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Summary record of the 2039th meeting

Topic:
Other topics

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55. The CHAIRMAN suggested that it would be better to use the word "defence".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

56. Mr. THIAM (Special Rapporteur) said that the words "does not refer to the criminal responsibility of the State", in the first sentence, should be replaced by "refers to the criminal responsibility of the individual".

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

The commentary to article 3, as amended, was approved.

Commentary to article 5 (Non-applicability of statutory limitations)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

Paragraph (2) was approved with a drafting change.

Paragraph (3)

57. Mr. RAZAFINDRALAMBO proposed that the words "concern themselves with statutory limitation", in the first sentence, should be replaced by "concern themselves with the rule of statutory limitation".

It was so agreed.

58. Mr. BARSEGOV said that the second sentence should refer to "recognition of the rule", and not "introduction of the rule", which conveyed the impression that the rule of the non-applicability of statutory limitations had emerged from nowhere, which had not been the case. It had always existed, even though it had not been properly recognized.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) and (5)

59. Mr. TOMUSCHAT said that paragraph (4) was of little value, for article 5 applied to all crimes against the peace and security of mankind, without distinction. Why then draw a distinction between war crimes and crimes against humanity?

60. Mr. THIAM (Special Rapporteur) said that paragraph (4) was purely explanatory and could be deleted, but the Commission would later revert to the rule of the non-applicability of statutory limitations. It was not entirely obvious that the rule applied to all crimes against the peace and security of mankind, particularly war crimes.

61. Mr. PAWLAK said that the question had been discussed in the Commission and should be reflected in the report.

62. Mr. TOMUSCHAT said that he, among others, had reservations about the rule set out in article 5 and would point out that it might well have to be reviewed in the light of the list of crimes. Paragraph (4) ought therefore to come after paragraph (5) and begin with the sentence: "In particular, as far as war crimes are concerned, there may be a need to recognize statutory limitations." In its present form, paragraph (4) was not readily understandable.

63. Prince AJIBOLA said that paragraph (4) could be retained, whether or not it was combined with paragraph (5).

64. Mr. THIAM (Special Rapporteur) said that he had no objection to the idea of reversing the order of paragraphs (4) and (5), or even combining them.

65. The CHAIRMAN suggested that the Special Rapporteur should make arrangements with the secretariat for the presentation of paragraphs (4) and (5).

It was so agreed.

Paragraphs (4) and (5) were approved on that understanding.

The commentary to article 5, as amended, was approved.

The meeting rose at 1.05 p.m.

2039th MEETING

Thursday, 16 July 1987, at 3 p.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Al-Khasawneh, 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. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its thirty-ninth session (*continued*)

CHAPTER II. ***Draft Code of Offences against the Peace and Security of Mankind*** (continued) (A/CN.4/L.414 and Add.1)

C. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind (*concluded*) (A/CN.4/L.414/Add.1)

Article 6 (Judicial guarantees)

1. Mr. MAHIOU, referring to the French text, said he noted that, although article 6 had been amended by the Commission, it now appeared in its original version.

Paragraphs 1 and 2 should be inverted, and paragraph 3 incorporated in the new paragraph 2.

2. Mr. THIAM (Special Rapporteur) confirmed that the French text of article 6, as it appeared in document A/CN.4/L.414/Add.1, should be replaced by the revised text adopted by the Commission (see 2032nd meeting, para. 39, and 2033rd meeting, para. 26).

3. The CHAIRMAN suggested that the phrase "In the determination of any charge against him", in paragraph 2 (*a*), should be transferred to the introductory clause of paragraph 2, which would then read: "2. He shall have the right, in the determination of any charge against him:". The guarantees listed in the subsequent subparagraphs were all related to the situation covered by that phrase.

4. Mr. EIRIKSSON said that the Chairman's suggestion would give rise to difficulties of translation because the words "in the determination of any charge against him", which had been taken from article 14 of the International Covenant on Civil and Political Rights, had not been translated into French word for word. As the Commission had decided not to depart from the Covenant, it would be better to leave those words in paragraph 2 (*a*).

5. Mr. MAHIOU said that, while the Chairman's remark was justified, it would suffice to delete the sequential letters in paragraph 2 and, in the English text, to add the words "in particular" after "He shall have the right". It was, however, only a question of format and he would not press the point.

6. Mr. CALERO RODRIGUES said that, in his view, it was not the time to be making changes in article 6.

7. The CHAIRMAN said he would take it that the Commission agreed to retain article 6 as adopted at its 2033rd meeting (para. 26).

It was so agreed.

Commentary to article 6 (Judicial guarantees)

Paragraph (1)

8. Mr. PAWLAK, referring to the third sentence, said that it would be preferable to refer to "multilateral" rather than "plurilateral" instruments.

