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Summary record of the 2166th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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44. In the event, the Special Rapporteur had apparently been guided above all by treaty provisions relating to environmental protection and transboundary pollution, but that link was not in itself likely to call into question the usefulness of the provisions in annex I, provided that they formed the subject of a protocol that was optional.

45. Since the Commission planned to complete its consideration of the draft articles on first reading at its next session, however, it would be preferable if the Special Rapporteur could submit to it as a matter of priority the articles that had been announced on the settlement of disputes. He, too, therefore considered that it would be advisable to postpone consideration of the proposed articles on implementation until after the first reading and not to refer them to the Drafting Committee at the current stage, particularly since some members of the Commission had pointed out that some of those articles should rather be placed among the general principles, and that would call into question provisions already adopted by the Commission.

46. Mr. McCAFFREY (Special Rapporteur) said that he had submitted provisions on the settlement of disputes to the Secretariat and trusted that they would be distributed during the course of the current session.[6] That would enable members to take cognizance of the provisions in time for the next session and to express their views on the matter then.

47. Mr. FRANCIS, referring to the comments made by Mr. Bennouna at the previous meeting with regard to the wording of paragraph 1 of draft article 24 (Relationship between navigational and non-navigational uses; absence of priority among uses), said that, in his view, it would be difficult for the Special Rapporteur to avoid referring to navigation, since the objective was also to lay down the principle of equality between the different uses to which an international watercourse might be subject. He would, however, have preferred paragraph 1 to read:

> "Neither navigational use nor any use contemplated by these articles shall enjoy any inherent priority over any other use."

Worded in that way, the paragraph would probably have more chance of being accepted.

The meeting rose at 11.30 a.m. to enable the Drafting Committee to meet.

[6] Annex II to the draft articles, on fact-finding and settlement of disputes, is contained in chapter IV of the Special Rapporteur's sixth report (A/CN.4/427 and Add.1).

2166th MEETING

Thursday, 31 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Co-operation with other bodies (*continued*)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Guerreiro, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. GUERREIRO (Observer for the Inter-American Juridical Committee) said that, fortunately, the Commission and the Inter-American Juridical Committee had been able to maintain the co-operation provided for in their statutes. The visit by the Commission's outgoing Chairman, Mr. Graefrath, at the Committee's August 1989 session held at Rio de Janeiro had been much appreciated.

3. The Inter-American Juridical Committee's field of operation covered not only public international law but also private international law, consultative opinions, legal aspects of regional integration and studies on the possibilities for uniform legislation. The Committee was in a sense the heir to various legal organs of the inter-American system going back to 1906. For its part, the Commission was the result of a General Assembly decision pursuant to Article 13, paragraph 1 (*a*), of the Charter of the United Nations, and its statute reflected the trends prevailing at the time the Commission had been established: the trend which favoured conventions as the only proper method of codification; the school which thought that anything beyond "restatements" was dangerous; and the middle course which advocated flexibility, leaving it open to the Commission to recommend the conclusion of a treaty or the adoption of a resolution, or even simply to take note of something. The Committee followed more informal methods, probably because of its regional character and smaller membership. However, the spirit of both the Commission and the Committee, and to a large extent the topics discussed, were similar.

4. In recent years, the Committee's agenda had been dominated by items connected with the drug problem and preservation of the environment. In 1989, it had held only one session, at which it had completed its draft American Declaration on the Environment. Article 1 contained the essence of the right of man to a balanced and healthy environment, while article 2 stressed that preservation of the environment was not only everyone's right, but also their duty. The draft declaration was thus addressed to the public at large.

* Resumed from the 2160th meeting.

Accordingly, it also established the duty for States and communities to include topics on preservation of the environment in educational programmes.

