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Summary record of the 2697th meeting

Topic:

Adoption of the report

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been given, shedding light on particular aspects of the problem, but the overall issue remained a difficult one.

57. The delimitation of territorial boundaries with his country's neighbours had been a challenging endeavour. The Timor Gap Treaty[9] had brought discussions to a successful conclusion at the time, although current events in East Timor had effectively overwritten it. At the request of the Secretary-General, he had taken on the task of demarcating the boundary between Iraq and Kuwait, as Chairman of the United Nations Iraq-Kuwait Boundary Demarcation Commission,[10] an exercise in which the placement of a 12-metre marker had established the acceptance by Iraq of a very controversial boundary. When the hole had been dug for the marker, a water main had been hit and the nearest municipal water works department, located in Basra, had been called in. A practical fact had thus been shown to be capable of establishing agreement. The fact that silence could be taken as acquiescence had been clearly demonstrated by the *Temple of Preah Vihear* case.

58. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), replying to points made during the discussion, thanked the members of the Commission for all the comments made in criticism as well as in praise of his work. The debate reflected the topic's complexity, but the confusion surrounding it actually had a positive effect, since it forced the Commission to systematize its study of unilateral acts. Most members had found the topic to be difficult but important and thought that progress could be made on the basis of various approaches and additional elements, all of which would be mentioned in his next report, as would the other points that had been made. The progress achieved so far, including through the open-ended working group, would also be detailed. The lack of information about State practice had been mentioned and it was to be hoped that the working group could look into the matter.

59. The comments made about interpretative declarations and countermeasures had been extremely interesting. The lack of references to estoppel in the report could be rectified when the invalidity regime was discussed and in the context of the analysis of article 45 of the 1969 Vienna Convention, which referred to estoppel without mentioning it expressly. Silence remained an important element, not as a legal act, but as part of the sphere of, or reactions to, unilateral acts.

60. Comments had been made about whether establishing a classification was possible, impossible or desirable, but most speakers had concluded that it was possible on the basis of the information from case law contained in the report. That did not rule out the possibility of looking once again at classic unilateral acts with reference to their definition, consequences and legal effects. Attention had been drawn to the difficulty of fitting in to the classification mixed acts, such as declarations of neutrality, in which States not only assumed obligations, but also affirmed rights. Much had been said about autonomous acts. The term should perhaps be reconsidered, but the phenomenon should be defined as acts which occurred outside treaty relations and whose effects were generated unilaterally and therefore required no acceptance or other subsequent conduct on the part of the addressee State.

61. Important comments had been made on whether the rules of interpretation could be applied to all unilateral acts. The report said that they could and that such rules could be included in a general part of the draft because all unilateral acts were characterized by the manifestation of will, on which all legal interpretation focused. There seemed to be a need to strike a balance between declared will, which some thought of as having the greatest legal validity, and real will, which, in the view of others, was predominant. Much had been said about whether preparatory work should be excluded or assimilated to surrounding circumstances. He thought that it should be considered as a supplementary means of interpretation when a text was not sufficient for that purpose. It had been suggested that the draft articles should stipulate that interpretation had to be restrictive and wording to that effect could be incorporated. With regard to the opinion that the word "declaration" was ambiguous and should be replaced, he said he had always maintained that it referred to something different from unilateral acts and that it was an instrument through which most, if not all, unilateral acts were expressed. Such terminology problems could account for at least some of the circling around the topic that had been mentioned.

62. In conclusion, he said that he had found the debate enriching and would comply with the request for a document describing the progress made on the topic, setting out the draft articles already referred to the Drafting Committee and the working group and outlining the views expressed to date.

The meeting rose at 1.10 p.m.

2697th MEETING

Friday, 27 July 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr.

[9] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (Timor Sea, 11 December 1989), *Australian Treaty Series 1991, No. 9* (Canberra, Australian Government Publishing Service, 1995).

[10] See Security Council resolutions 687 (1991) of 3 April 1991 and 773 (1992) of 26 August 1992.

Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Draft report of the Commission on the work of its fifty-third session

1. The CHAIRMAN invited the Commission to consider the draft report on the work of its fifty-third session, beginning with chapter IV, on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), the second reading of which had been completed. Sections C and D of the chapter, relating to the recommendation of the Commission with regard to the topic and the tribute to its Special Rapporteur, were still to be completed and would be taken up at a later stage. He invited the Commission to consider chapter IV paragraph by paragraph.

Chapter IV. ***International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)***

A. Introduction (A/CN.4/L.607)

Section A was adopted.

B. Consideration of the topic at the present session

Section B was adopted.

2. The Chairman reminded the Commission that it would return to sections C and D at a later stage. Section E.1 would contain the text of the articles already adopted by the Commission.

E. Draft articles on prevention of transboundary harm from hazardous activities (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)

2. Text of the draft articles with commentaries thereto (A/CN.4/L.607/Add.1 and Corr.1)

General commentary

Paragraph (1)

3. Mr. PELLET and Mr. CANDIOTI noted inconsistencies in the use of the expressions *projets d'article* and *projets d'articles* in the French version of the text, and of the expressions "articles" and "draft articles" in the English version.

4. Mr. TOMKA (Chairman of the Drafting Committee) said that the usual practice was to refer to the set of articles to be submitted to the General Assembly as "draft articles", and to individual draft articles simply as "articles". The word "draft" would thus appear once only, in the title, and would be omitted in the main body of the text.

Paragraph (1) was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

5. Mr. PELLET, referring to footnotes, said that, throughout the commentaries, they frequently cited *International Legal Materials* as a source. While thoroughly worthy, that source had the disadvantage of being published only in English. A decision of principle should be taken to refer, wherever possible, to the United Nations *Treaty Series* in citations.

6. Mr. SIMMA said that the solution adopted would depend to some extent on the prospective readership. The average academic reader could gain access to the United Nations *Treaty Series* and other official United Nations sources only with difficulty and at considerable expense. *International Legal Materials* had the advantage of being easily accessible.

7. Mr. CRAWFORD said that, as a matter of principle, if a treaty was in force it should be cited in the United Nations *Treaty Series*, which was currently available on the Internet. Some materials, however, including treaties not yet in force, were not published in the United Nations *Treaty Series*. In such cases, *International Legal Materials* should be cited as a second source.

8. Mr. ROSENSTOCK suggested that, while the official citation should come first and the *International Legal Materials* citation second, both should appear in the footnote, in order to give the reader the opportunity to choose the most convenient means of access.

9. Mr. KAMTO supported Mr. Rosenstock's suggestion.

10. Mr. TOMKA (Chairman of the Drafting Committee) agreed that the reference should be to the official publication of the United Nations. The problem was that *International Legal Materials* contained texts only in English. Tracing additional citations in other languages would place a further burden on special rapporteurs.

11. Mr. Sreenivasa RAO (Special Rapporteur) said he was prepared to comply with the general view of the Commission on the question.

12. Mr. MELESCANU said that, in spite of the linguistic drawback of citing *International Legal Materials*, Mr. Rosenstock's proposal was clearly the most realistic solution in what was admittedly an imperfect world.

13. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to accept the policy decision suggested by Mr. Rosenstock.

It was so agreed.

Paragraph (4) was adopted.

Paragraph (5)

14. Mr. PELLET said that the citations in the footnote to the paragraph and in other footnotes should be organized according to a consistent system, either in alphabetical or in chronological order.

Paragraph (5) was adopted.

The general commentary was adopted.

Preamble

15. Mr. GAJA said it was an unusual feature of the draft articles that they included a preamble. Some brief explanation of the preamble should thus be given in the commentary.

16. Mr. PAMBOU-TCHIVOUNDA agreed that some mention of the preamble should be made in the commentary, perhaps as a footnote. In the third paragraph of the preamble, the word *précis* should be replaced by *placés* in the French version, bringing it into line with the wording of article 2, subparagraph (*c*).

17. Mr. Sreenivasa RAO (Special Rapporteur) said that the preamble represented a delicate compromise and a discreet acknowledgement of the unfulfilled wishes of some States with regard to the draft. Quite apart from the fact that it was not usual practice to provide commentaries to preambular texts, and that such an exercise would be time-consuming, any discussion of the preamble would in any case run the risk of reopening the debate in the General Assembly, thereby diverting attention from the main thrust of the articles. His own view was that no commentary to the preamble should be provided.

