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Summary record of the 2188th meeting

Topic:
Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-
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80. Mr. AL-QAYSI pointed out that article 24 was new, since it had been produced by the Drafting Committee, and that the Commission had never discussed it in a plenary meeting.

81. He asked whether the expression "effects detrimental to other watercourse States" meant effects detrimental "to uses of international watercourse[s] [systems] and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse[s] [systems] and their waters", as provided in article 2, paragraph 1, on the scope of the present articles, or whether the Drafting Committee thought that the expression also referred to effects in other areas. He would have no objection if article 24 went beyond the scope of the present articles, but, if it did, it should be so stated in the commentary. If, however, the scope of article 24 was limited by article 2, paragraph 1, that should be indicated in the text of the article.

82. Mr. YANKOV said that, while it was clear that, in article 196, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, reference was being made to prevention of the detrimental effects which the introduction of alien or new species might have on the marine environment—in other words, the environment—the same was not true in article 24. The text of the article should therefore state clearly that it referred to effects detrimental "to the environment of other watercourse States". He would not insist that the words "individually or jointly" be added to article 24, but he did believe that it should be explained in the commentary why those words were not included, so that it would not be thought that there had been an omission. He was, moreover, of the opinion that those words could be deleted in the other articles, since States could not act otherwise than "individually or jointly" and the words in question only made the texts heavier.

83. Mr. ARANGIO-RUIZ said he would insist that a reference to the environment be included in article 24, first, because that had been done in other articles and, secondly, because of the relationship between article 24 and article 25.

84. Mr. MAHIOU (Chairman of the Drafting Committee) said that article 23, paragraph 2, referred explicitly to the environment because it related to pollution in general. Article 24 dealt with a very particular situation, namely the introduction of alien or new species whose possible effects on the environment could not be known. Moreover, harm to the environment was covered by the concept of "detrimental effects". He would, however, not object if members of the Commission wished to include a reference to the environment in article 24.

85. As Mr. Al-Qaysi had said, article 24 was a new provision. The question with which it dealt had, however, been discussed by the Special Rapporteur in his fourth report (A/CN.4/412 and Add.1 and 2), as well as by the Commission itself, which had concluded at the time that it should be the subject of a separate article.

86. Mr. KOROMA asked Mr. Arangio-Ruiz not to insist that the environment be explicitly referred to in article 24.

87. He also thought that the present discussion proved that the Commission had to have the necessary time to consider the Drafting Committee's reports. Members of the Commission could not be required to adopt articles in haste.

88. Mr. AL-QAYSI and Mr. MAHIOU (Chairman of the Drafting Committee) proposed that the Commission should defer a decision on article 24 until the next meeting.

89. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to defer a decision on article 24 until the next meeting.

It was so agreed.

The meeting rose at 6.20 p.m.

2188th MEETING

Friday, 6 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*concluded*) (A/CN.4/412 and Add.1 and 2,[1] A/CN.4/421 and Add.1 and 2,[2] A/CN.4/427 and Add.1,[3] A/CN.4/L.443, sect. F, A/CN.4/L.445, ILC(XLII)/Conf.Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 24 (Introduction of alien or new species)[4] (*concluded*)

1. Mr. McCAFFREY (Special Rapporteur) said that the Drafting Committee proposed the following revised text for article 24:

"Article 24. Introduction of alien or new species.

[1] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] For the text, see 2187th meeting, para. 64.

"Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse [system] which may have effects detrimental to the ecosystem of the international watercourse [system] resulting in appreciable harm to other watercourse States."

2. The article had been redrafted in response to the point raised by some members of the Commission that the standard of "effects detrimental" to other watercourse States was not consistent with the reference in other articles to "appreciable harm" to those States. In the previous text, it had not been wholly clear which of the two standards was meant. It had also been remarked that there should be some reference to the ecosystem. The introduction of alien species of flora or fauna could have a highly detrimental impact on the ecosystems of watercourse States; for instance, the invasive water hyacinth was a particularly virulent species which killed off all life in the surrounding waters. Moreover, new species created through biotechnology could wreak havoc on the ecosystem: in the United States of America and Canada, a type of mussel which had been brought in on the hulls of ships arriving from other parts of the world was now reproducing itself in the Great Lakes, with serious effects on the ecosystem. By referring to "appreciable harm to other watercourse States", the new text met such situations, yet complied with the fundamental principles of the draft. The revised article 24 also corresponded to the obligation in article 22 to protect and preserve the ecosystems of international watercourses and to the obligation in article 8 not to cause appreciable harm.

