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Summary record of the 2087th meeting

Topic:
Other topics

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fourth report (A/CN.4/412 and Add.1 and 2). They should be referred to in the Commission's report simply to give a balanced account of the debate.

82. Mr. BARBOZA pointed out that all the comments made on the matter were already contained in the summary records.

83. Mr. THIAM said that he supported Mr. Bennouna's proposal, more particularly since the Sixth Committee of the General Assembly might be surprised at the absence of any reference to the matter in the Commission's report when it had been discussed at length in the Special Rapporteur's report.

84. Mr. McCAFFREY (Special Rapporteur) said that he had reached a conclusion similar to Mr. Sreenivasa Rao's, namely that it would be better to remain silent on the point. He had spoken about the matter in his report because the works on the obligation of due diligence did so; as Special Rapporteur, it had been incumbent on him to present the topic from every angle. It certainly would not be surprising for the Commission's report to say nothing about the concepts in question, since he had not spoken about them in introducing his own report. Mr. Bennouna's amendment, if adopted, might in fact lead to superfluous discussion in the Sixth Committee.

85. Mr. THIAM pointed out that several members of the Commission had been opposed to the concepts. Their position ought to be reflected in the report.

86. Mr. McCAFFREY (Special Rapporteur) said that no member, including himself, had defended resort to the criteria of "good government" and "civilized State".

87. Mr. Sreenivasa RAO said that some members had mentioned those concepts and rejected them. The very silence of members who had not spoken about them had indicated that they shared that view. Hence members were unanimously agreed that the Commission's report could not and should not mention such anachronistic criteria, which would not fail to give rise to futile discussion. The Commission should beware of giving them the least respectability, or at the very least indicate its unanimity on the matter.

88. Mr. BEESLEY said that a question of principle was involved. It could not be assumed that the Special Rapporteur had adopted a particular stance simply because he had referred to the question in his report. Personally, he shared the opinion expressed by Mr. Sreenivasa Rao, but thought that the best course, if Mr. Bennouna's amendment were adopted, would be to add a sentence stating: "No member of the Commission, including the Special Rapporteur, had associated himself with that position."

The meeting rose at 1.05 p.m.

2087th MEETING

Monday, 25 July 1988, at 3 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its fortieth session (*continued*)

CHAPTER III. *The law of the non-navigational uses of international watercourses* (*continued*) (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

B. *Consideration of the topic at the present session* (*continued*) (A/CN.4/L.425)

Paragraph 62 (*continued*)

1. Mr. SHI said that he would prefer paragraph 62 not to include any reference to "good government" or a "civilized State". Those concepts had received no support during the debate and had been severely criticized by some members of the Commission. Mentioning them in the report would only divert the attention of the Sixth Committee of the General Assembly from the topic dealt with in chapter III and might possibly bring the Commission into disrepute.

2. Mr. GRAEFRATH referring to the additional sentence proposed by Mr. Beesley at the 2086th meeting (para. 88), said that a reference to the concepts in question, if included at all, might more appropriately be worded in positive, rather than negative terms. He suggested a sentence along the following lines: "All members agreed that any reference to 'good government' or a 'civilized State' in the definition of due diligence would be anachronistic and out of place."

3. Mr. BENNOUNA, Mr. THIAM and Mr. RAZAFINDRALAMBO accepted that suggestion.

4. Mr. SHI said that he, too, could accept Mr. Graefrath's suggestion.

5. Mr. CALERO RODRIGUES remarked that the sentence proposed by Mr. Graefrath would read rather oddly in paragraph 62. In his view, if such a sentence were included, it should be preceded by another sentence, perhaps along the lines suggested by Mr. Bennouna at the 2086th meeting (para. 78).

6. Mr. McCAFFREY (Special Rapporteur), Mr. KOROMA, Mr. MAHIOU and the CHAIRMAN, speaking as a member of the Commission, recommended leaving paragraph 62 as it stood. There was no point in giving prominence to concepts that were not endorsed by anyone.

7. Mr. BEESLEY, explaining the additional sentence he had proposed at the 2086th meeting, said that a statement in positive terms might look like a political declaration of a kind the Commission ought not to make.

