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**Summary record of the 2416th meeting**

Topic:  
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## 2416th MEETING

Thursday, 13 July 1995, at 10.10 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacobides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/459,<sup>1</sup> A/CN.4/464/Add.2, sect. E, A/CN.4/468,<sup>2</sup> A/CN.4/471,<sup>3</sup> A/CN.4/L.508, A/CN.4/L.510, A/CN.4/L.511 and Add.1, A/CN.4/L.519)**

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE IDENTIFICATION OF DANGEROUS ACTIVITIES

1. Mr. BARBOZA (Chairman of the Working Group on the identification of dangerous activities), introducing the report of the working group<sup>4</sup> recalled that the working group's mandate had been to identify the activities which came within the scope of the topic. Those activities had already been defined, to a certain extent, in article 1 of the draft articles provisionally adopted by the Commission<sup>5</sup> as

activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which involve a risk of causing significant transboundary harm through their physical consequences.

A definition of such a risk was also given in article 2, subparagraph (a). That initial definition had clearly been inadequate, however, because such activities involved major obligations for the Governments and operators concerned, particularly in terms of prevention and compensation in the event of harm. The working group had accordingly been established to form a clearer idea of, and to define, the activities in question.

2. The working group had held three meetings and had worked on the basis of a document prepared by the secretariat, presenting an overview of the ways in which the

<sup>1</sup> See *Yearbook* . . . 1994, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>3</sup> *Ibid.*

<sup>4</sup> For the composition of the working group, see 2397th meeting, para. 43.

<sup>5</sup> See 2399th meeting, footnote 6.

scope of multilateral treaties dealing with transboundary harm and with liability and prevention had been defined in terms of the activities or substances to which they applied. The working group had also examined the practice of some other multilateral treaties dealing with a specific type of activity or substance, such as oil or nuclear material or the carriage of such material, which were easier to define because a specific activity was involved. Other treaties, such as the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, which related to all activities that posed a threat to the environment, covered a broader category of activities or substances and provided a list of activities or substances, either within the body of the treaty or in an annex thereto. Some of them contained a standard amendment clause or provisions on updating the list of activities or substances to which they applied. The Commission could therefore usefully draw inspiration from such documents because the draft articles it was to prepare on the topic under consideration were also general in nature.

3. The working group had studied and evaluated three alternatives for the draft articles. The first would be to leave the current definition in articles 1 and 2. It had seemed to the working group, however, that that did not respond to the concerns expressed in the Sixth Committee of the General Assembly and in the Commission that the draft articles did not provide sufficient guidance to States to enable them to comply with the obligations set forth in respect of prevention or with those that would be imposed by the articles on liability. The second alternative—to draw up and annex to the draft articles a list of activities or substances that were to be covered by the topic—had been found premature at the current stage of the Commission's work, since the degree of specification needed in the topic was directly linked to the type of obligations to be imposed by the articles on liability. The working group had therefore opted for the third alternative, namely, to revisit the question of providing more specificity to the scope of the articles once the Commission had completed its work on issues dealing with liability. The Commission would then be in a better position to make a decision on the issue, since it would have adopted a complete liability regime, together with a regime for prevention and specific provisions regarding the relationship between the two regimes. Since it was nevertheless aware that, at the present stage of work, the Commission and Governments must have a general idea of the kind of activities covered by the topic, the working group was of the view that the lists of activities in a number of conventions on transboundary harm, particularly those referred to in paragraph 9 of its report (A/CN.4/L.510), would provide that general idea. That did not mean that the activities or substances listed in the annexes to those conventions should or would necessarily be among the activities within the scope of the topic, or that the Commission should follow their model of identification. They might simply be useful to provide the Commission with a general or approximate idea of the types of activities involved and to enable the Commission to move on to the next stage of the work, namely, the liability regime.

4. In other words, the definition of the scope of the topic, as provided in articles 1 and 2, was not sufficient

for the next stage of the Commission's work; on the other hand, a more precise definition would be premature at the present stage. In the meantime, the Commission could usefully work on the basis of the lists of activities and substances contained in the relevant instruments. Even if the elaboration of a precise list of activities was deferred to a later stage, the Commission could continue its work on the articles relating to the liability regime. That was the conclusion reached by the working group and the one contained in paragraph 10 of its report.

5. The CHAIRMAN said that, following a discussion on paragraph 10 of the report, which the Commission was invited to adopt as a recommendation, he wished to suggest a number of drafting amendments to the paragraph based on comments and proposals made by Mr. Al-Baharna, Mr. Bennouna, Mr. de Saram, Mr. Eiriksson, Mr. Idris, Mr. Rosenstock and Mr. Tomuschat.

6. In the first sentence, the words "general idea" should be replaced by the words "clear view". In the third sentence, the words "listed in those conventions" should be replaced by the words "listed in various conventions dealing with issues of transboundary harm". A new sentence would be inserted between the third and fourth sentences and would read: "Examples include the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991, the Convention on Transboundary Effects of Industrial Accidents of 17 March 1992 and the Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment of 21 June 1993". In the fourth sentence, the words "at some later stage" should be replaced by the words "at some point" and the words "States may require more specificity in the articles" should be replaced by the words "more specificity may be required in the articles". In the fifth sentence, the words "which have been adopted by the Commission" should be added after the words "provisions on prevention".

