

Document:-  
**A/CN.4/SR.2092**

**Summary record of the 2092nd meeting**

Topic:  
**Other topics**

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

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

rorism, which were not always without some noble purpose.

63. Prince AJIBOLA said the basic philosophy should be that terrorism constituted a crime. Glorification of terrorism should, of course, be avoided. He urged that paragraph 60 be reduced to one compact sentence.

64. Mr. EIRIKSSON proposed that the discussion on paragraph 60 should be suspended and the Special Rapporteur invited to submit a redraft at the next meeting.

*It was so agreed.*

*The meeting rose at 6.10 p.m.*

## 2092nd MEETING

*Thursday, 28 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, 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. Roucounas, 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 IV. *Draft Code of Crimes against the Peace and Security of Mankind* (*continued*) (A/CN.4/L.426 and Add.1)

##### B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.426)

Paragraph 57 (*concluded*)

1. Mr. KOROMA said that he no longer wished to propose any amendment in connection with the penultimate sentence (see 2091st meeting, para. 55).

2. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 57 as amended at the 2091st meeting, on the understanding that the penultimate sentence ("In future, even entire countries or regions might fall into the hands of terrorists") would be deleted.

*It was so agreed.*

*Paragraph 57, as amended, was adopted on that understanding.*

Paragraph 60 (*concluded*)

3. Mr. THIAM (Special Rapporteur) proposed, in the light of the discussion at the previous meeting, that paragraph 60 should be amended to read:

"Some members were of the opinion that a degree of caution was required on the part of the Commis-

sion in the matter of international terrorism. They pointed out that terrorism could be inspired by the most diverse motives, particularly idealism."

Paragraph 61 would follow on logically.

4. Prince AJIBOLA said that he was somewhat troubled by the word "idealism".

5. Mr. MAHIOU said that he appreciated Prince Ajibola's view, but would point out that the paragraph reflected the opinions expressed by some members of the Commission and not the position of the Commission as a whole.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the new text of paragraph 60 proposed by the Special Rapporteur.

*It was so agreed.*

*Paragraph 60, as amended, was adopted.*

Paragraph 61

7. Mr. PAWLAK proposed, with the agreement of the Special Rapporteur, that the end of the second sentence should be amended to read: ". . . and it was therefore suggested that international terrorism as an independent crime should form the subject of a separate draft article."

8. Mr. BENNOUNA pointed out that there might well prove to be more than one draft article on the subject.

9. Mr. THIAM (Special Rapporteur) proposed that the words "a separate draft article" should be replaced by "separate provisions".

10. Prince AJIBOLA said that he would like the text to make it clear whether the "suggestion" had been made by one or more members of the Commission.

11. Mr. THIAM (Special Rapporteur), pointing out that many members had made the suggestion, said that he would so specify in the paragraph. In addition, since paragraph 61 reflected first his view, and then the views of certain members of the Commission, it should be divided into two, the second paragraph starting with the second sentence ("Not all acts of international terrorism . . .").

12. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 61, as amended by Mr. Pawlak and the Special Rapporteur.

*It was so agreed.*

*Paragraph 61, as amended, was adopted.*

Paragraph 62

*Paragraph 62 was adopted.*

Paragraph 63

*Paragraph 63 was adopted with a minor drafting change.*

Paragraph 64

13. Mr. THIAM (Special Rapporteur) said that the words "more precise", in the first sentence, should be replaced by "better drafted".

14. Mr. TOMUSCHAT asked the Secretariat to verify the titles of the treaties mentioned in the paragraph.

15. Mr. KOROMA said that the dates of all three treaties mentioned in the paragraph should be indicated.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 64, as amended by the Special Rapporteur and in the light of the comments made by Mr. Tomuschat and Mr. Koroma.

*It was so agreed.*

*Paragraph 64, as amended, was adopted.*

Paragraph 65

17. Mr. ROUCOUNAS proposed that the following sentence should be added at the end of the paragraph: "According to another opinion, paragraph 4 should not provide encouragement to a potential aggressor or give the impression that the inherent right of self-defence under the Charter of the United Nations was being impaired."

18. Mr. THIAM (Special Rapporteur) said that he agreed to the proposal by Mr. Roucounas. In addition, at the end of the second sentence, the words "any breach" should be replaced by "a breach".

