

Document:-
A/CN.4/SR.2789

Summary record of the 2789th meeting

Topic:
Adoption of the report

Extract from the Yearbook of the International Law Commission:-
2003 vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

was to be published, it would be preferable, as with all other documents of that kind, to do so on the Commission's website rather than in the *Yearbook of the International Law Commission*.

67. Mr. MIKULKA (Secretary to the Commission) pointed out that as soon as the final version of the Study Group's report was available, it would be dealt with in the same way as the reports by special rapporteurs and thus would be published in volume II (Part One) of the *Yearbook of the International Law Commission, 2003*. To insist on having the outline published there would serve little practical purpose, as volume II was scheduled to appear in just six years, five years after the final version of the Study Group's report would have been published as a document for general distribution. Posting the document on the Commission's website after consulting the author was therefore a solution that the Commission might wish to consider.

68. The CHAIR said that, if he heard no objection, he would take it that the Commission agreed to post on its website, after consultation with Mr. Koskenniemi, the outline of the study concerning the function and scope of the *lex specialis* rule and the question of "self-contained regimes".

It was so decided.

Paragraphs 23 to 25

Paragraphs 23 to 25 were adopted.

Paragraph 26

Paragraph 26 was adopted with minor drafting changes to the English version.

Paragraph 27

69. Mr. PELLET suggested that the words "self-contained regimes" should be inserted in parentheses after the words *régimes autonomes* in the French text, as the English term was commonly used in French, whereas the term *régime autonome* was never used.

Paragraph 27, as amended, was adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted.

Section C, as amended, was adopted.

Chapter X of the report, as amended, was adopted.

The meeting rose at 1 p.m.

2789th MEETING

Thursday, 7 August 2003, at 10.10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fifth session (*continued*)

CHAPTER VIII. *Reservations to treaties* (*continued*)* (A/CN.4/L.640 and Add.1–3)

B. *Consideration of the topic at the present session* (*continued*** (A/CN.4/L.640/Add.1–3)

Paragraphs 1 to 8 (A/CN.4/L.640/Add.2)

Paragraphs 1 to 8 were adopted.

CHAPTER IX. *Shared natural resources* (A/CN.4/L.641)

A. *Introduction*

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. *Consideration of the topic at the present session*

Paragraph 4

Paragraph 4 was adopted.

Paragraph 5

1. Mr. YAMADA (Special Rapporteur) asked whether it would be against the rules to list the names of the experts from FAO and UNESCO and of the representatives of ILA who had briefed the Commission. He proposed that the second sentence of the paragraph should read: "The Commission also had an informal briefing by experts on groundwaters from FAO and the International Association of Hydrogeologists on 30 July 2003. Their presence was arranged by UNESCO."

2. Mr. MIKULKA (Secretary of the Commission) explained that the exchanges with the representatives of ILA had not formed part of the discussion of the topic, but had taken place within the framework of cooperation with

* Resumed from the 2786th meeting.

** Resumed from the 2785th meeting.

other bodies. The issue should therefore be raised in the context of chapter XI.

Paragraph 5, as amended, was adopted.

Paragraphs 6 to 10

Paragraphs 6 to 10 were adopted.

Paragraph 11

Paragraph 11 was adopted with minor drafting changes.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

Paragraph 13 was adopted with minor drafting changes.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

3. Mr. PELLET said that, in the French version, either the word “liability” should be added in brackets after the words *responsabilité internationale*, or the full title of the topic should be given.

Paragraph 15 was adopted with that drafting change in the French version.

Paragraph 16

4. Mr. PAMBOU-TCHIVOUNDA queried the use of the word “metaphor”.

5. Mr. BROWNLIE said that he was happy to claim responsibility for having introduced that term during the debate, when he had referred to the example of the Nubian aquifer. The report therefore accurately reflected that debate.

6. Mr. YAMADA (Special Rapporteur) said that the paragraph summarized the statements of Mr. Operti Badan and Mr. Brownlie.

Paragraph 16 was adopted.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

7. Mr. RODRÍGUEZ CEDEÑO said that, in the first sentence of the Spanish version, the word *recelos* was too strong.

8. The CHAIR suggested *dudas*.

9. Mr. MOMTAZ suggested the addition of the adjective “solid” to qualify “minerals”.

10. Following a discussion in which Mr. PELLET, Mr. BROWNLIE, Mr. KATEKA and Ms. ESCARAMEIA took part, the Commission concluded that minerals could take the form of solids or solutes.

