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Summary record of the 2201st meeting

Topic:
Other topics

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101. The CHAIRMAN said that he saw no point in amending paragraph 24. If members agreed, he could mention their reservations in his statement to the Sixth Committee of the General Assembly at its forty-fifth session. Perhaps the Sixth Committee could then find a way of solving the problem.

102. Mr. PELLET opposed the Chairman's proposal. He was not against the dates because they were inconvenient; he was opposed in principle to the way in which they were fixed. He agreed with Mr. Barboza's suggestion that a footnote be added, but thought that explaining why the particular dates chosen were objectionable might complicate matters considerably.

103. Mr. AL-QAYSI said that he agreed with Mr. Pellet. It was not just a question of convenience; more fundamental questions were at issue. Every year, the Commission was simply assigned an available slot. The same applied to the number of meetings.

104. Mr. EIRIKSSON (Rapporteur) said that a footnote would have to be quite long to cover all the points of view expressed. It would therefore be more appropriate for the Chairman to raise the issue in his statement to the Sixth Committee.

105. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 24, on the understanding that the reservations expressed would be recorded in the summary record of the meeting and that he would raise the matter in his statement to the Sixth Committee of the General Assembly.

Paragraph 24 was adopted on that understanding.

Section C was adopted.

The meeting rose at 6.15 p.m.

2201st MEETING

Thursday, 19 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

CHAPTER VIII. *Other decisions and conclusions of the Commission* (continued) (A/CN.4/L.453)

D. Representation at the forty-fifth session of the General Assembly

Paragraph 25

Paragraph 25 was adopted.

Section D was adopted.

E. International Law Seminar

Paragraph 26

1. Mr. KOROMA, supported by Mr. JACOVIDES, Mr. TOMUSCHAT and Mr. BEESLEY, and by the CHAIRMAN speaking as a member of the Commission, said that the programme of the International Law Seminar should be drawn up in collaboration with the Commission's secretariat, so that the participants could derive maximum benefit from it. At its next session the Commission should consider the organization of the Seminar, with which it should be more closely associated. He also proposed that the words "young professors", in the second sentence, be replaced by "young academics".

2. Mr. EIRIKSSON (Rapporteur) said he understood that the Legal Counsel would consult members of the Commission by letter concerning the organization of the next Seminar.

3. Mr. PAWLAK said that he, too, was concerned about the organization of the Seminar and the subjects it covered. He thought that the Commission should be consulted in more detail on those two points and that the programme of the Seminar should reflect both the work of the Commission and current trends in international law.

4. Mr. RAZAFINDRALAMBO said that, when a member of the Commission was in Geneva at the time the committee selecting participants in the Seminar was sitting, he was invited to preside over that committee. That was how he had come to be its chairman in 1988. Thus there was already a link between the Commission and the Seminar.

Paragraph 26 was adopted.

Paragraphs 27 to 35

Paragraphs 27 to 35 were adopted.

Section E was adopted.

CHAPTER IV. *The law of the non-navigational uses of international watercourses* (continued) (A/CN.4/L.449 and Add.1 and 2)

C. *Draft articles on the law of the non-navigational uses of international watercourses* (continued) (A/CN.4/L.449/Add.1 and 2)

SUBSECTION 2 (Texts of draft articles 22 to 27, with commentaries thereto, provisionally adopted by the Commission at its forty-second session) (continued) (A/CN.4/L.449/Add.1 and 2)

Commentary to article 24 (Introduction of alien or new species)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

The commentary to article 24 was approved.

Commentary to article 25 (Protection and preservation of the marine environment)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

The commentary to article 25 was approved.

Commentary to article 26 (Prevention and mitigation of harmful conditions)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were approved.

The commentary to article 26 was approved.

Commentary to article 27 (Emergency situations)

Paragraph (1)

5. Mr. EIRIKSSON (Rapporteur) proposed that paragraph (1) be expanded by substituting the following text for the first sentence:

“Article 27 deals with the obligations of water-course States in responding to actual emergency situations that are related to international water-course[s] [systems]. It is to be contrasted with article 26, which concerns the prevention and mitigation of conditions that may be harmful to water-course States.”

6. Mr. McCAFFREY (Special Rapporteur) supported that amendment.

The Rapporteur’s amendment was adopted.

7. Mr. KOROMA, supported by Mr. BARSEGOV, said that the definition in paragraph 1 of article 27 concerned the whole of that article and should not be transferred to article 1, as suggested in the footnote.