3. Mr. PAWLAK wondered whether the "appreciable harm" to other watercourse States could arise solely from the detrimental effects of alien or new species on the ecosystem. Could watercourse States be harmed in any other way?

4. Mr. McCAFFREY (Special Rapporteur) said that, as now drafted, article 24 would cover all the situations of which he was aware. He did not know of any case in which a watercourse State had been harmed other than in conjunction with, or as a result of, harm to the ecosystem.

5. Mr. MAHIOU (Chairman of the Drafting Committee) suggested that Mr. Pawlak's concern was to preserve a link between effects detrimental to the ecosystem and appreciable harm to a watercourse State.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the revised text of article 24 proposed by the Drafting Committee (para. 1 above).

It was so agreed.

Article 24 was adopted.

ARTICLE 25 (Protection and preservation of the marine environment)

7. Mr. MAHIOU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 25, which read:

Article 25. Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse [system] that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

8. In drafting article 25, which corresponded to paragraph 2 of draft article 17 [18] as originally submitted by the Special Rapporteur,[5] the Drafting Committee had been careful not to exceed the limits of the topic. It had focused on the link between international watercourses and the marine environment and had therefore left aside the obligation with regard to the marine environment of States with non-international watercourses that flowed into the sea. It had appreciated, of course, that the obligations arising under the law of the sea could not be transposed automatically to international watercourses, since the latter fell within the sovereignty of States. The Committee had none the less considered that, in view of the fact that watercourses were the main source of pollution of the marine environment, it was essential to include a provision defining the obligations of watercourse States for protection of that environment.

9. The Drafting Committee had modified the Special Rapporteur's proposed wording so as to place the main emphasis not on the marine environment but on the watercourse itself, from the point of view of its relationship with the marine environment. Thus the obligation laid down was no longer an obligation to protect the marine environment, but an obligation to take measures with respect to the watercourse that were necessary to protect the marine environment.

10. For the rest, the Drafting Committee's task had been essentially one of simplification. It had decided that, since the phrase "all measures . . . that are necessary" was general in scope, the words "including preventive, corrective and control measures" could be eliminated without difficulty. The Committee had also deleted the words "and on an equitable basis", since paragraph 2 of article 6 provided for the participation of watercourse States in the protection of an international watercourse "in an equitable and reasonable manner". It would, however, be made clear in the commentary that the obligation set forth in article 25 would depend on the degree of responsibility of watercourse States for the damage caused to the marine environment as well as on their economic and technical capabilities.

11. The Drafting Committee had again incorporated the concept of protection and preservation that it had adopted in article 22, which was taken from article 192 of the 1982 United Nations Convention on the Law of the Sea. It had replaced the expression "estuarine areas" by the term "estuaries", which was now commonly accepted, and had deleted the reference to marine life, which obviously formed part of the marine environment. It had also eliminated the last part of the original text in its entirety, for the reasons he had explained in connection with article 22 (see 2187th meeting, para. 11). It had added a clause reading "taking into account generally accepted international rules and standards", which was borrowed from article 211,

[5] See 2187th meeting, footnote 3.

paragraph 2, of the United Nations Convention on the Law of the Sea, and which took account of the existence of numerous regional and universal instruments on the marine environment.

12. Prince AJIBOLA said that some more suitable expression should be found to replace "marine environment", in order to make it quite clear that the draft articles were concerned with international watercourses, not with the sea. He was also a little concerned about the words "including estuaries", which might make it necessary to add other elements as well. It would be preferable to refer simply to the environment, a term which would cover all elements, including tributaries and estuaries.

13. Mr. McCAFFREY (Special Rapporteur) said that the expression "marine environment" had been used to ensure that precautions were taken to prevent the increasingly serious problem of pollution of that environment through watercourses, whether or not international, which contained pollutants that could find their way into the marine environment and cause serious damage to it. A similar obligation was laid down in a number of regional seas conventions and also in the 1982 United Nations Convention on the Law of the Sea. For those reasons, he considered that the expression should be retained. Omission of the reference to estuaries could give the impression that article 25 did not apply to estuarine areas, which were, of course, a vital breeding ground for many marine species.

