

Document:-
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Summary record of the 2195th meeting

Topic:
Other topics

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104. Mr. EIRIKSSON (Rapporteur) said that the informal working group (see para. 14 above) proposed the following new text for subparagraph (b) of paragraph 54: "(b) if the acts were tried as ordinary crimes although they corresponded to one of the crimes characterized in the code (paragraph 3 of article 7 of the draft code)".

105. Mr. Sreenivasa RAO suggested replacing the words "ordinary crimes" in that text by "common crimes".

106. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that a distinction was being made between crimes under ordinary law and political crimes. He supported the new text proposed for subparagraph (b).

107. Mr. BENNOUNA proposed the following wording: "(b) if the national court committed an error in characterizing an international crime as an ordinary crime (see paragraph 3 of article 7 of the draft code)".

108. Mr. KOROMA said that he supported the text proposed by the informal working group, but suggested replacing the words "characterized in" by the word "under".

109. Mr. EIRIKSSON (Rapporteur) pointed out that the words "characterized in" were used in paragraph 3 of article 7 of the draft code.

110. Mr. Sreenivasa RAO withdrew his suggestion.

111. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the new text of paragraph 54 and the new paragraph 54 bis presented at the beginning of the meeting (para. 2 above), but with paragraph 54 (b) being replaced by the text just proposed by the informal working group (para. 104 above).

It was so agreed.

Paragraph 54, as amended, and new paragraph 54 bis were adopted.⁶

112. Mr. FRANCIS said that the Commission should say something in its report on its attitude towards other international criminal trial mechanisms. Perhaps the Special Rapporteur could prepare an appropriate text.

113. The CHAIRMAN asked Mr. Thiam (Chairman-Rapporteur of the Working Group), Mr. Eiriksson (Rapporteur) and Mr. Pawlak to draft a text.

The meeting rose at 1.40 p.m.

⁶ See also 2196th meeting, paras. 23-42.

2195th MEETING

Monday, 16 July 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodriguez, Mr. Díaz González, Mr. Eiriksson,

Mr. Francis, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-second session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter III.

CHAPTER III. Jurisdictional immunities of States and their property (A/CN.4/L.448)

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

2. Mr. EIRIKSSON (Rapporteur) proposed that, for the sake of accuracy, the words "for second reading", in the second sentence, should be deleted. It was the plenary Commission, rather than the Drafting Committee, which considered draft articles on second reading. Similar amendments should be made in paragraphs 8 and 9.

It was so agreed.

Paragraph 6, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the words "for second reading", in the last sentence.

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraph 9

4. Mr. OGISO (Special Rapporteur) said that a footnote should be added after the words "article 2 (Use of terms)", in the second sentence, reading: "The Drafting Committee deferred the adoption of paragraph 1 (b) (iii bis) of article 2 pending the adoption of article 11."

5. Mr. McCAFFREY proposed that, in view of the amendment to paragraphs 6 and 8, the words "undertake the second reading of", in the first sentence, should be replaced by the word "consider".

It was so agreed.

6. Mr. MAHIQU proposed, also in view of the above amendments, that the words "had not been concluded", in the third sentence, should be replaced by "could not be concluded".

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

7. Mr. OGISO (Special Rapporteur) said that the words “mainly because other members had already expressed their views at the previous session” should be added at the end of the second sentence.

8. Mr. MAHIU noted that there was sometimes a certain lack of balance in the way opinions expressed by members of the Commission were recorded in the draft report. That was particularly true of paragraph 10, which contained a long summary of the opinion of a single member of the Commission.

9. Mr. EIRIKSSON (Rapporteur) proposed the deletion of the fifth sentence “In his view . . . by a court of the forum State.”

10. That proposal was supported by Mr. BARSEGOV, Mr. MAHIU and Mr. AL-QAYSI.

The Rapporteur's amendment was adopted.

Paragraph 10, as amended, was adopted.

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

11. Mr. McCAFFREY suggested that paragraph 12 should perhaps be divided into two parts, since it dealt with both article 10 and article 11 *bis*.

12. Mr. OGISO (Special Rapporteur) said that he saw no reason why the paragraph should not be divided in the middle. The first four sentences would form the first paragraph, dealing with article 10, and the remainder, beginning with the words “As to article 11 *bis*”, would form the second paragraph, dealing with article 11 *bis*, although it also contained a further reference to article 10.

13. Mr. MAHIU said that, for the sake of clarity, it might be preferable to start a new paragraph with the seventh sentence, beginning with the words “Two members, however, supported the article as reformulated . . .”, since the article in question was in fact article 11 *bis*—a point which should be clarified by substituting the words “article 11 *bis*” for “the article”.

