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Summary record of the 2422nd meeting

Topic:
Other topics

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2422nd MEETING

Wednesday, 19 July 1995, at 3.25 p.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, 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.

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

CHAPTER VI. *The law and practice relating to reservations to treaties (A/CN.4/L.516)*

1. The CHAIRMAN invited the Commission to consider Chapter VI of the draft report paragraph by paragraph.

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

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraph 6

2. Mr. de SARAM, noting that the expressions “permissibility” and “opposability”, in the last sentence, were terms of art and might not be familiar to all readers of the report, suggested that they should be explained in the paragraph.

3. Mr. AL-KHASAWNEH pointed out that both terms were explained in paragraph 10 and suggested that a cross-reference should be included in paragraph 6.

It was so agreed.

4. Mr. BENNOUNA said that he had difficulties with the words “completion of political decolonization”, in the fourth sentence, and would prefer a formulation such as “ending of colonial domination”.

5. Mr. YANKOV agreed, adding that a similar change ought to be made in the first sentence of paragraph 31.

6. Mr. AL-KHASAWNEH said that he could see nothing wrong with the text as it stood.

7. Mr. PELLET (Special Rapporteur) said that the text corresponded to what he had said and should be maintained in both paragraphs.

8. Mr. de SARAM questioned the correctness of the words “political motives”, in the third sentence. If they were an exact translation of what Mr. Pellet had said in French, there would, of course, be no problem.

9. Mr. PELLET (Special Rapporteur) said that the English translation of the French expression “*arrière-pensées politiques*” was indeed a little lame.

10. The CHAIRMAN said that the secretariat would look into the matter at the editing stage.

Paragraph 6, as amended, was adopted.

Paragraphs 7 to 10

Paragraphs 7 to 10 were adopted.

Paragraph 11

11. Mr. BOWETT said that the words “permissibilists” and “opposabilists” were not only unpronounceable but, in fact, non-existent in the English language. They should be replaced by a reference to “schools” of permissibility and opposability, a formulation which already appeared in paragraph 6.

Paragraph 11, as amended, was adopted.

Paragraphs 12 to 22

Paragraphs 12 to 22 were adopted.

Paragraph 23

12. Mr. IDRIS proposed that the phrase “unless they proved to be wholly impracticable”, at the end of the first sentence, should be deleted.

Paragraph 23, as amended, was adopted.

Paragraphs 24 to 28

Paragraphs 24 to 28 were adopted.

Paragraph 29

13. Mr. PELLET (Special Rapporteur) said that the tributes to the Special Rapporteur recorded in the first sentence, while highly gratifying to receive during the Commission’s deliberations, seemed out of place in the report. He would be prepared to see such references deleted in his own case and felt that it would be desirable if other Special Rapporteurs adopted the same approach.

14. The CHAIRMAN said he agreed that references to tributes paid during the discussions should be reduced to a minimum, but did not think that they should entirely disappear from the report. The secretariat would make the necessary changes.

Paragraph 29 was adopted on that understanding.

Paragraphs 30 to 34

Paragraphs 30 to 34 were adopted.

Paragraph 35

15. Mr. BOWETT said that the word "judge", at the beginning of the fourth sentence, should be replaced by "tribunal", as the ruling had in fact been made by five judges.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 41

Paragraphs 36 to 41 were adopted.

Paragraph 42

16. Mr. TOMUSCHAT said the paragraph seemed to imply that domestic law was the essential criterion which determined the difference between interpretative declarations and reservations. He wondered whether that had really been the view expressed in the debate.

17. Mr. ROSENSTOCK said that, as he recalled, the view expressed had been that interpretative statements were often a function or product of internal law.

18. The CHAIRMAN, speaking as the person expressing the view in question, agreed that the paragraph in its current form failed to reflect his meaning. A Government which, while entirely in agreement with the object of a treaty, was unable for reasons of domestic law to comply immediately with all its provisions would be inclined to make an interpretative declaration rather than a reservation. The text of the paragraph would be amended to reflect that idea.

Paragraph 42 was adopted on that understanding.

Paragraphs 43 to 57

Paragraphs 43 to 57 were adopted.