5. Article 3 of the draft declaration, which was of fundamental importance for the western hemisphere, provided for mutual technical assistance. Preserving, sustaining, restoring and improving the quality of the environment obviously required experience and often costly research. Article 4 embodied well-known principles from the 1972 Stockholm Declaration[1] and other United Nations resolutions and said that the American States had the sovereign right to exploit their own natural resources and to produce man-made goods pursuant to their environmental laws and policies and development plans and to ensure rational exploitation of such resources so that production of such goods would ensure their sustained availability and the general interest of the community. As the Committee saw it, there was no contradiction between preservation of the environment and development, although there could be difficulties in maintaining a balance between the two.

6. Article 5 of the draft declaration limited sovereign rights in matters pertaining to the environment by application of the principle of responsibility for damage to third parties. For the damage to be legally relevant, the article specified that it had to be "significant". Article 6 referred to the State's duty to require individuals and corporations to submit prior assessments of any planned activity that might affect its own environment or that of other States. Such prior assessment was commonly required in national legislations.

7. Article 7, which established liability for damage caused to the environment of another State by transfrontier pollution, laid down the duty to restore the environment to its previous condition and to compensate for loss and damage. It recognized the State's right to proceed against the polluters whose action had given rise to its liability. Although that right was a normal rule in domestic legislation, the Committee had deemed it necessary to spell it out because of some concern about possible international effects; the text even said: "including transnational corporations". Article 8 in a sense limited the liability of the State responsible for transfrontier pollution by specifying that such pollution was relevant only when it exceeded the levels considered acceptable under comparable conditions and in comparable zones inside the country in which the pollution originated. Such a standard of equity was to be found in the "Principles concerning transfrontier pollution" adopted by the Council of OECD in 1974.

8. The second part of the draft declaration consisted of articles 9 to 18, which were procedural and referred to the duty of information and consultation. The parties were called upon to have recourse to a procedure of inquiry and conciliation in environmental disputes, in which connection provision was made for a joint commission, which was not an arbitration tribunal. If everything failed, however, article 17 specified that the States involved in the environmental dispute agreed to seek any other procedure for peaceful settlement provided for in the Charter of the Organization of American States.

9. Article 18 established that an American State had to give precedence to the procedure established in the draft declaration if another American State resorted to the declaration to facilitate settlement of an environmental dispute, even if it was a party to international treaties relating to certain forms of pollution. Of course, that provision did not mean that a State which was bound by a treaty should disregard its commitments thereunder in order to give preference to the declaration. Article 18 laid down an obligation on States "to the extent of their abilities" and the legislative history of the article showed that the intention was to set forth a plea rather than a binding obligation.

10. The draft declaration was important because it was the first instrument on the environment of such general scope to be adopted by the member States of OAS. It was the outcome of a serious analysis of relevant treaties, national legislations and recommendations by international bodies.

11. At its August 1989 session, the Committee had also adopted a resolution on improvement of the administration of justice in the Americas, a matter of great importance for strengthening democratic processes and institutions. It had resolved that an inter-American association should be formed on a private basis, working in close co-operation with governmental and intergovernmental bodies and in harmony with the General Secretariat of OAS, in order to facilitate inter-American discussion and consideration of methodologies and activities for better administration of justice in the Americas. Steps to expedite the formation of the new association would be taken by the American Society of International Law. For reasons of efficiency, and also on budgetary grounds, the Committee had recommended that the task be undertaken by private efforts.

12. The Committee had heard proposals and progress reports on a number of other items: co-operation in preventive measures on criminal matters, more particularly suppression of drug trafficking; legal aspects of foreign debt; legitimacy in the American system and the interaction of the provisions of the OAS Charter regarding self-determination, non-intervention, representative democracy and protection of human rights; and the reasons why a greater number of States were not parties to the 1948 American Treaty on Pacific Settlement (Pact of Bogotá).

13. Lastly, one of the Committee's most interesting activities was the course on international law it organized with the help of OAS and the Getulio Vargas Foundation. Students came from many States members of OAS and included young university professors and diplomats. The subjects were very varied and highly appreciated lectures had been given by, among others, a number of members of the Commission in attendance at the Committee's sessions. It was to be hoped that in 1990 it would again be possible to benefit from such an opportunity.

