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Summary record of the 1983rd meeting

Topic:
Other topics

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Apart from not dealing at all with agenda item 8, the Commission had dealt only superficially with the various other items, due to lack of time.

55. Mr. YANKOV, while agreeing with the observation made by Mr. Díaz González, drew attention to paragraph 9 of chapter VIII of the draft report, where it was explained at length that the Commission had been short of time and had therefore been unable to give full treatment to many of the topics on its agenda.

56. Mr. FRANCIS said that he, too, agreed with Mr. Díaz González. The matter could perhaps be dealt with by means of a footnote referring to paragraph 9 of chapter VIII.

57. Mr. ARANGIO-RUIZ said that, in view of the importance of the matter, it would be better to stress the point again in paragraph 9 of chapter I.

58. Mr. KOROMA also supported the comments by Mr. Díaz González.

59. Mr. McCAFFREY proposed that the valid point made by Mr. Díaz González should be dealt with by adding, at the end of the first sentence of paragraph 9, the words "but as explained in the same chapter (paragraph 9), it was unable to give adequate consideration to several topics due to lack of time".

It was so agreed.

Paragraph 9, as amended, was adopted.

Chapter I of the draft report, as amended, was adopted.

The meeting rose at 12.45 p.m.

1983rd MEETING

Tuesday, 8 July 1986, at 10.05 a.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. Laclata 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 (A/CN.4/L.407 and Add.1)

A. Introduction (A/CN.4/L.407)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

1. Mr. McCAFFREY proposed that, in the second sentence, the word "however", which was redundant because the word "but" had been used in the same sentence, should be deleted.

It was so agreed.

Paragraph 4, as amended, was adopted.

Section A, as amended, was adopted.

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

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

2. Mr. MALEK suggested that the first part of the second sentence should be amended to read: "Owing to the lack of available time, only just over three meetings were devoted to consideration of the topic and several members were unable to make statements ..."

3. Mr. BALANDA suggested that the words "Owing to the lack of available time", in the second sentence, should be replaced by "Owing to the shortening of the present session", in order to make it clear why the Commission had had so little time to consider the topic. He also suggested that, in the last sentence of the French text, the words *nuances d'opinion* should be replaced by *opinions*.

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7

4. Mr. MALEK said that he did not understand the meaning of the words "of its dynamics", at the end of the second sentence.

5. Mr. BARBOZA (Special Rapporteur) said that, as he had indicated in his introductory statement (1972nd meeting, para. 33), his analysis had focused mainly on the dynamics of the schematic outline, in other words on the way it operated, and it was in that sense that the expression "of its dynamics" should be understood.

Paragraph 7 was adopted.

Paragraph 8

6. Mr. FLITAN said that, contrary to the Commission's usual practice, some sentences of the French text of chapter VI had been drafted in the first person plural. He therefore proposed that, in the last sentence of paragraph 8, the words *nous permet de nous démarquer de manière encore plus nette du domaine* should be replaced by *permet de démarquer de manière encore plus nette ce sujet du domaine*. The words *a cessé d'être nécessaire* should, moreover, be replaced by *n'est pas nécessaire*.

7. Sir Ian SINCLAIR said that, in the last sentence, the words "In the view of the Commission itself" wrongly gave the impression that a conclusion reached by the Commission was being expressed.

