Document:-
A/CN.4/SR.2324

Summary record of the 2324th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1993, vol. I

tion adopted by the Drafting Committee could not now be supplemented by way of the commentaries.

21. Again, he said he was shocked at the frequent references in the commentary to the judge or other third party involved in the settlement of the dispute. Surely it was primarily for the parties concerned to arrive at a settlement: the Commission should provide them with guidance and should not simply be thinking of the possibility of judges or arbitrators.

22. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that practically all the cases available from State practice involved decisions by third-party bodies. The point raised by Mr. Pellet was a valid one and the working group would no doubt take it into consideration.

23. Mr. TOMUSCHAT said that practically all the examples given in the commentary dealt with losses which affected capital assets. Actually, the rule in article 8 applied equally well to loss of working capacity. The commentary should include examples of compensation of individuals for loss of earnings.

24. Mr. ROSENSTOCK said he had no objection to the inclusion of further examples, but Mr. Tomuschat's point could be regarded as covered by paragraphs (22) and (23) of the commentary. The working group should not be asked to undo decisions taken at the previous session by the Drafting Committee, nor could it remedy any gaps left by those decisions.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that paragraphs (22) and (23) mentioned the case of the death of a private individual who was a national of the State concerned. If Mr. Tomuschat had any other examples in mind, he could perhaps make a specific suggestion.

26. There could certainly be no question of undoing what the Drafting Committee had done at the previous session, nor of filling gaps left by the Committee. He was confident that, in their wisdom, the members of the working group could avoid both pitfalls.

27. Mr. VILLAGRÁN KRAMER suggested that Mr. Tomuschat should indicate a few specific examples of loss of working capacity. Cases of expulsion obviously came to mind.

28. Mr. SHI pointed out that article 8 laid down the general rule in the matter of compensation. In his opinion, the text of the article was sufficient and it was neither practicable nor desirable to try to supplement it by means of commentaries. A commentary could not fill a gap in the text of the article.

29. The whole subject of compensation was very complex. All the examples given in the commentary related to cases settled by arbitral tribunals or by mixed commissions. None were taken from the very rich practice of bilateral settlements. He was thinking, among others, of the settlement agreements after the Second World War, most of which had been bilateral in character, especially the lump sum agreements of that time. Under those agreements, it had been left to each party's internal commission to handle the question of distribution among its nationals. Such examples were worth mentioning.

30. He saw no need for a working group and urged that the commentary should be left as it stood. In any case, if the working group were to produce a text, he was certain that it would lead to a further lengthy and unprofitable discussion.

31. The CHAIRMAN invited Mr. Tomuschat to submit a text for incorporation in the commentary in order to cover the point raised by him.

32. Mr. TOMUSCHAT said that he would submit a few sentences to deal with the cases he had in mind. The examples to be mentioned would include treaties signed by Germany with a number of countries immediately after the Second World War, dealing with compensation to persons persecuted on racial grounds.

33. The CHAIRMAN said that, while waiting for the issue to be reported on by the open-ended working group, he invited the Commission to consider, paragraph by paragraph, chapter IV, sections A and B.

A. Introduction (A/CN.4/L.484)

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.484 and Add.1)

Paragraphs 9 to 87 (A/CN.4/L.484)

Paragraphs 9 to 87 were adopted.

Paragraphs 1 to 51 (A/CN.4/L.484/Add.1)

Paragraphs 1 to 51 were adopted.

Section B was adopted.

The meeting rose at 11.15 a.m.