14. Mr. BEESLEY, endorsing the Special Rapporteur's remarks, said that, as a matter of developing conventional law and, he would suggest, customary law as well, it was no longer possible to view a particular part of the environment in isolation from the environment as a whole. It was essential to take account of the intricate interrelationship between river systems and the marine environment not only from the scientific and technical standpoint, but also from that of humanity as a whole. He therefore urged Prince Ajibola not to insist on his point.

15. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 25 as proposed by the Drafting Committee.

Article 25 was adopted.

16. Mr. MAHIOU (Chairman of the Drafting Committee) said that articles 26 and 27 of part V of the draft, entitled "Harmful conditions and emergency situations", corresponded to draft articles 22 and 23 submitted by the Special Rapporteur in his fifth report in 1989.[6] The Drafting Committee had noted that, although most speakers in the Sixth Committee of the General Assembly had approved the general direction of those draft articles, some had considered that the distinction between their scopes of application had not been brought out clearly enough in their titles. In response to that criticism, the Drafting Committee had amended the titles and reworded the two articles.

ARTICLE 26 (Prevention and mitigation of harmful conditions)

17. The text proposed by the Drafting Committee for article 26 read:

PART V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 26. Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

18. The Drafting Committee had adopted the same wording as that used in article 25 to introduce the obligation imposed on watercourse States, namely: "Watercourse States shall, individually or jointly, take all . . . measures". It had not retained the words "on an equitable basis", which had appeared in paragraph 1 of draft article 22 as originally submitted by the Special Rapporteur. As in the case of article 25, the Committee had noted that the concept of equitable participation underpinned the draft articles as a whole and that to refer to it in some articles but not in others could give rise to problems of interpretation. Furthermore, the word "jointly" implied a shared responsibility, while the phrase "take all appropriate measures" clearly indicated that States were not required to go beyond what was appropriate. Those points would be developed in the commentary.

19. The Drafting Committee had replaced the words "hazards, harmful conditions and other adverse effects", which blurred the distinction between the subjects of articles 26 and 27, by the more neutral term "conditions", which denoted a *de facto* situation and was general in scope. To meet the concern of some representatives in the Sixth Committee, the Drafting Committee had included, in addition to conditions resulting from natural causes, conditions resulting from human conduct. The phrase "whether resulting from natural causes or human conduct" indicated that the conditions referred to could arise as a result either of natural causes or of human conduct or of a combination of both. The list of conditions which followed was more or less the same as that proposed by the Special Rapporteur in paragraph 1 of draft article 22. The words "floods, ice conditions" had, however, been replaced by the expression "flood or ice conditions", which was more general in scope. The reference to drainage problems and flow obstructions had been deleted, and a reference to water-borne diseases had been added.

20. The Drafting Committee was, of course, aware that the link between a watercourse and drought and desertification was less direct than in the case of the other conditions referred to in article 26. It had none the less retained the reference to those conditions, as the measures to combat drought and desertification could make a significant contribution to more effective watercourse conservation and management.

[6] For the texts of draft articles 22 and 23 submitted by the Special Rapporteur in his fifth report and a summary of the Commission's discussion on them at its forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 124 *et seq.*, paras. 636-676.

21. There had been two more paragraphs in the text of draft article 22 submitted by the Special Rapporteur. Paragraph 2 had contained an illustrative list of measures that watercourse States should take in order to fulfil their obligations. Some members had felt that paragraph 2 provided watercourse States with useful indications as to the kind of measures they should take to comply with their obligations under the article, but the general view had been that those indications could be incorporated in the commentary and that the paragraph was therefore unnecessary.

22. The Drafting Committee had further noted that the object of paragraph 3 had been to remind watercourse States that the obligations set forth in the article extended to the prevention of activities having only an indirect link with the watercourse that might cause damage to downstream States. The Committee had, however, taken the view that the obligation of prevention as set out in article 26 was very general in scope and that there was no reason to focus on certain aspects of it. It had therefore deleted paragraph 3 as well.

