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**Summary record of the 1860th meeting**

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49. In his second report, he had discussed the question of ground-water resources unrelated to any surface watercourse (A/CN.4/381, paras. 26-30). The best known example was the enormous water resources—often described as an underground ocean—deep beneath the Sahara. Another example was the underground geological formation in the border region between the State of Arizona in the United States of America and the State of Sonora in Mexico. He thanked members who had made observations on that question and reiterated his view that the Commission should not attempt to deal with independent ground-water resources in the draft. Nevertheless, the principles and rules laid down in a framework convention on the present topic could have a bearing on, or be applicable by analogy to, independent ground-water resources. Some members, such as Mr. Mahiou (1854th meeting), had supported that approach, but others appeared to favour the inclusion in the draft of a provision dealing with independent ground-water resources. If the majority of the Commission favoured that course, he would have no objection.

*The meeting rose at 1 p.m.*

## 1860th MEETING

*Thursday, 12 July 1984, at 10.10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/367,<sup>1</sup> A/CN.4/381,<sup>2</sup> A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4)**

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>3</sup>  
(concluded)

1. Mr. EVENSEN (Special Rapporteur), continuing his summing-up of the discussion on draft articles 1 to 9,

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

said that draft article 2, dealing with the scope of the articles, appeared to be generally acceptable. Its language had been drawn from article 1 as provisionally adopted by the Commission in 1980. It had been pointed out by Mr. Reuter (1855th meeting), however, that the wording “uses of international watercourses and of their waters” in article 2 was not consistent with the terminology used in other articles—such as articles 5, 6 and 7—which referred to the “use of the waters of an international watercourse”. Even article 2, paragraph 2, itself began with the words: “The use of the waters of international watercourses ...”.

2. To some extent, those differences of wording were justified, and had in fact been inherited from the articles provisionally adopted in 1980. Paragraph 1 of article 1 as adopted in 1980, for example, referred to “uses of international watercourse systems and of their waters”, while paragraph 2 of the same article spoke of “The use of the waters of international watercourse systems”. Article 3, paragraph 3, spoke of “the uses of an international watercourse system”, while article 5, paragraph 1, referred to “the use of waters of an international watercourse system”. Those discrepancies could, of course, be eliminated by the Drafting Committee. In that connection, the proposal by Mr. McCaffrey to introduce the formula “the utilization of the waters of an international watercourse” was useful, since the term “utilization” could prove more viable than “use” in that context.

3. Draft article 3, on the definition of watercourse States, appeared to be broadly acceptable to most members. Its wording was based on that of article 2 (System States) as adopted in 1980. The current formulation depended, of course, upon agreement to abandon the “system” concept. The word “relevant” qualifying components or parts was intended as a reference to draft article 1, paragraph 2. If there was any objection to it, it could easily be deleted. Also, the words “the present Convention” could, if so desired, be replaced by “the present articles”, until the nature of the instrument had been agreed upon.

4. Draft article 4 on watercourse agreements had given rise to serious reservations. Mr. Calero Rodrigues (1854th meeting) had proposed that paragraph 2 should become paragraph 1. A number of speakers had suggested the deletion of the qualifications contained in the first sentence of paragraph 1, a suggestion with which he concurred. It had also been suggested that draft article 4 should begin with a provision similar to that of article 3, paragraph 1, as provisionally adopted in 1980, which read:

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

Some speakers had, however, expressed reservations as to that formulation, which they found too inflexible; they also felt that it gave too much importance to the provisions of the current draft articles concerning special watercourse agreements. He himself found those comments justified and suggested that draft article 4, paragraph 1, might be redrafted along the following lines:

“1. A watercourse agreement is an agreement between two or more watercourse States concerning the utilization, management and administration of the waters of an international watercourse, international watercourses or parts thereof.”

Paragraph 2 would be similar to the text proposed in his second report, except that the word “should” would be replaced by “shall”.