*Mr. Roucounas's amendment was adopted.*

*Paragraph 65, as amended, was adopted.*

Paragraph 66

19. Mr. THIAM (Special Rapporteur) said that, in the last sentence of the French text, the word "autres" should be replaced by "d'autres".

*Paragraph 66, as amended in the French text, was adopted.*

Paragraph 67

*Paragraph 67 was adopted.*

Paragraph 68

20. Mr. THIAM (Special Rapporteur) said that it should be made clear that the "article 19" referred to in the paragraph was article 19 of part 1 of the draft articles on State responsibility.

*Paragraph 68, as amended, was adopted.*

Paragraph 69

21. Mr. KOROMA proposed that the first part of the second sentence should be amended to read: "It was pointed out that 'colonialism' was a familiar term and that, despite the advances in decolonization . . .".

*It was so agreed.*

*Paragraph 69, as amended, was adopted.*

Paragraph 70

22. Mr. THIAM (Special Rapporteur) said that the word "colonization", at the end of the first sentence, should be replaced by "domination".

23. Mr. RAZAFINDRALAMBO said that the dates of the two General Assembly resolutions should be given.

*It was so agreed.*

*Paragraph 70, as amended, was adopted with a further minor drafting change.*

Paragraph 71

*Paragraph 71 was adopted.*

Paragraph 72

24. Mr. TOMUSCHAT proposed that the following text should be inserted after the second sentence: "The right to self-determination was a right of all peoples, as expressly proclaimed in article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights, as well as in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. It was therefore necessary to confirm its general application."

25. Mr. ARANGIO-RUIZ said that he supported Mr. Tomuschat's proposal. For his own part, he proposed that the end of the second sentence of paragraph 72 should be amended to read: ". . . but there were other cases in which it had been and could and should be used."

*It was so agreed.*

26. Mr. THIAM (Special Rapporteur), referring to the second sentence of Mr. Tomuschat's proposal, said that to speak of "general application" of the right to self-determination might well be going too far and imply a right to secession. The principle of self-determination was to be handled with care.

27. Mr. ARANGIO-RUIZ pointed out that self-determination was a general principle and, like any principle in international law, it applied—obviously with its own particular limitations—to all persons and all peoples.

28. Mr. CALERO RODRIGUES noted that paragraph 72 reflected the views of members and did not commit the Commission as a whole.

29. Mr. TOMUSCHAT suggested changing his amendment so that it spoke of "more general" application.

30. Mr. BARSEGOV said that the principle of self-determination was a universal rule of *jus cogens*. The way it had been applied in Africa, in the context of decolonization, was only one of the possible ways of implementing it and in no sense altered its universal character. Accordingly, it was difficult to agree to Mr. Tomuschat's sub-amendment: how could something be more or less universal?

31. Mr. THIAM (Special Rapporteur) and Mr. MAHIU said that the point at issue was the application of the principle, not the principle itself.

32. Mr. ARANGIO-RUIZ said that he had spoken a number of times in the course of the debate in order to affirm that the right to self-determination was a universal principle, proclaimed as such by the United Nations, and he wished to emphasize that he was against the idea

of qualifying it by an expression such as “more general”. Consequently, the following sentence should be added immediately after Mr. Tomuschat’s sub-amendment: “One member wished to emphasize that the principle of self-determination was of universal application.”

33. Mr. TOMUSCHAT withdrew his sub-amendment. The effects of the new sentence proposed by Mr. Arangio-Ruiz would be disastrous. The principle of self-determination was universal in character for the Commission as a whole and not simply for one of its members.

34. Mr. BARSEGOV, Mr. KOROMA, Mr. GRAEF-RATH, Prince AJIBOLA, Mr. BENNOUNA and Mr. Sreenivasa RAO said that they shared the concern expressed by Mr. Tomuschat, and suggested various formulas for the opening words of the new sentence proposed by Mr. Arangio-Ruiz (“Some members” or “Many members wished to emphasize . . .”, “All members considered . . .”), finally proposing: “It was pointed out . . .”.

35. Mr. ARANGIO-RUIZ said that paragraph 72 consisted of three parts. The first stated the universality of the principle of self-determination, the second pointed out that it had been applied mainly in eradicating colonialism, and the third indicated that it could be used outside the colonial context. He was ready to withdraw the new sentence he had proposed adding if it was made clear in the report that the principle of self-determination was universal in character.