18. Mr. MELESCANU said that both Mr. Gaja and the Special Rapporteur had made very valid points. What was needed was simply a brief two- or three-line explanation of why the Commission had decided to draft a preamble.

19. Mr. ADDO, Mr. AL-BAHARNA, Mr. ECONOMIDES and Mr. GOCO were of the view that no commentary was necessary, and that the preamble was self-explanatory.

20. Mr. TOMKA (Chairman of the Drafting Committee) said that for the Commission to draft a preamble was the exception that proved the rule. It should be easy to provide a brief explanation, thereby avoiding the need for a conference or the Sixth Committee to take the matter up again.

21. Mr. PELLET said that, while he would not break with the emerging consensus that there should be no commentary to the preamble, he still felt that every provision ought to be the subject of a commentary. It was simply not true to say that the preamble was "self-explanatory" and the Commission should guard against setting an undesirable precedent.

22. Mr. SIMMA suggested that the Commission should ascertain what course it had adopted in the case of the preamble to the draft articles on nationality of natural persons in relation to the succession of States.[1] Regardless of the findings, Mr. Gaja's suggestion remained a good one.

23. Further to a proposal by Mr. Sreenivasa RAO (Special Rapporteur), the CHAIRMAN suggested that the Commission should suspend its consideration of the preamble, to enable the Special Rapporteur to come up with an appropriate wording on the basis, inter alia, of the report of the Drafting Committee.

It was so agreed.

Commentary to article 1 (Scope)

Paragraph (1)

24. Mr. YAMADA said that the reference to subparagraph (*c*) in the second sentence should be to subparagraph (*d*).

25. Mr. CRAWFORD said there was a clear discrepancy between the statement, in paragraph (1), that article 1 limited the scope of the articles to activities not prohibited by international law, and the statement, in paragraph (6), that the State could raise issues whether the activity was or was not prohibited by international law. Either the articles applied only to activities not prohibited by international law, or they applied to activities of a certain description, whether or not prohibited by international law, by virtue of the fact that they caused certain levels of harm.

26. Mr. Sreenivasa RAO (Special Rapporteur) said that the answer might be to delete the words "not prohibited by international law and" from paragraph (1).

27. Mr. CRAWFORD said that it seemed rather odd to be changing the scope of the subject by deleting from the first sentence of the commentary to article 1 the phrase which appeared in the text of the article itself, and thereby in effect to state that what article 1 meant was that the draft articles applied to activities which produced those effects whether or not they were prohibited by international law. The scope of the subject had been a fundamental problem lurking behind the conceptual trap, which Special Rapporteur Ago had set for the Commission when the topic was first established and from which the Commission had never managed to escape. It must stick to the terms of the topic and retain the words "not prohibited by international law and", working on the assumption that States when they were dealing within the framework of prevention would leave that question to one side, so that there would be a *de facto* extension of application of those draft articles on a "without prejudice" basis.

28. Mr. TOMKA (Chairman of the Drafting Committee) agreed, noting that the problem had been discussed at length in the Drafting Committee, where the decision had not been an easy one. However, paragraph (1) should be kept as it was, because paragraph (6) correctly reflected that invocation of the article by a State likely to be affected was not a bar to a later claim by that State that the activity in question was a prohibited activity. It might be better to rework the previous sentence in paragraph (6), but that could be tackled at the time the paragraph was discussed.

[1] *Yearbook . . . 1997*, vol. II (Part Two), pp. 14 *et seq.*

29. The CHAIRMAN said that he would take it that the Commission wished to adopt paragraph (1), with the amendment to the second sentence.

Paragraph (1), as amended, was adopted.

Paragraph (2)

30. Mr. ECONOMIDES said that non-hazardous activities could also involve a risk of causing significant transboundary harm and hence there was an apparent contradiction between the title of the articles and the scope of the draft. In his view, the two should be harmonized. Paragraph (2) referred to "different types of activities" that could be envisaged under the category, and then cited hazardous and ultra-hazardous activities. But they were only one type of activity. Was the Special Rapporteur able to explain the apparent contradiction?