9. Mr. MAHIOU said that the word "plurilateral" could be explained by the list that followed. The Charter of the Nürnberg Tribunal and the Charter of the Tokyo Tribunal were neither universal nor regional instruments signed by States from different regions. He suggested, however, that the phrase "universal, regional and plurilateral instruments" should be replaced by "international instruments", which encompassed the idea of "universal, regional and plurilateral".

It was so agreed.

10. Mr. ROUCOUNAS proposed that the European Convention on Human Rights and the American Convention on Human Rights should be added to the human rights conventions mentioned in paragraph (1).

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

11. Mr. BENNOUNA, referring to the French text, proposed that the word *universaliste*, in the first sentence, should be replaced by *universelle*. In addition, to make the sentence less cumbersome, the phrase "a multilateral instrument adopted under the auspices of the United Nations, namely" should be deleted in all languages.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

12. Ms. DAUCHY (Deputy Secretary to the Commission), referring to the French text, said that the following sentence was missing from paragraph (3): *S'agissant de l'expression "tant en ce qui concerne le droit qu'en ce qui concerne les faits", contenue également dans le chapeau, elle doit être interprétée comme se référant au "droit applicable" et à "l'établissement des faits".*

13. Mr. OGISO said that article 14 of the International Covenant on Civil and Political Rights differed from article 6 with respect to the meaning of the expression "minimum guarantees", since the list of guarantees in article 6, unlike that set forth in the Covenant, was not exhaustive. An explanation should be given as to why the Commission had consciously departed from the Covenant, and he therefore proposed that the following text should be added at the end of the first sentence: "although the list in article 14 of the Covenant is exhaustive". The purpose was to make it clear that the Commission had deliberately changed the meaning given to the expression "minimum guarantees".

14. Mr. TOMUSCHAT said that he was not convinced of the merits of a restrictive interpretation of the Covenant. It would be more prudent for the Commission to refrain from interpreting that instrument.

15. Mr. BENNOUNA said that the reference to "minimum guarantees" in the introductory clause did not mean that article 6 covered all guarantees; indeed, because of the words "In particular", it did not even cover all minimum guarantees. Paragraph (3) of the commentary was not sufficiently clear on that point.

16. Mr. GRAEFRATH said he was fairly certain that the enumeration of guarantees in article 14 of the Covenant was not exhaustive.

17. Mr. THIAM (Special Rapporteur) said that, in his view, the French text of paragraph 3 of article 14 of the Covenant was clear, since it stated that: *Toute personne . . . a droit . . . au moins aux garanties suivantes.* Hence the list of guarantees in the Covenant was not exhaustive.

18. Mr. OGISO said that he would not insist on his proposal in view of the differences of opinion on the matter. However, it seemed to him from the phrase "the following minimum guarantees", in paragraph 3 of article 14 of the Covenant, that the list of guarantees was exhaustive.

19. Mr. BEESLEY said that the first part of the first sentence of paragraph (3) of the commentary was clear, but the words "but contains the essential guarantees" could be misread and seemed to be a contradiction. While he agreed with the sense as intended by the Special Rapporteur, he wondered whether those words were necessary and therefore suggested that they should be deleted.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

20. Mr. BENNOUNA, referring to the last sentence, said that the question of an international criminal court had been discussed at length, and he himself had suggested that, in addition to that solution, the possibility of regional or specialized courts to try certain crimes provided for under specific treaties could be envisaged. He therefore suggested that the last sentence should be replaced by the following: "And the draft code reserves this possibility."

21. Mr. BARSEGOV said that, in approving the expression "established by law or by treaty", in article 6, paragraph 2 (*a*), the Commission had had in mind agreements concluded between States which had the right to pass judgment on a crime committed in their territory. He was afraid that the Commission had departed from that position. In his view, the last sentence of paragraph (4) of the commentary should be so worded as to make it clear that the question of the establishment of an international criminal court had not yet been finally settled, and that it had not been prejudged one way or the other. The lack of precision in the last sentence was regrettable for it could give rise to all kinds of interpretations: in the Russian text, it was wrongly stated that the establishment of an international criminal court was envisaged in the draft code.

22. Mr. OGISO said that a number of members, including himself (1997th meeting), had spoken on the question of the establishment of an international criminal court and therefore it would not be correct to state that the question had never been discussed. In his view, the last sentence was a correct interpretation of the discussion.

23. Mr. THIAM (Special Rapporteur) agreed that, as now worded, the last part of the paragraph could suggest that the Commission envisaged in the draft the establishment of an international criminal court. He therefore suggested that it should be replaced by the following wording: "If an international criminal court was to be established, it could only be established by treaty." That would explain the inclusion of the word "treaty" in the article itself.

