

Document:-
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Summary record of the 2248th meeting

Topic:
Other topics

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85. The CHAIRMAN said that, if he heard no objection, he would give the floor to Prince Ajibola, who wished to speak in connection with article 2 of the draft articles on jurisdictional immunities of States and their property.

86. Prince AJIBOLA said that, inasmuch as article 2, on the use of terms, defined "court", "State", and "commercial transactions", he saw no reason why it should not define "State enterprise", the interpretation of which had given rise to a great deal of litigation. The uncertainty about what amounted to commercial activities by States had given room for some States to assume "long-arm jurisdiction" against other sovereign States for acts outside their territory, and State property had been attached in execution of judgements obtained.

87. It would therefore be desirable, in order to eliminate that type of problem, to define the term "State enterprise". An "agency" of the State would be a State enterprise if it was a sovereign State's "alter ego", in such a way that it could bind that State to a contract. He therefore proposed a definition that would read: "A 'State enterprise' means an agency or organ or instrumentality of a sovereign State or a political subdivision thereof which enjoys an *alter ego* relationship with that State or a political subdivision thereof".

88. In that regard, he would refer members to article 31 of the Havana Charter,³ which contained the notion of effective control.

89. The CHAIRMAN said that he took note of Prince Ajibola's proposal, which would appear in the summary record.

The meeting rose at 6.50 p.m.

³ Havana Charter for an International Trade Organization (*United Nations Conference on Trade and Employment, Final Act and Related Documents*, Havana, 1948 (E/CONF.2/78, sect II)).

2248th MEETING

Wednesday, 17 July 1991, at 7.25 p.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

CHAPTER III. *The law of the non-navigational uses of international watercourses* (A/CN.4/L.463 and Corr.1 and Add.1-4)

1. The CHAIRMAN invited the Commission to consider chapter III of its draft report, paragraph by paragraph.

A. *Introduction* (A/CN.4/L.463 and Corr.1)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. *Consideration of the topic at the present session* (A/CN.4/L.463 and Corr.1)

Paragraphs 7 to 19

Paragraphs 7 to 19 were adopted.

Paragraph 20

2. Mr. NJENGA requested that the following sentence should be added at the end of the paragraph: "A view was, however, expressed by one member that ground-water travelling between two or more States should also be included, since the same rules were applicable."

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Paragraphs 24 and 25

3. Mr. BARSEGOV proposed that, in the first sentence of paragraph 24, the words "most members" should be replaced by the words "many of the members" and that, at the beginning of paragraph 25, the words "certain members" should be amended to read: "several members".

Paragraphs 24 and 25, as amended, were adopted.

Paragraphs 26 to 29 bis

Paragraphs 26 to 29 bis were adopted.

Section B, as amended, was adopted.

C. *Tribute to the Special Rapporteur, Mr. Stephen McCaffrey* (A/CN.4/L.463 and Corr.1)

Paragraph 30

Paragraph 30 was adopted.

Section C was adopted.

D. Draft articles on the law of the non-navigational uses of international watercourses (A/CN.4/L.463 and Add.1-4)

1. TEXT OF DRAFT ARTICLES PROVISIONALLY ADOPTED BY THE COMMISSION ON FIRST READING (A/CN.4/L.463/Add.4)

Section D.1 was adopted.

2. TEXT OF DRAFT ARTICLES 2, 10, 26 TO 29 AND 32, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-THIRD SESSION (A/CN.4/L.463 and Add.1-3)

Commentary to article 2 (Use of terms)

Paragraphs (1) to (8)

Paragraphs (1) to (8) were approved.

Paragraph (9)

4. Mr. MAHIU suggested that the passages in English in paragraph (9) and other parts of the French text should be translated into French.

5. Mr. McCAFFREY (Special Rapporteur) said that there were a number of technical corrections relating to punctuation and form, especially in the footnotes, which he would make available to the secretariat in writing.

Paragraph (9) was approved on that understanding.

Paragraphs (10) to (13)

Paragraphs (10) to (13) were approved.

The commentary to article 2, as amended, was approved.

Commentary to article 10 (Relationship between uses)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

The commentary to article 10 was approved.