Paragraph 58

19. Mr. de SARAM, noting that the paragraph was the last one dealing with the debate on the problems of the topic as distinct from the scope of the Commission's future work on the topic, said that he could not find a reference in any of the previous paragraphs to his view that reservations were not necessarily, and not always, dictated by ulterior motives but that they sometimes stemmed from the failure on the part of a Government to

grasp all the nuances of a treaty's provisions. He would draft a sentence to that effect for inclusion in the appropriate paragraph.

20. Mr. PELLET (Special Rapporteur) suggested that the appropriate place would be at the end of paragraph 33.

Paragraph 58 was adopted.

Paragraph 59

Paragraph 59 was adopted.

Paragraph 60

21. Mr. THIAM proposed that the word "Some" at the beginning of the paragraph should be replaced by "Several".

Paragraph 60, as amended, was adopted.

Paragraph 61

22. Following a point raised by Mr. AL-KHASAWNEH, Mr. ROSENSTOCK proposed that the words "as risky as going back to the drawing board", in the second sentence, should be replaced by "as risky as revising the text of the Vienna Conventions".

Paragraph 61, as amended, was adopted.

Paragraphs 62 to 75

Paragraphs 62 to 75 were adopted.

Paragraph 76

23. Mr. IDRIS said that there seemed to be a certain lack of harmony between paragraph 76, the second sentence of which spoke of a "more flexible approach", and paragraph 26, which referred to the "drafting of model clauses". In his view, the two paragraphs should be harmonized for the sake of clarity.

24. Mr. PELLET (Special Rapporteur) said that the apparent lack of harmony between the two paragraphs in fact reflected a change of mind on his part as to the form the draft should take. None the less, he would like the two texts to stand as drafted.

Paragraph 76 was adopted.

Paragraphs 77 and 78

Paragraphs 77 and 78 were adopted.

Paragraphs 79 and 80

25. Mr. BENNOUNA said that it might have been better to preface paragraph 79 with a clause stating simply that the conclusions it listed were those of the Commission. A more serious problem, however, concerned sub-

- paragraph (b), which was somewhat confused. It referred, on the one hand, to a guide, which would take the form of draft articles with commentaries, and, on the other, to model clauses. A guide should simply consist of a text designed to provide guidance concerning State practice, while model clauses should be proposed to States, along with commentaries, for possible incorporation in a convention. The conclusion set out in subparagraph (b) was basic to the Commission's work on the topic and must therefore be couched in the clearest terms, which was unfortunately not the case. The subparagraph should be reconsidered.
26. Mr. EIRIKSSON pointed out that the conclusion in question had already been adopted in the Commission following consultations. Consequently, discussion on it could not be reopened.
27. Mr. THIAM, agreeing with Mr. Bennouna, said that subparagraph (b) was not at all clear and it should be reworded. It was true that the conclusion had been adopted, but that did not mean it could not now be reviewed.
28. Mr. PELLET (Special Rapporteur) said that he had agreed to engage in consultations on the condition that, once the conclusion had been adopted, the matter would not be reopened. If the Commission none the less reverted to it, he would withdraw from the discussion. What was more, he would regard it as unfair to reopen the matter.
29. Mr. BENNOUNA, speaking on a point of order, said that he would ask the Special Rapporteur to withdraw his last remark. He was not questioning the Special Rapporteur's work, but merely asking him to clarify matters. It was important for members of the Commission to come to an agreement on a text that was to be submitted to the General Assembly.
30. Mr. MAHIU said that, if paragraph 79 was understood to reflect the summary made by the Special Rapporteur, the responsibility for that summary lay with the Special Rapporteur and there would be no problem. The position would be different, however, if it was understood to reflect the conclusions of the Commission, and an amendment would be required. In any event, in his view paragraph 79 should remain as it stood.
31. Mr. BOWETT suggested that, to overcome the difficulty, the last phrase of subparagraph (b), reading "these provisions would, if necessary, be accompanied by model clauses" should be replaced by "the guide might also propose model clauses on reservations to be used in multilateral treaties with the aim of reducing controversies in the future". That would make a clear distinction between the purpose of the model clauses and the purpose of articles accompanied by commentaries.
32. Messrs. BARBOZA, IDRIS, TOMUSCHAT, de SARAM and YANKOV said that Mr. Bowett's suggestion was acceptable to them.
33. Mr. THIAM said that Mr. Bowett's suggestion would also be acceptable to him, unless the Special Rapporteur considered that subparagraph (b) reflected his own opinion, in which case the words "in the view of the Commission", in paragraph 80, would have to be deleted.
34. Mr. AL-BAHARNA said that he saw no difference between subparagraph (b) as drafted and Mr. Bowett's suggestion. If it were agreeable to the Special Rapporteur, however, the subparagraph could perhaps end with the word "reservations", in the second sentence.
35. Mr. EIRIKSSON said that he had no difficulty regarding the text, at least in the English version. Mr. Bowett's suggestion simply spelt out the matter in more detail.
36. The CHAIRMAN said members appreciated that paragraph 79 expressed the Special Rapporteur's views but felt that, since it related to the form of the Commission's work on the topic and was to be submitted to the General Assembly, it should be clarified somewhat. He therefore appealed to the Special Rapporteur for his cooperation. In particular, was Mr. Bowett's suggestion acceptable to him?
37. Mr. PELLET (Special Rapporteur) said that it was a question of principle. The Commission had already discussed the text in question on two occasions and he had agreed to the negotiated text on condition that the Commission did not revert to the matter. Yet that was precisely what had happened. Consequently, he refused to participate in any further discussion on the matter. The Commission could do as it wished. If the text finally agreed was acceptable to him, he would say so. If not, he would tender his resignation as Special Rapporteur.
38. Mr. BENNOUNA said that he would like it to be placed on record that he found Mr. Pellet's behaviour before the Commission unacceptable. As Special Rapporteur, Mr. Pellet should take part in the discussion. If he did not do so, then paragraph 80 should be deleted.
39. Mr. THIAM said that, if paragraph 79 was retained, paragraph 80 would in any event have to be deleted, for it would be inaccurate to state that the Special Rapporteur's conclusions represented the views of the Commission.
40. Mr. EIRIKSSON said that Messrs. Bennouna, Mahiou and Thiam were mistaken in their recollection of what had occurred. Paragraph 80 had been part and parcel of the negotiated settlement and, consequently, the views reflected had been endorsed by the Commission. Therefore, he could not agree to the deletion of paragraph 80.
41. Following a proposal by Mr. IDRIS, the CHAIRMAN suggested that a small group, composed of Messrs. Bennouna, Bowett, Eiriksson, Mahiou, Pellet (Special Rapporteur), Rosenstock, Tomuschat and himself, should meet informally to agree on a revised text of subparagraph (b) of paragraph 79 for consideration by the Commission.

