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Summary record of the 2067th meeting

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

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

74. The best approach would have been to predicate article 16 on article 9 [10], which set out the general obligation to co-operate. The majority of States, whether industrialized or not, were not prepared to accept the standard of strict liability for damage in case of pollution. He therefore agreed with Mr. Roucounas that article 17 should be brought forward to the position now occupied by article 16; the next article might then specify the obligation of individual watercourse States not to cause or permit pollution, and recommend various ways of ensuring its prevention.

75. The law on pollution control of watercourses should hinge on international co-operation; it was failure to observe the obligation to co-operate that should entail liability. That, in his view, was as far as the international community was prepared to go at present, and he saw little point in drafting articles, however commendable their spirit, which would not receive the international community's approval.

76. The CHAIRMAN announced that, in the previous week, the Commission had once again used 100 per cent of the time and conference service facilities allotted to it.

The meeting rose at 1 p.m.

2067th MEETING

Thursday, 23 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,[1] A/CN.4/412 and Add.1 and 2,[2] A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)[3] (*continued*)

1. Mr. YANKOV said that his comments on articles 17 and 18 would be of a preliminary nature. In his previous statement (2063rd meeting) on some general points relating to part V of the draft, and more particularly to article 16, he had already expressed his views on the notion of protection and preservation of the environment of international watercourses. He would not, therefore, revert to the matter, although the consideration of article 17 offered an opportunity to do so, since the article dealt directly with that issue and treated it as an obligation of States. In fact, article 17 dealt with it much more comprehensively than did article 16. By its very title (Protection of the environment of international watercourse[s] [systems]), which should have been worded "Protection and preservation of the environment of international watercourse[s] [systems]", article 17 sanctioned a concept of protection and preservation of the environment that was much broader in scope than the obligation not to cause or permit pollution.

2. On that subject, two different trends had emerged. The first, which could be described as "traditional", was to avoid pollution of the environment: a concept that belonged to the past and perhaps to the present, but certainly not to the future. The other, much broader, was to give a legal content to the concern to protect, preserve and if possible improve the environment, because it was no longer enough for mankind to combat the increase in pollution.

3. Pollution had already reached such proportions that some rivers were dead and others were turning into channels to spread pollution. It was therefore imperative to take preventive and corrective measures at the same time as conservation measures and, where possible, measures to improve the environment. Article 16, and especially paragraph 2, although it focused on the obligation not to cause or permit pollution, did not, for all that, reflect the classical notion of *non facere*. It did not state simply the obligation to refrain from doing something but, rather, the obligation to refrain from doing something specific: causing harm to the environment. Article 17, for its part, focused more on the obligation to take all reasonable measures to protect the environment of an international watercourse. Accordingly, the idea of placing article 17 before article 16, which had been put forward by Mr. Roucounas (2066th meeting) and supported by Mr. Koroma (*ibid.*), was quite justified, considering that paragraph 1 of article 17 enunciated the general obligation to protect and preserve the environment.

4. That was in fact the approach underlying part XII of the 1982 United Nations Convention on the Law of the Sea, in which the first article, namely article 192, proclaimed the general obligation of States to protect and preserve the marine environment. In that connection, incidentally, the provisions of the Convention relating to deep sea mining always used the expression

[1] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

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

[3] For the texts, see 2062nd meeting, para. 2.

"States parties", so as to emphasize the treaty obligations of States, whereas in most of the other provisions of the Convention, especially those in part XII, the general term "States" had been deliberately employed, in order to make it clear that the obligation enunciated was of a general character and binding upon all States, whether coastal or land-locked, and to enunciate a principle which the Convention, the bilateral and multilateral agreements and the domestic legislation of States could make into a legal tenet recognized by all.

5. State practice, as evidenced by numerous international instruments concluded both before and after the adoption of the United Nations Convention on the Law of the Sea, as well as by national legislation in some 20 countries, showed that States had already subscribed to that obligation to protect and preserve the marine environment. For example, only a few months earlier, the Bulgarian National Assembly had adopted a comprehensive law on the marine areas under Bulgaria's sovereignty and jurisdiction. The law reiterated the obligations incumbent upon States under those various instruments and under the 1982 Convention, namely to "take, both individually or jointly as appropriate, all measures . . . necessary to prevent, reduce and control pollution of the marine environment from any source" (art. 194, para. 1), and to "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights" (art. 194, para. 2). That approach, which amounted essentially to placing the emphasis on measures of prevention and conservation as a general obligation, was also to be found in article 3 of the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, in article 3 of the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, in article 1 of the 1972 London Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter, and in article 1 of the 1973 International Convention for the Prevention of Pollution from Ships.[4] The Commission was engaged in formulating rules which had to meet the challenges of today and also those of tomorrow. It should therefore stress measures of prevention, protection and preservation, bearing in mind particularly that it would be a number of years before a final text of the draft articles on the present topic was adopted.

