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Summary record of the 2140th meeting

Topic:
Other topics

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Paragraph 35

43. Mr. BARSEGOV proposed that the second sentence be replaced by the following text:

“In the view of one member, invocation of analogous principles selectively taken from individual decisions of domestic courts was not always justified, since the decisions of domestic courts and domestic law were not sources of international law.”

44. Mr. ARANGIO-RUIZ said he doubted whether that text adequately reflected Mr. Barsegov’s opinion, since he had denied the possibility of deriving principles of international law by proceeding by analogy with internal law.

45. Mr. BARSEGOV said that the word “analogous” in his amendment could be deleted.

Mr. Barsegov’s amendment was adopted.

Paragraph 35, as amended, was adopted.

Paragraph 36

46. Mr. BARSEGOV said he doubted whether the phrase “the articles may be drafted in a way that was appropriate for a residual convention”, in the fifth sentence, accurately reflected the discussion, since the preference of several members of the Commission was for a list enumerating the activities to which the articles applied. He therefore proposed the addition of the following sentence to summarize what he had said about the list of activities:

“Another member remarked that no member of the Commission had been able to indicate which types of activity entailing no risk could be the cause of transboundary harm considered as the sole source of liability.”

47. Mr. EIRIKSSON said he was not sure how the words “considered as the sole source of liability” in that amendment should be understood.

48. Mr. BARSEGOV said that, according to the dualist approach, liability could be considered to derive either from activities involving risk or from activities involving no obvious risk; but could anyone give an example of an activity which, although it involved no intrinsic risk, could nevertheless cause harm?

49. Mr. BARBOZA (Special Rapporteur) said that Mr. Barsegov’s view was reflected in paragraph 41.

50. Mr. EIRIKSSON said he thought that the amendment proposed by Mr. Barsegov should apply to paragraph 41.

51. Mr. CALERO RODRIGUES said that proposals made by a member of the Commission with a view to recording in the Commission’s report an opinion he had expressed should not give rise to a discussion.

52. Mr. BARSEGOV said that he had no objection to the sentence he had proposed being added to paragraph 41 rather than to paragraph 36; he had raised the matter in connection with paragraph 36 only because the list of activities was mentioned there.

53. The CHAIRMAN said that the Commission would revert to Mr. Barsegov’s proposal when it considered paragraph 41.

54. In the eighth sentence of paragraph 36, he suggested that the words “another member” be replaced by “some members”.

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraph 37

55. Mr. BARSEGOV said that he had indeed expressed the opinion summarized in the first sentence, but from a different viewpoint. In his view, the different types of responsibility were not interchangeable: to confuse them introduced a dualist approach into the study of the topic.

56. Mr. BEESLEY said he recognized that it was difficult to record the opinions of members of the Commission in the report, but added that, at the present stage, concrete proposals would be preferable.

57. Mr. BARBOZA (Special Rapporteur) observed that the sentence called in question by Mr. Barsegov in fact reflected the opinion of Mr. Thiam. He suggested that the words “In the view of a member” should be replaced by “In the view of two members of the Commission”.

58. After an exchange of views in which Mr. BENNOUNA (Rapporteur), Mr. BARSEGOV, Mr. McCAFFREY and Mr. BARBOZA (Special Rapporteur) took part, Mr. BARSEGOV proposed the addition of the following sentence: “According to one member of the Commission, the different types of responsibility could not be combined, and unfortunately the dualist approach would lead to that eventuality.”

59. Mr. BEESLEY said he agreed with the Special Rapporteur that there could be two bases of no-fault liability, which could be reflected in one and the same text. If the draft report, which was balanced and fair, was to be called in question again by additions and amendments intended to record what he must regretfully qualify as a minority view, he would have to do what was required to restore the balance or even reopen the debate if necessary.

60. The CHAIRMAN said he understood that, according to Mr. Barsegov, the Commission’s position could be a source of confusion. But did not the penultimate sentence of paragraph 37 reflect that concern? He invited the Commission to revert to paragraph 37 at the next meeting.

The meeting rose at 1.05 p.m.

2140th MEETING

Monday, 17 July 1989, at 3 p.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat.

