Document:-
A/CN.4/SR.2316

Summary record of the 2316th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1993, vol. I

phagen, as far as the additional consequences of the crime of aggression were concerned.

71. Mr. ROSENSTOCK said that he had not intended to suggest any impropriety in the Special Rapporteur's reference to decisions taken in the United Nations system. However, he doubted the correctness of what the Special Rapporteur had said and wanted to emphasize the point which he had made about the interpretation of his own silence.

72. If there was any substantive discussion of the topic at the present session it must be included in the 1993 report. It would in fact be better not to have such a discussion; that report could then refer merely to the exchange of a few preliminary remarks.

73. Mr. THIAM said he endorsed the last point made by Mr. Rosenstock.

74. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was glad that Mr. Rosenstock was not taking a stand for or against any position on the issue. He had not done so either: he had merely described the perplexing legal problems.

75. Mr. AL-KHASAWNEH said he was still puzzled as to why a "small aggression", for example, should carry more consequences than a large-scale genocide.

76. Mr. ARANGIO-RUIZ (Special Rapporteur) said, in response to Mr. Al-Khasawneh, that in his report and his introduction he had indeed referred to the need to distinguish acts of aggression from other crimes. Acts of aggression posed less of a problem because there was a specialized United Nations body to deal with them, at least for the purposes of the maintenance of peace and security. The Commission was in a more difficult position with respect to other crimes.

77. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to proceed along the lines just suggested by Mr. Rosenstock and supported by Mr. Thiam.

It was so agreed.

The meeting rose at 1.05 p.m.

2316th MEETING

Tuesday, 6 July 1993, at 10 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Gudmundur EIRIKSSON

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,[1] A/CN.4/L.480 and Add.1, ILC(XLV)/ Conf.Room Doc.1)

[Agenda item 2]

CONSIDERATION OF DRAFT ARTICLE 1, PARAGRAPH 2, AND OF DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* OF PART 2, AS ADOPTED BY THE DRAFTING COMMITTEE AT THE FORTY-FOURTH SESSION[2] (*continued*)*

1. The CHAIRMAN, speaking as a member of the Commission, asked for his position on the text of article 1, paragraph 2, of part 2 of the draft on State responsibility to be reflected in the summary record of the discussions in the Commission. Actually, the text appeared to make for some confusion by subjecting the State which had committed the internationally wrongful act to obligations which fell into two different categories and did not have the same source. On the one hand, there was the primary obligation, for example, which had its source in a treaty between the States concerned, and on the other hand, secondary obligations, which were the legal consequences of the internationally wrongful act and which had their source in the convention that the Commission was in the process of drafting. Endorsing the proposed text would mean completely ignoring the distinction between primary obligations and secondary obligations, which the Commission had been using successfully for many years and which was not simply a trick of formal logic that could be applied when it suited the Commission to do so. On the contrary, in his opinion, it corresponded to inescapable reality.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he partly agreed with Mr. Barboza's views and explained that the paragraph in question had not originally been part of his proposed text. He had tried, without success to prevent it being added to the draft article.

3. Mr. YANKOV said that, as he had indicated at the previous session in his capacity as Chairman of the Drafting Committee, article 1, paragraph 2, had been designed as a safeguard clause in regard to the general rule set out in the article.[3] It had been intended to show that new relations formed after the internationally wrongful act did not automatically relieve the State committing the act from its duty to perform the obligation it had breached. He failed to see how that safeguard clause would destroy the structure of the article and, in the absence of convincing arguments, he could not endorse any proposal to delete it.

4. The CHAIRMAN pointed out that the Commission had already adopted the text in question.

5. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, for personal reasons, he was compelled to be away from Geneva until the middle of the following week. During his absence, the Drafting Committee could, as it was perfectly entitled to do, move ahead in finding a solution to difficulties of both form and substance still posed by article 12 as he had proposed at the previous

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* Resumed from the 2314th meeting.

[1] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[2] Document A/CN.4/L.472.

[3] See *Yearbook... 1992*, vol. I, 2288th meeting, para. 13.

session.[4] The article raised more difficulties than the Drafting Committee had considered so far: interim measures, prior communication, and so on. He wished, through the Chairman, to call the attention of all members of the Commission, whether or not they were members of the Drafting Committee, to the crucial importance of article 12. Whatever its faults of form or substance, which could not in any case be decisive, paragraph 1 (*a*) was essentially intended to declare unambiguously that resort to countermeasures was not admissible prior to recourse to settlement procedures provided for in international rules binding on the parties in a responsibility relationship. In other words, according to his original proposal, the settlement procedures available—by virtue of existing commitments between the parties—should be implemented before the injured State took any countermeasure. Other drafts with essentially the same effect had been proposed to the Drafting Committee, including one by the Chairman himself, who was convinced that a provision of that type was needed.

