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**Summary record of the 1984th meeting**

Topic:  
**Other topics**

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It was to be hoped that she might be able to come back to help the Commission at its next session.

66. Mr. REUTER, speaking also on behalf of the other members of the Commission from Western countries, said that, in paying tribute to Mrs. Petermann, the Commission was also paying tribute to the Secretariat as a whole. An international organization was essentially an inter-State body, but its secretariat ensured its continuing existence and gave it an international outlook. Although the United Nations was now in the midst of a crisis, it represented the only hope for the future.

67. Mr. USHAKOV, Mr. NJENGA, Mr. DÍAZ GONZÁLEZ and Mr. MALEK, speaking also on behalf of the members of the Commission from the Eastern European, African, Latin American and Asian countries, respectively, associated themselves with the tribute paid by the Chairman and Mr. Reuter to Mrs. Petermann, who had been a member of the Commission "family" for such a long time, and, through her, to all the international officials who worked so tirelessly on behalf of the United Nations.

*The meeting rose at 1.10 p.m.*

## 1984th MEETING

*Tuesday, 8 July 1986, at 3.15 p.m.*

*Chairman: Mr. Doudou THIAM*

*Present:* Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

### Draft report of the Commission on the work of its thirty-eighth session (*continued*)

**CHAPTER VI. International liability for injurious consequences arising out of acts not prohibited by international law** (concluded) (A/CN.4/L.407 and Add.1)

**B. Consideration of the topic at the present session** (concluded) (A/CN.4/L.407/Add.1)

Paragraph 13

1. Mr. BALANDA proposed that the word *interposer*, in the first sentence of the French text, should be replaced by *proposer*.

*It was so agreed.*

*Paragraph 13, as amended in the French text, was adopted.*

Paragraph 14

*Paragraph 14 was adopted.*

Paragraph 15

2. Mr. McCAFFREY drew attention to the need to correct the tenses of the verbs used in paragraph 15. In addition, he proposed that the paragraph should begin with the words "The Special Rapporteur considered that", in order to make it clear that the content of the paragraph reflected the view of the Special Rapporteur.

*It was so agreed.*

*Paragraph 15, as amended, was adopted.*

Paragraph 16 and new paragraph 16 bis

3. Mr. FLITAN proposed that the last sentence of paragraph 16 should be deleted, for it was out of place in that paragraph, which reflected the views of the Special Rapporteur.

4. Mr. ILLUECA said that the sentence in question was useful as a bridge between paragraphs 5 to 16, containing the Special Rapporteur's views, and paragraphs 17 *et seq.* The sentence should be retained, but be amended so as to indicate that the points referred to were the ideas put forward by the Special Rapporteur.

5. Mr. BARBOZA (Special Rapporteur) said that he agreed with Mr. Illueca, but the points in question were those raised not only by himself, but also by the previous Special Rapporteur.

6. Mr. FLITAN pointed out that paragraphs 17 *et seq.* dealt with the discussion in the Commission itself, a fact that should be made clear.

7. Mr. CALERO RODRIGUES agreed that it was important to separate the statement of the views of the Special Rapporteur from the account of the discussions in the Commission. He therefore supported the proposal to retain the last sentence. However, its content was foreign to the rest of paragraph 16. It should therefore be suitably adjusted and form a new paragraph 16 *bis*.

8. Sir Ian SINCLAIR proposed the following wording for the new paragraph 16 *bis*: "The discussion of the above-mentioned points in the Commission can be summarized as follows."

*It was so agreed.*

9. Mr. KOROMA noted that the second sentence of paragraph 16 stated that the discussion had not dealt with the question whether the topic covered "situations" as well as "activities". It should also be indicated that certain members had referred to "activities" not by reference to "situations", but by reference to "acts".

10. Mr. CALERO RODRIGUES proposed that the words "the discussion thus did not deal", in the second sentence, should be amended to read: "the discussion thus would not deal".

*It was so agreed.*

*Paragraph 16, as amended, and new paragraph 16 bis were adopted.*

## Paragraph 17

11. Mr. CALERO RODRIGUES proposed that the words "in the sense of material harm" should be added after the word "injury" in the first sentence, as had been done in paragraph 8.

