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Summary record of the 2370th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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(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 preemptory 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."

An addition to paragraph 120 *bis*, proposed by Mr. AL-Khasawneh, would read: "Other members took the view that nothing was more debatable".

4. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he objected to adding paragraph 120 *bis* to the report. He had summarized the views of members with regard to article 19 and had clearly indicated the various positions taken (2348th meeting).

5. Mr. ROSENSTOCK said that paragraph 120 *bis* was an accurate reflection, in very mild form, of the statements made during the debate and it would be misleading to omit it from the report. The proposed addition to paragraph 120 *bis* should not be included, as no statement to that effect had actually been made by any member.

6. Mr. MAHIOU said that the paragraph did not belong among the Special Rapporteur's conclusions with regard to article 19, because it actually dealt with the reactions of only one group of members to those conclusions.

7. Another and even larger group had been in favour of using article 19 as the basis for future work. Therefore, a paragraph 120 *ter* proportionate in length to the strength of that opinion, should be prepared to reflect those views.

8. Mr. BENNOUNA said he endorsed the idea of a paragraph 120 *ter*. The last sentence of paragraph 120 *bis* was unsatisfactory because it used the very language that had been the object of reservations. Accordingly the words "between quantitatively less serious and most serious delicts" should be replaced by "between quantitatively less serious and more serious violations of international law".

9. Mr. HE said that paragraph 120 *bis* was an accurate reflection of the views expressed during the debate.

10. Mr. CALERO RODRIGUES said that he was in favour of including paragraph 120 *bis* in the report as well as a new paragraph 120 *ter*. As to paragraph 120 *bis*, he proposed, with the support of Mr. KABATSI and Mr. de SARAM, that the words "Some members took the view" should be replaced by "Some members expressed the opinion"; that the words "set out in paragraph 103 of Chapter IV of the Commission's report" should be inserted after "in his summing-up"; and that the words "of part one of the draft articles" should be inserted after "article 19".

11. Mr. ARANGIO-RUIZ said he hoped that the Commission would give him more precise guidance on how it wished him to proceed with his work on the topic. The inclusion of paragraph 120 *bis* in the report might cast doubt on his mandate.

12. Mr. TOMUSCHAT said he, too, was in favour of including paragraph 120 *bis* and paragraph 120 *ter* in the report. The Special Rapporteur's mandate was to strike the very delicate balance between the opposing views expressed in the Commission.

13. Mr. KABATSI (Rapporteur) pointed out that paragraph 36 already expressed the reservations of members with regard to the language of article 19.

14. Mr. de SARAM supported by Mr. AL-BAHARNA, said that he associated himself with those who favoured the inclusion of paragraph 120 *bis* and paragraph 120 *ter*. The word "considerable", in the first sentence of paragraph 120 *bis*, should be replaced or deleted.

15. Mr. AL-BAHARNA observed that the draft report already answered some of the questions just raised in the discussion: paragraph 103 clearly reflected the main viewpoints with regard to article 19; paragraph 120 clearly defined the mandate of the Special Rapporteur.

16. Mr. CALERO RODRIGUES said he agreed that the Special Rapporteur's task of striking a balance between the general view and other shades of opinion was a difficult one. However, the instructions to the Special Rapporteur were clear and he was certainly up to the task, which would not in fact be made any more difficult by including the proposed new paragraph.

17. Mr. RAZAFINDRALAMBO said that the second sentence of paragraph 120 *bis* was less a reaction to the Special Rapporteur's summary than an attempt to restate an opinion already put forward in the debate. It should therefore be deleted. The first sentence seemed to be contesting the Special Rapporteur's view that there was a majority in favour of the present wording of article 19. Perhaps it would be better to make that point in a separate paragraph at the end of the Special Rapporteur's summary.

18. Mr. PELLET said that paragraph 120 *bis* was designed to reflect the brief debate which had taken place on the Special Rapporteur's summary. There was really no need to repeat that debate in the report. If the paragraph was inserted, an additional paragraph would be required to reflect the opposing view.

19. Mr. AL-KHASAWNEH said that the inclusion of paragraph 120 *bis* would not prevent the Special Rapporteur from fulfilling his mandate. The main purpose of the report was to convey information to the Sixth Committee. However, Mr. Pellet was right. Paragraph 120 *bis* would have to be balanced by yet another paragraph, especially as it interpreted the Special Rapporteur's views wrongly. The proliferation of additional paragraphs was becoming absurd, and it would be better to reject paragraph 120 *bis* and his own proposal thereon.