6. The Drafting Committee had for a number of meetings been discussing a so-called compromise solution which was unquestionably a reversal of that rule, since it provided that resort to available settlement procedures could follow or be concomitant with the adoption of countermeasures, without the slightest distinction being drawn between definitive and interim countermeasures. Such a rule would mean legalizing any arbitrary resort to unilateral measures before the least kind of settlement procedure was implemented. Adopting that rule, even if the text was placed in square brackets, would be highly detrimental to the work of codifying and developing the law on State responsibility. The Drafting Committee would be legitimizing in advance practically unfettered resort to unilateral reactions, something which would not fail, as was often the case with drafts by the Commission, to attract the immediate attention of public and private commentators, regardless of the status of the text and regardless of any square brackets or footnotes. The effects of adopting such a text would be all the more negative in that the Drafting Committee would thus have set aside the basic rule of the pre-countermeasure phase, namely the rule of prior resort to available procedures, before taking even a glance at part 3 of the draft which was now before it and concerned the settlement of disputes.

7. He trusted that members of the Commission who shared his views about the importance of article 12 would not fail to attend meetings of the Drafting Committee, whether or not they were members of that Committee. In that regard, the double composition of the Drafting Committee was not helpful, since it led to situations in which participation in the Drafting Committee was so small that it was doubtful whether a quorum was reached. This had been the case particularly during the discussion of the most crucial elements of article 12. He had frequently missed the presence of members whom he had heard speak in plenary in favour of the requirement for prior recourse to dispute settlement procedures. The Drafting Committee ought not to operate in such conditions. It was not fitting for a special rapporteur to have to insist more than was reasonable on his views, but important questions should be dealt with by a full, or virtually full, Drafting Committee, for which 10 participants were the strict minimum. If such was the case, he would be very happy to find on his return that the problem of article 12 had been settled.

Mr. Eiriksson took the Chair.

8. Mr. CALERO RODRIGUES said that the discussion in plenary was not concerned with article 12, but since a statement had just been made in regard to that subject, he wished to say publicly that he entirely disagreed with the Special Rapporteur's analysis.

9. Mr. MIKULKA (Chairman of the Drafting Committee) said that it would be wise for the Drafting Committee to meet at least once in the presence of the Special Rapporteur, with the participation of the largest possible number of members of the Committee.

10. Mr. BENNOUNA said that the solution proposed by the Chairman of the Drafting Committee would avoid a debate in plenary and the Chairman should follow it up.

11. Mr. VILLAGRÁN KRAMER said that the Bureau should definitely follow up the request of the Chairman of the Drafting Committee, so that the Committee could allocate one or two meetings, in the presence of the Special Rapporteur, to the question of article 12. It was a delicate and complex question that had a bearing not only on part 3 of the draft but also on the distinction between international crimes and delicts. The Committee had now been considering the matter for two months without reaching agreement on a suitable formula. If the Commission discussed it openly, in the presence of the Special Rapporteur and a majority of the members of the Drafting Committee, it would perhaps be possible to find a solution.

12. The CHAIRMAN, after consulting the other members of the Bureau, said that the Drafting Committee would hold a meeting on article 12 that very afternoon.

ARTICLE 6 *bis* (Reparation) (*concluded*)

13. Mr. VERESHCHETIN recalled that, at the last meeting at which the Commission had considered article 6 *bis* (2314th meeting), he had proposed that it should incorporate some of the provisions contained in article 7. The exceptions in subparagraphs (*b*) to (*d*) of article 7 did not relate solely to restitution in kind; they were also applicable to other forms of reparation. He had therefore circulated the text of a proposed amendment to be inserted after the first paragraph of article 6 *bis*, a new paragraph which, in its subparagraphs (*a*), (*b*) and (*c*), would reproduce subparagraphs (*b*), (*c*) and (*d*) of article 7.

14. Mr. ARANGIO-RUIZ (Special Rapporteur) said he wondered how the exception in subparagraph (*a*) of the text proposed by Mr. Vereshchetin could apply to compensation, and whether the situations would not in that case be those in subparagraphs (*b*) or (*c*). Quite obviously, the relationship between the three subparagraphs was not clear. In the initial formulation of article 7, the three exceptions in question were deemed to

[4] For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook... 1992*, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

apply only to restitution in kind, because it concerned a form of reparation that could place an excessively heavy burden on the wrongdoing State. He asked whether the same could be said of the other forms of reparation, and particularly compensation. Again, applying the exception in subparagraph (*c*) to compensation would mean expressly and unnecessarily introducing into that form of reparation the principle of equity, which should implicitly be taken into account in any decision by an arbitral tribunal or by ICJ, but which should not explicitly be made an additional source.

