

Document:-
A/CN.4/SR.2041

Summary record of the 2041st meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1987, vol. I

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

Paragraphs 24 to 29

Paragraphs 24 to 29 were adopted.

Paragraph 30

100. Mr. SEPÚLVEDA GUTIÉRREZ, referring to the first sentence of the Spanish text, said that some other word should be found for *desequilibrado*.

101. The CHAIRMAN asked Mr. Sepúlveda Gutiérrez to consult with the secretariat on a suitable word.

Paragraph 30 was adopted on that understanding.

Paragraphs 31 to 33

Paragraphs 31 to 33 were adopted.

Section B, as amended, was adopted.

102. Mr. BARSEGOV said that the text of chapter III of the draft report had often been available in Russian too late for him to be able to use it. In addition, the Commission had had to work so quickly that it had not always had time to enter into detail. If, therefore, it subsequently transpired that he had participated in the adoption of any provisions which were in contradiction with his statements in plenary, he reserved the right to defend his position at a later stage.

103. The CHAIRMAN said that Mr. Barsegov was, of course, fully entitled to reserve his position.

104. The Commission still had to adopt a final section for chapter III of the report to indicate the points on which comments by Governments were invited. He suggested the following wording:

“The Commission would welcome comment in the General Assembly, in particular on the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted during the present session.”

105. Mr. TOMUSCHAT said that that proposal was acceptable. Chapter III contained a detailed account of the discussion on the topic in plenary. He only regretted that all parts of the debate had not been fully reported, something which created an obvious imbalance.

106. The CHAIRMAN said that that point would be taken up by the Commission at its next session.

107. Mr. GRAEFRATH, associating himself with Mr. Tomuschat’s remarks, said that, while he appreciated that the Commission was extremely short of time, he did not think it sufficed merely to draw the General Assembly’s attention to certain draft articles. It would be more useful to direct its attention to specific points.

108. The CHAIRMAN said that he would consult members informally to see whether a suitable form of wording could be found. A final decision in the matter could then be taken at the next meeting.

The meeting rose at 1.10 p.m.

2041st MEETING

Friday, 17 July 1987, at 3 p.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. 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. Tomuschat, Mr. Yankov.

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

CHAPTER IV. International liability for injurious consequences arising out of acts not prohibited by international law (concluded)*
(A/CN.4/L.416 and Add.1 and Add.1/Corr.1)

B. Consideration of the topic at the present session (A/CN.4/L.416/Add.1 and Corr.1)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

1. Mr. BARBOZA (Special Rapporteur) said that the last three sentences should be replaced by the following text:

“Thirdly, those physical events had to have social repercussions, in keeping with the arbitral award in the *Lake Lanoux* case. It then had to be shown that the physical consequences ‘adversely’ affected persons, objects or the use or enjoyment of areas within the territory or control of another State. The inclusion of the word ‘adversely’ was necessary, for without it a State might argue that, although the effect was beneficial, it was not to its liking and it would rather have an unchanged *status quo ante*.”

Paragraph 4, as amended, was adopted.

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

2. Mr. AL-KHASAWNEH said he did not think that the expression *travaux préparatoires*, in the fifth sentence, was apposite in the context, for it normally referred to work done at a plenipotentiary conference of States.

3. The CHAIRMAN said that, as paragraph 6 reflected the Special Rapporteur’s views, it should perhaps not be changed. Mr. Al-Khasawneh’s point would, however, be reflected in the summary record.

Paragraph 6 was adopted.

Paragraphs 7 to 11

Paragraphs 7 to 11 were adopted.

* Resumed from the 2035th meeting.

Paragraph 12

4. Mr. TOMUSCHAT proposed the addition, at the beginning of the first sentence, of the words: "Many members of the Commission pointed out that".

It was so agreed.

5. Mr. AL-KHASAWNEH proposed that, in the first sentence, the word "was" should be replaced by "is".

Paragraph 12, as amended, was adopted.

Paragraph 13

6. Mr. ARANGIO-RUIZ said that the first sentence of the English text, and in particular the words "some international legal way", sounded very strange.

7. The CHAIRMAN, agreeing with Mr. Arangio-Ruiz, suggested that it should be left to the secretariat to bring the first two sentences of the English text more closely into line with the Spanish.

Paragraph 13 was adopted on that understanding.

Paragraph 14

8. Mr. BARSEGOV said that the paragraph smacked of hyperbole. He, for one, would never have equated pollution with the threat of aggression or the use of force. It would therefore be advisable to add the words "some members" or "one member", to indicate who, if anybody, held such views.

9. Mr. BARBOZA (Special Rapporteur) said that he would have no objection to adding such a form of words. It had not been his intention to suggest that the use of force did not pose a threat, but at least three members had expressed the views reflected in the paragraph.

