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Summary record of the 2068th meeting

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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)

[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. 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.

8. The comments on article 16 suggested that the State would be responsible for appreciable harm caused by transboundary pollution only if the harm was foreseeable. That proposition was not valid. Regardless whether the harm was foreseeable or not, the State of origin incurred international responsibility in the event of harm being caused. The basis of responsibility was the harm caused; the occurrence of harm automatically generated State responsibility.

9. The expression "appreciable harm" was not the only one used in the report. Expressions such as "significant harm", "substantial harm", "serious harm" and others also appeared. Efforts should be made to bring greater harmony into the language used, not only in the articles, but also in the commentaries.

10. He agreed that not all harm could be compensated, but a more modern system of liability should be worked out which, without discouraging necessary activities, would protect the interests of third States. It was clearly necessary to depart to some extent from traditional concepts of responsibility.

11. The provisions of paragraph 3, on co-operation, should be broadened. Some mention should be made of international organs of co-operation; it was not sufficient to make provision for co-operation at the request of a watercourse State.

12. Mr. BARSEGOV said that draft article 17 covered a subject of great interest, not only to individual States, but to the whole of mankind. In the Soviet Union, the protection of the environment in general, and of watercourses in particular, was currently receiving much attention. In January 1988, the Central Committee of the Communist Party of the Soviet Union and the Council of Ministers of the USSR had adopted a decree radically restructuring the country's environmental protection activities on the basis of the growing interdependence of the state of the environment and economic development. A State committee for nature conservation had been set up to act as the central organ of State control for nature conservation and utilization of the environment. The committee's responsibilities extended to the utilization of surface and ground water, the marine environment and the natural resources of the Soviet Union's territorial sea, continental shelf and economic zone. In view of the global nature of ecological problems, steps were to be taken to increase the Soviet Union's co-operation in nature conservation with other countries and international organizations. The State committee was also responsible for ensuring the Soviet Union's fulfilment of obligations under international agreements on environmental protection and on the rational utilization of natural resources, and for formulating proposals for a unified State policy on international co-operation in those areas.

13. In the text of article 17, greater clarity was needed in determining both the object and the substance of the regulatory measures. The article spoke of protecting the environment of an international watercourse, including the ecology of the watercourse and of surrounding areas, from impairment, degradation or destruction, or serious danger thereof. He considered that the rules being elaborated should be directed principally to acts leading to pollution of the waters of the watercourse itself. The problem of ecology as a whole outside the area of the watercourse, important as it was, lay outside the topic under consideration.

14. As to relations between States in the matter of protection of watercourses, they took the form, in agreements between the Soviet Union and its neighbour States, of co-operation on a treaty basis. The agreements provided both for regular measures aimed at reducing pollution of the waters through national, bilateral or multilateral programmes relating to each particular watercourse, and for emergency measures to be taken in the event of pollution, or danger of pollution, caused by accidents or natural disasters. Those measures were taken in accordance with the internal regulations of the parties to the agreement and with the technical and economic possibilities open to them. That proviso was to be found, with minor variations, in all agreements on the subject between the Soviet Union and its neighbours. In addition to the adoption of agreed indicators to ensure comparability of observation data on water quality, unified methods of analysis and assessment of the condition of the water, and of any alteration in its quality, were elaborated on the basis of special agreements; those agreements also contained provisions on mutual assistance, exchange of experience and information, and joint control measurements. The nature and extent of co-operation depended largely on the closeness of political relations between the States concerned and could hardly be the same throughout the world, although in his opinion a higher level of worldwide co-operation was a goal worth striving for.

15. It had been suggested that the provisions relating to co-operation in pollution control should be placed in a separate article. While agreeing that such a step would emphasize the importance of preserving the purity of watercourses, he wondered whether separating that particular area of co-operation from the general article might not weaken the concept of the interrelationship between the utilization of watercourses and their protection. If the articles on ecology were to be set apart, they should give priority to co-operation.

16. In the light of Soviet practice as he had just described it, he could only welcome the provisions of article 17, and also the adoption of any necessary measures for the protection of the marine environment, which was a matter of great interest to his country with its long coastline and extensive economic zone. He agreed with previous speakers that paragraph 2 of article 17 should form a separate article, and would have no objection if that article or the commentary thereto included specific references to the 1982 United Nations Convention on the Law of the Sea which, he hoped, would have entered into force by the time the draft articles under consideration were completed.