15. Mr. VERESHCHETIN said he was convinced that the exception in subparagraph (*a*) applied in any case to all forms of reparation, including compensation, if only in the situation the Special Rapporteur himself had mentioned in the Drafting Committee, namely a situation in which the Government of one State relinquished the restitution of territory illegally occupied by another State and opted in exchange for compensation. It would unquestionably be a breach of a peremptory norm of general international law. As to subparagraph (*c*), he could not see why the principle of proportionality should not apply to the other forms of reparation.

16. Mr. ROSENSTOCK said that it would be a mistake to subject the various forms of reparation to the conditions set out in subparagraphs (*b*) and (*c*) of Mr. Vereshchetin's proposal, for to do so would be to seriously affect the rights of the injured State. The question of the condition concerning peremptory norms of general international law, in subparagraph (*a*) of the proposal, was more complex. The difficulty lay partly in the fact that the condition was set out in article 7, where it was not necessary, since respect for peremptory norms of general international law was essential in all cases, and there was no need for an express reference to them. Furthermore, article 6 *bis* concerned the rights of the injured State and not the options available to the wrongdoing State. Accordingly, it did not seem desirable to set forth a rule expressly limiting the injured State's freedom of action. Lastly, it would be a mistake to include subparagraphs (*b*) and (*c*) of Mr. Vereshchetin's proposal in article 6 *bis*, and he was not persuaded that it was advisable to include subparagraph (*a*).

17. Mr. YANKOV said that as Chairman of the Drafting Committee in 1992 he was in a position to state that, after considering article 6 *bis* at length and recasting it a number of times, the Drafting Committee had considered that it was a kind of *chapeau* article setting out principles applicable to all the forms of reparation mentioned in paragraph 1 of the article. The conditions in subparagraphs (*a*) and (*d*) of article 7 had been included in that article precisely for the reasons given by the Special Rapporteur.

18. He had at first been in favour of Mr. Vereshchetin's proposal, but on further reflection he thought that caution was necessary. It was difficult to see in particular how subparagraphs (*a*), (*b*) and (*c*) could apply to satisfaction and, for example, how satisfaction could be contrary to a peremptory norm of general international law. The same was also true of guarantees of non-repetition. The General Assembly's attention should indeed be drawn to the important issues raised by Mr. Vereshchetin, but the question deserved to be studied in greater depth, in view of the possible consequences of adopting Mr. Vereshchetin's proposal.

19. Mr. VERESHCHETIN pointed out that precisely because article 6 *bis* was a *chapeau* article, his proposal was to set out the conditions governing all forms of reparation in that article, rather than in article 7, which was concerned solely with restitution in kind.

20. Mr. BENNOUNA said that, like Mr. Yankov, he thought the Commission should be cautious. It was quite obvious that, while subparagraphs (*a*) to (*c*) of the text proposed by Mr. Vereshchetin applied to *restitutio*, a form of reparation that involved risks, the same was not true of other forms of reparation. The Commission should look into the matter further before taking a decision.

21. Mr. TOMUSCHAT said he endorsed the comments made by Mr. Bennouna and Mr. Yankov. Moreover, he questioned whether it was really necessary to mention peremptory norms of general international law, for they would apply in any case. Again, the conditions in subparagraphs (*b*) and (*c*) of Mr. Vereshchetin's text might weaken the provisions of article 8, concerning compensation, residual provisions which the injured State could always invoke "if and to the extent that the damage is not made good by restitution in kind". Actually, if conditions (*b*) and (*c*) were applicable to compensation, the wrongdoing State would not fail to invoke them. It would therefore be better for article 6 *bis* to remain as it stood.

22. Mr. VILLAGRÁN KRAMER pointed out that it was PCIJ which had ruled that when *restitutio* was impossible the injured State had to be compensated. The question, therefore, was what options were available to the injured State when compensation was impossible. In that regard, Mr. Vereshchetin's proposal raised a very interesting question for small countries, namely, the difference between justice and equity. The question was to what extent the Commission should move ahead in regard to equity and find solutions to problems that would be encountered by some countries in order to discharge their obligation to make reparation.

