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Summary record of the 2875th meeting

Topic:
<multiple topics>

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could recommend that the Drafting Committee determine whether certain provisions could be formulated in a more prescriptive fashion, for example by replacing the numerous instances of the word "should" in the English text by "shall".

The meeting rose at 11.20 a.m.

2875th MEETING

Friday, 12 May 2006 at 11.35 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Later: Mr. Víctor RODRÍGUEZ CEDEÑO

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (*continued*) (A/CN.4/562 and Add.1, A/CN.4/566, A/CN.4/L.686 and Corr.1)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. CHEE commended the Special Rapporteur's tenacity and diplomatic skills, which had enabled him to overcome many obstacles. Equipped with his excellent third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities, the Commission would undoubtedly bring its work to a successful conclusion.

2. Following the adoption of the draft articles on prevention of transboundary harm from hazardous activities,[82] the Special Rapporteur had produced the draft principles on liability arising from transboundary harm, which were intended to be a soft law instrument. The core of the instrument was the provision of remedies for damage sustained by victims; if compensation for the damage was not adequate, additional financial resources would be provided based on allocation of loss. The formulation in principle 4 seemed to be based upon the Hull formula, articulated by United States Secretary of State Cordell Hull in 1938 in response to the nationalization of United States assets by the Government of Mexico.[83]

3. The preamble to the draft principles referred to the 1992 Rio Declaration,[84] which had followed up on the 1972 Stockholm Declaration.[85] It was significant that both declarations contained a clause on the obligation of States to ensure that "activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

4. The Special Rapporteur's report highlighted three principles, namely the precautionary approach, the "polluter pays" principle and the principle of due diligence. In paragraph 42 of his report the Special Rapporteur declared his objective of casting the end-product in the form of draft principles, an approach which had the twofold advantage of not requiring the potentially unachievable harmonization of national laws and legal systems, and of being more likely to meet the goal of widespread acceptance. Paragraph 43 of the report stated that such a course might pave the way for eventual codification of international law on the subject.

5. Principle 21 of the 1972 Stockholm Declaration was also of great relevance to the topic, and a reference thereto should be included in the preamble to the draft principles on allocation of loss. While both developing and developed States continued to seek industrial development, the reality was that environmental pollution had been mainly caused by the developed countries. Their reluctance to regulate environmental pollution was therefore to be expected. Nevertheless, the stakes were high: unless industrial pollution was regulated, the very future of human life on earth could be jeopardized.

6. On the threshold of "significant" harm adopted in draft principle 1, he noted that that criterion needed to be weighed against the extent of the risk of such harm arising. Draft principle 2 provided comprehensive definitions of "damage", "environment", "transboundary damage", "hazardous activity" and "operator". Draft principle 3 was crucial in that it defined the objective of the draft principles as being to provide compensation which was prompt and adequate. Accordingly, pursuant to draft principle 4, paragraph 1, each State should take necessary measures to ensure that prompt and adequate compensation was available for the victims of transboundary damage. Paragraphs 3, 4 and 5 of the same draft principle related to financial security such as insurance to cover claims of compensation, including industrywide funds at the national level where appropriate and, where such measures proved to be inadequate, called upon the State to ensure that additional financial resources were allocated. Draft principle 5, on response measures, provided that States should, *inter alia*, take steps promptly to notify other States affected. Draft principle 6 indicated that States should provide appropriate procedures to ensure that victims received compensation for damage caused by transboundary harm. In draft principle 7, States were urged to cooperate in the development of global, regional or bilateral agreements on prevention and response measures.

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[82] See footnote 56 above.

[83] Cited in A. Cassese, *International Law in a Divided World*, Oxford, Clarendon, 1986, p. 322.

[84] See footnote 72 above.

[85] See footnote 71 above.

7. Draft principle 8, paragraph 2, called upon States to apply the draft principles and any implementing measures without any discrimination such as that based on nationality, domicile or residence. Paragraph 3 urged States to implement the draft principles in a way that was consistent with their obligations under international law. The language of draft principles 4 to 8 was, of course, recommendatory rather than prescriptive.

8. As to the final form that should be taken by the draft principles, they should be transformed into a legally binding instrument. Precedents existed in some of the principles of the Stockholm and Rio Declarations that he had cited earlier, which could be regarded as norm-creating declaratory principles of international law. Another precedent was provided by the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[86] adopted by the Commission in 1950. In any case, whether the draft principles were adopted as an instrument containing prescriptive articles or as a recommendatory soft law instrument, the Special Rapporteur had his support.