Paragraph 18 was adopted with minor drafting changes.

Paragraph 19

11. Mr. MOMTAZ proposed that the word “general” should be replaced by “single”.

Paragraph 19, as amended, was adopted.

Paragraph 20

12. Mr. RODRÍGUEZ CEDEÑO said he could see no reason to retain the paragraph. Deleting it would have the advantage of enabling paragraph 19 to be merged with or followed immediately by paragraph 21, the two paragraphs being linked by a common thread of argument.

13. Mr. MATHESON said that paragraph 20 set out a viewpoint expressed during the discussion that the subject of oil and gas was not suitable for the Commission’s consideration, raised issues different from those raised by groundwaters and could be addressed by other processes. It should therefore be retained.

Paragraph 20 was adopted.

Paragraph 21

14. Mr. MATHESON said that the second sentence did not accurately reflect what he had said in the debate. He therefore proposed that it be replaced by a sentence reading: “The view was expressed that any consideration of the topic of oil and gas should be postponed until the Commission had completed its work on groundwaters.”

Paragraph 21, as amended, was adopted.

Paragraph 22

15. Mr. YAMADA (Special Rapporteur) said that the paragraph summarized comments by Mr. Pambou-Tchivounda, Mr. Momtaz and Mr. Operti Badan, but needed improvement. In the first sentence, the words “in some cases” should be deleted.

It was so decided.

16. Mr. MANSFIELD (Rapporteur) said the point made by those three members was that the Commission should perhaps be developing a type of framework regime, like that established by the United Nations Convention on the Law of the Sea, under which regional arrangements in addition to the overall structure were envisaged. The word “framework” should perhaps be inserted in the first sentence, before “regime”. The second sentence reflected Mr. Operti Badan’s concern that any reference to maritime resources might imply a common heritage. He proposed

that the first part of that sentence, which read “Nonetheless, it was also stressed that the criterion of sovereignty should be applied to groundwaters, just as it had been for oil and gas...”, should be revised to read: “It was also stressed that the criterion of sovereignty was as relevant to groundwaters as it was to oil and gas...”

17. Mr. BROWNLIE said that the reference in the first sentence to a regime “along the lines of the one for maritime resources” was not clear. What regime was envisaged? The law of the sea dealt with maritime spaces, not resources, or, in the case of the exclusive economic zone, with the allocation of resources.

18. Mr. PELLET said that, as an objective observer not having participated in the debate on the subject, he found the paragraph unclear. In particular, the reference at the end to the “shared heritage of mankind” seemed to come from nowhere.

19. Mr. PAMBOU-TCHIVOUNDA said the reference to “characteristics” in the first sentence was somewhat vague and the word “hydrogeological” should perhaps be inserted before it. His point had been that State jurisdiction over confined groundwaters should perhaps be determined on the basis of the depth of the groundwaters beneath the surface. The phrase “criterion of sovereignty” was incorrect: it should read “principle of sovereignty”. Mr. Operti Badan’s remarks, reflected in the phrase “any reference to the concept of shared heritage of mankind would raise concerns”, followed on remarks of a different nature made by other members, and they might be better placed elsewhere.

20. Mr. MANSFIELD (Rapporteur) said that the paragraph appeared to require extensive redrafting: Might it not be better to delete it altogether?

21. Mr. CHEE said that the concept of the common heritage of mankind had been proposed by Arvid Pardo in 1962 in connection with seabed mineral resources outside national jurisdiction.¹ The phrase “maritime resources” was ambiguous, as it carried the connotation of fisheries resources.

22. The CHAIR said that, to avoid any confusion, the phrase “along the lines of the one for maritime resources” in the second sentence should be deleted. In the first sentence, the word “groundwaters” should be replaced by “them”.

It was so decided.

23. Mr. BROWNLIE said that the phrase “shared heritage”, in the second sentence, should be replaced by “common heritage”.

It was so decided.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

24. Ms. ESCARAMEIA suggested the inclusion of additional wording at the end of the paragraph in order better to reflect the point she had made. The amendment would read: “and to clarify the meaning of ‘confined’, since it did not seem to be a term used by hydrogeologists”.

