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Summary record of the 2186th meeting

Topic:

International liability for injurious consequences arising out of acts not prohibited by international law

Extract from the Yearbook of the International Law Commission:-

1990, vol. I

2186th MEETING

Wednesday, 4 July 1990, at 3 p.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Thiam, Mr. Tomuschat.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,[1] A/CN.4/423,[2] A/CN.4/428 and Add.1,[3] A/CN.4/L.443, sect. D)[4]

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 33[5] (*continued*)

1. Prince AJIBOLA said that the indisputable progress made on the present topic was obvious from the fact that no less than 33 draft articles were presented by the Special Rapporteur in his sixth report (A/CN.4/428 and Add.1), which, with reasonable flexibility, combined the practical and academic approaches. The Special Rapporteur had no doubt received much inspiration from current international activities—especially in Europe—on draft treaties on international environmental law.

2. The discussion had revealed that there were three major trends of opinion among members of the Commission. Some thought that, despite the increase in the number of articles, the scope of the topic had been narrowed. Others held the view that it had been expanded. The third view was that the Special Rapporteur was still steadily on course—a view he himself was inclined to share.

3. The answer to the question whether the topic was being restricted or expanded lay in the series of definitions contained in the new texts of draft articles 1 and 2. A careful reading had confirmed his suspicion of adjectives in a text like the draft under consideration. For example, he saw no need to qualify "risk" or "harm" in the context of articles 1 and 2. The issue of harm was clear and unambiguous. It was interesting to note that, apart from article 2, in none of the articles from 1 to 8 was the word "harm" qualified in any way. Not until article 9 did the expression "appreciable harm" figure in the text. The words "appreciable" and "significant" clouded the issue of the scope of the topic and should be deleted. One could say that they did more harm than good to the meaning of "harm".

4. If, however, the majority of members considered that those adjectives should be retained, although they detracted from the clarity of the articles, they could perhaps be considered relevant in the matters of quantum of damages, reparation and degree of liability. Once it was established that certain activities resulted in harm, no matter how negligible, suitable adjectives could be used to evaluate the harm. The adjudicators or negotiators might need to define the degree of harm as being "grave", "serious", "alarming", "disastrous", "appreciable", "substantial", "significant" or even "notable".

5. The introduction of the concept of "dangerous substances" in subparagraphs (*a*), (*b*), (*c*) and (*d*) of article 2 probably did narrow the scope of the topic. The definitions in those subparagraphs suggested that the draft articles somehow dealt exclusively with matters relating to environmental pollution. Subparagraph (*a*) (i) spoke of the handling, storage, production, carriage or discharge of "dangerous substances"; under subparagraph (*a*) (ii), activities involving risk included the use of technologies that produced hazardous radiation; subparagraph (*a*) (iii) referred to "dangerous genetically altered organisms" and "dangerous micro-organisms"; and subparagraph (*b*) referred to man-made pollutants—all language that gave the impression that the draft articles were concerned only with environmental law. The narrowness of the definition could be illustrated by means of the example of the collapse of a large dam which caused harm to life and property in another State. If one applied the definition of activities involving risk, one could say that subparagraph (*a*) (i) was relevant. Could it be said, however, that water *per se* was a dangerous substance?

6. Another example was the definition of the term "incident" in subparagraph (*k*) of article 2. In the report, the Special Rapporteur used that term interchangeably with the word "accident". In everyday English, "incident" meant an event of lesser importance and one which the authorities did not wish to describe precisely, while an "accident" was an event which occurred without any visible cause and was usually both unfortunate and undesirable. The word "accident" should therefore be used instead of "incident", bearing in mind also that "accident" was a generic term that included "incident".

7. The fear of a narrowing of the scope of the topic was perhaps most justified in the case of article 1, which referred to activities with injurious consequences

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[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One)/Add.1.

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

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

[4] Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

[5] For the texts, see 2179th meeting, para. 29.

that caused transboundary harm but was silent on the issue of operators and the situation of individual victims. On that point, he strongly supported the remarks made by Mr. Graefrath (2183rd meeting). In many developing countries, activities were being conducted which involved risks—like those defined in article 2—known only to the companies that were the operators. A State was supposed to know what was going on within its territory, but it was an obvious fact that, in the third world, the necessary technology to assess the transboundary effect of activities was lacking. For that reason, article 1 should take cognizance of operators and individuals if the scope of the whole draft was not to be reduced.

8. A clearer indication of the need to expand articles 1 and 2 was to be found in the articles of chapter IV of the draft, on liability, and chapter V, on civil liability. Thus draft article 26, paragraph 2, began as follows: "If the State of origin or the operator, as the case may be . . .", wording that recognized the need to mention specifically the operator, as distinct from the State of origin. Again, draft article 28, paragraph 1, said: "It is not necessary for all local legal remedies available to the affected State or to individuals or legal entities represented by that State . . .". Paragraph 2 of the same article also contained a reference to individuals and legal entities. Why, therefore, did articles 1 and 2 fail to give recognition to individuals, legal entities and operators? They should be adequately mentioned in article 1 and possibly defined in article 2.

9. The attempt in article 2, subparagraph (*b*), to define dangerous substances and give an exhaustive list of those substances also strongly suggested that the scope of the topic was being limited. There was, of course, no harm in drawing up a list of dangerous substances, but he feared that the exercise was not relevant in the present circumstances.

10. It was important to remember the need for the universal acceptability of the draft. Among other constraints, the Special Rapporteur was dealing with a new topic which was residual but was at the same time attracting great attention from the legal community all over the world. It was an area of international law which had been mostly addressed by the developed world, as could be seen clearly from the report. Most of the materials cited as precedents and examples were European treaties or draft conventions. In its work of progressive development and codification of international law, however, the Commission had to take a broad universal approach. The draft articles had to take into account the interests not only of the technologically advanced, but also of the less advanced countries. Accordingly, he fully endorsed the Special Rapporteur's remarks on the need to make provision for the special situation of the developing countries, which had played a far lesser role than the developed countries "in the process which has led to saturation of the atmosphere. Moreover, many developing countries would be totally innocent victims of any consequences of global warming and climatic change, having done little if anything to cause them." (A/CN.4/428 and Add.1, para. 86.)

