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Summary record of the 2610th meeting

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79. Mr. CRAWFORD (Special Rapporteur) said that the problem could be solved by inserting the word “only” before the words “in relation to”.

Paragraph 53, as amended, was adopted.

The meeting rose at 6.05 p.m.

2610th MEETING

Thursday, 22 July 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

CHAPTER V. *State responsibility (concluded)* (A/CN.4/L.582 and Add.1-4)

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

1. The CHAIRMAN invited the Commission to resume its consideration of chapter V, section B, starting with subsection 29.

Subsections 29 and 30 (A/CN.4/L.582/Add.3)

Subsections 29 and 30 were adopted.

Subsection 31

2. Mr. SIMMA said that the word “apparently” in the penultimate sentence of paragraph 63 should be deleted.

3. Mr. PAMBOU-TCHIVOUNDA, noting that some words had been omitted from the French version of paragraph 64, requested that the secretariat should correct the drafting.

4. Mr. CRAWFORD (Special Rapporteur), referring to the suggestion by Mr. GAJA, proposed that the second sentence of paragraph 65 should be amended to read: “Moreover, the purpose of countermeasures, as expressed

in article 47, was very different from the purpose of the proposed article embodying a narrow *exceptio*.”

Subsection 31, as amended, was adopted.

Subsections 32 to 38

Subsections 32 to 38 were adopted.

Subsection 39

5. Mr. TOMKA said that the third sentence of paragraph 96 was not correct, in that the necessity argument had been taken up by only one of the parties in the *Gabčíkovo-Nagymaros Project* case and the other party had expressed its views on that argument.

6. Mr. CRAWFORD (Special Rapporteur) proposed that the third sentence of paragraph 96 should consequently be amended to read: “Article 33 was referred to by both parties in the *Gabčíkovo-Nagymaros Project* case, and the International Court of Justice expressly endorsed it as a statement of general international law.”

7. Mr. DUGARD said that the second sentence of paragraph 101 did not capture the original intention, which had been to state that, as a result of the amendment to article 33, the finding of ICJ in the *South West Africa* cases would no longer prevail.

8. Following an exchange of views in which Messrs DUGARD, PAMBOU-TCHIVOUNDA and TOMKA, took part, Mr. CRAWFORD (Special Rapporteur) proposed that the second sentence of paragraph 101 should be redrafted to read:

“For example, in the *South West Africa* cases, the implicit argument for South Africa was that the policy of apartheid in South West Africa was necessary for the good governance of the territory. However, the question did not affect the individual interests of Ethiopia or Liberia but the interests of the people of South West Africa.”

Subsection 39, as amended, was adopted.

Subsection 40

Subsection 40 was adopted.

Subsection 41

9. Mr. CRAWFORD (Special Rapporteur) said that the first sentence of paragraph 111 would be clearer if, beginning with the word “because” it was amended to read: “because paragraph 2 excluded the violation of a peremptory norm of general international law”, with the words “from circumstances precluding wrongfulness” deleted at the end of the sentence.

Subsection 41, as amended, was adopted.

Subsection 42

10. Mr. PAMBOU-TCHIVOUNDA said that the word “invoked” was better than the words “relied on” in the first sentence of paragraph 114.

Subsection 42, as amended, was adopted.

Subsection 43

11. Mr. PAMBOU-TCHIVOUNDA said that he was disturbed by the expression *refroidir l'ardeur des États* in the French version of paragraph 117. He would prefer an expression that was closer to the English, such as *tempérer l'enthousiasme*.

12. Mr. BROWNLIE said that he found that wording a bit too general and suggested that the word “occasional” should be inserted before the word “enthusiasm”.

13. Mr. CRAWFORD (Special Rapporteur) endorsed Mr. Brownlie's and Mr. Pambou-Tchivounda's proposals.

14. The CHAIRMAN said he took it that the Commission wished to replace the words “curb the enthusiasm of States” by the words “temper the occasional enthusiasm of States” in paragraph 117.

It was so agreed.

15. Mr. GAJA said that, as a matter of consistency, the Special Rapporteur's concluding remarks on article 34 bis should appear in a separate subsection, 43 bis, which would be composed of paragraphs 120 to 123.

16. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission accepted that proposal.

It was so agreed.

Subsection 43, as amended, was adopted.

Subsection 44

Subsection 44 was adopted.

Subsection 45

17. Mr. GAJA said that subsection 45 should be divided in the same way as subsection 43, with paragraph 132 constituting a separate subsection 45 bis, entitled “Concluding remarks of the Special Rapporteur on article 35”.

Subsection 45, as amended, was adopted.

