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Summary record of the 2290th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
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83. The CHAIRMAN further suggested that the Commission should adopt the report of the Planning Group, as amended.

It was so agreed.

The meeting rose at 6.10 p.m.

2290th MEETING

Tuesday, 21 July 1992, at 10.10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: 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. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada.

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

1. The CHAIRMAN invited the Commission to resume consideration of its draft report, paragraph by paragraph, starting with chapter III on State responsibility.

CHAPTER III. *State responsibility (A/CN.4/L.478 and Corr.1 and Add.1-3)*

2. Mr. RAZAFINDRALAMBO (Rapporteur), introducing chapter III of the draft report, explained that the corrigendum to document A/CN.4/L.478 reflected the decision taken at the 2289th meeting on the way in which the Commission should report to the General Assembly on the work done by the Drafting Committee on the topic of State responsibility. It also contained a new paragraph, to be inserted immediately before paragraph 16, giving a summary of the Special Rapporteur's introduction to his third report, as contained in chapter VII of the Commission's report on the work of its forty-third session.¹

A. *Introduction (A/CN.4/L.478)*

Paragraph 1

3. Mr. EIRIKSSON said that it was perhaps time to think about the question of the form of the Commission's reports and, for example, to summarize to a

greater extent the part which dealt with the discussions and which, in the present case, was too long.

4. He also noted that the Commission was not asking the General Assembly any questions, although it was due to complete its consideration of the topic of State responsibility by the end of the quinquennium. Since it had decided to discuss the question of the distinction to be made between delicts and crimes, it should perhaps ask for the General Assembly's opinion on that point without further delay.

5. He was puzzled by the reference in the last sentence of paragraph 1 to "a possible part 3, which the Commission might decide to include . . .". That seemed to imply that the Commission had not yet decided that there would be a part 3.

6. Mr. ARANGIO-RUIZ (Special Rapporteur) said he did not think that it would be wise for the Commission to ask the General Assembly about the distinction between crimes and delicts in too direct a way. That question raised the complex problem of the effects of crimes and delicts in international law.

7. With regard to the uncertainty about part 3 of the topic, paragraph 1 had been written from the 1975 point of view, but, since then, the Commission had taken a number of decisions showing that it definitely intended to start work on part 3.

8. In the course of a discussion in which Mr. MAHIOU, Mr. de SARAM, Mr. BOWETT, Mr. SHI and Mr. JACOVIDES took part, a number of ways were suggested of eliminating the hypothetical slant of the last phrase of paragraph 1, which gave the impression that the Commission had not yet decided to include a part 3, and of making it clear that the situation had changed since 1975.

9. Mr. CALERO RODRIGUES pointed out that, since paragraph 1 related to the situation as it had existed some 15 years previously, it was impossible to go back on it: at that time, part 3 of the topic had indeed been one "which the Commission might decide to include".

10. Mr. ROSENSTOCK, supported by Mr. MAHIOU, Mr. BOWETT and Mr. SHI, said he shared the Special Rapporteur's view that it was not yet time to ask the General Assembly about the distinction between delicts and crimes.

Paragraph 1 was adopted.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

Paragraph 4

11. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in order to dispel any false impression given by paragraph 1, a sentence should be added after the first sentence, to read: "From that time on, the Commission assumed that a part 3 on implementation and the settlement of disputes would be included in the draft articles".

* Resumed from the 2287th meeting.

¹ Reproduced in *Yearbook . . . 1991*, vol. II (Part Two).

12. Mr. MAHIU proposed that the last part of the sentence should instead read: "... a part 3 on the question of the settlement of disputes and the implementation of international responsibility".

It was so agreed.

Paragraph 4, as amended, was adopted.

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

Paragraph 7

13. The CHAIRMAN proposed that the date should be specified and that the words "in 1991" should be added after the words "At its forty-third session".

It was so agreed.

Paragraph 7, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.478 and Corr.1 and Add.1-3)

1. COMMENTS ON THE TOPIC AS A WHOLE (A/CN.4/L.478)

Paragraph 8

14. Mr. BENNOUNA, supported by Mr. JACOVIDES, proposed that the words "within two or three years" should be replaced by the words "by the end of the quinquennium".

Paragraph 8, as amended, was adopted.

Paragraph 9

15. Mr. ROSENSTOCK said that he would like the opinion he had expressed on the final drafting of a text on State responsibility to be reflected in the report. He therefore proposed that a sentence should be added to paragraph 9, to read: "The Commission should seek to complete a first reading of the topic, including the necessary revisions or deletions in part 1, by the end of the quinquennium".