23. From a legal standpoint, Mr. Vereshchetin was unquestionably right about the peremptory norms of general international law, which by their very nature did apply, whether to *restitutio*, compensation or even satisfaction. As to the conditions set out in subparagraphs (*b*) and (*c*) of Mr. Vereshchetin's proposal, it was difficult to see how they could apply to satisfaction or to guarantees of non-repetition. He would therefore like explanations on that point and considered that the question none the less deserved to be examined in greater depth.

24. Mr. ARANGIO-RUIZ (Special Rapporteur), replying to a question by Mr. KOROMA on Mr. Vereshchetin's proposal, said that it was interesting but, like Mr. Yankov and other members, he thought it could be taken up later, possibly on second reading.

25. The CHAIRMAN, speaking as a member of the Commission, said that, in the Drafting Committee, he had expressed serious reservations about the need or utility of including the conditions which were set out in subparagraphs (*b*) and (*d*) of article 7 and were reproduced in Mr. Vereshchetin's proposal. He had agreed to them in the Drafting Committee in regard to article 7, in other

words, restitution, in a spirit of compromise. That did not mean he would favour them being included in an article which concerned the other forms of reparation.

26. Mr. KABATSI said Mr. Vereshchetin's proposal deserved careful consideration. In his opinion, the exceptions set out in subparagraphs (*b*) and (*c*) could apply to forms of reparation other than *restitutio*.

27. Mr. THIAM said the Commission should be grateful to Mr. Vereshchetin for having raised certain important issues. Personally, he favoured the proposal, but the Commission should be given more time to examine it. It did not seem possible to take an immediate decision at that stage on a proposal that had such implications.

28. Mr. VERESHCHETIN said that the discussion on his proposal proved the Commission would need to revert to the questions it raised. He did not press for an immediate decision, but he believed that those questions would have to be examined, probably on second reading. He was convinced that the conditions set out in subparagraphs (*a*) to (*c*) of his proposed text did not apply solely to restitution in kind, and it was for that reason that the present text was difficult to accept. Article 10, paragraph 2 (*c*), for example, showed that the conditions set out in subparagraph (*b*) of his proposal applied to satisfaction. Apparently the majority of members of the Commission did not wish to take a decision at the present stage, but he hoped that the Commission would examine those questions in due course as they deserved, in the light of observations by Governments.

29. The CHAIRMAN said that Mr. Vereshchetin's proposal could be reproduced in its entirety in the summary record, together with the discussion to which it had given rise.

30. Mr. VERESHCHETIN said that the discussion could perhaps be placed in the commentary to article 6 *bis*. He would also like his proposal, which he had submitted in writing, to be reproduced in the commentary.

31. Mr. THIAM said it was difficult to understand exactly what decision the Commission was taking in regard to Mr. Vereshchetin's proposal.

32. The CHAIRMAN proposed that article 6 *bis* should be adopted in its present form, since Mr. Vereshchetin had explained that he was not pressing for an immediate decision on his proposal.

33. Mr. YANKOV recalled that when, in connection with reparation, Mr. Mahiou had mentioned the situation in which a number of States were concerned and had emphasized the complex problems that would arise, it had ultimately been decided that the best course was to reflect the discussion in the commentary, stating that it would be for the tribunal to settle the matter in each case. Mr. Vereshchetin's proposal could also be reflected in the commentary. As to the rest, he endorsed the Drafting Committee's text and proposed that it should be adopted without any change.

34. The CHAIRMAN pointed out that the discussion on article 6 *bis* and on Mr. Vereshchetin's proposed amendment would in any case appear in the summary record.

35. Mr. KOROMA asked whether that meant that the discussion would also be reflected in the Commission's report to the Sixth Committee. Otherwise, the Sixth Committee might get the impression that article 6 *bis* had been unconditionally approved by the members of the Commission, which was not the case.

36. Mr. TOMUSCHAT said he, too, thought the discussion could be reflected in the commentary that the Special Rapporteur would be preparing on the draft article, so as to draw the Sixth Committee's attention to Mr. Vereshchetin's proposed amendment.

37. The CHAIRMAN said he fully agreed with that suggestion. For example, it could be mentioned in the commentary to article 7 that the conditions in subparagraphs (*a*) to (*d*), also applied in other cases. Perhaps the Special Rapporteur might wish to take note of that.

38. Mr. YANKOV said that that was precisely what he had proposed: Mr. Vereshchetin's proposal and the resulting discussion could be reflected in the commentary to article 7.

39. Mr. ARANGIO-RUIZ (Special Rapporteur) said that it might be better for the discussion to be reflected in the commentary to article 6 *bis*, with perhaps a reference to article 7.

Article 6 bis *was adopted.*

Mr. Barboza resumed the Chair.