11. With regard to chapter VI of the report, on liability for harm to the environment in areas beyond national jurisdictions—the "global commons"—there could be no doubt about concern for that problem on the part of the entire international community. At conferences organized around the world by the legal profession, the two major topics were the legal aspects of the international environmental situation and the problem of narcotic drugs. Chapter VI pointed in the right direction. If the Commission failed to take the necessary action at present, it could find itself overtaken by events. After a careful study of chapter VI, however, he had reached the conclusion that the issue of the global commons should form the subject of an independent topic, and some of the reasons had already been indicated by the Special Rapporteur. In the first place, while it was difficult to pinpoint the State of origin as defined in the Commission's present work, it would be even more difficult to define "affected States" in the context of a global effect. Furthermore, the issue of transboundary harm would not be as readily identifiable as in the present topic. At the moment, the Commission was just finding its bearings, and any attempt to extend the scope of the topic would encounter difficulties which might jeopardize the current reasonable measure of success.

12. He wished to reiterate his plea to the Special Rapporteur at the previous session for an improvement in the unsatisfactory wording of the title of the topic and would add, with respect to draft article 1, that he preferred the alternative text suggested in the footnote to the article in the annex to the sixth report, without the bracketed word "effective". Elimination of the words "throughout the process" would make for greater clarity. There was no advantage in using the word "physical" to qualify "consequences"; the consequences of an activity might not be "physical" or visible and yet still be harmful and even fatal.

13. Draft articles 7 and 8 were acceptable, but the alternative texts suggested in the report, in the footnotes to the articles, were better.

14. In addition to his earlier comments on draft article 9, he urged retention of the current formulation in preference to the alternative text suggested in the footnote to the article. His position was that reparation was preferable to compensation, an issue on which he differed with Mr. Calero Rodrigues (2184th meeting). An affected State in which the environment, property and lives had been harmed without any fault on its part should not only be compensated: it deserved more in the form of restitution and reparation.

15. He had doubts about draft article 13. Its provisions could be more conveniently handled by developed countries, whereas developing countries would find that the obligations involved could not easily be carried out without the assistance of an international organization with the necessary technical expertise.

16. The responsibility of the State of origin under draft article 15 should be toned down and the first sentence should therefore be amended to read: "The data and information referred to in article 11, if found to be vital to the national security of the State of origin or to

the protection of its industrial secrets, may be provided only at its discretion."

17. The provisions of draft article 17 should be made mandatory by replacing the word "may", in the introductory clause, by "shall". But the most serious aspect of the article was that it urged the States concerned to consult or negotiate. To consult would require mere discussion or the passing of information. To negotiate was to "confer in order to reach an agreement", but did not necessarily imply that an agreement would be reached. The article should boldly use the word "agreement", instead of the weaker terms "consultations" and "negotiations". Such an approach was not difficult, as could be seen from draft article 24, paragraph 1, which required the State of origin to "bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm", adding significantly that, if full restoration was impossible, "agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered". Subparagraphs (*j*) and (*m*) of article 17 could be deleted because they were unnecessary.

18. Draft article 18 should be deleted, unless it could be redrafted in positive terms so as to make a breach of its provisions justiciable. Draft article 19 was unduly restrictive and should also be deleted, although its content might perhaps be transferred to article 11. The provision contained in draft article 20 was a good one, but the phrase "or cannot be adequately compensated for" should be deleted.

19. As to chapter IV of the draft on liability, article 21 should be improved along the same lines as article 17 and further strengthened by inserting the words "and agree" after "to negotiate". That change would put teeth into the article, as should be done for articles 17 and 18. Draft article 22 was acceptable, but he could not say the same for draft article 23: its content was desirable, but was already partly covered in subparagraphs (*i*), (*j*) and (*k*) of article 17. Paragraphs 1 and 2 of draft article 24 were in order, but paragraph 3 should be deleted. Alternative A was preferable to alternative B in draft article 25.

20. With regard to draft article 26, there were sound arguments in favour of paragraph 1 (*b*) and paragraph 2, but it was difficult to see the rationale behind some of the acts listed in paragraph 1 (*a*). While he could perhaps agree with the exceptions covering "a natural phenomenon of an exceptional, inevitable and irresistible character", the same was not true of "an act of war, hostilities, civil war, insurrection", a phrase that could be deleted. In view of the argument he had advanced about the constraints of the developing countries, draft article 27 should be deleted.

21. Lastly, he welcomed all the articles in chapter V of the draft, on civil liability, particularly article 32, which was similar to provisions contained in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[6]

22. Mr. PAWLAK congratulated the Special Rapporteur on his stimulating sixth report (A/CN.4/428 and Add.1) and on his constructive efforts to respond to the many concerns expressed in the Commission and in the Sixth Committee of the General Assembly.

23. With the presentation of 33 draft articles in the report, the Commission at last had a complete outline of the topic. Its main task now was to frame a set of rules for compensating for harm caused by a State or from the territory of a State, or from areas under its control, to another State or its inhabitants or property, in situations where such transboundary harm could not be linked to activities constituting a breach of international law. At the same time, the Commission should concentrate on practical solutions and avoid unnecessary theoretical debate; the whole project might otherwise be overtaken by codification by other international bodies.

24. He personally held to the view that the liability under consideration should be based on a definition of the legal consequences of transboundary harm, not on the concept of risk. The Special Rapporteur apparently attributed equal significance in draft article 1 to activities causing harm and those involving risk, but the main thrust of the article was that harm caused by one State to another, as a result of transboundary consequences, was a basis for liability. Logically, therefore, the concept of risk should be treated separately, as the basis for prevention. Although he would prefer risk and harm to be dealt with separately, he did not object to the present wording of article 1, on the understanding that risk was regarded as an additional factor. The text of article 1 could be further refined by the Drafting Committee. As pointed out in the report, activities involving risk and activities with harmful effects "have more features in common than ... distinguishing features" and might be brought together "under a single legal régime" (*ibid.*, para. 3). According to draft article 2, subparagraph (*a*), activities involving risk included those "carried on directly by the State". He would be willing to accept the simplified, alternative text of article 1 suggested in the footnote to the article in the annex to the report, but would prefer to add a reference to the "territory" of a State and to "areas" under its jurisdiction or control.