6. Turning to article 17 itself, he pointed out that it comprised two paragraphs which were very different from one another and could well form two separate articles. Paragraph 1 set out a general obligation, whereas paragraph 2 could be considered as a provision deriving from that general obligation but centred on the marine environment. It would therefore be convenient to consider the two paragraphs separately, despite the fact that they were closely interconnected.

7. Paragraph 1 could be split into two paragraphs, the first expressing the general obligation to protect and preserve the environment of an international watercourse, including its ecosystem and surrounding areas, and the second, more specific in character, stating the obligation to take measures to protect and preserve the environment of the watercourse, including measures to prevent, reduce and control toxic wastes from industry, agriculture and communities, and in particular persistent wastes having a tendency to bio-accumulation. Some substances were biodegradable or could be rendered biologically harmless by natural processes of self-purification, but unfortunately that was not the case with the substances found in most rivers at the present time. For that reason, it was necessary to place the emphasis on the discharge or disposal of substances characterized by their persistence, their toxicity or their noxious properties and by their tendency to bio-accumulation. Those three criteria had already been used in a number of conventions, in particular in the 1974 Paris Convention on the Prevention of Marine Pollution from Land-based Sources.[5]

8. Paragraph 2 of article 17 could form a separate article, not only to bring out the question involved but also because the main sources of pollution of the marine environment were rivers, canals and the like, and because the provision should state the obligation of States to take all appropriate measures to protect and preserve the marine environment, including estuaries or mouths of rivers which flowed directly into the sea. It should not be forgotten that the sea penetrated deeply into some estuaries: the East River or the Hudson River, for example. In that connection, he associated himself with the remarks made by Mr. Roucounas on the repercussions of the contamination of international watercourses on the marine environment. Efforts should therefore be made to promote uniformity of the law in the matter, for in areas only a few kilometres from the coasts, the two régimes—the law of the sea and the law of international watercourses—might well have to be applied concurrently. In that case, the criteria he had mentioned with regard to paragraph 1 were of special relevance to pollution of the marine environment from land-based sources originating in rivers, estuaries, pipelines and outfall structures, as provided for in article 207 of the United Nations Convention on the Law of the Sea.

9. As to the drafting, the words "including estuarine areas and marine life", in paragraph 2, gave the impression that marine life was not part of the marine environment. It would be better to say "particularly estuarine areas and marine life".

10. In short, article 17 contained the basic elements but needed further elaboration, especially if the idea of placing it before article 16 were accepted and if some of his own observations were taken into consideration.

11. Turning to article 18, he said that it had some points in common with former article 15 which, after consideration by the Drafting Committee, had become article 19, on measures of utmost urgency,[6] but there were also differences. Both articles dealt with measures to be taken in emergency situations, i.e. in the event of serious and imminent threat to health, safety or other

[4] See 2063rd meeting, footnote 7.

[5] *Ibid.*

[6] See 2073rd meeting, para. 8.

vital interests. Article 19 spoke of the implementation of planned measures in general, while article 18 concerned measures to be taken in the event of pollution or other environmental emergency. Paragraph (1) of the Special Rapporteur's comments on article 18, which indicated the sources for that provision, referred to article 25 of Mr. Evensen's draft and to paragraph 9 of article 10 of Mr. Schwebel's draft; there might be other relevant texts as well. The Special Rapporteur drew attention, in his report (A/CN.4/412 and Add.1 and 2, footnote 264) to other possible sources for the drafting of article 18.

12. Paragraph 1 of article 18 contained a definition of "pollution or environmental emergency". He was not against such a provision, although is was a moot point whether it should appear there or elsewhere in the draft articles. However, he would be inclined not to confine the scope of the draft too strictly by a definition of that kind, which, general as it was, entailed a risk of leaving out certain important aspects. The text of draft article 18 would not suffer from the deletion of the definition.

