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Summary record of the 2190th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1990, vol. I

even go further and say that "referring to the court a case against an individual could avoid an inter-State dispute".

42. Mr. MAHIOU said that, if the second sentence was to be retained, it should be couched in less ambiguous terms. Moreover, the word "remove" was too strong and might give rise to doubts. He therefore proposed the following wording: "In some cases, referring to the court a case against an individual could attenuate or wipe out the inter-State aspects of the case."

43. Mr. HAYES said that he, too, would like to retain the second sentence, which made an important point. Perhaps it would be clearer and more acceptable if it were less categorical. He therefore proposed that it be reworded as follows: "In some cases, referring to the court a case against an individual could result in the case not being regarded as relating to an inter-State dispute."

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

44. Mr. MAHIOU, referring to the first sentence, said that "small States" were not the only ones to have "problems in implementing existing systems". That could also happen to large States. It would therefore be better to say: "Some States have problems . . .".

45. Mr. SEPÚLVEDA GUTIÉRREZ said that, in his view, the paragraph as a whole was poorly drafted. There was no proper connection between the two ideas expressed in the two sentences. In addition, the second sentence was not very clear: the impression was that something was missing. He would appreciate some clarifications in that regard.

46. Mr. ARANGIO-RUIZ said that he, too, considered that the second sentence, and particularly the final part, gave the impression of being incomplete.

47. Mr. GRAEFRATH, explaining the meaning of the second sentence, said that, in the case of certain types of crime—drug trafficking being the most recent example—some States did not manage to ensure the administration of justice in their territory. As it might be thought that the establishment of an international court would provide a solution in their case, the purpose of the second sentence was in fact to say that that was not so: the problems encountered in the administration of justice at the internal level would not be solved by the establishment of an international court.

48. Mr. BENNOUNA said that, in that case, the end of the second sentence could be deleted, so that it would read: "It would, however, be illusory to believe that an international prosecuting mechanism would enable those States to overcome all those problems."

49. Mr. AL-QAYSI supported that proposal, which reflected Mr. Graefrath's idea more accurately. For the sake of clarity, however, he would add a reference at the end of the sentence to "problems with regard to prosecution and trial".

50. Prince AJIBOLA said that he would like the terminology to be harmonized and a choice to be made once and for all between the words "court" and "international court". As to the second sentence, if the Commission did not adopt Mr. Bennouna's proposal, the existing wording could be clarified by a reference at the end of the sentence to "problems associated with the implementation of their criminal legal systems".

51. Mr. GRAEFRATH proposed the following text for paragraph 28:

> "Some States often have problems in implementing existing national jurisdiction and the court is seen as a useful alternative. It would, however, be illusory to believe that an international prosecuting mechanism would relieve those States of the problems associated with the national administration of justice."

52. Prince AJIBOLA said that, in his view, the expression "administration of justice" was too broad.

53. The CHAIRMAN suggested the expression "administration of criminal justice".

54. Mr. CALERO RODRIGUES said that the words "implementing . . . national jurisdiction" were not very clear. Moreover, it was difficult to know by whom "the court is seen as a useful alternative". Lastly, the text proposed by Mr. Graefrath seemed to go further than the original text.

55. Mr. AL-QAYSI said that he, too, considered that Mr. Graefrath's proposal differed considerably from the original text. He would also like some examples to be given of "the problems associated with the national administration of justice".

The meeting rose at 6.10 p.m.

2190th MEETING

Tuesday, 10 July 1990, at 10.10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Qaysi, 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. Jacovides, 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.

Tributes to the memory of Professor Paul Reuter

1. The CHAIRMAN declared open the special meeting in honour of the memory of Professor Paul Reuter, who had been one of the Commission's most eminent members. He welcomed as guests Madame Reuter, a number of distinguished jurists, including Judges Ago

and Guillaume of the International Court of Justice, and the Permanent Representative of France to the United Nations Office at Geneva.

2. The news of Mr. Reuter's death on 29 April 1990, two days before the opening of the forty-second session of the Commission, had been a great shock to all its members, who shared the grief of Madame Reuter. Mr. Reuter had been a distinguished scholar and jurist, a great teacher of international law, an internationalist, a humanist and a patriot. During World War II, he had joined in the struggle to liberate his country and to make the world safe from nazism. Several generations of students and teachers of international law had benefited from his mastery of the subject. He had written many treatises on international law and published hundreds of articles on international legal problems. He had served on several international arbitral tribunals, and was particularly remembered for his contribution to the award in the *Lake Lanoux* arbitration. His work in the Commission and its Drafting Committee had been outstanding for its style and scholarship, and all his former colleagues vividly remembered his kindness and modesty. A few years previously, Mr. Reuter had undertaken a lecture tour in China, and he had hoped to make another; it was most regrettable that Chinese law students would not have another opportunity to benefit from his lifelong experience of international law.

3. In conclusion, he wished to pay a personal tribute to the memory of a great teacher, scholar and jurist, a distinguished member of the Commission, and a good friend.