31. Mr. PAMBOU-TCHIVOUNDA in agreement, said that it was the duty of the Commission to specify what hazardous activities were.

32. Mr. Sreenivasa RAO (Special Rapporteur) said that the emphasis was on any activity with a risk of inherent danger, and the fact that certain activities were highlighted did not exclude others. The point was surely covered by the fourth sentence of paragraph (2).

33. Mr. ECONOMIDES said that he would have preferred it to be stated in paragraph (2) that any activity that involved a risk of causing significant transboundary harm was *a priori* a hazardous activity, and that therefore *a fortiori* some activities were more hazardous than others. However, although he was not entirely satisfied, he accepted the Special Rapporteur's explanation and would not press the point.

34. Mr. CANDIOTI asked what the phrase "risk of inherent danger" really meant. Did "inherent" apply to "risk" or to "danger"?

35. Mr. MELESCANU, supported by Mr. SIMMA, said that "inherent" qualified "risk".

36. Mr. Sreenivasa RAO (Special Rapporteur) said he agreed.

37. Mr. SIMMA wondered whether one might not be over-egging the pudding by speaking of a risk of danger. Would it not be sufficient to refer to "inherent risk" or "inherent danger"?

38. Mr. Sreenivasa RAO (Special Rapporteur) said the point he had been trying to make was that the risk had to be inherent and productive of danger. He proposed that the text might make reference to "any activity with an inherent risk of causing significant harm".

39. Mr. CRAWFORD said that the word "inherent" involved a serious problem and should be deleted. If in practice one was dealing with a situation, one would ask whether the particular activity involved a risk of causing transboundary harm as a result of the physical consequences, and the fact that other activities of that general description might or might not carry such a risk had no bearing on the matter. The question was whether the particular activity was covered by article 1. The problem with the word "inherent" was that it either tended to distract one's attention towards the general category of activities of which the particular activity was one, which was not the point, or it tended to draw a distinction between "inherent" and "extraneous", which again was not the point.

40. Mr. KAMTO said that it was not entirely clear whether "inherent danger" and "an exceptionally high level of danger" in the fourth sentence were alternative ideas or whether the idea of gradation was being introduced. The Special Rapporteur had explained that all activities with an inherent risk of danger were covered, so that idea might be better reflected if "*a fortiori*" were inserted after "even".

41. Mr. PELLET said that "risk" and "danger" were roughly the same and it was absurd to speak of the risk of danger. What was meant was the risk of harm. The Special Rapporteur had made a sensible proposal that should be accepted.

42. Mr. CANDIOTI agreed, saying that it was a question of a risk of causing harm and not of risk leading to danger. The notions were distinct.

43. Mr. GOCO said the language was entirely satisfactory. The phrase should be "risk of inherent danger", as it appeared in the text, since "inherent danger" was amplified by the rest of the sentence.

44. Mr. SIMMA said that if "danger" was replaced by "harm" the change would have to be made throughout.

45. Mr. AL-BAHARNA said that the word "inherent" was not needed and should be deleted. Reference should be made to "risk of harm" and "an exceptionally high level of harm".

46. Mr. HAFNER said that paragraph (2) of the commentary to article 6 referred to "activities with a possible risk of significant transboundary harm". In his view it would be wise to use that phrase throughout the commentary for the activities addressed by the draft articles.

47. Mr. ECONOMIDES said that he considered the word "inherent" useful; it was the second part of the sentence that needed to be corrected. It should refer to "even an exceptionally high level of harm", rather than "danger".

48. The CHAIRMAN said he agreed: "inherent" was a very useful word in the context.

49. Mr. PELLET said that "inherent" was indispensable to the sense of the sentence. The word "danger" should be replaced by "harm", and "even" should be replaced by "a fortiori".

50. Mr. Sreenivasa RAO (Special Rapporteur) said that the word "inherent" could not be deleted, but "even" could. In any event, due to a drafting error the phrase "risk or inherent danger"—to be replaced by "harm"—had appeared as "risk of inherent danger". He would come back to the Commission with a definitive formulation of the sentence.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were adopted.