[1] See 2151st meeting, footnote 1.

14. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his very clear presentation of the Committee's work. The topics it had under consideration were of great interest to the international community, and to the Commission in particular. The two bodies had common objectives, and co-operation between them was of very great benefit to both. They had much to learn from each other and he sincerely hoped that such co-operation would become closer, in the interests of the progressive development and codification of international law.

15. Mr. McCAFFREY, speaking on behalf of members of the Commission from the Western group of countries, welcomed the lucid and very informative statement made by the Observer for the Inter-American Juridical Committee, which had dealt with matters connected with some of the items on the Commission's own agenda, such as the law of the non-navigational uses of international watercourses, and international liability for injurious consequences arising out of acts not prohibited by international law. In 1987 it had been his privilege to represent the Commission at the Inter-American Juridical Committee's session and, like other members of the Commission who had had the same experience, he had been impressed by the Committee's very effective methods of work— an effectiveness which was demonstrated by its remarkable output.

16. Mr. DÍAZ GONZÁLEZ, speaking on behalf of members of the Commission from Latin American countries, extended a warm welcome to the Observer for the Inter-American Juridical Committee and thanked him for his admirable summary of the Committee's work. It was a tradition for the Committee to be represented by an observer at each session of the Commission and for the Commission, in turn, to be represented by its chairman at the sessions of the Committee, which was actually one of the oldest organs of its kind established by the international community. Indeed, when the General Assembly had decided in 1947 to establish the International Law Commission, the experience at the inter-American level had served as a model, and a very extensive study of the subject had been prepared at the time by the United Nations Secretariat.

17. The Committee dealt with topics of great contemporary importance, not only at the regional American level but also at the world-wide level. That was particularly true of the subject of the environment. On that topic as well as on that of international watercourses and others, it was of the utmost importance for the Commission and the Committee to co-operate closely with each other. The illicit drug traffic was a universal problem and acutely affected a number of Latin American countries. It was therefore essential to examine the problem and he noted with interest that the Inter-American Juridical Committee's work on the subject covered also the criminal-law aspect. The Committee's annual seminars were veritable courses on contemporary international law and the practice of enlisting the assistance of private organizations provided a useful example that the Commission could well follow with regard to its annual International Law Seminar.

18. Mr. GRAEFRATH thanked the Observer for the Inter-American Juridical Committee in the name of members of the Commission from the Eastern European countries. He had had the privilege of seeing at first hand the work of the Committee in Rio de Janeiro and had been deeply impressed by the Committee's broad agenda and had admired its working methods. The Committee was of course a comparatively small body, working in one language, and its members came from countries which had to a large extent a common history. It was easier for them to avoid long statements and to concentrate on workable solutions. Strengthening the co-operation between the Committee and the Commission would be helpful to both bodies.

19. Mr. THIAM thanked the Observer for the Inter-American Juridical Committee for his comprehensive statement. The Committee and the Commission had largely identical concerns, as he had been able to observe on the occasions on which he had had the pleasure of attending the Committee's sessions. The very thorough and expeditious work of the Committee was of great value to the Commission in its own work. He was highly appreciative of the Committee's annual seminar, at which he had had the honour of being invited to lecture.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/421 and Add.1 and 2,[2] A/CN.4/427 and Add.1,[3] A/CN.4/L.443, sect. F, ILC (XLII)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) *and*

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (*continued*)

ANNEX I (Implementation of the articles)[4] (*continued*)

20. Mr. BARSEGOV said that, at the present stage in the consideration of the topic, when, as a result of many years of effort, the Commission, with the assistance of the Special Rapporteur, was entering the final stage of its work on the draft articles, he was particularly reluctant to make critical comments. However, precisely because of the importance he attached to the draft, he felt obliged, with all due respect to the Special Rapporteur, to state his views in the hope that by so doing he would advance the Commission's work. His task was greatly facilitated by the objective in-depth

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[4] For the texts, see 2162nd meeting, para. 26.

analyses already made by other members of the Commission.