4. Mr. KOTLIAR (Secretary to the Commission) read out the following message from Mr. Fleischhauer, the Legal Counsel to the United Nations:

I am deeply sorry that I cannot be with you in Geneva to join personally in today's tribute by the Commission to the memory of one of its most distinguished members. I hope you will allow me, however, to express on behalf of the Secretariat and myself our sympathy for the loss suffered by the international legal community.

The long and brilliant career of Paul Reuter ranged over many specialist fields. Some will recall more especially his contribution to the teaching of international law, and his association with some of the most prestigious French universities, especially the University of Aix-en-Provence, a town to which he was particularly attached because it was there that he met you, Madame, for whom he had such deep affection, and who showed him such untiring devotion throughout his life. Others will evoke his exceptional contribution to international jurisprudence, and the part he played in several major cases before international courts and arbitral tribunals in the past 50 years. Others, again, will emphasize his writings and his doctrinal work.

For my own part, I should like to dwell more particularly on two aspects of Paul Reuter's career to which I attach great value. The first is his decisive part in setting up the institutions of the European Community. Born in Lorraine in 1911, he was perhaps more aware than others of the need to lay the legal foundations for a united Europe. His country and mine can only salute his pioneering work in the launching of the European Coal and Steel Community, which was to have immense implications for the future development of Europe. The second aspect of his career that I wish to evoke here is his contribution to the activities of the United Nations. In addition to the deep and lasting influence he exercised as Chairman of the International Narcotics Control Board, as you know, he placed at the Commission's disposal, with complete fidelity and devotion, his legal knowledge, his intelligence, his practical mind and his sense of proportion. The contribution he made to treaty law, and especially to the drafting of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, ensures that he will always be remembered in the many international organizations which daily refer to the Commission's work on this topic.

No doubt each of the tributes that have been or will be paid to Paul Reuter will emphasize some particular aspect of his manifold activities; but they will all, I think, stress his outstanding moral qualities, his humanism and simplicity—in a word, his nobility of spirit. And it is with this reminder of his spiritual greatness, that rarest and most irreplaceable quality, that I would like to conclude this brief tribute.

5. Speaking on behalf of the Commission's secretariat, he said that the staff had regarded it as a privilege to work with Paul Reuter for so many years. He himself had learned to appreciate Mr. Reuter's high professional and personal qualities during the one session he had so far served the Commission.

6. Mr. THIAM, speaking as doyen of the Commission, said that Paul Reuter's death, two days before the opening of the present session, had caused deep grief and left an immense void. His presence in the Commission had enhanced its prestige; he had brought to it vast learning, a keen intelligence and an inventive and alert mind which had often enabled the Commission to find solutions to apparently intractable problems. To an impressive body of published work, a distinguished university career in France, and a greater breadth of culture, he had added exceptional human qualities. Full of charm and delicacy, he was modest and simple, open and conciliatory, but so persuasive that he could bring his listeners round to his point of view. He (Mr. Thiam) had been honoured by Mr. Reuter's friendship and affection, and he keenly felt the loss of such an exceptional man. To Mr. Reuter's wife, Christiane, who had always stood by and encouraged her husband, he expressed faithful friendship.

7. He proposed that the next session of the International Law Seminar be entitled the "Paul Reuter Session".

8. Mr. DÍAZ GONZÁLEZ, speaking on behalf of his colleagues from Latin America, said that it was both difficult and easy to speak of Paul Reuter. His death had been the first news in Geneva during the current session, and it meant losing someone he had been used to seeing in the Commission for the past 13 years. It had been a privilege to be counted among Professor Reuter's friends, and his death was a cause of heartfelt sorrow.

9. Mr. Reuter had been a fitting model for others to follow. A man without artifice, he had always done what was needed. When barbarian forces had invaded his country, he had fought for its freedom; and as a teacher, he had sought to inculcate in his students the inherited wisdom of the past. He had played a distinguished part in international treaty-making and as an international arbitrator and expert adviser. His learning had been a source of valuable guidance to many third world and developing countries.

10. Recalling Mr. Reuter's work as Chairman of the International Narcotics Control Board, and his inestimable contribution to the work of the Commission, he pointed out that Mr. Reuter had also fought for the rights of the poor. He concluded by expressing his heartfelt condolences to Madame Reuter.

11. Mr. McCAFFREY, speaking on behalf of members of the Commission from Western countries, said that he had known Paul Reuter only through his universal reputation and his writings until 1982, when he himself had joined the Commission. At that time, Professor Reuter had been Chairman of the Commission and Special Rapporteur for its work on the question of treaties concluded between States and international organizations or between international organizations. As Chairman, Mr. Reuter had insisted that the Commission should begin its meetings punctually at 10 a.m., thus setting a model for the future. As Special Rapporteur, his mastery of the law of treaties, on which he had written a classic work, had enabled him to write reports outstanding for their concision and lucidity.