Paragraph (6)

51. Mr. PELLET said that footnotes 7, 8, 9 and 11 posed a problem of principle. It was not a good method in a commentary on draft articles on first reading, and even worse on second reading, for the Commission to cite itself, and worse still to cite its special rapporteurs. It was normal to repeat in the commentary that which had already been written, but it was not good to cross-refer to previous commentaries and previous proposals. All the cross-references in the footnotes should be deleted. If the Special Rapporteur considered that by doing so something important would be missing, the text to which reference was made could be reintroduced. He was very insistent on the point.

52. Mr. Sreenivasa RAO (Special Rapporteur) said it was the first time that he had heard a policy statement on footnotes, but if colleagues agreed, so would he. It would be helpful to all special rapporteurs.

53. Mr. BROWNLIE said that it clearly did not help the progress of the exposition if there was heavy historical back-referencing to previous reports and proposals, but he could not see that there was any need for an extreme general policy justifying an absolute prohibition on references to previous work.

54. Mr. PELLET said that the Special Rapporteur had not heard such a policy statement before, because commentaries on second reading had never before made reference to previous work. Such reference could be made in the introduction. The commentaries were the property of the Commission, which could repeat what it had said but could not make cross-references.

55. The CHAIRMAN said it was not the first time commentaries adopted on second reading had made reference to previous work: it had been done in the case of the topic of nationality in relation to the succession of States.

56. Mr. SIMMA said that the simple quotation in footnote 7 could be moved into the body of the text if it was considered important. In his opinion, where a special rapporteur had made a very comprehensive point it would be helpful for the commentary, which was very compact, to include a reference so that the reader could find more material.

57. Mr. PELLET said that special rapporteurs should not be encouraged to cite themselves and develop a personality cult. It should be avoided at all costs, and there was no need for the Commission to cite itself. Important matters should be stated; unimportant matters should not. Citing special rapporteurs was poor form.

58. Mr. TOMKA (Chairman of the Drafting Committee) said that he was not averse to references to the previous work of the Commission when necessary and within reasonable limits. Such references had been included in the commentary to the draft articles on nationality of natural persons in relation to the succession of States. He was in favour of keeping footnote 7 and deleting footnote 8.

59. Mr. HE suggested that the sources simply be cited and not quoted at length.

60. Mr. Sreenivasa RAO (Special Rapporteur) said he would not press for retention of the material in footnote 7. He had nevertheless thought it useful and a contribution to the historical record on the commentaries.

61. Mr. PELLET said that his proposal for footnote 7 appeared to have been misunderstood. The usefulness of the material therein was not in dispute. The problem was merely with the form. To improve it, he proposed that in the first sentence, the words "concluded that [it]" be deleted and the quotation marks removed. Similarly, in the second sentence, the phrase "The Special Rapporteur . . . liability as" should be deleted, replaced by "Moreover," and the quotation marks then removed. The Commission could thus incorporate material from its earlier works without designating itself as the source.

62. Regarding footnote 9, if the contents of paragraphs 35 to 37 of the second report[2] were deemed to be essential, they must be placed in the commentary; if not, they should not be mentioned in the footnote. Not to include substantive material did a disservice to the reader and possibly to members of the Commission, who did not have an encyclopaedic memory of what was in the paragraphs.

63. Mr. KATEKA said that references to reports by special rapporteurs were of use, especially to future students of the topics, and should not be prohibited. It would be tantamount to barring references to any of the authors in the literature unless their works were cited *in extenso.*

64. Mr. PELLET said that not all works mentioned could or should be cited *in extenso,* but there was a fundamental difference between quoting an author and quoting a special rapporteur: the Commission was the proprietor of its own work and of that of the special rapporteurs. It accordingly did not have to cite such work as a source. It was, he thought, an important matter of principle. He was not totally opposed to any quotation whatsoever of such material, but as Mr. Tomka had said, it should be done sparingly and only when truly necessary.

65. Mr. ECONOMIDES said that reports by special rapporteurs were endorsed by the Commission not in their entirety, but to the extent that the material therein was reproduced in the report of the Commission to the General Assembly. Mention of such reports in a footnote did not mean that each and every member of the Commission accepted their entire contents. Consequently, he could not understand Mr. Pellet's statement that the Commission was the proprietor of work by special rapporteurs.