21. It had been obvious from the outset that the earlier the Commission reached a decision on the nature of the draft, the more easily it would achieve agreement on the content of the articles. If the draft articles were to be recommendations of an optional nature, they could be formulated more ambitiously than if they were intended to be binding; in the latter case, the Commission would have to stand firmly upon existing international law, limiting such elements of progressive development of international law as might enter into the draft to what was acceptable to the majority of States. That, of course, required a realistic evaluation of sources of law. As to treaty practice, it had to be borne in mind that treaties did not always embody rules of a universal nature: sometimes they reflected the interests of a limited number of States in a specific situation. That requirement was not entirely met by the reports under consideration.

22. Another general shortcoming to which he had drawn attention in the past but which, unfortunately, was still in evidence was that the draft articles drew practically no distinction between States whose geographical positions with respect to the watercourse were not the same. The relationship between States situated on opposite sides of a river was obviously different from the relationship between States situated in the river's upper reaches and lower reaches; while, in the former case, their interests were more or less symmetrical, in the latter case they were not only asymmetrical but might even be mutually contradictory. The Special Rapporteur's failure to draw that distinction made itself felt in the draft as a whole, and particularly in draft article 24, the first provision on which he wished to comment.

23. By emphasizing the absence of priority among uses, draft article 24 seemed to imply that some priority had previously been granted to navigation by legal rules. But the situations of upstream and downstream States with respect to navigation always differed so widely, as also did the practice in the case of specific watercourses, that a general rule was quite impossible to establish. To prescribe what uses States should favour was, of course, still less appropriate, as Mr. Shi (2164th meeting) and other members had pointed out. The provision in paragraph 2 of article 24 went beyond the scope of the draft and, indeed, beyond that of international law. Therefore, while agreeing with the principle enunciated in paragraph 1 that neither navigation nor any other use enjoyed an inherent priority over other uses, he could see no point in the article as a whole other than stating the obvious: that States themselves determined their uses of watercourses, taking into account the interests of optimum utilization and other relevant factors, not least their own geographical situation with respect to the watercourse.

24. The provisions of draft article 25 appeared to go beyond the scope of its title, "Regulation of international watercourses", as defined by the Special Rapporteur in his fifth report (A/CN.4/421 and Add.1 and 2, para. 129). The reference in paragraph 1 to co-operation among watercourse States in identifying their needs was not very clear, especially in the case of downstream States. He had no objection in principle to the provision in paragraph 2, but suggested that States should also be required to participate on an equitable basis in the maintenance of such structures as they might have agreed to construct, individually or jointly.

25. Draft article 26, whose purpose appeared to be to transfer to the international level the mechanisms for the multi-purpose planning and integrated development of watercourse systems established between different units of a federal system or, to put it more simply, within a single State, gave rise to a number of problems. He welcomed the idea of co-operation in the management of international watercourses, yet the provision in paragraph 1 seemed too comprehensive on the one hand, and too mandatory on the other. Most members of the Commission had expressed the view that the proposed provision might, at most, take the form of a recommendation and that it should therefore be recast in less peremptory terms. As the Special Rapporteur himself pointed out in his sixth report (A/CN.4/427 and Add.1, para. 7), there was no obligation under general international law to form joint river and lake commissions. Nor was there any obligation for States to enter into consultations, at the request of any other State, concerning the establishment of such a joint organization. Indeed, most States—perhaps regrettably—did not accept any obligation to consult. He entirely shared the Special Rapporteur's views on the need for new organizational solutions, but believed that the shortest way towards that goal lay in adopting recommendations which each State could use in the light of its specific situation. Any attempt to raise mechanisms established by virtue of bilateral agreements to the status of binding international rules would be premature. In that connection, he would point out that the Soviet Union had such agreements with practically all its neighbours.

