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Summary record of the 2369th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-

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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. Eirksson, 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.

6. Mr. AL-KHASAWNEH said that he did not agree with Mr. Pellet's view. Each example had to be evaluated separately.

7. Mr. AL-BAHARNA said that he would be prepared to accept the phrase as it stood.

8. After an exchange of views in which Mr. AL-BAHARNA, Mr. AL-KHASAWNEH, Mr. ARANGIO-RUIZ, Mr. BENNOUNA, Mr. PELLET, and Mr. TOMUSCHAT took part, the CHAIRMAN said that a proposal on the wording of the phrase would be submitted in writing later. He therefore suggested that the members of the Commission should postpone a decision on paragraph 55 until the following meeting.

It was so agreed.

Paragraph 56

9. Mr. KABATSI proposed that the word "believed" should be replaced by the word "alleged".

Paragraph 56, as amended, was adopted.

Paragraph 57

Paragraph 57 was adopted.

Paragraph 58

10. The CHAIRMAN recalled that it had been decided that the words "faculté of reaction to a crime" should be replaced by the words "power of reaction to a crime" throughout the text.

Paragraph 58 was adopted.

Paragraphs 59 to 65

Paragraphs 59 to 65 were adopted.

(iii) The punitive implications of the concept of crime

Paragraphs 66 to 72

Paragraphs 66 to 72 were adopted.

(iv) The role of the United Nations in determining the existence and the consequences of a crime

Paragraph 73

11. Mr. TOMUSCHAT proposed that the words "supra State" should be replaced by the words "super State".

12. Mr. PAMBOU-TCHIVOUNDA proposed that, in the French text, the words "Etat supranational" should therefore be replaced by the words "super Etat".

Paragraph 73, as amended, was adopted.

Paragraphs 74 to 76

Paragraphs 74 to 76 were adopted.

Paragraph 77

13. Mr. ELARABY said that Article 39 of the Charter of the United Nations referred not to acts, but to situa-

tions. He therefore proposed that the second part of the first sentence should be amended to read: "provided that the alleged act was one of those which would give rise to the situation referred to in Article 39".

Paragraph 77, as amended, was adopted.

Paragraph 78

Paragraph 78 was adopted.

Paragraph 79

14. Mr. BENNOUNA proposed that, in the French text, the words *freins et contrepoids* should be replaced by the words *poids et contrepoids*.

Paragraph 79, as amended, was adopted.

Paragraphs 80 to 84

Paragraphs 80 to 84 were adopted.

Paragraph 85

15. Mr. BOWETT (Chairman of the Drafting Committee) said that the word "evolution" was ambiguous and that what was meant was an expansion of the Security Council's competence.

16. Mr. ELARABY said that the real question was whether or not the Security Council was exceeding its authority.

17. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had dealt with the matter referred to in paragraph 85 in chapter II of his fifth report.¹ He had done so as clearly and carefully as possible without trying to make a judgement.

18. He confirmed that the word "expansion" would be more accurate than the word "evolution".

19. Mr. ROSENSTOCK said that there was no point in coming back to a question that should not have been raised or discussed in the first place.

20. Mr. BENNOUNA said that, in his view, paragraph 85 was very ambiguous because there were in fact two issues at stake, namely, whether the resolutions in question had established an interpretive custom giving the Security Council more power than the Charter of the United Nations had done and whether, in exercising a kind of legislative power, the Security Council had exceeded the authority vested in it by the Charter.

21. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 85, on the understanding that the word "evolution" would be replaced by the word "expansion".

Paragraph 85 was adopted on that understanding.

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

Paragraph 86

22. The CHAIRMAN said that, following the discussion which had just taken place on paragraph 85 on the question whether the resolutions had established an interpretive custom relating to the competence of the Security Council and in order to take account, in particular, of the comments by Mr. Bennouna, the following new compromise text was proposed to replace the text of paragraph 86:

“86. Most of the members who commented on this question answered in the negative. It was stated in particular that each of the above-mentioned resolutions dealt with the maintenance of international peace and security, i.e. the area of responsibility of the Security Council. In this context, however, one member held the view that the Council had, at times, exceeded its authority under the Charter of the United Nations. Attention was drawn by several members to the fact that whether there had been an expansion of the competence of the Council was a question of interpretation of the Charter which fell outside the Commission’s mandate.”

23. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the new text of paragraph 86 in English, on the understanding that the secretariat would prepare an appropriate French version.

Paragraph 86, as amended, was adopted on that understanding.

Paragraph 87

24. Mr. YANKOV proposed that, in the second sentence, the words “to invent new laws” should be replaced by the words “to enact new rules” and that the word “mandate” should be replaced by the word “competence”.

25. Mr. PAMBOU-TCHIVOUNDA said that he could agree to that amendment if he knew how the words “enact new rules” would be translated into French. The words *énoncer de nouvelles règles* might be appropriate.

Paragraph 87, as amended, was adopted.

Paragraph 88

26. Mr. BOWETT (Chairman of the Drafting Committee) suggested that the word “decision” should be replaced by the word “position”.

27. Mr. IDRIS said that he supported the proposal by the Chairman of the Drafting Committee. He also noted that the words “just about everything”, which came right afterwards, were particularly clumsy.

28. Mr. ELARABY suggested that those words should be replaced by the words “on a wide range of issues”.

29. Mr. TOMUSCHAT, supported by Mr. ARANGIO-RUIZ, Mr. BOWETT, Mr. AL-BAHARNA, and Mr. MAHIOU, criticized the words “it was the centre of gravity of the conscience of the international community” at the end of the first sentence.

30. Mr. CRAWFORD suggested that those words should be replaced by the words “it reflected the conscience of the international community”.

31. Mr. BOWETT pointed out that, in the second sentence, reference should have been made to Articles 10 and 11 of the Charter of the United Nations, not to Articles 10 and 34.

32. The CHAIRMAN suggested that reference should simply be made to the Charter of the United Nations, stating: “It was pointed out that, on the basis of the Charter,”.

33. Mr. AL-BAHARNA said that, in order to make the text less cumbersome, the second sentence might end with the word “opportunity.” and the following sentence would begin with the words “Although, in regard to . . .”.

34. Mr. PAMBOU-TCHIVOUNDA said that the word *possibilité* in the second sentence of the French text was wrong and should be replaced by the word *pouvoirs*. The phrase would then read: *qu’elle tirait le meilleur parti possible de ces pouvoirs*.

35. The CHAIRMAN said that the first two sentences of paragraph 88, as reworded by the secretariat to take account of the proposed amendments, would read:

“Several members expressed the opinion that the General Assembly had a role to play in the case of crime since, it was said, it reflected the conscience of the international community. It was pointed out that, on the basis of the Charter of the United Nations, the Assembly could deal with a wide range of issues and made the most of that opportunity.”

Paragraph 88, as amended, was adopted.

Paragraph 89

36. Mr. IDRIS proposed that the words “of the Charter” should be added after the words “Article 51” at the end of the second sentence.

Paragraph 89, as amended, was adopted.

Paragraphs 90 and 91

Paragraphs 90 and 91 were adopted.

(v) Possible exclusion of crimes from the scope of application of the provisions on circumstances precluding wrongfulness

Paragraphs 92 and 93

Paragraphs 92 and 93 were adopted.

(vi) The general obligation of non-recognition of the consequences of a crime

Paragraphs 94 and 95

Paragraphs 94 and 95 were adopted.

(vii) The general obligation not to aid a “criminal” State

Paragraph 96

Paragraph 96 was adopted.

(c) The courses of action open to the Commission

37. Mr. PAMBOU-TCHIVOUNDA said that, in the French text, the title of subheading (c) was clumsy and requested that the secretariat should redraft it.

It was so agreed.

Paragraphs 97 to 99

Paragraphs 97 to 99 were adopted.

Paragraph 100

38. Mr. TOMUSCHAT suggested that the following new second sentence should be added: "Other members considered it urgent to draw up an appropriate regime for international crimes".

39. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, for the sake of harmony with the first sentence, that new second sentence should read: "It was also suggested that the Commission should draw . . .".

40. Mr. PELLET said that, if that amendment was accepted, the word "however" in the last sentence should be deleted or replaced by the word "moreover".

It was so agreed.

Paragraph 100, as amended, was adopted.

Paragraph 101

Paragraph 101 was adopted.

(d) Conclusions of the Special Rapporteur on the debate

Paragraphs 102 to 120

41. The CHAIRMAN recalled that paragraphs 102 to 120 of the report reflected the conclusions of the Special Rapporteur. Before requesting the members of the Commission to adopt them, he wanted to be sure that they had the Special Rapporteur's approval.

42. Mr. ARANGIO-RUIZ (Special Rapporteur) said that those paragraphs did reflect his position and had his approval.

Paragraphs 102 to 120 were adopted.

The meeting rose at 6.10 p.m.

2370th MEETING

Tuesday, 19 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. 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. Yamada, Mr. Yankov.

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 (*concluded*) (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 (*concluded*)

(ii) The possible consequences of a determination of crime (*concluded*)

b. *The instrumental consequences (countermeasures)* (*concluded*)

1. The CHAIRMAN invited the Commission to continue its consideration of Chapter IV of its draft report.

Paragraph 55 (*concluded*)

2. The CHAIRMAN said that a proposed reformulation of the second sentence of paragraph 55 would read:

"The remark was made in this connection that recognition of the concept of crime did not mean recognition of an absolute and unlimited right of riposte or of *lex talionis* and that the world had recently witnessed an armed intervention following on a genocide where the use of force had never been recognized as lawful by the international community because, in order to put a stop to the crime, the intervening State had in turn violated a peremptory rule of international law."

Paragraph 55, as amended, was adopted.

(e) Comments on the topic in general

Paragraph 120 bis

3. The CHAIRMAN said that a new paragraph 120 bis, proposed by Mr. He, would read:

"120 bis. Some members took the view that, in view of the Special Rapporteur's estimation in his summing-up, it should be stressed that there was a considerable body of opinion having reservations on the language of article 19. If constructive efforts were to be made for part two, it would seem advisable to move on based on a distinction, not necessarily between crimes and delicts, but between quantitatively less serious and most serious delicts."