ARTICLE 7 (Restitution in kind)

Article 7 was adopted.

ARTICLE 8 (Compensation)

Article 8 was adopted.

ARTICLE 10 (Satisfaction)

40. Mr. RAZAFINDRALAMBO drew attention to article 10, paragraph 2 (*d*), which read:

> (*d*) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct, disciplinary action against, or punishment of, those responsible.

Without further explanations the "criminal conduct" in question might be regarded as that of private individuals. However, it was apparent from the work of the Drafting Committee[5] that the provision applied both to State officials and to private individuals. To make article 10 clearer in that regard, subparagraph (*d*) should be amended to read: "in cases where the internationally wrongful act arose from the serious misconduct or criminal conduct of officials or private individuals ...". It would then be obvious that "criminal conduct" could also be imputed to State officials.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said he agreed to that proposal, which seemed reasonable. In English it would be better to say "... from the serious misconduct or criminal conduct of officials or private parties ...".

42. Mr. EIRIKSSON said he did not agree. A distinction had been drawn in that subparagraph between the serious misconduct of officials, on the one hand, and criminal conduct by anyone, including officials and private individuals on the other. That distinction should be maintained. The effect of Mr. Razafindralambo's pro-

[5] See *Yearbook... 1992*, vol. I, 2288th meeting, para. 58.

posal would be to apply the notion of serious misconduct to private individuals, which was not in keeping with the meaning of the article.

43. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the Commission had been very clear. He believed the Commission was aware that extensive application of that form of satisfaction might result in undue interference in the internal affairs of States. It had therefore limited the scope of application of the subparagraph to criminal conduct whether of officials or private individuals and to serious misconduct of officials. It was not certain that that was quite clear from the English text of the article. Perhaps it would be possible to add something to bring out clearly that "criminal conduct" could indeed be the conduct of officials and of private individuals.

44. Mr. RAZAFINDRALAMBO pointed out that that was precisely the purpose of his proposal, which should perhaps be explained at greater length in the commentary on article 10.

45. Mr. VERESHCHETIN said he would like in that regard to revert to the work of the Drafting Committee where in connection with article 10, paragraph 2 (*d*), it was said that:

> The subparagraph was constructed so as to make it clear that criminal conduct was punishable whether it was to be ascribed to State officials or to private individuals, whereas disciplinary action would of course be limited to officials.[6]

46. Hence, the idea underlying article 10, paragraph 2 (*d*), was that criminal conduct could be the conduct of both officials and individuals, whereas disciplinary action related solely to officials. That was not perhaps very clear from the French text of the subparagraph, but the English version did seem to reflect the position adopted by the Drafting Committee.

47. Mr. TOMUSCHAT said that the text could certainly be kept in its present form. If the meaning was to be made clearer, it would be better to do so as suggested by the Special Rapporteur rather than to follow Mr. Razafindralambo's proposal, which would have the effect of applying the concept of "serious misconduct" to individuals, when it applied only to State officials. However, by making the text more explicit, it could well become more cumbersome.

48. The CHAIRMAN said that perhaps the best solution would be to reverse the order of terms and say "... arose from criminal conduct of officials or private individuals or serious misconduct of officials ...".

49. Mr. CALERO RODRIGUES said he did not think that was necessary. In its present form, the text was sufficiently clear, but in the French version it might be better to add the words *de ces agents ou de particuliers* after *agissements criminels*.

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he was not opposed to that suggestion, even though repetitions seemed more tolerable in English than in the other languages.

51. Mr. EIRIKSSON said that, if the subparagraph was to be changed, he would prefer the Chairman's suggestion to reverse the order of terms: "... arose from criminal conduct of individuals or from serious misconduct of officials ...".

52. Mr. THIAM said that he did not understand Mr. Eiriksson's proposal. Was it to be inferred that State officials could not engage in criminal conduct?

53. Mr. ROSENSTOCK said that, in the English version at least, the subparagraph seemed perfectly clear and in keeping with what had been proposed by the Drafting Committee. Perhaps an even more explicit formulation could be found, but a plenary meeting of the Commission was certainly not the best place to discuss it. In his opinion, it would be enough to insert in the commentary a remark or footnote indicating that the wording of the article should be considered more closely on second reading, it being understood that the members of the Commission wished fully to respect the intentions expressed by the Drafting Committee, as reflected in the discussions on the work of the Drafting Committee.[7] In that way it would be possible to avoid losing time and possibly spoiling what was in fact a very acceptable text.

