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A/CN.4/SR.2367

Summary record of the 2367th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1994 vol. I

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2367th MEETING

Friday, 15 July 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

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. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (concluded) (A/CN.4/453 and Add.1-3,¹ A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,² A/CN.4/L.501)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(concluded)

1. The CHAIRMAN said that the Commission had to decide two separate issues, namely, what action should be taken on article 12, and whether the results achieved at the current session with respect to countermeasures should be reported to the General Assembly.

2. With regard to the first issue, the text adopted by the Drafting Committee at the forty-fifth session³ was apparently not satisfactory to some members, particularly since almost all of its provisions contained wording that appeared between brackets. Since it seemed that it would be very difficult to arrange for an additional meeting of the Drafting Committee at the current stage in the session, he would suggest that action on article 12 should be postponed until the following session.

It was so agreed.

3. The CHAIRMAN said that, with regard to the second issue, namely, whether draft articles 11, 13 and 14 should be included in the report on the work of the session, together with an indication that article 12 was still under consideration and would be completed at the following session, he wished to remind members that, at its forty-fourth session, the Commission had adopted certain guidelines concerning the content of its reports to the General Assembly,⁴ paragraph (f) of which stated, in substance, that, if the results of the work of the Commission were fragmentary and could only be properly assessed by the Sixth Committee after further elements had been added, the information contained in the report should be very summary, with the indication that the

matter would be more fully presented in a future report. Certain delegations in the Sixth Committee—including those of Bahrain, Sweden (on behalf of the Nordic countries), Austria, Hungary and the United States of America—had hailed those guidelines as particularly commendable. The situation with regard to articles 11, 13 and 14 fell squarely within the parameters of those guidelines inasmuch as the results achieved were fragmentary and could be properly assessed by the Sixth Committee only after the crucial element represented by article 12 had been added. Furthermore, some members had accepted article 11 subject to its modification in the light of the content of article 12. In the circumstances, he wondered whether it would not be more advisable not to transmit articles 11, 13 and 14 to the General Assembly.

4. Mr. BENNOUNA said that, while he considered that the Chairman had made a very wise proposal, he wondered whether it would not be better, with a view to making progress in the discussion, to refer to the General Assembly draft articles 13 and 14, which did not give rise to any fundamental problems and were less dependent on article 12. In that way, the Commission could get some feedback, particularly on the more difficult part of the draft—prohibited countermeasures.

5. Mr. JACOVIDES, supported by Mr. VARGAS CARREÑO and Mr. AL-BAHARNA, said he was afraid that, if nothing concrete was submitted on State responsibility for two consecutive years, it would create a bad impression in the Sixth Committee. If the Commission submitted draft articles 13 and 14 at least, it would give the Assembly a more accurate picture of the work it had accomplished.

6. Mr. MAHIOU and Mr. MIKULKA said that, although the Commission should normally submit complete drafts to the General Assembly, in the present case, they considered that it should submit draft articles 13 and 14, as well as draft article 11, together with an indication that the latter would be re-examined when article 12 had been adopted.

7. Mr. AL-KHASAWNEH said that the Commission would create an even worse impression if it did not apply the guidelines it had itself adopted two years earlier. Article 11 was linked to article 12, but so were articles 13 and 14. It would therefore be better to wait until the following session to give the General Assembly a complete picture of the work carried out on State responsibility.

8. Mr. CALERO RODRIGUES, supported by Mr. EIRIKSSON, Mr. IDRIS, Mr. HE and Mr. ROBINSON, said that the Commission should apply the guidelines it had adopted. There was no point in informing the General Assembly about a limited part of the Commission's work.

9. Mr. GÜNEY and Mr. de SARAM said they too agreed that the Commission should not submit any draft article in its report on the current session. The Commission had completed the work on two topics, which should keep the Sixth Committee quite busy.

10. Mr. THIAM said that the Commission should submit a complete set of articles to the General Assembly or nothing at all. If it did decide to submit articles, it could

¹ Yearbook . . . 1993, vol. II (Part One).

² Reproduced in Yearbook . . . 1994, vol. II (Part One).

³ Yearbook . . . 1993, vol. I, 2318th meeting, para. 3.

⁴ Yearbook . . . 1992, vol. II (Part Two), para. 373.

not put forward draft articles 13 and 14 without draft article 11, since that would be tantamount to referring to prohibited countermeasures before specifying what authorized countermeasures were.

