

Document:-
A/CN.4/SR.2086

Summary record of the 2086th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

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97. Mr. YANKOV said that paragraph 5 dealt with an important issue having political and legal implications, for it stated that a Security Council determination as to the existence of an act of aggression was binding on national courts. Article 25 of the Charter of the United Nations was relevant in that connection, as was Article 39, on the competence of the Security Council. Paragraph 5 commanded his full support, since it constituted in a sense the development of United Nations law. The square brackets were unnecessary, for adequate explanations would be given in the commentary and members' views would be set out in the summary records. If, however, the majority wished to retain the square brackets, he would be prepared to accept such a course for the purpose of indicating that there had been differences of opinion.

98. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 5 with the square brackets.

It was so agreed.

Paragraph 5 was adopted.

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Article 12 was adopted.

99. Mr. BARSEGOV said that the text of article 12 did not contain any reference to the binding force of relevant General Assembly resolutions. The reason was that some members of the Commission were opposed to such a reference. In the course of the debate, the view had been expressed that General Assembly resolutions must be regarded as political texts from a political body, so that it was inappropriate to speak of them in a criminal code, which constituted a legal text.

100. He did not share the view that the 1974 Definition of Aggression was a purely political text devoid of legal content. Such a view would mean that any determination by the Security Council, and any steps it took on the basis of that Definition, would be without legal meaning. It would also open the door to justifying the refusal to observe Security Council decisions on the grounds that they were based on a purely political text and not on a legal instrument.

101. Prince AJIBOLA noted that paragraph 2 of article 12 used the expression "Charter of the United Nations" in full, and said that the same form should be used in all the other paragraphs that referred to the Charter.

The meeting rose at 1.10 p.m.

2086th MEETING

Monday, 25 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

Mr. Calero Rodrigues, Mr. Eriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its fortieth session

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

CHAPTER III. *The law of the non-navigational uses of international watercourses* (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

A. Introduction (A/CN.4/L.425)

Paragraphs 1 to 15

2. Mr. YANKOV said that, rather than repeat the background to the topic every year, it might be more rational simply to give a brief summary. A detailed history of the work could be provided when consideration of the topic was completed. That was true for all the Commission's reports and he would therefore revert to the matter during consideration of the part of the draft report on the Commission's working methods and documentation.

Paragraphs 1 to 15 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.425)

Paragraphs 16 to 25

Paragraphs 16 to 25 were adopted.

Paragraph 26

3. Mr. RAZAFINDRALAMBO asked why the Commission's discussion on article 15 was summarized in only one paragraph, whereas much greater space was given to the consideration of the other articles, on pollution.

4. Mr. McCAFFREY (Special Rapporteur) said that it was the Commission's practice not to include a summary of the discussion on draft articles adopted in the course of the session, probably because the commentaries to the articles performed the same function. It was true, however, that paragraph 26 could be expanded a little, for example by adding a sentence indicating that the text of article 15 had been provisionally adopted at the present session on the recommendation of the Drafting Committee and that it now constituted articles 10 and 20.

It was so agreed.

Paragraph 26, as amended, was adopted.

Paragraphs 27 to 31

Paragraphs 27 to 31 were adopted.

Paragraphs 32 and 33

5. Mr. BARSEGOV said that he would like some clarification regarding the content of paragraph 33. Although the Commission had so far considered articles only on relations between watercourse States, the impression gained from paragraph 33 was that the Commission was also envisaging the adoption of articles governing relations between watercourse States and non-watercourse States. What meaning was to be attached in that regard to the expression "watercourse State"? If paragraph 33 were taken to its logical conclusion, the draft could well include not only States with multinational watercourses, but also States whose territory contained the whole of a watercourse that might cause marine pollution.

6. Mr. McCAFFREY (Special Rapporteur) pointed out that, in the discussion on articles 16 and 17, which was summarized in paragraph 33, some members had noted that, since the draft dealt with pollution of the sea by international watercourses, it should envisage the possible relationship between watercourse States and other States, for example in the case of harm to a non-watercourse State or in the case of pollution of the sea beyond the limits of national jurisdiction. For his own part, he had found the idea interesting. Nevertheless, Mr. Barsegov's comment was entirely relevant. The only, and perhaps rather simplistic, reply was that the title of the topic spoke not of national watercourses but only of international—or, to use Mr. Barsegov's expression, multinational—watercourses.