17. Mr. EIRIKSSON said that he shared almost all the views expressed by Mr. Yankov, Mr. Beesley and Mr. Calero Rodrigues at the previous meeting. Article 17, paragraph 2, brought into focus a dilemma inherent in the draft from the outset. Should the Special Rapporteur be encouraged to propose the establishment of norms in other areas, or should he be asked to bring article 17, paragraph 2, into line with earlier articles, confining its scope to co-operation between watercourse

States in fulfilling their obligations, established elsewhere, to preserve the marine environment? In proposing that the Special Rapporteur should follow the former course, he hoped that the draft articles as a whole could be adapted accordingly at some later date.

18. His suggestions for the restructuring of part V of the draft were the following: paragraph 2 of article 16 would be placed in the section on general principles, beside the principle of equitable use, as an important aspect of the no-harm principle, with a cross-reference to part V, regarding the implementation of that obligation; paragraph 1 of article 17, dealing with measures to prevent the pollution of the environment of the watercourse, would become the first article of part V; paragraph 2 of article 17 would become a separate article whose provisions, as suggested by Mr. Yankov and Mr. Barsegov, would be of general application to the marine environment; paragraph 3 of article 16, since it merely provided an illustration of the possible measures to be taken, should follow the general articles, together with article 18 and, possibly, other similar illustrative provisions.

19. He would prefer the definition of pollution in article 16 to be replaced by the definition appearing in article 1, paragraph 1 (4), of the 1982 United Nations Convention on the Law of the Sea. In any case, the definition should refer to "pollution of the watercourse" or "pollution of the environment" rather than simply to "pollution". In paragraph 2 of article 16, which, as already suggested, should be moved to an earlier part and be accompanied by a cross-reference to part V, the word "the" before the word "pollution" was redundant and should be deleted.

20. In article 17, paragraph 1, the reference should be to "necessary" rather than to "reasonable" measures. He was not sure of the need to indicate that the environment of an international watercourse included its ecology; and, like Mr. Al-Qaysi (2067th meeting), he doubted whether it was appropriate to refer both to protection from impairment, degradation or destruction and to protection from danger thereof. In his view, the paragraph could be streamlined to read:

> "1. Watercourse States shall, individually and in co-operation, take all necessary measures to prevent pollution of the environment of an international watercourse [system] by activities within their territories."

21. Paragraph 2 of article 17 should, as already suggested, appear as a separate article setting out the general obligation to prevent pollution of the marine environment. It would then be divided in two parts, the first setting out the general obligation and the second dealing with co-operation between the watercourse States to fulfil that obligation. The reference to "an equitable basis" would be appropriate in the second part only. While agreeing that it was necessary to mention estuaries as being included in the marine environment, he saw no need to refer specifically to "marine life".

22. He shared the view of Mr. Calero Rodrigues (*ibid.*) on article 18, but if that article were maintained as a separate provision, the expression "pollution or environmental emergency", which was not a term of art, should be replaced.

23. He supported the use of the term "appreciable harm" in article 16, paragraph 2, having reached the same conclusion (2048th meeting) on that issue as in the case of the draft articles being prepared by Mr. Barboza.

24. Mr. TOMUSCHAT said that he found the text of article 17 rather difficult to understand. By speaking of "the environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas", the article brought the number of concepts dealt with in part V to four, namely international watercourses, the waters of international watercourses, the environment of international watercourses, and the ecology of international watercourses and surrounding areas. That approach was unnecessarily complicated, and the Special Rapporteur should have used simpler language and concentrated on the concept of the international watercourse and its waters. The introduction of so many elements entailed difficulties of interpretation and could lead the Commission into areas beyond the limits of the topic under consideration; in particular, there was a risk of encroaching on Mr. Barboza's topic. If the Special Rapporteur thought it necessary to keep the different terms, he should provide a clear explanation of their meanings and indicate what criteria he had used in differentiating between them.

25. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with the general orientation of the Special Rapporteur's work and with the part V which he proposed to include in the draft articles. It should be remembered that the object was to prepare a framework agreement to serve as a basis for States in drafting agreements to control the uses of individual watercourses. Accordingly, the definition of pollution in article 16, paragraph 1, should be adapted to take account, as appropriate, of already existing agreements, such as the 1982 United Nations Convention on the Law of the Sea. The definition should be in general terms, and he agreed with Mr. Thiam and other speakers that it should be moved forward into part II, on general principles.

26. Referring to the obligations set out in article 16, paragraph 2, he observed that pollution of an international watercourse generally resulted from lawful activities by watercourse States. As Mr. Reuter had pointed out (2065th meeting), responsibility in the event of transboundary harm arose from the consequences of lawful activities, rather than from those activities themselves. As to the use of the word "ecology" in the last phrase of paragraph 2, he agreed with Mr. Yankov (2063rd meeting) that the term "ecosystems" would be preferable.

