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Summary record of the 2141st meeting

Topic:
Other topics

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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.

Paragraph 19

Paragraph 19 was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.440/Add.1 and 2)

Paragraphs 20 to 30h (A/CN.4/L.440/Add.1)

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

9. Mr. McCAFFREY (Special Rapporteur) said that the words "on those subtopics" should be added at the end of the paragraph.

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 25b

Paragraphs 22 to 25b were adopted.

Paragraph 25c

10. Mr. McCAFFREY (Special Rapporteur) said that the last part of paragraph 25c, from the words "The Special Rapporteur pointed out that the problem had been addressed . . .", should be deleted.

Paragraph 25c, as amended, was adopted.

Paragraphs 26 to 27a

Paragraphs 26 to 27a were adopted.

Paragraph 28

11. Mr. Sreenivasa RAO said that he would prefer the first sentence to be couched in more neutral terms and suggested that the words "expressed support for the general thrust" should be replaced by "dealt with the general thrust". Moreover, he wondered about the meaning to be attached to the expression "integrated treatment", in the same sentence.

12. Mr. AL-QAYSI said that the first sentence was simply an objective statement of fact. Perhaps Mr. Sreenivasa Rao could propose a sentence starting with the words "One member indicated . . .".

13. Mr. McCAFFREY (Special Rapporteur) pointed out that he had used the expression "integrated treatment" in his oral introduction of his fifth report (A/CN.4/421 and Add.1 and 2) and in the report itself, and it should be taken to mean treatment of the various sorts of water-related hazards in one article, namely article 22, and of the various sorts of water-related emergency situations in another article, namely article 23. If the word "integrated" did not seem felicitous, it would be possible to say: "including treating all types of hazards and dangers together in the draft articles".

14. Mr. Sreenivasa RAO proposed that paragraph 28 or a new paragraph 28 *bis* should contain a further sentence reading: "One member"—or "Some members" if others shared his point of view—"observed that the material submitted by the Special Rapporteur in his fifth report, while being very interesting, did not always appear relevant or lead to the conclusions and draft articles that were presented."

15. After an exchange of views in which Mr. McCAFFREY (Special Rapporteur), Mr. CALERO RODRIGUES, Mr.

NJENGA and Mr. BENNOUNA (Rapporteur) took part, the CHAIRMAN suggested that the Commission should revert to paragraph 28 later.

It was so agreed.

Paragraph 28a

16. Mr. NJENGA proposed that, in view of the role played by international organizations, they should be mentioned in the phrase "would marshal both governmental and private resources".

17. Mr. McCAFFREY (Special Rapporteur) proposed that the phrase should be replaced by the formulation: "would marshal private resources as well as those of Governments and international organizations".

It was so agreed.

Paragraph 28a, as amended, was adopted.

Paragraph 28b

18. Mr. BENNOUNA (Rapporteur) proposed that an additional sentence should be inserted, reading: "It was also pointed out that the bilateral agreements cited contained very diversified obligations and could not serve as the basis for customary norms in this area."

19. Mr. TOMUSCHAT proposed that another sentence should be added, reading: "Other members felt that the source material referred to by the Special Rapporteur indicated at least certain modern trends in international law which the Commission should take into account."

20. After an exchange of views in which Mr. BARBOZA and Mr. BEESLEY took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt both of the proposed sentences in the form of a separate paragraph.

It was so agreed.

21. Mr. Sreenivasa RAO proposed that the first two sentences of paragraph 28b should be amended to read: "It was questioned whether the bilateral treaties cited by the Special Rapporteur could be treated as proper precedents for the envisaged multilateral instrument."

22. After an exchange of views in which Mr. NJENGA, Mr. AL-QAYSI, Mr. BARBOZA and Mr. McCAFFREY (Special Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Sreenivasa Rao's amendment and to insert the words "and case material" after the words "bilateral treaties".

It was so agreed.

Paragraph 28b, as amended, was adopted.

Paragraph 28c

Paragraph 28c was adopted.

Paragraph 28d

23. Mr. REUTER said that, to remove any ambiguity, the word "stricter" in the first sentence should be avoided.

24. After an exchange of views in which Mr. REUTER, Mr. ARANGIO-RUIZ, Mr. BARSEGOV, Mr. Sreenivasa RAO, Mr. BENNOUNA (Rapporteur) and Mr. McCAFFREY (Special Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the

Commission agreed to replace the word “stricter” by “higher”.