7. Mr. MAHIU pointed out that paragraph 33 simply said that the problem of the relationship that might arise between watercourse States and other States merited careful consideration. When the Commission reverted to the matter, it would obviously take account of Mr. Barsegov's comments.

8. Mr. BARSEGOV said it would be better for the report to say that the Commission, in considering the problem of the relationship between watercourse States and non-watercourse States, would be facing the risk of going beyond the scope of the topic it had been instructed to consider.

9. Mr. BENNOUNA said that, whereas paragraph 32 summarized the arguments against the idea of having a separate part in the draft on questions of pollution and paragraph 33 set out the opposite view, the draft report said nothing about the middle-ground position. The advocates of that position, one he himself shared, held that the general provisions of the draft already dealt with the protection of a watercourse against pollution, for which reason a link should be established between those general provisions and the separate part on the question. A sentence along those lines could be added at the end of paragraph 32.

10. Mr. BEESLEY said that he attached the greatest importance to making the provisions on environmental protection a separate part of the draft. He was concerned, however, to respect other views and saw no drawback in endeavouring to harmonize as best as possible, both in form and in substance, the provisions in other parts of the draft and those dealing especially with environmental protection. He was aware of the dif-

ficulties connected with the other question raised—pollution of the marine environment by national rivers—but felt that they should not prevent the Commission from seeking, within the context of its mandate, to establish the broadest possible régime of protection.

11. Mr. McCAFFREY (Special Rapporteur) proposed that, to take account of Mr. Barsegov's comments, the following text should be inserted before the last sentence of paragraph 33: "It was pointed out, however, that care should be taken not to exceed the scope of the Commission's mandate with regard to the present topic." With regard to Mr. Bennouna's comments, the following sentence could be added at the end of paragraph 32: "According to another view, it was essential that a link be provided between the provisions on pollution and environmental protection and the other parts of the draft."

12. The CHAIRMAN said that, in the first sentence of the Spanish text of paragraph 33, the word *refutarlo* should be replaced by *incluirlo* or *incorporarlo*.

13. Mr. BARBOZA said that he would like to know whether the Special Rapporteur's proposal concerning Mr. Barsegov's comments actually reflected the debate in question or whether it reflected the present discussion—in which case it would be enough for that point of view to be set out in the summary record of the meeting. It was, in his opinion, a very important matter of procedure and one that applied generally.

14. Mr. OGISO said that the Special Rapporteur's proposal regarding paragraph 33 was satisfactory. For his own part, he had one minor suggestion, namely to start a new paragraph from the words "In this connection" in the fifth sentence, so as to deal separately with that exceptional case.

15. Mr. YANKOV said that he endorsed Mr. Ogiso's suggestion. Similarly, the sentence the Special Rapporteur had proposed adding at the end of paragraph 32 could also form a separate paragraph, for it, too, contained a different idea.

16. With regard to protection of the marine environment against land-based pollution, it was difficult to draw a clear-cut distinction between pollution from international watercourses and pollution from national watercourses. In the latter case, however, it was the 1982 United Nations Convention on the Law of the Sea that applied and, like Mr. Barsegov, he therefore considered that the Commission should confine its work to international watercourses. In his opinion, the solution was to be found in paragraph 34, to which he would in due course propose an amendment to meet all the views expressed.

17. Mr. BENNOUNA, referring to the sentence starting with the words "According to another view" proposed by the Special Rapporteur for insertion at the end of paragraph 32, said that it was doubtful whether those words were necessary, for it was not a point of view different from the one expressed earlier in the paragraph. Those who deemed it pointless to have a separate part of the draft on environmental protection and pollution of international watercourses also thought that, if the opposite view prevailed, a link had to be provided between that separate part and the other parts of the draft. In

any event, the sentence proposed by the Special Rapporteur should be amended by adding, after the words "the other parts of the draft", the phrase "which already referred more specifically to that question, in particular the articles just mentioned".

18. Mr. McCAFFREY (Special Rapporteur) said that Mr. Bennouna's suggestion was acceptable. He had no strong feelings as to whether the sentence in question should be added at the end of paragraph 32 or whether it should form a separate paragraph and pointed out that Mr. Bennouna himself had proposed that a sentence along the same lines should be added at the end of paragraph 32.