27. There was no need to establish a list, as provided in paragraph 3, of substances or species whose introduction in the waters of the watercourse was to be prohibited, limited, investigated or monitored; that task could be left to States drawing up agreements on particular watercourses.

28. The point raised by Mr. Mahiou (2065th meeting) concerning cumulative responsibility in the case of international watercourses which crossed several countries was interesting and might be studied further.

29. In conclusion, he stressed the importance of complying with the General Assembly's instructions concerning the topic and of ensuring that all the articles could be properly integrated in a future framework agreement.

30. Mr. McCAFFREY (Special Rapporteur), summing up the discussion, said that there had been a very rich and helpful debate on articles 16 and 17, as well as a brief discussion of article 18. A wide spectrum of views had been expressed on the complex issues raised by articles 16 to 18; all those who had spoken, however, had agreed on the importance of environmental protection and pollution control. The differences of opinion related mostly to the manner in which the subject should be approached and the desired results achieved.

31. Before dealing with the articles in detail, he wished to speak on a number of general issues. The first was whether the draft should include a separate part to deal with pollution and environmental protection. A few members had expressed a negative opinion on that question, whereas others had considered that part V should be more detailed. The majority view had been that a separate part was necessary, because of the importance of the problem in the contemporary world. It had also been pointed out that the articles under discussion could affect non-watercourse States and areas beyond national jurisdiction—considerations which justified separate treatment of the subject, since the rest of the draft concerned only watercourse States.

32. It had been suggested that the rights and duties of non-watercourse States should be specifically provided for in part V. That point deserved careful consideration and could perhaps be covered simply by replacing the expression "watercourse States" by the term "States" in appropriate places.

33. Several speakers had referred to the number of draft articles on environmental protection and pollution, and to the detailed coverage of that subject; most of them appeared to favour a minimalist approach, on the grounds that the draft was intended to become a framework instrument. Some believed that several paragraphs should be made into separate articles, while others had suggested adding a procedural component, at least to article 16.

34. If the Commission accepted the Drafting Committee's recommendation that the subject of exchange of data and information should be moved to part II (General principles), part V would become part IV. With regard to the structure of part V, he could accept the useful proposal to reverse articles 16 and 17, so that the more general provision would come first and be followed by the more specific provision on pollution.

35. He had no objection to the suggestion that the title of part V be changed to "Protection of the environment of international watercourses", but wished to point out that the right of a State to be free from pollution harm went beyond environmental protection; it was not only the environment but also the uses of an international watercourse that had to be protected against pollution harm.

36. As to the definition of pollution in paragraph 1 of article 16, he had no objection to the suggestion that it should cover the "pollution of an international watercourse" and not "pollution" generally. The majority of speakers had favoured moving the definition to article 1, on the use of terms. He accepted that suggestion, which was in keeping with the Commission's usual practice. He had included the definition of pollution in article 16 for convenience only.

37. The terms of the definition had been found generally acceptable, although there had been some suggestions for improvement. One suggestion was that a reference be introduced to what produced pollution—a possibility which he discussed in paragraph (2) of his comments on article 16. It had also been suggested that the definition should refer to the "introduction" of dangerous substances, but some speakers had held that that approach would produce too narrow a definition: it was also necessary to cover pollution by withdrawal.

38. Several references had been made to the definition of pollution contained in article 1, paragraph 1 (4), of the 1982 United Nations Convention on the Law of the Sea. Some speakers had suggested that the definition in that Convention should be followed more closely, in the interests of uniformity of the law; others, however, had found that definition inappropriate for international watercourses.

39. It had been asked by one member whether the term "biological alteration" would cover the introduction of species such as fish, on the grounds that it was doubtful whether that problem could be dealt with in the context of pollution. In reply to that point, he would refer members to article 196 of the United Nations Convention on the Law of the Sea, concerning the use of technologies or the introduction of alien or new species. Paragraph 1 of that article referred to "the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto". The question of covering that type of harm should be considered.

40. One member had suggested that actions that produced detrimental effects indirectly should not be excluded from the purview of the articles; situations like that in the Minamata case would then be covered. Another member had thought that that kind of situation was already covered by the definition as it stood.

41. Concern had been expressed about the words "results directly or indirectly from human conduct", which did not appear to be in line with traditional causation requirements under the law of State responsibility. He would point out, however, that that would also be true of the definition in the United Nations Convention on the Law of the Sea which spoke of the "introduction by man, directly or indirectly, of substances or energy". He would not be opposed to examining alternative language with the help of the Drafting Committee.

42. It had been suggested that the term "safety" be replaced by "well-being", and that express reference be made to "amenities", as in the definition in the United

Nations Convention on the Law of the Sea. Those useful suggestions would be considered by the Drafting Committee. As to the proposed reference to radioactive elements, he recalled that in an earlier statement he had put forward the idea of introducing the term "energy", which would cover radioactivity (2062nd meeting, para. 45).