24. Mr. BARSEGOV said that he could not agree with Mr. Ogiso and the Special Rapporteur. Many views had been expressed on the issue, and the Commission had arrived at the conclusion that the question should not be decided or prejudged in any way. If the Commission wished to reflect the different views in its report, it should not disregard any of them. The Commission was, however, currently engaged in the consideration of something very speciic, namely the commentary to article 6, and the expression "established by law or by treaty" called for a very specific commentary. The words "by treaty" had always been understood to mean an agreement concluded between States on whose territory a crime had been committed, and they certainly did not refer to the establishment of an international criminal court. In his view, the rules of the game called for a gentlemen's agreement. An agreement had been reached and it was necessary to abide by it. If the Commission subsequently decided that an international criminal court should be established, matters would be different, but that was not the case for the time being. As now worded, paragraph (4) seemed to link the establishment of an international criminal court to the words "or by treaty", which, at present, did not allow for that possibility. Some wording should be found to show that, for the moment, there was no question of establishing such a body.

25. Mr. ARANGIO-RUIZ said that an international criminal court, which some members regarded as an essential and others as a non-essential yet important condition for the implementation of the code, was one thing; the right of two or more States to come to an agreement, within the context of a universal system of jurisdiction, and exercise jointly the powers they were authorized to exercise individually was another. He did not wish to amend article 6, but if the commentary allowed any doubt to subsist in that connection, in other words if it meant that a court composed of only two, three, four or five States would be classified as international—in the sense of an international criminal court—he would have to enter a reservation.

26. Mr. THIAM (Special Rapporteur) pointed out that the Commission had adopted as the basis for its work the International Covenant on Civil and Political Rights, which referred only to a court "established by law" (art. 14, para. 1). As the Commission had modified that expression by adding the words "or by treaty", an explanation had had to be given. During the discussion, however, Mr. Reuter (1993rd meeting) had drawn attention to the distinction to be made between "the" international criminal court and a tribunal common to a few States. Paragraph (4) of the commentary did not refer expressly to the case of a common tribunal but he (the Special Rapporteur) had deliberately used the indefinite article. The body in question could thus be a regional tribunal or a court of universal jurisdiction. To meet Mr. Barsegov's point, he would suggest the following wording: "If an international criminal court or a court common to several States was to be established, it could only be established by treaty." That would cover all possibilities.

27. Mr. MAHIOU said that the question of an international criminal court was an important one, which remained open. Renewed substantive discussion on the matter should be avoided. In the light of the Special Rapporteur's further suggestion, which he was prepared to accept, he would refrain from making any proposals himself.

28. Mr. FRANCIS suggested, in the light of the Special Rapporteur's proposal, that the last sentence of

paragraph (4) should be replaced by the following: "And the Commission leaves open the question of the establishment of such a body."

29. Mr. BENNOUNA said that two things should be explained in the commentary: first, why the Commission had added the words "or by treaty"; and secondly, why it had left aside the question of an international criminal court. He therefore suggested that the following sentence should be added after the first sentence of paragraph (4): "The object is to cover at one and the same time the internal law of a given State which establishes its own tribunal, and a treaty concluded between two or more States establishing a tribunal having jurisdiction over those States." A reference should then be made to the article which dealt with criminal jurisdiction, and it should be indicated that the sentence was to be understood as being without prejudice to the provisions of the relevant article, as would be explained in the commentary.

30. Mr. THIAM (Special Rapporteur) said that he maintained his proposal, but to respond to Mr. Bennouna's concern would suggest that the following words should be added: "But this question has not yet been decided by the Commission."

31. Mr. BARSEGOV said he considered that Mr. Bennouna's proposal reflected the situation more accurately, since it noted that several States could establish a court if they wished.

32. Mr. PAWLAK said that he agreed with the Special Rapporteur's proposals but would prefer a clear statement that an international criminal court could be established only by treaty.

33. Mr. GRAEFRATH said that, while he could accept the Special Rapporteur's proposal, he considered that the additional sentence suggested by the Special Rapporteur was unnecessary as the Commission could not settle the question: it was for States to do so.

34. Mr. ARANGIO-RUIZ said that his comment could be regarded either as a suggestion addressed to the Special Rapporteur or as a reservation. Three situations could be envisaged: the establishment of an international criminal court; the exercise by every State of universal jurisdiction; and the possibility of the joint exercise by two or more States of their universal jurisdiction. Accordingly, while it was certainly not his wish to amend article 6 or the commentary, he would merely draw a very sharp distinction between the first possibility, which involved an international criminal court in the strict sense of the term, and the third, which did not concern the same type of body.