26. Like Mr. Calero Rodrigues (2163rd meeting), he had doubts as to the legal significance of paragraph 1. To declare that States were under an obligation to comply with that provision was obviously incorrect at the present stage of development of international law, while to say that they could do so seemed redundant. In any event, the earlier proposals by Mr. Schwebel and Mr. Evensen, reproduced by the Special Rapporteur in paragraph (2) of his comments on article 26, seemed more appropriate and more acceptable. However, he approved of the list of functions of the proposed joint commissions set out in paragraph 2 of the draft article, and considered that, combined with elements drawn from the earlier proposals, it would provide a basis for a model statute to be annexed to the draft or even included in the body of the articles.

27. Draft articles 27 and 28 were dictated by humanitarian considerations and met the general interests of the peoples of watercourse States. He had no doubt as to the need for protection of water resources and installations, and also welcomed the fact that the provision in article 28 was applicable not only to international but also to internal armed conflicts, a point which, unfortunately, was important to his country at

the present juncture. Poisoning as well as other acts causing damage to watercourses violated the security of peaceful populations and could, in terms of the objectives pursued by such acts, be regarded as crimes against humanity. The problems connected with the relationship between draft article 28 and the 1977 Additional Protocols to the 1949 Geneva Conventions were, in his view, readily surmountable; they could be resolved either by the codification of international law or by its progressive development. However, if any doubts on that score still persisted among members of the Commission, a question concerning article 28 could perhaps be addressed to the General Assembly. The arguments advanced by the Special Rapporteur in support of article 28 were highly convincing and not likely to encounter much opposition. The wording of the article and the question of its eventual position in the draft would none the less require further work. In pursuit of concision the Special Rapporteur had made the text unnecessarily obscure; its meaning should be spelt out in greater detail and it should be brought into line with instruments of international law already in force.

28. Like most members, he found annex I, on implementation of the articles, somewhat disappointing and lacking in consistency. Some of the articles it contained should be transferred elsewhere; others called for additional work, while still others should be omitted altogether. Thus draft article 1, if needed at all, should be related to article 1, on the use of terms, in the body of the draft. He agreed with Mr. Graefrath (2165th meeting) that draft articles 2 and 5 should either be eliminated or be transferred to part III of the draft articles (Planned measures). Draft articles 3 and 4, on the other hand, did appear to relate to the subject-matter of the proposed annex.

29. He agreed with the view that draft article 6 was superfluous and should be deleted. The Special Rapporteur introduced a new form of jurisdictional immunity of States, and then immediately imposed limits upon it. The problems raised by the article outnumbered the solutions proposed, and he was opposed to it. The provisions of draft article 7 constituted a denial of the framework-agreement nature of the articles under consideration. As Mr. Calero Rodrigues (*ibid.*) had pointed out, the examples cited by the Special Rapporteur related to completely different situations. He saw no need for the establishment of a permanent or temporary supra-State control organization along the lines proposed. Lastly, draft article 8 was, in his view, also unnecessary for similar reasons. As many members had already said, the annex as a whole was not ready for referral to the Drafting Committee.

30. In conclusion, he expressed the hope that the first reading of the draft articles as a whole could be completed before the expiry of the term of office of the Commission's current members. In order to achieve that end, the Special Rapporteur would have to concentrate his own and the Commission's efforts on articles which were really necessary and exclude those which were superfluous or fell within the scope of other topics. Despite the critical comments he had made in the interests of advancing the common task, he wished to express his profound appreciation of the Special Rapporteur's tireless and unceasing efforts.

31. Mr. DÍAZ GONZÁLEZ expressed appreciation to the Special Rapporteur for his fifth and sixth reports (A/CN.4/421 and Add.1 and 2 and A/CN.4/427 and Add.1), which contained a wealth of information on the practice of States and international organizations, as well as on doctrine, in relation to a topic that was essentially concerned not with the codification but with the progressive development of international law.

