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Summary record of the 2419th meeting

Topic:
Other topics

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62. Mr. THIAM (Special Rapporteur) said that he could accept the proposal by Mr. Rosenstock. He would also agree that reference should be made to the fact to which Mr. Pambou-Tchivounda had drawn attention.

63. Mr. IDRIS said that Mr. Rosenstock's proposal met his concern and was entirely satisfactory.

64. The CHAIRMAN suggested that the words "—particularly of developing countries—" should be deleted and that Mr. Pambou-Tchivounda's idea of referring to statements made in the Sixth Committee should be adopted.

65. Mr. ROSENSTOCK said he did not think that the Commission should make a distinction only in that paragraph between the written comments of Governments and comments made by Governments in the Sixth Committee, all of which were and had been taken into account. It was none the less true that relatively few comments had been made. It was therefore totally unnecessary to amend that paragraph.

66. Mr. PAMBOU-TCHIVOUNDA said that, if the paragraph was not amended, the word "regretted" should be looked at once again.

67. The CHAIRMAN suggested that new wording for paragraph 101 should be submitted to the Commission later.

Paragraphs 102 to 107

Paragraphs 102 to 107 were adopted.

Paragraph 108

68. Mr. VARGAS CARREÑO proposed that, in the second sentence, the words "the view of Latin American members" should be replaced by the words "the view of some members" and that the words "necessarily pernicious" should be replaced by the words "always wrongful".

69. Mr. ROSENSTOCK said that he would like the second sentence to be purely and simply shortened. A full stop should be placed after the words "widely shared" and the second part of the sentence should be deleted.

Paragraph 108, as amended, was adopted.

Paragraphs 109 to 111

Paragraphs 109 to 111 were adopted.

Paragraph 112

70. Mr. GÜNEY said that the text proposed by the Special Rapporteur contained a definition. He therefore asked who was going to give a more acceptable definition and when. The wording of the paragraph should be changed so that it would reflect the debate more faithfully.

71. Mr. THIAM (Special Rapporteur) said that he would not object to the deletion of the paragraph if it was going to create problems. If it was retained, the words "more acceptable" should be replaced by the words "more precise".

72. Mr. TOMUSCHAT said that the debate was fully reported in paragraphs 79 to 85 of chapter II of the report and that paragraph 112 was only part of the "summing up of the debate by the Special Rapporteur".

73. The CHAIRMAN, supported by Mr. ROSENSTOCK, suggested that the paragraph should be amended to read: "If the crime of international terrorism were to be retained in the Code, he felt that it would be necessary to draft a more precise definition for the purposes of prosecution."

It was so agreed.

Paragraph 112, as amended, was adopted.

Paragraphs 113 to 115

Paragraphs 113 to 115 were adopted.

Paragraph 116

74. Mr. EIRIKSSON proposed that the words "Further to the decision reflected in paragraph 115 above" and the words "under the terms reflected in paragraph 114 above" should be deleted.

Paragraph 116, as amended, was adopted.

Paragraph 117

Paragraph 117 was adopted.

The meeting rose at 1.05 p.m.

2419th MEETING

Monday, 17 July 1995, at 3.15 p.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, 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. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft report of the Commission on the work of its forty-seventh session (*continued*)

CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.511 and Add.1)*

1. The CHAIRMAN invited the Commission to consider chapter IV of its report (A/CN.4/L.511 and Add.1), paragraph by paragraph.

A. Introduction

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 8 to 27

Paragraphs 8 to 27 were adopted.

Paragraph 28

2. Mr. TOMUSCHAT said that readers might have difficulty understanding the reference in the second sentence to a “right of action”, for which there was no explanation other than the reference in footnote 14, subparagraph (c) (iii).

3. Mr. BOWETT proposed that the words should be replaced by either “right to sue” or “right of legal suit”.

4. Mr. BARBOZA (Special Rapporteur) said that the problem did not arise in his original draft, since “*titulares de la acción*” in Spanish meant precisely that the State and bodies designated by it were entitled to appear in court to assert a right. If the English version was unclear, it should be modified.