8. Mr. BARBOZA (Special Rapporteur) said that Sir Ian Sinclair's point was well taken.
9. Mr. RIPHAGEN agreed with Sir Ian Sinclair that the content of the last sentence must not be attributed to the Commission as a whole.
10. Mr. CALERO RODRIGUES said that the fourth and fifth sentences stood in need of correction in so far as the term "injury" had been used. The term used in the original Spanish text was *daño*, whose meaning was very clear: it corresponded more to "harm" or "damage" than to "injury".
11. Mr. RAZAFINDRALAMBO said that the problems encountered by the English-speaking members of the Commission did not arise in French and that *préjudice* was the appropriate term to be used in paragraph 8. The French text of the last part of the last sentence should, however, be brought into line with the English.
12. Mr. McCaffrey said that, in the light of earlier work on the topic, the question raised by Mr. Calero Rodrigues was an important one. The intention in the fourth and fifth sentences had been to refer to harm or to damage, rather than to injury in the sense of legally recognizable damage. The term "injury", in the fourth and fifth sentences, should therefore be replaced either by the term "harm", which would adequately render the Spanish term *daño*, or by wording along the following lines: "injury in the sense of factual harm".
13. Mr. MAHIOU drew attention to the need to harmonize the terminology used, particularly if injury was always to be regarded as harm or damage which might have legal consequences entailing rights and obligations. He agreed with Mr. Razafindralambo's suggestion concerning the last part of the last sentence.
14. Mr. REUTER said that, as a rule, there was no distinction in French between the concepts of *préjudice* and *dommage*. However, a term such as *lésion* was nearly always used in French to refer to a flaw in a contract and could not be regarded as a synonym of the term "harm". The Commission therefore had to be careful in its use of terms and reserve its general position.
15. Mr. BARBOZA (Special Rapporteur) said that, although the Commission had adopted the view that injury was not taken into account in defining the conditions for the existence of an internationally wrongful act and that a breach of an international obligation would be enough, even without material harm, there was nothing to prevent it from changing its mind. The last sentence of paragraph 8 could therefore be deleted, particularly since it merely reflected what was stated in his second report (A/CN.4/402, para. 9) and what he had indicated in his oral introduction (1972nd meeting).
16. Mr. TOMUSCHAT said that, if the last sentence were deleted, the concern expressed by various members would be allayed.
17. Sir Ian SINCLAIR proposed that only the first three sentences of paragraph 8 should be retained.
18. Mr. ARANGIO-RUIZ supported that proposal.
19. Mr. CALERO RODRIGUES said that, in his view, only the last sentence should be deleted. The Commission would, however, still have to deal with the problem of the use of the term "injury" in the English text.
20. Mr. KOROMA said that the appropriate term to use in the English text was "harm".
21. Mr. CALERO RODRIGUES said that the term "harm" was quite acceptable to him.
22. Mr. DÍAZ GONZÁLEZ said that the Commission appeared to agree that the last sentence should be deleted.
23. Mr. MAHIOU noted that, if the last sentence were deleted, the only remaining problem would be that of the wording of the fourth sentence of the English text.
24. Mr. FLITAN said that the logical approach would be to use the wording of the schematic outline.
25. Mr. BARBOZA (Special Rapporteur) said that the use of the English term "harm" should not give rise to any problems.
26. Mr. NJENGA said that the term "harm" was more appropriate than the terms "injury" or "damage". The term "injury" had, however, been used in the Special Rapporteur's second report (A/CN.4/402). He therefore proposed that the problem should be solved by using the wording suggested by Mr. McCaffrey, namely "injury in the sense of factual harm".
27. Mr. DÍAZ GONZÁLEZ and Mr. EI RASHEED MOHAMED AHMED supported that proposal.
28. Sir Ian SINCLAIR proposed that the fourth sentence should be amended to read: "Although the present Special Rapporteur did not rule out that idea, he found that the concept of 'injury' in the sense of material harm constituted the cement of that 'continuum': injury in that sense, whether as injury which had already occurred or ..."
29. Mr. CALERO RODRIGUES supported that proposal.
30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the amendment to the fourth sentence proposed by Sir Ian Sinclair and to delete the last sentence.
- It was so agreed.*
- Paragraph 8, as amended, was adopted.*
- Paragraph 9
31. Mr. McCAFFREY suggested that the secretariat should be requested to harmonize the tenses of the verbs used in chapter VI.
32. Since paragraph 9 consisted of one long sentence, he proposed that it should be divided into two: the first would end with the words "incumbent on any person living in society" and the second would begin with the words "He therefore concluded that those terms referred not only to the secondary obligation ...".
- It was so agreed.*

33. Mr. McCAFFREY requested the Special Rapporteur to explain how the conclusion, at the end of the new second sentence, that “obligations of prevention would be within the scope of the topic” related to the first part of the sentence.

34. Mr. BARBOZA (Special Rapporteur) said that the Commission’s discussions and his predecessor’s fifth report¹ clearly showed that the term “liability”—like the Spanish term *responsabilidad* and the French term *responsabilité*—referred both to the consequences of a breach of an obligation and to the obligation itself. Consequently, when the General Assembly had invited the Commission to study the topic of international liability for injurious consequences arising out of acts not prohibited by international law,² it had implicitly requested it to deal with the consequences of a breach of an obligation and with the duties which were incumbent on States and which included obligations of prevention. That was the conclusion he had reached as a result of his study. In his view, obligations of prevention were duties and they formed part of the general idea of liability.