19. With reference to Mr. Barboza's comments, he seemed to recall that the points mentioned by Mr. Barsegov and Mr. Bennouna had indeed been raised in the course of the debate. It was for the members concerned to confirm whether or not that was true.

20. Lastly, he welcomed the suggestion by Mr. Ogiso, supported by Mr. Yankov, to turn part of paragraph 33, as amended by him, into a separate paragraph; it could be provisionally numbered paragraph 33 *bis*.

21. Mr. BARSEGOV said that he was not the only one to have cautioned against the danger of going beyond the scope of the topic by dealing with watercourses other than international watercourses. Yet the phrase "the relationship between watercourse States and non-watercourse States", in paragraph 33, could be interpreted as meaning regulation of the relationship between a national watercourse State and other States, which was out of the question.

22. Mr. MAHIU said he entirely agreed with Mr. Barsegov that the Commission should keep to its mandate, but would none the less point out that a "watercourse State" was defined in article 3, provisionally adopted by the Commission at its thirty-ninth session, as a State "in whose territory part of an international watercourse [system] is situated". Hence no ambiguity was possible.

23. Mr. BARSEGOV said that he would be happy to see his position reflected in the summary record. Despite Mr. Mahiou's point, however, it seemed useful to explain in the report that the Commission intended to keep to its mandate, especially since, although it was called upon to regulate the relations between States of a multinational watercourse in regard to marine pollution, it had to take account of the fact that marine pollution was attributable much more to national watercourses than to multinational watercourses.

24. Mr. BEESLEY said that he had no recollection of the position expressed in the course of the debate being stated in the terms proposed by the Special Rapporteur: it had been implicit. Nevertheless, he had no objection to the sentence proposed by the Special Rapporteur being added to paragraph 33 of the draft report, instead of simply mentioning that position in the summary record.

25. Mr. CALERO RODRIGUES said that he endorsed Mr. Beesley's remarks.

26. Mr. REUTER suggested that the sentences at the end of paragraph 33 should be placed in a different order. The fifth and seventh sentences should run in sequence, for they reflected two suggestions that had actually been made, and the sixth sentence should be placed at the end of the paragraph and be amended to read: "The Special Rapporteur reacted favourably to these suggestions, stating that they merited further careful consideration, more particularly because they questioned, as was pointed out, the scope of the mandate assigned to the Commission"

27. Mr. McCAFFREY (Special Rapporteur) said he thought that the last sentence of paragraph 33 should remain where it was, for it simply stated a fact. As to the order of the other sentences, a new paragraph 33 *bis* could start as from the present fifth sentence ("In this connection, . . ."), which would be followed by the sixth sentence ("The Special Rapporteur reacted . . ."), then the sentence he had proposed in order to take account of Mr. Barsegov's position ("It was pointed out, however, . . ."), and lastly the final sentence of the present paragraph 33 ("Attention was also drawn . . .").

28. Mr. YANKOV said that he agreed with Mr. Reuter. He proposed that the new paragraph 33 *bis*, after the first sentence ("In this connection, a suggestion was made . . ."), should read:

"The Special Rapporteur reacted favourably to this suggestion. It was pointed out, however, that care should be taken not to exceed the scope of the Commission's mandate with regard to the present topic. Attention was also drawn to the fact that the 1982 United Nations Convention on the Law of the Sea, considered by many to be one of the most important multilateral conventions in recent history, contained a separate part (Part XII) devoted entirely to the question of the protection and preservation of the marine environment. The Special Rapporteur believed that all these suggestions merited careful consideration."

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 32 as amended by the Special Rapporteur and Mr. Bennouna, and paragraphs 33 and 33 *bis* as amended by the Special Rapporteur and Mr. Yankov.

It was so agreed.

Paragraphs 32, 33 and 33 bis, as amended, were adopted.

30. Mr. BEESLEY said that he would have liked it to be indicated at the end of the new paragraph 33 *bis* that he had said that Part XII of the 1982 United Nations Convention on the Law of the Sea was considered by many States, even non-signatory States, as expressing customary law.

Paragraph 34

31. Mr. YANKOV proposed that the words "reflecting general rules relating to the subject-matter" should be added at the end of the first sentence. The text would thus be more in keeping with the debate that had taken place and the next sentence would follow on logically.

32. Mr. BEESLEY said he supported that proposal. The instrument being elaborated was a framework agreement that would be used for the conclusion of special agreements containing more binding rules.

