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Summary record of the 2466th meeting

Topic:
<multiple topics>

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ing the recommendation, to achieve clarity and precision and to avoid prejudging the Commission's future work on the topic. The very form of language used had been chosen precisely to take account of the concerns raised at the current meeting. It would be truly unfortunate if a rigid approach to working methods were to preclude the possibility of hearing the reactions of States. As Mr. Calero Rodrigues had pointed out, since there would be a new special rapporteur in the next quinquennium, such reactions were of special importance. He therefore did not think the "compromise proposal" was really a compromise at all: it merely allowed the views of some members to predominate over those of others. He appealed to members to rally to the wording of the Working Group's carefully crafted recommendation.

83. Mr. CALERO RODRIGUES, referring to the possibility of sending the report to the General Assembly, said that, in practical terms, the Assembly would have very few opportunities to consider the report, since it was also to receive draft articles on a number of other topics from the Commission. Perhaps the proposal by Mr. de Saram could be supplemented to make it clear that the report was being transmitted to the General Assembly for comment, but that any observations from Governments in writing would be greatly appreciated as well.

84. Mr. THIAM said it was not only appropriate, but indispensable, for the Commission to report to the General Assembly on what it had done on the topic during the quinquennium. To transmit the report direct to Governments, however, would be to break with the long-established tradition of requesting comments by Governments only at the stage of first reading. He did not believe the Commission should alter that practice.

85. Mr. FOMBA said that, as a member of the Working Group, he fully supported the outcome of its work. He could, however, accept the compromise proposal, as amended by Mr. Calero Rodrigues, as a way out of the current impasse.

86. Mr. KABATSI said he fully supported the course of action proposed by the Special Rapporteur and did not feel comfortable with the alternative suggested by Mr. de Saram, which would deprive the Commission of the benefit of guidance from States on its future work on the topic. On the other hand, he could go along with Mr. de Saram's proposal as amended by Mr. Calero Rodrigues, because the Commission would then be able to hear the comments of States.

87. Mr. EIRIKSSON, joined by Mr. SZEKELY, Mr. HE and Mr. AL-BAHARNA, said they endorsed the proposal made by Mr. de Saram, as amended by Mr. Calero Rodrigues.

88. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt that proposal, together with the amendment thereto.

It was so decided.

89. The CHAIRMAN inquired whether, having taken that decision, the Commission wished to consider its dis-

ussion of the topic concluded, or would prefer to take it up again in order to record views on the substance of the matter, at a meeting in the final week of its session.

90. Mr. BOWETT, Mr. PAMBOU-TCHIVOUNDA and Mr. BENNOUNA spoke in favour of devoting an additional meeting to the topic.

91. Mr. AL-BAHARNA said he, too, was in favour of such a course, on the understanding that nothing that would be said would call into question in any way the procedural decision just taken.

It was so agreed.

The meeting rose at 1.05 p.m.

2466th MEETING

Monday, 22 July 1996, at 3.10 p.m.

Chairman: Mr. Ahmed MAHIU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

Visit by a former member of the International Law Commission

1. The CHAIRMAN said he welcomed Mr. Graefrath, who had been a member of the Commission from 1987 to 1991 and the Chairman of its forty-first session in 1989.

Programme, procedures and working methods of the Commission, and its documentation (continued) (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT ON THE LONG-TERM PROGRAMME OF WORK (continued)

2. The CHAIRMAN invited Mr. Bowett, coordinator of the Working Group on the long-term programme of

work, to introduce the report of the Working Group (ILC(XLVIII)/WG/LTPW/2/Rev.1).¹

3. Mr. BOWETT said that the report was divided into two parts consisting of a general scheme and three addenda.

4. In the general scheme, which had been prepared by Mr. Pellet, international law as a whole was reviewed subject by subject in 12 sections. Each section was organized so as to show the topics which had already been completed or which had been taken up, but abandoned, the topics under consideration by the Commission and the topics which the Commission might study in future. He invited the members of the Commission not to attach too much importance to the wording of the possible future topics because they were only ideas that were not binding either on the Commission or on its members.