23. The title of article 26 reflected the text and called for no further comment.

24. Mr. ARANGIO-RUIZ said that, although article 26 dealt with emergency situations, no link was established between the emergency and the watercourse, thus giving the impression that any kind of emergency would be covered. Yet an earthquake, for example, would have nothing to do with a watercourse. Some wording should therefore be added, in the first part of the article, to make it clear that the reference was to a specific kind of emergency which affected the watercourse.

25. Mr. CALERO RODRIGUES proposed, in order to meet that point, that the words "relating to an international watercourse" be inserted between the words "conditions" and "that may be harmful".

26. Prince AJIBOLA said that he would be grateful if the Chairman of the Drafting Committee could enlighten him as to the use, in the context of the reference to natural causes and human conduct, of the words "appropriate measures". They seemed to require re-examination.

27. Mr. MAHIOU (Chairman of the Drafting Committee) said that, while the point made by Mr. Arangio-Ruiz was implicit in the terms of the article, it would perhaps be advisable to spell it out by incorporating the amendment proposed by Mr. Calero Rodrigues.

28. With regard to Prince Ajibola's point, the words in question were taken from the 1982 United Nations Convention on the Law of the Sea and were also standard in conventions on pollution.

29. Mr. McCAFFREY (Special Rapporteur) said that, from the substantive point of view, he had no difficulty with Mr. Calero Rodrigues's proposal, which would perhaps guard against any unnatural interpretation of the draft articles should they be viewed in isolation. If they were viewed in the context of the draft as a whole, of course, it was obvious that the emergency situations referred to related to watercourses. Many of the provisions of the United Nations Convention on the Law of the Sea, for example, made no specific reference to the sea, yet that had not given rise to any difficulty.

30. As to Prince Ajibola's point, the intention behind the words "appropriate measures" was to soften the obligation somewhat. For example, although a flood could not perhaps be prevented, reasonable measures should be taken in that connection.

31. Mr. Sreenivasa RAO said that his concern with respect to article 26 had been somewhat allayed by the Special Rapporteur's explanation that the intention was to soften the obligation. It might, however, sometimes be beyond the capacity of certain States to manage conditions such as those referred to in the article, particularly drought and desertification. To take account of that possibility, he would suggest that the word "appropriate" be replaced by "possible". If that created too much difficulty, an explanation could perhaps be included in the commentary.

32. Mr. PAWLAK said that he would not oppose the proposal by Mr. Calero Rodrigues but saw no need for that change, which would make it necessary to add a similar phrase to all the relevant articles. Article 26 already contained two references to watercourse States and that should be sufficient.

33. He understood Mr. Sreenivasa Rao's wish to soften the obligation, but disagreed with his proposal to replace the words "appropriate measures" by the words "possible measures", which were too subjective and concerned only the point of view of the State in question. He suggested the words "appropriate measures in existing conditions".

34. Mr. BARSEGOV said that there was no need to complicate a text that was perfectly clear as it stood. Obviously, watercourse States were not being asked to prevent an earthquake; but if an earthquake did occur, those States should assist each other in order to prevent loss of life, flooding and the like.

35. Mr. ARANGIO-RUIZ said that the addition of two or three words might clarify the texts of both article 26 and article 27 and would certainly not make them too cumbersome.

36. Prince AJIBOLA said that he had always had doubts about the use of the word "appropriate". Perhaps the Special Rapporteur would consider using the word "reasonable" in the commentary.

37. Mr. McCAFFREY (Special Rapporteur) said he could understand that the word "reasonable" might be preferable in a common-law context, but that was not the case in civil law. The word "possible" was ambiguous, because it might be interpreted to mean that a State must do everything possible, regardless of the cost, whereas the expression "appropriate measures" could be tailored to the circumstances. Since the word "appropriate" had already been used in other conventions, it should be retained, and the meaning should be explained in the commentary.

38. Mr. Sreenivasa RAO said that, despite his reservations regarding the use of the word "appropriate", he was prepared to withdraw his proposal. He would nevertheless point out that it was technically difficult

for a developing country to ensure preventive measures, which were often beyond its means; it could do what was possible for it and would then require the help of other States. But it was impossible for it to take all the preventive measures called for in article 26. The point was that States would do what they could.