5. With regard to draft article 5, he accepted the proposal by Mr. Al-Qaysi (1853rd meeting) to insert a reference to article 4, paragraph 2, after the words “project, programme or use”, in paragraph 2. In his view, both paragraphs 1 and 2 of draft article 5 should be retained. The fact that certain changes had been made in previous articles did not alter the basic reality that the various parts and components of a watercourse formed an entity as far as the utilization of the waters was concerned. The expression “to an appreciable extent” in article 5, paragraph 2, which had been criticized as vague by Mr. McCaffrey, had been used earlier in article 3, paragraph 2, and in article 4, paragraph 2, of the 1980 draft.

6. Turning to chapter II, he recalled that he had already dealt with the suggestions and comments relating to draft articles 6 and 7, including the proposal—which he found acceptable—to delete the latter article. He also accepted Mr. McCaffrey’s suggestion to replace the word “use” in article 6, paragraph 2, by “utilization”. There had also been considerable discussion of the expression “reasonable and equitable”, which had of course been taken from the Helsinki Rules adopted by the International Law Association in 1966.<sup>4</sup> It would be for the Drafting Committee to consider the various alternatives suggested.

7. Draft article 8 gave a non-exhaustive list of factors which could serve to determine what was a reasonable and equitable use. Most speakers had favoured the inclusion of such an article. Mr. Reuter had suggested that the various factors should be rearranged more systematically, while Mr. Calero Rodrigues had suggested that the relevant subparagraphs should be moved to the commentary. Some speakers had suggested additional factors for inclusion in the list. In reply to all of those suggestions, he wished to stress that he had relied largely on the enumeration contained in article V of the 1966 Helsinki Rules and in draft article 7 as submitted by the previous Special Rapporteur in his third report.<sup>5</sup>

8. With regard to the order in which the various factors had been placed in draft article 8, he had had no intention of establishing an order of priority. As to the structure of the article, he favoured the idea of combining subparagraphs (g) and (k) and of adding in subparagraph (a) a reference to the avoidance of unnecessary waste in the utilization of water. Regarding the proposals made for an express reference to the population factor, he felt that that point was already covered by the general ref-

erence in subparagraph (b) to “The special needs of the watercourse State concerned”. Three interesting additional factors had been suggested for inclusion in article 8 by Mr. Boutros Ghali (1853rd meeting), namely: (a) agreements already in existence; (b) technical factors regarding the quantity and quality of the waters concerned; (c) long-term estimates for the watercourse. Mr. Boutros Ghali, together with other members, had urged that the utilization of waters for human consumption should be emphasized. In his own opinion, it would also be advisable to add provisions on compensation in money or in kind for harm caused by particular works, installations or uses.

9. Opinions were divided on the wording of draft article 9. In particular, there had been some criticism of the expression “appreciable harm”. He had considered terms such as “substantial harm”, “serious harm” or “unacceptable harm” but had preferred “appreciable harm” because it had been adopted as the acceptable standard in articles 3 and 4 as provisionally adopted in 1980. The term “harm” also seemed preferable to “damage” or “injury”, which brought to mind the law of State responsibility. There might also be grounds for replacing the words “cause appreciable harm” by “adversely affect to an appreciable extent”. Lastly, the proposal made by Mr. McCaffrey to add, at the end of draft article 9, the expression “except as may be allowable under a determination for equitable participation for the international watercourse involved” was an interesting one.

10. The discussions had shown that there were wide differences of opinion on the action to be taken by the Commission. Mr. Calero Rodrigues had proposed that the articles in chapters I and II should be referred to the Drafting Committee at the end of the present discussion and that the Commission should concentrate on chapters III and IV at its next session and deal with the last two chapters of the draft in 1986. Other members had supported that proposal. In view of the existing divergences of opinion, he felt the need for assistance in redrafting articles 1 to 9 and, accordingly, hoped that the Drafting Committee would be able to take up those articles with a view to arriving at texts which could serve as a basis for the discussion of subsequent chapters of the draft.