9. Mr. BAENA SOARES said that while the Chairperson had already welcomed Mr. Valencia-Ospina on behalf of the Commission, he wished to extend him an especially warm welcome on behalf of the Latin American members of the Commission.

10. The third report on allocation of loss in case of transboundary harm constituted new evidence of the Special Rapporteur's talent for synthesizing and harmonizing positions and for giving careful consideration to all aspects of an issue. It therefore came as no surprise that the draft principles had been well received by the General Assembly. The fact that the Commission was now embarking on the final phase of its work on the draft was evidence of the extraordinary progress made. As the Special Rapporteur had pointed out, 24 reports had been devoted to the topic over a period of 27 years, and Mr. Candioti had recalled how, 10 years previously, a number of eminent jurists had attempted to bury the topic. The fact that the work could be completed at the current session was truly a splendid reversal of fortunes.

11. Generally speaking, he supported the Special Rapporteur's wise and prudent recommendations. Flexibility and effectiveness should be the watchwords informing the decisions made, especially with regard to the final form that the draft principles should take. The Special Rapporteur was right to suggest, in paragraphs 42 to 44 of his report, that the best way of working with States was for the Commission to offer the end-product as draft principles with commentaries and to wait until the time was ripe for a binding instrument. It would appear that that time had not yet come. The fact that as of October 2005, nearly 10 years after its adoption, the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter "1997 Watercourses Convention") had been ratified by only 6 States and signed by only 16 was hardly auspicious.

12. In view of the variety of factors involved and the diversity of situations, flexibility was of the utmost importance for the success of his work, a fact of which the Special Rapporteur was well aware. He agreed with the Special Rapporteur that the draft should be general and residual to enable States to fashion specific regimes taking into consideration particular sets of circumstances. In addition, it was essential to ensure that victims of hazardous activities received prompt and adequate compensation, as the report asserted when designating the liability of operators as being strict but limited, with a minimum of exceptions. The report cautiously endorsed the "polluter pays" principle and, with regard to multiplicity of claims, referred to the considerable support given to adopting the "most favourable law" principle.

13. The Special Rapporteur rightly remained of the opinion that there was no good reason not to maintain the threshold of "significant" harm, thereby excluding negligible damage and frivolous claims. He had no reservations regarding the Special Rapporteur's handling of the question of damage to environment *per se*, and considered the Commission's definition of "environment" to be sufficiently broad.

14. In the section entitled "Notable obligations of State", the Special Rapporteur pointed out that State liability for transboundary damage for either ultrahazardous activities or hazardous activities did not appear to have support, but that the obligation of due diligence had emerged as a general principle of international law to be observed by States both at the stage of authorization of hazardous activities and in monitoring the activities authorized, with the ancillary duty of mitigating the effects of damage when it took place. In paragraph 32, the Special Rapporteur quite rightly referred to principle 11 of the Rio Declaration and to the need to take account of the wide divergence of social and economic conditions obtaining among States. The standards applied by some countries might be inappropriate and of unwarranted economic and social cost to other countries.

15. At the end of the report, the Special Rapporteur raised the issue of the relationship between the draft articles on prevention adopted by the Commission in 2001 and currently awaiting further action by the General Assembly, and the draft principles under consideration, offering the Commission, in paragraphs 45 and 46 of the report, two alternative courses of action. In his personal view, both suggestions should be transmitted to the General Assembly for consideration and decision, as both were relevant and appropriate. For his own part, he preferred the proposed course of action set forth in paragraph 45 of the report.

16. Mr. Sreenivasa RAO (Special Rapporteur), summing up the discussions, said it was regrettable and frustrating that, session after session, the Commission had been unwilling to devote the necessary time to such a complex topic. Although Mr. Pellet had rightly noted that the subject required careful study and should not be rushed through, it had been on the Commission's agenda for nearly 30 years but had gone nowhere. The Commission should decide whether it really wanted to pursue the topic, or to accord it an honourable burial.

[86] *Yearbook ... 1950*, vol. II, document A/1316, Report of the International Law Commission covering its second session, 5 June–29 July 1950, p. 374 (available on the Commission's website).