8. Mr. TOMUSCHAT, supported by Mr. ARANGIO-RUIZ, said that he had nothing against the proposed addition, but thought a distinction should be made between the expressions "good government" and "civilized State", the former being widely used and, in other contexts, quite unexceptionable.

9. Mr. REUTER said that he was prepared, with some reservations, to accept the sentence proposed by Mr. Bennouna, but could not endorse the text proposed by Mr. Graefrath (para. 2 above). The concepts in question were certainly out of date, but they had been current at an earlier period in history and to attack them seemed gratuitously aggressive.

10. Mr. BEESLEY agreed, pointing out that the concept of "good government" was fundamental to his country's constitution.

11. After further discussion, in which Mr. BENNOUNA, Mr. REUTER and Mr. McCAFFREY (Special Rapporteur) took part, Mr. PAWLAK suggested that paragraph 62 should be held over until the end of consideration of chapter III of the draft report, on the understanding that the Special Rapporteur, assisted by other members of the Commission, would endeavour to draft a text acceptable to all.

It was so agreed.

12. Mr. McCAFFREY (Special Rapporteur), emphasizing his disapproval of the concepts in question, said that the discussion had revealed the dangers of referring to controversial opinions in a report. That, he thought, was regrettable as far as the completeness of the information placed before the Commission was concerned.

Paragraph 63

13. Mr. AL-BAHARNA suggested that, in the last sentence, the word "members" should be inserted between the words "Some" and "however".

It was so agreed.

Paragraph 63, as amended, was adopted.

Paragraph 64

Paragraph 64 was adopted.

Paragraph 65

14. Mr. ARANGIO-RUIZ said that paragraph 65 established a closer correlation between the burden of proof and dispute-settlement machinery than he thought really existed. He did not agree with the Special Rapporteur's view that it would be difficult to incorporate provisions on the burden of proof in the draft articles without knowing whether the future instrument would contain dispute-settlement machinery.

Paragraph 65 was adopted.

Paragraph 66

15. Mr. PAWLAK suggested that the last sentence should be amended to show that the opinion it expressed was held not only by the Special Rapporteur, but also by other members of the Commission.

16. Mr. McCAFFREY (Special Rapporteur) proposed that, to that end, the words "In his view" should be replaced by "He agreed with other members that".

It was so agreed.

17. Mr. REUTER said that the last sentence should be further amended to make it more comprehensible and less awkward. He proposed the following text: "He agreed with other members that those issues were best left to be dealt with in the framework of other topics under consideration where they mainly belonged."

It was so agreed.

Paragraph 66, as amended, was adopted.

Paragraphs 67 to 75

Paragraphs 67 to 75 were adopted.

Paragraph 76

18. Mr. EIRIKSSON suggested that a paragraph 76 *bis* should be added to reflect a comment he had made about article 17, paragraph 2. If that paragraph was to be made a separate article—a possibility mentioned in paragraph 72 of the draft report—the new article should be divided into two parts, one setting out the general obligation and the other dealing with co-operation between watercourse States to fulfil that obligation. Only in the latter part would the reference in article 17, paragraph 2, to action being taken "on an equitable basis" be appropriate.

19. Mr. McCAFFREY (Special Rapporteur) said that he would not oppose such an addition, provided it was drafted with economy.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 76, on the understanding that a paragraph 76 *bis* would be added to record the view expressed by Mr. Eiriksson.

It was so agreed.

Paragraph 76 was adopted.

Paragraphs 77 to 85

Paragraphs 77 to 85 were adopted.

C. Draft articles on the law of the non-navigational uses of international watercourses (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION (A/CN.4/L.425)

Paragraph 86

21. Mr. McCAFFREY (Special Rapporteur) said that paragraph 86 reproduced all the draft articles provisionally adopted so far by the Commission. In footnote 35 to article 1, the words "The Drafting Committee agreed" should be replaced by "The Commission agreed at its thirty-ninth session". Footnotes 36 to 41 to

articles 2 to 7, which had already been included in the Commission's report on its thirty-ninth session, were now superfluous and should be deleted.