5. The CHAIRMAN suggested that the words “right of action” should be replaced by “right to sue”.

It was so agreed.

Paragraph 28, as amended, was adopted.

Paragraphs 29 to 37

Paragraphs 29 to 37 were adopted.

Paragraph 38

6. Mr. MAHIU, supported by Mr. PELLET, suggested that the words “such acts”, in the second sentence, should be replaced by “dangerous and ultrahazardous activities”.

Paragraph 38, as amended, was adopted.

Paragraphs 39 and 40

Paragraphs 39 and 40 were adopted.

C. Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law

7. The CHAIRMAN said that a document, containing the text of the articles adopted at the present session, together with the commentaries, would be issued at a later stage. Since article D had been adopted as a working hypothesis, the words “, as a working hypothesis,” should be added before “D [9 and 10]” in the title.

It was so agreed.

CHAPTER V. *State succession and its impact on the nationality of natural and legal persons (A/CN.4/L.514)*

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Paragraph 7

8. The CHAIRMAN, at the suggestion of Mr. PELLET, said that the words, “, being essentially a matter of internal law,” should be added after the word “nationality”.

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 14

Paragraphs 8 to 14 were adopted.

Paragraph 15

9. Mr. PELLET said that the phrase “the discretionary power of the State with regard to nationality was not absolute”, in the first sentence, was almost redundant. Under French administrative law, discretionary power was, by definition, not absolute. Accordingly, he would delete the word “discretionary” from that phrase.

10. Following a discussion in which Mr. MIKULKA, Mr. PELLET, Mr. VILLAGRÁN KRAMER and Mr. RAZAFINDRALAMBO took part, the CHAIRMAN suggested that the first clause of the first sentence of

paragraph 15 should read: "While the freedom of action of the State with regard to nationality was not absolute."

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraphs 16 to 22

Paragraphs 16 to 22 were adopted.

Paragraph 23

11. Mr. TOMUSCHAT, supported by Mr. MIKULKA and Mr. PELLET, said that the word "humanitarian" usually referred to the law relating to warfare, yet in the penultimate sentence of paragraph 23, it was being used to refer to human rights. Was the word "humanitarian" appropriate in that context?

12. Mr. de SARAM said that in the debate he had pointed out that, in matters pertaining to nationality, there were humanitarian considerations which had to be taken into account. In his view, the word "humanitarian" did not necessarily imply a connection with the laws of warfare and could be used in the context of human rights.

13. The CHAIRMAN suggested that the words "humanitarian aspect of the question" should be replaced by "humanitarian needs of the matter".

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 28

Paragraphs 24 to 28 were adopted.

Paragraph 29

14. Mr. PELLET said that the words "proposed new definition", in the last sentence of the paragraph, should simply read "proposed definition", to avoid giving the definition more emphasis than it deserved.

Paragraph 29, as amended, was adopted.

Paragraphs 30 to 34

Paragraphs 30 to 34 were adopted.

Paragraph 35

15. Mr. PELLET proposed that the words "in its preliminary study", in the first sentence, should be deleted, because they gave an erroneous impression of the Commission's approach.

Paragraph 35, as amended, was adopted.

Paragraph 40

16. Mr. PELLET said that, to be consistent with the decision on paragraph 15, the words "on the discretionary power of States", in the first sentence, should be replaced by "on the freedom of action of States".

17. Following a brief discussion in which Mr. MAHIOU, Mr. PELLET, Mr. RAZAFINDRALAMBO and Mr. LUKASHUK took part, the CHAIRMAN suggested that Mr. Pellet's proposal should be adopted.

It was so agreed.

Paragraph 40, as amended, was adopted.

Paragraphs 41 to 43

Paragraphs 41 to 43 were adopted.

Paragraph 44

18. Mr. TOMUSCHAT suggested that the references to the *Flegenheimer* and *Micheletti* cases should be accompanied by footnotes.