12. For all his greatness, Paul Reuter had been uncommonly modest, and on many occasions had declined the chairmanship of the Commission. His personal signatures in the Commission had been his rumpled black raincoat, his well-worn briefcase and the running shoes he bought for walking the streets and parks of Geneva. Praise or compliments made him uncomfortable. Yet he had been a tireless and effective advocate for the less privileged and for those exploited by others. His qualities of humanity and compassion had been demonstrated many times both in his interventions in the Commission and in his work for the International Narcotics Control Board. In the Commission, he had been admired for his eloquence, his penetrating legal analysis and his vast experience, including his work on the *Lake Lanoux* award. On many occasions, his brilliant arguments had persuaded other members to forswear firmly held views.

13. The Commission should be thankful for having known Paul Reuter—a great and good human being and a citizen of the world.

14. Mr. AL-QAYSI, speaking on behalf of the Asian members of the Commission, said that they had always regarded Professor Reuter as a fountain of knowledge, culture and civility. His legal expertise and sense of realism had been a beacon of light along many dark and troubled paths, and his charm and modesty had been a source of encouragement in the Commission's difficult tasks. His contributions to the work of the Commission would continue to inspire its present and future members. The high standards he had set were worthy of emulation, and the Asian members were proud to have worked with him. He had been a valuable asset not only to his own country, France, but also to the Commission and to the legal community at large.

15. In concluding, he offered sincere condolences to Madame Reuter and to France. As the Muslim mystics said: "The beginning of the path is at its end." With his death, Mr. Reuter had achieved a glorious beginning.

16. Mr. BARSEGOV, speaking on behalf of his Eastern European colleagues, expressed their deep sorrow at the passing of the Commission's most senior member. They had always prized Professor Reuter as a distinguished international lawyer and for his broad and refined culture.

17. Paul Reuter had been born into the legal profession, inheriting from his family background a zeal for the law, for which he had proved particularly apt through his training and his natural gifts. A citizen of the world as well as of France, he had been trained in the Law Faculty at Nancy, and in the hard school of the Resistance, before entering diplomacy.

18. From 1974 to 1983, he had served as Chairman of the International Narcotics Control Board. A great peace-lover, he had exercised a signal influence as an arbitrator in several leading arbitration cases. He had been a member of the Institute of International Law, and in 1964 had joined the Commission as representative of the French legal system, making a major contribution both as a member and as a Special Rapporteur. Showing great modesty and reserve, he had always treated his colleagues as equals. On many occasions, he had persuaded them to adopt political compromises that were nevertheless legally sound. The General Assembly had repeatedly shown its confidence in him by reappointing him to the Commission.

19. In the countries of Eastern Europe, he was well known for his many articles on legal questions. Among the numerous topics on which he had written were nationality law, the Nürnberg trials, labour and labour disputes, nationalization, human rights, European integration, an international criminal court, treaty law, international responsibility, and maritime delimitation. Of particular interest, in view of the restructuring of international relations, was his work on confederation and federation.

20. Besides his manifold activities of a diplomatic and scientific nature, Mr. Reuter had done much for the rising generation of international lawyers through his work in the Commission and in academic institutions in his own country. Yet he had often refused distinctions and titles: the only title he had retained was that of professor. Lawyers everywhere, including the developing countries, would owe a lasting debt to Professor Reuter's work, especially that on the law of treaties, with which he had been closely associated for a quarter of a century.

21. In conclusion, he expressed his deep sympathy to Madame Reuter.

22. Prince AJIBOLA, speaking on behalf of members of the Commission from the African countries, paid a tribute to the late Professor Paul Reuter, an Officer of the Order of the Green Crescent of the Comoros, Commander of the Legion of Honour and the National Order of Merit and, until his death, the doyen of the Commission.

23. Born in 1911, Paul Reuter had obtained a Doctorate of Law in 1933. He had become an Assistant Lecturer in 1937, and a full Professor at the law faculties of Poitiers in 1938, of Aix-en-Provence in 1941 and of Paris from 1951 to 1981. In 1953 he had been appointed Professor at the Institute of Political Studies in Paris; in 1981 he had become Professor Emeritus of the University of Law, Economics and Social Sciences in Paris; and in 1985 he had been appointed Associate Professor at the Graduate Institute of International Studies in Geneva. He had given several courses at The

Hague Academy of International Law, the first in 1952, and had lectured at many institutes and universities in France and abroad. He had held a number of public offices from 1944 to 1946 at the French Ministries of Information, Justice, and National Defence. In 1948, he had been appointed Deputy Legal Adviser to the French Ministry of Foreign Affairs and had later become Legal Adviser to that Ministry.

24. As a jurist of international repute, Mr. Reuter had appeared as counsel in several cases before the International Court of Justice, including that of the *Rights of Nationals of the United States of America in Morocco* (1952) and the case concerning the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954). It had been said that "Some are born great, some achieve greatness, and some have greatness thrust upon them". Of Paul Reuter it could be said that he had achieved greatness in his lifetime by his dedicated work.