It was so agreed.

The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.

42. The CHAIRMAN announced that, in the informal discussions, agreement had been reached on the text for paragraphs 79 and 80. Paragraph 79 remained as it stood. For paragraph 80, a second sentence would be added at the end of the paragraph to read: "The Commission understood that the model clauses on reservations, to be inserted in multilateral treaties, would be designed to minimize disputes in the future." If he heard no objection, he would take it that the members agreed.

Paragraph 79 and paragraph 80, as amended, were adopted.

Paragraph 81

43. Mr. AL-BAHARNA proposed that the last phrase of the paragraph, "as regards reservations to treaties", should be placed after the word "questionnaire", and a full stop placed after the word "conventions".

It was so agreed.

Paragraph 81, as amended, was adopted.

44. Mr. BARBOZA said that a change should be made in the Spanish version of the title. "Ley" should be replaced by "Derecho".

45. Mr. de SARAM proposed that a new paragraph should be inserted after paragraph 33, reading:

"The view was also expressed by one member that it would be unrealistic to expect Governments not to insist on the protection of their national interests, after the adoption of a treaty, in the form of reservations, as they often did in the final stages before the adoption of a treaty in statements for the record—for inclusion in the *travaux préparatoires*. It also seemed reasonable to assume that Governments, when fully aware of all the issues and, having made up their minds to become parties to a treaty, would not wish to disengage themselves from the central core of obligations within a treaty. Moreover, there was no statistical or other basis for assuming that reserving States acted in bad faith. Indeed, in practice States that were making non-permissible reservations might well be under the misapprehension that the reservations were in fact permissible or might not in fact have looked into the question of what were or were not permissible reservations under a treaty."

It was so agreed.

Section B, as amended, was adopted.

Chapter VI as a whole, as amended, was adopted.

CHAPTER I. *Organization of the session (A/CN.4/L.517)*

46. The CHAIRMAN invited the Commission to consider chapter I of the draft report (A/CN.4/L.517).

- A. Membership
- B. Officers
- C. Drafting Committee

- D. Working group on State succession and its impact on the nationality of natural and legal persons
- E. Working group on the identification of dangerous activities under the topic "International liability for injurious consequences of acts not prohibited by international law"
- F. Secretariat
- G. Agenda
- H. General description of the work of the Commission at its forty-seventh session

Paragraphs 1 to 13

Paragraphs 1 to 13 were adopted.

Sections A to G were adopted.

- H. General description of the work of the Commission at its forty-seventh session

Paragraphs 14 and 15

Paragraphs 14 and 15 were adopted.

Paragraphs 16 to 25

47. The CHAIRMAN drew attention to a number of corrections. In paragraph 16, the phrase "further to the decision reflected in paragraph 15 above," should be deleted. Paragraph 21 should read: "The Commission adopted the above-mentioned articles and the annex thereto in an amended form for inclusion in part three of the draft." In paragraph 24, the end of the first sentence should be replaced by: "namely articles A (Freedom of action and the limits thereto), B (Prevention) and D (Cooperation) and, as a working hypothesis, article C (Liability and reparation)". In paragraph 25, the following phrase should be inserted at the end of the paragraph: "and agreed that these conclusions constitute the result of the preliminary study requested by the General Assembly in resolutions 48/31 and 49/51".

Paragraphs 16 to 25, as amended, were adopted.

Paragraph 26

Paragraph 26 was adopted.

Section H, as amended, was adopted.

Chapter I, as a whole, as amended, was adopted.

CHAPTER VII. *Other decisions and recommendations of the Commission (A/CN.4/L.518)*

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

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

48. Mr. PELLET suggested that the words "as from 1995" should be deleted from the penultimate sentence.

49. Mr. ROSENSTOCK proposed that the clause, as amended by Mr. Pellet, i.e. “the Commission considers that its work could cover a period of five years”, should be replaced by “the Commission expects that its work will be completed within a period of five years”.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 11

Paragraphs 8 to 11 were adopted.

Paragraph 12

50. Mr. EIRIKSSON proposed that, in the first sentence, the words “and decided, subject to the approval of the General Assembly, that the topic would be included on its agenda” should be inserted after the words “in favour of the topic of ‘Diplomatic protection’ ”.

51. Mr. IDRIS proposed that the words “*inter alia*” should be inserted, in the third sentence, after the words “It could cover”.

Paragraph 12, as amended, was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

52. Mr. TOMUSCHAT said that, in the penultimate sentence, a better expression than “It would also cover” might be used, for example, “It would also analyse”. The same applied to the beginning of the third sentence in paragraph 12.

53. Mr. PELLET proposed that, in the French version, the word *ainsi* should be deleted from the last sentence. In the English version, in the same sentence, the phrase “The Commission would avoid” should be replaced by “The Commission should avoid”.

54. The CHAIRMAN suggested that the phrase in question might read: “The Commission intends to avoid duplication”.

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 17

Paragraphs 15 to 17 were adopted.

Paragraph 18

55. Mr. IDRIS, supported by Mr. de SARAM, said that the commentaries included important legal concepts and were more than simply a gloss to the articles. In that connection, the second sentence of paragraph 18 was too restrictive. He proposed that the words “draft the briefest possible commentaries” should be deleted.

56. The CHAIRMAN suggested that the entire sentence should be deleted.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraphs 19 and 20

Paragraphs 19 and 20 were adopted.

Section A, as amended, was adopted.

B. Cooperation with other bodies

C. Date and place of the forty-eighth session

D. Representation at the fiftieth session of the General Assembly

E. International Law Seminar

Paragraphs 21 to 35

Paragraphs 21 to 35 were adopted.

Sections B to E were adopted.

Chapter VII, as a whole, as amended, was adopted.

Visit by a member of the International Court of Justice

57. The CHAIRMAN said that he took great pleasure in announcing the presence at the meeting of Prince Ajibola, a Judge of the International Court of Justice and a former member of the Commission whose significant contribution to its work was well known to everyone.

Organization of the work of the session (continued)*

[Agenda item 2]

58. The CHAIRMAN said that the remaining commentaries would be available the following day, but only in English.

59. Mr. ROSENSTOCK said that the unavailability of overtime services accounted, in part, for the delay in issuing the commentaries. He wondered whether, at its next session, the Commission might allocate existing funds for those services.