19. Mr. de SARAM suggested that, in general, when specific cases were referred to, the complete citation for the case should be provided in a footnote.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 49

Paragraphs 45 to 49 were adopted.

Paragraph 50

20. Mr. MIKULKA said that, as it stood, the first sentence of paragraph 50 might not properly reflect the discussion. The phrase "an obligation on which a consensus had emerged within the Commission," should be inserted, in the first sentence, after "an obligation on States to negotiate". Again, the word "additional", in the last sentence, should be replaced by "optional".

Paragraph 50, as amended, was adopted.

Paragraphs 51 to 54

Paragraphs 51 to 54 were adopted.

Paragraph 55

21. Mr. VILLAGRÁN KRAMER proposed that, in the Spanish version, the word "retirada", in the second line, should be replaced by "revocación".

Paragraph 55, as amended in the Spanish version, was adopted.

Paragraph 56

Paragraph 56 was adopted.

Paragraph 57

22. Mr. MAHIU said that the word “omission”, in the first line, was inappropriate. The Commission had not omitted the question of the nationality of legal persons. It had assigned priority to other matters.

23. The CHAIRMAN said that Mr. Mahiou and the Special Rapporteur should perhaps consult and agree on an appropriate change in the wording.

Paragraph 57 was adopted on that understanding.

Paragraph 58

Paragraph 58 was adopted.

Paragraph 59

24. Mr. de SARAM suggested it should be made clear that the “regret” mentioned in the first sentence had been expressed by only one member.

25. Mr. AL-BAHARNA proposed that the words “Regret was, however, also expressed” should be replaced by “Regret was expressed by one member”.

Paragraph 59, as amended, was adopted.

Paragraphs 60 to 66

Paragraphs 60 to 66 were adopted.

Paragraph 67

26. Mr. de SARAM suggested that where the terms *jus soli* and *jus sanguinis* first appeared in the draft report, a footnote should be added indicating the precise meanings of those terms in English.

Paragraph 67 was adopted.

Paragraph 68

Paragraph 68 was adopted.

Paragraphs 69 and 70

27. Mr. PELLET said that his views on the matter referred to in the paragraph had not been included. Accordingly, he would add, either to paragraph 69 or 70, the following: “Doubt was also expressed as to whether the initial manner of acquiring the nationality of the predecessor State was of any relevance as regards the right of option.”

28. Mr. MAHIU said that, while endorsing Mr. Pellet’s observation, he would prefer to present it in a positive fashion, for example by using the words: “The vari-

ous criteria for the acquisition of nationality were involved . . .”.

Paragraph 69 and paragraph 70, as amended, were adopted.

Paragraphs 71 to 75

Paragraphs 71 to 75 were adopted.

Paragraph 76

29. Mr. RAZAFINDRALAMBO said that, having been the author of the remarks identified in the text by the figures (1) and (3), he would prefer to see them grouped together and introduced by the words “One member remarked that”. The comment identified by the figure (2) could then be introduced by a phrase such as “The view was also advanced that”.

Paragraph 76, as amended, was adopted.

Paragraph 77

Paragraph 77 was adopted.

Paragraph 78

30. Mr. MAHIU said that the word “supplementary”, in the first sentence, should be replaced by “residual”.

Paragraph 78, as amended, was adopted.

Paragraphs 79 to 85

Paragraphs 79 to 85 were adopted.

Paragraph 86

31. Mr. PELLET proposed the addition of a paragraph 86 that would provide a clear indication of where the Commission’s work on the topic stood at the conclusion of the forty-seventh session. It was important, in his view, that the General Assembly should be informed about the extent to which the Commission had been able to respond to resolution 49/51.

32. Mr. MIKULKA (Special Rapporteur) drew attention to the last two sentences of paragraph 7 of the report of the Planning Group (A/CN.4/L.515), which contained the requisite information. A paragraph along those lines could be added to chapter V of the report.