20. Mr. TOMUSCHAT said that it was not absurd for members to want the debate to be properly reflected in the report.

21. Mr. MAHIOU said that he agreed with Mr. Pellet. There would have to be a paragraph 120 *ter* stating that several members expressed an opposing view to the effect that, notwithstanding the debate on article 19 and the distinction drawn between crimes and delicts, the article and the distinction constituted a basis for the continuation of the Special Rapporteur's work and the elaboration of draft articles for submission to the Commission. There should then be a paragraph 120 *quater* referring to the decision taken by the Commission as reflected in paragraph 9.

22. Mr. ARANGIO-RUIZ (Special Rapporteur) said it seemed that an attempt was being made to prevent him

as Special Rapporteur from proceeding on the basis of the majority view in the Commission. He could see some merit in Mr. Mahiou's proposal but, after adopting as many additional paragraphs as it wished, the Commission must then restate clearly what it wanted the Special Rapporteur to do.

23. Mr. ROSENSTOCK said that there appeared to be broad support for paragraph 120 *bis* and for Mr. Mahiou's proposal for a paragraph 120 *ter*. However, the Commission should not include a further paragraph referring to paragraph 9 because it would then have to repeat the reservations concerning the conclusions mentioned therein.

24. Mr. BENNOUNA said that the Commission was departing from its established procedure for adoption of its reports. The debate should be terminated on that ground and also because it reflected badly on the Commission.

25. Mr. AL-BAHARNA said that any additional paragraphs restating members' views should be placed before paragraph 120 so that they would not cast any doubt on the clear statement of the Special Rapporteur's conclusions and the mandate for his future work contained in that paragraph.

26. Mr. MAHIU said that his proposal would be changed to read: "The Commission concluded as indicated in paragraph 9 above", a more neutral form of wording that corresponded to the Commission's decision as reflected in the summary record of the 2348th meeting. He was prepared to accept paragraph 120 *bis* provided that the word "considerable" was deleted.

27. Mr. GÜNEY said that paragraph 9 already provided the Special Rapporteur with a clear indication of the course he should follow in his further work. There was therefore no need to repeat that indication in the conclusions.

28. Mr. ARANGIO-RUIZ (Special Rapporteur), agreeing with Mr. Mahiou concerning the word "considerable", said that the word "body" should also be deleted. Paragraph 120 *bis* could then be followed by a further paragraph stating certain other views and then by a final—and essential—paragraph which would refer back to paragraph 9.

The meeting was suspended at 11.30 a.m. and resumed at noon.

29. The CHAIRMAN said that an informal meeting had been held and the following text had been prepared:

"(e) Views expressed subsequent to the formulation by the Special Rapporteur of his conclusions on the debate

"120 *bis*. Some members expressed the opinion that, in view of the Special Rapporteur's estimation in his summing-up (see para. 103 above), it should be stressed that there was a substantial body of opinion having reservations on the language of article 19 of part one of the draft. 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 internationally wrongful acts.

"120 *ter*. Some other members expressed the opposite view, pointing out that, notwithstanding the discussion to which article 19 and the distinction between crimes and delicts had given rise, this article and this distinction provided a basis for the continuation of the Special Rapporteur's work and the elaboration of draft articles to be submitted to the Commission.

"120 *quater*. The Commission concluded as indicated in paragraph 9 above."

30. The authors of paragraph 120 *bis* further proposed that a sentence should be added at the end of that paragraph to read:

"These members also expressed reservations concerning the conclusions indicated in paragraph 9 above."

31. If he heard no objection, he would take it that the Commission wished to adopt the proposed new text.

Paragraphs 120 bis, 120 ter, and 120 quater, as amended, were adopted.

Paragraph 121

32. Mr. EIRIKSSON said he understood that, in his absence, the paragraph had been attributed to him. In fact, it did not reflect his views. Indeed, the last sentence conveyed precisely the opposite of what he had actually said, namely, that the Commission should not be afraid to be progressive since, if it erred, States were there to correct it. Also, he had dealt with the matter in the context of the question who determined that a crime had been committed, his view being that, subject to the Commission's decision on part three of the draft articles, it should be the injured State that did so.

33. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete paragraph 121.

It was so agreed.

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*)*

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

COMMENTARY TO ARTICLE 1 (A/CN.4/L.493)

34. Mr. ROSENSTOCK (Special Rapporteur) proposed that a new paragraph (5) should be added to the

* Resumed from the 2368th meeting.

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, in response to comments made by one member. It would read:

“(5) One member objected to the formulation in paragraph (1) of the commentary to article 1 on the ground that the term ‘uses’ is not precisely defined. He urged the elaboration of a homogeneous criterion for identification of the operations or activities comprehended by the term ‘uses’ and the imputability of such undertakings to a watercourse State.”

35. Mr. PAMBOU-TCHIVOUNDA said that fifth in a series of paragraphs was not the proper place for the wording proposed by the Special Rapporteur. He had not himself actually proposed a homogeneous criterion but had simply suggested a series of factors that could form the basis of a material approach to the concept of utilization. He had drafted a text to that effect, which had already been circulated to members and could perhaps replace paragraph (1) to the commentary, reading:

“(1) The term ‘uses’ as employed in article 1 derives from the title of the topic. Indeed, as such it covers all uses other than navigation. It cannot form the subject of a conceptual definition. Since the uses in question are understood in terms of their purpose, the notion of such uses is, as a result, functional and evolutive. The notion is none the less imprecise. In the absence of a homogeneous criterion for identification, the consistency of the uses referred to in this article, in other words, of the operations or activities carried out on a watercourse for non-navigational purposes, could be identifiable in terms of three criteria: their nature (industrial, economic . . . or domestic), the technical character of the works or the means utilized and the linkage of initiating such undertakings to the jurisdiction or control of a watercourse State.”

36. His proposal had been prompted by his concern at noting that the Commission was embarking upon a draft convention on the uses of watercourses without having actually defined the object and purpose of the convention. That was a serious lacuna in the draft. Moreover, the commentary in paragraph (1) was circular in effect. Consequently, while he would not insist on the inclusion of a definition in article 2, he considered that paragraph (1) should be drafted in more substantive terms.

37. The CHAIRMAN asked whether Mr. Pambou-Tchivounda was prepared to consult with the Special Rapporteur in an endeavour to arrive at a mutually acceptable solution.

38. Mr. PAMBOU-TCHIVOUNDA said that he had no objection. His own preference was for the proposal to be inserted after paragraph (1). Contrary to the assertion made by the Special Rapporteur, he had not proposed a homogeneous criterion. Indeed, he had noted that no such criterion was possible.

39. Mr. ROSENSTOCK (Special Rapporteur) said that he would be loath to have paragraphs (1) to (4) of the commentary—which reproduced unchanged the text that had been approved at the forty-third session in 1991—disrupted by the insertion of the paragraph proposed by Mr. Pambou-Tchivounda. Nor did he think it a good idea to include the entire proposal in a paragraph (5). However, if Mr. Pambou-Tchivounda was prepared to accept

a paragraph (5) starting with the words “One member”, followed by some formulation of his own devising, summarizing more accurately his position, he had no objection to that solution.

40. Mr. CALERO RODRIGUES said he did not think that Mr. Pambou-Tchivounda’s proposal to replace the existing paragraph (1) by another text was acceptable. Members were certainly entitled to have their dissenting opinions reflected in the commentary, but, he wondered whether the proposal was of sufficient importance to justify such inclusion, and he urged Mr. Pambou-Tchivounda not to insist.

41. Mr. PAMBOU-TCHIVOUNDA said that he would be reluctant to take the course advocated by Mr. Calero Rodrigues. However, he would be happy to engage in informal consultations with the Special Rapporteur with a view to drafting a fifth paragraph reflecting his concerns.

42. The CHAIRMAN said that, on the understanding that Mr. Pambou-Tchivounda and the Special Rapporteur would formulate a paragraph (5), he would take it that the Commission agreed to adopt the commentary to article 1.

It was so agreed.

The commentary to article 1 was adopted on that understanding.

COMMENTARY TO ARTICLE 2

43. Mr. ROSENSTOCK (Special Rapporteur) said that the addition in article 2, subparagraph (b) of the word “normally” was explained at length in paragraph (6) of the commentary.