17. He was grateful to all members who had commented on his third report, which he had sought to keep short and concise. He could not have hoped to solve the problems left in abeyance for so many years, especially as the issues were becoming increasingly technical and politically sensitive. Stressing the need for the work in the Commission to be based on a spirit of compromise, good faith and transparency so that the views of all members could be taken into account and no one was left isolated, he thanked Mr. Economides for his independence of mind, Ms. Escarameia for her valiant efforts, Mr. Matheson for bringing in a completely new perspective and for his cooperation in seeking a common goal, and Mr. Gaja for drawing attention to a number of aspects of a given issue which had hitherto gone unnoticed. It should be borne in mind, however, that not all goals could be attained. Aware of the heavy burden of responsibility he bore, he had been unable to move ahead as quickly as some might have liked. He himself could only make proposals, and he relied on members for their contributions and comments in what should be a collegial effort.

18. Much work remained for the Drafting Committee. Like the Sixth Committee, the Commission in plenary session had identified some clearly established principles. Mr. Matheson had summed up the situation in his excellent statement on the topic. He himself had done so to a certain degree in the section of the report on "Notable obligations of State".

19. Throughout the 27 years of debate, the State had been the main focus, but it had become clear in the mid-1990s that, although not directly liable, a State had an obligation to set up a liability regime and would be responsible if it failed to do so. For the past 10 or so years, the Commission had promoted the ideas of civil liability and of strict and limited liability of the operator as far as was possible; that notion had already been accepted in most jurisdictions. There could, however, be no single set formula even in that respect. If liability were made less strict and fault liability established, some goals could still be achieved. Moreover, as Mr. Kolodkin had rightly pointed out, in the case of fault and negligence on the part of the operator, the operator's liability was unlimited. However, although the literature showed that strict and limited liability was not the only way of achieving prompt and adequate compensation for victims, the general tendency was to require strict and limited liability of the operator with respect to hazardous activities. That was because it was difficult to obtain proof: the activities were complex, and industrial secrecy and other requirements of confidentiality did not permit full disclosure of how they were carried out. If it was difficult for nationals or Governments to obtain proof, it was even more difficult for victims of transboundary harm to do so. Hence the need for strict liability, which lightened the burden of proof. As Mr. Yamada had noted, such liability must be limited, because in the modern world, there was universal interest in such activities continuing; no one wanted an operator to be put out of business because of a single accident, especially if he was irreplaceable. Moreover, it was still difficult for operators to obtain security such as insurance to cover themselves against claims, and thus some obligations could not be strictly imposed.

20. No State could any longer allow hazardous activities within its territory without putting some kind of compensatory mechanism or liability regime in place for the potential victims of transboundary damage. States could not shelter themselves behind the excuse that they had no relevant legislation and thus could not pay compensation. If the operator did not pay, the State should do so. Ultimately, it was no longer acceptable in terms of human rights and the development of international law that the State should fail to intervene and pay compensation.

21. The question was how to incorporate those considerations in the draft principles. The Commission had reason to be pleased with draft principle 4, but it had to be strengthened. As Ms. Escarameia had observed, the problem was one of content. He urged members to put forward their own proposals for new formulations.

22. The Commission had agreed that supplementary funding mechanisms were very important. As in other contexts, States must attract contributors other than the operator on the basis of a common interest in the continuation of an activity. Alternatively, they might introduce tax mechanisms. It was in the common interest of other stakeholders to establish supplementary funding mechanisms to deal with oil spills or nuclear accidents. In some instances, the State itself had contributed to establishing liability for accidents in nuclear power plants, because it was directly involved in running the plants and wanted the operating process to continue. It would be difficult to introduce a supplementary mechanism as a mandatory obligation without identifying which stakeholders had a common interest in contributing to it. Different types of contributor would have to be found for each hazardous activity.

23. It was important to place on record those areas in which consensus existed. The State had considerable flexibility in deciding how to go about ensuring that the operator, however he might be defined, paid compensation to victims of transboundary damage arising out of hazardous activities, but that idea must emerge clearly and unambiguously at some point in the draft principles; that was a job for the Drafting Committee. He would indicate in the commentaries to what extent some of the principles were in the process of crystallizing into clear obligations. It was not necessary to include everything in the text itself; many issues could be dealt with in the commentaries, thereby opening the way to compromise. The format would have to be that of draft principles; but the Commission could not establish a principle without fleshing it out, and if a principle remained hollow, it would serve no purpose. That was why he was not prepared to cast the draft principles in the form of a convention, because then everything would have to be spelled out in mandatory, normative terms, which was not possible.