Subsection 46

18. Mr. SIMMA proposed that the word “However” at the beginning of the second sentence of paragraph 136 should be deleted, as the sentence was the logical continuation of the first sentence and not at all in opposition to it.

19. The second solution mentioned in paragraph 140 and proposed by Mr. Hafner and himself had not referred to article 31, but only to chapter V. He therefore proposed that the words “by way of an addition to article 31” should be deleted from the end of the second sentence.

20. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt subsection 46 with the amendments proposed by Mr. Simma.

It was so agreed.

Subsection 46, as amended, was adopted.

Subsection 47 (A/CN.4/L.582/Add.4)

Subsection 47 was adopted.

Section B, as amended, was adopted.

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

21. The CHAIRMAN said that the Commission had concluded its consideration of chapter V of its draft report and expressed thanks to the Special Rapporteur for enabling the Commission to submit a coherent set of draft articles and comments to the General Assembly.

22. Mr. CRAWFORD (Special Rapporteur) thanked the secretariat and also expressed appreciation to the précis-writers, who often went unrecognized, for the high professional quality of their work throughout the session.

CHAPTER VII. Jurisdictional immunities of States and their property (A/CN.4/L.584 and Add.1)

Chapter VII, as a whole, was adopted.

Programme, procedures and working methods of the Commission, and its documentation (continued)* (A/CN.4/496, sect. G, A/CN.4/L.577 and Add.1, A/CN.4/L.589)

[Agenda item 10]

REPORT OF THE PLANNING GROUP

23. Mr. GOCO (Chairman of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.577 and Add.1), said that the various sections were self-explanatory. He drew attention to section 6 (A/CN.4/L.577/Add.1) containing the Planning Group's recommendation on the dates of the fifty-second session, which would be a split session in view of the fact that conference services would not be available to the Commission during the week of 24 April 2000.

24. Mr. LUKASHUK said that paragraph 5 of the report of the Planning Group dealt with the complex question of States' replies to the questionnaires they received from the Commission. Even the best-equipped ministers for

* Resumed from the 2575th meeting.

foreign affairs were often unable to reply to such complex questionnaires. The Commission might therefore suggest that States which had a shortage of personnel should join efforts, for example, in the framework of regional organizations such as the League of Arab States and OAU, in replying to the questionnaires. That approach would have the advantage of familiarizing the Commission with the practice in certain regions.

25. He believed there was an omission from section 2 of the report of the Planning Group on the Commission's relationship with other bodies concerned with international law, as that relationship was most often limited to hearing representatives of those bodies speak before the Commission. In his view, the Commission should communicate its drafts and final texts to scientific agencies and institutions and request their comments, giving special attention to comments from institutions and agencies in regions whose practice might not be given sufficient consideration.

26. The split session was a very sound idea.

27. Mr. SIMMA noted that, on the day of the Planning Group's meeting, the secretariat had announced that the Commission would not have conference services during the week of 24 April 2000, for which reason he had suggested to the Planning Group that the first half of the session should begin one week later and last only five weeks. That would have been a way of indicating to the General Assembly that the Commission was willing to take budgetary considerations seriously.

28. Mr. DUGARD said that the Commission had in the past held 11-week sessions, which had been productive; he found Mr. Simma's proposal acceptable.

29. Mr. ROSENSTOCK (Rapporteur) said that the question had been discussed at length in the Planning Group at both the fiftieth and fifty-first sessions and that a clear majority had emerged in favour of the last two sessions of the quinquennium being 12-week sessions given the volume of work to be completed during the remainder of the quinquennium. The Commission had endorsed that decision in paragraph 562 of its report on the work of its fiftieth session.¹

30. Mr. TOMKA asked whether, in view of the considerable progress achieved, the Commission might not reconsider that decision and possibly change it.

31. Mr. PAMBOU-TCHIVOUNDA said that cost should not be the only consideration. Clarifications from the secretariat on the technical operation of sessions, such as the time needed for receiving, translating and publishing reports of the special rapporteurs, would be useful. Moreover, the reference to "experience" in paragraph 25 was not very felicitous, given that the only split session ever held by the Commission had not been particularly productive.

32. Mr. PELLET noted that his name had been omitted from the list of members of the Planning Group. Although the members of the Group had been unanimous in acknowledging the need for the Commission to hold a

split session, they had been divided on the issue of how that should be done within the resources available. The question should be discussed by the members of the Commission as a whole. He therefore proposed that the Commission should consider paragraphs 23 to 28 of the report of the Planning Group, which dealt with that question, in a closed meeting.

33. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to consider paragraphs 23 to 28 of the report of the Planning Group in a closed meeting, in accordance with Mr. Pellet's proposal.

It was so agreed.