11. The CHAIRMAN thanked the Special Rapporteur for his able summing-up of the discussion and suggested that draft articles 1 to 9 be referred to the Drafting Committee.

12. Mr. BARBOZA noted that the Special Rapporteur was in favour of deleting draft article 7, in view of the criticisms of the concepts of optimum utilization, good faith and good-neighbourly relations made by several members of the Commission. However, the first part of that article set forth a highly important principle which was the complement of the principle stated in article 6, paragraph 1. To renounce the principle stated in article 7, which approached the situation from the viewpoint of the community of riparian States, would be tantamount to emphasizing the utilization of the waters by the territorial State, with no mention of the idea of sharing. As it

<sup>4</sup> See 1831st meeting, footnote 4.

<sup>5</sup> *Yearbook ... 1982*, vol. II (Part One), p. 90, document A/CN.4/348, para. 106.

was essential to express that idea in the draft, he was firmly opposed to the deletion of draft article 7.

13. The Special Rapporteur had also come out in favour of eliminating the concept of good-neighbourly relations, which was referred to not only in draft article 7, but also in draft article 8, paragraph 2. In his earlier statement (1855th meeting), he himself had opposed the retention of that concept. The concept of a shared natural resource had been dropped because it created a legal superstructure from which principles not enunciated in the draft articles could be derived. However, good-neighbourly relations created another superstructure, and it was impossible to eliminate one without eliminating the other. It was one thing not to include the concept of a shared natural resource in the text, because of the opposition which it aroused, but it was quite another matter to assert that the principles which could be derived from it would not be applied, as if the superstructure created by the concept of good-neighbourliness had also been eliminated.

14. With regard to the question of the relativity of watercourse systems, both he and Sir Ian Sinclair (1857th meeting) had noted that, in the provisional working hypothesis adopted by the Commission, it was stated that

... to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.<sup>6</sup>

Consequently, in a given case, a watercourse system could be considered as comprising a number of systems simultaneously, depending on whether it was considered from the point of view of pollution, hydraulic power or irrigation. He wondered whether such a conclusion could be drawn from the new wording of the draft, since article 1 referred not to uses in one part of a watercourse affecting uses in another part, but to the components affecting uses in another part of the watercourse. Could a flood system be considered to exist in the event of a flood occurring at a given point in the watercourse and affecting the uses of the waters by downstream States?

15. In the interest of expediting the discussion, there should be the fullest possible dialogue between members of the Commission and the Special Rapporteur. At the previous session, he had raised two questions which had not been referred to by the Special Rapporteur in his summary of the debate and which had been raised again at the current session, namely the question of optimum utilization, a concept which the Special Rapporteur was currently thinking of eliminating, and the question of the position of articles 11 to 14 in the draft, a concern which the Special Rapporteur now said he appreciated.

16. The CHAIRMAN pointed out that the Commission was at the present stage considering only the action to be taken on the formal proposal by the Special Rapporteur to refer draft articles 1 to 9 to the Drafting Committee.

17. Sir Ian SINCLAIR recalled that he had already expressed reservations (1857th meeting) as to whether draft

articles 1 to 9 should be referred to the Drafting Committee at the current stage. While he welcomed the conciliatory approach of the Special Rapporteur, it was unlikely that all the objections raised with regard to the draft articles submitted in the second report (A/CN.4/381) could be overcome. The articles provisionally adopted by the Commission in 1980 had constituted a coherent and consistent whole, based on the "system" concept. Now that that pillar had been removed, it was necessary to rethink all the provisions. However, he would not oppose the proposal to refer draft articles 1 to 9 to the Drafting Committee, on the understanding that the Special Rapporteur would cooperate in a collective effort to produce a more acceptable set of articles.

18. Mr. KOROMA supported the suggestion to refer draft articles 1 to 9 to the Drafting Committee but endorsed Mr. Barboza's plea for the retention of the first part of article 7, which was central to the topic.