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Section B.1, as amended, was adopted.

2. THE DRAFT ARTICLES CONTAINED IN THE PRELIMINARY AND SECOND REPORTS OF THE SPECIAL RAPporteur (A/CN.4/L.478/Corr.1)

Paragraphs 10 bis and ter

16. The CHAIRMAN drew the Commission's attention to document A/CN.4/L.478/Corr.1, which proposed that a new subsection 2 should be inserted after paragraph 10, to read:

"2. The draft articles contained in the preliminary and second reports of the Special Rapporteur

"10 bis. At its 2288th meeting, the Commission heard the presentation by the Chairman of the Drafting Committee of a report of the Committee (A/CN.4/L.472) concerning its work on the draft articles on State responsibility which were contained in the preliminary and second reports of the Special Rapporteur and which had been referred to the Committee at the forty-first and forty-second sessions of the Commission. The Drafting Committee devoted 25 meetings to the consideration of those draft articles and succeeded in completing its work on them. It adopted on first reading a new paragraph 2 to be included in article 1, as well as articles 6 (Cessation), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10 bis (Assurances and guarantees of non-repetition).

"10 ter. In line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the material required to enable it to take a decision on the proposed draft articles. At this stage, the Commission merely took note of the report of the Drafting Committee."

17. The adoption of that text would involve two consequential amendments: the present section B.2 would become section B.3 and paragraphs 15 and 16, which had become redundant, would be deleted.

Paragraphs 10 bis and ter were adopted.

New section B.2 was adopted.

3. THE THIRD AND FOURTH REPORTS OF THE SPECIAL RAPporteur (A/CN.4/L.478 and Corr.1 and Add.1-3)

Paragraphs 11 to 14

Paragraphs 11 to 14 were adopted.

Paragraphs 15 and 16

Paragraphs 15 and 16 were deleted.

Paragraph 16 bis

(a) *General approach to the question of countermeasures (A/CN.4/L.478 and Corr.1)*

18. The CHAIRMAN said that document A/CN.4/L.478/Corr.1 also contained a new paragraph 16 bis, which was to be inserted under the subheading: "(a) General approach to the question of countermeasures" and which read:

"16 bis. Summarizing the presentation of his third report which he had made at the previous session of the Commission, the Special Rapporteur noted that the legal regime of countermeasures, which constituted the core of part 2 of the draft on State responsibility, was one of the most difficult subjects of the whole topic. He pointed out that whereas, with regard to the substantive consequences of a wrongful act,

one could draw from domestic law analogies to deal with similar problems arising on the international plane, domestic law could not provide much assistance with respect to countermeasures. The other difficulty with the study of countermeasures was the absence, in the international community, of any institutionalized remedies to be put into motion against a State which committed an internationally wrongful act. Consequently, the injured States were bound to rely mainly, in so far as general international law was concerned, upon their own unilateral reactions; and in that respect, the Commission had to take the greatest care, in devising the conditions of lawful resort to such reactions, to ensure that the factual inequalities among States did not unduly operate to the advantage of the strong and rich over the weak and needy.

Paragraph 16 bis was adopted.

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

Paragraph 19

19. Mr. BOWETT said that the meaning of the first sentence of paragraph 19 was obscure.

20. Mr. ARANGIO-RUIZ (Special Rapporteur) said that paragraph 19 reflected the opinion expressed by one member of the Commission.

21. Mr. SHI said that paragraph 19 was supposed to reflect his opinion, but it was not well drafted and distorted what he had said. He would redraft it with the help of the secretariat.

It was so agreed.

22. Mr. PELLET pointed out that, as a matter of principle, when a paragraph reflected an opinion expressed by one member of the Commission, the other members could not propose any kind of change. He also drew the secretariat's attention to discrepancies between the English and French texts and requested it to ensure that the French translations were more faithful to the original.

23. Mr. RAZAFINDRALAMBO (Rapporteur) said that the report had been prepared in English on the basis of various documents and that it had not been possible to revise the French translations.

24. He also pointed out that, since the purpose of the report was simply to reflect the discussion which had taken place in the Commission on the reports of the special rapporteurs and to summarize those reports, it was quite obvious that, if a member of the Commission considered that his views had not been reflected accurately, he could submit corrections, preferably in writing, to the secretariat.

Paragraphs 20 to 24

Paragraphs 20 to 24 were adopted.