54. The CHAIRMAN, summing up the discussion, said the Commission therefore had a choice: either to adopt the proposal by Mr. Razafindralambo or by Mr. Calero Rodrigues, or to leave the text as it was, with a note in the commentary, as proposed by Mr. Rosenstock.

55. Mr. EIRIKSSON said that he would prefer a formulation in the singular: "of an official" and "of that official". In response to a comment by Mr. Thiam, he pointed out that he was referring to private individuals not in contrast to State officials but in contrast to artificial persons.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that, in the English version, the words "of officials or private individuals" should be repeated after the word "conduct".

57. Mr. GÜNEY said that the proposal by the Special Rapporteur and the proposal by Mr. Calero Rodrigues would make for some ambiguity: if the text stated "criminal conduct of officials or private individuals", the disciplinary action referred to afterwards would seem to apply also to private individuals, which was not possible. Accordingly, the best course might be to adopt the solution proposed by Mr. Rosenstock and to review the formulation of the subparagraph on second reading.

58. Mr. ARANGIO-RUIZ (Special Rapporteur) said that it was impossible for "serious misconduct" to be ascribed to private individuals, who could not therefore be the object of disciplinary action.

59. Mr. CALERO RODRIGUES pointed out that the problem raised by Mr. Güney did not lie in the proposed amendment. The ambiguity already existed in the text, but that was not really a problem since no one would conceive of disciplinary action against individuals. He did not wish to press for adoption of the formulation he had proposed, but if members wished to make the subparagraph more explicit, either his own proposal or that of the Special Rapporteur seemed equally acceptable. There was also a minor problem of translation in regard to article 10, paragraph 2 (*c*). The words "gross infringement" had been translated into French by *atteinte*

[6] Ibid.

[7] Ibid.

flagrante. Would it not be better to speak of *atteinte grave*?

60. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10 with the changes to paragraphs 2 (*c*) and 2 (*d*) proposed by Mr. Calero Rodrigues.

It was so agreed.

Article 10 was adopted.

ARTICLE 10 *bis* (Assurances and guarantees of non-repetition)

Article 10 bis *was adopted.*

The law of the non-navigational uses of international watercourses (*continued*)* (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,[8] A/CN.4/451,[9] A/CN.4/L.489)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

61. Mr. ROSENSTOCK (Special Rapporteur) said that, unfortunately, circumstances beyond his control had prevented him from following all of the discussion, but he believed he had none the less gained a sufficiently accurate idea from the summary records transmitted to him by the secretariat and from written observations sent to him by some of his colleagues.

62. It was reassuring to see the constructive approach adopted by all speakers, except one. Admittedly, not all had approved each and every one of his suggestions, but they had all unquestionably been motivated by a common purpose, one which he shared. He had no axe to grind and concrete results alone counted, results that the whole of the Commission could be proud of.

63. On the question of the nature of the instrument, he had heard the message loud and clear. While no final decision would yet be made, the preference was clearly for a framework convention. Some members had regarded the generally favourable comments of Governments as auguring well for wide ratification. For his own part, he still feared that States which did not have significant international watercourses would not bother to ratify the convention and that many of those with substantial international watercourses might prefer to deal with questions on an ad hoc basis. In that regard, the view expressed in the comments by the Government of the Netherlands, a classic lower riparian State, that the incorporation of the draft articles in a recommendation providing guidelines for the conclusion of binding agreements on individual watercourses should not be lightly dismissed.

64. While he invited members to keep an open mind on that question, he would not go against the current and would approach the issue in the Drafting Committee on the basis of the implicit bias in the text adopted on first reading and the preference expressed at the present session for a framework convention.

65. Before taking up more specific matters, he wished to make a few comments on the notion of good faith, which was relevant to treaties in general and in particular to any treaty that emerged from the Commission's work on the topic. It would be dangerous and unwise to suggest that the principle of good faith applied more to some articles or clauses than others in view of the *a contrario* consequences that manifestly stemmed from such a principle.

66. As to the 10 articles, and first of all article 1, he particularly appreciated the judicious proposal by Mr. Yankov (2312th meeting) to add the word "management", before "conservation", in paragraph 1.