24. Accordingly, it would be best for the Drafting Committee to consider the draft principles in the light of the drafting suggestions and comments made, before discussing how some of the formulations could be strengthened, bearing in mind Mr. Koskenniemi's comment about the fundamental need to ensure that victims

received compensation. If the Commission lost sight of that fundamental objective, then the entire exercise would have been in vain. That would be a shame, since there was still time to realize the topic's great potential.

25. The CHAIRPERSON said that the Commission had thus completed its consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities). In keeping with the Commission's practice, the draft principles would be referred to the Drafting Committee so that their consideration on second reading could begin, having regard to the Special Rapporteur's proposals, the comments of Governments and the observations made by members of the Commission during the debate.

26. The Bureau was of the opinion that the Commission should follow the Special Rapporteur's recommendations and that it was for the General Assembly to decide whether the results of the work on the topic should take the form of a convention or of a statement of principles. Furthermore, the Drafting Committee should bear in mind that there were two groups of principles: those which were already regarded as being part of general or customary international law, and those which fell within the area of progressive development. The principles that were already part of customary international law should be couched in normative terms, whereas those that sought to gain entry into general international law should allow for some flexibility so that the Commission could rally the support of all States and the international community as a whole. The Chairperson asked whether, bearing in mind the convergence of approach that had emerged in the comments of members, the guidance offered by the Special Rapporteur and the Bureau's assessment, the Commission wished to refer the draft principles to the Drafting Committee.

27. Mr. MATHESON said that the Drafting Committee would undoubtedly take into account the Chairperson's comment regarding the possible customary law basis of some of the draft principles. He sought reassurances, however, that the Commission was not instructing the Drafting Committee to draw up two separate sets of principles, one of which pertained to customary law while the other did not. Such an approach would be impracticable and have an adverse impact on the Commission's work. The Drafting Committee would be wise to work on the basis of the principles put forward by the Special Rapporteur.

28. The CHAIRPERSON said that there had never been any suggestion, from any quarter, that two sets of principles should be prepared. Each draft principle would be considered and dealt with as appropriate. If he heard no objection, he would take it that the Commission wished to refer the draft principles to the Drafting Committee.

It was so decided.

Mr. Rodríguez Cedeño (Vice-Chairperson) took the Chair.

Responsibility of international organizations[87] (A/CN.4/560, sect. C, A/CN.4/564 and Add.1–2,[88] A/CN.4/568 and Add.1,[89] A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

29. Mr. GAJA (Special Rapporteur), introducing his fourth report on responsibility of international organizations, said that he would discuss only the first part of the report. The second part of his report would be presented during the current session if the programme of work allowed. Comments received from international organizations following the Commission's fifty-seventh session appeared in documents A/CN.4/568 and Add.1. He would refer extensively to two comments—from the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO)—which had been received after the date of submission of the report but which included a brief discussion of circumstances precluding wrongfulness.

30. In recent months there had been a positive increase in the interest shown by international organizations in the Commission's work on responsibility of international organizations, as evidenced by two meetings that he had attended. The first had been organized by the World Bank and had involved lawyers from the World Bank, the International Monetary Fund (IMF) and other financial institutions. The second, held in Vienna on the initiative of the Legal Counsel of the United Nations, had been attended by the legal counsels of all the United Nations specialized agencies and of the host agency, the International Atomic Energy Agency (IAEA).

31. Regarding circumstances precluding wrongfulness, it must be emphasized that there was a dearth of available practice and literature on the subject. That should not be taken to mean that circumstances precluding wrongfulness were not relevant with regard to wrongful acts of international organizations, that, for example, consent would preclude the wrongfulness of an act of a State but not that of an act of an international organization. Nor would it be tenable to hold that an international organization could never invoke *force majeure*. At the same time, however, not all the circumstances precluding wrongfulness should be applied in the same way to States and to international organizations.

32. Although the report considered all the circumstances precluding wrongfulness that had been dealt with in the context of States, he would, in his introduction, consider only three circumstances that appeared to raise specific problems with regard to international organizations, on the basis of what little practice he had gleaned in that area. The three were self-defence, countermeasures and necessity.