25. All the African members of the Commission extended their heartfelt sympathy to Mr. Reuter's widow and to the other members of his family. Their sincere condolences also went to the Government and people of France, whose loss and grief they shared. To the African members of the Commission, Mr. Reuter had not seemed to belong to any one geographical region; he had undoubtedly wished them to see him in that light, through his words, deeds and association with the members of the Commission during his lifetime. He had shared in the Commission's aspirations and determination to make international law a law that was at the service of man, free from injustice and intended to serve the interests of both developed and developing countries, while protecting the weak from the strong. His contribution to the modern law of treaties and the law of international organizations would leave indelible imprints on legal history.

26. As a member of the Permanent Central Opium Board and later Chairman of the International Narcotics Control Board, Mr. Reuter had dedicated himself to fighting the scourge of drug trafficking which was now such a great danger to humanity, and especially to young people. For his distinguished contribution to peace and international understanding, he had received the Rufus Jones Award of the World Academy of Art and Science in 1986.

27. A great gentleman, author, distinguished lawyer, jurist and humanitarian was no more. The members of the Commission would miss his wisdom, his experience and above all his friendship. They could find solace in their memories of him and in the imperishable work he had left behind.

28. Mr. PELLET observed that he was speaking as one who had the impossible task of succeeding the late Professor Paul Reuter as the member of the Commission from France. In the past six weeks he had been able to realize the fascination which Mr. Reuter had exercised on all who met him. His had been an extraordinary personality, in which were blended firmness and subtlety, assurance and respect for others, faith and a critical spirit. He had been a man of faith, but not of dogma.

29. It was difficult to place Professor Reuter in one of the various schools of thought of international lawyers. His realism and sense of proportion ruled out the voluntarist school; he had known full well that law could not be reduced to pure theory. He certainly came closer to objectivism, but as he had said in his 1961 course at The Hague Academy of International Law, "law is not only a product of social life; it is also the fruit of an effort of thought".[1]

30. His extraordinarily subtle mind could not possibly have been satisfied with any pre-existing general theory of law; but for his great respect for the freedom of others, he could have founded a school of his own, like Kelsen or Georges Scelle. He had left a large body of learned writings marked by a coherence which was due primarily to his concern "not to neglect any of the aspects of social life"[2] and to include all the facets of a reality that was far too complex to be apprehended by "makers of systems".

31. In some quarters, Professor Reuter had been described as belonging to the "natural law" school; but it seemed hardly possible so to classify him and thus lock him into a closed system of thought. He might perhaps have been willing to be associated with natural law so long as it was understood as a bridge between ethics and law. For him, moral values were the only basis for the binding force of international law.[3] In the conclusion to his 1961 course at The Hague Academy, he had not failed to stress how the present era was increasingly marked by the impact of moral considerations and their exigencies.[4] His conviction on that point must have been strengthened by the recent remarkable developments in Europe.

32. Paul Reuter had taken an active part in the French Resistance during the Second World War and had occupied a number of important posts after the Liberation. He had participated in founding the newspaper *Le Monde* and in the setting up of the National School of Administration. As Deputy Legal Adviser to the Ministry of Foreign Affairs, as advocate and counsel in numerous cases before the International Court of Justice, as member or chairman of a number of arbitration tribunals, and as a member of the International Law Commission, he had played a most important part in international legal affairs.

33. The construction of Europe owed much to Professor Reuter. It was no exaggeration to say that, without him, the European Communities would not have appeared in their present form, or would have been established only much later. But the part played by Mr. Reuter in that work was unknown to the general public; seeking fame had been foreign to his nature.

34. In his writings, he had consistently sought to combine precision of thought with conciseness of style. He had attached the greatest importance to brevity, and

[1] P. Reuter, "Principes de droit international public", *Recueil des cours de l'Académie de droit international de La Haye, 1961-II* (Leyden, Sijthoff, 1962), vol. 103, p. 459.

[2] *Ibid.*, p. 472.

[3] *Ibid.*, p. 481.

[4] *Ibid.*, p. 650.

his aim had been to make intelligence triumph over confusion—a determination that was similarly evident in his teaching. His contact with students had given him unalloyed satisfaction. His numerous activities in public life, including the construction of Europe, had left him with mixed memories, but as he had pointed out in a recent letter, teaching, with its special values, had given him unique satisfaction. Students knew how to recognize great teachers and Professor Reuter had been a great one among the great. He had inspired an impressive number of internationalists' careers, not only in France, but all over the world.

35. No personality could be more appealing than that of Paul Reuter the man, always ready to listen to others and steadfast in his feelings towards his masters, his students, his friends, his son, his grandchildren and his wife, to whom he (Mr. Pellet) expressed his most sincere condolences.

36. The CHAIRMAN invited Mr. Levitte, Permanent Representative of France to the United Nations Office at Geneva, to address the Commission.

37. Mr. LEVITTE (Permanent Representative of France to the United Nations Office at Geneva) said that he had been instructed by Mr. Michel Rocard, Prime Minister of France, to convey the following message to the Commission:

I am particularly anxious to associate myself, in my own name and in that of the French Government, with the tribute being paid today by the International Law Commission to the memory of Professor Paul Reuter.

This tribute is being paid to the scholar whose teaching and legal publications have—and I say this with pride—profoundly influenced generations of jurists, both foreign and French, and who for 25 years made a great contribution to the progress of your work on essential topics of international law.