*It was so agreed.*

12. Sir Ian SINCLAIR proposed that the words "no formal objections", in the same sentence, should be corrected to read "no formal objection".

*It was so agreed.*

13. Mr. MALEK proposed that in the phrase "Some members regarded ...", in the second sentence, the word "Some" should be rendered in French by *Plusieurs* instead of *Quelques*. Several members, including himself, had in fact withdrawn their names from the list of speakers on the point in question.

*Paragraph 17, as amended, was adopted.*

## Paragraph 18

14. Sir Ian SINCLAIR said that the third sentence was intended to reflect his views and some changes were required. In particular, the phrase "reference should be made only to" should be replaced by "the topic should be confined to"; the words "activities merely involving risk" by "other activities involving risk"; the words "at the present time" by "at an early stage of their development"; and the phrase "as had initially been the case with automobiles" by "as had initially been the case with the driving of automobiles on the public highway".

*It was so agreed.*

15. Mr. KOROMA proposed that the opening words of the third sentence, "Two members were of the opinion", should be replaced by "The view was expressed". It was contrary to the practice of the Commission to single out a specific number of members when giving an account of a discussion.

*It was so agreed.*

16. Mr. DÍAZ GONZÁLEZ said that the Spanish text used the word *riesgosas*, which did not exist. The words "involving risk", in the first and third sentences, should be rendered in Spanish by *que entrañan un riesgo*. In the last sentence, the words *que pueden entrañar un riesgo* should be used.

*It was so agreed.*

17. Mr. RIPHAGEN said that the words "(low risk of catastrophic damage)", in the third sentence, were difficult to understand and should be amended to read "(low probability of an accident that might cause catastrophic damage)".

18. Mr. LACLETA MUÑOZ proposed the adoption of Mr. Riphagen's amendment, as well as the proposals made by Mr. Díaz González regarding the Spanish text. In addition, throughout the Spanish text, the word *tópico* should be replaced by *tema*.

*It was so agreed.*

*Paragraph 18, as amended, was adopted.*

## Paragraph 19

19. Mr. MAHIOU proposed that the word *contamination*, in the first sentence of the French text, should be replaced by *pollution*, and the words *tout bonnement*, in the penultimate sentence, by *tout simplement*.

*It was so agreed.*

20. Mr. McCAFFREY said that he was the "One member" whose views were reflected in the first two sentences of paragraph 19. He would supply a revised text to give a more precise account of his views.

21. Mr. TOMUSCHAT proposed that the words "the Special Rapporteur will continue", in the last sentence, should be replaced by "the Special Rapporteur pointed out that he would continue".

*It was so agreed.*

*Paragraph 19, as amended, was adopted.*

## Paragraph 20

*Paragraph 20 was adopted.*

## Paragraph 21

22. Mr. MAHIOU proposed that the words *considérât devoir*, in the first sentence of the French text, should be replaced by *considérât comme devant*.

*It was so agreed.*

*Paragraph 21, as amended in the French text, was adopted.*

## Paragraph 22

23. Mr. TOMUSCHAT proposed that the words "in the view of the Special Rapporteur" should be inserted after "Moreover", at the beginning of the paragraph, in order to make it clear that the paragraph expressed the Special Rapporteur's views.

*It was so agreed.*

*Paragraph 22, as amended, was adopted.*

## Paragraph 23

24. Mr. McCAFFREY proposed the insertion of the words "the Special Rapporteur was of the view that" immediately after the opening words "as regards ships".

*It was so agreed.*

25. Mr. OGISO said that the statement at the end of the fifth sentence that "the United States paid compensation for injuries caused to the crew of the *Fukuryu Maru*" was inaccurate. He proposed that the passage in question should be replaced by the words "the United States had made an *ex gratia* payment where injuries had been sustained by the crew of the *Fukuryu Maru*".

*It was so agreed.*

26. Mr. TOMUSCHAT said that the meaning of the words "although there may be many of them, the activity is one and the same", in the first sentence, was difficult to grasp. They should be deleted and the first part of the sentence should simply read: "As regards ships, the Special Rapporteur was of the view that the

countries which might be affected by their operation must ...”