35. Mr. BEESLEY said that the Commission was discussing two interrelated questions: the possible establishment of an international tribunal and the acceptance of universal jurisdiction exercised by a recognized entity having competence. He cautioned the Commission against the danger of confusing the two. There were a number of ways of reaching agreement on a tribunal and accepting its jurisdiction, and the Commission, in referring to a "treaty", was perhaps ignoring the other possibilities. He had in mind, for example, a situation in which an existing institution would acquire jurisdiction in criminal matters with, where necessary, unilateral declarations of acceptance of such jurisdiction by States, and the use of national tribunals to which various judges would be added.

36. Mr. BENNOUNA said that he was prepared to accept the Special Rapporteur's proposals but did not understand which "question" was referred to in his last sentence. In any event it was not for the Commission to take a decision on the question of tribunals that were common to two or more States. To avoid any ambiguity, therefore, that last sentence should be replaced by the following wording: "This is without prejudice to the question of the establishment of an international criminal court under the present code, which has not yet been decided."

37. Mr. TOMUSCHAT, speaking on a point of order, proposed that the Special Rapporteur's first proposal (para. 26 above) should be adopted and that his second proposal should be dropped in the light of the comment made by Mr. Graefrath.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

38. Ms. DAUCHY (Deputy Secretary to the Commission), referring to the French text, said that the following phrase should be added at the end of paragraph (5): *vu l'extrême gravité des crimes visés dans le projet de code et la gravité probable de la sanction.*

Paragraph (5) was approved.

Paragraphs (6) to (8)

39. Ms. DAUCHY (Deputy Secretary to the Commission) said that there were a number of errors in the references made in the French text: the Secretariat would circulate a revised version.

Paragraphs (6) to (8) were approved.

The commentary to article 6, as amended, was approved.

Commentary to article 1 (Definition) (*concluded*)

Paragraph (5) (*concluded*)

40. The CHAIRMAN recalled that the Commission had decided to revert to paragraph (5) of the commentary to article 1 when the text proposed by Mr. Bennouna to replace the last sentence (see 2038th meeting, para. 18) had been submitted in writing. That proposed text read:

> "It was also pointed out that the inclusion of the expression raised the question whether crimes against the peace and security of mankind were governed by rules of general international law, even outside the draft code. Some members also wondered whether such rules did not have a *jus cogens* character. Finally, it was maintained that the inclusion of this expression was premature and that it was necessary, before deciding the matter, to wait until the list of crimes in question was known in detail."

Mr. Bennouna's amendment was adopted.

Paragraph (5), as amended, was approved.

The commentary to article 1, as amended, was approved.

Section C, as amended, was adopted.

CHAPTER III. ***The law of the non-navigational uses of international watercourses*** (continued)* (A/CN.4/L.415 and Add.1-3)

C. Draft articles on the law of the non-navigational uses of international watercourses (A/CN.4/L.415/Add.2 and 3)

TEXTS OF DRAFT ARTICLES 2 TO 7, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-NINTH SESSION

ARTICLE 1 [Use of terms]

41. The CHAIRMAN recalled that the Commission had decided to leave aside for the time being the question of article 1 (Use of terms) (see 2028th meeting, para. 16), as explained in the footnote to the title of that article.

42. Prince AJIBOLA said that the Commission had properly explained why the word "system(s)" had been placed between square brackets. Hence there was no reason, wherever the word "watercourse" appeared, for not considering that it implicitly meant "watercourse system". A reference to that effect in article 1 would preclude the need to refer to "system(s)" between square brackets in the commentaries to the various articles.

43. The CHAIRMAN said that that was a sensitive issue with a long history, and he doubted whether it could be settled easily. In his view, it would be preferable at the present stage to leave the texts of the commentaries as they were.

Commentary to article 2 (Scope of the present articles)

Paragraph (1)

44. Mr. CALERO RODRIGUES said that paragraph 1 of article 2 seemed to draw a distinction between "uses" and "measures of conservation related to the uses". Consequently, there seemed to be a slight contradiction between the article and the explanation given in paragraph (1) of the commentary, according to which the word "uses" should be interpreted in its broad sense to cover the protection and development of the watercourse.

45. The CHAIRMAN, speaking as Special Rapporteur, said that article 2 dealt with the scope of the draft articles and that, since article 6 dealt, *inter alia*, with protection and development, it should be made clear that measures of that kind were not excluded from the scope of the draft. The question to be determined was the circumstances in which such measures fell within the framework of the draft. Strictly speaking, as was clear from the commentary to article 1 on the scope of the draft provisionally adopted by the Commission in 1980,[1] the term "conservation" did not cover the idea of development: hence the need to speak of protection and development in the commentary. Moreover, it was more logical to say that the uses could take various forms, including measures for the protection of the watercourse and works and measures to develop the watercourse.