36. Mr. AL-BAHARNA proposed that the following sentence should be added at the end of paragraph 72: “However, all members of the Commission believed that the principle of self-determination was of universal application.”

37. Mr. Sreenivasa RAO said he endorsed that formula, but would prefer to say “In this connection” rather than “However”.

*It was so agreed.*

*Mr. Al-Baharna’s amendment, as modified by Mr. Sreenivasa Rao, was adopted.*

38. Prince AJIBOLA suggested that the word “strong”, in the first sentence of paragraph 72, should be replaced by “strengthened”.

*Paragraph 72, as amended, was adopted.*

#### Paragraph 73

39. Mr. ARANGIO-RUIZ proposed that the third sentence should be replaced by the following text:

“Other members said that self-determination was a perpetual, imprescriptible right which was contemplated by international law in both its internal and its external dimensions. It protected not only the acquisition and preservation of independence from alien domination, but also the right of any people, in any State, freely to choose and change at any time its political, economic and social status.”

40. Mr. TOMUSCHAT proposed that the first part of the fourth sentence should be amended to read: “Still others cautioned against any misunderstanding of the

right to self-determination as sanctioning a right of secession in composite, multiracial . . .”.

41. Mr. BENNOUNA said that he supported both of the proposed amendments, but the expression “without external interference”, which was drawn from United Nations terminology, should be added at the end of the text proposed by Mr. Arangio-Ruiz.

42. Mr. ARANGIO-RUIZ said that he could not agree to that addition. Chapter IV of the report dealt elsewhere with the question of interference.

43. Mr. BARSEGOV proposed, with the agreement of Mr. Arangio-Ruiz, that the following phrase should be added at the end of the latter’s proposed text: “according to its freely expressed will, without foreign interference”.

44. Mr. CALERO RODRIGUES said that the fourth sentence, which Mr. Tomuschat sought to change, reflected the opinion expressed by some members of the Commission during the debate. Hence it seemed difficult to make any changes.

45. Mr. BARSEGOV said he did not recall that the words “ambiguity” and “danger”, which Mr. Tomuschat was striving to avoid in the fourth sentence, had been used in the debate.

46. Mr. THIAM (Special Rapporteur) proposed that the words “ambiguity” and “danger”, which seemed to pose some difficulty, should be deleted and that the first part of the fourth sentence should be amended to read: “Still others drew attention to the fact that the expression ‘self-determination of peoples’ might potentially contain the idea of secession . . .”.

47. Mr. Sreenivasa RAO said he feared that, if the contentious words were deleted, the opinion reflected in that passage might be devoid of substance. Another formula should be found.

48. Mr. KOROMA suggested that the words “in composite, multiracial or multiracial societies”, in the same sentence, should be replaced by “in heterogeneous societies”.

49. Mr. AL-BAHARNA, after consulting various members of the Commission, proposed that the words “ambiguity” and “danger”, in the fourth sentence, should be deleted and that, in the light of the proposals made by the Special Rapporteur and Mr. Koroma, the first part of that sentence should be amended to read: “Still other members drew attention to the fact that the expression ‘self-determination of peoples’ might potentially contain the idea of secession in heterogeneous communities and stated that, in the framework of . . .”.

50. The CHAIRMAN, noting that Mr. Bennouna and Mr. Barsegov were not pressing their proposals, said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 73 with the amendments proposed by Mr. Arangio-Ruiz and Mr. Al-Baharna, on the understanding that it would be made clear that Mr. Arangio-Ruiz’s amendment expressed the opinion of one member

*It was so agreed.*

*Paragraph 73, as amended, was adopted.*

Paragraphs 74 to 77

*Paragraphs 74 to 77 were adopted.*

Paragraph 78

51. Mr. Sreenivasa RAO said that the following sentence should be added at the end of the paragraph: "One member expressed the view that, in defining a mercenary, 'private gain' as a motivation should be regarded as an important element and that the exact amount of remuneration paid and the nationality of the person in question should not be over-emphasized."

*It was so agreed.*

*Paragraph 78, as amended, was adopted.*

Paragraphs 79 to 84

*Paragraphs 79 to 84 were adopted.*

*Section B, as amended, was adopted.*

**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)

**C. Draft articles on the law of the non-navigational uses of international watercourses (continued)\*** (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

2. TEXTS OF DRAFT ARTICLES 8 TO 21, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTIETH SESSION (A/CN.4/L.425/Add.1 and Corr.1)

*Commentary to article 8* (Obligation not to cause appreciable harm)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

52. Mr. CALERO RODRIGUES proposed that the words "A watercourse State's right . . . is limited by its duty", in the second sentence, should be replaced by "A watercourse State's right . . . has its limit in the duty".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraphs (3) to (5)

*Paragraphs (3) to (5) were approved.*

Paragraph (6)

53. Mr. McCAFFREY (Special Rapporteur) said that the treaties that should be mentioned in footnote 5 were the 1971 Convention between Ecuador and Peru and the 1909 Treaty between Great Britain and the United States of America. The footnote would be reworded accordingly.

*Paragraph (6) was approved on that understanding.*

Paragraph (7)

54. Mr. MAHIU said it was paradoxical that the paragraph dealt with the qualifier "appreciable" (*appréciable, apreciable*), yet most of the examples cited argued in favour of the word *sensible* in French and Spanish.

\* Resumed from the 2087th meeting.

55. Mr. McCAFFREY (Special Rapporteur) said that the problem lay in the French and Spanish translations of the term "appreciable". He proposed that the following sentence should be added at the end of paragraph (7): "The word *sensible* in French and Spanish is ordinarily translated by 'appreciable' in English."

*It was so agreed.*

56. Mr. GRAEFRATH said that, even at the thirtieth session, during the debate in the Drafting Committee on draft article 8, and then during the consideration of the Committee's report at the present session, he had criticized article 8 for not bringing out the distinction between the rule of responsibility and the rule of liability. "Appreciable harm" was not a sufficiently clear criterion, something which had been amply demonstrated by the debate on paragraph 2 of draft article 16, as was apparent from paragraphs 49 to 57 of chapter III of the draft report and the question addressed to the General Assembly in paragraph 87 (b) (see 2088th meeting, para. 3). It could also be seen from the debate on the expression "appreciable harm" in connection with the topic of international liability. As he had already stated (2070th meeting, para. 51), he would have preferred article 8 to be worded as follows: "Watercourse States shall ensure that the use of an international watercourse within their territory is in conformity with their obligations under article 6 and shall take the necessary measures to prevent significant harm from being caused to other watercourse States."

57. The Special Rapporteur presented article 8 as a "well-established rule" (para. (1) of the commentary) confined to an obligation "not to cause appreciable harm", and sought to show that numerous treaties contained a rule of that kind. Yet a perusal of the treaties mentioned in footnote 5 and paragraph (7) of the commentary did not prove that the term "appreciable" was generally used to qualify "harm" or significant damage, nor did the treaties establish a general obligation of liability in the event of harm. Like the discussion in the Commission, they showed that, in its present form, article 8 did not set out a "well-established rule" and that it represented progressive development of the law.

58. It was regrettable that the Commission had not had time to recast the commentary so as to make it clear that the Commission was proposing progressive development of the law. Accordingly, he was obliged to reserve his position on article 8 and on the whole of the commentary thereto, and asked for his position to be reflected in a footnote.

59. Mr. BARSEGOV said that he, too, thought that the Commission was creating new rules of law, whereas it should simply work out a framework agreement constituting recommendations to States. Since the commentary to article 8 implied that the rules adopted by the Commission rested on rules of law already in force, he was compelled, since he did not share that view, to reserve his position from the outset, so as not to have to revert to the question during the consideration of each paragraph of the commentary.

60. After a procedural discussion in which Mr. BEESLEY, Mr. YANKOV, Mr. McCAFFREY (Special Rapporteur) and the CHAIRMAN took part, on the question whether Mr. Graefrath's and Mr. Barsegov's reservations should be mentioned in a footnote or in the main body of the commentary to article 8, it was decided that Mr. Graefrath and the Special Rapporteur should settle the matter together.

*Paragraph (7), as amended, was approved on that understanding.*

Paragraph (8)

61. Mr. CALERO RODRIGUES said that the first sentence, reading: "A breach of article 8 would engage the international responsibility of the watercourse State in question", was too categorical in affirming what was, for the moment, simply one of a number of possible interpretations. The Commission had not yet considered the matter in sufficient depth to decide whether such international responsibility was for fault or liability for harm arising out of lawful activities. It would be premature to set out such a clear position in the commentary, a position that would have major consequences for future work on the international liability topic. He therefore proposed that paragraph (8) should be deleted.

62. Mr. AL-BAHARNA said that he thought an attempt should be made to find suitable wording so that the paragraph could be retained.

63. Mr. McCAFFREY (Special Rapporteur) said that he agreed to delete paragraph (8), if that was the Commission's wish.

64. Mr. ARANGIO-RUIZ and Mr. TOMUSCHAT said that they, too, were in favour of deleting the paragraph.

*Paragraph (8) was deleted.*

Paragraph (9)

*Paragraph (9) was approved.*

Paragraphs (10) and (11)

65. Mr. EIRIKSSON said that it was ill-advised to state, as did the first sentence of each paragraph, that the principle expressed in article 8 was "implicit" in a number of agreements. Since it was sometimes difficult to determine the substance of express provisions in agreements, it seemed questionable to base a rule of law on implicit provisions.

66. Mr. McCAFFREY (Special Rapporteur) suggested that it be stated instead that the principle expressed in article 8 "is applied" in a variety of agreements.

*It was so agreed.*

67. Mr. CALERO RODRIGUES proposed that the words "in modern watercourse agreements", in the first sentence of paragraph (11), should be replaced by "in many modern watercourse agreements" and that, in the second sentence, the words "several examples" should be replaced by "some examples".

*It was so agreed.*

*Paragraphs (10) and (11), as amended, were approved.*

Paragraph (12)

*Paragraph (12) was approved.*

Paragraph (13)

68. Mr. GRAEFRATH said that the examples and precedents cited in paragraphs (13) *et seq.* were far too long, if not pointless. They did not, in any case, persuade him that the rule laid down in article 8 existed in international law. In his opinion, paragraphs (13) to (28) could well be deleted.

69. Mr. BENNOUNA said he, too, found that part of the commentary too long. As he had said at the previous session,<sup>1</sup> a special rapporteur's report, in which he explained why he was proposing a particular article—and in which an explanation of diplomatic and treaty practice was therefore of some use—should be distinguished from a commentary, which clarified the article for the purposes of interpretation and application.

70. Mr. MAHIU said that he was of the same opinion.

71. Mr. BARSEGOV said that he agreed with what had just been said, especially since the sources cited by the Special Rapporteur in support of his argument could well be used to justify the opposite case, namely that the rule in question did not exist. In order to save time, he would simply refer members to the comments he had made in that regard at the previous session.<sup>2</sup>

72. In response to a question by Mr. BEESLEY, Mr. McCAFFREY (Special Rapporteur) said that the sources cited in paragraphs (13) to (28) had been gathered specially for the commentary. They did not appear in any of his reports, since it was not he who had presented article 8.

73. Mr. ARANGIO-RUIZ said that precedents did have their place in a commentary, but only in so far as they were needed in order to understand and apply the article. It lay with the Special Rapporteur to distinguish between what was essential and what was not.

74. Prince AJIBOLA said that the Commission's commentaries always gave ample room to examples drawn from treaty law or international judicial precedents and they were very useful for jurists. The Commission should remain faithful to that tradition. If the examples cited in the present instance were regarded as too long for inclusion in the commentary, they could at least appear in footnotes.

75. Mr. CALERO RODRIGUES said he, too, considered that the part of the commentary on sources was too long, but Mr. Graefrath's proposal was too radical. Moreover, the Commission's statute provided (art. 20 (a)) that, when the Commission was engaged in codification work, it was to accompany its draft articles with commentaries containing precedents and other relevant data, including treaties, judicial decisions and doctrine. The topic of the law of the non-navigational uses of international watercourses was, at least in part, one of codification.

<sup>1</sup> *Yearbook* . . . 1987, vol. I, pp. 261-262, 2039th meeting, para. 62.

<sup>2</sup> *Ibid.*, p. 263, para. 90.