It was so agreed.

Paragraph 28d, as amended, was adopted.

New paragraph 28d bis

25. Mr. Sreenivasa RAO proposed the addition of the following new paragraph 28d bis:

“One member expressed the view that the draft articles should not impose on States obligations which it would be known in advance they could not discharge in view of the complexity of factors contributing to water-related hazards. The answer for meeting and remedying such situations lay in the field of education, assistance, prevention and transfer of experience and technology.”

New paragraph 28d bis was adopted.

Paragraph 28 (concluded) and new paragraph 28 bis

26. Mr. McCAFFREY (Special Rapporteur) said that, further to consultations with the members concerned, it was proposed that paragraph 28 should end after the first sentence and that the remainder of the paragraph should constitute a paragraph 28 bis, opening with the following new text, which had been proposed by Mr. Sreenivasa Rao and was supported by Mr. Calero Rodrigues and Mr. Njenga: “Some members were, however, of the view that the material submitted by the Special Rapporteur in his fifth report did not always appear relevant or lead to the conclusions and draft articles that were presented.” Paragraph 28 bis would end with a sentence which Mr. Pawlak wished to insert in connection with secondary rules.

It was so agreed.

27. Mr. PAWLAK proposed the addition of the following sentence at the end of paragraph 28 bis:

“The view was, however, expressed that secondary rules should eventually be included in the draft articles and that efforts in that regard should be harmonized with similar endeavours in connection with the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law.”

It was so agreed.

Paragraph 28 and new paragraph 28 bis, as amended, were adopted.

Paragraph 28e

28. Mr. YANKOV said that, since the new paragraph 28d bis started with the words “One member . . .”, another formulation should be found for the beginning of paragraph 28e.

29. Mr. McCAFFREY (Special Rapporteur) proposed the words “It was suggested by another member . . .”.

It was so agreed.

Paragraph 28e, as amended, was adopted.

Paragraph 29

Paragraph 29 was adopted.

Paragraph 29a

30. Mr. NJENGA, pointing out that the problem of water-borne diseases was of crucial importance in Africa, asked what the Special Rapporteur’s position was on that point, for it was not clear from paragraph 29a whether the Spe-

cial Rapporteur wanted the problem to be specifically mentioned in the text of draft article 22.

31. Mr. McCAFFREY (Special Rapporteur), answering in the affirmative, said that Mr. Njenga’s fears could be allayed by replacing the word “could”, in the first part of the second sentence, by “should”.

It was so agreed.

Paragraph 29a, as amended, was adopted.

Paragraph 29b

32. Mr. Sreenivasa RAO said it was surprising that no mention was made of his proposal to replace the concept of co-operation “on an equitable basis” by that of “mutual reimbursement”.

33. Mr. McCAFFREY (Special Rapporteur) suggested that, in order to take account of that proposal, the third sentence of paragraph 29b should be amended to read: “It was also proposed to add a reference to other forms of co-operation, including mutual reimbursement.”

It was so agreed.

Paragraph 29b, as amended, was adopted.

Paragraph 29c

Paragraph 29c was adopted.

Paragraph 29d

34. Mr. BENNOUNA (Rapporteur) said that, to make the reader’s task easier, it should be made clear that the subparagraph concerned was paragraph 2 (a) of draft article 22.

Paragraph 29d, as amended, was adopted.

Paragraph 29e

Paragraph 29e was adopted.

Paragraph 29f

35. Mr. BENNOUNA (Rapporteur) said that, once again, it should be made clear that the subparagraph concerned was paragraph 2 (b) of draft article 22. Moreover, the expression “something like”, in the last sentence, was rather trite.

36. Mr. McCAFFREY (Special Rapporteur) said that the latter expression could be replaced by “for example”.

It was so agreed.

Paragraph 29f, as amended, was adopted.

Paragraph 29g

Paragraph 29g was adopted.

Paragraphs 29h and 29i

37. Mr. BENNOUNA (Rapporteur), noting that the two paragraphs dealt with the same provision, proposed that they be merged.

It was so agreed.

Paragraphs 29h and 29i, as amended, were adopted.