33. Following a discussion in which Messrs. TOMUSCHAT, ARANGIO-RUIZ, EIRIKSSON, ROSENSTOCK and PELLET took part, the CHAIRMAN suggested the text of new paragraph 86 to read as follows:

“In the view of the Special Rapporteur, the Working Group should be reconvened at the next session to complete its task, which would enable the Commission to meet the request contained in paragraph 6 of

General Assembly resolution 49/51. The Commission took note of the views of the Special Rapporteur.”

It was so agreed.

Paragraph 86 was adopted.

Section B, as amended, was adopted.

Chapter V, as a whole, as amended, was adopted.

CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (concluded) (A/CN.4/L.509 and Corr.1)

B. Consideration of the topic at the present session (concluded)

Paragraph 29 (concluded)

34. The CHAIRMAN read out the following new text to replace paragraph 29 as it appeared in document A/CN.4/L.509:

“29. As to the range of crimes to be included in part two some members favoured a restrictive list as proposed by the Special Rapporteur to ensure a meaningful code strictly confined to the most serious types of behaviour that posed a serious and immediate threat to the peace and security of the whole of mankind, as recognized by the international community; to give priority to the crimes whose prosecution was provided for by well-established rules of international law and, customary rules whose application would not depend on the form of the future instrument; to exclude crimes on which there was insufficient existing practice or which were mainly of historical significance; to ensure the widest possible acceptance of the Code; to avoid undermining the success of the entire Code by engaging in a quixotic exercise resulting in yet another draft that would remain in the archives. There was a further suggestion to restrict the Code to crimes whose perpetrators were directly responsible by virtue of existing general international law, and primarily the international crimes of States for which individual criminal responsibility was only one of the consequences thereof. Other members favoured an expanded list, as compared with the list proposed by the Special Rapporteur. A comprehensive code was viewed as a more effective tool for the strengthening of international law and international peace and security, for the protection of the fundamental interests of the international community in preserving life, human dignity and property rights and for achieving a more appropriate balance between political realism and legal idealism. It was stressed that some of the crimes which had been excluded from the list adopted on first reading, for example apartheid and terrorism, were covered and defined by international instruments and fully qualified for inclusion in the future code. It was also noted that there was a wide range of positions as to the scope of the future code and that to categorize those positions as ‘minimalist’ or ‘maximalist’ would be an oversimplification. Those favouring a more comprehensive list of crimes also suggested that a restrictive list was no guarantee of acceptance of States, nor of consensus on its contents.”

35. Mr. ROSENSTOCK said that he did not want to start a lengthy discussion and would be prepared to accept the proposed text if that was the wish of the Commission. However, the second sentence, beginning with the words “There was a further suggestion”, was not clear, was not helpful and was not necessary, and he would prefer it to be deleted. The sixth sentence, beginning with the words “It was also noted”, also seemed unnecessary, since the Commission had agreed not to employ the terms “minimalist” and “maximalist”. The best course would be to delete it.

36. Mr. MAHIU, recalling that the paragraph had been redrafted at his suggestion, said that he was prepared to accept Mr. Rosenstock’s proposals and wished, in turn, to suggest that the text be further simplified by deleting the words “for example apartheid and terrorism” from the fifth sentence.

37. Mr. LUKASHUK endorsed Mr. Mahiou’s suggestion and said that he was also in favour of the deletion, proposed by Mr. Rosenstock, of the sentence beginning with the words “There was a further suggestion to restrict” which, to his mind, was of somewhat academic interest.

38. Mr. MIKULKA said that, having been the author of the suggestion referred to in the second sentence, he was strongly opposed to its deletion. One of the physical consequences of international crimes of States was the fact that acts attributable to the State risked being punished at the international level without regard to the provisions of internal law. The sentence could be made clearer by inserting the words “on the international plane” between the words “criminal responsibility” and “was only one of the consequences thereof”.

39. Mr. ROSENSTOCK said that the sentence, as proposed, was badly formulated and not legally plausible. If, for the sake of argument, there was such a thing as a State crime, an individual could not be held responsible for it.