43. Some members had found the expression "any beneficial purpose" confusing, but the concept of "beneficial use" was well known in watercourse law, both national and international, being linked with the concept of equitable utilization. There was also a reference, in article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea, to "hindrance to marine activities, including fishing and other legitimate uses of the sea". If the expression "beneficial purpose" raised difficulties, he had no objection to referring simply to the "use of the waters".

44. Most speakers had found paragraph 1 of article 16 generally acceptable. He therefore proposed that it should be referred to the Drafting Committee together with the comments and suggestions made. The Drafting Committee would recommend whether the paragraph should be moved to article 1 of the draft.

45. Paragraph 2 of article 16 set out the obligation not to cause appreciable pollution harm, in which connection the Commission might wish to consider a suggestion that the first substantive provision in part V of the draft should read: "Watercourse States shall co-operate to prevent, reduce and control pollution of international watercourses." It had also been suggested that paragraph 2 should form the subject of a separate article, or be moved to part II of the draft.

46. One of the main issues discussed in connection with paragraph 2 had been the use of the expression "appreciable harm", for which there was ample precedent in State treaty practice. He would refer members, in particular, to Mr. Schwebel's third report, which stated that

> "Substantial", "significant", "sensible" (in French and Spanish) and "appreciable" (especially in French) [were] the adjectives most frequently employed to modify "harm"[4]

and which listed some of the agreements in which equivalent expressions were used.[5] The intention, as explained in paragraph (4) of the comments, was to use a term that was as factual as possible. He agreed on the need for an objective criterion but, in the absence of specific agreement on scientifically determined levels of permissible emissions, it was possible to have only a general criterion that came as near as possible to objectivity. That was particularly true of a framework agreement. Besides, if a different criterion, such as "substantial" or "considerable" harm, were used in article 16, it would be difficult to reconcile with the criterion of "appreciable" harm laid down in article 8 [9].

47. As to the relationship between the concept of "appreciable harm", in paragraph 2 of article 16, and that of "detrimental effects", in paragraph 1, his idea was that such effects might, or might not, rise to the level of appreciable harm. Both terms, or similar ones, had been used in conjunction in other instruments, such as the United Nations Convention on the Law of the Sea. He agreed, however, that detrimental effects which did not rise to the level of appreciable harm should be the subject of "reasonable measures" of abatement, under paragraph 1 of article 17.

48. The question of responsibility was particularly difficult, because it touched on the topics of State responsibility and liability for acts not prohibited by international law. He urged members not to try to resolve all the problems that had arisen in regard to those two topics in a single paragraph of one article of the draft under consideration, since that would only delay the work on the topic as a whole.

49. He had been surprised by the number of members who considered that watercourse States should be held strictly liable for all appreciable pollution harm, although most members believed that causing such harm entailed the international responsibility for wrongfulness of the State of origin only. In his view, that was the right approach; for there was little, if any, evidence of State practice that recognized strict liability for pollution damage that was non-accidental or that did not result from a dangerous activity—which matters properly fell within the scope of Mr. Barboza's topic.

50. Once that approach was accepted, the question that arose was what exactly was the nature of the obligation or primary rule involved? It seemed clear from paragraph 2 of article 16 as drafted that, as Mr. Barboza (2064th meeting) had convincingly demonstrated, it was an obligation of result. The paragraph could, however, be interpreted as establishing a rule of strict liability, or of liability without fault, for causing appreciable pollution harm. Since that was not the intention, some way should be found to make it clear that it was responsibility for wrongfulness, not strict liability, that was at issue. That could be done in a number of ways. The paragraph could, for instance, be drafted to provide that watercourse States should "exercise due diligence" or "take all measures necessary to prevent the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm". Alternatively, the wording of article 194, paragraph 2, of the United Nations Convention on the Law of the Sea could be followed, to provide that:

> "Watercourse States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause appreciable harm by pollution to other watercourse States or to the ecology or ecosystem of the international watercourse [system]."

Another alternative would be to leave paragraph 2 as it stood and add a paragraph providing that a watercourse State should not be considered to be in violation of paragraph 2 so long as it was exercising due diligence or taking all reasonable measures to prevent appreciable pollution harm.

51. Some members had rightly noted that the obligation of due diligence had been proposed with a view to introducing a measure of flexibility in an obligation not to cause appreciable pollution harm which would

[4] *Yearbook ... 1982*, vol. II (Part One), p. 98, document A/CN.4/348, para. 130.

