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Summary record of the 2363rd meeting

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watercourses and the resolution on confined groundwater to the General Assembly with a view to the elaboration of a convention by the Assembly or by an international conference of plenipotentiaries.”

104. If he heard no objection, he would take it that the Commission agreed to include that text in the relevant chapter of its report under the heading “Recommendation of the Commission”.

It was so agreed.

The meeting rose at 1.05 p.m.

2363rd MEETING

Tuesday, 12 July 1994, at 10.20 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

Tribute to the memory of Mr. José María Ruda

1. The CHAIRMAN said that it was his sad duty to inform the members of the Commission of the death, on 8 July 1994, of Mr. José María Ruda, who had been a member of the Commission from 1964 to 1973 as well as its Chairman in 1968. Mr. Ruda had been elected in 1973 to ICJ where he had served for two consecutive terms and over which he had presided from 1988 to 1991. An experienced diplomat who had represented his country in many international forums, Mr. Ruda had also published a number of valuable studies on matters of international law. Special mention should be made of the course Mr. Ruda had given in 1975 at the Hague Academy of International Law on reservations to treaties,¹ which would undoubtedly be extremely valuable to the Commission in its forthcoming consideration of the topic.

At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Mr. José María Ruda.

¹ “Reservations to Treaties”, *Collected Courses of The Hague Academy of International Law, 1975-III* (Leiden, Sijthoff, 1977), vol. 146, pp. 95-218.

2. Mr. BARBOZA said that he was particularly saddened by Mr. Ruda’s death, not only as a member of the international legal community, but also as a compatriot and a friend. He had been co-holder of a chair at Buenos Aires University with Mr. Ruda before Mr. Ruda had become Under-Secretary for Foreign Affairs and then representative of Argentina to the United Nations Security Council and General Assembly at a delicate time in his country’s history. Mr. Ruda had always been noted for his integrity and his dedication to the public interest both at the national and international levels.

3. Having risen through the hierarchy of the Department of Legal Affairs of the United Nations, he had then sat as a judge at ICJ for 18 years. His whole life had been devoted to diplomacy, teaching and writing, and it set an example for future generations.

4. Mr. THIAM said that he too wished to pay a tribute to Mr. Ruda, who had been his colleague for one year on the Commission before he had become a judge at the Court. He would stress in particular Mr. Ruda’s human and social qualities, his keen mind and his special interest in relations between Africa and Latin America.

5. The CHAIRMAN said that, on behalf of the Commission, he would address a letter of condolences to Mr. Ruda’s family and enclose a copy of the summary record of the meeting.

Statement by the Under-Secretary-General, Director-General of the United Nations Office at Geneva

6. The CHAIRMAN said that it was his pleasure to welcome the Under-Secretary-General, Director-General of the United Nations Office at Geneva, who had been associated throughout his career with United Nations efforts to develop international law and thus improve international relations and whose work was held in high esteem by the entire international legal community.

7. Mr. PETROVSKY (Under-Secretary-General, Director-General of the United Nations Office at Geneva) said that he first wished to convey to the Commission the wishes of the Secretary-General, who had himself been a member of the Commission.

8. It was an honour for him to speak before the Commission, which had established its reputation as the world’s leading body in the field of international law-making and included in its membership some of the best experts in that field. Fourteen multilateral conventions had been concluded on the basis of drafts prepared by the Commission. At the current time, in the new international environment, the Commission continued to make a vital contribution to the strengthening of international law through its involvement in a number of important topics, such as the preparation of a statute for an international criminal court, State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law and the law of the non-navigational uses of international watercourses.

9. That involvement in efforts to strengthen international law was a difficult but gratifying experience. He recalled that, in 1989, as Soviet Deputy Foreign Minister, he had had occasion at the forty-fourth session of the General Assembly to present a memorandum setting forth concrete proposals on enhancing the role of international law and, although it had taken some time for those ideas to gain support, they were now becoming a reality.

10. One of the characteristics of the current international scene was the continuous flow of new and important developments affecting all fields of international law. The changes that were taking place at the economic, social and political levels were transforming civilization. That acceleration of history was characterized by increased democratization and the creation of a more human-oriented society which would, it was hoped, lead to the dawn of an era of *pax multilateralis* and the strengthening of the United Nations. But it was also generating some alarming tendencies, such as the multiplication of regional conflicts and the rise of extremist and aggressive nationalistic ideologies.