13. As to paragraphs 2 and 3, the Special Rapporteur might find help in certain similar provisions, such as articles 198 and 199 of the United Nations Convention on the Law of the Sea, concerning notification of imminent or actual damage and contingency plans against pollution, as well as provisions of the same type appearing in various regional conventions. In addition, the reference to "any competent international organization", in paragraph 2, should appear in the plural, as there could be more than one competent organization in the case in point. With a few rare exceptions, the expression was to be found in that form in the United Nations Convention on the Law of the Sea. In paragraph 3, the term "neutralize" appeared for the first time. What did it mean as distinct from "mitigate"? Would not the terms used in various conventions—to "prevent", "reduce", "control" pollution—be appropriate? It seemed necessary to standardize the vocabulary employed in the articles.

14. In his introductory statement (2062nd meeting), the Special Rapporteur had said that he would not insist on having draft article 18 referred to the Drafting Committee at the present stage of the work. In his own view, the text needed further elaboration. Moreover, the title should be better suited to the contents, for instance "Preventive measures in an emergency".

15. Mr. BEESLEY said that he associated himself with everything Mr. Yankov had just said and had only a few observations to add. It was encouraging that every member who had spoken recognized the importance of the preservation of the environment; it could thus be taken for granted that the provisions of draft article 17 would be approved without much difficulty. True, the Commission had, in a way, put the cart before the horse by holding, in connection with draft article 16, a debate on the question of liability and on the relationship between the topic under consideration and others before the Commission, a debate which, although undoubtedly of interest, had at the same time been something of a digression from environmental issues, before debating the basic issue giving rise to such liability. However, although he would favour reversing the order of articles 16 and 17, he still thought that the approach adopted in that respect by the Special Rapporteur struck the right balance.

16. The Commission should now try to see how it might visualize the whole of part V of the draft. Even if it were decided to place paragraph 2 of article 16 between square brackets—something he was not suggesting—the definition of the term "pollution", in article 16, paragraph 1, would still be required. However, in accordance with normal practice, it should appear in article 1, on the use of terms. Part V could therefore start with a provision along the lines of paragraph 1 of article 17. Mr. Yankov's idea of splitting the paragraph in two seemed altogether acceptable. Even if the provision set forth a positive duty, that of protecting the environment, it would be difficult not to employ the word "pollution"; however, he would not press the point.

17. Paragraph 2 of article 17 could, as Mr. Yankov had just said, become a separate article. The text would also have to be harmonized with that of corresponding provisions to be found in other conventions, and particularly in the United Nations Convention on the Law of the Sea. It had been suggested that the Commission should revert to the approach adopted by Mr. Schwebel, but that was not absolutely essential. On the other hand, it would seem difficult to avoid using the expression "protection from pollution", which once more raised the question of the usefulness of defining the concept of pollution.

18. Paragraph 3 of article 16, concerning consultations with a view to preparing and approving lists of substances or species, would come next. The importance of that provision would stand out more clearly if the articles were presented in that order.

19. He was not in favour of deleting paragraph 2 of article 16. The Commission undoubtedly had to take into account the views expressed by States on certain issues, but it should not seek to substitute itself for States. He was not persuaded by the argument that a provision should not appear in the text because it would not be deemed acceptable by States. If, as Mr. Yankov had suggested, the positive obligation set out in paragraph 1 of article 17 were placed at the beginning of part V, the liability issue would, in his view, fall into place.

20. Lastly, concerning article 18, the expression "water resources" was too limited and should be replaced by a more general expression, such as "ecology of watercourses". The matter could be left to the Drafting Committee.

21. Mr. CALERO RODRIGUES said that draft article 17 was a specific application of the obligation to co-operate as set forth in article 9 [10] and also mentioned, in particular, in article 6, paragraph 2, and article 7 (*e*). The obligation to co-operate in the protection of the environment of watercourses was formulated in general terms, it being stated simply that watercourse States should take "all reasonable measures", the details to be settled through special agreements. Article 17 was therefore perfectly acceptable, and he wished to raise only a few points of detail.

22. Paragraph 1 spoke of the "environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas". The latter part of the sentence seemed unnecessary inasmuch as the concept of the environment was sufficiently well known to include ecology—unless the provision meant that protection should extend to the environment of the watercourse but be confined to ecology in the case of the surrounding areas. Some clarification of that point would be welcome.