10. The CHAIRMAN suggested that, to meet Mr. Barsegov's point, the words "It was observed", at the beginning of the first sentence, should be replaced by "Some members observed".

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

Paragraph 16

11. The CHAIRMAN suggested that, at the beginning of the first sentence, the word "members" should be inserted after "Some".

It was so agreed.

12. Mr. BARSEGOV proposed that, to take account of a point he had made during the discussion (2020th meeting), the following new sentence should be added after the third sentence: "In the absence of established, scientifically substantiated international standards for the determination of adverse transboundary effects in various spheres, the elaboration of general principles could contribute to the emergence of disputes, while the lack of such standards would impede their settlement."

It was so agreed.

13. The CHAIRMAN suggested that the words "In their opinion", at the beginning of the fourth sentence, should be replaced by "In the opinion of some members".

It was so agreed.

14. Mr. GRAEFRATH proposed that the words "relating to very specific subjects" should be added at the end of the fourth sentence.

15. Mr. BARBOZA (Special Rapporteur) said that he would prefer not to use the word "very".

16. Mr. MAHIOU said that, if Mr. Graefrath's amendment were adopted, the last sentence of the paragraph would be unnecessary.

17. Mr. GRAEFRATH said that he did not agree: the last sentence spoke of what States should do, whereas his proposed amendment was concerned with the situation as it actually obtained in international law. However, he would further propose that the last sentence should be amended to read: "It might therefore be better for States to focus on particular types of activity and to avoid drafting a general treaty."

18. The CHAIRMAN suggested that the Commission should adopt Mr. Graefrath's proposal concerning the fourth sentence, as further amended by the Special Rapporteur, and also Mr. Graefrath's amendment to the last sentence.

It was so agreed.

Paragraph 16, as amended, was adopted.

Paragraph 17

19. Mr. BENNOUNA proposed that, to make the text clearer, the last two sentences should be amended to read: "It was said that the treatment of the topic consisted in drawing logical conclusions from certain premises, but that a line of reasoning, however logical, could not substitute for agreement between States or constitute binding rules."

It was so agreed.

20. Mr. ARANGIO-RUIZ said that the first sentence, and in particular the reference to a general convention on liability, was obscure and ambiguous. He would not insist on an amendment, but would like his views to be reflected in the summary record.

21. Mr. BEESLEY said he agreed with that remark.

22. Mr. BARBOZA (Special Rapporteur) suggested that the words "convention on" should be replaced by "régime of".

It was so agreed.

23. Mr. AL-KHASAWNEH said that the statement he had made during the general discussion (2019th and 2020th meetings) did not appear to have been reflected in the report. In view of the lack of time, he would not propose an amendment, but would like to enter a reservation regarding his position on paragraph 17.

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

24. Mr. SEPÚLVEDA GUTIÉRREZ said that the first sentence of the Spanish text did not reflect very well on the Commission. It might be preferable to say that whether or not there was a solid basis for the topic in international law or customary law was *de menor importancia*.

25. The CHAIRMAN suggested that the Special Rapporteur should agree on a suitable form of wording with Mr. Sepúlveda Gutiérrez.

It was so agreed.

26. Mr. SEPÚLVEDA GUTIÉRREZ proposed that, at the end of the second sentence, the word "international" should be added before "law".

It was so agreed.

27. Following a point raised by Mr. AL-BAHARNA, Mr. BARBOZA (Special Rapporteur) suggested that the words "in international law or customary law", in the first sentence, should be replaced by "in general international law".

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

28. Mr. SEPÚLVEDA GUTIÉRREZ said that the first sentence was not clear and should be redrafted. In the Spanish text, the words *se señaló* recurred at several points throughout the report: possibly the secretariat could find some suitable alternatives.

29. Mr. BEESLEY proposed that the first sentence should be amended to read: "A few members referred to various other concepts of law, some in domestic systems, to find a basis for the present topic." In addition, the concept of inherently dangerous activities should be added to the concepts mentioned in the second sentence.

It was so agreed.

30. Mr. ROUCOUNAS, referring to the French text, noted that a number of expressions used throughout the report did not conform to normal legal usage; in particular, the concept of "nuisance", in paragraph 20, should be clarified.

31. The CHAIRMAN suggested that Mr. Reuter and Mr. Roucounas should consult with the secretariat on that point.

Paragraph 20, as amended, was adopted on that understanding.

Paragraph 21

Paragraph 21 was adopted.