33. Mr. McCAFFREY (Special Rapporteur) said that he agreed to Mr. Yankov's proposal.

Mr. Yankov's amendment was adopted.

Paragraph 34, as amended, was adopted.

Paragraphs 35 and 36

34. Mr. EIRIKSSON said that, in the course of the debate, he had proposed that articles 16, 17 and 18 should be redrafted, more particularly by transferring paragraph 2 of article 16 to the part of the draft on general principles, alongside the principle of equitable use. The suggestions he had made on that point might to some extent have been taken into account in paragraphs 32, 33 and 34 of the draft report, to which he had not wished to propose any amendment. However, he reserved the right to make a specific proposal in connection with paragraph 46.

35. Mr. PAWLAK proposed that paragraphs 35 and 36 should be combined, since they both related to explanations given by the Special Rapporteur in connection with article 16.

36. Mr. RAZAFINDRALAMBO, noting that paragraphs 35 *et seq.* related to articles 16, 17 and 18, suggested that paragraph 35 should be preceded by the heading "*Article 16. Pollution of international water-course[s] [systems]*", as was the case with paragraphs 67 and 77 for articles 17 and 18.

37. Mr. McCAFFREY (Special Rapporteur) thanked Mr. Razafindralambo for drawing attention to that omission.

38. He had no objection to Mr. Pawlak's proposal to combine paragraphs 35 and 36. The decision lay with the Commission's Rapporteur.

39. Mr. REUTER proposed that, in the French text of paragraph 35, the word *préjudice* should be followed by the word "injury" in brackets, so as to make the text more intelligible. The problem of terminology arose only in English, for the French terms *dommage* and *préjudice* were roughly the same in meaning.

It was so agreed.

40. Mr. SEPÚLVEDA GUTIÉRREZ said that the words *la realidad*, in the first sentence of the Spanish text of paragraph 35, should be replaced by *en realidad*.

It was so agreed.

41. Mr. SHI (Rapporteur) said that he had no difficulty in agreeing to the amendments proposed by Mr. Pawlak and Mr. Razafindralambo.

The amendments by Mr. Pawlak and Mr. Razafindralambo were adopted.

Paragraphs 35 and 36, as amended and combined, were adopted.

Paragraphs 37 and 38

Paragraphs 37 and 38 were adopted.

Paragraph 39

42. Mr. BENNOUNA questioned whether the first sentence really reflected the main point of the Commission's discussion of the matter. It implied that a distinction was drawn between "physical, chemical or biological alteration of the composition or quality of the waters" and "alteration of such waters through the introduction or withdrawal of substances". Yet it was precisely such introduction or withdrawal that brought about physical, chemical or biological alteration.

43. Mr. REUTER said that the sentence should be construed as recording the view that the definition should refer to "physical, chemical or biological alteration of the composition or quality of the waters" as well as "alteration of such waters through the introduction or withdrawal of substances".

44. The CHAIRMAN said that that was clear from the Spanish text.

45. Mr. McCAFFREY (Special Rapporteur) proposed that the first sentence should be amended to read: "Some members expressed the view that the definition should refer to the fact that the physical, chemical or biological alteration of the composition or quality of the waters was effected through the introduction or withdrawal of substances from the waters."

46. Mr. MAHIU said that he would be ready to agree to that formula if it were not so restrictive. Account should be taken of cases in which, for example, the alteration was in the temperature of the water, without any introduction or withdrawal of substances.

47. Mr. BEESLEY recalled that he had raised the question of pollution through the introduction of energy, a factor he would like the report to mention.

48. Mr. CALERO RODRIGUES said that he shared Mr. Beesley's view. The new wording proposed by the Special Rapporteur was scarcely any different from the existing text, which was quite acceptable.

49. Mr. Sreenivasa RAO said that the question raised by Mr. Bennouna could be settled by speaking first of "the physical, chemical or biological change . . ." and then of "the alteration . . . through the introduction or withdrawal of substances".

50. Mr. BENNOUNA proposed that the first sentence should be amended to read: "Some members expressed the view that the definition should refer in particular to the physical, chemical or biological alteration of the composition or quality of the waters through the introduction or withdrawal of substances."

51. Mr. McCAFFREY (Special Rapporteur) said that that formula was very similar to the text he had just suggested. It would be enough to add the words "or energy" at the end of the sentence to meet the concern expressed by Mr. Mahiou and Mr. Beesley.