5. The more important part of the report was the second, in which the Working Group put forward three of the possible future topics, each one in a separate addendum. Addendum 1, on diplomatic protection, was designed to supplement and explain the proposal which the Commission had, following its forty-seventh session, submitted to the General Assembly.² It would give the Sixth Committee a relatively clear idea of what the Commission meant by that topic. Addendum 2, on ownership and protection of wrecks beyond the limits of national maritime jurisdiction, was based on a proposal that the Commission had made three years previously and contained an abridged version of the detailed outline it had proposed at that time.³ Addendum 3, on unilateral acts of States, related to a proposal which had been made at the current session, which the members of the Working Group had generally well received, and contained an analysis of the possible content of the topic.

6. Neither the Commission nor any future special rapporteur would be bound by the content of the topics as contained in the three addenda. The aim was to enlighten the Sixth Committee so that it might evaluate the various proposals on their merits.

7. The CHAIRMAN suggested that the Commission should consider the introduction paragraph by paragraph, the general scheme section by section and then the addenda.

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

GENERAL SCHEME

8. The CHAIRMAN, supported by Mr. ROSENSTOCK, said that only the heading in each section entitled "Possible future topics" was likely to be commented on, since that heading related not to topics that the Commission should study, but to topics that it might consider taking up because no codification work had yet been done on them.

SECTION I (Sources of international law)

Section I was adopted.

SECTION II (Subjects of international law)

9. Mr. de SARAM said that the topic of democratic government under the subheading of "Statehood" seemed to be of less legal relevance than other topics under that subheading and that it was more political than strictly legal. He would like to have some further explanations on that point.

10. Mr. LUKASHUK said that he did not understand Mr. de Saram's concerns. That topic reflected the new trend in international law, especially in the field of co-operation in Europe and elsewhere. Research on it should therefore be carried out.

11. Mr. BOWETT said that the topic was not of a purely political nature because democracy required legal structures and some principles of democratic government could be stated in the form of constitutional principles. A statement of those principles might be helpful to some Governments.

12. The CHAIRMAN said that the problem might be one of wording because it could be that the idea of democratic government made people think of the internal system of government.

13. Mr. PELLET said that, although public international law had long been defined as a law that was indifferent to systems of government, the problem of democratic government now arose in modern-day law as a result of the growth of pluralist democracy, as shown by the statutes of the European Bank for Reconstruction and Development, IMF "conditionality" and the guidelines for the recognition of States being applied by the European Union to the new States of central and eastern Europe. In any event, the topic was probably not ripe for codification and, in that connection, he reaffirmed the need to take that part of the report for what it was, namely, a statement of a number of topics which had either been formally proposed at one time or another in the Commission's work or which might be of some interest because they were governed by rules of customary law in connection with which codification might be a possibility. That part of the report was therefore designed only to show the members of the Sixth Committee that there were very broad sections of international law, whether traditional or more recent, which were still to be codified, but it did not commit the Commission to anything for the future. It might, moreover, be stated in a footnote that the Commission reserved the right to give further consideration to the various topics at its next session.

14. Mr. VILLAGRÁN KRAMER said that, on the American continent, the problem of democratic government continued to be discussed in legal and political terms from two very important points of view: as an inherent component of the State and as a commitment of the State to strengthen democracy in its territory and, where necessary, implement machinery to protect it. Since the question had been raised, he considered it positive and constructive that the Commission should

¹ See 2465th meeting, footnote 1.

² *Yearbook* . . . 1995, vol. II (Part Two), para. 501.

³ See *Yearbook* . . . 1993, vol. II (Part One), document A/CN.4/454.

include it on its agenda, but he expressed reservations about any right of interference in the internal affairs of States.

15. Mr. ROSENSTOCK said that he was in favour of keeping that topic on the list of topics for future study in the hope that, sooner or later, the Commission would be called upon to draft a text on the legal consequences of the principle that Governments derived their legitimacy from the freely given consent of the people.

16. Mr. ROBINSON said that it would not be difficult to define some legal principles relating to democratic government, but he understood Mr. de Saram's concern that the wording of the topic might suggest that democratic government was a necessary condition for Statehood. More neutral wording, such as "forms of government", might be more acceptable.

17. Mr. SZEKELY said that that topic must be kept on the list of topics that the Commission might consider in future because it was of the greatest importance both for those who were concerned about excessive international pressures and for those who were sincerely attached to the principle that Governments derived their power from the will of the people.

18. Mr. MIKULKA said that, in his view, the topic of "Succession" of governments should be moved to heading 1 (Topics taken up, but abandoned), because he seemed to remember that the question had been discussed in 1963 and that the Commission had then reached some conclusions.

19. Mr. TOMUSCHAT, supported by Mr. ALBAHARNA, said that, although democratic government was an important topic in today's world, he thought that it was a question that related to the recognition of Governments rather than being a criterion for statehood. He therefore proposed that it should be moved to the sub-heading of "Government".

20. Mr. PELLET said that he would not object to such a move, but he would also be prepared to accept Mr. Mikulka's suggestion, subject to verification. With regard to the form of the general scheme, he regretted that the structure that had originally been chosen for each section had been changed and he invited the Commission to change back to the following presentation: 1. Topics already completed; 2. Topics under consideration by the Commission; 3. Topics taken up but abandoned; 4. Possible future topics.

21. Mr. LUKASHUK said that "democratic government" referred not to the executive power, but to the democratic system, at the heart of which lay human rights. If human rights were recognized, the idea of democratic government had to be accepted.

22. Mr. BENNOUNA said that he agreed with the comment by Mr. Tomuschat. The idea was very controversial and it did not at present lend itself either to codification or to progressive development. He therefore proposed that the topic should simply be deleted.

23. Mr. ROSENSTOCK, supported by Mr. SZEKELY, said that, since it had been proposed by way of a compromise that that topic should be moved to the sub-

heading of "Government", it could be deleted only by means of a vote.

24. Mr. BENNOUNA said that the solution might be to replace the word "democratic" by the word "representative".

It was so decided.

Section II, as amended, was adopted.

SECTIONS III (Succession of States and other legal persons), IV (State jurisdiction/immunity from jurisdiction) and V (Law of international organizations)

Sections III, IV and V were adopted.

SECTION VI (Position of the individual in international law)

25. Mr. LUKASHUK said that the item "The individual as a subject of international law" under heading 2 was a concept of international law, not the title of a topic. He therefore proposed that it should be deleted.

26. Mr. ARANGIO-RUIZ said that, in order to avoid the adoption of any doctrinal positions, the topic should be entitled "The individual in international law".

It was so decided.

27. Mr. VILLAGRÁN KRAMER said that the title "Minimum standards of civilization" under heading 2 was not very felicitous and recalled that, until the nineteenth century, Europe had characterized the rest of the world as "uncivilized" in order to justify its own privileges.

28. Mr. PELLET said that, although that was a very common expression, that topic should be deleted in order to avoid any discussion and enable the Commission to gain time.

It was so decided.

29. Mr. TOMUSCHAT, said that the last two topics under heading 2 were in a category that usually came within the competence of the Commission on Human Rights and the Subcommittee on Prevention of Discrimination and Protection of Minorities. The International Law Commission had never played an active role in that field, but, if it wanted to do so, it might give the impression that it was calling in question the work of the Commission on Human Rights.

30. Mr. PELLET pointed out that the Convention on the Reduction of Statelessness had originated with the Commission. The two topics referred to by Mr. Tomuschat had, moreover, been proposed and selected for consideration. If the Commission wanted to delete them, it would have to reconsider the entire report. It would be able to delete them when it came to drawing up the final list of topics that it really wanted to study.

31. The CHAIRMAN, supported by Mr. ROSENSTOCK, said it should perhaps be indicated in the introduction that the topics listed in the general scheme were not topics that the Commission had to study, but only

topics that might lend themselves to codification, not necessarily by the Commission itself.

32. Mr. SZEKELY, referring to Mr. Tomuschat's comment, said that the majority of topics contained in the general scheme had been or were being considered by other bodies within or outside the United Nations system. That should not curtail the freedom of action of the Commission, which was the subsidiary organ of the General Assembly with particular responsibility for the codification and progressive development of international law. The last two topics under heading 2 of section VI should therefore be retained.

33. Mr. VILLAGRÁN KRAMER said that there was practically no field of international law that was not in some way connected with the question of human rights. The last two topics should therefore be retained.

34. Mr. BOWETT recalled that the topic of human rights and defence of democracy had been proposed in 1962. With regard to Mr. Tomuschat's comment, paragraph 2 of the introduction expressly indicated that some topics proposed in the paper have been taken up by other bodies.

35. Mr. ROBINSON, noting that the topic of extradition came under the subheading "Treatment of aliens", asked whether the Commission would study extradition only from the human rights point of view or as a whole and as a much broader topic.

36. The CHAIRMAN said that the topic had been proposed in 1949, but had not been defined.

Section VI, as amended, was adopted.

SECTION VII (International criminal law)

37. Mr. BARBOZA said he was surprised that the topic of crimes against humanity had been included under heading 2 (Possible future topics) because the Commission had been studying those crimes as part of its work on the draft Code of Crimes against the Peace and Security of Mankind.

38. Mr. PELLET said that Mr. Barboza's comment was not illogical, but the Commission had not yet exhausted the topic.

39. Mr. VILLAGRÁN KRAMER proposed that the topic might be entitled "Other crimes against humanity".

40. The CHAIRMAN said that there was indeed a problem, particularly in the year when the Commission was submitting its draft Code of Crimes against the Peace and Security of Mankind to the General Assembly. The topic of "Crimes against humanity" should perhaps be deleted, on the understanding that it could be reintroduced at a more appropriate time.

41. Mr. BENNOUNA said that the draft Code was not exhaustive and that some crimes of the greatest importance for the international community, such as international terrorism and large-scale drug trafficking, had been left aside. Perhaps the topic could be entitled

"Other crimes against the peace and security of mankind".

42. Mr. CALERO RODRIGUES said he agreed with the Chairman that it might seem strange to the General Assembly for the Commission to be referring to crimes against humanity as a topic for future study just at the time when it was submitting the draft Code. It was nevertheless also true that the draft Code did not cover all international crimes.

43. Mr. PELLET proposed that the topic should be entitled "International crimes other than those contained in the draft Code of Crimes against the Peace and Security of Mankind".

It was so decided.

Section VII, as amended, was adopted.

SECTION VIII (Law of international spaces)

44. Mr. GÜNEY said that the question of the legal regime of international rivers appeared both under heading 1 and under heading 3 of this section. Under heading 3, it covered navigation on international rivers, a welcome topic that followed on logically from the law of the non-navigational uses of international watercourses, and the law of confined international groundwaters. The latter topic had been regarded as premature by the Commission, which had not been able to agree on it. In addition, the General Assembly had not yet taken a decision on the earlier draft relating to watercourses. In his opinion, the topic of confined groundwaters should be removed from the list.

45. Mr. MIKULKA, also referring to the topic of the law of confined international groundwaters, asked whether it belonged under the subheading "Legal regime of international rivers and related topics". For the Commission, the term "confined groundwaters" meant anything other than watercourses. The topic should therefore be placed under the subheading "Shared resources".

46. Mr. ROSENSTOCK said that he was in favour of such a change.

47. Mr. SZEKELY, supported by Mr. PELLET, said that, although the topic of the law of confined international groundwaters had been discussed, but no decision had been taken on it, it had been proposed in 1993.⁴ It should therefore be included in the list. Perhaps it should be placed under the subheading "Shared resources".

48. Mr. LUKASHUK referring to the topic of the law of space in the section under consideration, said he had the same problem as the one Mr. Tomuschat had pointed out with regard to human rights in the preceding section: the Sixth Committee might ask why the Commission had included space as a possible future topic when the United Nations had a specialized body for that purpose, namely, the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space.

⁴ Ibid.

49. The CHAIRMAN, supported by Mr. MIKULKA, pointed out that the topic had been proposed by the Commission in 1962, even before the establishment of the body to which Mr. Lukashuk had just referred. He recalled that paragraph 2 of the introduction stated that some topics proposed in the paper have been taken up by other bodies.

50. Mr. SZEKELY said that the term “Shared resources”, which was no longer used, should be replaced by the commonly used term “Transboundary resources”.

51. Mr. PELLET, Mr. CALERO RODRIGUES, Mr. BARBOZA and Mr. GÜNEY said they agreed with that amendment.

52. The CHAIRMAN suggested that the subheading “Legal regime of international rivers and related topics” should be deleted, that the subheading “Shared resources” should be replaced by the subheading “Transboundary resources” and that that new subheading should include the following topics: the law of confined international groundwaters; navigation on international rivers; the global commons; and the common heritage of mankind.

53. Mr. BARBOZA proposed that a fifth topic, “The common concern of humankind”, should be added to that list. Further consideration had demonstrated the limits of the concept of the common heritage of mankind: it was difficult to consider the moon and other celestial bodies, or biological diversity, from the heritage point of view. The principle of the common concern of humankind was already included in the preambles to the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change, as well as in some General Assembly resolutions. That topic was also very close to the international community’s modern-day concerns.

54. Mr. PELLET said he agreed with that proposal.

55. Mr. CALERO RODRIGUES said that the proposed topic had been referred to at a UNEP meeting held recently in Malta.

56. The CHAIRMAN said that the Commission was prepared to add “The common concern of humankind” to the list of possible future topics.

57. Mr. TOMUSCHAT said that he was not sure about the title of heading 3 (Possible future topics), because most of those topics had been proposed in the past and were, so to speak, historical.

58. Following a discussion in which Mr. MIKULKA, Mr. CALERO RODRIGUES, Mr. BOWETT and Mr. BARBOZA took part, the CHAIRMAN suggested that paragraph 2 (c) of the introduction to the report should be amended, as indicated by Mr. Pellet, to read:

“(c) Adding some other possible topics on which the Commission does not intend to take a definite decision as to the feasibility or advisability of their future consideration.”

It was so decided.

Section VIII, as amended, was adopted.

SECTION IX (Law of international relations/responsibility)

59. Mr. MIKULKA said that it was strange that the law of international relations and the law of international responsibility should be included in the same section. It would have been more logical to include the topic of international “quasi-diplomatic” representation of international organizations in section V, which dealt with the law of international organizations. He proposed that, at the least, the word “quasi-diplomatic” should be deleted.

60. Mr. PELLET said that he would have no objection if the word “quasi-diplomatic” were deleted. He was, however, opposed to the idea of moving the topic to section V because he thought it related directly to the title of section IX, namely, “Law of international relations/responsibility”. It was inevitable that some topics should overlap, with the result that their inclusion in one section or another could give rise to endless discussions.

61. Mr. MIKULKA, supported by Mr. GÜNEY, said that he maintained his reservation. It was important that the separation between sections should be as strict as possible.

62. Mr. LUKASHUK said that the law of diplomatic and consular relations should have been included in a separate section.

63. The CHAIRMAN said that he had taken note of the comments by the members of the Commission, but he thought that their reservations related more to form than to substance. He therefore suggested that section IX should be adopted as it stood.