23. The provisions of paragraph 2, whether or not they appeared in a separate article, deserved a place in the draft. The "marine environment" could, in fact, be regarded as forming part of "surrounding areas", not perhaps in terms of geographical proximity but in the sense that those areas could be affected by watercourses. The provision should, as far as possible, be harmonized with the text of the 1982 United Nations Convention on the Law of the Sea. Since the Convention defined "pollution of the marine environment" (art. 1, para. 1 (4)) without, however, specifying what the "marine environment" was, except to say that it included estuaries, a definition of the term was not necessary in the present context either. Lastly, to the extent that draft article 17 set forth an obligation to co-operate in the protection of the environment, it should be as wide as possible in scope. For that reason, the term "environment" should be understood in a broad sense. For the same reason, the expression "due to activities" was too restrictive: States should co-operate in the protection of watercourses against all impairment, degradation or destruction from any source, including natural causes.

24. In paragraph (3) of his comments to article 17, the Special Rapporteur contemplated the possibility of adding a provision on the adoption of protection régimes. There was no need for such a step; at most, a general indication of the type of measure or régime States might wish to apply could be included in the commentary.

25. Since the Special Rapporteur intended to review draft article 18 for the next session, he would confine himself to making a few suggestions. The title seemed to be too restrictive; the article should, as the definition in paragraph 1 entitled it to do, cover all emergencies, whatever the causes, even if they were not man-made.

26. Furthermore, article 18 set forth an obligation for the watercourse State to notify all potentially affected watercourse States in the event of an incident, as well as the obligation to take immediate action to prevent, neutralize or mitigate the danger of damage to other watercourse States resulting therefrom. In his view, there was a good case for expanding those provisions by adding a general obligation to co-operate with a view to minimizing the effects of emergencies. As to the obligation to inform, set forth in a general manner in article 10 [11], it should perhaps be made more strict in the present context, and some indication might be given of the mechanisms to be used in that connection.

27. Mr. AL-QAYSI welcomed the fact that the Special Rapporteur, as stated in his report (A/CN.4/412 and Add.1 and 2, para. 90), had reduced the part of the draft articles dealing with environmental protection and pollution to a bare minimum. Notwithstanding the importance of the subjects referred to at the end of the report (*ibid.*, para. 91), he was not in favour of expanding the scope of those provisions; the Commission's objective was to draw up a framework convention on the non-navigational uses of international watercourses, not on pollution control.

28. In connection with draft article 16, doubts had been expressed concerning the usefulness of the definition of pollution. To his mind, such a definition, whether it appeared in article 16 or in article 1, was absolutely necessary. While it might be appropriate, as the Special Rapporteur suggested (*ibid.*, footnote 207), to refer to the causes of pollution, as had Mr. Schwebel in his draft, the inclusion of the question of acid rain, as the Special Rapporteur seemed to contemplate, would certainly be going too for. Once again, it should not be forgotten that pollution control was only an ancillary aspect of the topic.

29. The expression "use of the waters for any beneficial purpose", in article 16, paragraph 1, was perplexing: uses for purposes which were not beneficial were difficult to imagine, and it would be preferable to speak simply of "uses".

30. Paragraph 2 of article 16, which set forth the obligation not to cause appreciable pollution harm to other States, had given rise to a good deal of questioning, particularly as to the meaning of "appreciable harm". Some members, taking the view that the criterion was a subjective one and did not lend itself to quantification, had suggested that it would be better to speak of "substantial" or "significant" harm. However, the Special Rapporteur had explained that he was using the expression in the same sense as it was used in article 8 [9]; moreover, the Commission should beware of reading too much into certain comments made by the Special Rapporteur without relating them to the text as a whole. For example, in paragraph (4) of the comments on article 16, the sentence "Rather, it is when such pollution causes appreciable harm to another watercourse State that it becomes internationally wrongful" was ambiguous if taken out of context. However, the Special Rapporteur was clear enough when he explained further that appreciable harm was harm that was "not trivial or inconsequential—but . . . less than 'substantial' ". "Substantial" harm might perhaps be easier to quantify, but if the standard adopted was too stringent, the provision ran the risk of not being applied. And indeed, was the expression "substantial harm" so much more objective? The difficulty might lie in the fact that the appreciable harm referred to in the text under consideration related to "other watercourse States"; one solution might be to relate it to the equitable and reasonable utilization of the watercourse. That suggestion should not be confused with what the Special Rapporteur said in paragraph (5) of his comments and developed further in paragraphs (16) and (18).