19. Mr. DÍAZ GONZÁLEZ said that it was clear from Mr. Barboza's statement, if not from the debate itself, that the Commission was unable to achieve either a consensus or unanimity on the form and basic concepts of the draft. However, it was the Commission's responsibility to reach a decision on those two points. At least five speakers had questioned the wording of the articles under consideration. To refer those articles to the Drafting Committee would mean that the Commission approved them, which was not the case. As Sir Ian had pointed out, it was the philosophy of the draft which had changed, now that the foundations of the draft prepared on the basis of the reports of the previous Special Rapporteur were no longer the same. The Drafting Committee comprised only a small number of members of the Commission, and the Commission could not shift its responsibilities on to the Committee. While he was not really opposed to referring draft articles 1 to 9 to the Drafting Committee, he wished to make it clear that he disapproved of such a step, since it was important first to redefine the basis of the draft. It was not possible either simply to eliminate concepts which had been discussed at length and approved by the Commission, or to disregard the numerous observations made by members of the Commission regarding the wording of the draft articles.

20. Mr. McCAFFREY said that, as it was usually impossible to achieve unanimity, the Commission had to rely on consensus for the purpose of referring articles to the Drafting Committee. It thus had to defer to the judgment of the Special Rapporteur as to whether an article was ripe for referral. He did not object to draft articles 1 to 9 being referred to the Drafting Committee, on the understanding that draft article 7 was included. He shared the concern of Mr. Barboza regarding that article.

21. Mr. STAVROPOULOS urged that articles 1 to 9 should be referred to the Drafting Committee, so that the Commission itself could embark on a discussion of the subsequent articles. The points raised by Mr. Barboza would be taken into account by the Drafting Committee.

22. Mr. BALANDA said that the Commission was still uncertain as to what its methods of work should be. It

<sup>6</sup> See 1854th meeting, footnote 4.

must determine, first, the extent to which it was bound by the discussions which had taken place prior to the enlargement of its membership, and, secondly, the degree of maturity which a draft article should reach before being referred to the Drafting Committee, after consideration by the Commission. Could a special rapporteur modify, on the basis of the discussion in the Commission, texts which had already been approved? Should unanimity, or simply consensus, within the Commission be required before draft articles could be referred to the Drafting Committee? Since those fundamental questions threatened to impede the future work of the Commission, they should be taken up by the Enlarged Bureau or the Planning Committee.

23. In the case before the Commission, draft articles 1 to 9 as proposed in the second report of the Special Rapporteur (A/CN.4/381) were a faithful reflection of the discussions in the Commission and in the Sixth Committee of the General Assembly and, now that the Commission had considered them, it should follow its normal practice by referring them to the Drafting Committee. In any event, they would subsequently be referred back to the Commission.

24. Chief AKINJIDE also urged that draft articles 1 to 9 should be referred to the Drafting Committee—in whose work all members could now participate. Eight years had elapsed since the Commission had begun work on the topic, and it was essential to make some progress on it.

25. Mr. BARBOZA said that he would not oppose the referral of draft articles 1 to 9 to the Drafting Committee if such was the general wish of the Commission, particularly since he had himself proposed as much (1855th meeting). However, as the Drafting Committee was behind schedule and overloaded with work, it would probably not be able to consider those articles at the present session, and the decision to refer them could consequently be postponed until 1985. The Commission might also contemplate setting up a small *ad hoc* working group to reconcile differing points of view and improve the drafting of the articles. Such a group might be able to accomplish in a short time what would take much longer in the Drafting Committee.

26. Mr. REUTER said that he did not remember the Commission ever having refused to refer draft articles to the Drafting Committee at the suggestion of a special rapporteur. Such a referral could mean a number of things. In the case in question, the Commission would be temporarily abdicating its responsibility, not only because differences of view had emerged, but also because it had been unable to agree on a number of fundamental issues. It was important for members of the Commission to take the time to reflect on those issues before reaching a decision. He would not object to the referral of draft articles 1 to 9 to the Drafting Committee, on the understanding that the Commission must take decisions on a number of pending questions.