11. In the current situation, international law had to play an increasingly important role. There was already an evident trend towards the proliferation of international rules and standards, extending to virtually every field of human activity. However, much remained to be done and there was an urgent need to further strengthen the international juridical system. At the present time of global transformation, it could provide guidelines to minimize destabilizing tendencies and to promote peaceful change. As the United Nations Secretary-General had said in a recent statement, the universal aspirations and values common to all societies were proclaimed through international law, which taught peoples how to talk to each other and how to understand each other better.

12. The Secretary-General had also defined the three major fields in which the development of international law was most vital: protection of the rights and human dignity of the individual; promotion of mutual respect among nations; and enhancing prospects for international economic development. The goal of a new world order would be unattainable without a solid legal foundation and its stability could only be maintained by law. In practical terms, that meant that there was a need to facilitate the transformation of existing international law—the law of coexistence based on the balance of power—into a new international law based on partnership and a balance of interests among nations. It also meant that there should be much closer ties between theoretical deliberations on legal matters and practical political activities. He stressed that affirming the primacy of international law had always been one of the main aims of the United Nations. The major purpose of the Organization was in fact to counteract force with law.

13. It was difficult to overestimate the role of the United Nations in the international legal process. The San Francisco Conference had approved the inclusion, in Article 13 of the Charter of the United Nations, of a clause which read: “The General Assembly shall initiate studies and make recommendations for the purpose of

... encouraging the progressive development of international law and its codification”. By including the words “progressive development” in the Article, the Conference had recognized for the first time that an international organization had a role to play in the creation of new legal norms. Since that time, United Nations organs had made an immense contribution to the development of international law and, indeed, were playing a decisive role in the creation and elaboration of international legal norms. For example, the General Assembly had adopted such fundamental documents as the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations and four conventions on the law of the sea.² It had contributed to the protection of human rights by adopting the Universal Declaration of Human Rights,³ the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and a number of other basic conventions aimed at the elimination of discrimination based on race, sex or religious belief. A considerable quantity of international regulations had also been developed by the United Nations specialized agencies.

14. One difficulty was that United Nations bodies produced a vast amount of resolutions, decisions, declarations and codes on various subjects, which did not have binding force. As a rule, such documents were adopted in response to urgent political problems and reflected the most recent developments in the international political situation. Because of their non-binding character, they were more readily accepted by most Governments. In fact, they played an important role and often filled the gap between negotiated treaties and customary law. None the less, their quantity was sometimes frightening and, as Sir Robert Jennings, the President of ICJ, had remarked, there was a danger that international law might be “submerged” under the mass of paper emanating from international assemblies. Also, those documents often used vague language and contradicted each other, as a result of which they lost some of their weight and significance. It might be worth considering the introduction of some kind of legal appraisal of major United Nations resolutions before they were approved by the relevant organ.

15. Another problem concerned the under-utilization of the capabilities of United Nations legal bodies and institutions for the solution of international political crises. Thus far, legal means had been implemented far less frequently than was desirable in the settlement of disputes. For example, at the beginning of 1994, some 10 cases had been pending before ICJ. While that was perhaps an achievement as compared with recent years, it was still considerably lower than the potential of the Court. It was worth noting in that connection that the United Nations was currently attempting to settle by political means 79 existing and potential crises.

² Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas and Convention on the Continental Shelf.

³ General Assembly resolution 217 A (III).

16. Since the First World War, there had been a number of disputes of a very diverse nature in the settlement of which legal procedures had been instrumental, even in recent decades. For instance, in 1965, the Soviet Union had acted as mediator in securing a cease-fire between India and Pakistan in their conflict over Kashmir. In 1980, Iceland and Norway had settled their dispute over the continental shelf by conciliation. In 1986, the United Nations Secretary-General had himself acted as arbitrator in the "Rainbow Warrior"⁴ case between France and New Zealand. Those examples showed that all legal means of dispute settlement, including mediation, conciliation, arbitration and adjudication, had considerable potential in the settlement of disputes between States and, if properly used, could help to improve significantly the international political climate. Very often, the mere act of submitting a dispute to a juridical body prevented it from deteriorating and thereby transforming a heated political dispute into a normal legal case.

17. The aim should be to put in place an international system of judicial bodies which would include the Commission, ICJ and the Permanent Court of Arbitration as well as other institutions which could together activate the whole range of legal means for settling disputes. The proposal by the Permanent Court of Arbitration the year before that a new Hague convention should be concluded to coincide with the centenary of the Convention for the Pacific Settlement of International Disputes seemed to have considerable support and, if implemented, could help to achieve that goal.