22. Mr. EIRIKSSON said that he supported both those changes. In order to reflect the Commission's discussion on the term "watercourse States" at the present session, however, a footnote to article 3 should be included in the report, reproducing paragraph (1) of the commentary to the article approved at the thirty-ninth session,¹ which stated that the fact that the term "system" was not included in the expression "watercourse States" was without prejudice to its eventual use in the draft articles.

23. Mr. McCAFFREY (Special Rapporteur), supported by Mr. SHI (Rapporteur), said he understood the reasons for that proposal, but did not think it was necessary to dwell on an issue that had been settled at the thirty-ninth session.

24. Mr. TOMUSCHAT said that such a course might establish a dangerous precedent: if it repeated a reservation made at an earlier stage of its work, the Commission might be obliged to do the same with all reservations in future.

25. Mr. EIRIKSSON said that his proposal had been designed only to indicate, through a technical device found useful at the thirty-ninth session, that the term "system" would not be reproduced throughout the draft. If there was no longer any need for such a device, he would withdraw his proposal.

26. The CHAIRMAN, replying to a question by Mr. CALERO RODRIGUES, said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 86 with the changes made by the Special Rapporteur.

It was so agreed.

Paragraph 86, as amended, was adopted.

Section C.1, as amended, was adopted.

D. Points on which comments are invited (A/CN.4/L.425)

Paragraph 87

27. Mr. ROUCOUNAS said that, in his view, the single sentence in paragraph 87 was not sufficient to show that a number of articles on international watercourses had been prepared at the present session. He therefore suggested that the paragraph be amplified to state that the Commission sought the views of Governments particularly on the questions of pollution, environmental protection and co-operation in various fields, all of which were the subjects of draft articles.

28. Mr. BENNOUNA said that he fully supported that suggestion, particularly in view of the long discussions that had taken place in the Commission on the importance to be attached to environmental protection and pollution. The Special Rapporteur could perhaps draft an additional paragraph along the lines indicated by Mr. Roucounas.

29. Mr. CALERO RODRIGUES, endorsing Mr. Roucounas's remarks, said that paragraph 87, as drafted, could be ambiguous, since it referred to strict liability and due diligence "as they relate to draft article 16", and there was another article 16 (Absence of reply to notification), provisionally adopted by the Commission at the present session, which had nothing to do with those matters. It should therefore be made clear that the reference was to the new draft article and not to the earlier one.

30. Mr. McCAFFREY (Special Rapporteur) said that, in drafting paragraph 87, he had endeavoured to be as specific as possible in order to focus the comments of representatives in the Sixth Committee of the General Assembly on the narrow issues. He did not have any particular alternative text to suggest but would welcome any concrete proposals.

31. Mr. RAZAFINDRALAMBO, referring to the French text, said that the words *et qui sont* should be inserted before the word *examinées*.

32. Mr. TOMUSCHAT said that he found the reference to strict liability and due diligence somewhat contradictory in view of the last sentence of paragraph 66.

33. Mr. ROUCOUNAS proposed that paragraph 87 should be amended to read:

"The Commission would welcome the views of Governments, in particular on the following points:

"(a) the degree of elaboration with which the draft articles on international watercourses should deal with the problem of pollution;

"(b) the definition of pollution;

"(c) the concept of 'appreciable harm', as a standard for establishing liability;

"(d) the place of the protection of the environment within the framework of the draft articles;

"(e) the régime of protection and international co-operation in cases of emergency."

34. Mr. BARBOZA proposed that the words "the views of Governments" should be replaced by "the views of the General Assembly": the Commission did not work directly with Governments, but through the General Assembly, in which Governments were represented.

35. Mr. ARANGIO-RUIZ said that the reference to "appreciable" harm, in point (c) of the text proposed by Mr. Roucounas, might invite acceptance of that standard.

36. Mr. KOROMA said that the proposed text was quite elaborate and might require a commentary.

37. Mr. BARSEGOV said that it would be better to proceed from the general to the particular, dealing first with any issues regarding liability in the context of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and then with the question of liability as it applied to international watercourses.