It is also being paid to someone who worked, by his own acts, for the progress of international law, both as a judge and as an uncompromising advocate of the causes he considered just.

His commitment to the service of the common good and the painful experience of the men of his generation led him to take an active part in the formation of the European idea and the elaboration of the instruments which have marked the construction of the European Communities.

The same generous spirit led him faithfully to devote part of his activities to the fight against the use of, and traffic in, narcotic drugs, through the work of the International Narcotics Control Board.

But besides the great internationalist, today's tribute by his colleagues is being paid to Professor Reuter as a person, for his integrity, his delicacy, his deep attachment to his convictions, his great wisdom and kindness. His extreme modesty and spontaneous affability could not conceal the intellectual fascination he aroused so often and so naturally.

Lastly, allow me to observe that the passing of Professor Reuter is felt all the more in France because this servant of the law and of the international community was, at the same time, an outstanding servant of his country.

I am therefore deeply moved by the solemn tribute being paid today to Paul Reuter by the members of the Commission, whose work dominates the progress of international law. No one could appreciate better than you the eminent position of the departed and the void created by his loss. Please rest assured, Mr. Chairman, that my countrymen greatly appreciate this ceremony of farewell and loyalty.

38. To that message from the Prime Minister, he wished to add, in the name of all the members of the French Permanent Mission at Geneva, a message to Madame Reuter, whose grief they shared: "Session after session of the Commission we have had the joy of seeing your husband return to us. We saw him as that modest but, at the same time, brilliant personality and source of high inspiration which his colleagues have just evoked. His memory will never leave us."

39. The CHAIRMAN thanked the Permanent Representative of France for his statement and for the message from the Prime Minister of France. Madame Reuter had expressed the wish to address the Commission and he invited her to speak.

40. Madame REUTER said that she was so deeply moved by the warm and sincere tributes paid to her late husband that she found it difficult to convey her feelings to the Commission, with which her husband had been actively associated for so many years. She was very grateful for being asked to attend the commemorative meeting and gave her heartfelt thanks to the Chairman and members of the Commission for their invitation.

41. The CHAIRMAN drew attention to the proposal by Mr. Thiam that the next session of the International Law Seminar be entitled the "Paul Reuter Session". If there were no objections, he would take it that the Commission agreed to adopt that proposal.

It was so agreed.

42. The CHAIRMAN invited the members of the Commission and the distinguished guests present who had joined them in the tribute to the memory of Paul Reuter to sign the protocol of the commemorative meeting, which would be presented to Madame Reuter. The summary record of the meeting would also be forwarded to Madame Reuter and to the French Government.

The Permanent Representative of France and Madame Reuter withdrew.

The meeting was suspended at 11.15 a.m. and resumed at 11.50 a.m.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*)* (A/CN.4/384,[5] A/CN.4/423,[6] A/CN.4/428 and Add.1,[7] A/CN.4/L.443, sect. D)[8]

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLES 1 TO 33[9] (*concluded*)

* Resumed from the 2186th meeting.

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

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

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

[8] 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.

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

43. Mr. BARBOZA (Special Rapporteur), summing up the discussion on his sixth report (A/CN.4/428 and Add.1), acknowledged the suggestions made by members of the Commission for improving the draft articles. Notwithstanding the variety of extremely useful comments, he would focus on just a few key articles.

44. There had been general agreement that the activities referred to in draft article 1 should receive similar treatment in regard to their consequences. Doubts had been expressed as to the need for two definitions, it being argued that, in practice, the legal treatment would be the same. One member had wondered whether the activities referred to in article 1, namely those which "cause, or create a risk of causing" transboundary harm were the same as those referred to in subparagraphs (*a*) to (*e*) and (*f*), respectively, of draft article 2. He was rather surprised by that question and did not see how the draft articles could possibly refer to any other activities. But perhaps it would be wiser to identify the activities specifically, in order to dispel any further doubts.

45. It had been said that he had espoused the view cited in the report that activities causing transboundary harm in the course of their normal operation were neither "clearly unlawful" nor "clearly lawful" (*ibid.*, para. 8 *in fine*). Paragraph 8 of the report had been criticized, but in it he simply commented on the ideas of the Experts Group on Environmental Law of the World Commission on Environment and Development; they were not his own ideas.

46. The scope of the draft articles had not been amended since the submission of his fifth report (A/CN.4/423). No changes had been made with regard to activities with harmful effects, i.e. activities which caused harm as a result of their normal operation. A new criterion was very tentatively proposed to help in determining the concept of "appreciable" or "significant" risk, which in turn would provide a better definition of the scope of activities involving risk. That was the purpose of the list of dangerous substances. That concept must not, however, be taken in isolation, but only in relation to the idea of "significant risk of transboundary harm".

47. An activity included in an exhaustive list of dangerous activities might be one that created a risk of local harm, but not of transboundary harm: the site of the operation might be too far from national borders to be of any danger to neighbouring States, or the substance in question might be used in small quantities or in situations in which no risk was involved, etc. There was no method by which a case could be automatically identified as involving "significant risk of transboundary harm". On the other hand, the example given of a dam bursting, when water would clearly be a dangerous substance, was very pertinent. Subparagraph (*b*) of article 2 should be reworded to include such cases.

