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Summary record of the 2292nd meeting

Topic:
Other topics

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Paragraphs 162 and 163

Paragraphs 162 and 163 were adopted.

Paragraph 164

68. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the second and third sentences should be deleted and replaced by the following: "For the sake of brevity, he referred to the *Collected Courses of The Hague Academy of International Law, 1972-III* (vol. 137), pp. 629 *et seq.*, and especially 663 *et seq.* and 682-684".

Paragraph 164, as amended, was adopted.

The meeting rose at 6.05 p.m.

2292nd MEETING

Wednesday, 22 July 1992, at 10.35 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, 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, Mr. Yankov.

Other business

[Agenda item 10]

1. The CHAIRMAN informed the members of the Commission that the Enlarged Bureau had recommended that Mr. Robert Rosenstock should be appointed Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses. If he heard no objection, he would take it that the Commission wished to adopt that recommendation.

It was so agreed.

2. Mr. ROSENSTOCK thanked the members of the Commission for the honour they had bestowed on him.

3. The CHAIRMAN recalled that the General Assembly had authorized the Commission to send a special rapporteur to give a summary account, in the Sixth Committee, of the work of the Commission on a topic with which it had been entrusted. Initially, the Bureau had decided not to send any special rapporteur in the current year; the question had subsequently been reviewed by the Enlarged Bureau, which had, however, not come to any agreement and had not made any recommendation.

He therefore suggested that the members of the Commission should hold consultations on the question.

It was so agreed.

Date and place of the forty-fifth session

[Agenda item 9]

4. The CHAIRMAN informed the members of the Commission that the Enlarged Bureau recommended that the next session of the Commission should be held from 3 May to 23 July 1993 in Geneva. If he heard no objection, he would take it that the Commission wished to adopt that recommendation.

It was so agreed.

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)

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

(c) *The question of countermeasures in the context of articles 2, 4 and 5 of part 2 adopted on first reading at previous sessions of the Commission (continued)* (A/CN.4/L.478/Add.3)

(iii) The question of differently injured States

5. The CHAIRMAN invited the Commission to resume consideration of chapter III of the draft report, starting with paragraph 165.

Paragraph 165

Paragraph 165 was adopted.

Paragraphs 166 to 170

Paragraphs 166 to 170 were adopted.

Paragraph 171

6. Mr. CRAWFORD said that, in the second sentence, the idea would be clarified by referring to "the most affected State or States" instead of "most affected State".

Paragraph 171, as amended, was adopted.

Paragraph 172

Paragraph 172 was adopted.

Paragraph 173

7. Mr. CRAWFORD proposed that, for the sake of clarity, the three issues referred to at the beginning of the paragraph should be differentiated. The beginning of the first sentence would then read: "Three other issues were raised in the present context: (a) the problem of a plurality of wrongdoing States; (b) the question of collective countermeasures, i.e. the case where the most affected

State might seek assistance from others; and (c) the question of non-recognition”. The word “latter”, which appeared at the beginning of the next sentence, should be replaced by the word “last”.

Paragraph 173, as amended, was adopted.

Paragraph 174

8. Mr. EIRIKSSON said that the statement in the first sentence of the paragraph reading “the Special Rapporteur said that he would give careful consideration to the views expressed in the course of the debate” was self-evident and could be deleted.

9. Mr. ARANGIO-RUIZ (Special Rapporteur) explained that his purpose in making that statement was to indicate that he would take due account of the views expressed and thus to emphasize the respect he had for the advice he had been given. He was most anxious that the statement should remain as drafted.

Paragraph 174 was adopted.

10. The CHAIRMAN said that, before it adopted chapter III of its report on the work of its forty-fourth session as a whole, the Commission should revert to paragraphs 19 and 34 of document A/CN.4/L.478, which had been left in abeyance. A new version of paragraph 19 had been prepared by Mr. Shi and a revised version of paragraph 34 had been drafted by Mr. Pellet in cooperation with Mr. Vereshchetin and the Special Rapporteur.

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

Paragraph 19 (*concluded*)

11. The CHAIRMAN said that the changes proposed by Mr. Shi were that the first sentence should be amended to read: “According to one view, the question was whether the Commission could view the forms of countermeasures covering well over a century of State practice as rules of general international law and thus suitable for codification”.

12. The first part of the third sentence, up to the word “countermeasures”, should be amended to read: “Attention was drawn to the Special Rapporteur’s remark that the powerful or rich countries could easily enjoy an advantage over the weak or poor in the exercise of the means of redress in the form of reprisals or countermeasures”.

13. The fourth sentence should be amended to read: “In fact, according to this view, reprisals or countermeasures were often the prerogative of the more powerful State and the impropriety of the concept of reprisals or countermeasures as part of general international law lay in the fact that it was the outcome of the relationship between powerful States and weak and small States in a period when these latter States were unable to assert their rights under international law”.

14. The beginning of the sixth sentence should be simplified, so as to read: “With reference to a strict regime of conditional countermeasures as conceived by the Special Rapporteur, the remark was made that such a regime would be in the interest . . .”.