[5] *Ibid.*, pp. 98-99, paras. 132-133.

otherwise be quite strict; other members had welcomed the idea that the degree of diligence or care required should be proportional to the means at the disposal of the State. It had also rightly been said that an obligation of due diligence was nothing new. He was not, however, aware of any case in which the principle of due diligence had been applied to transfrontier pollution by name, although the arbitral award in the *Trail Smelter* case had come close to applying it, without actually using the term "due diligence". In any event, there was no need to use that term if it had undesirable connotations. On the other hand, a number of commentators had concluded that it was an appropriate general standard in cases of transfrontier pollution, and it had received extensive consideration by OECD.

52. The main question was, if State A had taken all reasonable measures to prevent appreciable pollution harm to State B, but such harm none the less occurred, would State A be internationally responsible? If the answer was in the affirmative, State A would, in his submission, be strictly liable for an act not prohibited by international law since, although it had used all means at its disposal, harm had still occurred. To his mind, that situation fell within Mr. Barboza's topic. If the answer was in the negative, and State A were not held internationally responsible if it had taken all the measures at its disposal to prevent pollution harm, a further question was whether State A had any duty or whether State B was to be left to bear its loss alone. On that question, the work on Mr. Barboza's topic could be very helpful. A provision might, for example, be included to the effect that State A should consult and negotiate with State B with a view to establishing a régime for compensation or to introducing additional measures to prevent, reduce or mitigate pollution harm.

53. He continued to believe, however, that a criterion of due diligence was the appropriate standard, not only because it afforded a measure of flexibility in the draft, but also because there was considerable support for it in State practice. According to that standard, which had the support of a number of members, a watercourse State would be internationally responsible for appreciable pollution harm to another watercourse State only if it had failed to exercise due diligence to prevent harm. In other words, the harm must be the result of a failure to fulfil the obligation of prevention. Mere failure to exercise due diligence, without appreciable harm to another watercourse State, would not entail responsibility, because what was involved in such a case was an obligation of result, not of conduct.

54. Some members, however, took the view that due diligence was too weak a standard, and placed too heavy a burden on the victim State, since only the State of origin would have the means of proving whether or not it had exercised due diligence. It had therefore been suggested that the burden of proving due diligence should be reversed, to lie with the State of origin. While he agreed with that suggestion, it would be difficult to provide for it in a framework instrument, especially if the instrument did not provide for machinery for the settlement of disputes. The point could perhaps be dealt with in the commentary and also considered in the Drafting Committee.

55. Another question concerned existing versus new pollution. While some members considered that a distinction must be made between the two, others believed that all pollution should be treated in the same way. His own view was that there could be no legal distinction between existing and new pollution, first, because there was no vested right to cause appreciable pollution harm and, secondly, because by the time the new pollution had been identified by the victim State, the State of origin might be able to argue that it had already become existing pollution. There had also been instances in which States had allowed each other a reasonable period of time in which to reduce existing pollution to acceptable levels, as in the case of the Rhine. That approach, which could be regarded as an application of the principle of due diligence, was the most consistent with State practice and the most suitable for a framework instrument. One proposal was that provision should be made for a transitional period within which States must comply with the requirement not to cause appreciable pollution harm. He would support that interesting proposal if a provision suitable for inclusion in a framework instrument could be drafted, but he was not sure how that could be done.

56. With regard to the relationship between article 16, paragraph 2, and article 6, which set out the rule of equitable utilization, he noted that none of the members who had addressed that question had advocated providing for an exception, on the grounds of equitable use, to the prohibition of appreciable pollution harm. Accordingly, the same standard should be applied in article 16 as in article 8 [9], which also provided for no exception to that prohibition.

57. Two ideas brought up during the discussion struck him as extremely good, and he hoped their authors would offer specific proposals to be taken up in the Drafting Committee. The first was that provision be made for an obligation to consult, at the request of a watercourse State, regarding "creeping" or "structural" pollution. The second was that the duties of exchanging data and information and of consultation be applied to all aspects dealt with in the article on pollution. The proposal to replace the term "ecology" by "ecosystems" was a definite improvement, and he endorsed it.

58. It had been suggested that a provision similar to the one in article 195 of the United Nations Convention on the Law of the Sea, relating to the duty not to transform one type of pollution into another, be included in the draft. He could accept that proposal and its consideration by the Drafting Committee, but he feared that it might introduce too many technical elements.

59. As to paragraph 3 of article 16, he endorsed the suggestion that it should be set out as a separate article. Most members had supported the inclusion of some reference to the preparation of a list or lists, which, many agreed, could be the responsibility of the watercourse States. He agreed that the paragraph should not imply that the list was fixed or unchangeable; the addition or deletion of substances, according to circumstances, should be permitted.