Paragraph 9, as amended, was adopted.

Paragraph 10

35. Mr. ARANGIO-RUIZ said that the word “transboundary”, in the second sentence, was not sufficiently broad to cover all the possible forms of harm which might arise, such as large-scale environmental harm. A term more in keeping with the scope of the topic should be found.

36. Mr. BARBOZA (Special Rapporteur) pointed out that the meaning of the term “transboundary” was explained in the last sentence of paragraph 20.

37. Mr. KOROMA said that the second sentence might be interpreted as excluding activities which did not involve risk. Accordingly, he proposed that the words “involving risk” should be replaced by “not prohibited by international law”.

38. In addition, the point had been made during the Commission’s discussion that the scope of the topic should cover not only physical loss or injury, but also economic or financial loss. That point should be reflected in the report.

39. Mr. ROUKOUNAS proposed that, in order to take account of the suggestion by Mr. Arangio-Ruiz, the words “and affecting one or more States” should be added after the words “an activity involving risk”.

40. Mr. TOMUSCHAT, supported by Mr. McCAFFREY, pointed out that paragraph 10 summarized the views expressed by the Special Rapporteur in his report (A/CN.4/402) and could therefore not be amended.

41. Mr. MAHIOU said that he agreed with Mr. Tomuschat that the text should be left as it stood. He also noted that the last sentence appeared to meet the concern expressed by Mr. Koroma.

42. Mr. BARBOZA (Special Rapporteur) said that paragraph 10 was in the part of chapter VI dealing with his second report and that it reflected his opinion; it could therefore not be amended. Referring to the second point raised by Mr. Koroma, he said that, following lengthy discussions in the Commission and in the Sixth Committee for the General Assembly, it had been decided that the question of economic activities giving rise to harm should be discussed only at a later stage. Mr. Koroma’s opinion might, however, be reflected in another part of chapter VI of the report.

43. The CHAIRMAN suggested that Mr. Koroma might, if he so wished, draft a text to be included in another paragraph.

44. Mr. YANKOV said that the suggestions made by Mr. Koroma might be reflected in paragraph 18 of chapter VI of the draft report.

45. Mr. NJENGA said that, while he appreciated the fact that what the Special Rapporteur had said in his report could not be changed, he, like Mr. Koroma, wondered whether the Special Rapporteur was not limiting the scope of the topic to a narrower field than was implied by the title.

46. Mr. LACLETA MUÑOZ said that paragraph 10 reflected only the opinions and concerns of the Special Rapporteur. In order to avoid any misunderstanding, the first sentence of the English and Spanish texts should therefore be brought into line with the French text. The words “The point of departure”, at the beginning of the second sentence, should then be replaced by “His point of departure”.

47. Mr. KOROMA said that, in view of the comments made by members, he would defer making his proposal until a later stage.

48. Mr. BARBOZA (Special Rapporteur) said that he had “inherited” the scope of the topic and the point of departure in question as they had been defined in the previous Special Rapporteur’s reports and as they had emerged from the discussions in the Commission and the Sixth Committee. He had thus proceeded on the basis of what had been decided by consensus, not on the basis of his own ideas. He therefore considered that paragraph 10 should be left as it stood. The concern expressed by Mr. Koroma might, as suggested by Mr. Yankov, be reflected in paragraph 18.

49. Mr. TOMUSCHAT proposed that the words “The point of departure”, at the beginning of the second sentence, should be replaced by “The Special Rapporteur’s point of departure”, in order to make it clear that the views expressed were those of the Special Rapporteur.

Paragraph 10 was adopted.

Paragraph 11

50. Mr. McCAFFREY proposed that, for greater clarity, the words “It was observed in the second report that” should be inserted at the beginning of the paragraph.

It was so agreed.

¹ Yearbook ... 1984, vol. II (Part One), pp. 170-171, document A/CN.4/383 and Add.1, paras. 39-40.

² General Assembly resolution 3071 (XXVIII) of 30 November 1973, para. 3 (c).

51. Mr. BALANDA said that, in the third sentence of the French text, the words *des obligations en gestation* were much too vague and that the use of the term "soft law" in brackets did not make their meaning any clearer. He therefore proposed that the phrase *étaient des obligations en gestation (soft law)* should be replaced by *avaient des conséquences juridiques*, so that the possibility referred to in the remainder of the sentence would be easier to understand.