11. Mr. PELLET said that a set of articles would not be complete without draft article 12. A balance had to be struck between draft articles 11 and 12, so that the submission of the former would be tantamount to prejudging a balance that had yet to be found. It would also cause offence to those who had accepted draft article 11 only reluctantly and subject to the future content of draft article 12. If the Commission were to submit articles to the General Assembly, it should make it quite clear that it did so only by way of information and that it had taken no decision either on article 12 or even on article 11.

12. Mr. YANKOV, supported by Mr. ROSENSTOCK, Mr. PAMBOU-TCHIVOUNDA, Mr. RAZAFINDRALAMBO, Mr. FOMBA and Mr. KABATSI, said that, while he fully endorsed the guidelines adopted by the Commission at its forty-fourth session, he wondered whether they should be applied without any flexibility whatsoever and without regard for the requirements of the particular situation. In his view, it would be preferable to submit draft articles 11, 13 and 14 to the General Assembly, together with explanations, which might be more detailed than usual, of the various views expressed and the links with draft article 12. That would also serve to acknowledge the work accomplished by the Drafting Committee and the Special Rapporteur over the past two years.

13. Mr. CALERO RODRIGUES said the fact that no article was submitted to the General Assembly certainly did not mean that it could not be informed in detail about the work carried out by the Commission on the topic of State responsibility. It was possible not only to keep the General Assembly informed, but also to abide by the principle that only a complete set of articles could be submitted to it.

14. Mr. BARBOZA, supported by Mr. YANKOV, said he considered that articles 11, 13 and 14 were a fairly complete set of provisions and that the Commission should submit them to the General Assembly together with an indication that the final wording of article 11 would depend on the wording of article 12. That solution had the advantage not so much of demonstrating that the Commission had worked on the topic at the current session as of submitting the result of its work to the General Assembly as quickly as possible, so that it could have the benefit of its opinion in its further work.

15. Mr. YAMADA said that it would be preferable to follow the guidelines adopted by the Commission at its forty-fourth session in 1992. It should be recognized that the Commission had been unable to adopt one of the main provisions with respect to countermeasures, namely, article 12, and that, as a result, the Sixth Committee could not take a valid decision in the matter.

16. The CHAIRMAN said that it was difficult for the Commission to refer articles 11, 13 and 14 to the General Assembly when half of its members were opposed to that.

17. Mr. YANKOV, supported by Mr. ROSENSTOCK and Mr. BENNOUNA, agreeing with the Chairman, said that he would not insist on the articles in question being referred to the General Assembly.

18. Mr. THIAM said that the Commission should not let itself be paralysed by the lack of a consensus. It would be better to take a vote and settle the matter.

19. Mr. IDRIS proposed that an interim report should be submitted to the General Assembly without submitting the articles to it officially. That solution would have the advantage of enabling the General Assembly to take a decision in the matter.

20. Mr. YANKOV, speaking on a point of order, said that, since the Commission was clearly very divided as to the advisability of referring articles 11, 13 and 14 to the General Assembly, any decision taken in that connection would inevitably lack weight. He therefore suggested the following compromise solution: first, the report of the Commission to the General Assembly should give a detailed account of the discussions that had taken place in the Commission on articles 11 to 14 of part two of the draft on State responsibility. It should be indicated that the Commission had adopted articles 11, 13 and 14, but had been unable, at the current stage, to reach agreement on article 12. It should also be mentioned that it would perhaps be necessary to improve the text of article 11 later in the light of the wording finally adopted for article 12. Secondly, the relevant part of the report should refer to a footnote that would contain the text of articles 11, 13 and 14 and that would explain that all the articles on countermeasures, together with the commentaries thereto, would be submitted to the General Assembly officially in 1995. Article 12 would not, of course, appear in the footnote, as the Commission had yet to adopt the text.

21. That solution would have a number of advantages. It would be a way of drawing the attention of the members of the Sixth Committee to the articles in question and of seeking their view while facilitating their task, since the Drafting Committee documents would not necessarily be available to them. It would also be a way of showing them that the Commission had worked hard on the matter.

22. Mr. JACOVIDES said that Mr. Yankov's proposal met his own concerns and would give the members of the Sixth Committee an opportunity to make their own comments on the points examined by the Commission. He wondered whether it was not necessary to go even further and, in the report, expressly seek the view of the Sixth Committee on the questions that had been the stumbling block in the work of the Commission and, in particular, on article 12.