38. Mr. YANKOV said that he agreed with the general approach adopted in the text proposed by Mr. Roucounas. It would perhaps be better, however, to em-

¹ *Yearbook* . . . 1987, vol. II (Part Two), p. 26.

phasize that the list of points was not exhaustive, and to indicate, in the introductory clause, that it presented some of the matters on which the Commission wished to have the General Assembly's advice.

39. If, as he assumed, point (b) referred to the definition of pollution as it related to international watercourses, it would be advisable to say so explicitly.

40. Mr. BENNOUNA said that, in the light of Mr. Tomuschat's reference to paragraph 66 of the report and Mr. Barsegov's comments, the Commission might wish to clarify the issue of liability before taking a position on its application in the specific case of international watercourses. A reference to paragraph 66 should perhaps be included in point (c) of the proposed text.

41. Mr. REUTER said that Mr. Bennouna's remarks raised the question of the topics under which the problems at issue should be dealt with. It was a highly technical question, and one that should be decided by the Commission alone. For if the General Assembly were consulted, he thought it would simply return the ball to the Commission's court.

42. He himself would prefer to approach the question from a different standpoint—that of the priorities allocated by the General Assembly, in its resolutions, for the Commission's work. While the Commission could not question those priorities, it could draw the General Assembly's attention to the fact that, in consequence of them, it found itself in a rather difficult position and would like to know the general feeling of the Assembly on the matter. The Commission should not, however, ask the General Assembly for a technical reply.

43. Mr. CALERO RODRIGUES, referring to Mr. Barboza's proposal, said that, for the sake of consistency, it would be best to use the language of paragraph 5 (c) of General Assembly resolution 42/156 of 7 December 1987, in which the Commission was asked to indicate, for each topic, the specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

44. With regard to point (c) of the text proposed by Mr. Roucounas, if the intention was to obtain opinions on the concept of appreciable harm only as it related to pollution, that point should not be formulated in general terms, but should be reworded to read: "The concept of 'appreciable harm' in the context of paragraph 2 of draft article 16."

45. Mr. BARBOZA suggested that the relevant paragraphs of the report should be indicated against each point in the text proposed by Mr. Roucounas, so as to facilitate the General Assembly's reply. Perhaps it would be excessive to submit as many as five points to the General Assembly. Point (a) did not seem really necessary: any representative in the Sixth Committee reading the Commission's report would appreciate its concern about the degree of elaboration with which the draft articles should deal with the problem of pollution. As to point (b), the definition of pollution was a technical question which the Commission should try to

resolve itself: it did not seem appropriate to put that question to the General Assembly.

46. On the other hand, he fully approved of the inclusion of point (c), since it was quite appropriate for the Commission to ask for guidance from the General Assembly on the concept of appreciable harm. On that point, he supported the rewording proposed by Mr. Calero Rodrigues. He also approved of the inclusion of point (d), on the place of protection of the environment in the draft articles. He had doubts about point (e): the régime of protection and co-operation in cases of emergency seemed more a subject for a conference. If that point was to be kept, some clarification was essential.

47. Mr. KOROMA and Mr. CALERO RODRIGUES supported the proposal by Mr. Barboza to insert references to the relevant paragraphs of the Commission's report against each of the five points.

48. Mr. ARANGIO-RUIZ stressed the technical character of some questions. He urged the adoption of an empirical approach. The Commission should not refrain from discussing an issue relating to international watercourses simply because it would be dealt with under other items on its agenda.

49. Mr. ROUCOUNAS said that, if the five points he had proposed were adopted, references to both the appropriate paragraphs of the report and the relevant draft articles should be included, in order to facilitate discussion in the Sixth Committee. As to point (c), he accepted the language proposed by Mr. Calero Rodrigues, subject to the views of the Special Rapporteur.

50. Mr. EIRIKSSON said that paragraph 87 was a very important part of the report and should be given most careful attention. Of the five points proposed by Mr. Roucounas, he thought that points (a) and (d) could be conveniently combined. On point (b), he agreed with those who considered that the definition of pollution was a technical question with which the Commission itself should deal. On point (c), he supported the rewording proposed by Mr. Calero Rodrigues. On point (e), he did not believe that the Commission had enough information to enable the Sixth Committee to comment usefully.