*Paragraph 10, as amended, was adopted.*

**The law and practice relating to reservations to treaties (concluded)\* (A/CN.4/464/Add.2, sect. F, A/CN.4/470,<sup>6</sup> A/CN.4/L.516)**

[Agenda item 6]

7. The CHAIRMAN said that the Special Rapporteur had drafted a proposed wording for the end of the chapter of the Commission's report on the law and practice relating to reservations to treaties, which had been distributed to the members of the Commission as document ILC(XLVII)/INFORMAL/5.

8. In the light of the comments made by Mr. Rosenstock, Mr. Eiriksson, Mr. Pambou-Tchivounda, Mr. Al-Baharna, Mr. de Saram and Mr. Pellet (Special Rapporteur), he suggested that the Commission should adopt the draft text, with the following amendments. In paragraph 1 (a), the words "as a whole" should be deleted.

In paragraph 1 (b), the words "try to" and the quotation marks should be deleted and the word "instrument" should be replaced by the word "guide". In the French text, the words *se présenteraient comme* should be replaced by the word *constitueraient*. The words "examples of" and "including derogation clauses" should also be deleted. In paragraph 1 (c), the word "should" should be replaced by the word "shall" and the words "felt the need to do so" should be replaced by the words "feels that it must depart from them substantially". Paragraph 2 should be amended to read: "These proposals constitute, in the view of the Commission, the result of the preliminary study requested by General Assembly resolution 48/31 of 9 December 1993." In paragraph 3, the words "through the Secretariat, to" should be added after the words "to send".

*It was so decided.*

**Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/464/Add.2, sect. F, A/CN.4/L.515, A/CN.4/L.518)**

[Agenda item 8]

#### REPORT OF THE PLANNING GROUP

9. Mr. PAMBOU-TCHIVOUNDA (Chairman of the Planning Group) read out the main parts of the report prepared by the Planning Group at the conclusion of four meetings held during the session, the first having taken place in the presence of the Legal Counsel. He particularly stressed the fact that, at the next session, the Commission was to spend most of its time on the topics of State responsibility and the draft Code of Crimes against the Peace and Security of Mankind, the Planning Group's recommendation being that a maximum of time should be allocated in the Drafting Committee to considering the corresponding draft articles. With regard to the long-term programme of work of the Commission, he said that, while there had been unanimity about the topic of diplomatic protection, it had been considered that the feasibility study on the second topic chosen, that of environmental law, should be based on the principle of an integrated approach, as opposed to the more fragmented approaches taken in other cases, and that the Commission should focus on problems of substance rather than on procedural problems, which had often been the subject-matter of its work on other topics. As to working methods, the Planning Group had dealt mainly with the question of commentaries on the basis of article 20 of the Commission's statute.

10. Mr. JACOVIDES said he regretted that the Planning Group had not chosen the topic of *jus cogens*. At some point—and the sooner the better—that concept should be discussed by the Commission, an ad hoc committee of the General Assembly or any other body because the situation in that regard could not be considered satisfactory, as explained in detail in the Outlines prepared by members of the Commission on selected topics of international law.<sup>7</sup> International tribunals and ICJ, in particular, could help to define and delimit the concept

\* Resumed from the 2412th meeting.

<sup>6</sup> Reproduced in *Yearbook* . . . 1995, vol. II (Part One).

<sup>7</sup> *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/454.

of *jus cogens*. There was no lack of situations in the world that would, if they were submitted to the Court, enable it to spell out some of the more obvious rules in that area, especially the role prohibiting the use of force.

11. Mr. PELLET proposed that, in view of the decision taken on the topic of the law and practice relating to reservations to treaties, the penultimate sentence of paragraph 7 of the report should end after the words "model clauses". In paragraph 14 of the report, there seemed to be a contradiction between wanting to undertake a feasibility study on the topic of environmental law and saying at the same time that the Commission considered it appropriate to take up that topic, the point of the feasibility study being, precisely, to show whether taking up the topic was appropriate. It would therefore be better to state in the third sentence of the first paragraph of the text (A/CN.4/L.515, para. 14) that the Planning Group recommended inserting in the report of the Commission to the General Assembly that the Commission was considering the possibility of taking up the topic. Lastly, he strongly supported Mr. Jacovides' idea that the Commission should deal with *jus cogens*, on the understanding that it would be codifying not the contents of the concept, but its legal status and its effects in areas other than that of the law of treaties.