18. It was satisfying to note that, despite all the problems, States increasingly regulated their conduct by reference to an international system of justice. The idea of international justice should be popularized. Political leaders must understand that recourse to juridical bodies was just another pillar in the structure of inter-State relations. International legal organs could assist them in that respect by emphasizing the pedagogical aspect of their work. In that connection, it would seem that the time had come to make another step forward and to enhance respect for international law by linking it to moral values. In ancient times, ethics were separate from the law. The time had now come, however, for a new synthesis.

19. Moral considerations were now one of the major factors in international politics. Nothing united people more than a common understanding of what was evil and what was good. And nothing divided them more than ethical norms that placed a certain group in a privileged position while depriving others of their human dignity and the right to be treated as equals. Ethics was one of the major driving forces that determined human behaviour and political judgement and it had always had a considerable impact on foreign policy.

20. The contemporary world was becoming increasingly interdependent and that interdependence influenced more than just the economic and social spheres. With the intermingling of cultures, an international moral code had come about, whose major norms were

accepted by all the nations of the world. Elements of that code were incorporated in a number of fundamental international accords such as the Charter of the United Nations and the Universal Declaration of Human Rights. That however, was only a first step. There was a need to merge law and ethics in international politics and to create a political mentality of a new kind that would unite rather than divide people and produce a feeling of solidarity among them. The mentality of the political leaders in particular must be changed and they must be made to understand that it was as reprehensible to violate a moral prohibition as to break a norm of international law. If the international community achieved that end, its impact on political life would be comparable to that of the Enlightenment on European culture.

21. Halfway through the United Nations Decade of International Law⁵—one aim of which was to make legal considerations an integral part of the work of all United Nations bodies and not just of the Sixth Committee—the time had perhaps come to review the plans for the rest of the Decade in an attempt to achieve more substantive results by the time it ended. The Commission, the most respected body in its field of activity, had considerable freedom in the choice of topics that it considered and could play a key role in that process.

22. The United Nations had already introduced a considerable amount of morality into international politics and the law and had made political relations more open. The behaviour of States in the various United Nations forums was subject to certain rules of conduct that were based on the highly moral principles of the Charter.

23. The CHAIRMAN thanked the Under-Secretary-General, Director-General of the United Nations Office at Geneva, for his most interesting statement.

24. The Commission greatly appreciated the hospitality of the United Nations Office at Geneva, which provided it with conference services of a high quality.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/457, sect. C, A/CN.4/459,⁶ A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

CONSIDERATION OF THE DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE AT THE FORTY-FIFTH AND FORTY-SIXTH SESSIONS (continued)

CHAPTER II (Prevention) (continued)

ARTICLE 13 (Pre-existing activities) (continued)

25. The CHAIRMAN suggested that consideration of article 13 should be suspended until later in the discussion.

It was so agreed.

⁴ Ruling of 6 July 1986 by the Secretary-General (UNRIAA, vol. XIX (Sales No. E/F.90.V.7), pp. 197 *et seq.*).

⁵ Proclaimed by the General Assembly in its resolution 44/23.

⁶ Reproduced in *Yearbook* . . . 1994, vol. II (Part One).

ARTICLE 14 (Measures to prevent or minimize the risk)

26. The CHAIRMAN said that the consideration of the article also concerned the corrigendum which had been issued to the article (A/CN.4/L.494/Corr.1), and invited the Chairman of the Drafting Committee to introduce article 14, which read:

*Article 14. Measures to prevent or minimize the risk**

States shall take legislative, administrative or other actions to ensure that all necessary measures are adopted to prevent or minimize the risk of transboundary harm of activities referred to in article 1.

* The expression "prevent or minimize the risk" of transboundary harm in this and other articles will be reconsidered in the light of the decision by the Commission as to whether the concept of prevention includes, in addition to measures aimed at preventing or minimizing the risk of occurrence of an accident, measures taken after the occurrence of an accident to prevent or minimize the harm caused.

27. Mr. BOWETT (Chairman of the Drafting Committee) said that the Drafting Committee recommended two changes in the article, as adopted by the Drafting Committee at the forty-fifth session. The first change, the purpose of which was merely to ensure consistency in the use of terms throughout the draft articles, involved the addition of the words "prevent or" before the word "minimize" in the text of the article and in the title.