39. Mr. MAHIOU (Chairman of the Drafting Committee) said that the expression "appropriate measures" was less restrictive than the expression "necessary measures" as employed in the 1982 United Nations Convention on the Law of the Sea. The word "possible" was ambiguous. The Drafting Committee had also considered the word "reasonable", but had decided in favour of "appropriate". He was not opposed to the proposal by Mr. Calero Rodrigues (para. 25 above) but considered it unnecessary.

40. Referring to the French text, he said that the word *préjudiciables* should be replaced by *dommageables* so as to bring the wording of the article into line with the title.

41. Mr. BENNOUNA said he agreed with the Special Rapporteur that the addition proposed by Mr. Calero Rodrigues would make the text too cumbersome and was unnecessary. The articles of a convention were read in their context.

42. Prince AJIBOLA said that he agreed with Mr. Bennouna: a similar addition would otherwise have to be made throughout the draft.

43. Mr. MAHIOU (Chairman of the Drafting Committee) said he took it that Mr. Calero Rodrigues withdrew his proposal.

44. Mr. PELLET, referring to the French text, expressed reservations about the first use of the word *conditions*. Furthermore, the same word was repeated in the sentence, which was awkward in French, and he therefore suggested replacing the second *conditions* by *celles*.

45. Mr. MAHIOU (Chairman of the Drafting Committee) explained that the word *conditions* had been used twice because, although awkward, it avoided any ambiguity. If the second *conditions* were to be replaced by *celles*, that might be misconstrued as referring to *causes naturelles*.

46. Mr. Sreenivasa RAO pointed out that the legal standard for bringing the relationship between watercourse States into play was "appreciable harm". He was not opposed to the phrase "harmful to other watercourse States", on the understanding that the legal threshold was the same as that used throughout the draft, namely appreciable harm.

47. Mr. PELLET suggested replacing the first *conditions* in the French text by *effets*.

48. Mr. McCAFFREY (Special Rapporteur) said he feared that Mr. Pellet's proposal might confuse article 26 and article 27. "Harmful conditions" was an expression commonly used in international watercourse management. The purpose of article 26 was precisely to deal with conditions. Watercourse States must be alert to such conditions, which did not arise suddenly, but often built up over time, for example siltation or salt-water intrusion. That was why the phrase "may be harmful" had been chosen. It was, of course, the effect that was actually harmful, but the condition was itself an effect, so to speak.

49. Mr. BENNOUNA, referring to the French text, suggested replacing the words *resultant de* by *liées à des* and the words *telles que* by *concernant*.

50. Prince AJIBOLA said that that problem did not arise in the English text.

51. Mr. MAHIOU (Chairman of the Drafting Committee) acknowledged that there had been a drafting problem with the French text in connection with the word *conditions*, which had been decided upon for lack of a better alternative. If that word were to be replaced by *effets*, the French text would no longer be identical with the English. He suggested leaving the text as it stood for the time being; the Drafting Committee would then attempt to find better wording on second reading.

52. Mr. ILLUECA pointed out that, whereas in the English original the term "conditions" was used in article 26 and the term "situations" in article 27, the Spanish text of both articles used the same term, namely *situaciones*. The Drafting Committee should correct that anomaly.

53. Mr. MAHIOU (Chairman of the Drafting Committee) said that, as far as the English and French texts were concerned, the Drafting Committee had deemed the term "situations" appropriate in article 27 (Emergency situations). A somewhat different meaning was conveyed by the term "conditions" used in article 26 to refer to "harmful conditions" to be prevented or mitigated. Personally, he would have been inclined to prefer the term *facteurs* to *conditions* in French. On the whole, the best solution would be to retain the present wording, which could be improved on second reading.

54. Mr. PELLET said that the term *facteurs* would be helpful in French for the expression "flood or ice conditions", but in that expression he could accept the existing term, *conditions*. His objection was to the use of the term *conditions* in the French version of the phrase "take all appropriate measures to prevent or mitigate conditions", where he would recommend the term *effets*.