Commentary to article 26 (Management)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

The commentary to article 26 was approved.

Commentary to article 27 (Regulation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

6. Mr. McCAFFREY (Special Rapporteur) said that paragraph (3) did not place enough emphasis on the residual nature of the rule embodied in article 27, paragraph 2. He therefore suggested that, in the second sentence, the words "It requires watercourse States" should be replaced by the words "It is a residual rule which requires watercourse States"; that the words "unless they have agreed on some other arrangement" should be added at the end of the first sentence; and that the words

"would be obligated to contribute" in the last sentence should be replaced by the words "would be obligated, in the absence of agreement to the contrary, to contribute".

Paragraph (3), as amended, was approved.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

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

Commentary to article 28 (Installations)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

7. Mr. BARSEGOV said that a drafting change was required in the Russian text.

Paragraph (3) was approved on that understanding.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to article 28, as amended, was approved.

Commentary to article 29 (International watercourses and installations in time of armed conflict)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

8. Mr. PAWLAK proposed that the words "to the extent possible" in the second sentence should be deleted. They could serve as an escape clause to enable States not to implement the provisions of article 29.

9. Mr. CALERO RODRIGUES pointed out that, if the draft articles ever became a convention, they would establish obligations that could not be implemented in time of armed conflict.

10. Mr. McCAFFREY (Special Rapporteur) said that, in his original draft of paragraph (3), he had referred to various circumstances which precluded wrongfulness and which might be applicable in time of war, such as necessity or *force majeure*. After informal discussions with some members of the Commission, he had replaced those references by the words "to the extent possible". In some cases, there might be a reason for exculpating a State for what would otherwise be a breach of its international obligations because of the need, for example, to protect its population.

11. Mr. GRAEFRATH said that he was in favour of the retention of the words "to the extent possible", which provided a realistic safeguard that related only to the draft articles, not to the rules applicable in time of armed conflict.

12. Mr. MAHIU said that, if the words "to the extent possible" were retained, they would have to be added to the French text.

13. Mr. AL-KHASAWNEH said it would be unwise to state expressly that the obligations under the draft articles would apply only "to the extent possible" in time of war. He therefore supported the proposal that those words should be deleted. Circumstances such as necessity, which precluded responsibility, would apply in any case.

14. Mr. McCAFFREY (Special Rapporteur) suggested that, if the words "to the extent possible" were deleted, the sentence should be amended to read: "The obligation of watercourse States to protect and use international watercourses and related works in accordance with the articles remains in effect during such periods." That wording would place the emphasis on the obligation rather than on the results to be achieved.

15. Mr. GRAEFRATH said that it would be totally unrealistic to believe that the obligations to consult and negotiate, for example, could be maintained without any restriction in time of armed conflict.

16. Mr. CALERO RODRIGUES said that the new wording suggested by the Special Rapporteur was a slight improvement. Nevertheless, he was not altogether satisfied because the second sentence would still contain a concept which everyone knew could not be applied.

17. Mr. PAWLAK said that the Drafting Committee had rejected the suggestion that the words "to the extent possible" should be included in article 29 itself. He could therefore not agree that they should be included in the commentary. He could, however, accept the wording proposed by the Special Rapporteur.

18. Mr. BARSEGOV said that there were rules relating to watercourses which had to be complied with even in time of war. That did not mean, of course, that an army would be allowed to cross a river, but it did mean that the water could not be polluted and that dams could not be blown up. He therefore supported the suggestion that the words "to the extent possible" should be deleted.

19. Mr. AL-KHASAWNEH recalled that, when the Commission had discussed the question of indirect procedures, it had agreed that those procedures would remain in effect and that the obligations would continue to be in force. He could agree with Mr. Graefrath's point if reference was being made to the exceptional case of the outbreak of hostilities. That situation was, however, dealt with in the third and fourth sentences of paragraph (3). He therefore supported the suggestion that the words "to the extent possible" in the second sentence should be deleted as unnecessary and inappropriate.

20. The CHAIRMAN suggested that the second sentence should be amended to read: "The obligation of watercourse States to protect and use an international

watercourse and related works in accordance with the articles remains in effect during such times."