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

CHAPTER V. International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/L.438)

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

Paragraph 15 (concluded)

1. Mr. BENNOUNA (Rapporteur) recalled that objections had been raised at the previous meeting to the use of the expressions *responsabilité indirecte* in French and "causal liability" in English. After consulting the Special Rapporteur, he would propose that, in conformity with general usage, the expressions to be used in paragraph 15 should be *responsabilité objective* and "strict liability", i.e. the expressions used elsewhere in the draft report. Accordingly, he proposed that the third sentence be amended to read: "The decision of the arbitral tribunal in the *Trail Smelter* case had provided for a twofold régime of responsibility for wrongfulness and strict liability."

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 37 (concluded)

2. The CHAIRMAN said that Mr. Thiam wished to propose that the first sentence of paragraph 37 be amended to read: "According to one member, the Special Rapporteur had not always drawn the line between the topic of State responsibility for wrongful acts and the present topic."

3. If there were no objections, he would take it that the Commission agreed to adopt that amendment.

It was so agreed.

Paragraph 37, as amended, was adopted.

Paragraph 38

4. Mr. McCAFFREY proposed that the fourth sentence, reading: "Otherwise, they feared that the matter would be taken up by other specialized bodies", should be deleted.

It was so agreed.

Paragraph 38, as amended, was adopted.

Paragraph 39

5. Mr. BARSEGOV asked why certain passages were underlined.

6. Mr. BARBOZA (Special Rapporteur) explained that the purpose was to draw the attention of the Sixth Committee of the General Assembly to certain points.

7. Mr. Sreenivasa RAO expressed doubts about the wisdom of underlining any passage.

8. Mr. CALERO RODRIGUES proposed that the underlining should be dispensed with, not only in paragraph 39 but also in the following paragraphs.

It was so agreed.

Paragraph 39, as amended, was adopted.

Paragraph 40

Paragraph 40 was adopted.

Paragraph 41

9. The CHAIRMAN drew attention to a proposal by Mr. Barsegov to reformulate the first two sentences of paragraph 41 as follows:

"Concern was expressed about the inclusion of appreciable harm within the scope of the articles as the basis of liability by itself. One member felt that that was tantamount to establishing absolute liability for any appreciable harm and that it would make the dividing line between the present topic and that of State responsibility less clear."

10. Mr. BARBOZA (Special Rapporteur) asked what was the effect of the words "by itself", at the end of the first sentence of that amendment.

11. Mr. BARSEGOV explained that appreciable harm was being treated as the only basis of liability or as the basis of liability *per se*. Hence his objection.

Mr. Barsegov's amendment was adopted.

Paragraph 41, as amended, was adopted.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

12. Mr. BARSEGOV expressed doubts about the last part of the first sentence, which spoke of the "very strong views which were expressed in the Commission last year and in the Sixth Committee", in connection with the concepts of harm and risk. As he recalled, there had been a marked division of opinion on the subject both in the Commission and in the Sixth Committee of the General Assembly.

13. Mr. BARBOZA (Special Rapporteur) pointed out that paragraph 44 contained an expression of his own views as Special Rapporteur. He believed he was right in saying that "very strong views" had been expressed on the question, both in the Commission at its fortieth session and in the Sixth Committee. Moreover, he had not suggested that there had been a majority opinion in the matter.

Paragraph 44 was adopted.

Paragraph 45

14. Mr. BENNOUNA (Rapporteur) noted the reference in the first sentence to the "global commons". Some explanation should be given regarding the meaning of that somewhat unfamiliar expression.

15. The CHAIRMAN pointed out that the expression had first been used in paragraph 8, which would therefore seem a more appropriate place for an explanation.

16. Mr. MAHIU proposed the insertion of the words "in particular those constituting the common heritage of mankind" at the end of the fifth sentence of paragraph 8, which referred to the "global commons" and to "areas beyond the national jurisdiction of any State". The expression "common heritage of mankind" was well established and was used in the 1982 United Nations Convention on the Law of the Sea.

17. Mr. BARBOZA (Special Rapporteur) said that the formula undoubtedly had intrinsic merits, but paragraph 8 gave an account of his own statement as Special Rapporteur and he had never referred to the common heritage of mankind.