2324th MEETING

Wednesday, 21 July 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

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

CHAPTER IV. *State responsibility* (concluded) (A/CN.4/L.484 and Corr.1 and Add.1-7)

C. Draft articles of part 2 of the draft on State responsibility (*concluded*)

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (*concluded*) (A/CN.4/L.484/Add.2-7)

Commentary to article 8 (Compensation) (*concluded*) (A/CN.4/L.484/Add.5)

Paragraphs (16) and (17), (18) and (21) (*concluded*)

1. Mr. CRAWFORD, reading out the amendments proposed by the working group to settle the problems posed by paragraphs (16), (17), (18) and (21), said that the phrase "to the persons of nationals or agents of the injured State", in paragraph (16), would be replaced by "to the persons of the injured State's nationals or agents as human beings". The expression "as human beings" would also be inserted after the words "the injured State's nationals or agents", in the last sentence. In paragraph (17), the expression "in their private capacity", in the second sentence, would be replaced by "as human beings". The phrase "which are relevant with regard to the broader concept of 'personal injury' " in paragraph (18), would be deleted. In paragraph (21), the phrase "the 'personal' damage—other than 'moral' damage—" would be replaced by "the personal injury".

Paragraphs (16), (17), (18) and (21), as amended, were approved.

Paragraph (27) (*concluded*)

2. Mr. BOWETT proposed that the following text should be added at the end of paragraph (27):

"If loss of profits are to be awarded, it would seem inappropriate to award interest on the profit-earning capital over the same period of time, simply because the capital sum cannot be earning interest and notionally employed in earning profits at one and the same time. However, interest would be due on the profits which would have been earned—but which have been withheld from the original owner. The essential aim is to avoid 'double recovery' in all forms of reparation."

3. Mr. TOMUSCHAT said that the second sentence proposed by Mr. Bowett should be deleted because it entered into too much detail.

4. Mr. ROSENSTOCK said that the second sentence could not be deleted if the first was retained.

Paragraph (27), as amended by Mr. Bowett, was approved.

New paragraph (30 *bis*)

5. Mr. TOMUSCHAT, arguing that the commentary should not be confined to cases involving companies but should also mention cases concerning private individuals, proposed that the commentary should include a new paragraph, paragraph (30 *bis*), to read:

"(30 *bis*) A right to compensation for loss of earnings may also arise when individuals are deprived of making use of their working capacity, either as self-employed or as employed persons. This situation can occur, in particular, when an alien is unlawfully deported from his country of residence. In two judgments the European Court of Human Rights affirmed in principle that the reparation owed to the victim of such a measure also included compensation for loss of earnings, although in both cases it found that a causal link had not been established."

The new paragraph would be accompanied by the following footnote:

"Judgments of 21 June 1988, *Berrehab*, Publications of the European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 138, p. 17; and Judgment of 18 February 1991, *Moustaquim*, ibid., vol. 193, p. 21."

6. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the word "naturally" should be added at the beginning of Mr. Tomuschat's proposed text, to give more force to an idea already expressed more generally in the commentary.

New paragraph (30 bis), as proposed by Mr. Tomuschat and amended by the Special Rapporteur, was approved.

Paragraph (38) (*concluded*)

7. Mr. BOWETT proposed that the following text should be inserted after the first sentence of the paragraph:

"The relative uncertainty in the case-law discloses three questions which give rise to controversy:

(*a*) In what cases are loss of profits recoverable?

(*b*) Over what period of time are they recoverable?

(*c*) How should they be calculated?

As regards the first question it seems fairly clear that the problem arises with 'going concerns' which have a profit-making capacity. The major uncertainty relates to the question whether loss of profits are recoverable for a lawful, as opposed to unlawful, taking (this is the uncertainty reflected in the difference of emphasis in *Amoco International Finance Corp.* v. *Iran* as compared with the *Phillips* case). As regards the second question, the central question, again unsettled, is whether that period of time ends at the date of judgement or should be extended to the original termination date for the contract or concession which has been terminated. The third question raises the whole question of the method of calculation, in particular whether the DCF (Discounted Cash Flow) method is appropriate. The state of the law on all these questions is, in the Commission's view, not sufficiently settled and the Commission, at this stage, felt unable to give precise answers to these questions or to formulate specific rules relating to them."

8. Furthermore, he proposed that the second sentence of paragraph (38) should be altered to read:

"It has therefore felt it preferable to leave it to the States involved or to any third party involved in the

settlement of the dispute to determine in each case whether compensation for loss of profits should be paid."

Paragraph (38), as amended, was approved.

The commentary to article 8, as amended, was approved.

Chapter IV, as a whole, as amended, was adopted.