60. In regard to the suggestion that an international standard should be developed for drawing up the lists, he drew attention to the list of environmentally harmful chemical substances and the definition of "hazardous wastes" prepared by UNEP.[6] It might be possible to stipulate that the lists must be drawn up in accordance with internationally accepted standards, such as those contained in the 1973 and 1978 MARPOL Conventions[7] and in the 1974 Paris Convention on the Prevention of Marine Pollution from Land-based Sources.[8]

61. He could agree with those members who thought that the introduction of toxic substances in an international watercourse should be banned, but must point out that there was very little authority in State practice for such a provision. On that point, he drew attention to article 194, paragraph 3 (*a*), of the United Nations Convention on the Law of the Sea. Other members of the Commission had pointed out that a prohibition could be implemented only if the banned substances were clearly identified—but those substances might vary with each watercourse system, and thus could best be covered by specific agreements. An alternative approach might be something along the lines of principle 8 (*d*) of the set of principles adopted by ECE in 1987 on co-operation in the field of transboundary waters (see A/CN.4/412 and Add.1 and 2, para. 56).

62. He endorsed the suggestion that article 17 be placed before article 16. He also agreed that the title of article 17 be redrafted to read: "Protection and preservation of the environment of international watercourse[s] [systems]", and that the obligation to "protect and preserve" the environment be stated in paragraph 1. There were good reasons for making paragraph 2 a separate article, as some members had suggested, and he had no objections to that proposal.

63. It had also been suggested that paragraph 1 of article 17 be divided into two paragraphs, the first to deal generally with the protection and preservation of the environment of an international watercourse, and the second to deal specifically with protection against substances that were toxic and tended to be bioaccumulative. He saw that as a positive idea and would welcome a draft text to that effect, which could be examined by the Drafting Committee. He had no objection to the idea that the article should include an obligation to "prevent, reduce and control" pollution of the environment of an international watercourse.

64. Regarding the comment that it was not clear whether a distinction was intended between the "environment" and the "ecology" of a watercourse, he explained that the formulation "measures to protect the environment . . . including the ecology" had been intended to show that "ecology" was included in "environment", which was the broader concept. It might be worth while, however, to consider defining the term "environment of an international watercourse" in article 1, in order to make it clear that the concept embraced the ecology of the watercourse or its ecosystems. He fully agreed that the paragraph should deal exclusively with international watercourses, and not purport to cover the entire environment.

65. In article 17, paragraph 2, he had no objection to inserting the words "and preserve" between the words "protect" and "the marine environment", to including a specific reference to the relevant provisions of the United Nations Convention on the Law of the Sea, and to providing that the mouths of rivers were covered, as in article 9 of that Convention.

66. Concerning article 18, he noted that most speakers had agreed that a comprehensive article dealing with all kinds of emergency situations, not only those related to the environment, should be included. He proposed to submit such an article at the Commission's next session, in the context of the subject of water-related hazards and dangers. The idea that the scope of paragraph 2 should be enlarged to include the duty to co-operate in providing information and in minimizing any harm caused by the emergency was a good one and would be taken into account in future drafting work on the article. Other points raised during the discussion related mainly to drafting, and would likewise be taken into account in future work.

67. He did not propose to submit additional articles for the Commission's consideration, since the debate had shown that the best approach would be to attempt to refine the existing articles by incorporating a number of points. He wished to thank members for giving so much thought to the articles that an extremely rich and constructive debate had resulted from their comments. Owing to the Commission's schedule of work, and because he feared that single-handedly he could do little to improve the draft, he requested that articles 16 and 17 be referred to the Drafting Committee.

68. The CHAIRMAN invited the Commission to decide whether the draft articles should be referred to the Drafting Committee. Some members had suggested that the referral should be postponed until the Commission's next session to allow time for further consideration, but the Special Rapporteur believed that no useful purpose could be served by such postponement.

69. Mr. THIAM called on the Special Rapporteur to justify his comment that, in the view of most members of the Commission, responsibility must be attributed solely on the basis of a wrongful act; in other words, that, if a person or an entity that caused pollution could not be shown to have committed a wrongful act, then responsibility for the harm could not be attributed. He strongly disagreed: the notion of due diligence was not acceptable to a majority of members if it enabled a State to evade its responsibility.

70. Mr. McCAFFREY (Special Rapporteur) said that the fundamental issue addressed in the draft articles was whether a State would be held responsible for appreciable pollution harm that emanated from its territory even if it had taken all the measures at its disposal to prevent such harm from occurring. He had found, through his research, that in practice States did not hold other States strictly liable without taking into consideration the efforts they had made to prevent or control pollution.

[6] UNEP/GC.14/9 (24 February 1987).