18. Mr. BENNOUNA (Rapporteur) said that, in the course of the discussion, he had referred to the common heritage of mankind.

19. Mr. RAZAFINDRALAMBO said that he, too, had referred to that concept during the discussion. He supported the proposal by Mr. Mahiou.

20. Mr. AL-QAYSI said that the phrase proposed by Mr. Mahiou could not be inserted in paragraph 8, which contained the views of the Special Rapporteur. The only suitable place would be paragraph 39, which presented the views of members of the Commission.

21. Mr. MAHIOU said that he agreed with Mr. Al-Qaysi and suggested that the phrase be inserted at the end of the first sentence of paragraph 39.

It was so agreed.

22. Mr. BEESLEY said that it was necessary to correct a mistake in the fourth sentence of paragraph 39, which read "... it was difficult to see how such a view could be reconciled with the principle of sovereignty". The word "view" should be replaced by "concept". The passage in question purported to reflect views expressed by him.

It was so agreed.

23. Mr. McCAFFREY proposed that the words "eventual liability", in the first sentence of paragraph 45, should be replaced by "issue of liability".

It was so agreed.

Paragraph 45, as amended, was adopted.

Paragraph 46

Paragraph 46 was adopted.

Paragraph 47

24. Mr. McCAFFREY said that the second sentence implied that the trend of opinion in the Commission was that, where transboundary harm had occurred, there was no obligation other than to negotiate. The intended meaning, in his view, was that, in cases involving risk, there had, up to now, been no obligation other than to negotiate.

25. Mr. BEESLEY, endorsing Mr. McCaffrey's remarks, said that the sentence could be more felicitously worded.

26. Mr. BARBOZA (Special Rapporteur) proposed that the second sentence be amended to read:

"There seemed to be a widely shared view in the Commission in favour of no liability before transboundary harm occurred; and even when such harm occurred, there had, up to now, been no obligation other than to negotiate the compensation due."

27. Mr. McCAFFREY said that, since the sentence was intended to reflect the view of the Special Rapporteur, he could not object to the proposed amendment. At the same time, he was bound to point out that, to his recollection, the view that there was no obligation other than to negotiate when transboundary harm occurred had not been expressed during the debate.

28. Mr. TOMUSCHAT pointed out that the whole sentence, both before and after the semicolon, reflected the opinion of the Special Rapporteur rather than a majority trend in the Commission.

29. After a discussion in which Mr. AL-QAYSI, Mr. McCAFFREY, Mr. BEESLEY and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN suggested that the Special Rapporteur's amendment should be adopted.

It was so agreed.

Paragraph 47, as amended, was adopted.

Subheading preceding paragraph 48

30. The CHAIRMAN suggested that the subheading preceding paragraph 48 should be amended to read "Comments on specific articles".

It was so agreed.

The subheading preceding paragraph 48, as amended, was adopted.

Paragraph 48

31. Mr. BARSEGOV proposed that the word "rightly", in the second sentence, should be deleted.

It was so agreed.

Paragraph 48, as amended, was adopted.

Paragraphs 49 to 53

Paragraphs 49 to 53 were adopted.

Paragraph 54

32. Mr. BARBOZA (Special Rapporteur) said that the sixth, seventh and eighth sentences, from "A doubt, however ..." to "... the control of other States", should be replaced by the following text:

"One member doubted, however, that that formula could effectively protect developing countries. Since the concepts of 'jurisdiction' and 'control' in the draft articles were now limited to 'places', they would no longer cover the jurisdiction and control exercised by the home State of a multinational corporation whose harmful activities took place in a foreign State."

Paragraph 54, as amended, was adopted.

Paragraphs 55 and 55 bis

Paragraphs 55 and 55 bis were adopted.

Paragraph 56

33. Mr. McCAFFREY, referring to the third sentence, said that the words "fell below the accepted ... standard" usually meant a weaker standard, whereas a stricter one was in fact required. He would be inclined to say that the expression "appreciable risk" was "more demanding" than the accepted standard, or something along those lines.

34. The CHAIRMAN suggested that the word "standard" should be replaced by "threshold".

It was so agreed.

Paragraph 56, as amended, was adopted.