15. Mr. BOWETT suggested that, in the fourth sentence, the plural should be used, the words “the prerogative of the more powerful State” being replaced by the words “the prerogative of the more powerful States”.

16. After an exchange of views in which Mr. SHI, Mr. VERESHCHETIN, Mr. KOROMA and Mr. ARANGIO-RUIZ (Special Rapporteur) took part, the latter said he could accept Mr. Shi’s proposals as amended by Mr. Bowett.

Paragraph 19, as amended, was adopted.

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

(i) The notion of countermeasures: terminological and conceptual aspects (*concluded*)*

Paragraph 34 (*concluded*) and 34 *bis*

17. The CHAIRMAN said that Mr. Pellet had proposed that the first sentence of paragraph 34 should be amended to read: “As far as terminology is concerned, there was general agreement with the Special Rapporteur’s view that, for the purposes of the draft articles, the notion of countermeasures was identical to that of reprisals”.

18. At the end of the paragraph or as an additional paragraph (paragraph 34 *bis*), two sentences should be added, to read: “Some members however stressed that the notion of countermeasures was broader than that of reprisals and encompassed in particular retortion and more generally all the forms of reaction to unlawful conduct. One member accordingly expressed the view that this idea should be duly reflected, at a future stage, either in one of the articles devoted to countermeasures or in a commentary”.

19. Mr. VERESHCHETIN thanked Mr. Pellet for drafting the new text, which fully reflected his own viewpoint. He would only ask that the words “reaction to unlawful conduct”, in the first of the two sentences it was proposed to add at the end of the paragraph, should be replaced by the words “lawful reaction to unlawful conduct”. He also reminded the Commission that the Chairman had envisaged the possibility that the two new sentences added to paragraph 34 should form a new paragraph 34 *bis*.

Paragraphs 34 and 34 bis, as amended, were adopted.

CHAPTER II. *Draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/L.475)*

20. Mr. RAZAFINDRALAMBO (Rapporteur), introducing chapter II of the Commission’s draft report (A/CN.4/L.475), said that section B (Consideration of the topic at the present session) was comparatively brief owing to the fact that chapter II reproduced the report of

* Resumed from the 2290th meeting.

the Working Group on the question of an international criminal jurisdiction *in extenso*. It would perhaps be useful, however, to subdivide that section to make the broad structure clearer. The report of the Working Group could be reproduced either in the body of chapter II or right at the end of the Commission's report, according to the usual practice.

21. Mr. CRAWFORD said he considered that it would in fact be advisable to rearrange the presentation of chapter II, if only because the Commission had not, strictly speaking, adopted the report of the Working Group, but only the decision it contained.

22. Mr. EIRIKSSON said that he would read out a list of the headings of the various subsections which should, in his view, be included in section B.

23. Mr. BENNOUNA, supported by Mr. GÜNEY, said that if the text was to be amended, he would prefer to consider it paragraph by paragraph.

24. Mr. MAHIU said that he was surprised by the content of paragraph 14, according to which the pages which followed would summarize only the two points not covered by the report of the Working Group. He did not understand why the substance of the Commission's discussions in plenary on the question of an international criminal jurisdiction should be passed over in that way.

25. Mr. RAZAFINDRALAMBO (Rapporteur) said that, given the length of the report of the Working Group which was being reproduced *in extenso*, there had seemed no point in reflecting all the discussions in plenary, with the risk of duplication.

26. Mr. THIAM (Special Rapporteur) said that, while he considered that Mr. Mahiou's remark was pertinent, he would point out that the General Assembly expected the Commission's reports to be as succinct as possible. If every discussion held in plenary and every remark made by the Working Group were to be reflected, the report would be too voluminous.

27. Mr. CALERO RODRIGUES said that, in his view, it should be possible to provide a summary of the discussions held in plenary, under the subheadings Mr. Eiriksson was proposing. The deliberations of the Working Group should also be summarized, but very concisely, since its report would in any event be reproduced as an annex.

28. Mr. ROSENSTOCK said that he always favoured brevity, but the part devoted to the consideration of the topic in plenary was dealt with in somewhat too drastic a fashion: three-quarters of the discussion had been lost. Mr. Mahiou had been right to complain on that score, but his concern could be met by drafting a few additional paragraphs to explain, in particular, that reference should also be had to the report of the Working Group. If brevity was indeed the aim, he could quote several passages in the report which could be summarized more concisely or even deleted.

29. Mr. MAHIU said that, in his view, concision was not worth the price of misrepresentation of the discussions the Commission had held in plenary. In those discussions, differing views had been expressed, whereas

the Working Group's aim had been to arrive at compromise solutions. The Commission had devoted two weeks to consideration of the Special Rapporteur's tenth report yet only a few pages of its own report were devoted to that part of its work. There was, moreover, a question of principle: the conclusions of a working group were not of the same nature as the ideas exchanged in plenary.