Paragraph 30

38. Mr. PAWLAK proposed the addition of the following sentence at the end of paragraph 30: “The view was also expressed that it would be preferable for all provisions relating to the pollution of watercourses to be included in one sub-chapter of the draft articles.”

It was so agreed.

Paragraph 30, as amended, was adopted.

Paragraphs 30a and 30b

39. Mr. EIRIKSSON and Mr. BENNOUNA (Rapporteur) proposed that paragraph 30a be deleted.

40. Mr. Sreenivasa RAO pointed out that he had commented, in connection with paragraphs 1 and 2 of draft article 23, that identification of the potentially affected State could well be very difficult. That was not simply a "suggestion of a basically drafting nature".

41. After a brief discussion, the CHAIRMAN proposed that paragraph 30a be deleted and that the first sentence of paragraph 30b be amended to read: "While comments on paragraphs 1 and 2 were basically of a drafting nature, the discussion of paragraph 3 covered a broad range of issues."

It was so agreed.

Paragraph 30b, as amended, was adopted.

Paragraph 30c

42. Mr. McCAFFREY (Special Rapporteur) said that the end of the first sentence should be amended to read: "... not parties to the present articles could not be bound by them".

Paragraph 30c, as amended, was adopted.

Paragraphs 30d and 30e

Paragraphs 30d and 30e were adopted.

Paragraph 30f

43. Mr. BENNOUNA (Rapporteur) noted that the second sentence, which spoke of "modalities through which assistance could be rendered", glossed over the fact that the safeguard clause that was the subject of the proposed new article 23 *bis* would also apply in other fields, such as means of prevention.

44. Mr. REUTER said that he shared the Rapporteur's view and proposed that the words "to deal with that issue as well as others", in the last sentence of paragraph 30f, should be replaced by "to deal with all common problems".

It was so agreed.

Paragraph 30f, as amended, was adopted.

Paragraph 30g

45. Mr. PAWLAK, pointing out that he had spoken on the question discussed in paragraph 30g, proposed that the words "long-term legal measures", in the second sentence, should be replaced by "long-term agreements".

46. Mr. McCAFFREY (Special Rapporteur) said that he would prefer to retain the expression "legal measures", which had been used by Mr. Barsegov. Mr. Pawlak's point could be met by adding the phrase "in particular international agreements" at the end of the second sentence.

It was so agreed.

47. Mr. BENNOUNA (Rapporteur) said that paragraph 30g was not satisfactory, for it seemed that the question of substance mentioned in the first sentence was placed on a par with the "drafting suggestions" referred to in the last sentence.

48. The CHAIRMAN proposed that the last sentence should be deleted.

It was so agreed.

Paragraph 30g, as amended, was adopted.

Paragraph 30h

Paragraph 30h was adopted.

49. Mr. RAZAFINDRALAMBO said it was surprising that paragraph 30h was not followed by a statement of what action the Commission had taken regarding draft articles 22 and 23.

50. Mr. McCAFFREY (Special Rapporteur) pointed out that paragraph 23 stated that the Commission had decided "to refer draft articles 22 and 23 to the Drafting Committee for consideration in the light of the debate".

51. After an exchange of views between Mr. McCAFFREY (Special Rapporteur), Mr. NJENGA and Mr. CALERO RODRIGUES on whether the information contained in paragraph 23 should be repeated, the CHAIRMAN suggested that the secretariat should look into the precedents and adopt the solution usually followed by the Commission.

It was so agreed.

52. Mr. DÍAZ GONZÁLEZ recalled that, at the opening meeting of the session (2095th meeting, paras. 2 *et seq.*), he had reported on the way in which the General Assembly had taken note of the Commission's report on its fortieth session and had stated that, in fact, the Sixth Committee had discussed the analyses by the special rapporteurs and their recommendations, but never the report of the Commission itself. In his opinion, the cause lay in the form of the Commission's report. Chapter VII currently under consideration was a perfect example.

53. Citing in that regard a number of paragraphs in document A/CN.4/L.440/Add.1, he pointed to the constant repetition of formulas such as "The Special Rapporteur noted", "The Special Rapporteur explained", "The Special Rapporteur had no objection", or again, "One member suggested", "Another member was of the view", and so on. Nowhere did the document indicate that the Commission had decided, or said, or proposed anything. It spoke only of the discussions between the Commission and the Special Rapporteur and the only conclusions it contained were those of the Special Rapporteur.

