commission propose solutions or, at least, guidelines.

19. Mr. MIKULKA (Special Rapporteur) said the fact that he referred in his report to the right of option, as envisaged by the Arbitration Commission of the Conference on Yugoslavia, in no way meant that he endorsed that approach: he had even had occasion to criticize it in another forum. As to the available documentation, referred to in his report, it consisted, on the one hand, of earlier material published by the Codification Division of the United Nations Office of Legal Affairs in 1959 and 1978[6] and of more recent documents on national legislation which had been provided by Governments in response to the request of the General Assembly and by other sources.

20. Ms. DAUCHY (Secretary to the Commission) said that the secretariat had a complete list of the documents transmitted to the Special Rapporteur. It could also have reproduced, either for general distribution or at least for members of the Commission who so requested, a document of about 100 pages which contained replies from the Governments of Austria, Cyprus, the Czech Republic, Singapore, Slovakia, Tunisia and the United Kingdom of Great Britain and Northern Ireland.

21. Mr. ROSENSTOCK reminded members that it had been suggested that a working group should be appointed—a solution that would assist the Commission in its task having regard to its programme of work.

22. Mr. PAMBOU-TCHIVOUNDA (First Vice-Chairman) said it was apparent from consultations he had held that there was general agreement on the need to set up a working group; opinions differed on the right time to do so, however.

23. Following a discussion in which Mr. BENNOUNA, Mr. EIRIKSSON, Mr. YANKOV, Mr. GÜNEY, Mr. AL-BAHARNA, Mr. IDRIS and Mr. MIKULKA took part, the CHAIRMAN said that there was a consensus on the need to appoint a working group, which would start work at the end of the general debate on the topic. He would therefore ask the First Vice-Chairman to pursue his consultations with a view to establishing a list of those who wished to be members of the group, in consultation with the Special Rapporteur, so that the Commission could take a decision as soon as possible on the working group's terms of reference and composition. Since consideration of the topic was still at the preliminary stage, he would personally favour an open-ended working group so as to have the benefit of the contribution of all members.

The meeting rose at 11.35 a.m.

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[5] "The consequences of an international wrong in international and municipal law", *The British Year Book of International Law 1976-1977* (Oxford, Clarendon Press, 1978), pp. 5 *et seq.*

[6] United Nations, Legislative Series, *Laws concerning Nationality* (ST/LEG/SER.B/4) (Sales No.54.V.1) and Supplement to *Laws concerning Nationality* (ST/LEG/SER.B/9) (Sales No.59.V.3) and *Materials on Succession of States in respect of Matters other than Treaties* (ST/LEG/SER.B/17) (Sales No.77.V.9).