8. Mr. NJENGA, agreeing, proposed that the footnote be deleted.

9. Mr. EIRIKSSON (Rapporteur) said that, since article 27 had been adopted as it stood, together with the footnote, when the texts proposed by the Drafting Committee had been considered, it would not be appropriate to make any changes.

10. Mr. McCAFFREY (Special Rapporteur) said that he had no strong views on the place for the definition of the term “emergency”; he thought that the matter should be decided later.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

11. Mr. NJENGA proposed that reference should also be made, at the end of paragraph (3), to the other international organizations concerned.

12. Mr. McCAFFREY (Special Rapporteur) said that he would finalize the text with Mr. Njenga.

Paragraph (3) was approved on that understanding.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were approved.

Paragraph (7)

13. Mr. PAWLAK proposed that the last two sentences be deleted.

14. After an exchange of views between Mr. McCAFFREY (Special Rapporteur), Mr. NJENGA, Mr. BARSEGOV, Mr. AL-QAYSI, Mr. FRANCIS and Mr. MAHIOU, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the last two sentences of paragraph (7).

It was so agreed.

Paragraph (7), as amended, was approved.

The commentary to article 27, as amended, was approved.

CHAPTER V. State responsibility (A/CN.4/L.450)

A. Introduction

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Paragraph 9

15. Mr. BENNOUNA proposed that the second sentence be amended to read: “He had examined three further consequences: reparation by equivalent, satisfaction and guarantees of non-repetition.”

16. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he agreed to that amendment.

Mr. Bennouna’s amendment was adopted.

17. Mr. BARSEGOV noted that there was a reference in the first sentence to “an internationally wrongful act”. Such acts could be either crimes or delicts, and in the present case the Commission was dealing only with delicts. The wording should be more precise.

18. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the whole chapter would refer to “internationally wrongful acts”. To meet Mr. Barsegov’s point it would suffice to introduce an explanation into the first sentence of paragraph 9 by referring to “an internationally wrongful act (delict)”, on the understanding that that explanation also applied to the remainder of the chapter.

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

19. Mr. PELLET said it should be made clear that paragraph 11 summarized the views of the Special Rapporteur and not those of the Commission. He therefore proposed that it start with the words: “The Special Rapporteur stated that . . .”.

It was so agreed.

20. Mr. BENNOUNA, supported by Mr. BEESLEY and Mr. RAZAFINDRALAMBO, said that he was not satisfied with the expression “legal sphere”, as used at the end of the second sentence.

21. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that that expression be replaced by “subjective right”, an expression known to Italian, German and French law.

22. Mr. TOMUSCHAT, noting that that expression already appeared in paragraph 13, proposed that it appear in quotation marks in all languages.

The amendments by the Special Rapporteur and Mr. Tomuschat were adopted.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

23. Mr. EIRIKSSON (Rapporteur) proposed that, in the penultimate sentence, the words “internationally wrongful act as a consequence of the”, “quality and quantity” and “(‘prejudice’)” be deleted.

It was so agreed.

Paragraph 13, as amended, was adopted.

Paragraph 14

24. Mr. PAWLAK said that he had difficulty in understanding why the words between brackets had been included in the first sentence. There seemed to be a contradiction.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the word “mostly” within those brackets be replaced by “frequently”.

It was so agreed.

26. Mr. EIRIKSSON (Rapporteur) proposed that the bracketed expression “in the broad sense explained”, in the second sentence, be deleted.

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraphs 15 and 16

Paragraphs 15 and 16 were adopted.

Paragraph 17

27. Mr. EIRIKSSON (Rapporteur) proposed a number of changes. The first sentence should be deleted. The beginning of the second sentence should be amended to read: “The Special Rapporteur stated that, in the area of primary rules . . .” and, at the end of that sentence, the words “obvious, relatively constant” should be deleted. In the third sentence, the words “and as frequently” should be deleted. In the fourth sentence, the word “either” should be inserted between the words “be” and “an”, and the words “as well as” should be replaced by the word “or”. Finally, in the last sentence, the words “in principle” and “ultimately” should be deleted, and the words “the rules” should be replaced by “any rules”.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraph 18

28. Mr. PELLET said that he was surprised to find the expression “metropolitan States” in the third sentence. He proposed that it be replaced by the words “former administering States”.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraphs 19 and 20

Paragraphs 19 and 20 were adopted.

Paragraph 21

29. Mr. PELLET, observing that he was among the members whose opinion was recorded in paragraph 21, said that he would prefer the words “To some extent”, at the beginning of the last sentence, to be deleted.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 22

30. Mr. RAZAFINDRALAMBO said he was surprised that the date of the decision in the “Rainbow Warrior” case was not mentioned. In other chapters of the report, the judgments and arbitral awards cited were given with the date on which they had been delivered.