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[87] See the text of the draft articles adopted so far by the Commission in *Yearbook ... 2005*, vol. II (Part Two), chapter VI, section C.

[88] Reproduced in *Yearbook … 2006*, vol. II (Part One).

[89] *Idem.*

33. The conditions for an act to be regarded as lawful because it was performed in self-defence were to some extent controversial. The Commission had not conducted an examination of those conditions when drafting the articles on responsibility of States for internationally wrongful acts,[90] nor, in his view, should it do so in the context of international organizations. The first question that arose was whether self-defence was relevant to international organizations. The term had frequently been used in United Nations documents—probably not always appropriately—in order to specify the circumstances in which the use of force by United Nations peacekeeping forces was permissible. According to the position taken by the United Nations, they were entitled to react to attacks—including for the defence of the mission—and such a reaction was to be regarded as lawful. The same would apply to organizations other than the United Nations that lawfully employed armed forces. Self-defence could also be invoked by an international organization under other circumstances, such as an armed attack on a territory that it administered. Although the World Health Organization held that "a circumstance such as self-defence is by its very nature only applicable to the actions of a State", that view appeared to ignore circumstances in which self-defence would be relevant. UNESCO, on the other hand, had favoured including self-defence as a circumstance precluding wrongfulness.

34. The second question was whether an international organization that was the target of an armed attack could invoke self-defence under the same conditions as a State. There again, he could see no reason why a different condition should apply to an international organization. As noted in paragraph 18 of the report, the ICJ had stated, in its judgment in *Oil Platforms*, that it did "not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence'" (para. 72 of the judgment). That was, admittedly, a broad conception of self-defence, but it stood to reason that the same solution should apply if an armed force deployed by an international organization or a territory that an organization administered was the object of a similar attack.

35. Countermeasures had been referred to in article 22 of the draft articles on responsibility of States for internationally wrongful acts,[91] within the chapter on circumstances precluding wrongfulness, only because of the effect that they had on the wrongfulness of the act by the State resorting to such a measure. Detailed provisions on countermeasures had been included in Part Three of the draft articles. A similar approach should be taken with regard to international organizations. It could not be ruled out that such an organization might take countermeasures under certain circumstances. For example, should a State or another international organization breach an obligation under a bilateral agreement with an international organization, there was no reason why the latter should not be entitled to resort to countermeasures. The conditions under which it might do so would need to be discussed. UNESCO had noted that the issue should be "clearly distinguished from that of sanctions, which may be adopted by an organization against its own member States". The Commission would need to reflect on whether sanctions could be regarded as countermeasures. It should do so, however, only when it came to discuss the implementation of international responsibility. Meanwhile, the provision could either be left blank save for the title, or else a text modelled on article 22 of the draft articles on responsibility of States for internationally wrongful acts could be included, with an implied reference to the provisions—yet to be written—that would specify the conditions under which an international organization might resort to countermeasures.

36. There were a considerable number of references to necessity in the practice of international organizations. The main question was whether, as a circumstance precluding wrongfulness, the concept of necessity should be applied to international organizations as liberally as it was to States. According to article 25 of the draft articles on responsibility of States for internationally wrongful acts,[92] States could invoke necessity when a grave peril threatened one of their essential interests or an essential interest of the international community as a whole. The essential interests that an international organization could invoke should not, however, be as wide-ranging as those of States. Paragraph 42 of the report referred to the way in which the term was understood by various international organizations, including the World Bank and the IMF. The European Commission referred to the need to protect an "essential interest enshrined in its Constitution as a core function and reason of its very existence". The first part of this wording was explicitly endorsed by ILO, and UNESCO also referred to the "functions" of the organization. Indeed, the latter had—somewhat prematurely—approved the text of draft article 22 appearing in paragraph 46 of the report, which stated that the only essential interests for which an international organization might invoke necessity were those which the organization had the function to protect. That would exclude, on the one hand, other interests pertaining to the international community but not entrusted to that organization and, on the other hand, interests relating to the very existence of the organization, unless the grave peril would also affect the essential interests that the organization had the function to protect.

The meeting rose at 1 p.m.

2876th MEETING

Tuesday, 16 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

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[90] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

[91] *Ibid.*, p. 27 and pp. 75–76 for the commentary.

[92] *Ibid.*, p. 28 and pp. 80–84 for the commentary.