

Document:-
A/CN.4/SR.2368

Summary record of the 2368th meeting

Topic:
<multiple topics>

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

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2368th MEETING

Monday, 18 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. Elaraby, 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. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/457, sect. E, A/CN.4/462,¹ 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 READING² (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the commentaries to the draft articles.

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

COMMENTARY TO ARTICLE 32 (*concluded*) (A/CN.4/L.493/Add.2)

Paragraph (5) (*concluded*)

2. The CHAIRMAN recalled (2367th meeting) that the Special Rapporteur had agreed to produce a revised text for paragraph (5).

3. Mr. ROSENSTOCK (Special Rapporteur) said he had concluded that only minor changes were needed. The beginning of the paragraph should now read: "Several members of the Commission found the article as a whole unacceptable on the ground that these articles ...".

4. The CHAIRMAN said, speaking as a member of the Commission, that he would like to add two sentences to the paragraph to reflect his view. They would read:

"Another member of the Commission held the view that this article is undesirable within the broad scope

of the present articles because it may be interpreted as establishing an obligation of States to grant to foreign nationals based on the territories of their respective States the rights which not only procedurally but in all other respects would be equal to the rights of their own nationals. In the view of this member, such a broadening of the principle of the exhaustion of local remedies would not correspond to the present content of this principle."

5. Mr. ROSENSTOCK (Special Rapporteur) said that his amendment had been intended to reflect the view of the Chairman, speaking as a member of the Commission, but he could accept the proposed addition.

6. Mr. IDRIS said that in the Drafting Committee he had taken more or less the same position. The first sentence proposed by the Chairman, speaking as a member of the Commission, should therefore begin "Two other members ...".

7. Mr. RAZAFINDRALAMBO said that the existing sentence of the paragraph, which had just been amended by the Special Rapporteur, should now revert to its original wording since the objection raised by Mr. Sreenivasa Rao (2355th meeting, para. 24) was covered in the proposal of the Chairman, speaking as a member of the Commission.

8. The CHAIRMAN said he had the impression that Mr. Sreenivasa Rao had objected on a different ground.

9. Mr. KABATSI said he supported the position of Mr. Razafindralambo.

10. Mr. CALERO RODRIGUES said that the original first sentence should remain unchanged: it reflected Mr. Sreenivasa Rao's position, while the two new sentences proposed by the Chairman reflected the position of the Chairman and Mr. Idris.

11. Mr. IDRIS endorsed Mr. Calero Rodrigues' comment.

12. Mr. BENNOUNA said that, it might not be wise to be so specific as to say "Two other members". It was often difficult to be accurate about the number of members taking a particular view.

13. Mr. CALERO RODRIGUES said that he agreed in principle with Mr. Bennouna, but in the present case the objection was a strong one, and it was therefore better to specify that it had been raised by two members.

14. The CHAIRMAN said that, if he heard no objection he would take it that the existing sentence of paragraph 5 should remain unchanged and that the Commission accepted the two additional sentences he had proposed, as amended by Mr. Idris.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to article 32 as a whole, as amended, was adopted.

¹ Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

² 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.

COMMENTARY TO ARTICLE 33 (*concluded*)*Paragraph (4) (concluded)*

15. The CHAIRMAN recalled that the Special Rapporteur had been asked to review the fourth sentence of paragraph (4) in the light of the observations made by Mr. Calero Rodrigues and Mr. Bennouna (2367th meeting), and the sixth sentence in the light of the observations made by the Chairman of the Drafting Committee (*ibid.*).

16. Mr. ROSENSTOCK (Special Rapporteur) said that the best way to deal with the fourth sentence was to place it in parentheses, since the point raised by Mr. Calero Rodrigues and Mr. Bennouna was a separate one concerning the usefulness of fact-finding machinery. In the sixth sentence, the beginning and the end of the quotation should be deleted so that it would read “acquiring detailed knowledge about the factual circumstances of any dispute or situation”.

Paragraph (4), as amended, was adopted.

Paragraph (11)

17. Mr. ROSENSTOCK (Special Rapporteur) said that the last sentence of the paragraph should be deleted, because it was no longer necessary.

Paragraph (11), as amended, was adopted.

The commentary to article 33 as a whole, as amended, was adopted.

Draft report of the Commission on the work of its forty-sixth session

18. The CHAIRMAN invited the Commission to consider the draft report on the work of its forty-sixth session, starting with Chapter IV.