67. With regard to article 2, the question was whether to retain the phrase "flowing into a common terminus". Subject to the open question of unrelated confined groundwaters, to which he would return in subsequent reports, there too he had noted the desire to retain the notion of flowing into a common terminus, even though he had not heard any overwhelmingly convincing arguments. Perhaps the perceived problems were mitigated or resolved by the conditions set out in article 3, paragraph 2, of the draft namely "where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies", and the careful distinction drawn in article 4 between system-wide agreements and agreements which applied only to a part of the watercourse. The Code of Conduct on Accidental Pollution of Transboundary Inland Waters[10] contained no requirement about flowing into a common terminus. Lastly, the experts on ILA's Water Resources Committee favoured deletion of the phrase, pointing out that such a notion had never been included in the recommendations of any previous special rapporteurs. He hoped that those members of the Commission who supported retention of the concept of a common terminus would reflect further on the matter. For his part, he would not press for deletion unless, on further study, he concluded that the Commission should deal with unrelated confined groundwaters and that elimination of the common terminus notion was the best way to do so. In that case, he would explore the possibility of mitigating any concern about express language to the effect that a system which was artificially connected to an international watercourse system was not deemed part of that system.

68. As to article 3, there was substantial support for the drafting change—which should indeed be regarded as no more than that—of replacing the ambiguous word "appreciable" by the term "significant". The justification for using the term "significant" in the topic of international liability for injurious consequences arising out of acts not prohibited by international law applied with equal force to the present topic. It should also be made clear in the commentary that the change was intended not to raise the threshold of harm but rather to avoid an artificial lowering of the threshold as the scientific meth-

* Resumed from the 2314th meeting.

[8] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[9] Ibid.

[10] E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

ods of measurement or assessment became ever more refined.

69. With regard to possible changes in article 3 to reflect the relationship between the draft framework convention and previous agreements, there seemed to be a preference for maintaining the status quo. Mr. Mahiou (ibid.) had correctly said that all those questions could be dealt with by the law of treaties. He had been trying to respond to some comments by Government, but would not press the matter further.

70. A variety of views had been expressed in the Commission on the relationship between articles 5 and 7. Some members would go further than what he was proposing and simply delete article 7, other members agreed with him, and still others partly agreed, especially about inserting the notion of "due diligence". Then again, some members were opposed to any of the changes to the scheme contained in the 1991 draft. Those matters would have to be thrashed out in the Drafting Committee.

71. The fact that there appeared to be a greater willingness to accept dispute settlement might well point the way to a means of avoiding artificial constraints on optimal utilization, while providing protection from significant harm.

72. He also urged members to reflect on the fact that, if articles 5 and 7 were kept in their present form, there was a considerable risk of undue importance being attached to prior uses—often by a more developed lower riparian State.

73. Interesting comments had been made on various aspects of articles 8, 9 and 10, but no fundamentally new issues had been raised during the discussion.

74. In conclusion, he recommended that the articles discussed in his first report should be referred to the Drafting Committee. If the Committee could begin work on the draft at the present session, there was reason to remain optimistic that the Commission would be in a position to complete consideration of the topic at the next session.

75. The CHAIRMAN invited the Commission to decide on the Special Rapporteur's recommendation to refer articles 1 to 10 of the draft to the Drafting Committee.

76. Mr. SZEKELY thanked the Special Rapporteur for an excellent summing-up of the discussion in plenary, but said he regretted that he had not reported more faithfully on the diverse opinions expressed about the desirability of altering the adjective to qualify harm and had rather hastily concluded that progress could be made by replacing "appreciable" by "significant".

77. It was a question which, in the course of the session, had been discussed in different contexts and about which there was still clearly a dilemma. Consequently, if the Commission decided to refer the draft articles to the Drafting Committee, the articles would not, in view of the nature of the discussion on the qualification of harm, be an amended version in which "appreciable" was replaced by "significant". The articles should be referred to the Drafting Committee, but with two alternatives, in other words, "appreciable" and "significant", possibly placed in square brackets, so as to reflect the real situation and to show that the question was still pending and had not been settled once and for all.

78. The CHAIRMAN said that, in his understanding, the articles would be referred to the Drafting Committee as worded in the draft and it would be for the Committee to assess, in the light of the discussion, whether a change was to be made. It was therefore pointless to place "appreciable" or "significant" in square brackets.

79. Mr. SZEKELY said that, in that case, he had no objection to referring the articles to the Drafting Committee. It should none the less be noted that a differing opinion had been expressed about the way in which the question had been discussed in plenary.

80. The CHAIRMAN said the Drafting Committee would have to consider an important point, namely the translation into Spanish of the English word "significant". The Spanish word *importante* did not faithfully render the English word "significant" and a change should be made in the Spanish version of the text.

81. Mr. SZEKELY said that, in his opinion, "significant" should be translated by *significativo* and not *importante*. Without prejudging the Drafting Committee's final decision, he would point out that, as the Commission had noted in the course of the session, the question was not one of translation in the various languages but one of substance.

82. The CHAIRMAN said that he took note of the Special Rapporteur's statement that the change in the term was not intended to raise the threshold of harm; that was a very important clarification.