Paragraph 25

25. Mr. EIRIKSSON proposed that paragraph 25 should be amended in order to make it clearer that there

were two separate alternatives. In the second sentence, the words "it was considered as dangerous" should be replaced by the words "this alternative was considered dangerous". The third sentence would be split into two, the first of which would read: "The other alternative was to abolish countermeasures as part of the law relating to the consequences of wrongful acts". It would be followed by the fourth sentence, which would begin with the words: "This alternative was viewed, on the one hand . . .". He also proposed that the inverted commas in the English text of the last sentence should be deleted.

Paragraph 25, as amended, was adopted.

Paragraph 26

Paragraph 26 was adopted.

Paragraph 27

26. Mr. ROSENSTOCK proposed that, in the first sentence, the words "States which considered themselves injured" should be replaced by the words "injured States".

Paragraph 27, as amended, was adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted.

Paragraph 30

27. Mr. EIRIKSSON said that although all the members of the Commission understood the paragraph it should be worded more clearly for the uninitiated.

28. Mr. PELLET said he thought that the paragraph reflected one of his own statements; it clearly reflected what he had said.

Paragraph 30 was adopted.

Paragraphs 31 and 32

Paragraphs 31 and 32 were adopted.

Paragraph 33

29. Mr. VILLAGRAN KRAMER proposed that, in the penultimate sentence, the words "concepts such as" before the words "*jus cogens*" should be deleted.

Paragraph 33, as amended, was adopted.

(b) *Elements relevant to the inclusion of a regime of countermeasures in the draft articles (A/CN.4/L.478 and Add.1 and 2)*

(i) The notion of countermeasures: terminological and conceptual aspects (A/CN.4/L.478)

Paragraph 34

30. After an exchange of views on whether the concepts of countermeasures and reprisals were the same, in which Mr. ARANGIO-RUIZ, Mr. KOROMA, Mr. PELLET and Mr. VERESHCHETIN took part, the CHAIRMAN suggested that those four members of the Commission should try to agree on new wording for

paragraph 34, to which the Commission would come back later.

It was so agreed.

Paragraphs 35 to 39

Paragraphs 35 to 39 were adopted.

- (ii) The various types of measures to be envisaged in the present context (A/CN.4/L.478)

Paragraph 40

31. Mr. ROSENSTOCK said that he objected to the use of the words "There was general agreement" at the beginning of the paragraph. In his opinion, there had not been any general agreement and it would be more correct to say "A number of members stressed the view that . . .".

32. Mr. KOROMA said that the wording proposed by Mr. Rosenstock was too restrictive and did not fully reflect the discussion.

33. The CHAIRMAN suggested that, in a spirit of compromise, the words "Most members agreed . . ." might be used. If he heard no objection, he would take it that the Commission accepted that proposal.

It was so agreed.

Paragraph 40, as amended, was adopted.

Paragraph 41

34. Mr. ROSENSTOCK suggested that a new sentence should be added at the end of the paragraph, to read: "It was urged that the Commission could and should avoid dealing with questions relating to Article 2, paragraph 4, and Article 51 of the Charter of the United Nations in the current context".

35. Mr. VILLAGRAN KRAMER said that the words "It was urged . . ." were too impersonal and suggested that they should be replaced by the words "Some members urged . . .".

Mr. Rosenstock's proposal, as amended by Mr. Villagran Kramer, was adopted.

Paragraph 41, as amended, was adopted.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

36. Mr. VERESHCHETIN said that he did not agree with the use of the words "One of them remarked" at the beginning of the third sentence. In his view, that remark had been made by several members and the sentence should begin: "Some members remarked". In the fourth sentence, the words "Another member observed" should also be replaced by the words "Some other members observed".

Paragraph 44, as amended, was adopted.

Paragraph 45

37. Mr. CRAWFORD suggested, for the sake of clarity, that a new sentence should be added at the end of the paragraph, to read: "One member, however, argued that the idea of reciprocity could have a useful application if it was confined to issues of diplomatic and consular relations".

38. Mr. VERESHCHETIN said that he supported that amendment, but proposed that the words "One member" should be replaced by the words "Some members", since it seemed to him that several members had expressed the opinion in question.

Paragraph 45, as amended by Mr. Crawford and Mr. Vereshchetin, was adopted.

Paragraph 46

Paragraph 46 was adopted.

- (iii) Functions of countermeasures (A/CN.4/L.478)

Paragraphs 47 to 50

Paragraphs 47 to 50 were adopted.