31. Mr. PELLET, supported by Mr. MAHIOU, said that he was surprised by the use of the adjective “retributive”, in the first sentence. The word seemed to be appearing in the report for the first time, and it was difficult to see what it referred to.

32. Mr. ARANGIO-RUIZ (Special Rapporteur), agreeing that the decisions cited in the report should be accompanied by the dates on which they had been delivered, said that he was prepared to assist the Rapporteur in adding the necessary information. The word “retributive” had already been used, but he could agree to its being replaced by “punitive”.

Paragraph 22 was adopted subject to those amendments.

Paragraph 23

33. Mr. PELLET, referring to the French text, said that, in his view, the translation of the term “torts” by *responsabilité délictuelle* introduced a notion hitherto alien to the topic and might cause confusion. He proposed that the words *responsabilité délictuelle* be replaced by *responsabilité non contractuelle*.

34. Mr. TOMUSCHAT, noting that the expression *responsabilité non contractuelle* was used in article 215 of the Treaty of Rome, supported that proposal.

Mr. Pellet’s amendment was adopted.

35. Mr. BENNOUNA said that the word *ingérences*, in the sixth and seventh sentences of the French text, should be replaced by *atteintes*.

It was so agreed.

Paragraph 23, as amended in the French text, was adopted.

Paragraph 24

36. Mr. EIRIKSSON (Rapporteur) said that the word “concerns”, in the fourth sentence, should be replaced by “consequences”.

Paragraph 24, as amended, was adopted.

Paragraph 25

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the word “tribunals”, in the first sentence, should be replaced by “awards”.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 34

Paragraphs 26 to 34 were adopted.

Paragraph 35

38. Mr. EIRIKSSON (Rapporteur) proposed that, at the end of the fifth sentence, the word “all” should be inserted before the words “developing States”. In the French text, the expression *responsabilité délictuelle*

should, as in paragraph 23, be replaced by *responsabilité non contractuelle*.

It was so agreed.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 38

Paragraphs 36 to 38 were adopted.

Paragraph 39

39. Mr. EIRIKSSON (Rapporteur) proposed the following changes. In the first sentence, the words "as it was conceived" should be deleted. The second sentence should be deleted. In the third sentence, the words "he proposed" and "the provision of" should be deleted, and the words "any one or more or all such States" should be amended to read: "one or more of the injured States". Lastly, the end of the fourth sentence should be amended to read: "... affected a number of injured States in different ways."

It was so agreed.

Paragraph 39, as amended, was adopted.

Paragraph 40

Paragraph 40 was adopted.

Paragraph 41

40. Mr. EIRIKSSON (Rapporteur) proposed that the end of the first sentence, after the words "by article 8", the whole of the second sentence, and the end of the last sentence, after the words "Part Three", should be deleted.

It was so agreed.

Paragraph 41, as amended, was adopted.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

41. Mr. EIRIKSSON (Rapporteur) proposed that, after the first sentence, the rest of paragraph 44 should read as follows:

"In reply to the members who had made drafting suggestions, he stated that he was open to drafting improvements. That included the question whether the draft articles would be better formulated in terms of rights of the aggrieved State or of obligations of the offending State."

It was so agreed.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 48

Paragraphs 45 to 48 were adopted.

Paragraph 49

42. Mr. EIRIKSSON (Rapporteur) proposed the following changes. The fifth sentence should be amended to read: "In his view, equity was an implicit element of any rule or decision; and the same applied to reasonableness." In the eighth sentence, the words "under draft article 7" should be deleted.

It was so agreed.

Paragraph 49, as amended, was adopted.

Paragraph 49a

43. Mr. BENNOUNA said that he did not altogether understand the meaning of the third sentence.

44. Mr. ARANGIO-RUIZ (Special Rapporteur) explained that the members in question wished to say that, in the case of compensation for unlawful arrest or imprisonment, and for grief and indignity, arbitral awards were not uniform. To meet Mr. Bennouna's point, he proposed that the word "consistency" be replaced by "uniformity".

It was so agreed.

Paragraph 49a, as amended, was adopted.

Paragraph 49b

Paragraph 49b was adopted.

Paragraph 50

45. Mr. EIRIKSSON (Rapporteur) proposed the following changes. The first two sentences should be combined to read: "On the question of moral damage to private parties, the Special Rapporteur felt that the Commission should not neglect that important element of State responsibility, an element closely connected with respect for human rights." In the third sentence, the word "express" should be deleted. The last sentence should be amended to read: "As explained in the report, that would not be an appropriate object for satisfaction, a remedy which was appropriate only for moral/legal injury to the State."