14. Mr. AL-QAYSI said he thought that the Special Rapporteur's suggestion would complicate matters unnecessarily, since the second paragraph, dealing with article 11 *bis*, would have to repeat the arguments of the member in question concerning article 10. It would be better to leave the paragraph as it stood, except for the amendment proposed by Mr. Mahiou.

15. Mr. KOROMA wondered whether the expression “segregated State property” adequately conveyed the idea intended. Perhaps the words “separate State property” could be used, following the model of the French and Spanish texts.

16. Mr. CALERO RODRIGUES said that the expression “segregated State property” was certainly not felicitous but it was taken from the title of article 11 *bis*.

17. He endorsed Mr. Al-Qaysi's remarks about the problems that would be raised by the division of

paragraph 12. The fact was that, when considering article 10, members of the Commission had also referred to article 11 *bis*. He supported Mr. Mahiou's proposal that the words “the article”, at the beginning of the seventh sentence, be replaced by “article 11 *bis*”.

18. Mr. BARSEGOV also endorsed Mr. Al-Qaysi's remarks. As to the expression “segregated State property”, which Mr. Koroma had criticized, the Commission could revert to it in due course, but it would be best to retain it for the time being, since it had been officially adopted.

19. Mr. Sreenivasa RAO said he also thought that splitting paragraph 12 into two parts would be awkward.

20. As for the expression “segregated State property”, he wondered whether it could be replaced at a later stage by “earmarked State property”.

21. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 12 with the amendment to the seventh sentence proposed by Mr. Mahiou, namely the replacement of the words “the article” by “article 11 *bis*”.

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 16

Paragraphs 13 to 16 were adopted.

Paragraph 17

22. Mr. TOMUSCHAT said that, in the fourth sentence, the words “judicial practice” should be replaced by “judicial practice”.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 26

Paragraphs 18 to 26 were adopted.

Paragraph 27

23. Mr. McCAFFREY said that he would like paragraph 27 to be recast. As it stood, it represented the views of the Special Rapporteur, while giving the impression that they were the views of the Commission.

24. After a discussion in which Mr. PAWLAK, Mr. OGISO (Special Rapporteur) and Mr. EIRIKSSON (Rapporteur) took part, Mr. CALERO RODRIGUES proposed that it be left to the Special Rapporteur to recast paragraph 27 along the lines indicated by Mr. McCaffrey.

It was so agreed.

25. Mr. TOMUSCHAT queried the antithesis between “international law” and “a national court” at the end of the fourth sentence. He thought that the text should refer either to “an international mechanism” and “a national court”, or to “international law” and “national law”.

26. Mr. BENNOUNA said that he agreed with Mr. Tomuschat.

27. Mr. KOROMA suggested that the end of the fourth sentence should read: "... the matter could be resolved only on the basis of international law."

Paragraph 27 was adopted subject to drafting changes on the basis of the comments made.

Paragraphs 28 to 30

Paragraphs 28 to 30 were adopted.

Paragraph 31

28. Mr. GRAEFRATH, noting that the second sentence was difficult to understand, suggested that the part following the reference to "article 31 of the Vienna Convention" be deleted.

It was so agreed.

Paragraph 31, as amended, was adopted.

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

Paragraph 34

29. Mr. McCAFFREY, comparing the text with paragraph 7, which had already been adopted, noted that paragraph 34 referred to the views of the Commission and the written comments of Governments, but not to the views expressed in the Sixth Committee of the General Assembly.

30. After an exchange of views in which Mr. OGISO (Special Rapporteur), Mr. CALERO RODRIGUES and Mr. PAWLAK took part, the CHAIRMAN proposed that the beginning of paragraph 34 should read as follows: "In the light of the views expressed at the Commission's previous session and the comments of Governments, the Special Rapporteur...".

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 45

Paragraphs 35 to 45 were adopted.

Paragraph 46

31. Mr. MAHIOU said that he was surprised at the statement, in the penultimate sentence, that "the ship... would be subject... to the same... liabilities as were applicable to natural or juridical persons", as though the ship were itself a person. He proposed instead the following formula: "would be subject... to the same... liability régime as... natural or juridical persons".

It was so agreed.

Paragraph 46, as amended, was adopted.

Paragraphs 47 to 65

Paragraphs 47 to 65 were adopted.

Paragraph 66

32. Mr. TOMUSCHAT proposed the addition of the words "if not impossible" after the word "hard" in the last sentence.

It was so agreed.

Paragraph 66, as amended, was adopted.

Paragraph 67

33. Mr. MAHIOU, noting that paragraph 67 was devoted entirely to legislation of the United States of

America, suggested reducing it to more reasonable proportions.