- (iv) The distinction between crimes and delicts in the context of countermeasures (A/CN.4/L.478)

Paragraphs 51 and 52

Paragraphs 51 and 52 were adopted.

Paragraph 53

39. The CHAIRMAN said that in the English version of the last sentence the words "concerned crimes alone" should read: "did not concern crimes alone".

40. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he agreed and that, in the preceding sentence, the French wording *et que l'on passait insensiblement de l'un à l'autre* was more felicitous and better reflected what he had said than the English version; he suggested that the secretariat might wish to bring the English text into line with the French.

It was so agreed.

Paragraph 53 was adopted, on that understanding.

- (v) The relationship between the regulation of countermeasures and the proposed part 3 on settlement of disputes (A/CN.4/L.478)

Paragraph 54

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that in the first sentence what he had said had been distorted by saying that he "had acknowledged" that "his predecessor's draft for part 3 on dispute settlement could not be regarded as generally acceptable". That opinion had, rather, been expressed by one of the members of the Commission. He therefore suggested that the phrase in question should be amended to read: "The view was expressed by one member that, since the previous Special Rapporteur's 1985 draft for part 3 on dispute settlement

could not be regarded as generally acceptable, it was not reasonable . . .”.

Paragraph 54, as amended, was adopted.

The meeting rose at 1 p.m.

2291st MEETING

Tuesday, 21 July 1992, at 3.05 p.m.

Chairman: Mr. Christian TOMUSCHAT

Present: 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. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada.

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

CHAPTER III. *State responsibility (continued)* (A/CN.4/L.478 and Corr.1 and Add. 1-3)

B. *Consideration of the topic at the present session (continued)* (A/CN.4/L.478 and Corr.1 and Add.1-3)

3. THE THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*) (A/CN.4/L.478 and Corr.1 and Add.1-3)

(b) *Elements relevant to the inclusion of a regime of countermeasures in the draft articles (continued)* (A/CN.4/L.478 and Add.1 and 2)

(v) *The relationship between the regulation of countermeasures and the proposed part 3 on settlement of disputes (continued)* (A/CN.4/L.478)

1. The CHAIRMAN invited the Commission to resume consideration of chapter III of its draft report, beginning with paragraph 55.

Paragraph 55

Paragraph 55 was adopted.

Paragraph 56

2. Mr. EIRIKSSON said that the words “it was proposed” should be replaced by “the suggestion was made”, in order to avoid implying that the Commission itself was taking a particular position.

Paragraph 56, as amended, was adopted.

Paragraph 57

3. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the words “He pointed out”, in the last sentence,

should be replaced by “He recalled” and that the words “indicated as” should be inserted before “suitable for judicial settlement”. Two new sentences should then be added, to read: “The Commission should not be discouraged by the reservations made in 1985 and 1986 to the previous Special Rapporteur’s draft articles of part 3. The present international situation was quite different and more encouraging.”

4. Mr. EIRIKSSON said he endorsed the Special Rapporteur’s proposals. In the third sentence, reference had been made to a decision of the “Working Group of 1963”.¹ The sentence had to be amended because a working group did not have the authority to take a decision.

It was so agreed.

5. Mr. JACOVIDES said he supported the amendment proposed by the Special Rapporteur, which reflected the position he himself had taken during the debate.

6. Mr. CALERO RODRIGUES said that he would appreciate clarification of the phrase “at least two of the four categories of disputes falling within the ambit of State responsibility”, in the last sentence of the paragraph.

7. Mr. ARANGIO-RUIZ said that, under Article 36, paragraph 2, of the Statute of ICJ, States parties to the Statute might recognize as compulsory the

. . . jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

It was on that basis that he had stated that at least two of the four categories referred to in Article 36, paragraph 2, of the Statute, namely, those corresponding to paragraphs (c) and (d), fell clearly within the ambit of State responsibility.

8. Mr. CALERO RODRIGUES said that the last sentence of paragraph 57 should be redrafted to read: “At least two of the four categories referred to in Article 36, paragraph 2, of the Statute of the International Court of Justice might fall within the ambit of State responsibility.”

It was so agreed.

9. Mr. VERESHCHETIN asked whether the first sentence, which indicated that countermeasures represented the only means of ensuring respect for international obligations, accurately reflected the Special Rapporteur’s views.

¹ Sub-Committee on State Responsibility which reported to the Commission at its fifteenth session. See *Yearbook . . . 1963*, vol. II, document A/5509, pp. 227-259.