25. Mr. MELESCANU endorsed the proposal but said the word “legal” should be inserted before “meaning”, to make it plain that it was not the technical or scientific aspect that would be addressed.

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

Paragraph 26 was adopted with minor drafting changes.

Paragraph 27

26. The CHAIR said that, at the beginning of the paragraph, “The point was made” should be replaced by “Some members suggested”.

Paragraph 27, as amended, was adopted.

Paragraph 28

27. Mr. PAMBOU-TCHIVOUNDA said that the paragraph did not read well. In particular, he took issue with the opening phrase “The view was expressed”, which might give the impression *inter alia* that only one member had stated that the principles of the permanent sovereignty of States over natural resources should be taken into account. In fact, several members had made that point. The phrase should be reworded to read: “Some members expressed the view...”

Paragraph 28, as amended, was adopted.

Paragraph 29

28. Mr. PAMBOU-TCHIVOUNDA suggested that, in order to follow on from paragraph 28, the opening phrase “Some members” should read “Other members”.

29. Ms. ESCARAMEIA said that the paragraph did not reflect the concern expressed by some members about the need to differentiate between the scope of the Convention on the Law of the Non-navigational Uses of International Watercourses and the work of the Commission, particularly since the Convention dealt with groundwaters linked with surface waters as they flowed into a common terminus. She therefore suggested adding a sentence that would read: “Some members also raised concerns regarding the scope of the present study *vis-à-vis* that of the Convention on the Law of the Non-navigational Uses of International Watercourses, since this Convention also covered some types of groundwaters and used expressions such as

¹ See A. Pardo, *The Common Heritage: Selected Papers on Oceans and World Order, 1967–1974* (Malta University Press, 1975).

‘flowing into a common terminus’, which were not very clear.”

30. The CHAIR suggested deleting the last part of Ms. Escarameia’s proposal, which implied criticism of the wording of the Convention on the Law of the Non-navigational Uses of International Watercourses, for which the Commission was also partly responsible.

It was so decided.

Paragraph 29, as amended, was adopted.

Paragraphs 30 to 32

Paragraphs 30 to 32 were adopted.

Paragraph 33

31. Mr. MANSFIELD (Rapporteur), referring to the second sentence, suggested that the word “would” should be replaced by “should” and that the phrase “to identify the means to get assistance in” should be reworded to read: “identify appropriate techniques for”.

Paragraph 33, as amended, was adopted.

Paragraphs 34 to 36

Paragraphs 34 to 36 were adopted.

Paragraph 37

32. Mr. YAMADA (Special Rapporteur) suggested that the words “priority focusing on” should be replaced simply by the word “and”.

Paragraph 37, as amended, was adopted.

Paragraph 38

Paragraph 38 was adopted.

Section B, as amended, was adopted.

Chapter IX of the report, as amended, was adopted.

CHAPTER XI. Other decisions and conclusions of the Commission (A/CN.4/L.643)

A. Programme, procedures and working methods of the Commission, and its documentation

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

33. Mr. PELLET suggested deleting the words “in fact” in the last sentence.

Paragraph 6, as amended, was adopted.

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

34. Mr. ECONOMIDES proposed, on behalf of eight members of the Commission, the inclusion of an additional paragraph in the report based on a text submitted to the Commission at its 2783rd meeting. He suggested that it might come under the heading “Reminder of the fundamental principles of international law”. Since the 2783rd meeting the text had been substantially revised with a view to attracting the support of more members and (he hoped) the majority of the Commission. Mr. Galicki had already signalled his support for the new text, which read:

“Some members of the Commission recalled that the fundamental principles of international law are designed to guarantee peace, security and order in relations among States. They stressed the absolute need for the international community to preserve such principles, which are peremptory and thus non-derogable, and proposed that the Commission should make itself available with a view to reaffirming them.”

The factual part of the text which had prompted considerable reaction had been deleted; what now remained was more neutral in tone and dealt only with the fundamental principles of the international legal order. It was also fully in line with the statement by the Secretary-General of the United Nations published in the *International Herald Tribune* on 1 August 2003, which stressed the urgent need to review the role of the United Nations in the light of the international crisis.

35. Mr. GAJA asked for clarification of the procedure to be followed, since it was fairly unusual for such a proposal to be submitted at the present juncture. Without wishing to enter into the details of the proposed text, he thought the Commission might consider it appropriate to deal with the substance under its long-term programme of work in connection with enhancing the effectiveness of the role of the United Nations. He did have some reservations about the Commission setting a precedent by expressing views on issues which related to United Nations resolutions. If it were to comment on one issue, might not its silence on other decisions of the United Nations be regarded as tacit approval? In his opinion, it was not the role of the Commission to take up such matters; it should adhere to its mandate, namely, codification and progressive development of international law.

36. Mr. DUGARD said that the purpose of the proposal was to express concern about recent events which, although not of a political nature, nonetheless threatened the role of international law. Mr. Economides had radically amended his original proposal. Notwithstanding Mr. Pellet’s remark that he could not endorse a proposal unless it expressly condemned one particular State, Mr. Economides had watered the text down simply to indicate the Commission’s concern about the fundamental principles of the international legal order. The proposal raised the question of whether it would ever be appropriate for the Commission to comment on such matters, which were clearly not provided for in its mandate. In that connection, he recalled the debate which had frequently taken place among legal bodies in South Africa during the apartheid era, when the basic principles of law were being undermined by the executive, the legislature and the ruling political party. Initially opinion in the legal bodies had been divided, but finally they had felt that it was incumbent

upon them to express their views. Perhaps the Commission had not yet reached that stage, but many members believed that recent events inside and outside the United Nations warranted comment. Moreover, many members who were in teaching found it increasingly difficult as students began to question the very existence of international law. It should be borne in mind that the Commission was the senior international law body in the United Nations system, and obviously ICJ could not comment on such matters in the absence of any dispute submitted to it. It was incumbent on the Commission to act in the final resort as a guardian of the principles of international law and to reaffirm them as and when appropriate. He was not certain that Mr. Economides' very bland proposal captured the concerns of the members who had originally supported it, but somewhere and somehow it had to be said that some members were concerned by recent developments in international law.

37. Mr. YAMADA, speaking on a point of order, said that he fully respected the views of Mr. Economides and Mr. Dugard and recognized their right to air them in the Commission. Nevertheless, he believed the proposed text was an evaluation of an external political event that simply fell outside the mandate of the Commission. If action was taken on the proposal, it would have serious implications in the General Assembly and would divide the members of the Commission, who had worked so harmoniously thus far. In accordance with rule 113 of the rules of procedure of the General Assembly, he requested the Chair to rule that the matter fell outside the mandate of the Commission.

38. The CHAIR said that, having listened to the arguments on both sides, he was ruling that, although the concern that had been expressed was undoubtedly valid, a chapter relating to the decisions and conclusions of the Commission was not the appropriate place for the proposal read out by Mr. Economides. The matter would be more appropriately raised within the Planning Committee or the Study Group on the Fragmentation of International Law. Important and topical though it was, the issue should be addressed in accordance with the appropriate procedure, in the same way that the Commission took up all its concerns.

39. Mr. ECONOMIDES said that, while he respected the Chair's ruling, he regretted that members had not been afforded an opportunity to express their views on a topic that was far from exhausted. Indeed, discussion had been curtailed in a somewhat authoritarian way. If, however, the proposed text was unacceptable in that part of the report, he proposed that an even more anodyne text should be inserted in the section on relations of the Commission with the Sixth Committee, with the following wording: "A proposal was made within the Commission that the Commission should offer its availability to contribute to the consideration and reaffirmation of the fundamental principles of international law." It was the least the Commission could do to show its concern.

40. The CHAIR said that, if a challenge was being made to his ruling, it should be made clearly and openly.

41. Mr. PELLET said that he wished to emphasize that, although his personal feeling had been that the original

proposal was too weak, he had never used the words ascribed to him by Mr. Dugard. He fully supported the Chair's ruling: the Commission was not the right body for that kind of statement.

42. Ms. ESCARAMEIA pointed out that Mr. Economides had made a new proposal, to be inserted in a different part of the report. There was surely no reason why the Commission should not offer to study the fundamental principles of international law. Moreover, since the issue had been raised a number of times during the current session, the concern should be reflected in the report.

43. Mr. YAMADA pointed out that, according to rule 123 of the rules of procedure, when a proposal had been adopted or rejected, it could not be reconsidered at the same session unless a two-thirds majority of the Commission so decided.

44. The CHAIR ruled that the proposed text was not appropriate in the chapter under consideration and had not gone through all the necessary steps in the Commission's normal procedure for insertion in another chapter. He added that he would prefer that the issue should not go to a vote. The Commission should try to avoid reaching a situation in which a vote became inevitable.

45. Ms. ESCARAMEIA, speaking on a point of order, said that she wished to place on record her disagreement with the assertion that rule 123 of the rules of procedure was applicable. There was no question of reconsidering the proposal: in accordance with rule 113, there had been no appeal against the Chair's ruling. On the contrary, a new proposal had been made. Any talk of voting was therefore out of place.

46. Mr. PAMBOU-TCHIVOUNDA said that the Chair's ruling had been based on the principle that the consideration of Mr. Economides' proposal was not appropriate under agenda item 10. The proposal had, however, been submitted under agenda item 13 ("Other business"), and it was regrettable that the Chair had not allowed the discussion to proceed on that basis. As for the question of whether, in considering the topic, the Commission would be straying beyond its mandate, he recalled that the Commission's development and codification of international law was based on principles; otherwise the exercise would be meaningless. If the Commission was competent to develop and codify the law, it was surely competent to express a view on the current state of international law.

47. The CHAIR invited the Commission, in the absence of a challenge to his ruling, to continue adopting the report.

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

Paragraph 12

48. Mr. PELLET proposed that the paragraph, together with its title, should be deleted. It said nothing, yet at the same time it might attract unwelcome attention from the Sixth Committee.

49. Mr. MELESCANU said that, in the absence of Mr. Kabatsi, he felt bound to convey to the Commission his colleague's strong view, expressed in the Planning Committee, that the paragraph performed a useful function. The Commission had, after all, adopted cost-saving measures, including the introduction of the shorter session.

50. The CHAIR said that, if he heard no objection, he would take it that the Commission wished to delete the paragraph.

Paragraph 12 was deleted.

Paragraph 13

51. Mr. BROWNLIE said that the text would read better if the words "the basis of" were inserted between "fairness on" and "which the United Nations".

Paragraph 13, as amended, was adopted.

Section A, as amended, was adopted.

B. Date and place of the fifty-sixth session

Paragraph 14

Paragraph 14 was adopted.

Section B was adopted.

C. Cooperation with other bodies

Paragraphs 15 to 18

Paragraphs 15 to 18 were adopted.

Paragraph 19

52. Mr. YAMADA said that a reference to the meeting on the topic of shared natural resources had appeared elsewhere. The last sentence could therefore be deleted.

53. The CHAIR said that, in view of the fact that the paragraph concerned cooperation with other bodies, both references should be retained. He added that the meeting with the experts from UNESCO and FAO had taken place not on 23 July, as was stated, but on 30 July.

54. Mr. PELLET expressed regret that the Commission's contacts with the human rights bodies were dealt with so cursorily. He would prefer to have them described as useful, interesting or stimulating.

55. Mr. MANSFIELD (Rapporteur) agreed that the effect was rather stark. He would like to see the inclusion of a warm tribute to the experts from UNESCO, who had made special efforts to meet the Commission.

56. The CHAIR suggested that a sentence should be introduced at the beginning of the paragraph, reading: "The following meetings, which were particularly valuable and useful, took place."

57. Mr. KATEKA (Chair of the Drafting Committee) said that the Commission would not be holding such

meetings if it did not consider them valuable. There was no need to state the obvious.

58. The CHAIR, after observing that to single out for praise meetings with one body might seem to cast an aspersions on the others, said that he nonetheless saw some merit in drawing attention to the expansion of the Commission's contact with other bodies.

59. Mr. PELLET concurred. The Commission's relations with human rights bodies had not always been particularly warm in the past. To include words of commendation would be both truthful and tactful.

60. The CHAIR suggested the insertion of a new paragraph 20 *bis* stating that the meetings with other bodies had been useful.

It was so decided.

Paragraph 19, as amended, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Section C, as amended, was adopted.

The meeting rose at 1.10 p.m.

2790th MEETING

Friday, 8 August 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fifth session (concluded)

1. The CHAIR invited the members of the Commission to continue their consideration of chapter XI of the draft