52. Mr. YANKOV said that Mr. Bennouna's proposal was still too restrictive. Pollution was encountered in very diverse forms. For example, it might take the form of radioactivity, and scientists would discuss endlessly whether, in such a case, the pollution was through the introduction of a substance or the introduction of energy.

53. Article 196, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea spoke of "the use of technologies . . . or . . . the . . . introduction of species, alien or new . . . which may cause significant and harmful changes". That article embodied a widely accepted norm in environmental circles. The Commission should reproduce formulae which had already been used and should not try to improvise a definition hastily. In his opinion, therefore, the first sentence of paragraph 39 should remain as it stood.

54. Mr. BENNOUNA said that, for the moment, the point was to record the opinion expressed by "some members", not to try to find a new definition of pollution.

55. Mr. McCAFFREY (Special Rapporteur) proposed that the first sentence should read:

"Some members expressed the view that the definition, apart from making reference to the physical, chemical or biological alteration of the composition or quality of the waters, should also refer to the introduction or withdrawal of substances or energy from the waters."

56. Mr. PAWLAK said that that formula was acceptable.

The Special Rapporteur's amendment was adopted.

Paragraph 39, as amended, was adopted.

Paragraph 40

57. Mr. OGISO said that the first sentence presumably reflected an opinion he had expressed during the debate. If that was so, the formula was too terse and should be replaced by the following sentence: "One member considered that the definition should be broad enough to cover situations in which continuous accumulation of small quantities of chemical substances in fish and shellfish would in the long run produce effects detrimental to human health, since paragraph 1 of article 16 referred only to the composition and quality of the waters, not to living resources."

58. Mr. McCAFFREY (Special Rapporteur) said that the first sentence did indeed seek to reflect Mr. Ogiso's position. The formula proposed by Mr. Ogiso was a much better summary.

Mr. Ogiso's amendment was adopted.

Paragraph 40, as amended, was adopted.

Paragraphs 41 to 45

Paragraphs 41 to 45 were adopted.

Paragraph 46

59. Mr. PAWLAK said that the presentation of paragraphs 46 to 48, concerning paragraph 2 of article 16, was not logical and the reader might well find the reasoning confusing. He therefore proposed that the first sentence of paragraph 46 should be followed by the whole of paragraph 48, the beginning of which would be amended to read: "The discussion of paragraph 2 focused on several main issues, including pollution of international watercourses, the concept of appreciable harm . . ."

60. Mr. McCAFFREY (Special Rapporteur) pointed out that paragraphs 46 to 48 acted as an introduction to the summary of the discussion on paragraph 2 of article 16 and therefore dealt with pollution only in general terms. Various legal aspects of that provision were taken up in the subsequent paragraphs. Furthermore, "pollution of watercourses" was the actual subject of the article and could thus not be included in the list of particular issues.

61. Mr. TOMUSCHAT said that the order adopted was the appropriate one. Paragraph 48 enumerated, in succession, the various issues dealt with in the subsequent paragraphs. Matters might perhaps be clearer if paragraph 48 began with the words: "The discussion of paragraph 2 focused on several specific issues . . ."

62. Mr. PAWLAK said it would be even better to say that the discussion had focused on "several specific legal issues".

63. Mr. McCAFFREY (Special Rapporteur) said that both those proposals would improve the paragraph.

64. The CHAIRMAN said that those proposals related to a paragraph which was not yet under consideration. It was his understanding that paragraph 46 would remain unchanged.

It was so agreed.

Paragraph 46 was adopted.

Paragraph 47

65. Mr. PAWLAK suggested that the word "international" should be inserted before "co-operation", in the third sentence.

It was so agreed.

66. Mr. EIRIKSSON, recalling the amendment he had intended to propose in connection with paragraphs 32, 33 and 34, which was also warranted in the case of paragraphs 46 and 47, suggested that a sentence should be inserted at the end of paragraph 47 reading: "Indeed, another view was that paragraph 2 should be transferred to the part of the draft dealing with general principles, to be placed alongside the principle of equitable use as an important part of the no-harm principle, with a cross-reference to part V as regards implementation."

67. Mr. McCAFFREY (Special Rapporteur) said that that proposal was acceptable, although he would have preferred a shorter text.

Mr. Eiriksson's amendment was adopted.

Paragraph 47, as amended, was adopted.