66. Mr. SIMMA said the Commission should take a pragmatic, not dogmatic, position, and should resolve such questions on a case-by-case basis.

67. Mr. CRAWFORD said that the beginning of the second sentence in paragraph (6), "This was originally intended", was misleading, as it implied that there was a different intention at the current time. The commentaries should be self-contained and not refer back to past

[2] *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/501.

decisions except where absolutely necessary. In general, it was bad practice to cite in the commentary reports by the special rapporteur on the topic of that commentary, and the Commission should adopt a policy of deleting all such references. The commentary constituted the collective view of the Commission and as such superseded the reports.

68. Mr. TOMKA (Chairman of the Drafting Committee) proposed that the phrase, "This was originally intended", mentioned by Mr. Crawford, should be replaced by "This approach has been adopted in order" and that footnote 7 should simply read: "*Official Records of the General Assembly, Thirty-Second Session, Supplement No. 10* (A/32/10), para. 17."

It was so agreed.

69. The CHAIRMAN suggested that the end of the third sentence, "irrespective of . . . not prohibited.", together with footnote 8, should be deleted.

70. Mr. SIMMA said he was opposed to such a deletion, as the sentence would be devoid of meaning.

71. Mr. CRAWFORD said he would prefer to replace the phrase "irrespective of . . . not prohibited" by "although the activity itself is not prohibited", which would restore consistency with article 1.

It was so agreed.

72. Mr. HAFNER proposed that, in the fifth sentence, the words "or at any event, the minimization" should read "at any event of the minimization".

It was so agreed.

73. Mr. PELLET proposed that in the penultimate sentence, the word "the" should be replaced by "a".

It was so agreed.

74. The CHAIRMAN said that all references to reports by special rapporteurs would be removed from the text during the editing process. If he heard no objection, he would take it that the Commission wished to adopt paragraph (6), as amended.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

75. Mr. CRAWFORD said that there were perfectly good reasons for limiting the draft to transboundary harm arising in a State's territory, without getting into issues of extraterritorial jurisdiction. The first sentence was therefore unnecessary and problematic and should be deleted.

It was so agreed.

76. Mr. MOMTAZ drew attention to a discrepancy in the underlining of words in the English and French language versions. The sixth sentence, "The Commission, however, is mindful of situations where a State, under international law, has to yield jurisdiction within its territory to another State", was something of an overstatement. A State, rather than yielding jurisdiction, assumed what could be described as functional jurisdiction in such instances.

77. Mr. ECONOMIDES endorsed those remarks and suggested that the unduly strong term "yield" should be replaced by "accept limits to".

It was so agreed.

78. Mr. HAFNER proposed that the word "territory", in the same sentence, should be replaced by "territorial jurisdiction".

It was so agreed.

Paragraph (8), as amended, was adopted.

Paragraph (9)

79. Mr. HAFNER proposed that, at the end of the first sentence, the phrase "is narrow and therefore the concepts of 'jurisdiction' and 'control' are also used" should be replaced by the words "does not cover all cases where a State exercises 'jurisdiction' or 'control'".

It was so agreed.

Paragraph (9), as amended, was adopted.

Paragraphs (10) and (11)

80. Mr. MOMTAZ said the second sentence of paragraph (11) failed to draw a necessary distinction between the territorial sea, the contiguous zone and exclusive economic zones, which did not have the same status. In the territorial sea, States exercised sovereign rights, not "functional mixed" jurisdiction, as the sentence suggested.

81. Mr. PAMBOU-TCHIVOUNDA said he agreed that the three different concepts should be treated separately but disagreed about the sovereignty of States in the territorial sea. There, they exercised full sovereignty, whereas in the exclusive economic zones, they exercised sovereign rights.

82. Mr. PELLET said that the sentence was accurately worded in that it referred to functional mixed jurisdiction over "navigation and passage" through the areas cited by Mr. Momtaz, not over those areas themselves. He agreed with Mr. Momtaz, however, that the three areas should not be placed on the same footing, because States exercised sovereign rights in the exclusive economic zones and territorial sovereignty in the territorial sea. He suggested

that the words "contiguous zone and exclusive economic zones" should be deleted.