46. Mr. BEESLEY said that, while he understood the Special Rapporteur's purpose, he shared Mr. Calero Rodrigues's hesitation at the idea of giving certain terms a meaning that would depart from the meaning attributed to them under various international instruments and in State practice based on those instruments. He also had serious reservations regarding paragraph (1). If the commentary was supposed to reflect the Special Rapporteur's view, he could accept it; if, however, it was the Commission's commentary, he could not. He suggested, as a solution, that the words "as well as the protection and development thereof", at the end of the second sentence, should be deleted.

47. Mr. CALERO RODRIGUES said he still believed that it was difficult to apply the word "uses" to the protection and development of a watercourse, as stated in the commentary, when paragraph 1 of article 2 made reference to "measures of conservation" as distinct from "uses". Actually, he was more inclined to favour the text of the commentary, and feared that the Commission had made a mistake in adopting the article. It would probably have been better if paragraph 1 of the article had read: "The present articles apply to uses . . . including measures of conservation"; the commentary would then be correct. In the circumstances, however, the best thing would be to delete from paragraph (1) of the commentary the phrase "as well as the protection and development thereof". If the Commission wished to retain that wording, however, he would not insist.

48. The CHAIRMAN, speaking as Special Rapporteur, said that he recognized the problem and could agree to the deletion of the last phrase of paragraph (1).

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

49. Mr. CALERO RODRIGUES, supported by Mr. BEESLEY, proposed that the last sentence should be amended to read: "Finally, the present articles would apply to uses not only of waters . . . but also of those . . ."

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

50. Mr. BEESLEY said that he had already drawn attention to the legal concept of "conservation", which was always interpreted as including the conservation of living resources. He wondered why that example did not appear among those given in paragraph (4).

51. The CHAIRMAN, speaking as Special Rapporteur, said the explanation was that that part of the commentary was taken virtually word for word from the commentary to article 1 provisionally adopted by the Commission in 1980. He suggested that the second

* Resumed from the 2035th meeting.

[1] *Yearbook . . . 1980*, vol. II (Part Two), p. 111, para. (11) of the commentary.

part of the first sentence should be amended to read: ". . . but also those aimed at solving other watercourse problems, such as those relating to living resources, flood control . . .".

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

The commentary to article 2, as amended, was approved.

Commentary to article 3 (Watercourse States)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

The commentary to article 3 was approved.

Commentary to article 4 ([Watercourse] [System] agreements)

52. Mr. EIRIKSSON said he thought that the number of examples and cases cited was excessive and more suggestive of a report by a Special Rapporteur than a commentary approved by the Commission.

53. The CHAIRMAN, speaking as Special Rapporteur, said that, under the terms of its statute, the Commission was required to submit articles to the General Assembly together with commentaries containing adequate presentation of precedents and other relevant data. It was therefore not unusual for the commentary to an article to include an indication of authorities that supported the article. That was true, for example, of the commentaries to the draft articles on jurisdictional immunities of States and their property and to the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, submitted to the General Assembly in 1986.

54. Mr. BEESLEY urged Mr. Eiriksson not to press his point, since many members of the Commission valued the commentaries as sources of international law. It was better to provide the relevant information regarding a particular notion of international law than simply to summarize the Commission's debate.

55. Mr. BARBOZA, endorsing Mr. Beesley's remarks, said that the information contained in the commentaries was extremely valuable for those who interpreted treaties and also for lawyers. In addition, the more the Commission cited State practice, judicial decisions, arbitral awards and declarations by specialized international associations in support of an article, the greater the justification for its decision to adopt the article.

56. Mr. EIRIKSSON said that he fully agreed with the two previous speakers. However, precisely because the commentaries should be a source of international law or provide justification for the articles adopted, the Commission should be able to determine their relevance. When such lengthy commentaries were received the day before they were to be considered, it was difficult to say whether they met that criterion. As to the Commission's statute, he wondered whether article 4 of the draft should be understood as codifying international law.

57. The CHAIRMAN said that traditionally the Commission did not specify whether any particular article codified or progressively developed international law. It had tended to adopt a combined approach to all its work, which was why he saw no need to characterize article 4 as an example of codification or of progressive development.

58. Mr. CALERO RODRIGUES said that, while he agreed with Mr. Beesley, Mr. Barboza and the Chairman, he also shared Mr. Eiriksson's views to some extent. Admittedly, the Commission should include in its commentaries material that could strengthen the interpretation of the articles it adopted. But he would have the same problem as Mr. Eiriksson unless it were possible to check that the references to all the precedents, agreements and decisions cited were warranted. As he had at times questioned some of the elements invoked by the Special Rapporteur to justify certain positions, he wished to enter the same general reservation to that type of commentary as did Mr. Eiriksson.