CHAPTER IV. State responsibility (A/CN.4/L.497 and Add.1)

19. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested that section B.1 (*e*) should be renumbered section B.2 and retitled “Comments on the topic of State responsibility in general”.

20. Mr. ROSENSTOCK, supported by Mr. CALERO RODRIGUES, said that it was already clear that section B dealt with State responsibility. If necessary, however, the title of the whole section should be amended to read “Consideration of the topic of State responsibility at the present session”.

21. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the sole paragraph in the section, paragraph 121, was in any event out of place because the problem of a dispute settlement procedure had not been discussed in general terms in the Commission. It was a pity that some members of the Commission always added the kind of negative comments reflected in paragraph 121 at the end of a debate when other members had no opportunity to respond, for that gave a wrong impression of the situation in the Commission. In the present instance it also

made things awkward for him as Special Rapporteur because of the absurdity of the inference of paragraph 121 that dispute settlement had nothing to do with State responsibility.

22. The CHAIRMAN suggested that the Commission should deal with that problem when it reached paragraph 121.

It was so agreed.

A. Introduction (A/CN.4/L.497)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

23. After a discussion in which Mr. BENNOUNA, Mr. ROSENSTOCK, Mr. AL-BAHARNA, Mr. CALERO RODRIGUES, Mr. PELLET, Mr. ROBINSON and Mr. ARANGIO-RUIZ (Special Rapporteur) took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission was in favour of retaining the word “assume” in the English version and that the secretariat should consult the French-speaking members with a view to agreeing on a suitable translation of the word into French.

Paragraph 4 was adopted.

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

Section A, as a whole, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.497 and Add.1)

Paragraph 7

Paragraph 7 was adopted.

1. THE QUESTION OF THE CONSEQUENCES OF ACTS CHARACTERIZED AS CRIMES UNDER ARTICLE 19 OF PART ONE OF THE DRAFT (A/CN.4/L.497)

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Paragraph 11

24. Mr. PELLET said that the words “and even modesty” were gratuitously offensive and should be deleted.

25. Mr. BENNOUNA suggested that the reference to prudence should also be deleted. The Special Rapporteur had, if anything, been too bold.

26. Mr. CALERO RODRIGUES said he could agree to deletion of the reference to “modesty” but not “prudence”.

27. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the words “and even modesty”.

Paragraph 11, as amended, was adopted.

(a) The distinction between crimes and delicts as embodied in article 19 of part one of the draft

(i) *The concept of crime*

Paragraphs 12 to 14

Paragraphs 12 to 14 were adopted.

(ii) *The question of the legal and political basis of the concept of crime*

Paragraph 15

28. Mr. MAHIU said that the words *était riche d'exemples*, in the French version, should be replaced by *était plein d'exemples* or *comportent beaucoup d'exemples*.

Paragraph 15, as amended in the French version, was adopted.

Paragraph 16

Paragraph 16 was adopted.

(iii) *The type of responsibility entailed by breaches characterized as crimes in article 19 of part one of the draft*

Paragraphs 17 to 23

Paragraphs 17 to 23 were adopted.

(iv) *The need for the concept of crime—possible alternative approaches*

Paragraph 24

29. Mr. PELLET, supported by Mr. GÜNEY, said there seemed to be some contradiction in the first sentence, as it was not a case of defending the rights of the victim State but of defending those of the international community as a whole. The words "in order to defend the rights and interests of the victim State" should be deleted.

30. Mr. TOMUSCHAT said that the statement in question was correct, and the sentence should be retained.

31. Mr. ROSENSTOCK said that it was important to preserve the possibility of intervention when, for instance, a State launched a policy of genocide against a part of its own population. Accordingly, he favoured deletion of the last phrase.

32. Mr. ARANGIO-RUIZ (Special Rapporteur), supported by Mr. RAZAFINDRALAMBO, said that the word "also" could be inserted before the phrase "in order to defend", to make it quite clear that the purpose of the intervention should be to defend the interests both of the international community and of individual victims.

33. After a discussion in which Mr. JACOVIDES, Mr. PELLET, Mr. AL-BAHARNA and Mr. CALERO RODRIGUES took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to change the last phrase of the first sentence to read: "in order to defend the interests of both the victim State and the international community". Moreover, the words "According to one view" would be altered to "According to one body of opinion".

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted with a minor drafting change.

Paragraphs 26 to 29

Paragraphs 26 to 29 were adopted.

(v) *The definition contained in article 19 of part one of the draft articles*

Paragraphs 30 to 35

Paragraphs 30 to 35 were adopted.