34. The CHAIRMAN invited the members of the Commission to consider the report of the Planning Group section by section.

Section 1. The relations between the Commission and the Sixth Committee (A/CN.4/L.577)

35. Mr. SIMMA, referring to paragraph 3, said that it was not appropriate to begin the paragraph with the words: "The Commission started implementing what it had proposed in 1996", without explaining the reference. The footnote to that sentence simply referred the reader to a document which might not be immediately available. The sentence should be clarified.

36. Mr. AL-BAHARNA endorsed Mr. Simma's comment.

37. Mr. MIKULKA (Secretary to the Commission) explained that it was not possible to make changes in the report of the Planning Group. Members would be able to do so when the Commission took up chapter X of its draft report, which would include the Planning Group's conclusions.

38. Mr. KATEKA and Mr. TOMKA questioned the advisability of a procedure which consisted of adopting a report in order to correct it later on.

39. The CHAIRMAN said that Mr. Simma's comment dealt with a question of form and could be accommodated on the basis of a simple drafting change.

It was so agreed.

Section 2. The Commission's relationship with other bodies concerned with international law

40. Mr. PELLET asked why paragraph 15 cited the British Institute of International and Comparative Law, while its equivalent, the Société française pour le droit international, was relegated to a footnote. The two institutions should receive equal treatment.

41. Mr. CRAWFORD and Mr. SIMMA endorsed Mr. Pellet's comment.

42. The CHAIRMAN said that Mr. Pellet's comment would be reflected in the wording of the corresponding passage in the report of the Commission to the General Assembly.

¹ *Yearbook ... 1998*, vol. II (Part Two), p. 112.

Section 3. Split sessions

43. The CHAIRMAN noted that section 3 was to be the subject of further consultations.

Section 4. Work programme of the Commission for the quinquennium (A/CN.4/L.577/Add.1)

44. Mr. SIMMA, referring to the work programme for the year 2000, said that the work programme for the topic “International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)” was not properly presented: the document before the Commission would be the third report of the Special Rapporteur, and not “Comments by Governments on the draft articles on ‘prevention’”, as indicated.

45. Mr. HAFNER, supported by Mr. KUSUMATMADJA, proposed that the entries in question should be reversed.

46. Mr. GAJA noted that paragraph 29 failed to mention “Reservations to treaties” as one of the topics on which substantial progress had been made. Much progress had been achieved on that topic and it should be included in the list.

47. Mr. KATEKA said that paragraph 31 was pessimistic in stating that the completion of the first reading of certain topics would “take place during the next quinquennium”. That prejudged the pace of work of the special rapporteurs, and hence of the Commission. Although some special rapporteurs’ work did spill over into the following quinquennium, the impression must not be given that they were deliberately proceeding at a snail’s pace.

48. Mr. PELLET noted that, if certain special rapporteurs were behind with respect to their own estimates, that was due to the volume and difficulty of their work.

49. The CHAIRMAN noted that the special rapporteurs themselves had supplied the information on which that projection was based.

50. Mr. ECONOMIDES said that he shared Mr. Kateka’s concerns. It was premature to state what would take place during the following quinquennium. He proposed that paragraph 31 should be deleted.

51. Mr. SIMMA said that paragraph 31 merely stated the obvious, as the work programme for 2000 and 2001 was contained in the preceding paragraph. Moreover, it was inappropriate to state that the Commission would not conclude a particular item.

52. Mr. ROSENSTOCK said that, although he shared the concerns expressed, it was not within the Commission’s power to change the report of a subsidiary body, much less delete a paragraph.

53. Mr. LUKASHUK said that he shared Mr. Rosenstock’s view. He proposed that the report of the Commission should simply state that the special rapporteurs on the topics of unilateral acts of States and reserva-

tions to treaties were encouraged to complete their work before the end of the current quinquennium.

54. The CHAIRMAN said that, if the members of the Commission so wished, the contents of paragraph 31 would not be reflected in the report of the Commission.

55. Mr. KATEKA said that he had been raising a matter of principle and had not had a particular special rapporteur in mind. He would be prepared to accept the Chairman’s solution.

56. Mr. MIKULKA (Secretary to the Commission) said that, if the Commission decided not to include the contents of paragraph 31 in its report, the secretariat would issue a corrigendum to chapter X (A/CN.4/L.587 and Add.1) of the draft report.

57. Mr. TOMKA said that, if chapter X of the draft report of the Commission was amended as proposed, the legitimate questions of the members of the Sixth Committee and of States concerning the three items referred to in paragraph 31 of the report of the Planning Group would not receive replies until 2000 or even 2001.

58. Mr. SIMMA said that the reference in the Commission’s work programme for the year 2000 (para. 30) to “Comments by Governments on the draft articles on ‘prevention’”, under the topic “International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)”, was inappropriate and should not appear in the report of the Commission.