12. Mr. YANKOV (Chairman of the Drafting Committee) said that, at the current session, the Drafting Committee had held a total of 35 meetings, 17 of which had been devoted to the draft Code of Crimes against the Peace and Security of Mankind, 13 to State responsibility and 5 to international liability for injurious consequences arising out of acts not prohibited by international law. As far as the next session was concerned, he thought it was optimistic to say that the second reading of the draft Code was already at quite an advanced stage, whereas, in fact, it was entering the difficult phase of defining and listing crimes. The topic of State responsibility would also require many meetings if agreement was to be reached on solutions to the difficult problems raised by the concept of State crimes. In the case of international liability for injurious consequences arising out of acts not prohibited by international law, the Drafting Committee would also have to hold more meetings to complete the first reading of the draft articles. It therefore seemed to him that, at the next session, the Drafting Committee should be allowed at least 40 to 45 meetings, about 15 of them for the draft Code, preferably in the first three weeks of the session, and 20 to 25 for State responsibility. The first three weeks of the session would be spent mainly, if not exclusively, on work in the Drafting Committee, which should continue to have priority during the following seven weeks, before the last two weeks of the session devoted to the adoption of reports. The Commission's past practice had shown that the most productive sessions had been those when it spent the first three weeks on intensive work in the Drafting Committee.

13. The topic of environmental law was certainly a good choice, but the wording of the title should be reviewed since the combination of the adjectives "international" and "global" was a bit strange. Special Rapporteurs should be requested to submit commentaries to draft articles before those articles were considered in

plenary so that the other members of the Commission could make their first reactions known. Lastly, considering that the next session would be the last of the current quinquennium, the members of the Commission must all make an effort to reduce absenteeism, as the Commission should take priority over other commitments.

14. Mr. THIAM said that, since the Drafting Committee's work on the draft Code was far from complete, he had been surprised to read in the report that a maximum of time should be allocated to the Drafting Committee to considering the draft articles on State responsibility. He would like that sentence to be amended so that a maximum amount of time would also be devoted to the draft Code, which might even take priority, since it might be completed at the next session.

15. Mr. VILLAGRÁN KRAMER said that the Drafting Committee had what appeared to be quite a heavy programme of work for the next session. Since the experience of the Drafting Committee working at the same time as working groups had been very positive, the Bureau might consider the possibility of dividing the Drafting Committee into two so that it could consider topics not consecutively, but concurrently. As to the long-term programme of work, the study of any environmental issues was interesting, on the understanding that the Commission would not yet be carrying out a direct study of that topic. However, diplomatic protection had already been studied in depth and had been the subject of many handbooks. Moreover, in Europe and Latin America at least, private individuals could now bring cases directly before human rights courts. That topic therefore seemed less vital than that of environmental law.

16. Mr. VARGAS CARREÑO said that he would appreciate it if information could be provided informally on the topics which would be dealt with during the three weeks of intensive work scheduled for the Drafting Committee at the beginning of the forty-eighth session and on the composition of the Drafting Committee for each different topic so that members could prepare for that intensive work. With regard to the long-term programme, the feasibility study on environmental law was a good idea and diplomatic protection was an important subject, but it must not be forgotten that it was the Commission as it would be composed for the following quinquennium that would be making the final decisions and which might be interested, simply in terms of feasibility, in other topics, such as *jus cogens* or self-determination.

17. The CHAIRMAN, summing up the debate, said that the report of the Planning Group should indicate clearly that the Drafting Committee would give priority both to the topic of State responsibility and to that of the draft Code of Crimes; the first three weeks of the session would be used for intensive work by the Drafting Committee; and the topic of diplomatic protection, on which there had been a consensus in the Commission, should be recommended to the General Assembly so that the Commission could begin considering it as soon as possible. A feasibility study, on which the General Assembly would decide at a later stage, would be conducted on the topic of environmental law. The report of the Planning Group, redrafted and amended as necessary in the light of the drafting conclusions and comments made

during the debate, would be included in the Commission's report for consideration when the report was adopted. The composition of the Drafting Committee for each topic would be decided, as was the practice, at the beginning of the session.

*It was so decided.*

*The meeting rose at 1.10 p.m.*

## 2417th MEETING

*Friday, 14 July 1995, at 10.15 a.m.*

*Chairman: Mr. Pemmaraju Sreenivasa RAO*

*Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Benouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.*

**State responsibility (continued)\* (A/CN.4/464/Add.2, sect. D, A/CN.4/469 and Add.1 and 2,<sup>1</sup> A/CN.4/L.512 and Add.1, A/CN.4/L.513, A/CN.4/L.520, A/CN.4/L.521 and Add.1)**

[Agenda item 3]

### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce part three of the draft articles on State responsibility proposed by the Drafting Committee (A/CN.4/L.513), the titles and text of which read:

Part three

#### SETTLEMENT OF DISPUTES

##### *Article 1. Negotiation*

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

\* Resumed from the 2406th meeting.

<sup>1</sup> Reproduced in *Yearbook . . . 1995*, vol. II (Part One).

##### *Article 2. Good offices and mediation*

Any other State Party to the present articles, not being a party to the dispute, may, upon its own initiative or at the request of any party to the dispute, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

##### *Article 3. Conciliation*

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in the Annex to the present articles.

##### *Article 4. Task of the Conciliation Commission*

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

##### *Article 5. Arbitration*

1. Failing the establishment of the Conciliation Commission provided for in article 3 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken counter-measures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with the Annex to the present articles.

##### *Article 6. Terms of reference of the Arbitral Tribunal*

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in the Annex to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.