28. The other change concerned the addition of a footnote. During the discussion in plenary at the forty-fifth session, the majority view in the Commission had opted for a narrow conception of prevention, which was confined to measures taken prior to the occurrence of an accident in order to prevent or minimize the risk of such an accident.⁷ In his tenth report (A/CN.4/459), the Special Rapporteur had raised the issue again and had presented strong arguments in favour of a broader concept of prevention which would also include measures taken after the occurrence of an accident in order to prevent or minimize the harm caused. The Drafting Committee had had to keep in mind the possibility that, after having considered the report of the Special Rapporteur at its next session, the Commission might opt for that broader concept of prevention. In that event, the wording of the articles would have to be modified wherever the phrase "to prevent or minimize the risk of transboundary harm" occurred and some wording would have to be included to provide for the need to prevent or minimize transboundary harm. That was the reason for the footnote to article 14, which also applied to all the articles in which the expression "to prevent or minimize the risk of transboundary harm" occurred.

29. Mr. ROSENSTOCK said that the new wording of the article raised problems in that it tended to transform an obligation of conduct into an obligation of result, which was not consistent with the Special Rapporteur's tenth report. Far from improving the text, the Drafting Committee had helped to remove it further from *lex lata* and to make it more difficult to accept.

30. He therefore proposed that the word "necessary" should at least be replaced by the word "appropriate"

and, that the words "prevent or" should if possible, be deleted.

31. Mr. HE said that he had two points to make, the first of which concerned the asterisk and the footnote. Although the question of a narrow or broad interpretation of article 14 was still in abeyance, he would prefer a broad interpretation for the reasons explained by the Special Rapporteur in his tenth report. In view of that uncertainty, the explanation given in the footnote should be transferred to the commentary.

32. His second comment concerned the word "necessary". Originally, he had considered that it could be replaced by the word "possible" to take account of the fact that the standards applicable in the developed countries with respect to "necessary measures" were perhaps not suitable for the developing countries, having regard to the stage of their technology. In the light of Mr. Rosenstock's proposal, he could agree that the word "necessary" should be replaced either by the word "possible" or by the word "appropriate".

33. Mr. BARBOZA (Special Rapporteur) said that either word would be acceptable to him. With regard to Mr. He's second comment, he would remind members that he had proposed that a rule should be included in the general principles to provide that in assessing the conduct of a State, the court or any other body responsible for interpreting the law or the treaty should take account of the special situation of the developing countries. A general provision of that kind would cover virtually all the articles.

34. Mr. BOWETT (Chairman of the Drafting Committee) said that, in his view, the addition of the word "possible" in the article would create the impression that an even higher duty was placed on States, in which case an explanation would be required in the commentary to eliminate that interpretation. In view of that risk, it would be preferable to retain the word "appropriate".

35. Mr. ROSENSTOCK said he would agree that his proposal to delete the words "prevent or" should be dropped if it was made clear in the commentary that the article dealt with an obligation of conduct and not of result.

36. Mr. de SARAM, stressing the importance of the question under discussion, said that it was the first reading of the draft articles and he would like his view to be reflected in the commentary. With regard, first, to the words "all necessary measures", there was a gradation between the three words "possible", "appropriate" and "necessary" even if the distinction was sometimes difficult to make.

37. Further, he trusted that the words "or other actions" would not be interpreted to mean that the other measures should be *ejusdem generis* with the legislative and administrative measures. He would prefer the beginning of the sentence to be re-worded to read: "States shall take all [necessary] measures to prevent . . .". He saw no reason for the Commission to determine that a measure should be of a legislative, administrative or any other nature.

38. With regard to Mr. Rosenstock's second proposal, his own view was that the inclusion of the words "pre-

⁷ See *Yearbook . . . 1993*, vol. I, 2302nd meeting.

vent or” was important, since, otherwise, the text would convey the impression that the only obligation was to minimize the risk and not to prevent it. All those points would, moreover, have an implication for the way in which the Commission dealt with liability for damage and for the question whether the obligation of the State of origin should be higher than an obligation of due diligence. That debate was still open. The Commission had still not entered into it and it should do nothing that might prejudice the position it would take during its consideration of liability at the forty-seventh session.