59. The CHAIRMAN said he took it that Mr. Calero Rodrigues's comments were essentially concerned with the Commission's methods of work. Unfortunately, it had been impossible to refer the commentaries to the Commission earlier because of the late date on which the articles had been adopted. The immediate question was whether some parts of the commentary should be deleted. Much of the material cited was taken from the commentaries to the articles adopted in 1980, which were very similar, except for paragraph 3 of the new article 4 and the commentary thereto. Nothing new, therefore, had been cited. The commentaries could perhaps be examined on second reading and the material to be included in them determined then. The fact that the Commission was only at first-reading stage should be of some consolation to those who had reservations.

60. Mr. EIRIKSSON stressed that the clause in the statute to which the Chairman had referred related only to codification, which was the reason for his earlier question. In certain cases—but less so in the case of the commentary to article 4 than in that of the commentary to article 6—some of the material could be incorporated in footnotes.

61. The CHAIRMAN, speaking as Special Rapporteur, said that Mr. Eiriksson's suggestion would indeed be the best solution. He would, however, point out that article 16 (*g*) of the Commission's statute, relating to the progressive development of international law, provided that articles should be accompanied by such explanations and supporting material as the Commission considered appropriate.

62. Mr. BENNOUNA said that he shared Mr. Calero Rodrigues's views and, like him, considered that some parts of the commentary were not altogether what a commentary ought to be. A special rapporteur's report, which explained an issue for the purpose of presenting an article and was situated upstream, so to speak, should be distinguished from a commentary, which was

situated downstream and was intended to facilitate an understanding of the article or amplify it or remove certain ambiguities. The commentary had a specific function to fulfil and should be based on the discussion on the article rather than on theory, doctrine or practice in the matter.

63. Mr. CALERO RODRIGUES said that the problem was actually one of method, relating more particularly to the dates selected for the adoption of decisions, and the Commission should attend to the matter in the future. For the time being, his reservations were not to the articles themselves but to the commentaries.

64. Mr. AL-KHASAWNEH said that he, too, wished to reserve his position on the commentaries to the articles.

65. Mr. BEESLEY thanked Mr. Eiriksson for his suggestion that certain parts of the commentaries should be incorporated in foonotes, which would solve one aspect of the problem. He was also grateful to those members who, like Mr. Calero Rodrigues, were willing to enter reservations for the benefits of other members who, like himself, wished to retain the material referred to in the commentaries.

66. Mr. EIRIKSSON said that he was not opposed to the idea of giving explanations in commentaries: his main concern was that the Commission did not have time to ensure that the information in the commentaries gave the correct reasons for the arguments adduced.

67. Mr. ARANGIO-RUIZ said that, at first sight, the commentaries appeared to be satisfactory but he had not been able to study them adequately. He would therefore listen to the reservations and remarks of other members and state his opinion afterwards. For the time being, the commentaries as proposed by the Special Rapporteur met with his approval.

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

68. Mr. GRAEFRATH, referring to the first sentence, proposed that, for the sake of clarity, the words "for the States parties" should be added after "will provide" and that the words "absent agreement" should be replaced by "absent specific agreement".

It was so agreed.

69. Mr. HAYES proposed that the word "absent", in the English text, should be replaced by "in the absence of".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

70. Mr. GRAEFRATH, referring to footnote 8, said that it would be useful to indicate which States had ratified the Treaty of the River Plate Basin, since there were cases of treaties being signed but never ratified.

71. The CHAIRMAN, speaking as Special Rapporteur, said that he did not have that information at his immediate disposal, but Mr. Graefrath was right and his remark would be taken into account in the final version of the report.

Paragraph (3) was approved on that understanding.

Paragraphs (4) to (14)

Paragraphs (4) to (14) were approved.

Paragraph (15)

72. Mr. CALERO RODRIGUES said that, while the references to the *Lake Lanoux* case were pertinent, paragraph (15) could end with the words "at no time suffer a diminution", at the end of the quotation in the fourth sentence. The passage that would thus be deleted was not directly relevant to the general principles adopted in the arbitral award. He would not, however, press the point if the Special Rapporteur considered that the passage was useful.

73. The CHAIRMAN, speaking as Special Rapporteur, said that the purpose of the quotation in that passage, which had also appeared in the commentary to article 4 provisionally adopted in 1980,[2] was to illustrate what was meant by the words "to an appreciable extent". As was clear from the commentary, the French proposal had been made only after a long-drawn-out series of negotiations and, as the Commission wished to encourage talks, he had thought that that example would serve to support the terms of article 4.

74. Prince AJIBOLA said that, in the interests of reconciling the views of members regarding the presentation of commentaries, it would be better to place a part of a commentary in a footnote than to delete it.