*It was so agreed.*

*Paragraph 23, as amended, was adopted.*

#### Paragraph 24

27. Mr. CALERO RODRIGUES said that paragraph 24 consisted of three parts. The first gave a summary of the Special Rapporteur's suggestions, the second summarized the debate in the Commission, and the third contained the Special Rapporteur's conclusions, to the effect that the course suggested by him had been tacitly accepted. There had in fact been no such acceptance and, for the time being, it could not be said that the Commission had endorsed the Special Rapporteur's suggestions. Accordingly, the last sentence should be replaced by the following: “Since, as indicated above (para. 6), the opinions expressed were only a partial reflection of the Commission's views, the matter should be considered further.”

*It was so agreed.*

28. Mr. ROUKOUNAS said that the word “obligations” should be used in the singular throughout the paragraph.

*It was so agreed.*

*Paragraph 24, as amended, was adopted.*

#### Paragraph 25

29. Mr. FLITAN proposed that the second sentence should be amended to read: “A few members even believed that the role of international organizations should be examined not only from that point of view, but also in the light of the fact that they might become subject to rights and obligations.”

*It was so agreed.*

*Paragraph 25, as amended, was adopted.*

#### Paragraph 26

30. Mr. McCAFFREY noted that, in several places in chapter VI, numbered paragraphs were subdivided into unnumbered subparagraphs, a method of presentation that should be avoided because it was confusing for the reader. He proposed that, throughout the report, such unnumbered subparagraphs should either become numbered paragraphs or be incorporated into the numbered paragraph to which they belonged.

*It was so agreed.*

31. Mr. ARANGIO-RUIZ pointed out the exaggerated character of the opening words of the penultimate sentence of paragraph 26, “The same member was the only speaker who expressed an opinion on possible exceptions”. It would be much better to use the simpler formula: “It was stated that to provide exceptions to the obligation to make reparation was inappropriate because ...”

32. Mr. LACLETA MUÑOZ said that the drafting of the last two sentences needed to be reviewed in all the languages.

33. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 26 with the amendments proposed and on the understanding that the secretariat would review the wording used in the last two sentences.

*Paragraph 26 was adopted on that understanding.*

#### Paragraph 27 and new paragraph 27 bis

34. Mr. TOMUSCHAT said that there were two ideas in paragraph 27. The first was contained in the first two subparagraphs and related to multinational corporations. The third subparagraph introduced an entirely new idea, relating to fact-finding machinery and the settlement of disputes. The first two subparagraphs should therefore be merged and the concluding subparagraph should form a new paragraph 27 bis.

*It was so agreed.*

*Paragraph 27, as amended, and new paragraph 27 bis were adopted.*

#### Paragraphs 28 and 29

*Paragraphs 28 and 29 were adopted.*

#### Paragraph 30

35. Mr. OGISO said that, during the debate (1974th meeting), he had expressed opposition to the concept of automatic application of strict liability. Accordingly, a new sentence should be inserted after the first sentence, and should read: “One member expressed opposition to the idea of an obligation to make reparation based upon strict liability.” The next sentence would then begin with the words “Another member”.

*It was so agreed.*

36. Mr. ROUKOUNAS said that the phrase “between the States of the international community”, in the last sentence, should be amended to read “between States as members of the international community”.

*It was so agreed.*

*Paragraph 30, as amended, was adopted.*

#### Paragraphs 31 and 32

*Paragraphs 31 and 32 were adopted.*

*Section B, as amended, was adopted.*

*Chapter VI of the draft report, as amended, was adopted.*

#### CHAPTER VII. The law of the non-navigational uses of international watercourses (A/CN.4/L.408 and Add.1)

##### A. Introduction (A/CN.4/L.408)

##### Paragraphs 1 to 7

*Paragraphs 1 to 7 were adopted.*

##### Paragraph 8

37. Mr. DÍAZ GONZÁLEZ said that the statement in the last sentence was inaccurate. It would not be true to say that, due to lack of time, the Drafting Committee had been “unable to consider” draft articles 1 to 9 at the 1984 session. It would be more correct to say that, to

date, the Drafting Committee had not been able to take any action on those articles.