25. He noted from the report (*ibid.*, paras. 15-16) that the Special Rapporteur apparently preferred a list of dangerous substances to a list of activities involving risk, and that he had followed the Council of Europe's draft rules on compensation for damage caused to the environment. The Special Rapporteur admitted, however, that a list of dangerous substances could not be exhaustive (*ibid.*, para. 17): other substances might cause the same effects, depending on the way they were handled. There were two possible approaches: to draw up an exhaustive list of dangerous substances and devise a procedure for amending it, as suggested by Mr. Graefrath (2183rd meeting); or to leave the list of dangerous substances to be annexed to specific agreements, confining the draft articles to general definitions and principles. Since the Commission's task was to draft a general framework agreement, it should not venture into a list of dangerous substances: to produce one would require assistance from experts and

[6] United Nations, *Treaty Series*, vol. 330, p. 3.

it could never be exhaustive. Instead, the Commission should concentrate on laying down broad, but precise, definitions and principles covering liability for transboundary harm, for use by States in elaborating more specific agreements. In draft article 2, the definition of the terms in question should therefore not go beyond the general definitions in subparagraphs (*a*) and (*b*); subparagraphs (*c*) and (*d*) should be left for inclusion in such specific agreements.

26. As to the qualification of harm in subparagraphs (*g*) and (*h*) of article 2, he would prefer the term "significant", which was more precise and objective than "appreciable". The notion of "significant" harm could serve as a basis for defining the type of harm that should be compensated for. It was no easy task, because any innocent victim of transboundary harm would expect compensation, and the trend towards complete restoration of the *status quo ante*, or full compensation, implied compensation for harm of any kind. Indeed, the Special Rapporteur appeared to take that view in the report (A/CN.4/428 and Add.1, para. 32 *in fine*), going on to say that, in conducting their negotiations, States must seek to "restore matters either to the situation that existed before the harm occurred (*status quo ante*) or to the situation which most probably would have existed had the harm never occurred" (*ibid.*, para. 49). However, the Special Rapporteur then took a more realistic approach, indicating that the compensation should be "within reasonable limits" and that "a compromise can be reached on (normally) an amount of money that satisfies the interests of both parties" (*ibid.*).

27. In his opinion, it should not be left to the negotiators to decide the extent of the harm that should be compensated for. The Commission must say unambiguously that compensation had to be adequate for the nature and degree of the harm sustained by the affected State and must not be left to be hammered out between negotiating parties, a process in which the stronger State would often win the day. In the report, the Special Rapporteur stated that "the draft articles do not automatically impose strict liability but merely the obligation to negotiate compensation for harm caused" (*ibid.*, para. 14). That was not enough. Only "significant" transboundary harm should be the basis for compensation, but the voluntary approach must be excluded: the obligation to negotiate must not be the sole obligation, as provided for in draft article 21. Accordingly, some guidelines must be set for the level of compensation. Article 21 was one of the most important provisions of the draft and should be strengthened. The crucial question was that of the harm caused. The last phrase of article 21 should read: "bearing in mind that the significant harm must be fully compensated for", deleting the words "in principle". That would afford the necessary protection of the interests of the affected State, yet respect the principle of strict liability. The words "fully compensated for" might be replaced by "adequately compensated for", but the intention must be the same: under international law, innocent victims of transboundary harm should not be left unprotected.

28. With regard to chapters IV and V of the draft, the State of origin should be the principal addressee of liability claims, not because it was necessarily responsible for the harm, but because it had a duty to organize its administration, licensing, legal and information systems in such a way as to be kept aware of activities in its territory that might cause transboundary harm. The principle of the primary liability of the State should be preserved in the draft, as it was in the 1972 Convention on International Liability for Damage Caused by Space Objects.

29. As for the remedies proposed by the Special Rapporteur, it was explained in the report (*ibid.*, para. 43) that the State of origin was bound to negotiate the amount of compensation payable to restore the balance of interests prevailing before the harm occurred. He agreed that negotiations were perhaps the only possible way to obtain satisfactory compensation in inter-State relations, but the concept of a "balance of interests" tended to favour the State of origin. The other method, proposed in chapter V of the draft, contemplated the use of the "domestic channel", i.e. the private-law system. Mr. Graefrath had been right to say that such a method could provide an additional means of obtaining compensation when the State of origin was not itself the author of the transboundary harm or when it had taken all the necessary preventive measures to avert it. As the Special Rapporteur explained, there could be a "peaceful coexistence of the domestic channel with the international channel" (*ibid.*, para. 63). For that purpose, however, the obligations of States in the sphere of prevention must be fully defined; a definition of the "operator" must be included in the draft; and there must be no blurring of the dividing line between the international liability of States and State responsibility for wrongful acts. The whole concept of civil liability must be precisely formulated, and the articles in chapter V required considerable modification in the Drafting Committee.

30. Lastly, he wished to congratulate the Special Rapporteur on making a substantial contribution to the development of the topic.

31. Mr. BARSEGOV congratulated the Special Rapporteur on his handling of a difficult topic and said that he sympathized with his difficulties. The key question was the conceptual basis of objective liability, the expression accepted in his country for strict liability. That was an exceptionally difficult question involving practical consequences and choices. The concept itself was still far from clear.

32. In his sixth report (A/CN.4/428 and Add.1), by comparison with the previous reports, the Special Rapporteur had apparently sought a broader legal basis for the notion of objective liability. Some members of the Commission had had the impression that he was returning to the theory of objective liability found in certain domestic systems, in which one of the basic elements was risk, and activities involving risk. The Special Rapporteur had himself asserted that he was pursuing the same approach as in his previous report (A/CN.4/423), but it was evident that several members saw matters in a different light. He had himself mistakenly noted the

reappraisal of risk in the concept as a positive development.

33. The attempts made to resolve difficulties through the drawing up of lists of "dangerous substances" and "activities involving risk" testified to the vagueness of the concept of "appreciable harm", which required additional, more precise criteria in order to set a more realistic threshold for liability. The degree of harm and the threshold of objective liability should be defined in such a way as to provide an objective basis for claiming damage, leading to responsibility. The harm must be calculable in a manner which allowed for a balance of interests among the States concerned and the threshold chosen must be sufficiently realistic to avoid a situation in which any aeroplane or lorry crossing a frontier might incur liability for harm.