39. Mr. YANKOV said it stood to reason that the expression “all measures” included legislative, administrative and other measures. But it was also important—and it was the practice in many legal instruments on the environment—to refer expressly to legislative, administrative and other measures because one of the most reliable ways of ensuring stability with regard to the protection of the environment and the avoidance of risk and damage was through legislation supported by administrative, technical, financial, demographic and other measures. If the Commission should decide on a general form of wording for the article, the commentary must make it clear that it had in mind all legislative, administrative, technical, financial and other measures.

40. His second point concerned the replacement of the word “necessary” by the word “appropriate”. In a spirit of compromise, he was prepared to go along with that replacement, although “necessary” was the proper term in his view.

41. It was also necessary to consider more closely the problem of double standards. Where there was a risk or damage to the environment or to human health, there could be no question of providing one standard for the poor, one for the less fortunate and a third for all the rest. The Commission should try to achieve harmonization and unification in the rules that protected, for instance, the global environment, security and stability, and health. He would therefore suggest, at the current stage, that the Commission should keep the words “prevent or minimize”, which were, in any event not its invention and which dated back to the Stockholm Declaration.⁸ When the Commission took up that part of the Special Rapporteur’s tenth report dealing with liability, it could see how that fitted in to the draft articles.

42. Mr. THIAM said he understood that some might want to drop the word “necessary”, although, basically, it was the most suitable. What he found extraordinary, however, was that there were those who wanted to drop the word “possible”, since it meant, precisely, that States were not being asked to do the impossible. The word “appropriate” was very vague and open to many interpretations.

43. He would therefore prefer to retain the word “necessary”, but, as a concession, would agree to its replacement by the word “possible”.

44. Mr. AL-BAHARNA pointed out that there had been agreement in the Drafting Committee on the word

“necessary”, which, in any event, the text required. He was not prepared to agree to its replacement without an explanation from the Special Rapporteur or the Chairman of the Drafting Committee as to the difference in that context between the various terms.

45. Mr. EIRIKSSON said that, whichever adjective was chosen, the nature of the obligation behind the article was not clear from the wording. Some explanation should be given of what the Commission meant by that obligation and which standards it intended to set.

46. Mr. BARBOZA (Special Rapporteur) said that he did not see the point of the discussion, since it was clear, as explained in detail in the comments made in the tenth report, that article 14 dealt only with an obligation of due diligence. Whichever word was adopted, the nature of that obligation would not change. The Commission could therefore equally well choose any one of the three words, although, perhaps, the Chairman of the Drafting Committee had pointed out, the word “possible” implied a higher degree of commitment.

47. Mr. TOMUSCHAT said that he objected to the word “possible”, as it would place too great a burden on the State. On the other hand, he saw little difference between the word “necessary” and the word “appropriate”, apart from the fact that the latter perhaps placed more emphasis on the test of proportionality with regard to the sacrifice demanded of the State.

48. Mr. de SARAM said he agreed with Mr. Al-Baharna that the question had been dealt with by the Drafting Committee and that the word “necessary” should therefore be retained.

49. Mr. GÜNEY said he shared Mr. Tomuschat’s view that it would be impossible to adopt the word “possible”, since it imposed a higher degree of commitment which was not acceptable in the context. If there was to be any change, it should consist of the replacement of the word “necessary” by the word “appropriate”.

50. Mr. ROSENSTOCK said that he welcomed the Special Rapporteur’s explanations, as well as his stated intention to make it clear in the commentary that article 14 dealt with an obligation of due diligence or an obligation of conduct. He was, however, concerned that the word “necessary” could be read as meaning “possible”. He would therefore prefer it to be replaced by the word “appropriate” or the word “practicable”, which would leave no doubt as to the consistency of the text of the article with the commentary and of the text with the Special Rapporteur’s tenth report.

51. Mr. MAHIU said that, like Mr. Tomuschat, he considered that there was no difference between the words “necessary” and “appropriate”. He would not, however, object to the replacement of the former by the latter.

52. Mr. CALERO RODRIGUES, referring to the footnote, said that it was contradictory to speak of “measures taken . . . to prevent or minimize the harm caused”, since, if harm was caused, it could not be prevented. He therefore proposed that the word “caused” should be deleted.

⁸ Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

53. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to delete the word “caused” in the last line of the footnote.

It was so agreed.

54. The CHAIRMAN said that, in the light of the explanations given by the Special Rapporteur concerning the nature of the obligation laid down in article 14, he would take it, if he heard no objection, that the Commission agreed to retain the words “prevent or”.