32. His comments would be based on the premise that the Commission was engaged in preparing a framework agreement. He did not think the Commission should go further than that or embark on an enterprise that went beyond its mandate. The Commission, having changed special rapporteurs for the topic a number of times, had had to adopt a different approach to its work with a view to making progress. However, as Mr. Barsegov had observed, each watercourse system had its own special characteristics, so that a universal obligation could not be imposed on all riparian States to apply a given set of norms.

33. So far as the articles proposed in the fifth report were concerned, it should be made quite clear in draft article 24 that the multiple uses of an international watercourse signified that a particular use must not cause prejudice to other uses provided for under bilateral or multilateral agreements or to the needs of any State through which the international watercourse in question flowed. Paragraph 2 of the article referred to the principle of equitable utilization "in accordance with articles 6 and 7", in which connection it had rightly been noted that the concept of priority had changed over the years. The use of international watercourses for navigational purposes had become far less of a priority, even though it remained so for some countries, such as those in Africa. Also, as Mr. Solari Tudela (2164th meeting) had pointed out, in 10 years' time it would be necessary to think in terms of yet other priorities. All those facts had to be borne in mind.

34. He agreed that draft article 25 provided a very good basis for the draft, since it laid down an obligation to co-operate and not to regulate.

35. The Special Rapporteur's sixth report was concerned with the practical application of the draft articles adopted by the Commission on first reading and, in particular, with the management of international watercourses, dealt with in draft article 26. In that regard, he, like Mr. Graefrath (2165th meeting), would prefer to talk of the institutionalization or coordination of the management of international watercourses. Like other members of the Commission, he considered that it would suffice to indicate the elements that should figure in a framework agreement and what the obligations of each State forming part of the watercourse system would be. There could obviously be no obligation to set up an international organization: even though certain multilateral agreements, such as the one concluded with respect to the River Danube, had established a permanent institution to regulate the water-

course, that was not necessarily a reason for the Commission to advocate the same idea in the present case.

36. Draft articles 27 and 28 had their *raison d'être* in that it was certainly necessary to protect water resources and hydraulic installations. At the same time, he would agree that draft article 27 simply repeated what was already stated in articles 6[5] and 8[6] as provisionally adopted by the Commission, while article 10,[7] also provisionally adopted, contained a provision similar to that set out in paragraph 3 of draft article 27. Also, paragraph 1 of draft article 27 added little, in his view. It was therefore perhaps more a matter of the application of articles 6, 8 and 10 than of drafting a new article.

37. Draft article 28 raised a certain number of difficulties, since it covered matters already dealt with in other instruments, such as the 1977 Additional Protocols to the 1949 Geneva Conventions. He would therefore urge caution, as the article could give rise to certain questions regarding, for example, inviolability. In any event, it should be expressed in different terms. The Commission should also take care not to give the impression that it relied on outmoded ideas such as those of Fauchille and Oppenheim, cited in footnotes 75 and 60, respectively, of the sixth report (A/CN.4/427 and Add.1). In the modern day and age, such quotations were no longer valid and should not be included in the commentary.

38. He furthermore agreed that, if the provisions contained in annex I, on implementation of the articles, had been placed there because they had been omitted from the main part of the draft articles, they should indeed figure in the body of the draft. However, as Mr. Graefrath had clearly demonstrated, inclusion of those provisions could create problems, and even aggravate existing ones, rather than facilitate acceptance of the draft. Once more, he would remind members that what was involved was a framework agreement. Certain obligations of a general character could be retained, but if the Commission tried to regulate everything in detail, that would only impede adoption of the draft articles as a whole. Draft article 6 of the annex, for example, was unnecessary and dangerous. The Commission was dealing with the question of jurisdictional immunities in another draft and, again, that question had no place in a framework agreement of the kind under consideration. He would reiterate that the Special Rapporteur was perhaps being too precipitate, as the Commission had never received a mandate to establish an international organization for the regulation and study of international watercourses. In his view, that question should be set aside, unless it was decided to suggest that the General Assembly confer a mandate on the Commission to draft a statute for the establishment of such an organization. Possibly the Special Rapporteur had been unduly influenced by the deliberations on the law of the sea, which had resulted in the establishment of an international sea-bed authority. The present case was different, however. Even the reference to pollution in the annex was inappropriate, for the 1982 United Nations Convention on the Law of the Sea dealt with one specific aspect of the matter, namely protection of the marine environment from pollution caused by navigation.