34. What indices could be used to define the level of harm: should one talk of "appreciable", "significant" or even "serious" harm? The lower the level at which the rules came into play, the more difficult it would be to determine that level. If it was possible to agree on a realistic threshold of liability, amenable to precise definition, harm could be precisely defined in terms which would meet the needs of environmental protection. In addition, more demanding standards might be set in future, leading to a corresponding drop in the liability threshold. Moreover, the Commission's articles must reflect the standards set in other instruments prepared in a European context, such as the draft framework agreement on environmental impact assessment in a transboundary context and the Code of Conduct on Accidental Pollution of Transboundary Inland Waters of the Economic Commission for Europe (see A/CN.4/428 and Add.1, footnotes 35 and 36). In those instruments, two criteria were adopted, namely any significant adverse transboundary environmental impact, and the kinds of activities which might cause such adverse transboundary effects. The authors of the latter instrument had assumed that the States concerned would themselves agree what kind of activities would be covered. Those instruments also differed from the Commission's draft in treating dangerous substances as one of the elements in the evaluation. The place and role of "dangerous substances" in the draft articles was not entirely clear. The Special Rapporteur seemed to have included a list of such substances in order to make it easier to assess the resulting harm, enumerating substances associated with particular types of activity. The Special Rapporteur's dualist approach, whereby the occurrence of harm could in itself entail objective liability, raised a number of questions. For instance, harm could occur as a consequence of innocent activities. If the harm itself entailed liability, how could harm which led to criminal liability, a breach of the law, be distinguished from harm entailing strict or objective liability? The Special Rapporteur's approach seemed to blur the distinction between the two types of harm and the two kinds of liability.

35. The Special Rapporteur espoused the view cited in the report that activities which caused transboundary harm in the course of their normal operation were neither "clearly unlawful" nor "clearly lawful" (*ibid.*, para. 8 *in fine*). In law, however, that was impossible: an act was either lawful or unlawful. Objective liability arose as a result of harm caused by a lawful activity in which the operator had complied with all his obligations, including the rules of conduct. According to the doctrine, harm caused in such circumstances was the result of an event associated with an activity involving risk, but independent of the will of the operator. But, according to the Special Rapporteur, such ordinary lawful activities would apparently, at a certain point, become unlawful. He could not understand how the Special Rapporteur, having distinguished two types of activities, namely "activities involving risk" and "activities with harmful effects", could qualify them as "unlawful". In the report, he explained that, whereas "activities involving risk are lawful in so far and so long as the measures dictated by *due diligence* are taken, activities with harmful effects are not legal until a consensual régime is in effect between the parties" (*ibid.*, para. 10). Apart from the subjective difficulty of deciding when the transition had been made from one category to the other, that approach offended against the conceptual basis of objective liability. For such liability to arise, there must either be an unlawful activity or some transgression of the rules of conduct.

36. The contradictions he discerned in the sixth report stemmed from an undue broadening of the concept of objective liability, which in turn would complicate the legal basis of liability and impede international relations. Logically speaking, no State would be able to enter into preventive arrangements with its neighbours, and every dispute arising from appreciable harm would have to be resolved by some form of compulsory jurisdiction—which would hardly be acceptable to States. The Special Rapporteur suggested that "the solution might be to impose a simple obligation on the parties to consult one another in the event that an activity shows signs of having harmful effects, as is done in the present draft articles in the case of activities involving risk" (*ibid.*, para. 14). Such an obligation could not square with the concept of strict liability.

37. Hence it was apparent that the Special Rapporteur was broadening the compass of the topic and stretching the legal basis of liability. As for the inclusion in the draft of a list of activities involving risk, he could agree with the Special Rapporteur's comment that the advantage of such a list would be to make the draft "much more acceptable to States, which would know the limits of their future liability" (*ibid.*, para. 15). The idea of a list had been strongly supported both in the Commission and in the Sixth Committee of the General Assembly. The list in draft article 2 drew on the work of a committee of experts of the European Committee on Legal Co-operation of the Council of Europe. However, as the Special Rapporteur recalled, activities involving risk were defined by the committee of experts "mainly in relation to the concept of dangerous substances" (*ibid.*). Personally, he felt that the questions involved in drawing up such lists were technical rather than legal, and must be resolved in close co-operation with experts in other United Nations bodies. If such a list were included in the draft articles, it must enumerate specific activities involving risk and set clear limits to the objective liability incurred, if the draft articles were to be acceptable to

States. Since no list could be exhaustive, provision must be made for a regular review.

38. As for the draft articles themselves, article 3 should be simplified and article 4 must be understood in the light of the 1969 Vienna Convention on the Law of Treaties. The obligations of the State of origin were also defined in article 11 and, in that provision, international organizations "with competence in that area" should be defined, together with the basis on which they might intervene. He queried the notion in article 12 that the parties to the future convention could define the functions to be performed by an international organization, for those functions were already laid down in the organization's constituent instrument. However, the new definition of activities involving risk in article 2 would be some guide to the types of international organizations which would have competence in the matter.

39. He welcomed the realistic arrangements for consultations proposed in draft article 14. The provisions of draft article 16 on unilateral preventive measures were, however, far from feasible in all countries. As to draft article 17, on the balance of interests, the Special Rapporteur himself displayed no great enthusiasm for setting any normative standards and had confined himself to a list of factors to be taken into account in achieving an equitable balance of interests. Clearly, some factors were more important than others, and the list required further development. It should also include some basis for the liability of the State of origin *vis-à-vis* the affected State, even if the two were, in the American phrase, "friends in misery". Draft article 20 should clearly state which particularly dangerous consequences might ensue from continuation of the activity; otherwise, there would be a break between the stringent measures indicated and the undefined level of harm, and that might mean virtually any harm.

40. He agreed with the remarks made by Mr. Bennouna (2184th meeting) and other members that draft article 21 was too rigid. The Special Rapporteur's comments on the article (A/CN.4/428 and Add.1, para. 49) were very categorical and deprived the parties of the possibility of resolving the problem in their own interests. The comments defended the interests of only one party, specifying not only full restitution but also compensation for loss of profits. He wondered whether the Special Rapporteur could cite a single court decision on no-fault liability that had gone so far. As had been pointed out in the Commission, existing conventions on civil liability also provided for ceilings. A number of members had already referred to the contradiction between the maximalist demands in article 21 and the provisions of article 9 and article 23, and it was to be hoped that the Special Rapporteur would draw the necessary conclusions, not by making the latter articles stricter but by taking into account in article 21 the interests of the other "innocent" victim: the State of origin. The Special Rapporteur did refer in his comments to reasonable limits in connection with claims made by States affected by the transboundary consequences of the legal activities of their neighbours, but he should also have pointed to the possibility and the need to take into account the interests of the other "innocent" party. That was only fair and reasonable and was in keeping with the very concept of objective liability. Although the Special Rapporteur referred to article 23 (Reduction of compensation payable by the State of origin) in his comments on article 21, the reference must be clearer and should be included in the text of article 21.