It was so agreed.

Paragraph 50, as amended, was adopted.

Paragraph 51

46. Mr. ROUCOUNAS said that it would be advisable to verify the accuracy of the references given in footnote 18. The same applied to footnote 13 in paragraph 13.

47. The CHAIRMAN said that that would be done.

Paragraph 51 was adopted on that understanding.

Paragraph 52

48. Mr. EIRIKSSON (Rapporteur) proposed that the words "of the relevant problems", in the last sentence, be deleted.

It was so agreed.

Paragraph 52, as amended, was adopted.

Paragraph 53

49. After a brief exchange of views between Mr. PELLET and Mr. ARANGIO-RUIZ (Special Rapporteur), the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the last part of the last sentence, "where he believed the Court decided that compensation should be paid for *lucrum cessans*", but to retain footnote 20.

It was so agreed.

Paragraph 53, as amended, was adopted.

Paragraph 54

50. Mr. EIRIKSSON (Rapporteur) proposed that the words "for the reasons amply developed in the report", in the second sentence, be deleted.

It was so agreed.

Paragraph 54, as amended, was adopted.

Paragraph 55

Paragraph 55 was adopted.

Paragraph 56

51. After an exchange of views between Mr. BARSEGOV, Mr. GRAEFRATH, Mr. PELLET and Mr. ARANGIO-RUIZ (Special Rapporteur), the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the words "of injury to an unlawful act" after the word "proximity" in the ninth sentence.

It was so agreed.

Paragraph 56, as amended, was adopted.

Paragraph 57

52. Mr. GRAEFRATH, referring to the expression "uninterrupted causal link", said he believed that the doubts expressed during the discussion related not to the concept itself, but to the fact that the Special Rapporteur seemed to connect it with the words "however long". For the sake of accuracy, the words "however long" should be added, without quotation marks, after the words "uninterrupted causal link" in the second sentence.

It was so agreed.

Paragraph 57, as amended, was adopted.

Paragraphs 58 to 61

Paragraphs 58 to 61 were adopted.

Paragraph 62

53. Mr. EIRIKSSON (Rapporteur) proposed the following changes. The words "as a cause of exoneration or", in the first sentence, should be deleted. In the second sentence, the word "partly" should be deleted. The words "at the Drafting Committee stage", in the third sentence, should be deleted, and the third and fourth sentences should be combined to read: "He was ready, in any case, to consider different language and was equally open . . .".

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 71

Paragraphs 63 to 71 were adopted.

Paragraph 72

54. Mr. EIRIKSSON (Rapporteur) proposed that the second sentence be deleted.

It was so agreed.

Paragraph 72, as amended, was adopted.

The meeting rose at 1.05 p.m.

2202nd MEETING

Thursday, 19 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr.

Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouнас, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

CHAPTER V. *State responsibility* (concluded) (A/CN.4/L.450)

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

Paragraph 73

1. Mr. MCCAFFREY said that it was not clear from the first sentence whether satisfaction had been granted once, several times or often.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested inserting the word "frequently" between the words "had" and "been granted".

It was so agreed.

Paragraph 73, as amended, was adopted.

Paragraph 74

3. The CHAIRMAN said that the following changes were proposed. In the second sentence, the words "as amply explained in the report" should be deleted, and the end of the sentence should be amended to read: ". . . formulated (usually against weaker States) were offensive to the honour, dignity and prestige of the allegedly lawbreaking State." In the fourth sentence, the words "clearly" and "by way of reparation for internationally wrongful acts" should be deleted.

It was so agreed.

Paragraph 74, as amended, was adopted.

Paragraph 75

4. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the word "restitutive", in the first sentence, should be replaced by "retributive", a word with a negative connotation in English which was incorrectly translated in the French text by the word *rétributif*, which had a positive sense.

5. Mr. GRAEFRATH, referring to the last three sentences, asked whether reprisals were to be regarded as incompatible with sovereign equality.

6. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, unlike sanctions, reprisals or retortion, which were actions taken by the injured State *vis-à-vis* the offending State and which obviously implied the infliction of a sanction, none of the forms of satisfaction resorted to in the case under consideration involved direct action by an injured State *vis-à-vis* an offending State in the sense of inflicting direct punishment; instead, it was a matter of self-inflicted punishment at the request of the injured State. Perhaps new wording should be found to express that idea.