39. Mr. THIAM thanked the Special Rapporteur for his thoroughly researched and richly documented sixth report (A/CN.4/427 and Add.1), which would undoubtedly enable the Commission to advance its work on a highly sensitive topic that involved not only the sovereignty of States, but also, and above all, the management of a vital resource.

40. Commenting first on draft article 24, submitted in the fifth report (A/CN.4/421 and Add.1 and 2), he noted that it laid down the principle that there was no priority in so far as the uses of an international watercourse were concerned, whether those uses were for navigation or any other purpose. He had, however, been somewhat surprised to see that the question of navigation was being dealt with in the context of a topic that was limited to the non-navigational uses of international watercourses. Although he appreciated that there was no strict division between the topics referred to the Commission, he none the less considered that, if a specific point of referring to non-navigational uses had been made, the Commission should not then deal with the question of navigation.

41. In paragraph (1) of his comments on draft article 24, the Special Rapporteur stated that "the fact that navigation was in the past accorded preferential status militates in favour of a clear statement that such is not the case under the present draft articles"; in paragraph (2) of his comments, he pointed out that "the opening clause of paragraph 1 preserves any agreements that accord priority to navigation or to any other use". Those statements prompted the question whether there had in fact existed in the past a preferential régime—and he would stress the word "régime"—deriving from treaties. The Special Rapporteur had furnished a number of examples of treaties but, surprisingly, had not supplied even one example that established such a preferential régime for navigation. At a particular point in history mankind had, of course, recognized the need to use watercourses for navigation. That did not, however, mean that there had been a legal régime derived from treaties whereby navigation had had priority. He would therefore ask the Special Rapporteur to indicate his sources. In the circumstances, he had reservations about adopting paragraph 1 of article 24. Also, it would be better, in matters involving State sovereignty, not to lay down a rule: it was for States to stipulate the form of use they wished to adopt at any given moment.

42. Turning to the sixth report, he said that draft article 26 was central to the draft articles. Paragraph 1 provided that watercourse States should enter into consultations "at the request of any of them" concerning the establishment of a joint organization for the management of an international watercourse. Once again, the Commission must not be too precipitate. Such a request must be well-founded and must state the reasons for it. In addition, the object of the request

[5] *Yearbook ... 1987*, vol. II (Part Two), p. 31.

[6] *Yearbook ... 1988*, vol. II (Part Two), p. 35.

[7] *Ibid.*, p. 43.

must be attainable. The establishment of regional organizations was a matter of particular interest to him, for all African States were members of some regional organization or other and those organizations provided the channels through which endeavours were made to set up bodies for the purposes of co-operation. However, he had begun to doubt the value of such organizations. Admittedly, they had their uses, but to believe that the establishment of an organization sufficed for all problems to be automatically resolved was another matter entirely.

43. The sixth report contained some significant information in that connection. The United Nations Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, held at Addis Ababa in October 1988, had noted that river basin development strategies in the past 20 years had met with varying and sometimes limited success, due to various factors (see A/CN.4/427 and Add.1, para. 14 *in fine*). Although a considerable number of organizations of the type in question were in existence, he wondered whether that was the goal the Commission wished to pursue. An organization could not be established simply at the request of one State: the proper climate was required, as well as other elements such as those to which the former Special Rapporteur, Mr. Schwebel, had drawn attention. Hence draft article 26 was too general, yet somewhat rigid in that the rule it laid down was not always applicable. It might be preferable to manage international watercourses through agreements and avoid a proliferation of bureaucratic systems, with all the expenses they entailed.