41. Draft article 23 should have found a more important place in the articles on the balance of interests and the rights of the parties, on the understanding that both sides were "innocent"; that approach had been borne out in relevant court decisions and was reflected in the doctrine. The Special Rapporteur's comments on article 23 (*ibid.*, para. 51) were unnecessarily restrictive. At issue was not a reduction of compensation owing to "the nature of the activity and the circumstances of the case", as the article stated, but a calculation of the costs borne by the State of origin for the benefit of the affected State. When the source of the harm was an installation set up and operated in the interests of both States, the burden of the harm should be borne by both, because they had both benefited from that installation.

42. Alternative B was the only realistic choice for draft article 25. Clearly, a State would not agree to bear the liability for another State, despite the possibility explained in the Special Rapporteur's comments (*ibid.*, para. 55) of itself bringing a claim against that other State at a later date. Joint liability might occur in special cases, where two States or their legal entities jointly operated an installation located in the territory of both States or even in the territory of only one of them and if joint liability had been specifically provided for in their agreement. The situation set out in article IV of the 1972 Convention on International Liability for Damage Caused by Space Objects was completely different. At issue there was damage to a third party as a result of the damage that the space object of one State caused to the space object of another in outer space. Furthermore, that Convention concerned liability for fault, which was not under consideration in the present draft articles.

43. The word "operator" suddenly appeared in draft article 26 and then disappeared just as mysteriously. The draft articles spoke solely of the liability of States, whereas, in reality, the harm was caused by an operator, enterprise or the like. Accordingly, new texts should be drafted to reflect that idea throughout the relevant provisions. Liability for damage caused by space objects was borne solely by States, because in that relatively new area such activities had originally been conducted by States and in their interests. But there, too, the situation had changed.

44. With regard to chapter VI of the report, it was clear that the question of the environment had taken on increasing importance; but it was a special problem with its own specific legal nature, and its consideration posed a number of problems. He doubted, for example, whether it was legitimate to define the "global commons" with such expressions as "public domain" (*dominio público* or *res communis*). A number of international conventions, for example the 1982 United

Nations Convention on the Law of the Sea, concerned themselves concretely with the legal aspects of that subject. Although he sympathized with the desire to address a very important matter, it would be premature to examine the question of liability with regard to the global commons.

45. Mr. MAHIOU commended the Special Rapporteur on his thought-provoking sixth report (A/CN.4/428 and Add.1) and asked, on a technical point, why a number of quotations had been left in English in the French mimeographed version, whereas they had been translated in the other languages.

46. The central problem facing the Commission was deciding what the obligations of States were at the prevention and at the reparation stages. One possibility would be to take a flexible approach and to produce general rules. Another would be to introduce strict rules on prevention and reparation. The Commission seemed to be steering a course between those two extremes. In his view, it was necessary to make the obligations governing preventive measures as clear and as strict as possible; after all, that was the purpose of producing the draft articles. If harm then occurred despite a State having met its obligations, it would be possible to exercise flexibility in deciding upon reparation, which should not be too heavy. If a State did not meet its obligations and harm occurred, it would then be liable for a wrongful act. The difficulty would be in identifying what the consequences would be for harm that arose even when a State respected its obligations and in determining whether and how those consequences might differ from obligations arising out of a wrongful act.

47. With regard to the draft articles themselves, reference was made to international organizations in a number of the provisions, but it was not clear what the obligations would be for States that were not members of those organizations.

48. Article 2, subparagraph (*g*), article 13 and article 24, paragraph 1, spoke of the cost of preventive measures, but only in the latter provision was it stated that such costs should be reasonable. Such a reference must extend to all of the provisions, so as to avoid any misunderstanding.

49. The term "incident" was employed in subparagraphs (*k*) and (*m*) of article 2, but nowhere else in the draft. He naturally had reservations about employing a term that appeared only in the article on the use of terms. The word "accident" appeared in article 7, but was likewise absent from the other articles—in particular article 2. That would perhaps require a drafting change. The parameters of "appreciable harm" in subparagraph (*h*) of article 2 also needed further clarification.

50. With regard to draft article 9, he preferred the alternative text suggested by the Special Rapporteur in the footnote to the article in the annex to the report, because it spoke of the "parties concerned", a broader formula which included the natural and legal persons affected by the harm.

51. Draft article 14 was not firm enough in encouraging States to negotiate. Admittedly, it should not be made an obligation, but perhaps the provision might draw upon the wording used in the 1982 United Nations Convention on the Law of the Sea. He was struck by the complexity of draft article 16, perhaps because of the inclusion of both preventive and restorative measures. Might it not be clearer to divide the article into two paragraphs or turn it into two separate articles? As for draft article 17, he wondered whether it was necessary to mention all of the elements that served as a basis for negotiations between States or whether it might not be better to provide for a number of clauses in an annex for that purpose.

52. Of all the draft articles, article 18 was the one about which he had the most serious reservations. The timid wording was not at all satisfactory. The draft had established a whole series of obligations for States, and article 18 then proceeded to neutralize them. Again, was it in conformity with international law to limit recourse to the possibilities provided for in the draft convention? The article definitely stood in need of redrafting. Draft article 20 should be made more stringent.

53. With regard to chapter IV of the draft, on liability, he had his doubts about the reference to full compensation in article 21. The purpose of article 17 was to indicate factors justifying a reduction in compensation, and that implied that compensation would not be in full. Thus article 17 conflicted somewhat with article 21. It was also questionable whether article 21 was in keeping with general practice. As the Special Rapporteur had himself pointed out, a number of conventions set ceilings for compensation. The article must be revised so as to take those factors into account.