55. Mr. McCAFFREY (Special Rapporteur) said that the drafting of article 26 had proved very difficult because it sought to cover many different kinds of conditions and effects in a single provision. The aim was to avoid having to draw up a large number of articles, bearing in mind that the draft was intended to become a framework agreement. Article 26 required watercourse States to take all appropriate measures to stop harmful effects to other States—effects which could arise from a wide range of conditions. Actually, the article mentioned only some of those conditions by way of example. He did not favour replacing the term "conditions" by "effects", which would result in a much too general provision. Accordingly, he recommended that the term "conditions" be retained.

56. Mr. FRANCIS pointed out that there was an interplay between conditions and effects. It was a fact

of life that human conduct could produce conditions—in addition to effects—harmful to other States which called for appropriate measures to be taken. He therefore suggested that there should be a reference to both conditions and effects in the phrase which now read: "take all appropriate measures to prevent or mitigate conditions".

57. With regard to procedure, he urged that matters of drafting should be left to the Drafting Committee.

58. Mr. DÍAZ GONZÁLEZ said that the Spanish-speaking members of the Commission reserved the right, with regard to all of the articles, to submit to the Secretariat their suggestions for ensuring that the Spanish text was in line with the English and French texts, as well as all the necessary Spanish corrections.

59. The CHAIRMAN said that the articles would be adopted subject to that reservation regarding the Spanish text; the position would be the same with regard to the Arabic, Chinese and Russian texts.

60. If there were no objections, he would take it that the Commission agreed provisionally to adopt article 26 as proposed by the Drafting Committee, on the understanding that the Special Rapporteur would clarify in the commentary the points which had arisen during the discussion.

It was so agreed.

Article 26 was adopted.

ARTICLE 27 (Emergency situations)

61. Mr. MAHIOU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 27, which read:

Article 27. Emergency situations

1. For the purposes of the present article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, as in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in co-operation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies in co-operation, where appropriate, with other potentially affected States and competent international organizations.

62. Article 27 had originally been submitted by the Special Rapporteur as draft article 23 (Water-related dangers and emergency situations).[7] In considering the article, the Drafting Committee had taken into account a number of observations, for example the comment that the obligations laid down in article 27 overlapped with those set out in article 26. It was therefore necessary to draw a clear distinction between them. Article 27 had to deal specifically and exclusively with the obligations of States in emergency situations. It had also been proposed that the text of the article should be simplified. Accordingly, the Committee, while retaining the underlying idea, had formulated a new text whereby the article dealt only with sudden and unexpected accidents that called for immediate measures to prevent or mitigate harm to other States.

63. With regard to paragraph 1, it had been agreed that the expression "emergency situations" covered all "water-related dangers" as well, so that there was no reason to use two different expressions. The Drafting Committee had therefore opted for the expression "emergency situations" and defined the term "emergency" in paragraph 1. It would be noted that the article did not simply apply to emergency situations affecting watercourse States alone. Certain emergency situations, such as oil spills or the dumping of dangerous high-risk chemicals into a watercourse, could spread into the sea and affect coastal States. For that reason, paragraph 1 spoke of emergencies which affected watercourse States "or other States". Emergencies could result from natural causes or from human conduct, and human conduct included both acts and omissions. The Drafting Committee had considered that it might perhaps be appropriate to transfer paragraph 1 to article 1 on the use of terms, but for the time being had kept it in article 27.

64. Under paragraph 2, a watercourse State was required to notify other potentially affected States and competent international organizations of an emergency, and the notification must be made "without delay and by the most expeditious means available". That obligation was a particularly pressing one in emergency situations and was the first of a series of measures which a watercourse State had to take in such circumstances.

65. Paragraph 3 dealt with the measures a watercourse State had a duty to take in co-operation with potentially affected States to prevent, mitigate and eliminate the harmful effects of the emergency situation. The duty was subject to two requirements: first, that the measures should be "practicable", i.e. feasible, reasonable and capable of being carried out; and secondly, that the measures should be "necessitated by the circumstances", in other words justified by the real facts of an emergency situation. Again, the co-operation in question should also involve, where appropriate, competent international organizations.