Paragraph 48

Mr. Tomuschat's amendment to the beginning of the first sentence, as modified by Mr. Pawlak (paras. 61-62 above), was adopted.

Paragraph 48, as amended, was adopted.

Paragraphs 49 to 51

Paragraphs 49 to 51 were adopted.

Paragraph 52

68. Mr. ARANGIO-RUIZ said that he was perhaps the only member not to approve of the term "appreciable". In his opinion, it sufficed to speak of harm. Perhaps the Special Rapporteur would add a sentence reflecting that position at the end of the paragraph.

69. Mr. ROUCOUNAS, supported by the CHAIRMAN, speaking as a member of the Commission, and by Mr. AL-BAHARNA and Mr. THIAM, said that Mr. Arangio-Ruiz was not the only member to take that view.

70. Mr. BARBOZA said that there was perhaps some confusion, inasmuch as some members objected to the use of the term "appreciable", whereas Mr. Arangio-Ruiz deemed it pointless to qualify the term "harm". Those were two different matters.

71. Mr. McCAFFREY (Special Rapporteur) said he recognized that paragraph 52 did not reflect the position of Mr. Arangio-Ruiz and proposed that the paragraph should be supplemented by adding the sentence: "The view was also expressed that the term 'harm' was sufficient by itself and should not be qualified at all."

It was so agreed.

Paragraph 52, as amended, was adopted.

Paragraphs 53 to 56

Paragraphs 53 to 56 were adopted.

Paragraph 57

72. Mr. EIRIKSSON proposed that the phrase "article 1, paragraph 1 . . . in its definition of", in the second sentence, should be replaced by "article 1, paragraph 1 (4), of the 1982 United Nations Convention on the Law of the Sea, in defining".

It was so agreed.

Paragraph 57, as amended, was adopted.

Paragraphs 58 to 60

Paragraphs 58 to 60 were adopted.

Paragraph 61

73. Mr. THIAM said that paragraph 61 did not fully reflect the view of members who found that the concept of an obligation of due diligence was dangerous. The following text should therefore be added at the end of the paragraph:

"Some members pointed out that the concept of due diligence was dangerous, inasmuch as it made responsibility rest on wrongfulness rather than on risk, and that States would be tempted to evade responsibility simply by trying to prove that they had complied with their obligation of due diligence. They also pointed out that the problem of responsibility should not be dealt with in the framework of the present topic, but rather in the framework of liability for acts not prohibited by international law."

74. Mr. RAZAFINDRALAMBO said that he supported Mr. Thiam's comments, but would point out that paragraph 66 reflected the idea expressed in the

second sentence of the proposed amendment. For his own part, he would therefore suggest that only the first of the two proposed sentences should be added at the end of paragraph 61 and that the beginning of paragraph 66 should state that "The Special Rapporteur noted, further to comments by some members . . .", in order to meet Mr. Thiam's concern.

75. Mr. THIAM said he had no objection to that proposal, but paragraph 66 did not fully reflect his view. It said that the question under consideration was related to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, whereas it should, in his opinion, be dealt with solely in the framework of that topic. He would not like the problems of liability for pollution, for example, to be considered under the present topic. If the Special Rapporteur agreed to indicate that in paragraph 66, he would have no objection. Otherwise, he would press for his amendment to be adopted.

76. Mr. CALERO RODRIGUES said that he supported Mr. Thiam's amendment, as he would support an amendment by any member who wished to see his views properly reflected in the report.

77. The CHAIRMAN, speaking as a member of the Commission, said that he supported Mr. Thiam's amendment.

Mr. Thiam's amendment was adopted.

Paragraph 61, as amended, was adopted.

Paragraph 62

78. Mr. BENNOUNA said that paragraph 62 clearly indicated that the members who had spoken about the obligation of due diligence had called for it to be based on precise rules. But many had emphasized the danger involved in the concepts of "civilized State" or "good government" adduced in support of the concept of due diligence. Their view was not reflected in the first sentence. The following sentence should therefore be inserted after the first sentence: "In this connection, according to those members the presumed conduct of 'good government' or government by a 'civilized State' could not serve as the basis for the obligation of due diligence."

79. Mr. McCAFFREY (Special Rapporteur) said that he had no objection to the text proposed by Mr. Bennouna, but thought that it did not cover the same issue as did the first sentence, which reflected the view of the members who had pressed for more emphasis on cooperation. Mr. Bennouna's proposal covered the problems posed by the concepts of "good government" and "civilized State" viewed as criteria: it should therefore follow on from the second sentence. Moreover, it should begin with the word "however".