44. He wondered what new elements were actually provided by draft article 28. There already existed a body of law governing armed conflicts, which constituted a complex problem that should be treated separately from all outside considerations. As far as internal armed conflicts were concerned, was it really necessary to remind countries not to do themselves harm?

45. The proposed annex I, on implementation of the articles, also raised many problems that might lead to future contradictions with existing precepts, and in his view it could not be retained as currently drafted.

46. Mr. ILLUECA said that he agreed with the suggestion by the Special Rapporteur in his sixth report (A/CN.4/427 and Add.1, para. 38 *in fine*) that draft articles 7 and 8 of annex I might be included in the main body of the draft articles. Those two articles were guided by foresight and acquired increasing importance in view of such disastrous phenomena as the destruction of the ozone layer and global warming, which were leading to world-wide changes in sea, lake and watercourse levels. Therefore articles 7 and 8, together with draft article 1 of the annex, should indeed be included in the body of the draft.

47. Draft articles 2, 3, 4, 5 and 6 of annex I, however, should form part of an optional protocol. In that connection, since the Special Rapporteur had recognized that the outline of the draft articles approved by the Commission did not mention provisions of the kind proposed in annex I and since there was not sufficient time to examine each article in depth, the Commission should now choose the methodology to be followed.

48. Several members of the Commission had expressed fears that the inclusion of the articles proposed in annex I might have the effect of making the future framework agreement less attractive or unacceptable to a number of States and had suggested that, since those articles represented progressive development of the law, they should form part of an optional protocol. The Special Rapporteur's arguments were well-founded and showed that the law had been evolving in the direction indicated by the proposed articles. Nevertheless, in some countries the principles covered by draft articles 3 and 4 of annex I and by article 8 of the Montreal Rules on Water Pollution in an International Drainage Basin adopted by the International Law Association in 1982,[8] although they had evolved favourably, had met with difficulties in practice. He understood that the EEC had adopted measures to expand the rights and remedies of persons harmed by transboundary pollution, along the lines recommended in article 8 of the Montreal Rules. However, courts in other countries applied what was called the "local action rule", whereby a court refrained from exercising its competence in proceedings relating to harm occurring in foreign territory. Those situations highlighted the Special Rapporteur's worthy efforts to formulate the articles in annex I and revealed the need to revise the outline of the draft approved by the Commission.

49. Since he shared the concerns expressed by a substantial number of members to the effect that articles 2 to 6 of annex I should not be included in the body of the draft articles, he would suggest, as a methodological approach, that the first reading be continued with a view to dividing the provisions of the draft into three areas: (*a*) the draft articles themselves, in other words the main body of the future framework agreement; (*b*) an optional protocol on equal access to judicial and administrative procedures; (*c*) an optional protocol on the settlement of disputes. It would be recalled, in that connection, that the 1961 Vienna Convention on Diplomatic Relations included two optional protocols, one concerning acquisition of nationality and the other concerning the compulsory settlement of disputes.

50. Mr. McCAFFREY (Special Rapporteur), replying to a question raised by Mr. Thiam, said that the 1921 Barcelona Convention and Statute on the Régime of Navigable Waterways of International Concern was the treaty universally referred to to indicate the priority formerly given to navigation. He had cited that instrument in his fifth report (A/CN.4/421 and Add.1 and 2, para. 122 and annex). The instrument had had broad support, although it had since been overtaken by events and current needs.

The meeting rose at 12.40 p.m.

[8] See para. (3) of the Special Rapporteur's comments on draft article 4 of annex I in his sixth report (A/CN.4/427 and Add.1).