23. Mr. ROSENSTOCK, supported by Mr. EIRIKSSON, said that he, on the contrary, considered that it would not be advisable at the current stage to encourage a substantive debate in the Sixth Committee on those matters. It was because the footnote proposed by Mr. Yankov would merely provide information and serve as a reference that the solution seemed acceptable to him.

24. Mr. CALERO RODRIGUES, agreeing with the two previous speakers, said that whether or not he could

accept Mr. Yankov's proposal would depend on how it was formulated in the report.

25. Mr. PELLET said that, before taking a decision on Mr. Yankov's proposal—which did, moreover, seem to offer an acceptable compromise—he too would first like to know what the commentary would state. In particular, he would like it to indicate that a sizeable portion of the members of the Commission had stressed that article 12 should achieve a proper balance with article 11.

26. Mr. THIAM said that, in a spirit of conciliation, he too would support Mr. Yankov's proposal. However, he did not see why the disagreement in the Commission had not been expressed through a formal vote.

27. Mr. BENNOUNA said that, given that disagreement, he would have preferred not to refer anything to the Sixth Committee. In particular, he saw little point in the inclusion of a footnote purely for informative purposes.

28. The CHAIRMAN invited the members of the Commission to accept Mr. Yankov's proposal on the understanding that the Special Rapporteur would be asked to draft the text to appear in the report.

It was so agreed.

29. The CHAIRMAN said that the Commission had before it a proposal by Mr. Eiriksson concerning article 14. At present, the article was entitled "Prohibited countermeasures" and Mr. Eiriksson proposed that that title should be replaced by "Restrictions on resort to countermeasures". In that connection, article 11, as amended by Mr. Tomuschat, laid down the right of the injured State to take countermeasures. The word "countermeasures", could therefore, only designate lawful measures and the expression "prohibited countermeasures" was a contradiction in terms.

30. Mr. YANKOV said his concern was that the word "Restrictions" was too wide and would include conditions connected with resort to countermeasures, which were the subject of article 12.

31. Mr. EIRIKSSON said that Mr. Yankov's point was well taken and he would therefore propose that article 14 should be entitled "Prohibited measures".

32. Mr. MIKULKA, supported by Mr. ROSENSTOCK, said that, in his view, Mr. Eiriksson's proposed amendment was the logical consequence of the amendment to article 11 adopted on Mr. Tomuschat's proposal (2366th meeting). The word "countermeasures" should be confined to measures taken in reaction to an internationally wrongful act which were lawful; were it otherwise, they would be violations of international law, as Mr. Tomuschat had explained when submitting his amendment. If certain members considered that the word "restrictions" caused confusion, article 14 could be entitled "Prohibited measures", as Mr. Eiriksson had proposed. The word "measures" also had the advantage of ensuring consistency with article 30 of part one.⁵

⁵ For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

33. Mr. ARANGIO-RUIZ said he did not see why the title of article 14 as worded caused a problem. Countermeasures were already defined in article 30 of part one as non-compliance with an international obligation, which was regarded as lawful because it was a reaction by a State to an internationally wrongful act of another State. That definition was perfectly clear and the introduction into the title of article 14 of the word "measures" could only mislead the reader. He would prefer the existing title of the article to be explained, if necessary, in the commentary.

34. Mr. de SARAM, supported by Mr. BENNOUNA, said that he agreed with the Special Rapporteur, since the effect of Mr. Eiriksson's proposed amendment would be to make the title of article 30 of part one inconsistent with article 14 now under consideration.

The law of the non-navigational uses of international watercourses (*continued*)* (A/CN.4/457, sect. E, A/CN.4/462,⁶ A/CN.4/L.492 and Corr.1 and 3 and Add.1, A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

[Agenda item 5]

DRAFT ARTICLES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION ON SECOND READING⁷

35. THE CHAIRMAN invited the members of the Commission to consider the commentaries to the draft articles beginning with the commentaries to articles 8 to 20.

COMMENTARIES (A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

COMMENTARIES TO ARTICLES 8 TO 20 (A/CN.4/L.493/ Add.1 and Add.1/Corr.1)

The commentaries to articles 8 to 20 were adopted.

COMMENTARIES TO ARTICLES 21 TO 23 (A/CN.4/L.493/ Add.2)

The commentaries to articles 21 to 23 were adopted.

COMMENTARIES TO ARTICLES 24 AND 25

The commentaries to articles 24 and 25 were adopted subject to the correction of a drafting error in the English version.