51. The CHAIRMAN, speaking as a member of the Commission, urged that the points to be put to the General Assembly, or to Governments, should be framed in precise, but at the same time general, terms. They should also be neutral: for example, if a reference to the concept of "appreciable harm" were included, it should be specified that some members of the Commission were not in favour of adopting that standard.

52. The points to be included should also be limited to two or three: the General Assembly would consider the pertinent issues when examining the articles submitted to it.

53. Mr. BARSEGOV said that some of the points proposed for inclusion in paragraph 87 had not really arisen during the Commission's work on the topic of international watercourses. He urged that only basic questions should be included.

54. Mr. BENNOUNA supported Mr. Calero Rodrigues's suggested rewording for point (c). Points (a) and (d) could perhaps be combined.

55. Mr. ARANGIO-RUIZ said that the Commission was not obliged to put questions to the General Assembly. It might be better to leave the Assembly to examine the articles submitted to it and state its views on them. Pressing the General Assembly to answer questions could lead to unsatisfactory results.

56. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the five points proposed for submission to the General Assembly were academic in character. There was no point on which the Commission needed political guidance from the General Assembly. Asking questions unnecessarily could have the effect of eliciting answers that would restrict the Commission's freedom of choice.

57. Mr. CALERO RODRIGUES again drew attention to paragraph 5 (c) of General Assembly resolution 42/156 of 7 December 1987, in which the Assembly requested the Commission:

To indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

Clearly, the Commission could not disregard those specific instructions. It should indicate the issues on which it wished to have the views of representatives in the Sixth Committee. The Commission would certainly be criticized if it failed to do so.

58. It was worth noting that that subparagraph of resolution 42/156 of 1987 had had its origin in a subparagraph introduced into the corresponding resolution of 1986 (resolution 41/81) at the request of a group of representatives who had believed that it would be helpful to have some general guidance on the issues the Commission wished to be discussed in the Sixth Committee.

59. Clearly, the object was not to obtain answers from the General Assembly by asking questions, but to single out specific issues of major interest to the Commission so that the Sixth Committee could discuss them in depth.

The meeting rose at 6.05 p.m.

2088th MEETING

Tuesday, 26 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindra-

lambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its fortieth session (continued)

CHAPTER III. *The law of the non-navigational uses of International watercourses* (continued) (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

D. *Points on which comments are invited (concluded)* (A/CN.4/L.425)

Paragraph 87 (concluded)

1. The CHAIRMAN drew attention to the revised texts for paragraph 87 proposed by Mr. Roucounas and by the Special Rapporteur.

2. The text proposed by Mr. Roucounas (2087th meeting, para. 33) read:

"The Commission would welcome the views of Governments, in particular on the following points:

"(a) the degree of elaboration with which the draft articles on international watercourses should deal with the problem of pollution;

"(b) the definition of pollution;

"(c) the concept of 'appreciable harm' as a standard for establishing liability;

"(d) the place of the protection of the environment within the framework of the draft articles;

"(e) the régime of protection and international co-operation in cases of emergency."

3. The text proposed by the Special Rapporteur read:

"The Commission would welcome the views of Governments, either in the Sixth Committee or in written form, in particular on the following points:

"(a) the degree of elaboration with which the draft articles should deal with problems of pollution and environmental protection, discussed in paragraphs 32-34, 67-68 and 73-74 above;

"(b) the concept of 'appreciable harm' in the context of paragraph 2 of draft article 16, discussed in paragraphs 49-57 above."

4. Mr. ROUCOUNAS said that his proposal had been circulated simply as a matter of interest. The Commission had before it only the text proposed by the Special Rapporteur.

5. Mr. McCAFFREY (Special Rapporteur) said that he had sought to reconcile the various points of view expressed at the previous meeting. Some members had thought that too many questions were to be put to States; others had felt that cross-references to particular paragraphs of the report were needed. The text he was now submitting consolidated points (a) and (d) of the text proposed by Mr. Roucounas, which had been endorsed by a number of members.

6. Mr. KOROMA said that it might be better, in the introductory clause of paragraph 87 to speak of the General Assembly, rather than the Sixth Committee. Again, perhaps point (a) was not sufficiently precise.