60. Ms. DAUCHY (Secretary to the Commission) said that the problem arose not from lack of overtime services but from delays in the preparation and translation of the commentaries.

61. Mr. VILLAGRÁN KRAMER said that he was prepared to consider the commentaries in English.

62. Mr. PELLET said that he was, in principle, opposed to such a method of working. Moreover, it was not possible to give serious consideration to the commentaries and other remaining articles in the short time that

* Resumed from the 2404th meeting.

remained. The Commission should not be compelled to examine in haste such an essential part of its work.

63. Mr. BENNOUNA said that, while he himself was prepared to consider the commentaries in English, other French-speaking colleagues might not wish to do so. It was not possible to conduct a meeting under such circumstances. He agreed fully with Mr. Pellet. The commentaries yet to be considered dealt with very delicate issues and could not be examined in haste. The Commission should instead inform the General Assembly that it would adopt the commentaries in question at the beginning of its next session.

64. Mr. ROSENSTOCK said that some of the responsibility for the lateness in distributing the commentaries lay with some members of the Commission. If the commentaries were not adopted at the present session, the Commission could not forward the articles it had adopted to the General Assembly and would, therefore, not be able to finish its work as planned.

65. Mr. BARBOZA said that he fully agreed with Mr. Rosenstock. He would point out that, although the articles on the topic for which he was the Special Rapporteur had been adopted only a few days ago, all the relevant commentaries had been available in English for the past two days.

66. Mr. TOMUSCHAT said that he was very concerned about the delay in receiving the commentaries, which would prevent the Commission from submitting any draft articles to the General Assembly. The commentaries to articles 11, 13 and 14 of part two of the draft on State responsibility could have been submitted for translation at the beginning of the session.

67. Mr. EIRIKSSON said that, while it was regrettable to have less time than usual to consider the commentaries, the work could still be done in the time remaining. Members must do their best to discharge the mandate assigned to them.

68. Mr. de SARAM said that he fully agreed with those who preferred not to adopt the commentaries hastily. That body of work was too important and represented the views of the Commission. He wished, therefore, to make a formal request that adoption of the commentaries should be placed on the Commission's agenda for the next session.

The meeting rose at 6.30 p.m.

2423rd MEETING

Thursday, 20 July 1995, at 3.20 p.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, 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. Mikulka, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

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

CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law (continued)* (A/CN.4/L.511 and Add.1)

1. The CHAIRMAN said that, in connection with chapter IV, the members of the Commission were invited to consider section B.4, which related to the establishment of a working group on the identification of dangerous activities.

B. *Consideration of the topic at the present session (concluded)**

ESTABLISHMENT OF A WORKING GROUP ON THE IDENTIFICATION OF DANGEROUS ACTIVITIES (A/CN.4/L.511/Add.1)

2. Mr. PELLET, referring to the establishment of the working group, said that, under its statute, the Commission, could, if necessary, call on experts. He wondered whether the dangerous activities which the proposed working group would identify were not precisely the type of activity on which it would be good to have the advice of technical experts.

3. Mr. BARBOZA (Special Rapporteur) said that Mr. Pellet's comment was entirely relevant. In drafting conventions on the environment, lawyers often worked in cooperation with technical experts. However, he pointed out that, in the last sentence of paragraph 4, it was stated that the list of activities would be prepared "through a method which the Commission could recommend at a later stage of work". That "method" might well include consultations with experts. He hoped that Mr. Pellet would find that explanation satisfactory.

4. Mr. de SARAM said that he supported Mr. Pellet's comments. Expert advice might well become necessary at some point or another. However, he was satisfied with the explanations given by the Special Rapporteur.

5. Mr. BOWETT said that he was sceptical about that approach. It was extremely difficult to prepare a list of dangerous activities because the dangers of an activity depended on all kinds of factors, such as duration, intensity, and the like, which had to be taken into account.

6. Mr. de SARAM said that Mr. Bowett had raised an important point. However, his own concerns were slightly different. Account must be taken of the fact that, whatever the results of the Commission's work, its conclusions would be taken very seriously by Governments. It was, however, difficult to ask Governments to comply

* Resumed from the 2419th meeting.