34. Mr. EIRIKSSON (Rapporteur), in response, proposed the deletion of the passage from the beginning of the second sentence: "If a judgment..." to the end of the fifth sentence: "... of the resulting judgment". The word "therefore", at the beginning of the sixth sentence, should also be deleted.

35. In response to a suggestion by Mr. CALERO RODRIGUES, he proposed that the phrase "Kinds of nuance contained in United States or other legislation", in the sixth sentence, be replaced by "distinctions contained in United States or other legislation with respect to State property".

The Rapporteur's amendments were adopted.

Paragraph 67, as amended, was adopted.

Paragraphs 68 and 69

Paragraphs 68 and 69 were adopted.

Paragraph 70

36. Mr. PAWLAK observed that the expression "segregated State property", regarding which he had reservations, quite rightly appeared in quotation marks in paragraph 70, but without them in paragraph 49.

37. Mr. KOROMA said that he saw no need to go beyond the distinction between State property and private property.

38. Mr. CALERO RODRIGUES said that the use of the term "segregated" in English raised terminological, rather than substantive, problems. He suggested attaching a footnote to the expression "segregated State property", explaining that some members of the Commission, although not objecting to the actual concept of "segregated State property", had doubts about the use of the adjective "segregated".

39. Mr. BARSEGOV said that the expression in question was of Chinese and Russian origin, since Mr. Shi and he had proposed its use in article 11 *bis*. The French text raised no problems, but a satisfactory English term still had to be found. It would be meaningless to refer simply to "State property". "Segregated State property" meant enterprises or independent legal persons which managed such enterprises and were answerable to the State for them.

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that the Drafting Committee should revert to that question at the next session and that the Rapporteur should draft a footnote along the lines suggested by Mr. Calero Rodrigues.

It was so agreed.

41. Mr. OGISO (Special Rapporteur) said that, in the first sentence, the word "fully" should be deleted and the words "some members" should be replaced by "one member". In the second sentence, the words "One member" should be replaced by "Another member".

42. Mr. RAZAFINDRALAMBO proposed that the words "Another member", in the third sentence, be replaced by "Yet another member".

It was so agreed.

Paragraph 70, as amended, was adopted.

Paragraphs 71 to 77

Paragraphs 71 to 77 were adopted.

Paragraph 78

43. Mr. TOMUSCHAT said that the word “enjoin”, in the second sentence, should be replaced by “prohibit”.

It was so agreed.

44. Mr. McCAFFREY proposed replacing the last sentence by the following text: “In the Special Rapporteur’s view, the foregoing comments could be taken into account by the Drafting Committee, which might also consider the possibility of recommending the deletion of the article.”

It was so agreed.

45. Mr. PAWLAK proposed that the words “A third member”, in the fourth sentence, be replaced by “Yet another member”.

It was so agreed.

Paragraph 78, as amended, was adopted.

Paragraphs 79 to 84

Paragraphs 79 to 84 were adopted.

Section B, as amended, was adopted.

46. Mr. EIRIKSSON (Rapporteur) said that, in view of the advanced stage of the work on the topic, there was no need to put specific questions to the General Assembly, as the Commission was generally invited to do.

47. Mr. CALERO RODRIGUES said that he agreed with the Rapporteur, but thought that the point should be explained in an additional paragraph at the end of chapter III.

48. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that a new paragraph should be added at the end of chapter III along the lines suggested by Mr. Calero Rodrigues.

It was so agreed.

Chapter III of the draft report, as amended, was adopted.

CHAPTER IV. The law of the non-navigational uses of international watercourses (A/CN.4/L.449 and Add.1 and 2)

A. Introduction (A/CN.4/L.449)

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.449)

Paragraphs 8 to 12

Paragraphs 8 to 12 were adopted.

Paragraphs 13 and 14

49. Mr. CALERO RODRIGUES said that the latter part of paragraph 13, from the words “the remark was made”, might give the impression that the Commission could reconsider the approach it had decided to adopt,

namely that of a framework agreement. As far as he could remember, the remark referred to had been a purely rhetorical one made by Mr. Al-Khasawneh, who had had no intention of questioning the approach adopted. He therefore proposed that that part of paragraph 13, and the whole of paragraph 14, be deleted.

It was so agreed.

Paragraph 13, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

Paragraph 16

50. Mr. CALERO RODRIGUES said that, since paragraph 16 was in some sense a reply to what was said in the latter part of paragraph 13 and in paragraph 14, which had been deleted, it could perhaps be redrafted in more positive terms so that the Special Rapporteur would not appear to be on the defensive.