40. Mr. MAHIU said that if Mr. Mikulka, as the author of the suggestion in question, wanted the relevant sentence to be maintained, there could be no question of deleting it.

41. Mr. MIKULKA said that Mr. Rosenstock’s objection would be valid only if the wider concept of what constituted a State crime were adopted, but not in the event of a more restrictive interpretation.

42. Mr. KABATSI proposed the deletion of the word “quixotic” before the word “exercise”, near the end of the first sentence. The word carried implications of madness and was inappropriate.

43. The CHAIRMAN noted that the Commission had agreed to adopt the proposed new text of paragraph 29 with the following changes: the word “quixotic” towards the end of the first sentence to be deleted; the second sentence to be maintained with the addition of the words “on the international plane” after “individual criminal responsibility”; the words “for example apartheid and terrorism” in the fifth sentence to be deleted; and the sixth sentence to be deleted.

Paragraph 29, as amended, was adopted.

Paragraph 101 (*concluded*)

44. The CHAIRMAN suggested that paragraph 101 should be replaced by the following text:

“101. The Special Rapporteur noted that the limited number of replies from Governments as regards the draft articles approved on first reading made it difficult for him to assess the degree of support which those draft articles commanded.”

45. Mr. LUKASHUK said that he had no strong feelings about the proposed wording of the paragraph. At several places throughout the report, however, it had been noted that developing countries had failed to respond to the questions put to them. It was a major problem for developing countries, since only countries that had the qualified staff to do so could respond to such questions. It could perhaps be partly resolved through cooperation with the developing countries within the framework of organizations such as OAU and the League of Arab States. The Commission should also sound out the position of third world countries in the course of its work.

46. The CHAIRMAN invited the Commission to take note of Mr. Lukashuk's statement.

Paragraph 101, as amended, was adopted.

Section B, as amended, was adopted.

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

CHAPTER III. *State responsibility (A/CN.4/L.512 and Add.1)*

A. Introduction

Paragraph 1

47. Mr. ROSENSTOCK proposed that the term “(mise en œuvre)”, in the penultimate line, should be deleted, as well as in the other paragraphs where it appeared.

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 6

Paragraphs 2 to 6 were adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraphs 7 to 16

Paragraphs 7 to 16 were adopted.

Paragraph 17

48. Mr. TOMUSCHAT said that the self-congratulatory tone of the paragraph created a bad impression and should be watered down.

49. The CHAIRMAN suggested that the Special Rapporteur and the Secretary to the Commission should be

asked to draft a new text, for consideration by the Commission later on.

It was so agreed.

Paragraph 18

50. Mr. GÜNEY, referring to the French text, said that some more suitable term should be found to replace the words “très séduisants”.

Paragraph 18 was adopted on that understanding.

Paragraphs 19 to 29

Paragraphs 19 to 29 were adopted.

Paragraph 30

51. Following a comment by Mr. TOMUSCHAT, the CHAIRMAN suggested that the words “a persona and”, in the last sentence, should be deleted.

It was so agreed.

Paragraph 30, as amended, was adopted.

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

52. Mr. TOMUSCHAT proposed that the words “of international regulations”, in the first sentence, should be deleted.

Paragraph 32, as amended, was adopted.

Paragraphs 33 to 37

Paragraphs 33 to 37 were adopted.

Paragraph 38

53. Mr. IDRIS said that the second sentence in its entirety was not clear. In particular, what was the difference between “a creation” and “an achievement”? One of them should be deleted.

54. The CHAIRMAN suggested that further consideration of the paragraph should be deferred to allow Mr. Idris time to consult the member who had expressed the view in question.

It was so agreed.

55. In response to Mr. EIRIKSSON, the CHAIRMAN said that a brief statement would be included in paragraph 7, stating, *inter alia*, that the Commission had agreed to refer the articles to the Drafting Committee, along the lines of similar references included in other chapters of the report.

The meeting rose at 6 p.m.