75. Mr. BEESLEY said that the Commission would perhaps not lose very much if the passage in question were deleted, but he would like the sixth sentence, starting with the words "In the absence of any assertion that Spanish interests . . .", to be retained. Another solution would be to incorporate that sentence in a footnote.

76. Mr. ARANGIO-RUIZ said that he was in favour of retaining paragraph (15) as it stood.

77. The CHAIRMAN, noting that Mr. Calero Rodrigues had not insisted on his proposal, suggested that paragraph (15) should be retained in its present form.

It was so agreed.

78. Mr. EIRIKSSON pointed out that paragraph (15) contained a number of references to the *Lake Lanoux* case and that the first time it was mentioned a cross-reference could be made to paragraph (20), which contained more details on the arbitration.

79. The CHAIRMAN suggested that the words "(see paras. (20)-(21) below)" should be added after "involved in the *Lake Lanoux* case" in the third sentence.

It was so agreed.

Paragraph (15), as amended, was approved.

[2] *Ibid.*, p. 119, para. (11) of the commentary.

Paragraph (16)

80. Mr. CALERO RODRIGUES said that he did not find the distinction between "appreciable" and "substantial" very clear, nor the reference to uses "which have an adverse effect". He therefore proposed that the last sentence of the paragraph should be deleted.

It was so agreed.

Paragraph (16), as amended, was approved.

Paragraph (17)

81. Mr. RAZAFINDRALAMBO said that the words "the first State", in the second sentence, apparently referred to the State which considered that adjustment or application of the provisions of the present articles was necessary. He therefore proposed that those words should be replaced by "the State or States in question".

It was so agreed.

Paragraph (17), as amended, was approved.

Paragraph (18)

82. Mr. RAZAFINDRALAMBO proposed that, in the light of the Commission's decision concerning paragraph (15) (see para. 79 above), the words "discussed below", in the last sentence, should be deleted.

It was so agreed.

Paragraph (18), as amended, was approved.

Paragraph (19)

Paragraph (19) was approved.

Paragraph (20)

83. Mr. CALERO RODRIGUES, referring to the fifth sentence, said that he wondered whether, in the *Lake Lanoux* case, it was not more by virtue of the Treaty of Bayonne than by virtue of the Arbitration Treaty that Spain had claimed that the works could not be undertaken.

84. The CHAIRMAN said that that point would be checked and the paragraph amended if necessary.

It was so agreed.

Paragraph (20) was approved on that understanding.

Paragraph (21)

85. Mr. EIRIKSSON said that it would be preferable if the long quotation in the paragraph were incorporated in a footnote.

86. Mr. REUTER said that he wished to enter a reservation regarding all the interpretations of the *Lake Lanoux* case in the Commission's draft report, and in particular the interpretation in the first sentence of paragraph (21) to the effect that "that obligation of States to negotiate the apportionment of the waters of an international watercourse was uncontested, and was acknowledged by France". His reservation applied both to the arbitration itself and to the very existence of a general rule of that kind in international law.

87. The CHAIRMAN, speaking as Special Rapporteur, said that the sentence in question was taken from the commentary to article 3 provisionally adopted in 1980.[3]

88. Mr. BENNOUNA said that he wondered whether all the material presented in the subsequent paragraphs, which was taken from the law of the sea, had a place in the commentary to article 4. He saw no need to substantiate the obligation to negotiate when article 4 did not deal with such an obligation, one to which the Commission had decided to revert in connection with draft articles 10 to 15, on procedure, submitted at the present session. Furthermore, while he agreed that reference could be made to the *Lake Lanoux* case because it concerned a watercourse, he had reservations about drawing an analogy with the law of the sea, where the problems posed were entirely different, even if the reasoning sometimes followed a similar path. Paragraphs (21) *et seq.* therefore seemed to be superfluous.

89. The CHAIRMAN, speaking as Special Rapporteur, said that he had endeavoured to provide some support for the obligation to consult as stated in paragraph 3 of article 4. However, the decisions of international tribunals that were likely to be invoked related only to the obligation of negotiation, which was stricter than that of consultation. He had therefore taken the view that, if the obligation to negotiate existed in respect of watercourses, as the *Lake Lanoux* case seemed to suggest, and also in respect of the apportionment of certain maritime resources, it was even less possible to rule out an obligation to consult. Moreover, the first sentence of paragraph (22) spoke of the obligation to "enter into discussions", while the last sentence of paragraph (26) spoke of "an obligation to consult", and no reference was made to an obligation to negotiate.