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 29, as amended, was approved.

Commentary to article 32 (Non-discrimination)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

21. Prince AJIBOLA requested the Special Rapporteur to explain the use of the word "transfrontier" in the first sentence. He also wished to know the meaning of the word "eventuate" in the third sentence.

22. Mr. McCAFFREY (Special Rapporteur) said that the term "transfrontier harm" meant harm which had its source in one State and its effects in another State. The word "eventuate" should be replaced by the word "occur".

23. Mr. AL-BAHARNA proposed that the words "transfrontier harm" should be replaced by the words "transboundary harm", which was the usual term.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

24. Mr. PAWLAK suggested that the word "substantive" in the first sentence should be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 32, as amended, was approved.

25. Mr. GRAEFRATH noted that section D contained the texts of draft articles 28, 29 and 32, but not of draft articles 30 and 31. In his view, the final version of the report should include draft articles 30 and 31 as well.

26. Mr. McCAFFREY (Special Rapporteur) suggested that a footnote should be added to draft article 32 to indicate that draft articles 30 and 31 were renumbered versions of articles that had previously been adopted.

It was so agreed.

Section D. 2, as amended, was adopted.

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

27. Mr. McCaffrey (Special Rapporteur) said that he wished to mention two further points. In the first place, a document entitled "Development of legal instruments for transboundary waters" had been issued by the Preparatory Committee for UNCED to be held in Rio de Janeiro in June 1992. That document, which the secretariat had made available in all languages, referred to the work on the draft articles on international watercourses, and that was a very positive development.

28. Secondly, a number of members had suggested that the commentaries to all the draft articles on international watercourses should be included in the Commission's report to the General Assembly. The main reason for that suggestion was that a number of important technical changes had been made to the commentaries adopted earlier. At the same time, he understood that the secretariat was planning to circulate a document to Governments incorporating those changes, so that it might not be necessary to include all the commentaries in the report. His own feeling was, however, that, if such a document was being prepared, its content could still be incorporated in the report, since no additional translation or typing would be required; in that way, the commentaries to the articles adopted on first reading would be available in one document.

29. Mr. Pawlak said the prevailing view in the Drafting Committee had been that the inclusion of the commentaries would make the report too voluminous. That was why the alternative solution had been advanced of making the full text of the commentaries and articles available to Governments in a separate document.

30. Mr. Graefrath said that he was very much in favour of including in the report the articles and commentaries in their entirety. He also considered that it should be indicated in a footnote that some of the commentaries and articles had already been introduced in earlier reports. Simply to set forth in the report part of what had been adopted, asking Governments to refer back to earlier reports if they wanted to know what had already been adopted, seemed to him to be a very strange way of going about matters.

31. Mr. Kotliar (Secretary to the Commission) said that the secretariat fully appreciated how useful it would be to include in the report all the commentaries to the draft articles on international watercourses. Before the Commission took a decision on the matter, however, he would like it to consider the following points. In the first place, it had never been the Commission's practice to include commentaries to articles adopted on first reading: in 1990, for instance, the commentaries to the articles on jurisdictional immunities had not been included in the report. Secondly, if the commentaries on international watercourses were included, the commentaries to the draft Code of Crimes Against the Peace and Security of Mankind would also have to be included, since the two topics could not be treated differently. That would add some 150 pages to a report already over 400 pages long, with a resultant increase in the costs of, and delay in, the reproduction of the report. Lastly, regard must be had to the possible reactions of representatives to the Sixth Committee of the General Assembly when faced with a

document of some 600 pages, which they would, moreover, receive later than usual.

32. Mr. Barboza asked why there should be any change in the Commission's practice of not including in its report commentaries to articles adopted on first reading.

33. Mr. Roucounas said that he supported Mr. McCaffrey's very useful proposal. If it had indeed been the Commission's practice not to include commentaries in the report to articles adopted on first reading, then it was time to change that practice. He appreciated that the Commission's report on its current session was particularly voluminous, but did not think that was a valid reason for not including in the report the full set of draft articles and commentaries. As a former student of the Commission's work and as a current member, he had had much difficulty in sifting through past reports of the Commission in an endeavour to determine the line of thinking of the author of a particular draft. In his view, the time had therefore come to harmonize the Commission's whole approach in the matter.