It was so agreed.

55. The CHAIRMAN reminded the Commission that Mr. He had proposed that the footnote should be moved from the text of the draft articles to the commentary.

56. Mr. BOWETT (Chairman of the Drafting Committee) said that, if that were done, it would not assist the reader, as it would be difficult to find the content of the footnote in the relatively lengthy commentary.

57. Mr. HE withdrew his proposal.

58. The CHAIRMAN said that the Commission still had before it the proposal to replace the word “necessary” by the word “appropriate”.

The Commission decided to replace the word “necessary” by the word “appropriate” and took note of the objections of two members.

Article 14, as amended, was adopted.

ARTICLE 14 *bis* (Non-transference of risk)

59. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 14 *bis*, which read:

Article 14 bis [20 bis]. Non-transference of risk

In taking measures to prevent or minimize a risk of causing significant transboundary harm, States shall ensure that the risk is not simply transferred, directly or indirectly, from one area to another or transformed from one type of risk into another.

60. Mr. BOWETT (Chairman of the Drafting Committee) said that the number 20 *bis* which appeared between square brackets was the number originally designated for the article by the Special Rapporteur. The Drafting Committee had, however, felt that the article dealt with a general principle, non-transference of risk, that must be taken into account in the implementation of all the articles. It had therefore decided that it would be better to place it after article 14. Article 14 *bis* was inspired by the new trend in environmental law to design a comprehensive policy for protecting the environment. The Drafting Committee had taken note of article 195 of the United Nations Convention on the Law of the Sea and of article II, paragraph 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,⁹ which also dealt with the issue.

61. The purpose of the expression “simply transferred” was to preclude actions that purported to prevent or to minimize the risk, but in effect merely externalized it by shifting it to a different place or changing it so as to produce a different risk which was not really a reduced risk. The Drafting Committee was aware that, in the context of the topic, the promotion of an activity, the place where it should be conducted and the use of measures to prevent or reduce the risk of its causing transboundary harm were, in general, matters that had to be determined through the process of finding an equitable balance between the interests of the parties concerned. Obviously, article 14 *bis* had to be understood in that context, but it was the view of the Drafting Committee that, throughout the process of finding an equitable balance of interests, the parties should take into account the general principle set forth in the article.

62. Mr. EIRIKSSON said that he wondered whether article 14 *bis* was really necessary. The consequences of such a provision were perhaps clearer in the instruments referred to by the Chairman of the Drafting Committee, whereas, in the draft under consideration, they might become too dependent on the reading of the word “simply”. Whether or not the risk was transferred from one area to another, if the risk of causing significant transboundary harm subsisted, it should not make any difference at all so far as the future convention was concerned.

63. Mr. BENNOUNA said that, in his view, it should be made clear, if not in the article itself, then at least in the commentary, that a risk of another type which arose out of the transformation of the initial risk continued to be a risk within the meaning of article 2.

64. Mr. BARBOZA (Special Rapporteur) said that the comments made by Mr. Eiriksson and Mr. Bennouna would be taken into account in the commentary.

Article 14 bis was adopted.

ARTICLE 15 (Notification and information)

65. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 15, which read:

Article 15. Notification and information

If the assessment referred to in article 12 indicates a risk of causing significant transboundary harm:

(a) The State of origin shall notify without delay the States likely to be affected and shall transmit to them the available technical and other relevant information on which the assessment is based and an indication of a reasonable time within which a response is required;

(b) When necessary, such notification may be effected through a competent international organization;

(c) Where it subsequently comes to the knowledge of the State of origin that there are other States likely to be affected, it shall notify them without delay.

66. Mr. BOWETT (Chairman of the Drafting Committee) said that article 15 addressed a situation where the assessment conducted by a State, in accordance with article 12, indicated that the activity planned did indeed have a risk of causing significant transboundary harm. Together with articles 16, 18 and 19, article 15 provided

⁹ E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

for a set of procedures that were essential in attempting to balance the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity, subject to satisfactory and reasonable measures being taken to prevent or minimize transboundary harm. The core idea of article 15 was the duty of the State of origin to notify the States likely to be affected. Article 12 of the draft articles on the law of the non-navigational uses of watercourses¹⁰ dealt with a similar issue and the Drafting Committee had also taken note of article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context, which also related to the same question.