52. Mr. BARBOZA (Special Rapporteur) said that it had to be determined whether the obligations in question formed part of "soft law" or whether the schematic outline did not provide for the possibility of a right of action. His point of departure had been that the obligations referred to in the schematic outline did not, in themselves, form part of "soft law", although they could have consequences under general international law. In order to express that idea more clearly, the words *de par leur nature* might be added after the words *étaient des obligations en gestation (soft law)* in the French text.

53. Mr. ARANGIO-RUIZ said that, as in paragraphs 10 and 12, it had to be specified that paragraph 11 reflected the view of the Special Rapporteur. Although the term "soft law" was very ambiguous, it did, in his own opinion, refer to rules which were not yet, and might never be, rules of law, since "soft law" could continue to be "soft law" for centuries. That term therefore did not correspond to the French term *obligations en gestation*, which implied that there would be an outcome. Only the English term "soft law" should be used in the French text.

54. Mr. BARBOZA (Special Rapporteur) suggested that the French text should be brought into line with the Spanish text, which referred only to "soft law".

55. Mr. MAHIOU, supporting the views expressed by Mr. Arangio-Ruiz and Mr. Barboza, said that the French text was an interpretation, not a literal translation. It should therefore be brought into line with the English and Spanish texts by amending it to read: *Ensuite, il fallait déterminer si ces obligations, ou certaines d'entre elles, faisaient, par leur nature, partie de ce que l'on appelait soft law, ou bien si ...*

It was so agreed.

56. Sir Ian SINCLAIR proposed that the word "incomplete", in the third sentence, should be replaced by "imperfect", which was the term more commonly used in respect of obligations.

It was so agreed.

57. Mr. LACLETA MUÑOZ said that, in the Spanish text, the word *incompletas* should also be replaced by *imperfectas*. The word *la* before the expression "soft law" should be deleted.

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraph 12

58. Mr. McCaffrey proposed that the first sentence should begin with the words "In the view of the Special Rapporteur". The third sentence should end

with the word "expectations" and the next sentence should begin with the words "But ultimately, in the view of the Special Rapporteur".

59. Mr. BARBOZA (Special Rapporteur) said that he accepted Mr. McCaffrey's proposals. He pointed out, however, that the new fourth sentence ("But ultimately, in the view of the Special Rapporteur, it could not be denied ...") reflected his own view of the previous Special Rapporteur's work, or in other words an idea which had been advanced by his predecessor and which he himself had borrowed. He therefore suggested that the beginning of the sentence should be replaced by the words: "The previous Special Rapporteur had indicated that it could not be denied ..."

Mr. McCaffrey's amendments were adopted.

60. Mr. BALANDA said that, in his view, there was no need to use the words "strict liability" in the French text, and they should therefore be deleted. He also proposed that the words "In the Special Rapporteur's view" should be inserted before "The operation of the obligation of reparation" at the beginning of the new fifth sentence.

61. Mr. BARBOZA (Special Rapporteur) said that that sentence also reflected the opinion of the previous Special Rapporteur, as explained at the beginning of the third sentence, which read: "From what the present Special Rapporteur has been able to gather from earlier work ..."

62. Mr. FRANCIS said that he had understood the previous Special Rapporteur's view to have been that the concept of strict liability, as a norm in the area in question, was reflected only in the relevant conventions signed thus far. It was because of his dismissal, in given circumstances, of the notion of strict liability that he had specified in the schematic outline that the point at which a right of action would arise was when negotiations broke down and reparations were not made.

63. Mr. TOMUSCHAT pointed out that the paragraphing of the English text did not always correspond to that of the French and Spanish texts. The discrepancies should be remedied.

64. Mr. MAHIOU noted that the second sentence of the French text referred to *Ces deux orientations*, whereas the English text referred to "The investigation". Also, the word *nous* should be deleted from the French text of that sentence, the beginning of which would then read: *Cette orientation de recherche conduisait ...*

It was so agreed.

Paragraph 12, as amended, was adopted.

Tribute to Mrs. Maria Petermann

65. The CHAIRMAN informed members that Mrs. Maria Petermann, who had worked for the Commission for many years, was planning to take early retirement. He paid tribute to Mrs. Petermann for her competence and outstanding professional abilities, as well as for her devotion, discretion, warmth, kindness and sensitivity.

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.