38. Mr. FRANCIS pointed out that the Commission itself could not have taken any action on those articles in 1984 because it had had to appoint a special rapporteur. It was important to stress that the Commission had not been remiss in any way and that the delay was due to circumstances beyond its control.

39. Mr. McCAFFREY (Special Rapporteur) pointed out that paragraph 8 dealt with the Commission's discussions at the thirty-sixth session. It would seem inappropriate to say at the end of the paragraph that the Commission had not been able to deal with those draft articles "to date" and then proceed in paragraph 9 to describe the discussions at the thirty-seventh session.

40. His own preference would be to deal with the matter in a footnote. If such a method was unacceptable to Mr. Díaz González, the alternative would be to introduce a new paragraph explaining that the Drafting Committee had been unable to take up the draft articles at the thirty-sixth session. The same could be done with regard to the present session. However, there was no real need for such additional paragraphs, which had not proved necessary for the other topics. The Commission's report dealt with what had been done during the session, not with what had not been done.

41. Sir Ian SINCLAIR drew attention to paragraph 13 in section B (A/CN.4/L.408/Add.1) and especially the footnote in which it was stated that, at the present session, there had been "insufficient time for the Drafting Committee to take up" the draft articles in question. The paragraph and the footnote covered the whole question.

*Paragraph 8, as amended, was adopted.*

Paragraph 9

42. Mr. McCAFFREY (Special Rapporteur) said that the words "due to the resignation", in the first sentence, should be replaced by "following the resignation".

*Paragraph 9, as amended, was adopted.*

Paragraph 10

*Paragraph 10 was adopted.*

Paragraph 11

43. Mr. McCAFFREY (Special Rapporteur) said that the first sentence should be amended and divided into two. The first sentence would read: "The Commission considered the Special Rapporteur's preliminary report at its thirty-seventh session." The second sentence would begin with the words "There was general agreement". Lastly, at the end of the paragraph, the following words should be added: "and that members of the Commission would, of course, be free to comment on those views".

*It was so agreed.*

44. Mr. RAZAFINDRALAMBO said that some improvements were needed in the French text. In what was now the fourth sentence, the words *il fallait qu'elle fût*

*tout en son pouvoir* should be replaced by *la Commission devait faire tout ce qui était en son pouvoir* and the words *des plus graves de ceux* by *des problèmes les plus graves*. In the next sentence, the words *qui fussent* should be deleted and the words *en présence* should be inserted after *tous les intérêts*.

*It was so agreed.*

*Paragraph 11, as amended, was adopted.*

*Section A, as amended, was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.408/Add.1)**

Paragraphs 12 to 15

*Paragraphs 12 to 15 were adopted.*

New paragraph 15 bis and paragraph 16

45. Mr. DÍAZ GONZÁLEZ said that the question put to members by the Special Rapporteur (1976th meeting) had related not only to the term "international watercourse", as indicated in paragraph 16, but also to whether the "working hypothesis" accepted by the Commission in 1980 should be used as a basis for its work. He, for one, had pointed out (1979th meeting) that the 1980 working hypothesis was itself based on acceptance of the "system" concept proposed by the former Special Rapporteur, Mr. Schwebel. Should that hypothesis now be adopted as a valid basis for continuing the work on the topic, it would have to be accepted in exactly the same way as it had been in 1980. Consequently, the paragraph should include an additional sentence to the effect that one member had pointed out that the 1980 working hypothesis would have to be accepted on exactly the same terms as it had been originally.

46. Sir Ian SINCLAIR proposed the insertion, before paragraph 16, of a new paragraph 15 bis reading: "Due to lack of time, not all members of the Commission were able to comment on the second report of the Special Rapporteur." That new paragraph would shed light on the statement in the first sentence of paragraph 16 that "most members who addressed the issue" had favoured deferring the definition of the term "international watercourse".