27. Mr. QUENTIN-BAXTER said that he would be a little reluctant to see the Drafting Committee saddled at the Commission's next session with consideration of matters that had been considered very inconclusively at

the current session. It might be that the nature of the Commission's work was changing radically with the Drafting Committee becoming a committee of the whole, since it had not proved possible to separate matters that should properly be considered in the Commission from those that should be considered in the Drafting Committee. If so, it was a rather serious matter. There were also about five questions of principle to which no answers had yet been found. In the circumstances, he would have no objection to referring the draft articles to the Drafting Committee, but if it were possible to respect the Commission's own procedures, possibly in the manner that Mr. Barboza had suggested, it would be better for the Commission and its work in the long run.

28. Mr. KOROMA agreed that referral of the draft articles to the Drafting Committee did not necessarily imply that they had been approved by the Commission, but simply meant that a more intensive discussion would ensue in the Drafting Committee. It would be quite unprecedented to reject a proposal by a special rapporteur that draft articles which had been considered in the Commission should be referred to the Drafting Committee. He therefore urged that the draft articles should be referred to the Drafting Committee.

29. The CHAIRMAN, speaking as a member of the Commission, said it would be premature at the present stage to decide whether or not to appoint a special group to consider draft articles 1 to 9. Such a possibility might, however, be envisaged at the beginning of the next session. He therefore suggested that the draft articles be referred to the Drafting Committee for consideration in the light of the discussion.

30. Mr. DÍAZ GONZÁLEZ recalled that it had been suggested that an *ad hoc* working group should be set up. Moreover, if a new special rapporteur were to be appointed, he might adopt a totally different approach to the draft articles.

31. Mr. FRANCIS said that, in his view, draft articles 1 to 9 should be referred to the Drafting Committee.

32. The CHAIRMAN suggested that draft articles 1 to 9—including draft article 7—be referred to the Drafting Committee for consideration in the light of the views expressed during the debate.

*It was so agreed.*

**State responsibility (continued)\* (A/CN.4/366 and Add.1,<sup>7</sup> A/CN.4/380, <sup>8</sup> A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf.Room Doc.5)**

[Agenda item 2]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)<sup>9</sup> (continued)***

\* Resumed from the 1858th meeting.

<sup>7</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>8</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>9</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 to 16<sup>10</sup> (*continued*)

33. Mr. REUTER said that, if he had correctly understood the reply given by the Special Rapporteur to one of the questions he had asked at the 1858th meeting, a reservation would be included, at the end of the draft, concerning all matters relating to the law of treaties. The Special Rapporteur had said that that would be a way of returning the compliment of the authors of the Vienna Convention on the Law of Treaties, which contained a reservation concerning all matters relating to responsibility. The Special Rapporteur had also stated that any matter concerning what was sometimes termed *exceptio non adimpleti contractus*—namely the right of a party to a treaty to suspend performance of its obligation in response to non-performance of an obligation by the other party—derived from the law of treaties and not from the law of responsibility. Accordingly, the Special Rapporteur felt no obligation to give special consideration to *exceptio non adimpleti contractus*, which was, moreover, widely referred to in his reports. While he himself had no objection to that approach, he wondered whether the exchange of courtesies between the authors of two sets of articles was a sound technique. It might perhaps be better to include the text of article 60 of the Vienna Convention itself in the draft, rather than refer to the law of treaties, since article 60 had, so to speak, set a limit to authorized reactions. Any violation of a treaty threatened the survival of that treaty, just as any violation of a custom threatened the survival of that custom. The idea in the Vienna Convention had been to safeguard treaty machinery as far as possible by virtue of the principles which had prompted the inclusion in that instrument of the concept of suspension, which, until then, had occupied only a minor place in international law and which the authors of the Vienna Convention had thus considerably developed. Only very serious violations jeopardized treaty machinery. In all other cases, the treaty machinery must continue to operate. Consequently, the Vienna Convention set a very definite limit.