Paragraph 57

Paragraph 57 was adopted.

Paragraph 58

35. Mr. McCAFFREY proposed that the words "attribution" and "assignment" should be placed between quotation marks.

It was so agreed.

Paragraph 58, as amended, was adopted.

Paragraph 59

Paragraph 59 was adopted with minor drafting changes.

Paragraph 60

Paragraph 60 was adopted.

Paragraph 61

36. Mr. BEESLEY asked whether the references to strict liability in the first sentence and to absolute liability in the last sentence were deliberate. He had consistently made the point that the two expressions should not be used interchangeably.

37. Mr. BARBOZA (Special Rapporteur) suggested that the expression "absolute liability" should be used in both places.

It was so agreed.

Paragraph 61, as amended, was adopted.

Paragraph 62

Paragraph 62 was adopted.

Paragraph 63

38. Mr. EIRIKSSON proposed that the words "texts in square brackets", in the second sentence, should be replaced by "article" and the word "latter" by "matter".

It was so agreed.

Paragraph 63, as amended, was adopted.

Paragraph 64

39. Mr. BENNOUNA (Rapporteur), referring to the second sentence, said that he had heard of no such principle as "limited State sovereignty" and thought that the expression should be avoided. Indeed, the whole sentence was not clear.

40. Mr. BARBOZA (Special Rapporteur) suggested that, in order to reflect the concept more accurately, the words "the principle of limited State sovereignty to act freely" should be replaced by "the sovereign right of a State to act freely within its territory".

41. Mr. ARANGIO-RUIZ said that the expression "within its territory" was unnecessary and should not be included.

42. Mr. BARBOZA (Special Rapporteur) said he would prefer to retain that expression for the sake of clarity.

The Special Rapporteur's amendment was adopted.

43. Mr. CALERO RODRIGUES said that the words "that of inviolability", in the same sentence, should be replaced by "the inviolability".

It was so agreed.

Paragraph 64, as amended, was adopted.

Paragraphs 65 to 67

Paragraphs 65 to 67 were adopted.

Paragraph 68

44. Mr. McCAFFREY said that, in the interests of clarity, the phrase "than those available in the former", at the end of the third sentence, should be replaced by "than would be 'available' in the former sense".

45. Mr. AL-QAYSI said that the sentence could be made even clearer simply by deleting the phrase "than those available in the former".

It was so agreed.

Paragraph 68, as amended, was adopted.

Paragraph 69

46. Mr. BENNOUNA (Rapporteur) said that, in the first sentence of the French text, the words *l'absence de mesures de prévention de la part de l'Etat d'origine* should be

replaced by *la non-adoption de mesures de prévention par l'Etat d'origine*.

Paragraph 69, as amended in the French text, was adopted.

Paragraph 70

Paragraph 70 was adopted.

Paragraph 71

47. Mr. BARSEGOV proposed that the penultimate sentence should be amended to read: "One member, however, found it counter-productive to set a régime of reparation in which the fact was totally ignored that the State of origin was also harmed while carrying on pioneering activities and suffered even more than the innocent victim." The last sentence should be deleted.

It was so agreed.

Paragraph 71, as amended, was adopted.

Paragraphs 72 and 73

Paragraphs 72 and 73 were adopted.

Paragraph 74

48. Mr. TOMUSCHAT suggested that the words "by some members" should be inserted between the words "found" and "not" in the first sentence.

It was so agreed.

49. Mr. BENNOUNA (Rapporteur) said that the views reflected in the third and fourth sentences were not related specifically to the "global commons" and should therefore be set out in a separate paragraph, the beginning of which would read: "Some members suggested providing, instead of negotiations, for a procedure for notification, or for the submission . . .".

It was so agreed.

50. Mr. McCAFFREY proposed the addition, after the second sentence, of the following sentence: "It was suggested that, in these cases, notification, consultation and other procedures could be effected through a clearing-house such as a competent international organization."

Paragraph 74, as amended, was adopted.

Paragraphs 75 and 76

Paragraphs 75 and 76 were adopted.

Paragraph 77

51. Mr. BENNOUNA (Rapporteur) suggested that, since paragraph 77 dealt with a point of detail, it might be deleted.

It was so agreed.