67. The notification provided for in subparagraph (a) must be accompanied by technical and other relevant information on which the assessment was based. Subparagraph (a) assumed that not only raw data and technical information were included, but also the analysis of the information which had been used by the State of origin itself to determine the risk of transboundary harm. The notification should also include an indication by the State of origin of a reasonable time within which the States likely to be affected must respond and which should allow them enough time to review the assessment material and make their own determination of the possible transboundary consequences.

68. States were free to decide how they wished to inform the States that were likely to be affected. As a general rule, they would make direct contact through diplomatic channels. In the absence of diplomatic relations, the notification could be made through a third State or a competent international organization. As use of the latter was not as common as the other two, the Drafting Committee had felt that it would be useful to mention that possibility in subparagraph (b). The reference to international organizations had a further purpose, namely, to enable a State of origin which was unable by itself to determine the States that were likely to be affected to request the assistance of a competent international organization for the purpose. In doing so, the State of origin could properly claim that it had exercised due diligence. The word "competent" meant that the organization was technically competent to deal with the problem concerned and legally competent to act in the way described. Subparagraph (c) addressed the situation where the State of origin, despite all its efforts, was unable to identify all the States that might be affected prior to authorizing the activity and learnt later that other States might be affected. In such cases, the State of origin was under the obligation to notify such States without delay.

69. Mr. EIRIKSSON said that one of the general points he had made when expressing his support for the substance of the proposed draft articles was that he would have preferred them to be more direct and methodical. There might therefore be an opportunity to make the link between articles 15, 18 and 19 clearer by adding, before the words "is required", at the end of article 15, subparagraph (a), the words "including a request for consultations under article 18". He also wondered whether there should be an obligation on the

notifying State to indicate a reasonable time. Perhaps it would be preferable to replace the words "and an indication of a reasonable time" by the words "and may indicate a reasonable time". Lastly, the link between subparagraphs (b) and (c) and the remainder of the article was perhaps not very clear and he would therefore suggest that the article as a whole should be recast with an introductory clause followed by three separate subparagraphs corresponding to the three existing subparagraphs. As a further meeting of the Drafting Committee was apparently contemplated, those changes could perhaps be dealt with then.

70. Mr. ROSENSTOCK proposed that the word "other", in subparagraph (c), should be deleted to make it clearer that the obligation to notify without delay would apply even if no State had been notified on the first occasion.

71. Mr. BENNOUNA said that, as a matter of procedure, he found it unacceptable that the Drafting Committee should be reconvened, once it had completed its work, to consider the proposals of one member of the Commission.

72. Mr. VARGAS CARREÑO said that the arguments invoked by the Drafting Committee to justify the reference to a competent international organization in subparagraph (b) were valid in theory perhaps, but in practice the provision could give rise to difficulties and controversy as to which organization was competent. Was there not a risk of undermining the main purpose of the article, which was to ensure that the State of origin was always required to inform the States likely to be affected? Perhaps it should be made clear that subparagraph (b) would apply only in the absence of diplomatic relations.

73. Mr. GÜNEY said that he agreed with Mr. Bennouna concerning procedure. The Drafting Committee was open-ended and Mr. Eiriksson had been free to submit his proposals to it. Even if his proposals had merit, it would be difficult to consider them at the current stage. They could perhaps be considered on second reading.

74. Mr. PELLET said that he had no objection with regard to procedure. He also agreed with Mr. Vargas Carreño about substance. He still did not see the point of effecting notification through a "competent" international organization and in his view, article 15, subparagraph (b), which was obscure and ambiguous, could be deleted.

75. Mr. BARBOZA (Special Rapporteur) said that the purpose of article 15, subparagraph (b), was not to compensate for any absence of diplomatic relations between the State of origin and one or more States that were likely to be affected, but to respond to a concern expressed at the preceding session, namely, that an activity might carry a risk of causing harm to a considerable number of States not all of which the State of origin would be able to identify by its own means. Under the terms of subparagraph (b), it would be able in such a case to turn to a competent international organization for assistance in that connection. Subparagraph (b) would also make it possible to assess the diligence of the State of origin, for it could be argued that, if such a State had

¹⁰ See 2353rd meeting, para. 46.

had the possibility of calling on a competent international organization to notify the States likely to be affected, but had not done so, it had perhaps not employed due diligence. The idea expressed in subparagraph (b) should therefore be retained, at any rate in the commentary.