76. Mr. TOMUSCHAT cited as an example the commentaries to the final draft articles on the law of treaties, adopted by the Commission at its eighteenth session, in 1966,<sup>3</sup> which contained a great quantity of quotations and examples drawn from treaties and judicial precedents. The Special Rapporteur had not departed from the Commission's tradition or indeed from its statute, as Mr. Calero Rodrigues had pointed out. The commentary under consideration was perhaps a little too long, but it was difficult at the present stage to do away with a whole section of it.

77. Mr. EIRIKSSON said he, too, thought that sources did have their place in a commentary, the purpose of which was not only to provide an understanding of the actual text of the article, as already pointed out, but also to explain why the Commission had adopted it. The difficulty in the present instance was one of striking a balance between the text of the commentary and the quotations, some of which could in fact be relegated to footnotes. However, the paragraphs in question should certainly not be deleted altogether.

78. The difficulty might also lie in the fact that the Commission had to adopt the commentary on the penultimate day of its session, without having time to verify all the sources mentioned. It would be a good idea to revert to the matter, for example when a whole set of draft articles had been adopted on first reading.

79. Mr. BEESLEY said that he endorsed the comments made by Mr. Tomuschat, Mr. Eiriksson and Prince Ajibola, as well as the observations made regarding the Commission's statute. For his part, he saw nothing to be deleted in the commentary to article 8, and would propose that the matter be left to the Special Rapporteur.

80. Mr. AL-BAHARNA said that he would like to hear the Special Rapporteur's opinion. Perhaps the quotations could be deleted and the sources mentioned in footnotes.

81. Mr. GRAEFRATH said that the Commission had just approved 11 paragraphs of the commentary, and therefore there was no question of doing away with it entirely. However, since paragraph (8)—the only paragraph containing a legal interpretation of article 8—had been deleted, the reader might well ask what the subsequent explanations related to. In any event, he had already entered a reservation with regard to the whole of the commentary and had no intention of pressing his proposal.

82. Mr. BENNOUNA said that it might be as well to reconsider the commentary paragraph by paragraph, in order to see what could be cut out.

83. Mr. SHI (Rapporteur) said that, in view of the little time available to the Commission, the best course would be to leave the commentary as it was for the time being and assign the Planning Group the task of considering the question in detail at the next session.

84. The CHAIRMAN, speaking as a member of the Commission, said that, generally speaking, sources were

useful and important and should figure in the commentaries to the articles adopted by the Commission. However, in the present instance the sources would be more suitable in a report by the Special Rapporteur than in a commentary, which was supposed to convey a kind of consensus in the Commission. In future, it would be necessary to ensure that a commentary contained only sources known to the Commission beforehand, which, in theory at least, was not true in the case in point.

85. Mr. McCAFFREY (Special Rapporteur) pointed out that article 6, which had been adopted by the Commission at its thirty-ninth session and which, in the view of some members, enunciated the most important of the general principles, was accompanied by a very lengthy commentary.<sup>4</sup> According to other members, article 8 was the one which contained the most important principle, and therefore it should be given identical treatment, for reasons of balance. He had merely sought to show, without in any way adopting a position, that the principle was based on a number of precedents in diplomatic practice and international instruments. In doing so, he had departed neither from the Commission's practice, nor from the provisions of its statute, which stipulated (art. 16 (g)) that, in the context of the progressive development of international law, the Commission was to attach to its drafts such explanations and supporting material as it deemed appropriate.

86. He proposed that the Commission should reconsider the whole of the commentary to article 8 once it had adopted the draft articles on first reading. For the time being, if the Commission so wished, he could agree to delete paragraphs (27) and (28) and simply give a reference to the texts quoted therein, without reproducing them, in a footnote to paragraph (24).

87. The CHAIRMAN said that the Commission would consider the Special Rapporteur's proposal at the next meeting.

*The meeting rose at 1.10 p.m.*

<sup>4</sup> *Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*

## 2093rd MEETING

*Thursday, 28 July 1988, at 3 p.m.*

*Chairman:* Mr. Bernhard GRAEFRATH

*later:* Mr. Leonardo DÍAZ GONZÁLEZ

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

<sup>3</sup> *Yearbook . . . 1966*, vol. II, pp. 187 *et seq.*, document A/6309/Rev.1, part II.