Paragraph 22

32. Mr. SHI said that, during the debate (2020th meeting), he had made alternative proposals concerning the course of action to be taken by the Commission. To reflect his ideas, he proposed that the following text should be added at the end of either paragraph 22 or paragraph 72:

"However, one member suggested that, in view of the slow progress of the Commission's work on the topic since it began in 1978 due to a wide divergence of views among members on basic theoretical issues, the Commission should take a decision either to request the General Assembly to defer consideration of the topic until a later date so as to pave the way for a speedy conclusion of some topics outstanding on the Commission's agenda, or to adopt a working hypothesis on the basis of the three principles mentioned in paragraph 72 (4) below so as to facilitate the formulation of draft articles on the topic, leaving aside all theoretical issues at the present stage."

33. Mr. BARBOZA (Special Rapporteur) said that he had no objection to the inclusion of the general idea underlying that proposal, but would like to make the actual wording a little more concise.

34. The CHAIRMAN suggested that Mr. Shi and the Special Rapporteur should consult on the precise wording to be included in the report.

It was so agreed.

35. Mr. BEESLEY said that, during the discussion (2021st meeting), he had made the point that the field of law with which the Commission was concerned was not entirely new and that there were precedents in terms of arbitration, some of which dated back 50 years. He wondered whether that point had been adequately reflected in the draft report.

36. Mr. BARBOZA (Special Rapporteur) said that Mr. Beesley's point had been reflected to some extent in paragraph 63 and had been referred to in more detail in his summing-up of the Commission's discussion on the topic.

37. Mr. BEESLEY said that he would like it to be placed on record that, in his view, the point might usefully have been included in the report, for example in paragraph 19.

Paragraph 22, as amended, was adopted.

Paragraph 23

38. Mr. BENNOUNA proposed that the following text should be added at the end of the paragraph:

"In particular, some members noted that, by dealing simultaneously with prevention and compensation, the topic necessarily concerned the injurious consequences of failure to observe obligations in respect of prevention, and hence wrongful acts. Consequently, they took the view that the present title of the topic was inappropriate and would have to be reformulated so as to cover simply the transboundary injurious consequences of dangerous activities."

39. Mr. BARBOZA (Special Rapporteur) said that the first sentence of the proposed text was to some extent covered in paragraphs 53 and 54 of section B. He would have difficulty in accepting the second sentence, in which it was proposed that the title be changed, as no other member had asked for such a change.

40. The CHAIRMAN suggested that the second sentence of the proposed text could be prefaced by the words "one member" and that the first sentence should

be dealt with when the Commission came to paragraph 53.

41. Mr. BENNOUNA said that, as his idea was linked more closely to paragraph 23 than to paragraph 53, he had to insist that it should be reflected in paragraph 23. He would, however, have no objection to a reference to "one member" being inserted in the second sentence of his proposal.

42. The CHAIRMAN suggested, in the light of the discussion, that Mr. Bennouna's proposal should be included in paragraph 23 as the view of one member.

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraph 24

43. Mr. CALERO RODRIGUES said that the Spanish word *dano* had been incorrectly rendered as "injury" throughout the English version of the report. It was a particularly important point, since a difference between State responsibility and liability was involved. Some alternative English term should therefore be found.

44. Mr. BARBOZA (Special Rapporteur), agreeing with Mr. Calero Rodrigues, said that a lexicon of terms should perhaps be provided in 1988. He suggested that the word "injury", in the tenth, eleventh and twelfth sentences of paragraph 24, should be replaced by "harm".

It was so agreed.

45. Mr. BARSEGOV asked whose views the paragraph was meant to reflect.

46. Mr. BARBOZA (Special Rapporteur) said that the views reflected in the paragraph were his own, but they had had the express support of certain members, including Mr. Beesley and Mr. Hayes.

47. The CHAIRMAN suggested that the words "In the view of these members" should be added at the beginning of the ninth sentence, before "Under the régime of this topic".

It was so agreed.

48. Mr. TOMUSCHAT, referring to the ninth sentence, said that he did not think any member had said that the State liable would have to pay "in all circumstances".

49. Mr. BARBOZA (Special Rapporteur) suggested that the words "in all circumstances" should be replaced by "as a general rule".

It was so agreed.

50. Mr. ROUCOUNAS proposed that the word "pay", in the ninth sentence should be replaced by "compensate".

It was so agreed.

51. Mr. BENNOUNA proposed that, in the thirteenth sentence, the words "in principle" should be added before "to restore".

It was so agreed.

52. Mr. BARBOZA (Special Rapporteur) said that the word "compensation", in the first part of the thirteenth sentence, should be replaced by "reparation" and that the word "legal" should be added before "condition".

53. Mr. BEESLEY said that the phrase "did not constitute a breach of an obligation", in the seventh sentence, seemed to be a contradiction in terms. It would be better to speak of "an unlawful activity".