Paragraphs 78 to 91

Paragraphs 78 to 91 were adopted.

Paragraph 92

Paragraph 92 was adopted with a minor drafting change.

Paragraphs 93 and 94

Paragraphs 93 and 94 were adopted.

Section B, as amended, was adopted.

52. Mr. BENNOUNA (Rapporteur) remarked that, in view of the highly complex and delicate nature of the issue of procedures, the Special Rapporteur might wish to suggest

that a question on that point be addressed to the Sixth Committee of the General Assembly.

53. Mr. BARBOZA (Special Rapporteur) said that he had detected a clear trend in the Commission in favour of formulating procedural articles of a general rather than of a detailed nature. He therefore saw no point in addressing a question on that issue to the Sixth Committee.

54. Mr. CALERO RODRIGUES, recalling that the General Assembly, in paragraph 5 (c) of its resolution 43/169 of 9 December 1988, had 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, remarked that in the absence of an indication of specific issues the debate in the Sixth Committee would risk being somewhat unstructured.

55. Mr. BARBOZA (Special Rapporteur) said that, if the Commission considered that some specific question should be formulated, he would not object to seeking the Sixth Committee's guidance on the question of procedures. However, as he had already stated, he saw no need for such action.

56. After a discussion in which Mr. CALERO RODRIGUES, Mr. OGISO and Mr. BEESLEY took part, the CHAIRMAN suggested that chapter V of the draft report be adopted without any further addition.

It was so agreed.

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

The meeting rose at 6.05 p.m.

2141st MEETING

Tuesday, 18 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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

CHAPTER V. *International liability for injurious consequences arising out of acts not prohibited by international law* (concluded) (A/CN.4/L.438)

1. Mr. BARBOZA (Special Rapporteur) said that, after considerable thought and in view of the arguments advanced at the previous meeting, he had decided not to ask the

General Assembly any specific questions concerning the topic entrusted to him.

CHAPTER VII. *The law of the non-navigational uses of international watercourses* (A/CN.4/L.440 and Corr.1 and Add.1 and 2)

A. Introduction (A/CN.4/L.440 and Corr.1)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraphs 5 and 6

2. Mr. McCAFFREY (Special Rapporteur) said that, when the draft report was being drawn up, he had been unaware that the draft articles already provisionally adopted by the Commission would be reproduced in a section of chapter VII. Accordingly, it would be better to reproduce the Commission's provisional working hypothesis in a footnote to article 1. The part of paragraph 6 beginning with the words "The hypothesis was contained . . ." could therefore be deleted and the remaining first sentence could be placed at the end of paragraph 5. A footnote would be added to indicate that the provisional working hypothesis was reproduced in the later footnote.

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the Special Rapporteur's amendment.

It was so agreed.

Paragraphs 5 and 6, as amended, were adopted.

Paragraphs 7 to 11

Paragraphs 7 to 11 were adopted.

Paragraph 12

4. Mr. McCAFFREY (Special Rapporteur) said that "(arts. 10-15)" should be inserted after the words "six draft articles".

Paragraph 12, as amended, was adopted.

Paragraph 13

5. Mr. McCAFFREY (Special Rapporteur) said that paragraph 13 was too long and should be replaced by the following text: "After discussion in the Commission, draft articles 10 to 15 as submitted by the Special Rapporteur were referred to the Drafting Committee." Footnote 14 would remain.

Paragraph 13, as amended, was adopted.

Paragraphs 14 to 16

Paragraphs 14 to 16 were adopted.

Paragraphs 17 and 18

6. The CHAIRMAN drew attention to the corrigendum (A/CN.4/L.440/Corr.1) concerning paragraphs 17 and 18.

7. Mr. McCAFFREY (Special Rapporteur) said that the words "latter draft article", in the first sentence of paragraph 18, should be replaced by "draft article 18 [19]", and that "article 18 [19]", in the second sentence, should be replaced by "that article".

8. Mr. CALERO RODRIGUES proposed that the words "suggested that he make", in the second sentence of paragraph 18, should be replaced by "indicated that he would make".

It was so agreed.

Paragraph 17 and paragraph 18, as amended, were adopted.