Paragraph 36

34. Mr. HE proposed that the phrase "and suggested to replace it by a more neutral phrase . . ." should be altered to read: "and expressed serious concern as to how the concept could be applied. Suggestions were made to replace the term 'crime' by a more appropriate phrase . . .".

35. Mr. PELLET said that paragraph 36 dealt with a problem of terminology, whereas Mr. He's proposal reflected a more fundamental objection and raised wider-ranging problems of substance.

36. Mr. HE, supported by Mr. IDRIS, said that Mr. Pellet's concern would be addressed if, in his proposed amendment, the words "in this context" were added after the words "could be applied".

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Pellet's view was the right one. Paragraph 36 should deal only with the question of terminology.

38. After a discussion in which Mr. ROSENSTOCK, Mr. HE, Mr. AL-BAHARNA, Mr. PELLET and Mr. THIAM took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to change the first part of the paragraph to read: "Some members observed that the term 'crime' might be an unnecessary source of difficulties because of its penal law connotations which caused concern as to how the concept would be applied. Suggestions were made to replace the term 'crime' by phrases such as . . .".

Paragraph 36, as amended, was adopted.

Paragraphs 37 and 38

Paragraphs 37 and 38 were adopted.

(b) *Issues considered by the Special Rapporteur as relevant to the elaboration of a regime of State responsibility for crimes*

39. Mr. TOMUSCHAT said that the title of section B.1 (b) was misleading, since it implied that what followed was a reflection only of statements made by the Special Rapporteur. In fact, it reflected the general debates in the Commission.

40. Mr. BENNOUNA proposed that, to make it clear that not just the views of the Special Rapporteur were reflected, a sentence or paragraph should be inserted

after the title stating that, in his sixth report (A/CN.4/461 and Add.1-3), the Special Rapporteur had invited members to give their views on a number of issues he considered relevant to the elaboration of a regime of State responsibility for crimes. A cross-reference should also be made to paragraph 11.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that mention should also be made of chapter II, section B, of his fifth report,³ which constituted a still more basic document. To save time, consideration of the wording of the title of section B.1 (b) should be suspended, pending consultations between himself and the secretariat to find an appropriate wording.

It was so agreed.

(i) Who determines that a crime has been committed?

Paragraphs 39 to 44

Paragraphs 39 to 44 were adopted.

(ii) The possible consequences of a determination of crime

42. Mr. AL-BAHARNA said that the title of section B.1 (b) (ii), should be amended to read "The possible consequences of determination of a crime".

43. Mr. PELLET said that he did not take exception to the title of section B.1 (b) (ii), but some members had maintained that what was at issue was the consequences of the commission of a crime. Perhaps a paragraph 44 *bis* should be inserted after the title, reading:

"Some members had objected to the wording of the question raised by the Special Rapporteur and had pointed out that within the framework of part two of the draft articles, the problem was not to determine the possible consequences of the determination of a crime but those of the commission of such a crime."

It was so agreed.

a. Substantive consequences

Paragraph 45

44. Mr. VARGAS CARREÑO drew attention to an important error in the Spanish version, in which the last sentence had been rendered as: *También se mantuvo sin embargo la opinión contraria.*

45. Mr. ROSENSTOCK said the expression "the prevailing opinion" was inappropriate. Only when a final decision had to be made as to the merits of two contending texts would one of those texts prevail.

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the prevalent or prevailing opinion in the Commission had been as described in paragraph 45.

47. After a discussion in which Mr. BOWETT, Mr. ROSENSTOCK, Mr. ARANGIO-RUIZ (Special Rapporteur) and Mr. BENNOUNA took part, the

CHAIRMAN asked whether the phrase "according to a substantial number of members" would be acceptable.

It was so agreed.

Paragraph 45, as amended, was adopted.

Paragraph 46

Paragraph 46 was adopted.

Paragraph 47

48. Mr. ROSENSTOCK proposed that the words "The prevailing opinion was however that", in the last sentence, should be replaced by "According to a substantial number of members,".

49. Mr. ARANGIO-RUIZ (Special Rapporteur) said that as he saw it, a prevailing view had emerged in the Commission in respect of reparation *lato sensu*.

50. The CHAIRMAN said that, if he heard no objection, he would take it that the words "The prevailing opinion was however that" would be replaced by "According to a substantial number of members,".

Paragraph 47, as amended, was adopted.