[7] 1973 International Convention for the Prevention of Pollution from Ships and 1978 Protocol; see 2063rd meeting, footnote 7.

[8] *Ibid.*

71. Mr. ARANGIO-RUIZ said he believed it would be reasonable to refer articles 16 and 17 to the Drafting Committee, as requested by the Special Rapporteur, with the proviso that the criterion of due diligence would apply, but that reversal of the burden of proof should be made explicit, perhaps in a new paragraph.

72. Mr. BARSEGOV said that since the Special Rapporteur had intimated that no new article would be submitted at the current session, he had no objection to referring those before the Commission to the Drafting Committee. He was afraid, however, that if the Commission adopted a decision on responsibility in the context of the topic under consideration, that might prejudge the question of responsibility for transboundary harm caused by lawful activities before the consideration of that difficult problem was completed.

73. Mr. BEESLEY said that, in view of the complexity of the issues, it was understandable that some members had reservations on whether the articles were ripe for referral to the Drafting Committee. He believed, however, that the thorough debate and the summing-up made by the Special Rapporteur had provided a sound basis for such referral. It would not be the first time the Commission had sent a draft to the Drafting Committee while some points still remained to be settled. If the Drafting Committee performed a purely formal function, as had been the case at the Third United Nations Conference on the Law of the Sea, he would not support referral. In view of the Committee's role of conciliation and negotiation, however, and because it was not the final arbiter, since its revisions came back to the Commission, he had no hesitation in fully endorsing the Special Rapporteur's recommendation that articles 16 and 17 be referred to the Drafting Committee.

74. Mr. THIAM explained that he did not oppose referral, but wished the objections he had raised regarding due diligence to be duly taken into account.

75. Mr. KOROMA said he supported Mr. Thiam's view that the Commission should move away from the dichotomy traditionally established in the context of State responsibility, between holding the perpetrator legally liable or leaving the victim to bear the cost of damage. In cases of pollution, source States were generally not prepared to accept legal liability, but would acknowledge their moral liability by compensation. Mr. Thiam seemed to be suggesting that the Commission should find a happy medium between not enforcing strict liability and ensuring that those who suffered harm because of pollution were compensated.

76. The Special Rapporteur had respected the views on the draft articles put forward during the debate, and had intimated that he would be prepared to recast them before their referral to the Drafting Committee. Hence the draft articles appeared to qualify for referral.

77. Mr. AL-KHASAWNEH said he did not think the draft articles were ready for referral: the Commission's debate had shown that fundamental questions relating to State responsibility and liability still needed to be settled. Referral to the Drafting Committee would impose on it the burden of deciding matters of substance, and would merely perpetuate debate on those difficult points. He suggested that the Special Rapporteur submit a revised set of articles.

78. Mr. PAWLAK endorsed the recommendation that articles 16 and 17 be referred to the Drafting Committee. Experience had shown that the Drafting Committee generally revised texts heavily, which was perhaps what was needed in the present case.

79. Mr. FRANCIS said that the draft articles should be referred to the Drafting Committee; that would enable the Special Rapporteur to submit a new set of articles at the Commission's next session.

80. With regard to the remarks made by Mr. Barsegov and Mr. Koroma on liability, he understood the Special Rapporteur to have been referring to liability in situations in which upstream States had done all they could and appreciable harm still resulted. Such cases could be dealt with in the context of the topic of liability for non-prohibited acts, with specific reference to the question of compensation, and not in relation to breaches of obligation, under article 16, paragraph 2.

81. Mr. BARBOZA said he supported the Special Rapporteur's recommendation. The discussion in the Commission had provided many elements on which drafting decisions could be based, and the Commission would have plenty of time to reflect on the solutions proposed by the Drafting Committee and take decisions on them.

82. Mr. BENNOUNA said he had a number of reservations about referring the draft articles to the Drafting Committee. The Special Rapporteur himself had acknowledged that many substantive changes would have to be made and that the articles might even need to be restructured. A more logical procedure would therefore be for him to redraft the articles and submit them for a brief debate in the Commission, after which they could be referred to the Drafting Committee. No time would be gained by premature referral.

83. The CHAIRMAN, speaking as a member of the Commission, said that he did not oppose referral. Nevertheless, he would point out that it was by no means traditional in the Commission's work for every draft article to be referred to the Drafting Committee; often they were first discussed a number of times in plenary. It was not appropriate for the Commission to leave fundamental problems unresolved and to delegate responsibility for them to the Drafting Committee, which was a body of limited membership. More discussion on the draft articles was needed, and the process would be facilitated if the Special Rapporteur were to submit a new set of articles, redrafted in the light of the discussion, for consideration at the Commission's next session.