34. Mr. Shi said that he was extremely sympathetic to the suggestion that all the commentaries to the draft articles on international watercourses should be included in the report. That would, however, add at least 100 pages to the report, quite apart from the fact that the commentaries to the articles on the draft Code would also have to be included, since there must be no discrepancy in the treatment of the two topics. Such a voluminous report would undoubtedly give rise to strong reactions in the Sixth Committee and the members of the Commission who attended its meetings would be placed in a very awkward position. His own suggestion was therefore that, after the first reading, all the draft articles on a given topic should be assembled together with the relevant commentaries in one document which should then be transmitted to Governments. A copy should also be sent to all members of the Commission.

35. Mr. Arangio-Ruiz said that he endorsed the views expressed by Mr. Shi.

36. Mr. Calero Rodrigues said that, while he fully agreed that it might be helpful to include in the report all the commentaries on the articles, he considered that, in view of the technical problems, the Commission should not press the point. For his own part, he would be satisfied to some extent if the commentaries to the draft articles adopted at the current session were included in the report. In addition, the Special Rapporteur and secretariat could perhaps be authorized to make any minor changes in the commentaries previously adopted that were necessary to adapt them to the revised texts of the articles.

37. Mr. Eiriksson said that the adoption of articles on first reading was not an everyday occurrence. Although the inclusion of the commentaries would add to the volume of the report, that drawback would be offset by the usefulness of the commentaries.

38. He understood, however, that the preparation of the documents incorporating the draft articles and commentaries on the topic of international watercourses and

of the draft Code were well under way. The best solution might therefore be to complete those documents as quickly as possible and make them available before the next session of the General Assembly.

39. Mr. McCaffrey (Special Rapporteur) said that he would not press his point. So far as the length of the report was concerned, however, it should be remembered that the Commission was faced with a very unusual situation in that it had completed three topics at the current session, but, to invoke that as a ground for not including the commentaries in the report was, in his view, quite unjustified. It was not just a matter of sifting through past commentaries. His main point was simply that, if an effort was to be made to assemble all the draft articles and commentaries in a single document, for submission to representatives in the Sixth Committee, the content of that document might just as well be incorporated in the report and eventually appear in the *Yearbook of the International Law Commission* so that a comprehensive set of commentaries was available.

40. Mr. AL-KHASAWNEH asked whether the commentaries to all the articles could be enclosed with the letter to be addressed to Governments in January 1992. A paragraph could perhaps also be included in the report to explain that that course had been adopted in order to save time. It would, of course, also save money.

41. Prince AJIBOLA said that he supported Mr. Shi's proposal on account of its realistic approach.

42. The CHAIRMAN said that it would have been of great assistance, particularly to researchers, to set forth in one document all the commentaries to the draft articles on international watercourses and on the draft Code of Crimes against the Peace and Security of Mankind. That might, however, have had a negative effect, causing the Sixth Committee to focus on the size, rather than the content, of the report. In the circumstances, he suggested that the Special Rapporteur should be requested to update the commentaries to the articles on the law of the non-navigational uses of international watercourses so that they could be made available to representatives to the Sixth Committee of the General Assembly.

It was so agreed.

The meeting rose at 9 p.m.

2249th MEETING

Thursday, 18 July 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues,

Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

1. The CHAIRMAN invited the Commission to consider chapter VII of its draft report, paragraph by paragraph.

CHAPTER VII. *State responsibility* (A/CN.4/L.467)

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

2. Mr. ARANGIO-RUIZ (Special Rapporteur), responding to a query by Prince AJIBOLA, said that the word "notably" helped to indicate that the third report dealt in principle only with delicts, although the existence of other internationally wrongful acts had not been forgotten.

Paragraph 9 was adopted.

Paragraphs 10 to 17

Paragraphs 10 to 17 were adopted.

Paragraph 18

Paragraph 18 was adopted with a minor drafting change.

Paragraph 19

3. Mr. JACOVIDES said that "imperative rules", in the second sentence, should be replaced by "peremptory norms".

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Section B, as amended, was adopted.