48. Three opinions had emerged during the discussion: some members were opposed to the inclusion of any list; some were in favour of including a supposedly exhaustive list, flexibility being provided by periodical updating; and some supported a less stringent method, in which the list would only play an illustrative part. The second suggestion seemed to be unworkable, if "exhaustive" was taken to mean that any activity in which a substance in the list was used would automatically be considered an activity referred to in article 1. His intention was not, however, to use the list merely to provide illustrations. If there was to be a list, it should be as extensive as possible for all substances that might cause transboundary harm. The term "exhaustive" was unclear, because it might be construed to mean that there were no other substances in the world that might be included in the list. Substances having the characteristics set out in subparagraph (*b*) *in fine* of article 2 could, however, also be considered dangerous, i.e. those which occurred only in certain quantities, concentrations or situations, for example water. He would like to give the matter further consideration in his next report.

49. Some members considered that too many terms were defined in article 2. There were 14; but the list of terms defined in a number of related conventions was at least as long, if not longer. In a new field, new terms must always be defined.

50. It had been said that the definition of "harm" should not appear in the article on the use of terms. But that was the general practice. In the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (see A/CN.4/428 and Add.1, footnote 37), the corresponding definition appeared in the article on the use of terms (art. 1, para. 15) and covered the category of damage contemplated by the Convention. Article 8 of the Convention concerned liability, not damage: it determined the liability of the operator, the liability of the State, exceptions, etc. The definition of "harm" should remain in the article on the use of terms.

51. It had been said that harm, apart from requiring a separate article, should be categorized in a number of provisions covering loss of life and personal injury; loss of and damage to property and the enjoyment of areas; the cost of reasonable preventive and clean-up operations; and damage to the environment. All those concepts were already contained in draft articles 2 and 24, although in somewhat different language. He agreed, however, that the provisions on harm should be presented in separate subparagraphs covering, more or less, the categories suggested (clean-up operations were not necessary in the case of all activities).

52. The new category of harm to the environment that had been introduced had been generally well received; it had, however, been suggested that it was included in the general notion of harm. The 1960 Convention on Third Party Liability in the Field of Nuclear Energy and the 1963 Vienna Convention on Civil Liability for Nuclear Damage did not include such a category, but there appeared to be a consensus in the legal community that it should be introduced. The most recent conventions and drafts made specific mention of the environment in their provisions on harm.

53. International practice favoured compensating only for those measures actually undertaken or to be undertaken in order to restore the environment. Apart from the Convention on the Regulation of Antarctic Mineral Resource Activities, no international instruments made

provision for cases in which it was impossible to restore the *status quo ante*. A number of views had been expressed, however, in favour of the provision in paragraph 1 of draft article 24 regarding monetary compensation if the *status quo ante* could not be restored.

54. The subject of "appreciable" or "significant" harm as a threshold had not been exhausted, although it had been discussed in the context of international watercourses and of the present topic and had become a common concept in environmental law. The term "significant" seemed to be used more than "appreciable", and a number of speakers had preferred it. In suggesting, if not precisely indicating, a higher threshold, that term might be preferable to "appreciable" for articles concerning activities in general. The word "nuisance" (art. 2 (*h*)) had rightly been objected to as being a common-law term with a well-defined meaning of its own. In any case, it was not a good translation of the Spanish term *molestia*. It had been suggested that "significant harm" be placed between "minor" and "serious" harm, but "minor" and "serious" might perhaps indicate something more precise than the wording suggested. In any event, it would be necessary to give further consideration to the provision.

55. Objections had been made to the expression "continuous process", used in defining the term"incident" in article 2, subparagraph (*k*). The term "occurrence" had been proposed, and it had been asked whether it was the equivalent of the term "situation" used earlier. He thought it probably was. Members had also urged the need to define the term "accident" in connection with activities involving risk. Again, the question required further elaboration.

56. The expression "throughout the process", in article 1, had been referred to by one member as possibly narrowing the scope of the articles. However, in the definition of "activities with harmful effects" (art. 2 (*f*)), the words "in the course of their normal operation" had been preferred.

57. Draft article 10, on the principle of non-discrimination, seemed to have been well received, although one member had expressed reservations and another had doubted whether States would be prepared to accept it, particularly in a global convention.

58. The idea that there should be measures to prevent accidents and measures to prevent (contain, minimize and mitigate) harm had not, in general, been challenged. That type of prevention applied to activities involving risk, but only once an accident had occurred. It seemed to be the only type of preventive measure applicable to activities with harmful effects, because the purpose was not to prevent the activity, but to contain, minimize and mitigate the harm caused as a consequence of its normal operation.