54. Alternative B was the better text for draft article 25, for the simple reason that the concept of joint liability did not exist in international law. In draft article 26, paragraph 1 (*a*), the word "directly" might well be replaced by "exclusively", since negligence by a State might aggravate a natural phenomenon, an act of war, etc. As in all régimes governing liability, *force majeure* and fortuitous events did not completely exonerate a State when certain circumstances for which it bore responsibility aggravated the harm that had occurred.

55. His own interpretation of the 1968 Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters (see A/CN.4/428 and Add.1, footnote 85), on which paragraph 3 of draft article 29 was based, was that preference should go to the courts of the State in which the defendant found himself, whereas the provision as it stood indicated that a choice was possible. Lastly, was it wise to make draft article 31 so general, and was it compatible with the draft articles on jurisdictional immunities of States and their property?

56. Mr. BEESLEY said that the issue of whether to found liability on the concept of risk or on that of harm had been the subject of extensive discussion, and the Special Rapporteur had made an ingenious attempt to combine the two concepts. Unfortunately, however, he had not been successful, since the fundamental aspects

of those concepts had had to be unduly compressed into one article, namely article 1. That was not intended as a criticism of the Special Rapporteur but rather as a comment on the intricacies of the subject.

57. At the Commission's fortieth session, he had expressed concern that risk would provide too restricted a basis for the topic and he was therefore pleased that a better balance between risk and harm had gradually been achieved. While risk was highly relevant to the question of preventive measures, he none the less remained unconvinced that it should play a major role in determining liability. As Mr. McCaffrey had pointed out at an earlier session, an activity that might carry a very low level of risk could still cause catastrophic harm. That had always been the starting-point for his own thinking, and he had not moved much beyond it, although he recognized that risk must be brought into the topic.

58. As to whether the Special Rapporteur had altered his approach, he noted that, while the element of damage or harm as a fundamental concept on which the draft was based had been retained, there had also been a shift towards risk as a major element to be taken into account because of the way in which the various concepts involving risk had been formulated. His fear was that to found the draft convention on risk, or even to over-emphasize risk as a basic element, would run counter to the underlying principle enunciated by the Special Rapporteur himself, namely that the innocent victim of injurious transboundary effects should not be left to bear the loss; and that could be the very consequence of transboundary harm caused by an activity which, though not foreseeably risky, was none the less sufficiently risky to cause harm.

59. If draft article 1 was interpreted literally, some curious conclusions ensued. In the first place, it included within its scope the physical consequences of activities that created a risk of causing transboundary harm throughout the process of the activity. In other words, there had to be a risk in order to attract the provisions of the future convention, and it had to be a continuous risk: perhaps that was not the intention of the wording, but it was the literal meaning. To his mind, that reflected an excessively narrow approach and left out of the equation the type of activity involving low risk and high damage.

60. The other element which fell within the scope of article 1 was harm, and there again continuity of harm seemed to be a requirement. He experienced some difficulty with the reference to transboundary harm "throughout the process". He did not know whether harm throughout the process was the only kind of harm contemplated, but he would suggest that the Special Rapporteur give further consideration to the consequences of using an expression that narrowed the scope of the article, perhaps quite unintentionally.

61. His concern grew when he came to draft article 2, which contained what was in effect a list of activities involving risk. The 1982 United Nations Convention on the Law of the Sea, which referred to a whole range of activities giving rise to potential liability, was proof enough that it was not really possible to have even an illustrative list of activities involving risk without the danger that States would be misled rather than reassured. He was not sure, therefore, that such a list would make for certainty, or encourage accession to the future convention. The real disadvantages of the list approach, however, became apparent when it came to the list of dangerous substances. Such lists were extremely useful in particular conventions designed to resolve particular problems, especially when they took the form of annexes that could be readily amended. He would not therefore jettison the idea of a list, especially if it was intended to be illustrative. However, the Special Rapporteur's intention would be more accurately reflected if, instead of including a long list of different types of substances at the very beginning, an annex were added at the end of the draft. He would therefore suggest that the subparagraphs of article 2 be rearranged and that those dealing with transboundary harm be placed at the beginning.

62. He was also concerned at the fact that the "list" approach was borrowed not only from very special kinds of conventions, but also from conventions which had been described as instruments designed to limit liability. While he welcomed the note of realism thus injected into the discussion—inasmuch as more States might decide to accede to the future convention if they could reduce their liability as a result—it was necessary to reflect very carefully before embarking along that route. Under such limited-liability conventions, a State or individual did not have to prove negligence, the *quid pro quo* being that compensation up to a limited amount—or ceiling—was granted, often combined with insurance schemes and funds provided by States. Strangely enough, the environment was a basic issue in all those conventions. Mr. Graefrath (2183rd meeting) had advocated that approach, saying that States, knowing what was involved, would accept it, with the result that a convention would be concluded. For his own part, he was a little more ambitious and would prefer to see States accept fundamental obligations and face the consequences of their acts. Admittedly, the lists in question could provide a degree of certainty, but it would be seen from article 194 of the United Nations Convention on the Law of the Sea just how many different kinds of activities could be involved, even if the words *inter alia* were used to make it clear that the provision in question was not intended to be exhaustive.

63. Some thought should be given to the concept of harm as referred to in subparagraph (*f*) of article 2, which might further unintentionally narrow the scope of the draft, already restricted by the phrase "throughout the process". Also, he was not sure about the word "normal", which he was inclined to interpret as meaning inherently dangerous. Some more precise terminology should be found. He also had difficulty with subparagraph (*g*), which defined the expression "transboundary harm", although he welcomed the reference to the environment. In that connection, he was surprised at the idea which apparently prevailed, namely that some new element was thus being introduced into the draft.

64. Despite his continuing concerns about the scope of the articles as drafted, he did not think that they were so flawed that they could not be improved to the point at which they would become generally acceptable. He also inclined to the view that the Commission should revert to the idea of having two parallel chapters rather than trying to compress the provisions of the draft into one set of articles.