34. From the standpoint of codification technique, the Commission faced a general problem. When it considered in succession two topics which, although separate, overlapped, it had to decide whether it should deal with the problem by making a simple reservation, as had been done in the Vienna Convention, or whether it should go a little further. The authors of the Vienna Convention had been right to express a reservation. However, in the case in question, it would be preferable to adopt another approach and to include the text of article 60 itself in order to be sure that, regardless of the form which the draft articles under consideration ultimately took, that rule would be included, since it set a limit to authorized reactions.

<sup>10</sup> For the texts, see 1858th meeting, para. 1. For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp.42-43.

35. He also wondered whether the definitions given in draft article 5, which was of paramount importance, were completely independent of an assessment of the advantage of instituting legal proceedings, or whether there was some link between the substantive provisions of the draft article and the assessment by the ICJ of the advantage of instituting proceedings. It was quite clear that, if draft article 5 affected the advantage of instituting proceedings, the data which currently governed international justice would be profoundly transformed, particularly the voluntary nature of acceptance of the jurisdiction of the ICJ.

36. Sir Ian SINCLAIR wondered whether a phrase should not be included in draft article 11 to the effect that it was without prejudice to article 60 of the Vienna Convention on the Law of Treaties.

37. Also, he would like to know whether the Special Rapporteur conceived of draft article 7 as being *lex specialis* in relation to internationally wrongful acts constituting a breach of an international obligation concerning the treatment accorded by a State to aliens. He wondered whether there was not some inconsistency between paragraph 1 (b) of draft article 6 and draft article 22 of part 1 of the draft.

38. With regard to the last clause of paragraph 2 of draft article 6, and also of draft article 7, he noted that the Special Rapporteur, in his fifth report (A/CN.4/380, para. 3), had raised the question of the utility of dealing with subtopics such as the quantum of damages. The clause in question, however, in fact appeared to refer to the quantum of damages, and in somewhat rigid terms. Possibly some more flexible wording could be found, such as “corresponding to the injury suffered”. The clause also seemed to exclude exemplary damages.

39. Mr. RIPHAGEN (Special Rapporteur), replying to Mr. Reuter’s question regarding draft article 16 (a), said he agreed entirely that every violation of a treaty threatened the very existence of that treaty. That was why the Vienna Convention on the Law of Treaties limited rather strictly the possibilities of considering a treaty as no longer in operation. The rule was that there had to be a material breach and it was stated in terms that implied a renunciation, in that the object and purpose of the treaty had to be destroyed. The authors of the Vienna Convention on the Law of Treaties had thus been concerned to ensure that the treaty remained in force so far as possible. Article 60 of the Vienna Convention was indeed relevant to the topic under consideration, but from a different angle. The Commission was concerned, not with the life of the treaty as such, but with the actions of a State which might be contrary to a treaty and which had been taken because that treaty had in fact been violated; hence questions of reciprocity and reprisal were involved. It was one thing for a party to a treaty to declare that, because of a material breach by the other party, it no longer regarded the treaty as valid, and another thing for the first party to violate the treaty itself. Although, in practice, the two often went together, from the abstract legal point of view, two different questions were involved. That was why he thought

it possible, in paragraph (a) of draft article 16, to return the compliment.

40. Furthermore, under the Vienna Convention on the Law of Treaties, all matters pertaining to the invalidity, termination and suspension of the operation of treaties were referred to a dispute-settlement procedure, and that was a matter which would have to be taken up in part 3 of the draft. The approach of article 60 of the Vienna Convention to limitations on the possibility of suspending the operation of treaties was also relevant to the cases with which the Commission was concerned, namely simple violations of obligations. The treaty under which an obligation was violated was often a multilateral treaty, and draft article 11, paragraph 1, which was very much inspired by article 60 of the Vienna Convention, dealt with the matter from the point of view of reciprocity or reprisal.