83. Mr. BROWNLIE said he endorsed the criticisms made by Mr. Momtaz, but in the final analysis there was a strong case for deleting paragraphs (10) and (11) because they set out problems but did not offer clear solutions. One solution, admittedly imperfect, was to be found in paragraph (12).

84. Mr. SIMMA said he agreed with Mr. Brownlie: the applicability of the draft articles to the situations described in paragraphs (10) and (11) would in any case be limited. Hence there was no need to go into specifics.

85. Mr. PELLET, supported by Mr. HERDOCIA SACASA, said that the two paragraphs contained useful examples that he would be loath to lose. On its own, paragraph (12) was by no means explicit enough. If paragraphs (10) and (11) were to be deleted, he would favour at least adding, before the word "States" in paragraph (12), the phrase "as often occurs under the law of the sea".

86. Mr. PAMBOU-TCHIVOUNDA said he shared Mr. Pellet's concern. The answer might be, after deleting paragraph (11), to compress paragraphs (10) and (12). He also suggested that the words "in outer space or on the high seas" in paragraph (10) should be replaced by a vaguer form of words, such as "maritime areas". All possible cases should thus be covered.

87. Mr. BROWNLIE, supported by Mr. GOCO, said that he had not advocated expanding paragraph (12) with a form of words that would provide the wrong solutions. To refer to exclusive economic zones as involving a functional jurisdiction was no solution, since the superjacent airspace of an exclusive economic zone did not form part of that zone. It would be far too complex, as well as legally problematical, to attempt to include such considerations in paragraph (12). He would prefer to retain a succinct form of words, much like the existing paragraph (12).

88. Mr. ECONOMIDES said he had no objection to deleting the last two sentences of paragraph (10), although he found the examples useful. As for paragraph (11), the problems might be solved if the three maritime zones concerned were left unspecified. The point was to retain functional mixed jurisdictions. The phrase "the territorial sea, contiguous zone and exclusive economic zones" could thus be replaced by the phrase "maritime zones".

89. Mr. MOMTAZ said he concurred. Since the jurisdiction of the flag State was the point at issue, the last sentence of paragraph (10) and the whole of paragraph (11) could safely be deleted if the words "flag State over a ship" in paragraph (10) were followed by "which, in accordance with the law of the sea, exercises a number of jurisdictions in the various maritime zones".

90. Mr. Sreenivasa RAO (Special Rapporteur) said that the paragraphs concerned dated from the forty-eighth session, before he had become Special Rapporteur. He had therefore not given them particularly close attention. He was, however, aware of the various jurisdictions and competencies in different zones, for different purposes, and as between coastal and other States with competencies in those zones. He would therefore prefer to retain paragraph (10). Moreover, as was stated at the end of paragraph (9), the article did not presume to resolve all the questions of conflicts of jurisdiction. Paragraph (11), on the other hand, attempted to combine too many concepts in too small a space, causing needless complexity, and it could therefore usefully be deleted.

Paragraph (10) was adopted and paragraph (11) was deleted.

Paragraph (12)

91. Mr. AL-BAHARNA suggested that, to bring extra clarity to paragraph (12), the phrase "such as the case of navigation and passage in maritime territory" should be added after the words "concurrent jurisdiction". That would avoid the complications involved in Mr. Momtaz's suggestion regarding references to specific terms such as "territorial sea".

92. The CHAIRMAN, after urging members to restrict their comments to requests for clarification or specific proposals for amendments, said he took it that the Commission wished to retain the existing wording of paragraph (12).

Paragraph (12) was adopted.

Paragraph (13)

93. Mr. SIMMA said that the phrase "such as in cases of intervention, occupation and unlawful annexation which have not been recognized in international law", in the first sentence, was ambiguous and generally unsatisfactory. He presumed that the intended meaning was "not recognized as valid". The best solution would be to delete the phrase "which have not been recognized in international law" and to qualify all the three eventualities—intervention, occupation and annexation—with the word "unlawful" or "illegal".