9. Mr. PELLET said he had not wished to oppose the adoption of chapter IV of the draft report, but in his opinion draft articles 6 to 10 *bis* had been considerably toned down in comparison with the text proposed by the Special Rapporteur, which had in itself been insufficiently precise, so that the result proposed by the Drafting Committee was extremely general and failed to provide potential users with the guidelines they were entitled to expect from the Commission. The fact that problems were difficult or that the law was not settled was no reason not to suggest solutions. The commentaries to the draft articles were scarcely more satisfactory, in that to make up for the general nature of the articles themselves they dealt with things which did not appear in the articles. The purpose of the commentaries was to comment on the draft articles adopted by the Drafting Committee and not those initially proposed by the Special Rapporteur.

10. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that the Drafting Committee had adopted the draft articles in question some years after the corresponding reports had been submitted. The superficial character of the draft articles noted by Mr. Pellet could also be explained perhaps by the tendency among a number of members of the Commission to produce rapid results at all costs, as well as the tendency of some to prefer the brevity of the articles proposed by the previous Special Rapporteur. Lastly, it was unfortunately a very common practice for the members of the Drafting Committee not to take part in the Committee's work with sufficient regularity. Consequently, they did not follow closely enough the developments in the questions the Committee was considering. This regrettable phenomenon had been particularly pronounced—not without consequences—during the work on articles 11 and 12 at the present session.

CHAPTER II. *Draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.482 and Add.1 and Add.1/Corr. 1 and A/CN.4/L.482* and Add.1*)

11. The CHAIRMAN said that chapter II of the draft report of the Commission (A/CN.4/L.482 and Add.1 and Add.1/Corr.1) had been reissued for technical reasons and bore the symbols A/CN.4/L.482* and Add.1*.

12. Mr. BENNOUNA, supported by Mr. ARANGIO-RUIZ, Mr. PAMBOU-TCHIVOUNDA and Mr. RAZAFINDRALAMBO, said that the documents A/CN.4/L.482* and Add.1* reissued "for technical reasons", were a veritable revision of the initial documents and no longer reflected the discussion in plenary. He would therefore like the Commission to revert to the initial documents.

13. Following a procedural discussion in which Mr. de SARAM (Rapporteur), Mr. CALERO RODRIGUES, Mr. ROSENSTOCK, Mr. PELLET, Mr. MAHIOU, Mr. CRAWFORD, Mr. BOWETT, Mr. VERESHCHETIN, Mr. TOMUSCHAT, Mr. MIKULKA, Mr. KOROMA, Mr. THIAM (Special Rapporteur) and Mr. AL-KHASAWNEH took part, the CHAIRMAN suggested that the Commission should instruct the Rapporteur, with the Rapporteur's agreement, to prepare with the help of the secretariat a further document on the basis of documents A/CN.4/L.482 and Add.1 and Add.1/Corr. 1 and A/CN.4/L.482* and Add.1*, in the light of the discussion in plenary.

It was so agreed.

The meeting rose at 1.15 p.m.

2325th MEETING

Wednesday, 21 July 1993, at 3.10 p.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/446, sect. B, A/CN.4/448 and Add.1,[2] A/CN.4/449,[3] A/CN.4/452 and Add.1-3,[4] A/CN.4/L.488 and Add.1-4, A/CN.4/L.490 and Add.1)

[Agenda item 3]

REVISED REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

1. The CHAIRMAN recalled that, at its 2298th plenary meeting, on 17 May 1993, the Commission decided to convene the Working Group on a draft statute for an international criminal court,[5] in accordance with the mandate contained in paragraphs 4, 5 and 6 of General Assembly resolution 47/33. He invited Mr. Koroma, the Chairman of the Working Group, to introduce its revised report (A/CN.4/L.490 and Add.1).

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* Resumed from the 2303rd meeting.

[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[3] Ibid.

[4] Ibid.

[5] The Commission, at its 2300th meeting on 25 May 1993, decided that the Working Group on the question of an international criminal jurisdiction should, henceforth, be called "Working Group on a draft statute for an international criminal court".