41. Referring to Sir Ian Sinclair's suggestion that the phrase "without prejudice to article 60 of the Vienna Convention on the Law of Treaties" be included in draft article 11, he said that he still felt it was possible to separate the two topics of treaties and State responsibility by a clause of the kind embodied in draft article 16 (a). However, if the Vienna Convention was not excluded under the terms of draft article 16 (a), the phrase suggested by Sir Ian would of course have to be included.

42. The questions posed by Mr. Reuter and Sir Ian Sinclair again raised the general point of the close interrelationship between primary and secondary norms of international law. In many cases, including the topic under consideration, it simply was not possible to maintain a clear distinction between the two. But once the question of the validity of a treaty was separated from the question of its performance, there remained a certain connection between the two elements which he had endeavoured to bring out in the draft.

43. Mr. Reuter had raised an important point concerning draft article 5 and the question whether and when there was an advantage in instituting proceedings. The simple answer was that the question would have to be dealt with in part 3 of the draft in the context of dispute settlement. In the past, the attitude of international courts as to whether there was an advantage in instituting proceedings had perhaps been somewhat influenced by the all-pervading idea of bilateralism in international relations. An element of progressive development of international law had emerged inasmuch as the Commission, and also the ICJ, had considered that certain violations of international obligations were violations *erga omnes*, whatever might be the precise meaning of that term. Accordingly, in the light of the Commission's discussion of article 19 of part 1 of the draft and of the decision of the ICJ in the *Barcelona Traction, Light and Power Company, Limited* case,<sup>11</sup> he had felt it necessary to include draft article 5 (b), although the action which an injured party could take in such a case would have to be dealt with in other parts of the draft.

44. Replying to questions raised by Sir Ian Sinclair, he said that he did indeed regard the provision embodied in draft article 7 as *lex specialis*, as was apparent from the reference to that article in paragraph 1 (c) of draft article 6. With regard to the relationship between draft article 6, paragraph 1 (b), and draft article 22 of part 1 of the draft, he said he had taken account of the view of some members that, where the remedies had not been exhausted, there could be no internationally wrongful act. That was why reference was no longer made to draft article 22. None the less, the question remained, in the sense that, apart from the rule of exhaustion of local remedies, there was a possible obligation of *restitutio in integrum stricto sensu* in regard to the rules relating to treatment of aliens. It was quite clear in his mind that, if it was possible for a State that had allegedly committed an internationally wrongful act in connection with the position of aliens to restore a person's rights, without any difficulty under its own internal law, it should do so. Impossibility, in that context, was not, of course, material impossibility, since theoretically a State could do anything it wished. There nevertheless remained a twilight zone, since many writers considered that it was not possible for a State, for instance, to repeal national legislation with retroactive effect although, theoretically, from the point of view of international law, it was always within the sovereign power of the State to do so. In a number of more recent arbitral proceedings dealing with the question of *restitutio in integrum* in cases of nationalization, however, quite different conclusions had been reached. His intention, therefore, was that draft article 7 should constitute *lex specialis*, and that draft article 6, paragraph 1 (b), and draft article 22 should have two entirely different objectives.

45. With regard to Sir Ian Sinclair's question regarding the last clause of paragraph 2 of draft article 6 and also of draft article 7, it was quite correct that he had stated in his report (A/CN.4/380, para. 3) that the draft did not deal with the quantum of damages, although that question could, of course, always be considered by the Commission. In his view, however, it was important at least to indicate what a State which committed an internationally wrongful act must do if, for material reasons, it was unable to restore the situation. Sir Ian had also pointed out that the same clause excluded exemplary damages. In that connection, he had already stated in an earlier report that, under modern international law, the idea of punishment of a State, if at all applicable, was reserved for very grave offences. The fate of post-war peace treaties was all too well known. In his view, therefore, it was not possible, in the present state of international law, to go further than the clause in question.

46. Lastly, since the possible inclusion of the text of article 60 of the Vienna Convention on the Law of Treaties would depend on the content of part 3 of the draft, he would suggest that a decision in that regard should be postponed until part 3 was taken up.

*The meeting rose at 1 p.m.*

<sup>11</sup> Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.