51. Mr. PAWLAK said that that would be an opportunity to use some of the material in paragraph 14, in particular the references to “existing international law” and the “elements of progressive development” of international law “that were acceptable to the majority of States”.

52. The CHAIRMAN suggested that the Rapporteur and the Special Rapporteur should redraft paragraph 16 in line with the proposals by Mr. Calero Rodrigues and Mr. Pawlak.

It was so agreed.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

53. Mr. BARSEGOV pointed out that, during the discussion, he had said that it was for States to decide what priority they would give to the various uses of watercourses. Paragraph 18 implied, however, that all members of the Commission agreed that navigation should no longer have priority over other uses. Yet it was quite conceivable that in some cases watercourse States might decide, in view of the importance of navigation for them, to give it priority over other uses. As it stood, paragraph 18 did not seem acceptable.

54. Mr. KOROMA said he recalled saying that the Commission should not appear to take sides on the question as to which uses of international watercourses should have priority. It was right to describe State practice, but the Commission should not pronounce in favour of any particular use rather than another, especially as some existing agreements gave priority to navigation.

55. Mr. EIRIKSSON (Rapporteur) said that the concern expressed by Mr. Barsegov and Mr. Koroma could perhaps be met by adding, after the word “underestimated” in the second sentence of paragraph 20, the words “—and those States have indeed given it priority—”.

56. Mr. McCAFFREY (Special Rapporteur) said that paragraph 18 was perhaps too categorical; but the fact remained that many members of the Commission had

said that, if priority had ever been assigned to navigation in State practice, as a general rule that was no longer the case today. He proposed that he and the Rapporteur should try to recast the paragraph in a form satisfactory to the Commission and submit a text in due course.

57. Mr. KOROMA suggested that the Rapporteur and the Special Rapporteur could consider wording such as: "There was general support for the article, which was said to reflect in a balanced way the fact that any priority which was once assigned to navigation was no longer considered automatic among modern uses."

58. Mr. CALERO RODRIGUES said that it might be stated in paragraph 18 that, if there had ever been a rule of international law giving priority to navigation, it no longer existed today, or could no longer be accepted as a rule of general international law.

59. Mr. MAHIOU said that it should be left to the Rapporteur and the Special Rapporteur to find a satisfactory form of words. The solution might perhaps be to replace the words "no longer" by "not always".

60. Mr. BARSEGOV said that the revised text should indicate, in substance, that there was no rule of general international law giving priority to navigation, or to any other particular use.

61. Mr. RAZAFINDRALAMBO said that the revised text should specify that the article in question was article 24.

62. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished the Rapporteur and the Special Rapporteur to review paragraph 18 in the light of the comments made and to submit a revised text in due course.

It was so agreed.

The meeting rose at 1.05 p.m.

2196th MEETING

Monday, 16 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*)* (A/CN.4/429 and Add.1-4,² A/CN.4/430 and Add.1,³ A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1, A/CN.4/L.455)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (*concluded*)

CHAPTER III (The Commission's discussion of the question at the present session) (*concluded*)

1. The CHAIRMAN pointed out that one question still pending in regard to the report of the Working Group was the possible addition of a reference to international criminal trial mechanisms other than an international court. A small working group had been formed to study that question, and he invited the Rapporteur to report on the results of its work.

*Paragraph 23 (concluded)***

2. Mr. EIRIKSSON (Rapporteur) said that paragraph 23, adopted at the 2189th meeting, had been redrafted to give a better idea of what followed. The new text read:

"Paragraphs 24 to 29 below contain a general discussion of the advantages and disadvantages, for the trial of crimes against the peace and security of mankind, of the possible establishment of an international criminal court as compared, in particular, to the system of universal jurisdiction based on prosecution before national tribunals. Paragraphs 31 to 58 contain an overview of possible options and the main trend evidenced in the Commission with regard to some very specific and significant areas related to the creation of an international criminal court. Paragraphs 59 to 61 deal with other possible international mechanisms for the trial of crimes against the peace and security of mankind."

3. It was also proposed that the title of section 6 of chapter III, "Other jurisdictional mechanisms", should be amended to read: "Other possible international trial mechanisms".

4. Mr. TOMUSCHAT said that the word "very" before the words "specific and significant areas", in the second sentence of the proposed new text of paragraph 23, was unnecessary.

5. Mr. BEESLEY asked whether the references to "crimes against the peace and security of mankind" covered crimes against humanity.

6. Mr. BENNOUNA said that he preferred the existing title of section 6. The words "other jurisdictional mechanisms" had been deliberately chosen to include

* Resumed from the 2194th meeting.

** Resumed from the 2189th meeting.

¹ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

² Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

³ *Ibid.*