54. However, the Sixth Committee of the General Assembly was interested in what the International Law Commission decided, not its Special Rapporteur, who was only a creature of the Commission. If the General Assembly was to take an interest in what the Commission had to say, it should receive reports, as it had in the past, of the opinion of the majority of the Commission's members, not an accumulation of opinions of individuals. The example to follow was chapter II of the draft report (A/CN.4/L.435 and Add.1-4 and Add.4/Corr.1), on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. If the Commission insisted on drafting its reports in the form it had given to chapter VII, it would lose all credibility.

55. Mr. McCAFFREY (Special Rapporteur) pointed out that chapter II of the draft report seemed to take the form sought by Mr. Díaz González because it presented a set of draft articles on which the Commission had taken its decisions on second reading. Chapter VII, which had just been criticized, was in keeping with the practice followed so far by the Commission.

56. The CHAIRMAN said that the Commission had taken note of the comments made by Mr. Díaz González, which

it would discuss in the debate on methods of work. They were similar comments to those already made on a number of occasions by the Rapporteur of the Commission, to the effect that the special rapporteurs and the Rapporteur should decide beforehand on a uniform presentation for the various chapters of the report.

The meeting rose at 1.05 p.m

2142nd MEETING

Tuesday, 18 July 1989, at 3.10 p.m.

Chairman: Mr. Bernhard GRAEFRATH

later: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Bahama, 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. 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 I. *Organization of the session* (A/CN.4/L.434)

Paragraphs 1 to 16

Paragraphs 1 to 16 were adopted.

Chapter I of the draft report was adopted.

Mr. Sreenivasa Rao, First Vice-Chairman, took the Chair.

CHAPTER IX. *Other decisions and conclusions of the Commission* (A/CN.4/L.442)

A. *Programme, procedures and working methods of the Commission, and its documentation*

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

1. Mr. McCaffrey said that the first sentence was repetitive and self-congratulatory. He proposed that the first two sentences should be replaced by the following text:

"The first of those goals has now been attained. The Commission intends to make every effort to complete the second reading of the draft articles on jurisdictional immunities of States and their property at its forty-second session, in 1990."

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraph 8

2. Mr. McCaffrey proposed that paragraph 8 should be deleted.

It was so agreed.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

Paragraph 11

3. Mr. PAWLAK proposed that the words "over a number of meetings" should be inserted between the words "views" and "on".

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

4. Mr. EIRIKSSON proposed that a footnote should be inserted after the word "achieved", in the first sentence, listing the draft articles currently before the Drafting Committee.

It was so agreed.

5. Mr. TOMUSCHAT suggested that the words "its special role", in the second sentence, should be replaced by "the latter's special role".

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraph 15

6. After a discussion in which Mr. PAWLAK, Mr. DÍAZ GONZÁLEZ, Mr. YANKOV, Mr. AL-QAYSI, Mr. ROUCOUNAS, Mr. BARBOZA, Mr. BENNOUNA (Rapporteur), Mr. JACOVIDES and Mr. McCAFFREY took part, Mr. CALERO RODRIGUES proposed that the subheading preceding paragraph 15 should be amended to read: "Relationship between the Commission and the General Assembly" and Mr. ARANGIO-RUIZ proposed that the first sentence should be deleted and that the second sentence should begin: "The Commission notes with satisfaction . . .".

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 16

7. Mr. EIRIKSSON proposed that the phrase "in acquainting themselves with the content of the report", in the first part of paragraph 16, should be deleted.

It was so agreed.

8. Mr. CALERO RODRIGUES proposed that the words "Rapporteurs of", immediately after the deleted phrase, should also be eliminated.

Paragraph 16, as amended, was adopted.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

9. Mr. McCAFFREY proposed the insertion at the end of paragraph 18 of the following additional text, which could alternatively take the form of a new paragraph 18 bis:

"Some members, however, without minimizing the magnitude and complexity of the topics on the Commission's agenda, continued to believe that a continuous 12-week session was too long, since it was highly inconvenient for some members to be away from their regular positions for that length of time and since, in their view, the