Section IX was adopted.

SECTION X (Law of the environment and of economic relations)

64. Mr. TOMUSCHAT noted that the possible future topics included international legal problems connected with privatization of State properties. He was not sure whether such problems would actually arise in practice.

65. Mr. PELLET confirmed that there were many examples and that the General Assembly had even adopted resolutions on the question.

66. Mr. YANKOV said that he did not see why the law of the environment and the law of economic relations had been included in the same section. Even if environmental problems had an economic dimension, the two were quite different. He therefore proposed that section X should be divided into two separate sections.

67. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt that proposal, which involved only a minor problem of layout.

Section X, as amended, was adopted.

SECTION XI (Law of armed conflicts/disarmament)

68. Mr. ROSENSTOCK, noting that each section contained a reminder of relevant topics already taken up at some point or another by the Commission, said he believed that the Commission had studied questions relating to the law of armed conflict in the past. If so, that should be indicated.

69. The CHAIRMAN said that that would be checked. If he heard no further comments, he would take it that section XI was adopted.

Section XI was adopted.

SECTION XII (Settlement of disputes)

70. Mr. VILLAGRAN KRAMER said that resolution 50/50 which had recently been adopted by the General Assembly, on United Nations Model Rules for the Conciliation of Disputes between States, was directly linked to the section under consideration. Perhaps the Commission should take that into account as a possible future topic.

71. The CHAIRMAN recalled that paragraph 2 of the introduction clearly stated that some of the proposed topics had been taken up by other bodies.

72. Mr. MIKULKA noted that, in the draft articles on State responsibility, the Commission had proposed provisions relating to dispute settlement for the first time, whereas, in the past, its practice had been to let diplomatic conferences deal with that question. It might consider the possibility of systematically including such provisions in its codification drafts in future.

73. Mr. PELLET said that the second topic under heading 2, "Model clauses for the settlement of disputes relating to application or interpretation of codification conventions" would meet Mr. Mikulka's concern. For the sake of greater clarity, the word "future" should be added before the words "codification conventions".

It was so decided.

Section XII, as amended, was adopted.

The meeting rose at 6.10 p.m.

2467th MEETING

Tuesday, 23 July 1996, at 10.10 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney,

Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Robinson, Mr. Rosenstock, Mr. Szekeley, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yankov.

Programme, procedures and working methods of the Commission, and its documentation (concluded) (A/CN.4/472/Add.1, sect. F)

[Agenda item 7]

REPORT ON THE LONG-TERM PROGRAMME OF WORK (concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of the report of the Working Group on the long-term programme of work (ILC(XLVIII)/WG/LTPW/2/Rev.1).¹

ADDENDUM 1 (Diplomatic protection)

Addendum 1 was adopted.

ADDENDUM 2 (Ownership and protection of wrecks beyond the limits of national maritime jurisdiction)

Addendum 2 was adopted.

ADDENDUM 3 (Unilateral acts of States)

Addendum 3 was adopted.

2. Mr. VILLAGRÁN KRAMER said he had not wished to block the adoption of addendum 3, which contained timely proposals and was well drafted. He did wish, however, to place on record a number of observations. It was extremely unfortunate that the Commission had made very little tangible progress in its work on reservations to treaties, despite the excellent second report placed before it by Mr. Pellet (A/CN.4/477 and Add.1 and A/CN.4/478).² If that slow pace were maintained, it was to be feared that the Commission's only contribution on the topic would be a doctrinal study, instead of a legal instrument in line with the Commission's mandate for the codification and progressive development of international law.

3. Mr. SZEKELY pointed out that he had strong reservations about the removal, from the list of possible topics for the Commission's future work, of the topic of representative government.

4. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the

¹ See 2465th meeting, footnote 1.

² *Yearbook . . . 1996*, vol. II (Part One).