54. Mr. BARBOZA (Special Rapporteur) said that, while Mr. Beesley's proposal was acceptable, "breach of an obligation" was an accepted term in the context of State responsibility.

Paragraph 24, as amended, was adopted.

Paragraphs 25 to 28

Paragraphs 25 to 28 were adopted.

Paragraph 29

55. Mr. BARSEGOV said that he had expressed the opinion reflected in paragraph 28, but he did not agree with that set out in paragraph 29. The word "also", in the first sentence, should therefore be deleted.

56. Mr. BARBOZA (Special Rapporteur) suggested that it would be better if the words "In a similar vein, it was also" were replaced by "Other members".

It was so agreed.

Paragraph 29, as amended, was adopted.

Paragraphs 30 to 33

Paragraphs 30 to 33 were adopted.

Paragraph 34

57. Mr. TOMUSCHAT suggested that the words "by a group of experts", in the last sentence, should be replaced by "in a simplified procedure".

58. Mr. BARSEGOV said that an important point was at issue, since any modification of the list of activities to be covered would broaden the scope of the topic.

59. Mr. BEESLEY suggested that the words "at intervals by a group of experts" should be replaced by "by the parties at intervals in consultation with a group of experts".

60. After a further exchange of views in which Mr. BARSEGOV, Mr. GRAEFRATH, Mr. MAHIOU and Mr. TOMUSCHAT took part, Mr. BARBOZA (Special Rapporteur) suggested that the last sentence should be amended to read: "One member suggested that such a list could be updated at intervals in a simplified procedure, in consultation with a group of experts."

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

61. Mr. MAHIOU suggested that, for the sake of consistency with paragraph 34, the words "by a group of experts", in the fifth sentence, should be deleted.

It was so agreed.

Paragraph 35, as amended, was adopted.

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

Paragraph 38

62. Mr. ROUCOUNAS, supported by Mr. YANKOV, proposed that the words "was not sufficiently clear", in the first sentence, should be replaced by "should be examined carefully".

It was so agreed.

Paragraph 38, as amended, was adopted.

Paragraph 39

Paragraph 39 was adopted.

Paragraph 40

63. Following a point raised by Mr. BARSEGOUV, the CHAIRMAN suggested that the words "In the opinion of the Special Rapporteur" should be added at the beginning of the first sentence.

It was so agreed.

Paragraph 40, as amended, was adopted.

Paragraph 41

64. Mr. BENNOUNA said that, in his view, paragraph 41 contained inaccurate and even dangerous statements and he took exception, in particular, to the third and fourth sentences. While he was prepared to allow the paragraph to stand, he did not think that those sentences reflected the view of the international community.

65. The CHAIRMAN said that Mr. Bennouna's view would be reflected in the summary record.

66. Mr. ROUCOUNAS said that the notion of "control" did not apply solely to cases where there was an unlawful presence, as in the *Namibia* case. He therefore proposed that the first sentence should be replaced by a short sentence stating simply that the question of control had also been raised.

67. The CHAIRMAN suggested that Mr. Roucounas and the Special Rapporteur should work out a suitable form of wording to replace the first sentence.

It was so agreed.

68. Mr. CALERO RODRIGUES proposed that the words "for policy reasons", in the third sentence, should be replaced by "for reasons of principle".

It was so agreed.

Paragraph 41, as amended, was adopted.

Paragraph 42

69. Mr. MAHIOU said that some logic was required in paragraph 42, which stated that there were two situations to be covered, but mentioned only one. To confound matters further, paragraph 43 then referred to a "fourth" situation.

70. Mr. BEESLEY said that he could accept the paragraph, but there was a distinction between jurisdiction and sovereignty on the one hand, and, on the other, such concepts as "sovereign rights", which embraced

jurisdiction but fell short of sovereignty. He proposed that the words "on the sea-bed beyond national jurisdiction" should be inserted after "on the high seas", in the last sentence.

It was so agreed.

Paragraph 42, as amended, was adopted.

Paragraph 43

71. Mr. YANKOV proposed that, in the interests of greater accuracy, the last sentence should be amended to read: "An example of such an area was the exclusive economic zone, where the coastal States exercised such sovereign rights and jurisdiction, while other States had been given rights such as freedom of navigation and overflight and freedom to lay submarine cables and pipelines."

It was so agreed.

Paragraph 43, as amended, was adopted.

Paragraph 44

72. Mr. ROUCOUNAS, supported by Mr. BARSEGOUV, proposed that the word "common", in the first sentence, should be deleted.

It was so agreed.

73. Mr. BEESLEY, also referring to the first sentence, proposed that, for the purposes of consistency, the words "the sea-bed beyond national jurisdiction" should be added after "the high seas".

It was so agreed.