66. Paragraph 4 covered a different obligation, i.e. contingency plans, which should be devised before an emergency situation occurred. In accordance with paragraph 4, watercourse States had jointly to develop contingency plans for measures to respond to emergency situations. In the light of the natural environment of a watercourse and the type of use made of the watercourse, watercourse States could forecast the possibility of certain emergency situations and should therefore be able to work out plans for appropriate ways of responding to those situations in order to prevent or control the harmful consequences. Obviously, the responsibility for formulating such plans lay primarily with the watercourse States. In certain circumstances, however, one could envisage types of emergency situations that might affect certain other

[7] See footnote 6 above.

States. In such a case, those States should also co-operate with the watercourse States. One could also envisage certain kinds of international organizations being competent for certain kinds of emergency situations or for questions relating to particular watercourses. In such a case, those organizations should also co-operate in the formulation of contingency plans. The proviso "When necessary" limited the obligation set out in paragraph 4.

67. Finally, the title of the article had been modified in line with the content.

68. Mr. PELLET said that the last phrase of paragraph 1, "as in the case of industrial accidents", had been rendered in French by the awkward wording *comme dans le cas d'accidents industriels*. It would be better to say *par exemple, en cas d'accident industriel*.

69. Mr. McCAFFREY (Special Rapporteur) agreed and said that the English text should read: "as for example in the case of industrial accidents". A similar change would have to be made in the other language versions as well.

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

70. Mr. AL-BAHARNA suggested deleting the word "that", before the words "results suddenly", in paragraph 1. It was unnecessary, since the same word already appeared before the verb "causes".

71. After a brief discussion in which Mr. McCAFFREY (Special Rapporteur), Mr. FRANCIS, Mr. BEESLEY and Mr. HAYES took part, Mr. AL-BAHARNA said that he would not press his proposal.

72. Mr. Sreenivasa RAO said that he had no objection to the text proposed for article 27 or to the drafting changes made. However, it was important to bear in mind that developing countries, in particular, needed to be able to rely on other more experienced States, as well as on international organizations, in devising contingency plans to deal with emergency situations. Such situations might include industrial accidents on an enormous scale, and the technical and financial resources available to most States in the world were very limited. Some countries, both developing and developed, had experience of such accidents, and even if they were not themselves watercourse States they could give valuable assistance to watercourse States in dealing with such catastrophes. The competent international organizations admittedly had relevant expertise and the ability to bring States together, but they did not necessarily have the financial and technical resources to enable developing countries to work out contingency plans. Watercourse States should be able to draw on the resources available in other States, and the commentary to article 27 should therefore refer to the need for that form of inter-State co-operation.

73. Mr. McCAFFREY (Special Rapporteur) said that it would be difficult to provide, in paragraph 4, for any legal obligation for non-watercourse States to co-operate in that way. In State practice, it was true that other States, often outside the drainage basin of the affected States, did render considerable practical assistance. The Commission could certainly make clear that such assistance was not excluded.

74. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 27 with the amendments to paragraph 1 by Mr. Pellet and the Special Rapporteur (paras. 68-69 above).

It was so agreed.

Article 27 was adopted.

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)*

ANNEX II OF THE DRAFT ARTICLES (Fact-finding and settlement of disputes)

75. The CHAIRMAN invited the Special Rapporteur to introduce the last part of his sixth report (A/CN.4/427 and Add.1), namely chapter IV containing the five articles of annex II of the draft.

76. Mr. McCAFFREY (Special Rapporteur) said he hoped that the Commission would consider chapter IV of his sixth report (A/CN.4/427 and Add.1) fully at its next session. The chapter contained articles 1 to 5 of annex II of the draft (Fact-finding and settlement of disputes) and the Commission had to decide whether the draft should in fact include such provisions. When dealing with the draft articles on jurisdictional immunities of States and their property, the Commission had decided not to include any provisions on the settlement of disputes; but it had taken the view that the draft articles on the law of treaties between States and international organizations or between international organizations should provide for dispute-settlement machinery, either within the draft or in an annex or optional protocol.

77. The settlement of disputes was a uniquely important aspect of the topic of international watercourses, and fact-finding was an essential element of the dispute-settlement machinery. As explained in the introduction to chapter IV of his report, the obligations set forth in the draft articles were, of necessity, very general. Frequently, a watercourse State would have to ascertain the facts in order to comply with those obligations. The voluntary fact-finding machinery proposed in annex II was intended as an adjunct to the substantive obligations in the draft articles to lend assistance to watercourse States.