59. A discussion had taken place on whether the obligation of prevention, particularly under draft articles 8, 16, 18 and 20, should be mandatory or "soft". Many members had favoured stringent obligations. He suspected, however, that there had been a misunderstanding. Article 18 was really redundant: its only purpose was to comply with the logic of strict liability of the State and to reassure certain members that, as long as no harm had been caused, the affected State had no right to take action to oblige the State of origin to comply with the obligation of prevention. Once harm had occurred, the State of origin was obviously under the obligation to make reparation, which, in the draft, only amounted to the obligation to negotiate some sort of compensation, on the understanding that it should, in principle, be full compensation. He said "in principle" because there could be some reduction of compensation under draft article 23 as a result of negotiations. That was within the logic of strict liability, however mitigated, of the State of origin: prevention was, in fact, assured by the strict obligation to compensate, and that amounted to deterrence. The articles on prevention in the draft were really recommendations, and they appeared only because many members had urged their inclusion. The deletion of article 18 would change nothing if the other articles remained unaltered.

60. An entirely different scheme—and one more in tune with international practice—would be to establish State responsibility for wrongfulness where a State failed to fulfil the obligations incumbent upon it, namely to compel private parties within its jurisdiction or control, by means of legislation, regulatory measures and administrative or judicial enforcement action, to comply with certain preventive measures such as those provided for under the draft articles or arising out of the requirement of due diligence. In such cases, a State would have to pay compensation for any damage resulting from its wrongful act. Alternatively, the private party responsible could be strictly liable to pay compensation.

61. In his view, where damage occurred, the best course would be for the consequences of the breach of obligations of prevention to be regulated by general international law or by the articles on State responsibility, should those articles ultimately be adopted in a convention. In that case, the articles on the present topic would no longer deal with acts not prohibited by international law, but with wrongful acts. The title of the topic would then have to be changed to "Responsibility and liability for the injurious consequences of activities not prohibited by international law" or some similar title. There would, however, be no need for any addition to the idea of responsibility in the Spanish and French versions of the title, since the words *responsabilidad* and *responsabilité* covered both liability and responsibility. In the French text, very little change at all would be required, since it already used the word *activités*. The Commission had proceeded on the assumption that the word "activities" would eventually replace the word "acts" in the title, and the time had perhaps come to ask the General Assembly to approve that change.

62. He noted that the second sentence of draft article 8 had been found to be too weak.

63. Draft article 17 had met with general approval, although some members considered that it should be more stringent. One suggestion had been that the

article should indicate how the various factors should be applied and how the balance of interests concept would fit in with the obligations under other articles. It had, however, also been said that the article served no useful purpose, that a general definition would suffice, and that the factors in question should be referred to only in the commentary.

64. Many members favoured the deletion of draft article 18, so that "real" obligations of prevention could be introduced.

65. He had been hesitant to include article 20 in the draft and had trusted that, if necessary, prohibition would be dealt with during the consultations under article 14 or even under article 21. He had, however, been comforted by the way in which article 20 had been received, the main criticism being that it was too mild.

66. Where reparation was concerned, there was a marked trend of opinion in the Commission against State liability for reparation of transboundary harm caused by private parties. That opinion was based on international practice, for only one convention—the 1972 Convention on International Liability for Damage Caused by Space Objects—established State liability for damage caused, and international case-law and diplomatic practice offered scant support for the idea. In some cases, for example under the nuclear-liability conventions, the State was subsidiarily responsible for amounts not met by the operator or by insurance. That was a very important point on which a decision should be taken by the Commission and the General Assembly, possibly during the next debate on the topic when all the new material had been assimilated.

67. His own view was that either the private party should be held strictly liable for any damage suffered, possibly with some form of subsidiary State responsibility in special cases, and with State responsibility for wrongfulness so far as the role of the State in the matter of prevention was concerned; or, alternatively, that the intermediate position reflected in the draft articles should be adopted, with no real obligations of prevention on the State of origin—or on anyone for that matter—and an extremely mitigated State liability in case of damage, as reflected in such phrases as "full compensation in principle" and "negotiation" of the compensation obligations, all of which had been criticized.

68. He had given much thought to the question of full compensation, as opposed to compensation adjusted to the balance of interests. Possibly the two concepts were one and the same, for costs had a tendency to be passed on: for instance, in the energy-producing nuclear industry it was not really the operator who paid for insurance, but rather the public, who paid more for their electricity. Furthermore, ceilings on compensation, which had originally been established because it had been impossible to obtain insurance coverage for the amounts required as indemnities, were constantly being forced up and were now very high indeed. The tendency in international practice, therefore, seemed to be to come as close as possible to full compensation. The examples given in draft article 23 concerned items paid by the State of origin that might well have been borne by the other side.

69. The idea of participation by international organizations had been well received, and a number of remarks had been made which deserved careful consideration. Doubts had been expressed about the participation of an international organization when non-member States were involved; the role of international organizations in regard to matters not covered by their constituent instruments, including their participation in the procedures established under the draft articles; the question of who would pay the expenses incurred; and the word "intervention". It was considered that the role of international organizations in assisting developing countries, particularly in technology and general knowledge of the nature and effect of the activities referred to in article 1, should be enhanced. In that connection, article 202 of the 1982 United Nations Convention on the Law of the Sea had been cited as a model.