74. Mr. BENNOUNA proposed that the words "Mixed zones, such as", at the beginning of the fourth sentence, should be deleted.

It was so agreed.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 48

Paragraphs 45 to 48 were adopted.

Paragraph 49

75. Mr. BENNOUNA said that, while paragraph 49 made it quite clear that the views expressed were those of the Special Rapporteur, as opposed to those of members, other paragraphs did not do so. The Secretariat could therefore perhaps make the necessary drafting changes in order to remove any ambiguity.

Paragraph 49 was adopted.

Paragraphs 50 to 54

Paragraphs 50 to 54 were adopted.

Paragraph 55

76. Mr. YANKOV proposed that the paragraph should be amended to read:

"Some members, on the other hand, believed that the question of liability and reparation should be properly dealt with either under a conventional framework or through international co-operation and negotiation among interested States. In their view, the topic should instead concentrate at the present stage

on preventive rules, as supported by current State practice.”

It was so agreed.

Paragraph 55, as amended, was adopted.

Paragraphs 56 to 59

Paragraphs 56 to 59 were adopted.

Paragraph 60

Paragraph 60 was adopted with a drafting change.

Paragraph 61

77. Mr. GRAEFRATH proposed that the following sentence should be added at the end of the paragraph: “In that connection, attention was drawn to the conclusion reached by the previous Special Rapporteur, R. Q. Quentin-Baxter, that there were two boundary lines for the topic, and that one could not, on the one hand, establish the principle of strict liability for lawful activities and, on the other hand, exclude economic activities.”

It was so agreed.

Paragraph 61, as amended, was adopted.

Paragraph 62

Paragraph 62 was adopted.

Paragraph 63

78. Following a point raised by Mr. BENNOUNA, the CHAIRMAN said that the first two sentences would be redrafted to bring them into line with the Spanish text.

Paragraph 63 was adopted on that understanding.

Paragraphs 64 to 68

Paragraphs 64 to 68 were adopted.

Paragraph 69

79. Mr. AL-BAHARNA proposed that the word “were”, in the first sentence, should be replaced by “was”.

Paragraph 69 was adopted.

Paragraphs 70 to 72

Paragraphs 70 to 72 were adopted.

Section B, as amended, was adopted.

Chapter IV of the draft report, as amended, was adopted.

CHAPTER VI. Other decisions and conclusions of the Commission (concluded)* (A/CN.4/L.418 and Add.1)

A. State responsibility (A/CN.4/L.418)

Paragraph 1

Paragraph 1 was adopted.

Section A was adopted.

B. Jurisdictional immunities of States and their property (A/CN.4/L.418)

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

Section B was adopted.

C. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.418)

Paragraph 4

Paragraph 4 was adopted.

Section C was adopted.

D. Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/L.418)

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

80. Mr. EIRIKSSON proposed that the second and third sentences should be replaced by the following text: “At its 2041st meeting, on 17 July 1987, the Commission adopted the following views on the basis of recommendations of the Enlarged Bureau and discussions in the Planning Group.”

It was so agreed.

81. The CHAIRMAN suggested that the words “and discussions” in that amendment should be replaced by “resulting from the discussions”.

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 13

Paragraphs 9 to 13 were adopted.

Paragraph 14

82. Mr. KALINKIN (Secretary to the Commission), referring members to footnote 3 of the annex to document A/CN.4/L.418, said he wished to state for the record that the assistance requested by the Special Rapporteur for the topic of State responsibility, as mentioned in paragraph 14, would not be rendered.

83. The CHAIRMAN asked whether the reason was lack of available resources.

84. Mr. KALINKIN (Secretary to the Commission) said he would like to explain that the Secretariat implemented the decisions of the deliberative bodies subject to the financial implications of those decisions. In the present case, the Commission had not taken any decision in the matter, but it had before it a request from a member. It was clear from the Commission's statute, and also from the Secretary-General's Bulletin ST/SGB/Organization, Section H/Rev.2, of 18 April 1983, defining the functions of the Codification Division (sect. II.5), that the Secretariat was under no obligation to engage in substantive research and studies on behalf of special rapporteurs.

85. The situation of the Codification Division in practical terms was gloomy. As the Legal Counsel had himself pointed out at an earlier meeting, the number of bodies which the Codification Division serviced had remained unchanged and, since priority had to be given to

* Resumed from the 2035th meeting.

the preparation of the documentation of those bodies, the Division's skeleton staff had virtually no time left to engage in long-term research projects.

86. Furthermore, it seemed from a letter addressed by the Special Rapporteur, Mr. Arangio-Ruiz, to him as Secretary to the Commission that, to carry out the research request, a person would be required for up to six years, although in discussions with him the Special Rapporteur had mentioned a period of eight months. In any event, as soon as it had the necessary financial and human resources, the Codification Division's first task would be to update the "Survey of international law" initially prepared by the Secretary-General in 1971.¹ That would be in line with the general wishes of the Commission and, he believed, also of the Sixth Committee of the General Assembly.

87. For all those reasons, and bearing in mind the recruitment freeze and the serious understaffing of the Codification Division, he was obliged, as Director of the Division—which was responsible for providing the Commission with substantive secretariat services—to state once again that the Division was not in a position to comply with the request made in paragraph 14.

88. Mr. ARANGIO-RUIZ said that his own understanding of the position, from meetings held in the Planning Group and from private conversations, was simply that the assistance he had requested could not be guaranteed. In any event, he had not asked for a six-year research project, but for urgent research to be conducted over a period of six to eight months for the purposes of his report to be submitted in 1988. He had not made any particular reference to research work to be done in 1989 or thereafter. Moreover, he would refer members to the Commission's report on its thirty-fifth session (1983), in which it had requested the Secretariat to provide the special rapporteurs with such assistance as they might need.² If the Secretariat was really unable to help, he would not insist. He would, however, echo the request made by the Commission in its report on its thirty-fifth session and once again appeal to the Commission for the assistance he urgently needed, particularly during his first year as Special Rapporteur.

89. The CHAIRMAN said that the statement in the second sentence of paragraph 29 of chapter VI of the draft report might help to respond to the concern expressed.

Paragraph 14 was adopted subject to the reservation entered by the Secretary to the Commission.

Paragraphs 15 to 17

Paragraphs 15 to 17 were adopted.

Paragraph 18

90. The CHAIRMAN suggested that the words "is anxious" should be replaced by "strongly desires".

It was so agreed.

Paragraph 18, as amended, was adopted.

¹ Yearbook ... 1971, vol. II (Part Two), p. 1, document A/CN.4/245.

² Yearbook ... 1983, vol. II (Part Two), pp. 87-88, para. 308.

Paragraph 19

91. Mr. ERIKSSON proposed that the following sentence should be added at the end of the paragraph: "A proposal was also discussed that the Drafting Committee should have a flexible composition depending on the questions before it, the number of members for any given topic varying from 12 to 16."

It was so agreed.

92. Following a point raised by Mr. TOMUSCHAT, the CHAIRMAN suggested that the words "all legal systems", in the first sentence, should be replaced by "the principal legal systems".

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraphs 20 and 21

Paragraphs 20 and 21 were adopted.

Paragraph 22

93. Mr. CALERO RODRIGUES said that paragraph 22 gave the impression that the General Assembly's request to the Commission in paragraph 5 (b) of its resolution 41/81 was pointless. It would, however, be a simple enough matter to comply with the request and there was nothing to be gained from disregarding it. Paragraph 22 should therefore be deleted.

94. Mr. BARBOZA said he agreed that paragraph 22 was not appropriate and that the Commission should endeavour to comply with the General Assembly's request. At the same time, its response should not become a routine and take the form of a list of questions to be submitted to the General Assembly year in, year out.

95. Mr. CALERO RODRIGUES said that the Commission had not been asked to put questions to the General Assembly but to indicate subjects and issues on which views expressed by Governments would be of particular interest to the Commission.

96. Mr. BENNOUNA said that he fully agreed with Mr. Calero Rodrigues, and therefore proposed that paragraph 22 should be replaced by the following text:

"As regards the request in paragraph 5 (b) of General Assembly resolution 41/81, the Commission decided to take it duly into account, while bearing in mind the practice of the Commission in that regard."

97. Mr. GRAEFRATH said that he could accept Mr. Bennouna's proposed wording.

98. Mr. FRANCIS said that it would be advisable to adopt a more positive tone and indicate that the Commission had taken up the matter and hoped to be able to respond in the near future.

99. Mr. HAYES said that he also agreed with Mr. Calero Rodrigues, but considered that the Commission could perhaps be a little more positive. The following sentence should therefore be added to Mr. Bennouna's proposal: "The Commission also wishes to draw attention to its previous practice in the matter."

100. Mr. CALERO RODRIGUES said that he was somewhat hesitant about Mr. Hayes's proposal, since it might strike the General Assembly as a little pro-

vocative. Mr. Bennouna's neutral form of wording was sufficient and should not be expanded.

101. Mr. EIRIKSSON proposed that the following sentence should be added after the text proposed by Mr. Bennouna: "The request of the General Assembly was discussed in particular in connection with the consideration of the topics 'Draft Code of Offences against the Peace and Security of Mankind' (see para. . . above) and 'The law of the non-navigational uses of international watercourses' (see para. . . above)."

102. Mr. TOMUSCHAT proposed that the following text should be inserted between Mr. Bennouna's proposal and Mr. Eriksson's proposal: "The Commission, at the present session, has already attempted to improve the existing ways and means for a constructive dialogue with the General Assembly. It will continue to look for a suitable method in order to satisfy the wishes of the General Assembly."

103. Mr. ROUCOUNAS said that the expression "constructive dialogue" seemed somewhat inappropriate in the context of relations between the Commission and the General Assembly. "Further co-operation" or some similar expression would be more appropriate.

104. The CHAIRMAN suggested that Mr. Roucounas should agree on a precise formulation with Mr. Tomuschat, and that that text should be adopted along with the proposals by Mr. Bennouna and Mr. Eriksson.

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

105. Mr. TOMUSCHAT proposed that the words "at least", in the second sentence, should be deleted.

It was so agreed.

Paragraph 24, as amended, was adopted.

Paragraphs 25 and 26

Paragraphs 25 and 26 were adopted.

Paragraph 27

106. Mr. EIRIKSSON proposed that the following sentence should be inserted after the first sentence: "Those proposals included: (a) that the report should open with a brief topical summary of its content; (b) that an introduction to the report by the Chairman of the Commission along the lines of his oral presentation to the Sixth Committee of the General Assembly be circulated to Governments immediately following the conclusion of the Commission's session."

107. Mr. YANKOV proposed that the words "Those proposals included", in that text, should be replaced by "Those proposals were, *inter alia*".

108. The CHAIRMAN suggested that the Commission should adopt Mr. Eriksson's proposal, as amended by Mr. Yankov.

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

109. Mr. BENNOUNA, supported by Mr. REUTER, proposed that, in order to take account of the comments concerning assistance to special rapporteurs made by the Secretary to the Commission in connection with paragraph 14 (see paras. 82-87 above), the following phrase should be added after the words "Codification Division", in the last sentence: "can perform its functions properly, particularly by providing the requisite assistance to special rapporteurs and".

It was so agreed.

110. Mr. BEESLEY said that, if the Special Rapporteur for the topic of State responsibility was to obtain satisfaction, it was essential to make specific reference to the inadequate staffing of the Codification Division. The Codification Division had lost two senior officers, one at the D-1 and one at the P-5 level, to the Office of the Legal Counsel, and there was little likelihood of their being replaced. In the circumstances, he did not see how the Codification Division could possibly do its basic work, let alone give the kind of assistance requested by the Special Rapporteur for State responsibility. Unless the Division's staff were retained and indeed increased, the situation would become more and more difficult.

111. Mr. KALINKIN (Secretary to the Commission) said that the Codification Division had had a specialist on State responsibility, but the person in question had been transferred on 1 January 1987 to the Office of the Legal Counsel. Moreover, another highly experienced staff member was now to be transferred, without any replacement. It was very difficult to find experienced people to work in the Codification Division, particularly at a time when there was a freeze on recruitment.

112. The CHAIRMAN suggested that, to take account of Mr. Beesley's point, the following phrase should be added in the second sentence after the word "understaffed": "—due in part to the non-replacement of two senior staff members who have been transferred—".

It was so agreed.

113. Mr. ARANGIO-RUIZ suggested that a cross-reference to paragraph 14 should be made in paragraph 29.

114. The CHAIRMAN suggested that the cross-reference should be incorporated in Mr. Bennouna's amendment.

It was so agreed.

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.
Section D, as amended, was adopted.

E. Co-operation with other bodies (A/CN.4/L.418)**Paragraphs 31 to 33**

Paragraphs 31 to 33 were adopted.
Section E was adopted.

F. Date and place of the fortieth session (A/CN.4/L.418)**Paragraph 34**

Paragraph 34 was adopted.
Section F was adopted.

G. Representation at the forty-second session of the General Assembly (A/CN.4/L.418)**Paragraph 35**

Paragraph 35 was adopted.
Section G was adopted.

Chapter VI of the draft report, as amended, was adopted.

ANNEX (A/CN.4/L.418)

The annex to the draft report was adopted.

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

115. The CHAIRMAN, recalling that the Commission had agreed to indicate in its report the points on which it wished to have the views of Governments (see 2039th meeting, paras. 95-98), suggested that the following new section D should be included at the end of chapter III:

“D. Points on which comments are invited

“The Commission would welcome the views of Governments, in particular on the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted at the present session.”

It was so agreed.

Chapter III of the draft report, as amended, was adopted.

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

116. The CHAIRMAN drew attention to the text of the additional paragraph proposed by the Special Rapporteur to be included, as agreed (see 2039th meeting, paras. 95-98), at the end of chapter II, requesting the views of Governments.