83. Mr. YANKOV said that, in the main, he endorsed the Special Rapporteur's statement, with three minor reservations. The first was the desirability of incorporating the notion of diligence, either in part I or in part II.

84. Secondly, with reference to the introduction of the first report, mention should be made of new developments since the adoption of the draft articles on first reading, including Agenda 21[11] and the Rio Declaration on Environment and Development,[12] and their implications. Room could be made for them, perhaps in parts I and II, but above all in part III, on management problems.

85. Lastly, he had already pointed out that he had not adopted a position on replacing the word "appreciable" by "significant". He would simply urge the Commission, before taking any final decision, to look further into the possible consequences of its choice.

86. Mr. GÜNEY said he did not object to the articles being referred to the Drafting Committee if there was general agreement to do so, provided the membership of the Drafting Committee was reviewed in the light of the

[11] A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), pp. 9 *et seq.*

[12] Ibid., pp. 3-8.

decision of principle taken in that regard at the beginning of the session.

87. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer draft articles 1 to 10, contained in the first report, to the Drafting Committee.

It was so agreed.

The meeting rose at 1.10 p.m.

2317th MEETING

Wednesday, 7 July 1993, at 11.10 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Gudmundur EIRIKSSON

Present: Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/446, sect. E, A/CN.4/ L.479)

[Agenda item 6]

1. The CHAIRMAN said that, at its meeting which had just ended, the Enlarged Bureau had taken note of the report of the Planning Group (A/CN.4/L.479) and had decided to transmit it to the Commission. The Commission had to determine whether the views and recommendations of the Planning Group were acceptable and should be submitted to the General Assembly as part of the Commission's report.

2. Mr. EIRIKSSON (Chairman of the Planning Group) said that the report contained three groups of recommendations. First, on the planning of the activities for the remainder of the quinquennium, the Planning Group recommended in paragraph 7 that the Commission should endeavour to complete by 1994 the draft statute of an international criminal court and the second reading of the draft articles on the law of the non-navigational uses of international watercourses, and by 1996 the second reading of the articles of the draft Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. It also recommended that the Commission should endeavour to make substantial progress on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Paragraph 10 referred to a tentative schedule of work for the 1994, 1995 and 1996 sessions that was annexed to the report.

3. The second group of recommendations concerned the long-term programme of work. In paragraph 13 of the report, the Planning Group noted that the Working Group on the long-term programme of work had recommended the incorporation in the agenda of two new topics: "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". In paragraph 26 of the report, the Planning Group recommended the inclusion of the two topics and, in paragraph 27, it referred to the question of whether the Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses should undertake a study on the feasibility of incorporating the question of "confined underground water" in the topic. In paragraph 28 it recommended that such a request should be addressed to the Special Rapporteur.

4. The third group of recommendations concerned the Commission's contribution to the United Nations Decade of International Law,[1] and the Planning Group recommended that the Commission should approve the arrangements proposed by the Working Group as set out in paragraph 31.

5. If the Commission endorsed the three groups of recommendations, together with the other recommendations contained in the report under "Other matters", they would appear as the final chapter of the Commission's report.

6. Mr. SZEKELY said that the report was an excellent one and provided guidance for the Commission. However, the two new topics proposed in paragraph 13 were extremely technical and, while no doubt of interest to experts, were not perhaps the most urgent in terms of the Commission's contribution to international law. Their selection illustrated a trend in the Commission to give preference to more technical topics, a trend that would be offset to a considerable extent if the Commission decided to include the very topical question of confined underground water in the topic of the law of the non-navigational uses of international watercourses. If it did so decide, the title of the topic might have to be changed.

7. Mr. MAHIOU said that he endorsed Mr. Szekely's comments on the proposed new topics. The Commission ran the risk of giving the impression that certain important topics could not be codified and that it preferred to stick to the subjects of the greatest interest to itself. The Planning Group was correct in arguing that consideration of the two topics could provide useful guidelines, but the guidelines would not amount to the codification of international law as such. He was not sure how the General Assembly would react to the proposal; it might conclude that, if the Commission could not propose topics requiring codification, it had no more work to do.

8. Mr. KOROMA said that the Planning Group had apparently not taken into account a thought-provoking report on the Commission's work produced a few years ago by UNITAR,[2] which had recommended that the Commission should enter new territory. He was in general agreement with the comments made on the new topics by Mr. Szekely and Mr. Mahiou. The topic of State

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[1] Proclaimed by the General Assembly in its resolution 44/23.

[2] United Nations publication, Sales No. 81.XV.PE/1.