78. In sections B to E of chapter IV it was explained that, in the past, States had resorted to various methods akin to dispute settlement in the conduct of their relations with respect to international watercourses. Section B reviewed those methods, which ranged from negotiation to adjudication, and showed how States had used them in treaties and in practice. Section C consisted of case-studies illustrating the use of expert advice for the avoidance of disputes—often a more important objective than settling them. Disputed questions could be referred to experts for investigation and report, and there were provisions for such referral in certain international watercourse agreements, such as the 1960 Indus Waters Treaty between India and

* Resumed from the 2167th meeting.

Pakistan and the 1909 Boundary Waters Treaty between Great Britain and the United States of America. Section D dealt with the work of international organizations in the field of the settlement of watercourse disputes. Section E summarized the wealth of material already prepared by previous Special Rapporteurs and their individual approaches to the question.

79. Section F contained the articles proposed for annex II, together with comments thereon. Part A of the annex contained draft article 1 on fact-finding, which appeared in an annex in accordance with the outline of the topic presented in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7). Draft articles 2 to 5 of part B of the annex covered the settlement of disputes, articles 3 to 5 defining the various methods to be used—consultations and negotiations, conciliation, and arbitration. Under draft article 4, a watercourse State would be bound to submit a dispute for conciliation to a conciliation commission. However, the report of the conciliation commission would not be binding on the States concerned unless they agreed otherwise. Finally, draft article 5 provided for submission of the dispute to binding arbitration by any permanent or *ad hoc* arbitral tribunal accepted by all the parties to the dispute.

80. He looked forward to a full discussion of those proposals at the Commission's next session.

81. The CHAIRMAN, thanking the Special Rapporteur, confirmed that the Commission would discuss the draft articles of annex II on fact-finding and settlement of disputes at its forty-third session.

The meeting rose at 12.55 p.m.

2189th MEETING

Monday, 9 July 1990, at 3 p.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/429 and Add.1-4,[2] A/CN.4/430 and Add.1,[3] A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION

1. The CHAIRMAN recalled that, at the 2158th meeting (para. 71), the Commission had established a Working Group to draw up a draft response by the Commission to the request by the General Assembly in paragraph 1 of its resolution 44/39 of 4 December 1989 that the Commission consider the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which might be covered by the code. The Commission had decided that, once it had considered and adopted the response drafted by the Working Group, it would include it in its report to the General Assembly on the present session.

2. He invited Mr. Thiam, the Chairman-Rapporteur of the Working Group, to introduce the report of the Working Group (A/CN.4/L.454 and Corr.1).

3. Mr. THIAM (Special Rapporteur, Chairman-Rapporteur of the Working Group) said that chapters I and II (paras. 1-22) of the report of the Working Group (A/CN.4/L.454 and Corr.1) related the background to the question and he therefore proposed that paragraph-by-paragraph consideration of the text should start with paragraph 23.

4. After some brief general considerations, chapter III dealt with the question of the type of jurisdiction which might be conferred on the international criminal court. With regard to its jurisdiction *ratione materiae*, there were three possible options (para. 31): (i) the court would exercise jurisdiction over the crimes included in the code; (ii) it would exercise jurisdiction over only some of those crimes; (iii) the court would be established independently of the code and exercise jurisdiction over crimes in respect of which States would attribute competence to it.

5. With regard to jurisdiction *ratione personae*, the report referred to the possibility of extending the court's jurisdiction—which would in principle be confined to individuals—to legal entities other than States, at least for certain crimes.

6. As to the nature of the court's jurisdiction, there were three possibilities (para. 38): (i) the court would have exclusive jurisdiction; (ii) it would exercise jurisdiction concurrently with national courts; (iii) it would have jurisdiction only to hear appeals against decisions by national courts.

7. The various options for submitting cases to the court were listed in paragraph 43 of the report. The Working Group had considered whether access to the court should be confined to States parties to its statute or to States having an interest in the proceedings—for example, because the crime had been committed in their territory, because the victim was one of their

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* Resumed from the 2159th meeting.

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[3] *Ibid.*