117. Mr. BARSEGOV noted that the proposed paragraph asked for the views of Governments on the *non bis in idem* principle set out in draft article 7, but made no reference to the fundamental issue of whether or not crimes against the peace and security of mankind constituted crimes under international law, or to the

complex question of jurisdiction. Admittedly, the Commission had decided to defer the consideration of jurisdiction. Hence it seemed pointless to address only one question to the General Assembly.

118. Mr. CALERO RODRIGUES, supported by Mr. BENNOUNA, Mr. ERIKSSON, Mr. BEESLEY and Mr. OGISO, said that the proposed paragraph was very useful and was the type of indication the Commission should give to the General Assembly. Mr. Barsegov's first point was covered to some extent by the fact that the expression “under international law” had been placed in square brackets in article 1. His second point was met by the reiteration of the request made by the Commission in 1983 for the views of the General Assembly on a competent international criminal jurisdiction.

119. Mr. BARSEGOV said that he failed to see any logic in the proposed paragraph. However, he would not press the matter, for he fully respected the views of the Special Rapporteur, who was unable to be present at the meeting.

120. After a discussion in which Mr. YANKOV, Mr. REUTER, Mr. ERIKSSON, Mr. GRAEFARTH, Mr. CALERO RODRIGUES, Mr. BEESLEY and Mr. BARSEGOV took part, the CHAIRMAN suggested that the following new section D should be included at the end of chapter II:

“D. Points on which comments are invited

“The Commission would attach great importance to the views of Governments regarding the following:

“(a) draft articles 1 to 3, 5 and 6, provisionally adopted by the Commission at its present session (see sect. C above);^a

“(b) the scope and conditions of application of the *non bis in idem* principle contained in draft article 7 as submitted by the Special Rapporteur (see paras. . . to . . . and . . . above);

“(c) the conclusion set out in paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session, in 1983.^b

^a Attention is drawn to the fact that the expression ‘under international law’ has been placed between square brackets in article 1.

^b Paragraph 69 (c) (i) of the Commission's report on its thirty-fifth session reads:

“(c) With regard to the implementation of the code:

“(i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals;”

“(Yearbook . . . 1983, vol. II (Part Two), p. 16.)”

It was so agreed.

Chapter II of the draft report, as amended, was adopted.

The draft report of the Commission on the work of its thirty-ninth session as a whole, as amended, was adopted.

* Resumed from the 2039th meeting.

Tribute to Mr. Larry Johnson

121. The CHAIRMAN said that there remained one more task for the Commission to perform at its present session, and that was to bid farewell to Mr. Larry Johnson, who was leaving the Codification Division to take up a new assignment in the Office of the Legal Counsel.

122. Larry Johnson had joined the Codification Division in 1971 after completing brilliant studies at Harvard University. Almost immediately he had been associated with the Commission, where he had served first as Assistant Secretary and later as Senior Assistant Secretary and Secretary to the Drafting Committee. From the very outset, his capabilities and dedication had made him an enormous asset to the Commission and its secretariat and, over the years, he had acquired a profound knowledge of the spirit of the Commission and a unique experience of its methods of work. He had not only played a major part in servicing 15 sessions of the Commission, but had also participated actively in the preparation and servicing of a number of codification conferences, at which he had been of great assistance to all the participants, and in particular to the chairmen of the various drafting committees. Last, but not least, and especially during the difficult period being experienced by the United Nations, he had followed with unfailing attention developments of interest to the Commission, both in the General Assembly and elsewhere, and had thereby helped to preserve the unique characteristics of the Commission by providing it with the means to fulfil its task.

123. On behalf of the Commission, he wished Mr. Johnson every success in his further career and expressed the hope that he and his family would remember

the Commission as fondly as its members would remember them.

124. Mr. AL-KHASAWNEH said that he had known Larry Johnson for a number of years and could attest to his intelligence, abilities and charm. He wished him and his family the best of luck for the future.

125. Mr. BARBOZA said that Larry Johnson would be missed in the Commission and in the Drafting Committee, both for his personal and for his professional qualities. He wished him all the best in his new assignment.

126. Mr. BENNOUNA said that Larry Johnson was part of a disappearing breed. He was also living proof of that sense of public service and dedication so often found in international civil servants and by which he would no doubt be guided in his new assignment. He wished him and his family every success in the future.

127. Mr. YANKOV said that, as a former Chairman of the Commission and Chairman of the Planning Group, as a Special Rapporteur and as a member of the Drafting Committee, he had known Larry Johnson for 10 years. Throughout that time Mr. Johnson had provided a fine example of confidence and friendship, and would be sorely missed. He congratulated him on his new assignment and wished him every success in his new endeavour.

Closure of the session

128. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-ninth session of the International Law Commission closed.

The meeting rose at 7.45 p.m.