84. Mr. BEESLEY said that he had suggested that articles 16 and 17 should be referred to the Drafting Committee, but accompanied by a statement that the Commission had not succeeded in resolving all its differences, and perhaps with paragraph 2 of article 16 in square brackets. Then, if the Drafting Committee could not resolve the outstanding problems, the Commission could take them up again.

85. Mr. McCAFFREY (Special Rapporteur) said he deeply appreciated the Commission's confidence in him, but doubted that he could produce a set of articles at the Commission's next session that would have effectively ironed out the remaining difficulties. Experience had shown that problems as fundamental as those the Commission was faced with could only be resolved in plenary after weeks of discussion. The Drafting Committee had often been chosen in the past as the appropriate place for working out difficult issues. Furthermore, if the articles were not referred to the Drafting Committee at the current session, the Committee might well not have a chance to consider them at the next, as the topic would probably be taken up fairly late. Work on it would then be delayed for a year.

86. The CHAIRMAN suggested that members of the Commission continue to reflect on the matter, and that a decision be taken at the next meeting.

It was so agreed.

Closure of the International Law Seminar

87. The CHAIRMAN said that the closure of the twenty-fourth session of the International Law Seminar was taking place in a plenary meeting to emphasize the importance attached to the annual Seminar by the Commission. The Seminar had been initiated in 1965, under the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. In close co-operation with the Commission, it had played a useful part in spreading knowledge of the Commission's work among students of international law and young officials of Member States of the United Nations.

88. At the current session, 20 young lawyers from all regions of the world, and in particular from developing countries, had been selected to attend the Seminar. Despite financial problems, the contributions obtained had made it possible to grant 10 fellowships. In addition, there had been four participants from the United Nations-UNITAR Fellowship Programme in International Law, a joint programme of the Office of Legal Affairs and UNITAR, which reflected the integration of the Seminar in the United Nations Programme of Assistance on international law.

89. Some difficulties had arisen regarding the availability of conference services, in particular simultaneous interpretation. He was confident that appropriate steps would be taken with the responsible officials of the United Nations Office at Geneva to ensure that, at the next session, the Seminar would be provided with the usual conference services.

90. The General Assembly had repeatedly emphasized, in its resolutions, the importance of the teaching, study, dissemination and wider appreciation of international law, which served to strengthen the function of progressive development and codification of international law entrusted to the Commission. It was not enough to formulate rules; they had to be disseminated and made known in order to promote their acceptance by States. Nothing could be more appropriate than the attendance at the Commission's sessions of a selected group of young lawyers who would later come to influence the decisions of their respective Governments and to spread knowledge of those rules in their own communities.

91. Those objectives were of particular significance for the participants from developing countries, whose attendance at the Seminar enabled them to improve their knowledge for the benefit of their own countries, many of which lacked the necessary resources to provide such specialized training.

92. On behalf of the members of the Commission, he wished all the participants in the Seminar a safe journey home and success in their professional activities.

93. Mr. MARTENSON (Director-General) said that the object of the International Law Seminar was to enable young lawyers who were qualified, and who worked in the field of public international law, to familiarize themselves with the work of the International Law Commission and to meet and discuss topics of international law with its members. Those participants in the Seminar who had been attending an international conference for the first time would perhaps also have gained greater insight into the reasons why international conventions, so often the result of a compromise reached after long negotiations, took some time to elaborate and were not always perfect.

94. Five members of the Commission had addressed the Seminar, at which the emphasis had been placed on humanitarian law, including human rights, which was a subject of particular interest to him as head of the Centre for Human Rights. The Seminar had also provided participants with a valuable opportunity for meeting and exchanging experience with other lawyers from countries with totally different legal and sometimes also political systems.

95. The Chairman had raised the question of conference services. Over the years every effort had been made to supply the Seminar with the necessary resources, although no budget allocation had been made for that purpose. Given the unfortunate financial situation of the United Nations, to which the Secretary-General had recently drawn attention, it had been especially difficult to provide the twenty-fourth session of the Seminar with all the necessary services, particularly interpretation. He trusted, however, that when the financial problems of the United Nations were resolved, that difficulty would be overcome, and that the General Assembly would take steps to provide a proper budgetary foundation for effective work at future seminars.

96. He hoped that the participants would find the experience gained at the Seminar useful in their future careers.

97. Mr. BLAY, speaking on behalf of the participants in the International Law Seminar, thanked members for their learned contributions to the Seminar and assured the Commission of the great admiration and respect of all participants in the Seminar for the work it was doing.

The Chairman presented the participants with certificates attesting to their participation in the twenty-fourth session of the International Law Seminar.

The meeting rose at 1.25 p.m.