59. The CHAIRMAN suggested that the reference to comments by Governments on the draft articles on “prevention” and the contents of paragraph 31 would not appear in chapter X of the report of the Commission.

It was so agreed.

Section 5. Long-term programme of work

60. The CHAIRMAN invited the members of the Commission to consider the interim report of the Working Group on the Long-Term Programme of Work (A/CN.4/L.589) which made up section 5.

61. Mr. ECONOMIDES said that he deeply regretted the decision of the Working Group on the Long-Term Programme of Work not to retain his proposal that the Commission should undertake a study of the law of collective security, especially as that question had not yet been dealt with from a legal standpoint within the United Nations. The decision was all the more regrettable in that a very serious and unprecedented crisis in international law was currently taking place, as ICJ had clearly acknowledged in its orders of 2 June 1999 in the cases concerning *Legality of Use of Force*, in which it stated that the use of force in Yugoslavia raised very serious issues of international law.

62. Mr. BAENA SOARES said that he shared Mr. Economides’ regrets. He would continue to support Mr. Economides’ proposal, which he hoped would receive more favourable consideration at the fifty-second session of the Commission.

63. Mr. LUKASHUK said that he feared the report of the Commission would make a negative impression on the members of the Sixth Committee: the Commission was proposing nothing substantial for the future, no issues of truly general interest. He noted that the Commission's statute required it to survey the whole field of international law with a view to selecting topics for study. If it did not, it would be forced to choose from topics proposed by certain of its members in accordance with their own interests, and that would do nothing to strengthen its authority as far as the Sixth Committee was concerned.

64. Mr. BROWNLIE (Chairman of the Working Group on the Long-Term Programme of Work) said that he had also found the results of the Working Group disappointing. The reality was that the Working Group was a collective body and that topics which were not favoured by the majority of members were rejected. He personally endorsed Mr. Economides' comments, although his *dédoulement fonctionnel* in that department prevented him from making extensive comments.

65. Mr. PELLET said he did not have the same idea as some members about the role of the Working Group on the Long-Term Programme of Work. The Working Group's responsibility was to find one or perhaps two topics to be taken up when the consideration of the current topics had been completed, not to provide an endless list of topics.

66. Mr. LUKASHUK said that he disagreed with Mr. Pellet's point of view; topics should be chosen with the long-term programme of work in mind, as the Working Group's title indicated.

67. Mr. HAFNER proposed that the footnote in the first sentence of paragraph 3 should make a distinction between the topics which had already been accepted and those which had not in order to give the Sixth Committee a clear idea of the views which had been expressed during the discussion.

68. The CHAIRMAN said that, as indicated in paragraph 10, the Working Group would continue its work at the fifty-second session of the Commission and that the report of the Commission would include all the opinions expressed during the discussion.

It was so agreed.

The meeting rose at 12.20 p.m.

2611th MEETING

Friday, 23 July 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr.

Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

CHAPTER VI. *Reservations to treaties (concluded)** (A/CN.4/L.583 and Add.1-5)

C. *Draft guidelines on reservations to treaties (concluded)** (A/CN.4/L.583/Add.1-5)

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-FIRST SESSION (*concluded*)* (A/CN.4/L.583/ADD.2-5)

Commentary to section 1.5 (A/CN.4/L.583/Add.5)

The commentary to section 1.5 was adopted.

Commentary to guideline 1.5.1 [1.1.9]

1. Mr. GAJA said that paragraph (6) gave the impression that a choice had been made by the 1978 Vienna Convention between multilateral treaties and bilateral treaties, whereas, in fact, notification of succession was applicable only to multilateral treaties. He therefore suggested that the following phrase should be added at the end of paragraph (6): "the notification of succession being generally admitted in respect of open multilateral treaties."

The commentary to guideline 1.5.1 [1.1.9], as amended, was adopted.

Commentary to guideline 1.5.2 [1.2.7]

2. Mr. GAJA said that, for the sake of clarity, the word *elles* in the first sentence of paragraph (1) of the French text should be replaced by the words *les Conventions*.

3. Mr. PELLET (Special Rapporteur) said that it might be better to say *ces Conventions*. He also pointed out that it had already been decided that the reference to [1.2.4] should be deleted in the draft guideline.

The commentary to guideline 1.5.2 [1.2.7], as amended, was adopted.

Commentary to guideline 1.5.3 [1.2.8]

4. Mr. GAJA said that, in the penultimate sentence of paragraph (2), the words "article 31" should be inserted between the words "in the sense of" and the words "paragraphs 2 and 3 (a)".

* Resumed from the 2608th meeting.