94. Mr. GOCO suggested that the phrase "even though it lacks jurisdiction *de jure*" was superfluous, in view of the immediately preceding reference to *de facto* jurisdiction.

95. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase should be retained because, whereas in normal cases of *de facto* control it was possible for *de jure* jurisdiction to follow, that was not the case when the intervention, occupation or annexation was unlawful.

96. Mr. KAMTO pointed out that, by definition, annexation could never be lawful.

97. Mr. PELLET said that the French version would be improved if the phrase *que la Cour avait declaré illégale* were replaced by the phrase *dont la Cour avait constaté l'illicéité*. *Declaré* was too strong a word in the context.

98. Mr. TOMKA (Chairman of the Drafting Committee) said that, according to his understanding, the word "case" had a connotation of contentiousness. He therefore suggested that the word "case" preceding the reference to

footnote 13 should be deleted and that the next sentence should begin "In that advisory opinion".

Paragraph (13), as amended, was adopted.

Paragraph (14)

99. Mr. MOMTAZ said that presumably the intervention in question was that undertaken on environmental grounds. In order not to confuse the reader, that fact should be specified. It might also be useful to add a reference to the International Convention on Civil Liability for Oil Pollution Damage.

100. Mr. Sreenivasa RAO (Special Rapporteur) said that paragraph (14), also dated from before his time as Special Rapporteur. However, he understood the type of intervention concerned to be different from any mentioned previously: it was intervention by agreement, under which a State was given control by another for certain purposes. He had assumed that it related to military intervention, where the army of one State was stationed in another. In that situation the incoming State was the "controlling" State. He would add that he endorsed the Chairman's plea for speed in adopting the report. Only a few pages had been adopted at the current meeting and some substantive issues requiring discussion lay ahead. Editing changes should be proposed only if they sought to correct glaring errors.

101. Mr. SIMMA said that second thoughts should not be excluded; shortage of time concentrated the mind. As for Mr. Momtaz's point, environmental disasters were covered by the current wording, even though they could not be said to be subject to an agreement. On the other hand, if "intervention" referred to agreed intervention, the word "ousted" was surely too harsh, implying, as it did, deprivation of jurisdiction.

102. Mr. HAFNER said that, as the comments by other members showed, it was a difficult issue and the Commission was not in a position to cover all cases. He therefore suggested deleting paragraph (14), which only complicated matters. The duty imposed on States under other articles should suffice.

103. Mr. CRAWFORD said he strongly concurred. The draft articles could not deal with extreme situations involving any form of intervention, consensual or otherwise. If the paragraph were to be retained, the phrase "It is the view of the Commission that" should be deleted: the Commission was not making a general point of principle.

104. The CHAIRMAN suggested that paragraph (14) should be deleted.

It was so agreed.

Paragraph (14) was deleted.

Paragraph (15)

105. Mr. HAFNER suggested that the words "the possibility of" should be inserted before "any harm" in the penultimate sentence.

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (18)

Paragraphs (16) to (18) were adopted.

Paragraph (19)

106. Mr. HAFNER asked whether the term "natural law", in the second sentence, was the best expression to use. It seemed ambiguous in a way that the French version did not.

107. Mr. CRAWFORD concurred. The phrase "in response to a natural law" should be deleted. He also suggested deleting, or at least qualifying, the phrase "not from an intervening policy decision", in the third sentence. An intervening policy decision might relate to the way in which the activity was being carried out and therefore be perfectly relevant to risk. He was aware that the draft articles did not cover decisions to use weapons, as distinct from the consequences of storage, but the distinction between the "quality" and a policy decision was too absolute. The simplest solution was to delete the phrase.

108. Mr. Sreenivasa RAO (Special Rapporteur) said that, while the phrase in question might have been misplaced, the intention had been to eliminate decisions that affected other countries because of a policy decision without any physical connection.

109. Mr. CRAWFORD said that that point, with which he agreed, was expressed in the example that had been given. Obviously, a country could not use injurious transboundary consequences as an excuse for a concern that might relate to the actual use of weapons.

The meeting rose at 1.10 p.m.

2698th MEETING

Monday, 30 July 2001, at 3 p.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.