30. Mr. BENNOUNA said that he would go even further. The way in which chapter II was presented posed a very serious problem of substance, since the reader could have no idea of what had happened during the session. He or she would realize that the Working Group had proposed a compromise solution, but would not understand on which views a compromise had been reached. The proposed international criminal court had, however, given rise to very divergent views. Some members had not even wanted a court at all. Consequently, if section B of chapter II was to be recast, it was not the technical points, as exemplified by paragraph 12, that should be considered, but the central issue of the session, namely, the difference between the various legal approaches. That was what interested the international community. People should know that the Commission had discussed a number of models for an international criminal court and had considered the place such a court should occupy in the international political and legal order and in the utopian vision of the times. In any event, the comments made in a rather small working group did not carry the same weight as exchanges of views in plenary.

31. Mr. THIAM (Special Rapporteur) suggested that a section might be added to the report to reflect the discussions held in plenary and, in particular, as Mr. Bennouna had just said, to highlight the main trends which had emerged and which were well known.

32. Mr. RAZAFINDRALAMBO (Rapporteur), agreeing with that suggestion, said he would propose that, while the new section was being drafted, the Commission should continue its consideration of the report.

33. The CHAIRMAN suggested, following informal consultations, that the Commission should consider chapter II of the draft report paragraph by paragraph, leaving aside paragraphs 9 to 14, which would be re-drafted and expanded to reflect the discussion that had taken place in plenary on the role and structure of the international criminal court and the main trends that had emerged in that connection.

It was so agreed.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

34. Mr. EIRIKSSON proposed that, at the beginning of paragraph 4, the words "At the conclusion of the work of the Special Committee" or some other wording along the same lines should be added to indicate that the outcome of the Special Committee's work had been the adoption of General Assembly resolution 3314 (XXIX).

It was so agreed.

Paragraph 4, as amended, was adopted.

Paragraph 5

35. Mr. EIRIKSSON proposed that the footnote should be reworded to read: "In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English to read 'Draft Code of Crimes against the Peace and Security of Mankind'".

Paragraph 5, as amended, was adopted.

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

36. Mr. EIRIKSSON said that the last sentence of paragraph 7 followed the wording of General Assembly resolution 44/41. Thus, for accuracy's sake, the expression "international jurisdiction" should read "international criminal jurisdiction".

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

37. The CHAIRMAN said that, in accordance with the decision taken earlier, the Commission should proceed to consider paragraphs 15 *et seq.* of the draft report.

38. Mr. PELLET said he did not think that the Commission could go on to consider paragraph 15 and the following paragraphs without having seen the text which would replace paragraphs 9 to 14. There had to be a reasonable balance, in terms of length, between that text and paragraph 15 and the following paragraphs. In that connection, while he agreed with Mr. Bennouna and Mr. Thiam that it was necessary to reflect the discussions which had taken place in plenary on the general approach to the proposed international criminal court, he considered that the more technical aspects developed by the members of the Commission should also be reflected. He himself, for instance, had stated that he objected to the Working Group's approach with regard to the applicable law and he would like his opinion to be reflected in the report. That was, moreover, a matter of principle: he was strongly opposed to any practice which consisted of not reflecting in the report discussions held in plenary on certain questions on the ground that those self-same questions had been considered by a working group. He therefore insisted that the new paragraphs which were to be submitted to the Commission should give a reasonably detailed picture of the discussion which had taken place in plenary.

39. Mr. JACOVIDES said that the report had been prepared on a solid foundation since the Commission's decision laid emphasis on the work of the Working Group and the results of that work with a view to facilitating the discussion in the Sixth Committee. None the less, while brevity was desirable, there should not be too great a disproportion between the paragraphs that would replace paragraphs 9 to 14 and paragraphs 15 to 32.

40. Mr. CALERO RODRIGUES, endorsing Mr. Pellet's remarks, said he doubted whether it would be possible to approve the paragraphs on compensation and the double-hearing principle—namely, paragraphs 15 *et seq.*—if the other points raised in the discussion held in plenary were dealt with in only a few paragraphs. Another solution would be to shorten paragraph 15 and the following paragraphs. In general, the premise on which the chapter under consideration had been drafted was doubtful; it seemed as though there had been a feeling that the discussion held in plenary on questions considered by the Working Group should not be reflected in the report.

41. Mr. CRAWFORD, agreeing with Mr. Pellet, Mr. Jacovides and Mr. Calero Rodrigues, said that the report on the discussion held in plenary on compensation and the double-hearing principle should be no longer than the report on the discussion that had taken place on the other questions. In that connection, he insisted that the main arguments adduced on the role of a possible international criminal court should be dealt with in one or two paragraphs.

42. Mr. AL-KHASAWNEH said that he supported Mr. Crawford's last remark.

43. The CHAIRMAN said it was his understanding that the Commission wished to suspend its consideration of chapter II of the draft report until the new paragraphs to replace paragraphs 9 to 14 had been made available.

It was so agreed.

The meeting rose at 1 p.m.

2293rd MEETING

Thursday, 23 July 1992, at 3.20 p.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, 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.