90. Mr. BARSEGOV said that he wished to reserve his position on the commentary as a whole, but would not stand in the way of its approval if the other members considered that it should be retained in its existing form. His conception of the commentary differed from that of the Special Rapporteur. He could not be answerable either for the content of the commentary or for the Special Rapporteur's interpretation of the *Lake Lanoux* case, particularly since he had studied that case and had arrived at different conclusions. The cases on the law of the sea, as he had already had occasion to point out, fell within an entirely different legal context from that of watercourses. Also, if they were examined in detail, a number of the cases cited in the commentary went against the propositions put forward by the Special Rapporteur. The commentary should relate specifically to the matters covered in the article and make it possible to determine the meaning, content and intent of the article. He was convinced, for example, that paragraph (22) had nothing to do with article 4 and proposed that all the commentaries, which ought in his view to be pruned, should form the subject of a critical review.

[3] *Ibid.*, p. 117, para. (34) of the commentary.

91. Prince AJIBOLA said that the problems which had arisen could be solved by incorporating the material that was in dispute in footnotes.

92. Mr. BEESLEY suggested that the Special Rapporteur should submit a revised version of the commentary, dealing solely with the obligation to consult, at the next meeting. In addition, the Commission should perhaps confine itself to precedents relating only to watercourses.

93. The CHAIRMAN, speaking as Special Rapporteur, thanked Mr. Beesley for his constructive proposal and pointed out that the precedents relating to the law of the sea which had been cited represented only a fraction of those contained in the 1980 commentary. A comparison of article 3 provisionally adopted in 1980 with the present article 4 would reveal that the Commission had merely replaced the obligation to negotiate by the obligation to consult. Hence the authorities which supported the obligation to negotiate should, *a fortiori*, support an obligation to consult. However, he was prepared to modify the commentary to take account of the concern expressed.

94. Speaking as Chairman, he said that the Commission would revert to paragraph (21) of the commentary to article 4 at the next meeting.

95. Mr. CALERO RODRIGUES, speaking on a general point, said that the General Assembly had requested the Commission to indicate in its annual report the subjects and issues on which views expressed by Governments, either in the Sixth Committee or in writing, would be of particular interest for the continuation of its work.[4] The Commission could respond to that request either by providing appropriate indications in the various chapters of its report or by setting aside a separate part of the report for that purpose. The chapters considered thus far did not contain any such indications and he feared that any failure by the Commission to respond to the request would attract criticism from the Sixth Committee.

96. The CHAIRMAN said that, having consulted the Rapporteur of the Commission, he considered that the best course would be to give the requisite indications at the end of the chapters on the various topics the Commission had discussed during the session.

97. Mr. THIAM, speaking as Special Rapporteur for the topic of the draft Code of Offences against the Peace and Security of Mankind, said that he would like to have further details regarding the questions to be put to the General Assembly. He did not think it was possible at the present stage to examine in plenary a series of questions prepared by each Special Rapporteur.

98. The CHAIRMAN said that, in his view, each special rapporteur should specify which questions should be put to the General Assembly. Since the sections in which the questions would appear formed part of the Commission's report, they would naturally have to be approved by the Commission, hence the need to be concise. In the case of the draft Code of Offences against the Peace and Security of Mankind and the law of the non-navigational uses of international watercourses, it would suffice to question the General Assembly more particularly about the draft articles adopted during the session.

It was so agreed.

The meeting rose at 6.10 p.m.

[4] General Assembly resolution 41/81 of 3 December 1986, para. 5 (*b*).

2040th MEETING

Friday, 17 July 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, 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. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its thirty-ninth session (*continued*)

CHAPTER III. *The law of the non-navigational uses of international watercourses* (continued) (A/CN.4/L.415 and Add.1-3)

C. **Draft articles on the law of the non-navigational uses of international watercourses** (*concluded*) (A/CN.4/L.415/Add.2 and 3)

TEXTS OF DRAFT ARTICLES 2 TO 7, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-NINTH SESSION (*concluded*)

Commentary to article 4 ([Watercourse] [System] agreements) (*concluded*)

Paragraphs (21) to (26)

1. The CHAIRMAN, speaking as Special Rapporteur, said that, further to consultations, he wished to propose certain changes to the commentary.

2. Paragraph (21), which dealt with the *Lake Lanoux* case, would remain unchanged, but it would be indicated in footnote 21 that the ICJ had also dealt with the obligation to negotiate in cases involving the apportionment of maritime resources. Reference would then be made to the cases cited in paragraphs (22) to (26), and those paragraphs would be deleted.

3. A new paragraph (22) would be added, paraphrasing paragraph 3 of article 4 and reading:

> "For these reasons, paragraph 3 of article 4 requires watercourse States to enter into consultations, at the instance of one or more of them, with a view to negotiating, in good faith, one or more agreements which would apply or adjust the provisions of the present articles to the characteristics and uses of the international watercourse in question."