Document:-

A/CN.4/SR.2666

Summary record of the 2666th meeting

Topic:

Other topics

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

concerned, focusing especially on compliance with international humanitarian law.

35. There had been a vigorous debate on Part Two, chapter III, described in paragraphs 43 to 53 of the report. In his opinion, chapter III was harmless, but it did contain an important concession to the emerging truth that there were obligations of concern to the international community as a whole whose effect was felt within the field of responsibility. There was a case for recognizing a category of serious breaches, although the form of language used in chapter III required discussion in the Drafting Committee. To delete the chapter at the current time would wholly unbalance the text and create very considerable difficulties in achieving consensus. He hoped that any proposals would be designed to improve chapter III, and not to exacerbate the problem of which it was a manifestation.

36. The issue of countermeasures was still extremely delicate, because of its relationship to questions of the allocation or misallocation of powers in the international community and the prospects opened up for their widespread use, especially in the context of article 54. The Commission's excellent work had contributed to the development of standards in the field of countermeasures, but it had to be asked whether full-scale treatment of the subject in the draft articles would be conducive to an overall consensus. He would prefer to keep chapter II of Part Two bis as a separate chapter, subject to drafting improvements. He was particularly unhappy with article 51, containing the list of prohibited countermeasures, which was not based on any principle and had been the subject of some justified criticism. A simpler version would definitely be desirable. The articles adopted on first reading containing lists, such as article 19 or 40, had been a catastrophe. Article 54, too, raised a number of problems. The principles in it were quite defensible, but they raised various questions which neither the proponents nor the opponents of countermeasures seemed happy to treat. One solution would be to retain the treatment of countermeasures, while substituting some kind of saving clause for article 54. It was not possible to say that, in the light of State practice, only article 43 States could take countermeasures. Countermeasures by States under article 49, in other words, States other than the injured State, would be exceptional. They raised questions of the relationship between the draft articles and the international arrangements for the maintenance of peace and security under the Security Council and regional organizations that went beyond the scope of the text. An alternative solution would be to transfer the uncontroversial limits on countermeasures, such as proportionality, to article 23 in Part One, chapter V (Circumstances precluding wrongfulness). A number of Governments had supported that option, which would involve having a Part Three dealing only with the invocation of responsibility. In any event, in the light of the balance of opinion in the Commission and in the Sixth Committee, it was necessary to rule out a passing reference to countermeasures in article 23; that would be taken by those who were concerned about the proliferation of countermeasures as a form of unqualified licence. Something, and something reasonably substantial, would have to be inserted in article 23. It was not feasible to delete countermeasures entirely: the Governments most hostile to chapter II of Part Two bis were the most enthusiastic about article 23. One option was to retain the general balance between article 23 and chapter II of Part Two bis, but with significant drafting improvements, and a possible reconsideration of article 54 to make it less controversial. Article 54 was perhaps the article that called for the most attention. The other option was the longer version of article 23. Countermeasures could not be deleted, but some changes were probably needed in the way they were treated.

The meeting rose at 5.40 p.m.

2666th MEETING

Tuesday, 24 April 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

Organization of work of the session (*continued*)

[Agenda item 1]

1. The CHAIRMAN said that the meeting would be devoted to the announcement of the final composition of the Drafting Committee for the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).

2. Mr. TOMKA (Chairman of the Drafting Committee) announced that the Drafting Committee for the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) would be composed of the following members: Mr. Sreenivasa Rao (Special Rapporteur), Mr. Baena Soares, Mr. Brownlie, Mr. Gaja, Mr. Galicki, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Melescanu, Mr. Opertti Badan, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada and Mr. He (ex officio).

3. The CHAIRMAN said that the meeting would be adjourned to enable members to hold informal consultations.

The meeting rose at 10.15 a.m.

2667th MEETING

Wednesday, 25 April 2001, at noon

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*)* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,[2] A/CN.4/517 and Add.1,[3] A/CN.4/ L.602 and Corr.1 and Rev.1)

[Agenda item 2]

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

1. The CHAIRMAN invited members to begin their consideration of the fourth report of the Special Rapporteur (A/CN.4/517 and Add.1), with particular reference to dispute settlement and the form of the draft articles.

2. Mr. YAMADA said that dispute settlement could be discussed on its own merits, but it was preferable to comment first on the form of the draft articles, a question with which it was so closely linked. Under article 23 of its statute, the Commission was expected to make a recommendation to the General Assembly on the form its work should take. It had done so in every instance so far, although in some cases the Assembly had not accepted its recommendation. In the case of the draft articles on State responsibility, the form was dependent on the content of the final product. If there were to be a substantial law-making element, the appropriate form would be a multilateral convention, but if the draft articles merely codified existing rules, there would be no real need for a convention. The concept of codification was defined in article 15 of the statute as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

3. The draft articles adopted on first reading[4] had attracted much criticism from Governments. Many of the provisions were inconsistent and went well beyond prevailing State practice, and were not therefore acceptable to many Governments. For the second reading, the Commission had taken the unusual step of provisionally adopting an entire text, and had canvassed the views of Governments, in order to reflect those views fully in its final product. As he understood it, the Commission was currently endeavouring to produce a text that would be readily acceptable to a majority of Governments. However, the text of the draft provisionally adopted by the Drafting Committee on second reading at the previous session contained provisions that in his own view went beyond a codification of existing rules, especially as regards serious breaches and countermeasures. Many Governments had made comments to that effect. The Commission must at the current time concentrate on achieving a codification of State responsibility. Once it had succeeded in that, it could, under article 23, paragraph 1 (*b*), of its statute recommend to the General Assembly to adopt its report by resolution. The report of the Commission on the work of its fifty-third session would then be an authoritative study of current rules, State practice and doctrine in the field of State responsibility, which the Assembly could endorse in the form of a resolution. Such a resolution would provide sufficient guidance to States on their rights and responsibilities in that field, and would clearly establish the circumstances in which an injured State could invoke the responsibility of another State, thus contributing to legal stability and predictability in international relations. It would serve as a general standard for international courts in settling international disputes, since almost all international disputes entailed State responsibility.

4. He was not, however, seeking to foreclose the possibility of a convention on the topic. If it so wished, the Commission could recommend that form to the General Assembly in accordance with paragraph 1, subparagraph (*c*) or (*d*), of article 23 of its statute. That had been the chosen form of the Commission's work on the law of the non-navigational uses of international watercourses, which had become the Convention on the Law of the Non-navigational Uses of International Watercourses. It was a highly specific technical subject, yet the process of framing a convention had nonetheless taken several years after the Commission's report to the Assembly. Even at the current time, there was no prospect of the Convention coming into force soon. He therefore had serious doubts as to the advisability of opting for a convention on State responsibility.

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* Resumed from the 2665th meeting.

[1] For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

[2] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

[3] *Ibid.*

[4] See 2665th meeting, footnote 5.