Paragraph 48

51. Mr. ROSENSTOCK said that the last sentence of the paragraph was not logical and should be redrafted.

52. The CHAIRMAN suggested that, pending consultations with Mr. Mikulka and Mr. Al-Khasawneh, the Commission should adopt paragraph 48, with the exception of the last sentence.

Paragraph 48 was adopted on that understanding.

Paragraphs 49 to 51

Paragraphs 49 to 51 were adopted.

b. The instrumental consequences (countermeasures)

Paragraph 52

53. Mr. ROSENSTOCK said that the use of the term *faculté* in paragraph 52, and elsewhere in the draft articles, was singularly inappropriate. The term was in many instances translated incorrectly into English, resulting in a lack of precision.

54. The CHAIRMAN said that the word *faculté* was often translated into Russian as a "right", when it actually meant the option to use a particular right.

55. Mr. BENNOUNA said that the term should continue to be used in English texts, because it referred, in general, to a possibility provided under the law. He objected to weakening the substance of the paragraph for linguistic reasons.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the term was used in the draft articles in part one and in the commentaries thereto. He saw no reason why the same term could not be used throughout the report.

³ Yearbook . . . 1993, vol. II (Part One), document A/CN.4/453 and Add.1-3.

57. Mr. BOWETT said that the correct translation of *faculté* was "power", in the sense of a legal power to take a particular action.

58. The CHAIRMAN said that, if he heard no objection, the word *faculté* would be replaced by "power" throughout the draft report.

It was so agreed.

59. Mr. PELLET pointed out that the last sentence of the paragraph referred to a particular case without giving any details. It should be deleted and the words "and pointed out that such a practice was far from uniform, as demonstrated by certain recent examples" should be inserted after "Other members expressed a different opinion".

60. After a discussion in which Mr. ARANGIO-RUIZ (Special Rapporteur), Mr. TOMUSCHAT and Mr. AL-BAHARNA took part, the CHAIRMAN said that, if he heard no objection, he would take it that the last sentence was to be retained, with the exception of the words "but principled".

Paragraph 52, as amended, was adopted.

The meeting rose at 1.05 p.m.

2369th MEETING

Monday, 18 July 1994, at 3.15 p.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. Elaraby, 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. Yamada, Mr. Yankov.

Tribute to the memory of Mr. Francisco García Amador

1. The CHAIRMAN informed the members of the Commission of the recent death of Mr. Francisco García Amador, who had been a distinguished member of the Commission from 1954 to 1961 and its Chairman in 1956. He had also been the first Special Rapporteur on the topic of State responsibility. He had been born in Cuba, but had spent most of his life in the United States of America, and had left many works on a variety of subjects, including international liability, international development law and the law of the sea.

At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. Francisco García Amador.

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

CHAPTER IV. State responsibility (continued) (A/CN.4/L.497 and Add.1)

B. Consideration of the topic at the present session (continued) (A/CN.4/L.497 and Add.1)

1. THE QUESTION OF THE CONSEQUENCES OF ACTS CHARACTERIZED AS CRIMES UNDER ARTICLE 19 OF PART ONE OF THE DRAFT (continued) (A/CN.4/L.497)

(b) Issues considered by the Special Rapporteur as relevant to the elaboration of a regime of State responsibility for crimes (continued)

(ii) The possible consequences of a determination of crime (continued)

b. The instrumental consequences (countermeasures) (continued)

Paragraph 53

2. Mr. HE said that he would like the following sentence to be added at the end of the paragraph:

"The view was also expressed that, in addition to imposing obligations of proportionality on the injured State, corresponding obligations not to take further intensified counter-countermeasures to upgrade the dispute should also be prescribed on the wrongdoing State".

3. Mr. ARANGIO-RUIZ (Special Rapporteur) said that that seemed to imply that the State which had committed a wrongful act was entitled to take "counter-countermeasures". However, if the countermeasures taken by an allegedly injured State were wrongful because there had been no wrongful act, the alleged wrongdoing State would then become an injured State and there would be no "counter-countermeasures", but, rather, countermeasures to which article 13 would be applicable.

Paragraph 53, as amended, was adopted.

Paragraph 54

Paragraph 54 was adopted.

Paragraph 55

4. Mr. TOMUSCHAT proposed that the last part of the second sentence, as from the words "and that the world had recently witnessed" should be deleted because citing such an example was tantamount to making an anonymous accusation against a State.

5. Mr. PELLET said that he objected to that deletion. A choice had to be made: either all the examples were taken out of the text or they were all maintained, but some could not be maintained and others deleted.