76. Mr. PELLET said that he was not indifferent to the Special Rapporteur's explanations, but, in his view, the intervention of an international organization was not linked to notification. A State could, of course, seek the help of an international organization, but it would do so more for the purpose of assessment, which was the subject of article 12. He did not see why a State would need help in making a notification.

77. Mr. MAHIU said that he shared Mr. Pellet's doubts. The provision might, moreover, be used by the State of origin to offload its procedural obligation to notify and inform on to an international organization.

78. As to Mr. Eiriksson's proposals, admittedly they were interesting, but the plenary must not be transformed into a drafting committee. It was a pity that his proposals had not been submitted to the Drafting Committee.

79. Mr. AL-BAHARNA said that his understanding of article 15, subparagraph (b), was the same as the Special Rapporteur's and he was opposed to deleting it or placing it elsewhere. Perhaps, for the sake of clarity, the words "at the request of the State of origin" could be added after the word "effected", and the word "through" could be replaced by the words "with the assistance of". At all events, the Special Rapporteur's explanations should appear in the commentary.

80. Mr. TOMUSCHAT said that, although subparagraph (b) was unnecessary, in his view, he would not object to its retention. He considered, however, that the replacement of the word "through" by the words "with the assistance of" would be awkward: he too did not see how a State could have need of the assistance of an international organization in making a notification.

81. Mr. CALERO RODRIGUES said he doubted that the existing wording of subparagraph (b) could be improved. If there was strong opposition to it, it could be deleted and the idea it reflected could be expressed in the commentary, as the Special Rapporteur had proposed.

82. Mr. YANKOV said that he favoured the retention of subparagraph (b) as worded because it defined one of the means the State of origin could use in making a notification. The differences of view concerning the subparagraph could be reflected in the commentary.

83. Mr. BENNOUNA, supported by Mr. KABATSI (Rapporteur), speaking as a member of the Commission, said that subparagraph (b) should be retained. The question had been debated at length and it might well be that a State did not know which States were likely to be affected by an activity and therefore turned to a competent international organization to identify and notify them.

84. Mr. RAZAFINDRALAMBO said that he too favoured the retention of subparagraph (b). The provision was important for the developing countries, which lacked technical resources. Recourse to an international

organization might also be necessary in the case of assessment and the ideal solution would perhaps be for a separate provision to be formulated, along the lines of the provision in the United Nations Convention on the Law of the Sea, on the assistance competent international organizations could provide in that connection. He also considered, like Mr. Tomuschat, that the replacement of the word "through" by the words "with the assistance of" would be awkward.

85. Mr. MAHIU said he agreed with Mr. Pellet that action by an international organization would be more justified when it came to risk assessment and the identification of the States likely to be affected. In that connection, he would not be opposed to a separate provision on assistance by international organizations.

86. Mr. FOMBA said that, although he had not expressed any objection to subparagraph (b) in the Drafting Committee, the discussion taking place raised doubts in his mind as to the relevance and utility of the provision. The State of origin could, of course, request an international organization to assist it in assessing the risk and in identifying the States likely to be affected, but, once those States had been identified, it was for the State of origin to notify them. Consequently, subparagraph (b) should not be retained, at least not as presently worded.

87. Mr. PELLET said that he agreed with Mr. Razafindralambo's analysis, but not with his conclusion. Developing States might need assistance, but it would not be for the purpose of notification. The retention of subparagraph (b) might even be dangerous, since it would suggest, *a contrario*, that international organizations could intervene solely for the purpose of notification—and that was probably the only area in which their assistance was unnecessary. He therefore proposed that subparagraph (b) should be deleted and that the following sentence should be added at the end of article 12: "For the purposes of such assessment, a State shall be entitled to seek the assistance of competent international organizations."

88. Mr. VARGAS CARREÑO said that the important thing was not to undermine the main objective of article 15, namely, that the States likely to be affected should be notified in time that the State of origin intended to undertake an activity that might cause them harm. If the notification could be made through an international organization, it was always possible that, once the harm had occurred, the affected States would say that they had not known that the activity was going to be undertaken and the State of origin would contend that it had notified its intention to undertake the activity in question in time to an international organization which it regarded as competent, but that that organization had carried out the notification in such a way that the affected States had not been informed in time. To avoid that situation, it would be preferable to delete subparagraph (b) or to word it in such a way as to explain the reasons for which an international organization might have to intervene. Also, as had been proposed, the intervention of international organizations could be dealt with in a separate article.

The meeting rose at 1.05 p.m.