80. Mr. Sreenivasa RAO said that he doubted whether it was necessary to refer to the concepts of "good government" and "civilized State", which the Commission could only reject. Why speak about something that was better forgotten?

81. Mr. BENNOUNA said that he appreciated Mr. Sreenivasa Rao's position, but the concepts in question had already been mentioned in the Special Rapporteur's

fourth report (A/CN.4/412 and Add.1 and 2). They should be referred to in the Commission's report simply to give a balanced account of the debate.

82. Mr. BARBOZA pointed out that all the comments made on the matter were already contained in the summary records.

83. Mr. THIAM said that he supported Mr. Bennouna's proposal, more particularly since the Sixth Committee of the General Assembly might be surprised at the absence of any reference to the matter in the Commission's report when it had been discussed at length in the Special Rapporteur's report.

84. Mr. McCAFFREY (Special Rapporteur) said that he had reached a conclusion similar to Mr. Sreenivasa Rao's, namely that it would be better to remain silent on the point. He had spoken about the matter in his report because the works on the obligation of due diligence did so; as Special Rapporteur, it had been incumbent on him to present the topic from every angle. It certainly would not be surprising for the Commission's report to say nothing about the concepts in question, since he had not spoken about them in introducing his own report. Mr. Bennouna's amendment, if adopted, might in fact lead to superfluous discussion in the Sixth Committee.

85. Mr. THIAM pointed out that several members of the Commission had been opposed to the concepts. Their position ought to be reflected in the report.

86. Mr. McCAFFREY (Special Rapporteur) said that no member, including himself, had defended resort to the criteria of "good government" and "civilized State".

87. Mr. Sreenivasa RAO said that some members had mentioned those concepts and rejected them. The very silence of members who had not spoken about them had indicated that they shared that view. Hence members were unanimously agreed that the Commission's report could not and should not mention such anachronistic criteria, which would not fail to give rise to futile discussion. The Commission should beware of giving them the least respectability, or at the very least indicate its unanimity on the matter.

88. Mr. BEESLEY said that a question of principle was involved. It could not be assumed that the Special Rapporteur had adopted a particular stance simply because he had referred to the question in his report. Personally, he shared the opinion expressed by Mr. Sreenivasa Rao, but thought that the best course, if Mr. Bennouna's amendment were adopted, would be to add a sentence stating: "No member of the Commission, including the Special Rapporteur, had associated himself with that position."

The meeting rose at 1.05 p.m.

2087th MEETING

Monday, 25 July 1988, at 3 p.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its fortieth session (*continued*)

CHAPTER III. The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

B. Consideration of the topic at the present session (*continued*) (A/CN.4/L.425)

Paragraph 62 (*continued*)

1. Mr. SHI said that he would prefer paragraph 62 not to include any reference to "good government" or a "civilized State". Those concepts had received no support during the debate and had been severely criticized by some members of the Commission. Mentioning them in the report would only divert the attention of the Sixth Committee of the General Assembly from the topic dealt with in chapter III and might possibly bring the Commission into disrepute.

2. Mr. GRAEFRATH referring to the additional sentence proposed by Mr. Beesley at the 2086th meeting (para. 88), said that a reference to the concepts in question, if included at all, might more appropriately be worded in positive, rather than negative terms. He suggested a sentence along the following lines: "All members agreed that any reference to 'good government' or a 'civilized State' in the definition of due diligence would be anachronistic and out of place."

3. Mr. BENNOUNA, Mr. THIAM and Mr. RAZAFINDRALAMBO accepted that suggestion.

4. Mr. SHI said that he, too, could accept Mr. Graefrath's suggestion.

5. Mr. CALERO RODRIGUES remarked that the sentence proposed by Mr. Graefrath would read rather oddly in paragraph 62. In his view, if such a sentence were included, it should be preceded by another sentence, perhaps along the lines suggested by Mr. Bennouna at the 2086th meeting (para. 78).

6. Mr. McCAFFREY (Special Rapporteur), Mr. KOROMA, Mr. MAHIOU and the CHAIRMAN, speaking as a member of the Commission, recommended leaving paragraph 62 as it stood. There was no point in giving prominence to concepts that were not endorsed by anyone.