70. The general idea behind chapter V of the draft, on civil liability, had in the main been well received. It had, however, been noted that the chapter made no reference to the liability of any private party, but only to that of the State. He realized, of course, that the "channelling" of liability was a mechanism used in many conventions, but the conventions in question dealt with specific activities. In some conventions, such as those concerned with the nuclear power industry, liability was channelled towards the operator, perhaps because otherwise it would be difficult to find other participants, such as those who provided nuclear materials; also, an accumulation of insurance premiums would only increase the cost of production considerably. Under other conventions, liability was channelled towards the carrier or owner. In the Working Group of Experts engaged in drafting the elements for the liability aspects of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,[10] there had been much resistance to the idea of channelling liability to the generator of wastes. The Council of Europe had tried to solve the problem by defining the operator as the person "in overall control of the operation", but any suggestion that such a definition should be incorporated in the present draft articles would prompt questions as to what was meant by "overall" and by "control"? The matter was one that required further attention.

71. The purpose of chapter V of the draft was simply to regulate certain international aspects of civil liability and to facilitate the use of internal-law channels by injured parties. The intention of draft article 30 was that the question of the liability of private parties in such matters should be decided by national courts.

72. The need to require States to make their courts competent to receive, on a non-discriminatory basis, the claims of foreign victims had been stressed. He was, however, a little puzzled by the suggestion that the corresponding provisions submitted in connection with the topic of the law of the non-navigational uses of

[10] See 2183rd meeting, footnote 6.

international watercourses could provide guidance; it had been his impression that draft article 29, paragraphs 1 and 2, together with draft articles 10 and 30, took care of that point. Perhaps some of the provisions in question could be adjusted to leave no room for doubt.

73. It had also been asked whether, if an injured party's claim in the courts of the State of origin failed, the party's own State could not in any circumstances then take up his claim through diplomatic channels, even on the ground of denial of justice. His initial reaction was that the rules of general international law would apply, as in any case of denial of justice, but he would like to have an opportunity to respond in greater detail during the next discussion on the topic.

74. Lastly, it had again been suggested that draft article 4 should be amended to bring the draft into line with article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties. In fact, the relevant provision of that Convention was not paragraph 3 of article 30, but paragraph 2, for the latter included the words "subject to" and "the provisions of that other treaty prevail", which were similar to the formula "subject to that other international agreement" used in draft article 4. He trusted that that clarification would prevent any repetition of the same suggestion at the next session.

The meeting rose at 12.50 p.m.

2191st MEETING

Wednesday, 11 July 1990, at 3.10 p.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Qaysi, 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. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

1. The CHAIRMAN invited Mrs. Killerby, Observer for the European Committee on Legal Co-operation, to address the Commission.

2. Mrs. KILLERBY (Observer for the European Committee on Legal Co-operation) said that she wished to inform the Commission of certain recent activities of the Council of Europe in the legal field and, more precisely, of the activities of the European Committee on Legal Co-operation.

3. Shortly after the Council of Europe had celebrated its fortieth anniversary on 5 May 1989, many changes had taken place in central and eastern Europe and, as a result, other countries would in due course join the 23 member States of the Council of Europe. For example, Hungary should become a member before the end of 1990.

4. One of the items on the agenda of the seventeenth Conference of European Ministers of Justice held at Istanbul from 5 to 7 June 1990 had been the legal heritage of the Council of Europe and its role in strengthening relations with the countries of central and eastern Europe. In their Resolution No. 2, the Ministers had considered that the gradual accession of those countries to the treaties and recommendations of the Council of Europe, as well as their participation in the formulation of new instruments, would confirm the general trend towards legal harmonization and pave the way for their entry into the Council. The Ministers had recommended, *inter alia*, that the Committee of Ministers of the Council of Europe should give favourable consideration to any application by those countries to accede to Council conventions and agreements, as well as to any proposals they might make for new legal instruments.

5. The European Ministers of Justice had also dealt with the protection of the environment through criminal law. In their Resolution No. 1, they had recommended that the Committee of Ministers should invite the European Committee on Crime Problems to develop common guidelines in the form of a recommendation or a convention, as appropriate, for the purpose of combating environmental impairment.

6. Furthermore, the European Ministers of Justice had adopted a resolution on bioethics, which recommended that the Committee of Ministers should instruct the *ad hoc* committee of experts on bioethics to consider the possibility of preparing a framework convention which would be open to non-member States and set out common general standards for the protection of the human person in the context of the development of biomedical sciences.

7. The European Committee on Legal Co-operation had been kept regularly informed of the activities of the Commission and had recently had the privilege of hearing statements by two of its members, Mr. Díaz González and Mr. Tomuschat.

8. As a result of the work of its committees of experts, the European Committee on Legal Co-operation had recently completed the texts of four recommendations and two conventions. The recommendations related to contributions following divorce; the protection of personal data used for employment purposes; provisional court protection with regard to administrative acts; and the protection of personal data used for payment or other related operations. The first

* Resumed from the 2166th meeting.