65. With regard to the draft articles themselves, he tended to agree that the Commission might be moving backwards from the *Trail Smelter* case (see A/CN.4/384, annex III) rather than building on it. Four questions had been raised in that case which would provide a useful yardstick to measure the effectiveness of the Commission's texts. Those questions were: (*a*) whether damage caused by the Trail smelter in the State of Washington had occurred since 1 January 1932 and, if so, what indemnity should be paid for it; (*b*) in the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail smelter should be required to refrain from causing damage in the State of Washington in future and, if so, to what extent; (*c*) in the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail smelter; (*d*) what indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the tribunal pursuant to the second and third questions. Again, notwithstanding the terms of draft article 8, on prevention, he trusted that the Commission would also not move very far backwards from Principle 21 of the 1972 Stockholm Declaration,[7] which he read out. He had yet to see any improvement on that Principle, which had been tightly negotiated and unanimously accepted. Indeed, even if draft article 8 were adopted, he wondered whether it should not be given more emphasis by starting with the duty to prevent transboundary harm and then going on to explain the liability that flowed from that duty.

66. Draft article 17 caused some concern, as it was perhaps a little too specific. Even though the factors listed would undoubtedly be useful, more time was needed to reflect on them. The Special Rapporteur was, for all that, to be commended for presenting the Commission with a list in an attempt to make it think its way through the matter.

67. He regretted the lack of opportunity to comment at length on chapter VI of the sixth report (A/CN.4/428 and Add.1), concerning the "global commons", and trusted that at the Commission's next session the Special Rapporteur, who had outlined the difficulties involved, would also be able to suggest solutions. It was not, of course, the first time that the question of the global commons had been tackled. To cite but one example, a clear reference was made in article 1, paragraph 1 (*l*), of the United Nations Convention on the Law of the Sea to areas beyond national jurisdiction, which were also covered by a number of other provisions of that Convention. He was not pleading for the concept of the common heritage of mankind, which none the less had his strong support. Even the most vigorous opponents of that concept accepted that there was an area of the sea-bed beyond national jurisdiction and had not hesitated to draft rules providing for obligations and potential liability in that regard. He therefore trusted that the Commission, as the official law-making body of the United Nations, could point the way in dealing with such matters. For instance, Principle 21 of the Stockholm Declaration applied specifically to areas beyond the limits of national jurisdiction, and thought could perhaps also be given to something in the nature of class actions, coupled with insurance schemes and funds. The Commission could not just say that it was possible to act with impunity with respect to areas beyond national jurisdiction. That was the most clear-cut conclusion to emerge from the analysis by the Special Rapporteur, who was to be congratulated on it.

68. Mr. McCAFFREY said that chapters IV and V lay at the very heart of the draft. In particular, he considered that chapter IV—which, though entitled "Liability", contained very little to do with liability—should set forth in clear terms the obligation of the State of origin to make compensation for harm caused. At present, that obligation was stated in rather weak terms in draft article 9, on reparation.

69. There should also be a clear provision to the effect that the amount of compensation should be such as to make possible restoration of the *status quo ante*, except to the extent that the amount might be reduced in accordance with the terms of article 23. As drafted, that article suggested that there was an onus on the affected State to secure what it could from the State of origin. In his view, the burden should be reversed so that there was in effect a presumption that the State of origin must make full compensation, that State having the possibility, however, of rebutting the presumption on the basis of the mitigating factors set out in article 23. Article 23 should be expanded to include certain factors now set out in draft article 17, including those in subparagraphs (*a*) to (*d*), (*f*) to (*h*), (*j*) and (*m*). All those factors could perhaps be incorporated in article 23 by reference, to provide guidance in the negotiations between the State of origin and the affected State.

70. He agreed with the principles stated in draft article 24, and welcomed in particular paragraph 1, concerning the obligation to compensate for reasonable costs of restoration of elements in the environment that had been damaged. It was a very positive contribution to the draft and seemed to be the most practical way of assessing damage to the environment at the present time, although in some cases it would not be possible to restore the damage done to the environment. In those latter cases, some form of satisfaction should be contemplated and could take the form, for instance, of nominal compensation, an expression of regret, or an offer to provide some form of replacement.

71. For draft article 25, he preferred alternative A, which provided for joint and several liability, since once again he considered that the onus should be on the State of origin. In many cases, it would be difficult for that State to prove which of two source States was responsible. There was, however, precedent at the domestic level. In a case in the United States of

[7] See 2179th meeting, footnote 17.

America, *Michie* v. *Great Lakes Steel* (1974), foreign polluters had in essence been made jointly and severally liable and the victims had therefore been able to obtain full compensation.

72. Article 26 should have a place in the draft as it was a standard provision in such instruments.

73. He would reserve detailed comments on chapter V (Civil liability), which was a most welcome addition to the draft, until the Commission's next session. It could perhaps be stated more clearly that claims must be brought before the courts of the State of origin, as provided for under certain conventions in the field. An article on enforcement of judgments would then be unnecessary because judgments would be enforced in the State in which they were delivered.

74. Chapter VI of the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) dealt with harm to the "global commons", an area in which the draft articles could have a significant impact. It was necessary to bear in mind that novel solutions would be required, as the commons did not enjoy legal personality. Nor, at present, was there any international organization empowered by the international community to represent the community's interests in the protection and preservation of the global commons. It was thus a problem that genuinely required the progressive development of international law, as well, perhaps, as some proposals concerning an institution—whether an international organization or an organ of an existing organization like the United Nations—that could be vested with competence to protect and, in essence, act as the guardian of the commons on behalf of the international community. One suggestion worth considering was that the Trusteeship Council could be assigned that responsibility.

75. Mr. HAYES said that he supported draft article 21, which provided for an obligation to negotiate that was well established in international law and had in fact also been considered by the ICJ. He agreed with the Special Rapporteur that a breach of that obligation, unlike a breach of the obligations covered earlier in the draft, should constitute a wrongful act.

76. While he was pleased that the Special Rapporteur had rejected the idea of imposing a ceiling for compensation, he considered that one of the grounds he had cited for a reduction of compensation—namely on the basis of the amounts spent to prevent transboundary harm to the affected State—would be unjustifiable. Viewed in mathematical terms, the effect of such measures, if successful, would be to mitigate the harm, thereby limiting the liability of the State of origin. If the measures were unsuccessful, however, the affected State could hardly be expected to share the costs. He did not, however, think that the question should be approached mathematically. Rather, the taking of preventive measures should be a matter for consideration in the negotiation of compensation between the two parties. He therefore supported the general thrust of draft article 23, but would omit the part in square brackets, which could be dealt with in the commentary, though without making any specific reference to the practical effects.