COMMENTARY TO ARTICLE 26

36. Mr. ARANGIO-RUIZ, referring to paragraph (3), said that it would be preferable to replace the Latin term *de minimis* by the word "minimal".

* Resumed from the 2362nd meeting.

⁶ Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

⁷ For the texts of the draft articles provisionally adopted by the Commission on first reading at its forty-third session, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

The commentary to article 26, as amended, was adopted subject to the correction of a minor drafting error in the English version.

COMMENTARY TO ARTICLE 27

37. Mr. BENNOUNA, referring to paragraph (6), proposed that the words “other evidence of” in the first sentence should be deleted.

38. Mr. CALERO RODRIGUES proposed that, in the same paragraph, the words “of these authorities” in the second sentence should also be deleted.

The commentary to article 27, as amended, was adopted subject to the correction of a minor drafting error in the English version.

COMMENTARY TO ARTICLE 28

The commentary to article 28 was adopted subject to the correction of a minor drafting error in the English version.

COMMENTARIES TO ARTICLES 29 TO 31

The commentaries to articles 29 to 31 were adopted.

COMMENTARY TO ARTICLE 32

39. Mr. CALERO RODRIGUES, referring to paragraph (3), proposed that the term “Inter-State agreement” should appear without initial capitals. Furthermore, in paragraph (5), it would be more accurate to say “One member of the Commission found the article as a whole unacceptable”.

40. Mr. ROSENSTOCK (Special Rapporteur) confirmed that the word “article” should appear in the singular in the first line and in the plural in the second line.

41. Mr. BENNOUNA, referring to the French version of paragraph (5), said that the word “articles” had been omitted from the second line, so that there was a discrepancy compared with the English text. The paragraph should be reworded to read:

“(5) Un membre de la Commission a jugé l'article inacceptable dans son ensemble au motif que le projet d'articles traite des relations entre États et ne devrait pas s'étendre aux procédures engagées par des personnes physiques ou morales en vertu du droit interne.”

42. Mr. EIRIKSSON said he was concerned that the word “actions” might convey the idea of “activities” and not of legal proceedings.

43. Mr. ARANGIO-RUIZ said that, in his view, the wording of paragraph (5) was ambiguous as it might intimate that the member of the Commission whose view was reported had claimed that no treaty “should extend into the field of actions by natural or legal persons under domestic law”.

44. Mr. ROSENSTOCK suggested, to dispel that ambiguity, that the words “on the ground that the articles deal with relations between States and should not”

should be reworded to read: “on the ground that these articles deal with relations between States and should not”.

45. Mr. IDRIS, agreeing that the word “articles” should appear in the singular in the first line of the paragraph, said that the Commission should be careful not to introduce major changes in a text which was the result of detailed discussion and which, in fact, reflected the view of one member of the Commission.

46. The CHAIRMAN, speaking as a member of the Commission, said that he had himself questioned the advisability of article 32, but for somewhat different reasons.

47. Speaking as Chairman, he suggested that the Special Rapporteur should re-examine the wording of paragraph (5) and that the Commission should defer its decision on the commentary to article 32 until the following meeting.

It was so agreed.

COMMENTARY TO ARTICLE 33

48. Mr. BOWETT (Chairman of the Drafting Committee) said that, in his view, the quotation in paragraph (4) was too long. Only the words “on its acquiring detailed knowledge about the factual circumstances” were of relevance and really related to the definition of fact-finding activities.

49. Mr. CALERO RODRIGUES, agreeing with that remark, noted that the fourth sentence of the same paragraph stated wrongly that “the availability to water-course States of fact-finding machinery will often prevent disputes from arising”, since the article would apply only if the dispute already existed. He therefore proposed that the words “from arising” should be replaced by the words “from continuing or escalating”.

50. Mr. EIRIKSSON pointed out that, in article 33 itself, a comma should be added in sub-paragraph (c), after the words “if a fact-finding”.

51. Mr. BENNOUNA said that he supported the substance of Mr. Calero Rodrigues’ proposed amendment, but considered that the Special Rapporteur should review the paragraph as a whole, since the third sentence already conveyed the idea that the information gathered should make it possible to prevent the dispute from escalating.

52. THE CHAIRMAN suggested that the Commission should defer its decision on the commentary to article 33 until the following meeting.

It was so agreed.

The meeting rose at 1.05 p.m.