31. In his view, the matter was quite simple; the same standard must be used throughout the draft. If the criterion of "appreciable harm" was applied for the purpose of the rule of equitable and reasonable utiliz-

ation, it should also be applied for the purposes of the ancillary obligation to prevent pollution.

32. Another issue frequently raised in connection with paragraph 2 of article 16 was the nature of the liability entailed by a breach of the obligation. The Special Rapporteur explained in paragraph (6) of is comments that it was not his intention to institute strict liability. Admittedly, paragraphs (12) and (13) of the comments gave the impression that the Special Rapporteur was none the less attracted to the concept of strict liability. But it was pointed out in paragraph (15) that, in practice, the obligations concerning equitable and reasonable utilization and participation and those defined in paragraph 2 of article 16 would "often, and perhaps usually, be compatible", that being no doubt partly explained by the fact that equitable utilization would usually entail the avoidance by watercourse States of appreciable pollution harm to other watercourse States. That was a fundamental point. For how could utilization be considered equitable and reasonable if appreciable pollution harm was being caused? In his opinion, it would be neither wise nor realistic to introduce strict liability in that connection. Subject to some drafting changes, the text before the Commission would seem to remain within appropriate bounds in that respect.

33. In paragraph (6) of his comments, the Special Rapporteur indicated that the obligation enunciated in paragraph 2 of article 16 was "one of due diligence to see that appreciable harm is not caused to other watercourse States or to the ecology of the international watercourse". In that regard, it was surprising to find that paragraph (7) of the same comments mentioned such notions as "good government" or "civilized State", concepts which predated the Paris Conference of 1856 and implied a value judgment that sufficed to render them meaningless. The obligations of due diligence and due care and other obligations of conduct with respect to international watercourses clearly illustrated the unquestionable interconnection—already referred to by several members—that existed between the present topic and the one assigned to Mr. Barboza. While the consequences of a breach of the obligations within the scope of the present topic had a vital part to play in the settlement of disputes on international watercourses, they also came within the scope of the topic of liability for injurious consequences arising out of acts not prohibited by international law.

34. Again, it was essential not to lose sight of the particular situation of developing countries, and he therefore welcomed the statement in paragraph (8) of the comments that "the degree of vigilance or care required depends both upon the circumstances in which pollution damage is, or may be, caused and the extent to which the State has the means to exercise effective control over its territory". Moreover, while it could be held, as did Mr. Roucounas (2066th meeting), that an obligation of due diligence was not legally strong enough, any attempt to go beyond that might mean returning to the concept of strict liability. Several members had referred to the provisions of the United Nations Convention on the Law of the Sea which dealt with the question; it might be possible to draw on paragraph 2 of article 194 of the Convention and recast the opening of paragraph 2 of article 16 to read: "Watercourse States shall take all necessary and appropriate measures in order not to cause or permit pollution . . .".

35. On the subject of lists of toxic substances and the distinction between existing and new pollution, he shared the views outlined in the Special Rapporteur's comments. His position was similar with regard to the need for progressive development of the law in the matter—in a measured way, of course—and also with regard to the reasonableness of inserting in paragraph 3 a prohibition on the discharge of toxic pollutants into international watercourses.

36. He had no firm opinion concerning the suggestion that article 17 should precede article 16, but would draw attention to the fact that the Commission's task was to elaborate draft articles on international watercourses, not on protection of the environment. In addition, while it was true that the content of article 17 related to the law of the sea, such a provision in the draft was none the less useful and reasonable, first because of the unity of the environment, and secondly because it was equitable not to place the burden for protecting the environment solely on the coastal State on whose territory an international watercourse flowed into the sea. It might also be appropriate to consider a situation in which the discharge of pollutants into the sea by a State that was not a watercourse State resulted in the pollution of a watercourse through the action of tides.

37. As to article 18, he questioned, as a matter of drafting, whether it was correct to use the verb "to prevent" in paragraph 3 concerning damage that had already occurred.