47. Mr. ILLUECA said that he supported that proposal.

*New paragraph 15 bis was adopted.*

48. Mr. FLITAN suggested that the additional sentence proposed by Mr. Díaz González should be inserted immediately before the last sentence of paragraph 16. In addition, the word "therefore", in the last sentence, should be deleted.

49. Mr. ROUKOUNAS said that, during the discussion (*ibid.*), he had been in favour of including the "system" concept. The sentence proposed by Mr. Díaz González should therefore begin with the words "Some members", rather than "One member".

50. Mr. LACLETA MUÑOZ said that, if reference was to be made to the fact that some members favoured the system approach, he would propose the addition of a formula along the following lines: "Some members

stated that they were not in favour of the 'system' approach." Certain members, like himself, preferred the "watercourse" concept, and the paragraph should strike a fair balance between the two schools of thought.

51. Mr. YANKOV proposed the insertion, at the end of the second sentence, of the phrase: "while other members were of the view that the 'international watercourse' concept would be satisfactory".

52. Mr. McCAFFREY (Special Rapporteur) said that, as he recalled, 11 members had spoken during the discussion in favour of deferring the definition of the term "international watercourse"; five had specifically said that they were in favour of the "system" approach, and only one member had spoken against that approach.

53. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 16 with the amendments proposed by Mr. Díaz González, Mr. Flitan, Mr. Roukounas, Mr. Lacleta Muñoz and Mr. Yankov.

*It was so agreed.*

*Paragraph 16, as amended, was adopted.*

#### Paragraph 17

54. Mr. ROUKOUNAS proposed the insertion in the second sentence, after the words "to be derived therefrom", of the phrase "and that it should be included in the text". The word "Members", at the beginning of the next sentence, should be replaced by "Many members".

*It was so agreed.*

*Paragraph 17, as amended, was adopted.*

#### Paragraphs 18 and 19

*Paragraphs 18 and 19 were adopted.*

#### Paragraph 20

55. Mr. BALANDA proposed that the words "might not be capable", in the third sentence, should be amended to read "might not always be capable". The words "the needs", in the penultimate sentence, should be changed to "the expressed needs".

*It was so agreed.*

*Paragraph 20, as amended, was adopted.*

#### Paragraph 21

56. Mr. ROUKOUNAS proposed the insertion, after the second sentence, of a new sentence reading: "Still others preferred to use the term 'harm' without qualification."

*It was so agreed.*

*Paragraph 21, as amended, was adopted.*

#### Paragraph 22

57. Mr. ARANGIO-RUIZ said that paragraph 22 was a key paragraph, since it concerned the future work on the topic. Accordingly, it was not desirable to use a vague formulation like "to elaborate general principles

and rules", in the third sentence. The underlying issue was whether or not any legal rules or principles regarding international watercourses existed at the present time. There was some confusion in paragraph 22 between *lex lata* (codification), *lex ferenda* (progressive development) and the rather vague concept of "guidelines" or mere recommendations.

58. Mr. McCAFFREY (Special Rapporteur) said that certain changes should be made to the paragraph to meet the valid points raised by Mr. Arangio-Ruiz. The beginning of the third sentence should be amended to read: "The thrust of that approach was to elaborate draft articles setting forth the general principles and rules ..." As a consequential change, the last sentence would state: "... the formulation of draft articles setting forth legal principles and rules; the Commission could turn next to ..."

*It was so agreed.*

59. Sir Ian SINCLAIR proposed that, in the last sentence, the words "set of recommendations" should be replaced by "set of guidelines" and the words "that are not required by international law" by "that are not strictly required by international law".

*It was so agreed.*

*Paragraph 22, as amended, was adopted.*

#### Paragraph 23

60. Sir Ian SINCLAIR proposed that the words "members of the Commission", in the first sentence, should be amended to read: "those members of the Commission who spoke on the topic".

*It was so agreed.*

*Paragraph 23, as amended, was adopted.*

*Section B, as amended, was adopted.*

*Chapter VII of the draft report, as amended, was adopted.*

*The meeting rose at 5.50 p.m.*

## 1985th MEETING

*Wednesday, 9 July 1986, at 11 a.m.*

*Chairman: Mr. Alexander YANKOV*

*Present:* Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov.