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Summary record of the 2281st meeting

Topic:
Cooperation with other bodies

Extract from the Yearbook of the International Law Commission:-
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tional situations so as not to produce some kind of “monster”. The conservatism of the earlier draft articles proposed by the former Special Rapporteur had had some good points and, if those earlier versions were combined with the bolder proposals by the present Special Rapporteur, the Commission could probably achieve some very sound results. As to the relationship between self-contained regimes and *erga omnes* obligations resulting from treaties or conventions, the Commission should be guided by the general rules derived from the Vienna Convention on the Law of Treaties. After all, self-contained regimes were treaties, too.

69. In that connection, the Commission should also not be in too much of a hurry to produce draft articles. There were specific examples to show, for instance, that the member countries of the European Community, both individually and as a community of States, had taken years to adjust to the new regime established by the United Nations Convention on the Law of the Sea. In that field as in the field of countermeasures, the Commission must consider that it was dealing with some very particular aspects of international law and act accordingly. For example, could the articles which the Commission was trying to draft be allowed to diminish or weaken the *erga omnes* obligations arising out of the 1949 Geneva Conventions? That brought him to the question of the rules of international law relating to the protection of human rights, which the Special Rapporteur quite rightly mentioned in draft article 14. That aspect, which warranted reflection and could be further developed later in the commentary to that article, was of great importance for the topic under consideration. For instance, the sovereign rights of States over their natural resources, which were essential for developing countries, were often violated by transnational corporations whose only concern was to make profits and whose operations were contrary to local regulations. In such a case, if the host country took countermeasures, they would, in his view, be fully justified. Of course, the violations of human rights which gave rise to countermeasures must have been persistent and violent. In that connection, he wondered whether the words “use of force” in article 14, paragraph 1 (a), referred only to physical force or to any kind of force. He could not answer that question himself, but he did want to warn the members of the Commission that there might be a risk of opening Pandora’s box. The Commission must continue to be cautious in its approach and aware of just how far it could go.

The meeting rose at 1.05 p.m.

2281st MEETING

Friday, 3 July 1992, at 10.10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna,

Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Cooperation with other bodies (*continued*)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

1. The CHAIRMAN extended a warm welcome to Mrs. Margaret Killerby, Observer for the European Committee on Legal Cooperation, and invited her to address the Commission.

2. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) said that since July 1991 two more States, Poland and Bulgaria, had joined the Council of Europe and that other Central and Eastern European countries were expected to become members in the near future. The Council now had 27 European Member States. It was continuing its extensive programme of cooperation in the legal field for the Central and Eastern European countries. The “Demo-Droit” programme, which was designed to facilitate the establishment of institutions and legislative frameworks based on the principle of pluralist democracy, human rights and the rule of law, contained multilateral and country-specific programmes that took account of the priorities of the States concerned. CDCJ had been kept regularly informed of the Commission’s activities and, at its 56th meeting, in November 1991, had had the pleasure of hearing a statement in that regard by Mr. Eiriksson.

3. At its meeting in June 1992, CDCJ had adopted a draft second Protocol to amend the Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality. The draft Protocol permitted dual nationality in certain instances and would enable contracting States to allow second-generation migrants to acquire the nationality of the host country while retaining their nationality of origin. It would also allow a spouse to acquire the nationality of the other spouse without losing the nationality of origin, and the children of such spouses to have both nationalities. The draft Protocol would be examined in the autumn by the Committee of Ministers of the Council of Europe. At the same meeting, CDCJ had invited the Committee of Ministers to adopt two draft recommendations: one on the protection of personal data in the area of telecommunications services, with particular reference to telephone services; and the other on teaching, research and training in the field of law and information technology.

* Resumed from the 2275th meeting.

4. A CDCJ committee of experts had finalized its work on the draft Convention on civil liability for damage resulting from activities dangerous to the environment, the object of which was to ensure adequate compensation for such damage, and to provide means of prevention and reinstatement. It struck a balance between the needs of environmental protection and the needs of industry. It applied strict liability to a wide range of dangerous activities, and operators were liable in civil law for damage caused by their activities even if they were not in breach of the law and had not committed any fault. Activities considered to be dangerous to the environment were those which produced or used dangerous substances, or which made use of genetically modified organisms and those involving waste treatment and waste dumps. The future Convention would be open to all European countries, and also to other countries outside Europe. The text would be considered by CDCJ at its meeting in December 1992.

5. Another CDCJ committee of experts was preparing a draft European Convention on the exercise of rights by persons below the age of 18, taking account of the Convention on the Rights of the Child, and especially of article 4, whereby States were required to take all legislative, administrative and other measures for the implementation of the rights recognized in the Convention. The aim of the European Convention was to ensure that children were given assistance and certain procedural rights in order to implement their rights, including personal and economic rights, persons between the ages of 16 and 18 years being referred to as "young persons". At a later stage, the committee would consider provisions for setting up machinery at a national and at a European level.

6. Other CDCJ committees were working on administrative law, data protection, the efficiency and fairness of civil and commercial justice, protection of and prevention of damage to the environment, multiple nationality and legal data processing.

7. CDCJ was responsible, jointly with the European Committee on Crime Problems, for the preparation of Conferences of European Ministers of Justice. At the 18th Conference, held in Nicosia in June 1992, the Ministers had adopted resolutions on the strengthening of the State based on the rule of law; on criminal law aspects of the market economy; and on the draft Convention on civil liability for damage resulting from activities dangerous to the environment.

8. The Steering Committee on Bioethics had begun to prepare a framework Convention on bioethics, which would include fundamental principles, and protocols on medical research and organ transplants.

9. In the past year, the Committee of Legal Advisers on Public International Law had held three meetings and, at its next meeting, in Paris in September 1992, would consider, *inter alia*, State succession in Europe relating to treaties, State property, archives and debts; the draft articles prepared by the Commission on jurisdictional immunity of States and their property; the United Nations Decade of International Law; and the conclusions of a group of specialists on publications concerning State practice in the field of public and international law.

10. The Parliamentary Assembly of the Council of Europe had considered a report concerning the establishment of an international court to judge war crimes, prepared by Mrs. Haller of Switzerland, the rapporteur on the subject to the Assembly's Committee on Legal Affairs and Human Rights. The report took account of the Commission's work on the establishment of an international criminal court, and of the draft Code of Crimes against the Peace and Security of Mankind. According to the report, the Committee, unlike the Commission, believed that such a court could come into being irrespective of the adoption of a code of international crimes, which might not be forthcoming for some time. The Committee took the view that a convention instituting a court responsible for judging crimes against peace, war crimes and crimes against humanity seemed altogether feasible, since those three types of crimes had been defined in a treaty. The report favoured the establishment of such a court by means of a multilateral convention, which would not prejudice adoption of the draft Code of Crimes against the Peace and Security of Mankind. At its meeting in Budapest on 1 July 1992, the Permanent Commission of the Parliamentary Assembly had adopted a recommendation on the establishment of such an international court. The text, which was subject to amendment, now read:

1. The Assembly deplores the fact that, despite international *détente*, conflicts still persist, and is aware of the international community's outrage at the fact that war criminals who committed crimes during recent conflicts remain unpunished.

2. It recalls that, although Second World War criminals were tried by the Nuremberg and Tokyo Tribunals, there is still no permanent international court to try war criminals. Under present international law there is no international court with jurisdiction over war crimes, or over crimes against peace and crimes against humanity, including the crime of genocide, which are just as unacceptable to the conscience of humanity.

3. These three types of crime have been defined in several generally accepted international texts, including the London Charter of 8 August 1945, the United Nations Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949 and several other United Nations conventions.

4. Various initiatives aimed at setting up an international criminal court have so far failed, particularly because they made the prior codification of these types of crime a precondition.

5. The Assembly does not consider it necessary to draw up a code prior to the establishment of an international court, for which the recent development of international relations seems favourable today.

6. It refers to the resolution adopted by the Inter-Parliamentary Union at its 86th session, in October 1991 (Santiago, Chile), urging the States Parties to the Convention on the Prevention and Punishment of the Crime of Genocide to set up the international criminal court provided for in the Convention.

7. The Assembly recommends establishing an international criminal court by means of a multilateral convention to be drafted by an international diplomatic conference convened under the auspices of the United Nations.

8. The Assembly, therefore, recommends that the Committee of Ministers call upon member States to act through the United Nations to secure the convening of an international diplomatic conference to prepare a convention on the setting up of a criminal court, and support such action.

9. In addition, the Assembly requests the International Law Commission to reach concrete results in this field during the next 12 months.

The recommendation would be considered by the Committee of Legal Advisers on Public International Law at its meeting in September 1992, in the context of questions relating to the United Nations, and the final version

would be sent to the Commission as soon as it was available.

11. The CHAIRMAN thanked the Observer for CDCJ for her valuable report. The information it contained was extremely important. The Commission's work on a draft statute for an international criminal court was still at a preparatory stage and the Commission had yet to receive from the General Assembly a formal mandate on the subject.

12. Mr. BARBOZA, speaking on behalf of the members from the Latin American Group, warmly thanked the Observer for CDCJ for the information on the Committee's rich and varied work. Relations between the Committee and the Commission had always been very fruitful and several topics appeared on the agendas of both bodies. Personally, he was particularly grateful for the cooperation he had received from Mrs. Killerby and the Committee in connection with all the material he had needed on the draft Convention on civil liability for damage resulting from activities dangerous to the environment, material which had been of great help to him as Special Rapporteur on the topic of international liability for injurious consequences arising out of activities not prohibited by international law.

13. Mr. KOROMA said that he would welcome further information in connection with the indication that the draft Convention provided for the operator's liability even when the operator was not in breach of the law.

14. Speaking on behalf of members from the African Group, he thanked the Observer for CDCJ for her comprehensive and lucid presentation. The Committee and the Commission maintained a symbiotic relationship which was reflected in many ways and the Commission benefited considerably from the Committee's work, which was impressive in terms of volume, and covered both private and public international law. The draft on multiple nationality would certainly be of great interest and, now that the Commission was considering placing new items on its agenda, it could suggest work for the future. The work on medical research and organ transplants, two very topical subjects, was also of importance.

15. State succession, especially in Europe, was a subject of immediate interest. The Commission had, of course, done considerable work on that topic that should be of use to European bodies. As to the subject of an international criminal court, the Committee had taken up the matter before the Commission. The recommendation adopted by the Committee of Legal Advisers on Public International Law would be a source of encouragement for the Commission and it was gratifying to note the conclusion that there was no impassable barrier to the establishment of an international criminal jurisdiction.

16. Mr. de SARAM, speaking on behalf of members from the Asian Group, thanked the Observer for CDCJ for her presence at the Commission and for the very carefully prepared and detailed statement she had made on the work presently in progress in the field of public and private international law, under the auspices of the Committee. It was a very helpful and informative statement. There were a number of matters to which reference had been made which were of relevance to the topics under present consideration in the Commission. The

statement was also of much interest, he was sure, to the Asian members of the Commission, because it was equally informative about the many processes of cooperation and consultation on matters of public and private international law that were continuing under the auspices of the Council of Europe, in addition to several other bodies in Europe such as ECE, the European Community and OECD. The pooling and sharing of legal knowledge and expertise had clearly reached an advanced stage in Europe. There were the beginnings of such processes of cooperation and consultation in the legal field in Asia which, in time, would, he hoped, be as substantial and advanced. One example was, of course, the Asian-African Legal Consultative Committee. Perhaps the present meeting, having regard also to the rising and very welcome tide of global consciousness in the world, could give rise to fuller and more continuous inter-regional consultation and cooperation in the field of public and private international law, between the European Committee and the Asian region, possibly through the Asian-African Legal Consultative Committee.

17. Mr. YANKOV, speaking on behalf of members from Central and Eastern European States, thanked the Observer for CDCJ for her statement, so rich in ideas and so full of information on achievements. Several Central and Eastern European countries had already become members of the Council of Europe and many others were in the process of applying for admission. The topics on the Committee's active agenda were of crucial significance to those States. Dual nationality was a case in point, especially in regard to the burning issue of second-generation migrants. The draft Convention on civil liability for damage resulting from activities dangerous to the environment was also of particular significance. The problem of State succession in Europe was vital and the work on the subject was bound to reveal that most of the precedents and cases came from Central and Eastern Europe, where the process of democratic transition had been coupled with national problems, boundary issues and the restructuring of pre-existing federal States into individual independent States. He was impressed by the Committee's dynamism in its approach to problems and the way in which its work was closely connected with relevant social, political, humanitarian and environmental issues.

18. Mr. ROSENSTOCK said that he would surely be speaking on behalf of members from those States which had the privilege of being Observers in the Council of Europe by expressing his thanks for an informative statement and his appreciation for the benefit derived from the work of the Council of Europe. On a personal note, he welcomed the information that a publication on State practice was to be prepared.

19. The symbiotic relationship between the Committee and the Commission had been apparent for many years. The Commission derived great help from the activities so well described by the Observer for the Committee. On the question of an international criminal court, however, he would point out that the Commission had not yet been mandated to do what the Council of Europe expected of it. The Commission was none the less preparing a report that was likely to be in harmony with many of the ideas in the European recommendation. As to State succession, and the possibility of further work on it by the

Commission, the activities of CDCJ were bound to be very useful. There were many other subjects, such as the environment and human rights, in which work of great value was being done at the European level. He looked forward to receiving the Committee's documents on the international criminal court and on the subject of liability.

20. Mr. VERESHCHETIN expressed sincere appreciation for a very informative report. He said that all of the aspects touched upon were of vital interest to members of the Commission and he wished to draw particular attention to the Committee's work on an international criminal court.

21. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) thanked members for their kind words. She said that the Asian-African Legal Consultative Committee had observer status with CDCJ, and it was with great pleasure that the latter welcomed cooperation with the Asian-African Committee. As to Mr. Koroma's question, under the draft Convention on civil liability for damage resulting from activities dangerous to the environment, operators could be liable although not in breach of the law. If the law stated that they must not exceed certain pollution levels, operators could be liable for damage even if they had not exceeded the level. There was, however, an exception to the rule, for under article 8 of the draft an operator would not be liable if he could prove that the harm resulted necessarily from compliance with a specific order or compulsory measure by a public authority. She would be pleased to supply the text of the draft Convention to members on request.

22. Several members had referred to problems of State succession in Europe, problems which European bodies had considered on a number of occasions. In January 1991, a special meeting had been held to study the matter. Moreover, the Council of Europe was always prepared to give technical assistance to European countries on the subject of State succession. With regard to legal problems on State succession that arose for the Commonwealth of Independent States, a meeting was scheduled to be held in Moscow in a few days' time.

23. Lastly, she thanked the Commission for the invitation to attend the meeting and stressed that the Council of Europe would welcome further cooperation with the Commission.

The meeting rose at 10.55 a.m.

2282nd MEETING

Wednesday, 8 July 1992, at 10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford,

Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*)* (A/CN.4/443,¹ A/CN.4/L.469, sect. D, A/CN.4/L.470, A/CN.4/L.476, ILC(XLIV)/Conf. Room Doc.2)

[Agenda item 5]

REPORT OF THE WORKING GROUP

1. The CHAIRMAN drew attention to the report of the Working Group set up by the Commission at its 2273rd meeting, on 16 June 1992, to consider general issues relating to the scope, methodology and possible direction of the Commission's future work on the topic, contained in document A/CN.4/L.470. The report summarized the conclusions and recommendations of the Working Group.²

2. Mr. BENNOUNA, referring to the French version, said that he would prefer the expression "remedial measures" to be translated by the word *remèdes* rather than by the words *mesures correctives*.

3. Mr. IDRIS said that, in his view, the report called for some modification. The second sentence of paragraph 5, starting with the words "However, priority should be . . ." did not make it sufficiently clear that what was meant was simply priority in time, not an order of priority in which the issues were to be considered. It would be preferable to state: "However, the issue of prevention should first be considered by the Commission". In paragraph 8, the phrase reading "the Working Group recommends that the Commission adopt as a working hypothesis . . ." was inaccurate, since the decision on that point had been taken a long time before. It would be better to say "recommends that the Commission should continue with the working hypothesis . ..". The first sentence of paragraph 9 should be expanded to read: "The Working Group took note with appreciation of the previous reports . ..". The recommendation, in the second sentence of the same paragraph, that the Special Rapporteur should "re-examine the issues" went a little too far, since it suggested that he would have to reopen the whole topic. The words "examine further" would be more appropriate. Lastly, he would like the words "a complete and a final set of draft articles", in the last line

* Resumed from the 2273rd meeting.

¹ Reproduced in *Yearbook . . . 1992*, vol. II (Part One).

² The full text of the recommendations, as approved by the Commission, is to be found in *Yearbook . . . 1992*, vol. II (Part Two), chapter IV.