44. Mr. YANKOV said that the text of paragraph (6) of the commentary contributed greatly to an understanding of subparagraph (b).

45. Mr. GÜNEY said the commentary should make it clear that the addition of the word “normally” in no way enlarged the geographic scope of the draft articles.

46. Mr. ROSENSTOCK (Special Rapporteur) said he thought that the paragraph was quite clear. The decision to insert the word “normally” had been a compromise between those who had urged simple deletion of the phrase “common terminus”, and those who had urged retention of that notion in order to suggest some limit to the geographic scope of the convention. In some cases, it might indeed extend that geographic scope. The yardstick, as a matter of common sense and practical judgement, was the notion of “unitary wholes”. He did not see how else the arguments could be expressed without destabilizing the paragraph.

47. Mr. GÜNEY said that the purpose of the compromise had not been to extend the geographic scope of the convention. That fact was implied in the wording of paragraph (6), but it could be stated explicitly somewhere in that paragraph, without upsetting what was admittedly a delicate balance.

48. Mr. ROSENSTOCK (Special Rapporteur) said it had been felt that without the addition of the word “normally”, the articles would fail to cover, for example, the Rio Grande, the Irawaddy, the Mekong and the Nile. The

addition expanded the scope of the draft articles, in the sense that it avoided a restriction of their scope; what it did not do was to change two systems into one where they were linked by a canal, or to consider the Rhine and the Danube as a single system. He urged Mr. Güney to propose a brief text consistent with the recognition that the addition of the word “normally” did in a sense change the scope of the articles.

49. Mr. GÜNEY proposed inserting, in the third sentence of paragraph 6, after the word “compromise”, the words “not with the intention of expanding the geographic scope as such of the convention, but . . .”.

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to suspend its action on the commentary to subparagraph (b) pending informal consultations between Mr. Güney and the Special Rapporteur, and to adopt the rest of the commentary to article 2.

It was so agreed.

The commentary to article 2 was adopted on that understanding.

COMMENTARY TO ARTICLE 3

51. Mr. ROSENSTOCK (Special Rapporteur) said that article 3 was the first in which the word “appreciable” had been replaced by the word “significant”. That decision was discussed in paragraphs (13) and (14) of the commentary.

The commentary to article 3 was adopted.

COMMENTARY TO ARTICLE 4

52. Mr. ROSENSTOCK (Special Rapporteur) said that the commentary to article 4 had not been changed.

53. Mr. AL-BAHARNA said it was very important to insert a comma after the words “programme or use”, in the English text of paragraph 2 of article 4.

54. After a discussion in which Mr. BOWETT (Chairman of the Drafting Committee), Mr. EIRIKSSON, Mr. AL-BAHARNA and Mr. ROSENSTOCK (Special Rapporteur) took part, the CHAIRMAN invited Mr. Al-Baharna not to press his proposal.

The commentary to article 4 was adopted.

The meeting rose at 1.05 p.m.

2371st MEETING

Tuesday, 19 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.

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*)

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

COMMENTARY TO ARTICLE 1 (*concluded*) (A/CN.4/L.493)

1. The CHAIRMAN said that, at its previous meeting, the Commission had left two matters pending, one concerning the commentary to article 1, and the other concerning paragraph (6) of the commentary to article 2. As to article 1, Mr. Pambou-Tchivounda and the Special Rapporteur had agreed to include a paragraph (5), reading:

“(5) According to one member, in the absence of a homogeneous criterion for identification, the uses of an international watercourse for non-navigational purposes could be identifiable in terms of three criteria: their nature (industrial, economic or private), the technical character of the works or the means utilized and the linkage of initiating such undertakings to the jurisdiction or control of a watercourse State.”

Paragraph (5) was adopted.

The commentary to article 1, as a whole, as amended, was adopted.

2. The CHAIRMAN said that, with regard to paragraph (6) of the commentary to article 2, Mr. Güney and the Special Rapporteur had agreed to insert, after the word “compromise”, in the third sentence of the paragraph, the phrase: “which is aimed not at enlarging the geographical scope of the draft articles as such but at bridging the gap between on the one hand those who urged simple deletion . . .”; the remainder of the paragraph was unchanged.

Paragraph (6), as amended, was adopted.

The commentary to article 2, as a whole, as amended, was adopted.

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

² The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.