77. He agreed that harm to the environment *per se* should also be covered in the draft articles but did not see the need for a separate article on the matter. Article 24, paragraph 1, seemed to him to be a general provision and should perhaps appear a little earlier in the draft, in which case paragraphs 2 and 3 would be unnecessary.

78. He agreed with Mr. Ogiso's comments (2185th meeting) on draft article 27, concerning limitation. That article apparently applied to litigation before the domestic courts and it seemed unwise to try to impose uniformity of limitation in a general instrument such as the one with which the Commission was concerned, particularly as it covered a very wide range of activities, unlike some of the conventions cited by the Special Rapporteur as precedents.

79. In the matter of civil liability, he welcomed the system whereby the affected State or injured party could choose between pursuing a remedy through diplomatic channels or before the domestic courts of the State of origin. That system would also permit a non-State claimant to pursue a remedy before the courts of the affected State, which would presumably be its own State. He applauded the fact that there was no suggestion that the liability of the State of origin was merely supplemental to that of the operator.

80. Among the provisions giving effect to that approach were those set forth in draft article 28, paragraph 1, in which the rule on domestic remedies was set aside so that diplomatic channels might be chosen, and in draft article 31, in which State immunity was set aside, thus enabling the national-court route to be pursued. There was, of course, also provision for giving jurisdiction in such cases to domestic courts and giving the injured parties access to those courts. In that connection, he had two questions. First, should the draft also expressly provide that a State of origin must accept the jurisdiction of the domestic courts in the affected State; and secondly, did the Commission intend, as he thought was the effect of the second sentence of article 28, paragraph 2, that where an injured individual pursued his remedy before the courts of the State of origin and failed, his own State might not under any circumstances subsequently espouse his claim through diplomatic channels, even if it wished to do so on grounds such as denial of justice?

81. Since comparatively few members of the Commission had spoken on the question of the "global commons", he trusted that it would be possible to revert to the matter at the next session on the basis of the very helpful chapter VI of the Special Rapporteur's sixth report (A/CN.4/428 and Add.1). He would welcome anything the Special Rapporteur might wish to add in that regard.

82. He wholeheartedly endorsed the Special Rapporteur's comment that "if there is no current liability whatsoever under international law for this type of harm to the environment in areas beyond national jurisdictions, then there definitely ought to be" (*ibid.*, para. 76). The report highlighted the considerable difficulties in devising rules to meet the situation, but also indicated some promising possibilities. In his view, it

should not be beyond the ingenuity of the Commission to devise a way of bringing the subject within the confines of the topic.

The meeting rose at 6.20 p.m.

2187th MEETING

Thursday, 5 July 1990, at 3.35 p.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*)* (A/CN.4/412 and Add.1 and 2,[1] A/CN.4/421 and Add.1 and 2,[2] A/CN.4/L.443, sect. F, A/CN.4/L.445)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 22 TO 27

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 22 to 27 as adopted by the Committee (A/CN.4/L.445).

2. Mr. MAHIOU (Chairman of the Drafting Committee) said that he first wished to thank the members of the Drafting Committee for their constructive spirit and hard work. He also thanked the members of the Commission who were not members of the Drafting Committee but had helped in its work, as well as the Special Rapporteur, whose assistance had been most valuable, and the secretariat.

3. In organizing its work, the Drafting Committee had borne in mind the Commission's stated intention to make every effort to complete the second reading of the draft articles on jurisdictional immunities of States and their property at the present session and to give priority, during its current members' term of office, to the topics of the draft Code of Crimes against the Peace and Security of Mankind and the law of the non-navigational uses of international watercourses. The Committee had been unable to start with the topic of jurisdictional immunities because the third report of the Special Rapporteur, Mr. Ogiso, which incorporated suggestions on the articles referred to the Drafting Committee at the previous session, had not yet been distributed in all languages at the beginning of the present session. The Committee had therefore decided to devote its first two weeks' work to the topic of international watercourses, on which it had then spent two additional meetings.

4. At the beginning of the present session, four draft articles on the law of the non-navigational uses of international watercourses had been pending in the Drafting Committee: draft articles 16 [17] (Pollution of international watercourse[s] [systems]) and 17 [18] (Protection of the environment of international watercourse[s] [systems]), submitted by the Special Rapporteur in his fourth report (A/CN.4/412 and Add.1 and 2) in 1988; and draft articles 22 (Water-related hazards, harmful conditions and other adverse effects) and 23 (Water-related dangers and emergency situations), submitted in the fifth report (A/CN.4/421 and Add.1 and 2) in 1989.

5. The Drafting Committee had been able to complete its work on those four articles, which were numbered according to the provisional numbering system used by the Special Rapporteur. Thus, in order to complete the draft articles as a whole, the Committee had only to finish work on the articles referred to it at the present session or yet to be proposed by the Special Rapporteur, as well as on article 1, on the use of terms. It was therefore highly likely that the Commission would be able, as it intended, to complete the first reading of the draft articles before the end of the term of office of its current members in 1991.

6. He recalled that the Commission had already adopted the first three parts of the draft at previous sessions. Part I (Introduction) contained five articles, the first of which, on the use of terms, was still under consideration; part II (General principles) consisted of articles 6 to 10; and part III (Planned measures) contained articles 11 to 21. The articles now proposed by the Drafting Committee constituted part IV (Protection and preservation) (arts. 22-25) and part V (Harmful conditions and emergency situations) (arts. 26-27) of the draft.

7. Articles 22 to 25 of part IV corresponded to draft articles 16 [17] and 17 [18] submitted by the Special Rapporteur in his fourth report in 1988,[3] which had dealt with pollution of international watercourses and with protection of the environment of international watercourses, respectively. The Drafting Committee had rearranged the provisions of those articles on the basis of the view expressed by several members of the Commission that, because the concept of protection was broader than the concept of pollution, the duty to

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* Resumed from the 2167th meeting.

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

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

[3] For the texts of draft articles 16 [17] and 17 [18] submitted by the Special Rapporteur in his fourth report and a summary of the Commission's discussion on them at its fortieth session, see *Yearbook ... 1988*, vol. II (Part Two), pp. 26 *et seq.*, footnote 73 and paras. 138-168, and pp. 31-32, footnote 91 and paras. 169-179, respectively.