38. In conclusion, he urged the Commission to be both realistic in its approach and modest in its goals: unduly general provisions would not suffice in the absence of concrete solutions, nor would detailed rules if they went beyond the bounds of the topic.

39. Mr. BENNOUNA said that he wished to offer some comments on the Special Rapporteur's approach and on the way of dealing with the question of pollution and protection of the environment, with a view to continued work on the topic.

40. Article 17 should be placed before article 16. On that point, he shared the view of Mr. Roucounas that the general provision should come first and the specific one second. Moreover, as pointed out by Mr. Yankov, combating pollution was only one of the aspects of protection of the environment. Protection of the marine environment, which was the subject of paragraph 2 of article 17, should form a separate article, with wording close to that of the provisions of the 1982 United Nations Convention on the Law of the Sea.

41. It was also necessary to remember, as Mr. Al-Qaysi had pointed out, that the Commission was assigned the task of formulating draft articles on the non-navigational uses of international watercourses, not on the protection of the environment of those watercourses. The question therefore arose whether that latter subject should be dealt with in detail or else be examined solely in the framework of the uses envisaged.

Personally, he favoured the second solution, for the same reasons as Mr. Reuter (2065th meeting).

42. In the circumstances, it would be premature to refer articles 16 and 17 to the Drafting Committee: their content was not clear, the plan for part V had not been established, the actual order of the articles had not been settled upon and the Commission had not yet decided what type of provisions and what type of law it was aiming at. Those were all questions that it was not for the Drafting Committee to settle. The Commission should therefore give the Special Rapporteur guidelines on how to deal with the issue of protection of the environment and pollution, so that proposals could be submitted at the next session and then referred to the Drafting Committee along with the observations made during the discussion.

The meeting rose at 11.35 a.m.

2068th MEETING

Friday, 24 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,[1] A/CN.4/412 and Add.1 and 2,[2] A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

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FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)[3] (*continued*)

1. Mr. THIAM congratulated the Special Rapporteur on his well-documented fourth report (A/CN.4/412 and Add.1 and 2), with its valuable systematic approach to a complex subject.

2. Draft article 16 consisted of three very different elements: a definition of pollution; the statement of a principle of responsibility; and a rule of co-operation. Those three elements were based on different concepts, and the article as it stood attempted to cover too wide a field. He therefore suggested that the three elements, all of them important, should be dealt with in separate articles; it would then be possible to treat them more fully.

3. With regard to the definition of "pollution" in paragraph 1 of article 16, he agreed that no exhaustive enumeration should be attempted. An unduly restrictive definition would be inappropriate for a subject that was in a constant state of evolution as a result of technical developments.

4. In regard to paragraph 2, his difficulties were not so much with the text as with the Special Rapporteur's comments in support of that provision. Since the comments consisted essentially of extracts from legal writings, his criticisms were directed at the authors of those works, not at the Special Rapporteur.

5. In the first place, with regard to the obligation of due diligence, paragraph (6) of the comments quoted the explanation by a writer that due diligence was the diligence "to be expected from a 'good government', i.e. from a government mindful of its international obligations". Paragraph (7) stated that the standard to be used in determining whether due diligence had been exercised was "the degree of care that could be expected of a 'good government' or a 'civilized State' ". Such a government or State was said to be one that possessed "on a permanent basis, a legal system and material resources sufficient to ensure the fulfilment of [its] international obligations under normal conditions".

6. It was hardly necessary to dwell on the questionable and out-of-date concept of a "civilized State". As to the introduction of the concept of a "good government" in the present context, he rejected it as morally unacceptable. A "good government", in the sense of those comments, was one that had the means of causing pollution, and did so on a large scale. Experience showed that it was the other governments—those not described as "good"—which had to suffer the consequences of pollution; their territories were becoming dumping grounds for harmful wastes originating in the territories administered by the "good governments". Those comments presented the governments that caused pollution as "good", instead of the governments that were not responsible for pollution.

7. Nor could he accept the suggestion that a State was exonerated from responsibility if it had taken appropriate preventive measures. A watercourse State had two separate and distinct obligations: first, to prevent pollution; secondly, to make reparation in the event of harm being caused by pollution. The fact that a State had discharged its obligations of prevention did not exonerate it from responsibility in the event of harm being caused by pollution.

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[1] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

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

[3] For the texts, see 2062nd meeting, para. 2.