

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1988

*Volume I*

*Summary records  
of the meetings  
of the fortieth session  
9 May- 29 July 1988*

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UNITED NATIONS





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## NOTE

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Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the fortieth session of the Commission (A/CN.4/SR.2042-A/CN.4/SR.2094), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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## MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Prince Bola Adesumbo AJIBOLA	Nigeria	Mr. Jorge E. ILLUECA	Panama
Mr. Husain AL-BAHARNA	Bahrain	Mr. Andreas J. JACOVIDES	Cyprus
Mr. Awn AL-KHASAWNEH	Jordan	Mr. Abdul G. KOROMA	Sierra Leone
Mr. Riyadh Mahmoud Sami AL-QAYSI	Iraq	Mr. Ahmed MAHIOU	Algeria
Mr. Gaetano ARANGIO-RUIZ	Italy	Mr. Stephen C. McCAFFREY	United States of America
Mr. Julio BARBOZA	Argentina	Mr. Frank X. NJENGA	Kenya
Mr. Juri G. BARSEGOV	Union of Soviet Socialist Republics	Mr. Motoo OGISO	Japan
Mr. John Alan BEESLEY	Canada	Mr. Stanislaw PAWLAK	Poland
Mr. Mohamed BENNOUNA	Morocco	Mr. Pemmaraju Sreenivasa RAO	India
Mr. Boutros BOUTROS-GHALI	Egypt	Mr. Edilbert RAZAFINDRALAMBO	Madagascar
Mr. Carlos CALERO RODRIGUES	Brazil	Mr. Paul REUTER	France
Mr. Leonardo DÍAZ GONZÁLEZ	Venezuela	Mr. Emmanuel J. ROUCOUNAS	Greece
Mr. Gudmundur EIRIKSSON	Iceland	Mr. César SEPÚLVEDA GUTIÉRREZ	Mexico
Mr. Laurel B. FRANCIS	Jamaica	Mr. Jiuyong SHI	China
Mr. Bernhard GRAEFRATH	German Democratic Republic	Mr. Luis SOLARI TUDELA	Peru
Mr. Francis Mahon HAYES	Ireland	Mr. Doudou THIAM	Senegal
		Mr. Christian TOMUSCHAT	Federal Republic of Germany
		Mr. Alexander YANKOV	Bulgaria

## OFFICERS

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ  
*First Vice-Chairman:* Mr. Bernhard GRAEFRATH  
*Second Vice-Chairman:* Mr. Ahmed MAHIOU  
*Chairman of the Drafting Committee:* Mr. Christian TOMUSCHAT  
*Rapporteur:* Mr. Jiuyong SHI

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*Mr. Georgiy F. Kalinkin, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.*

## **AGENDA**

The Commission adopted the following agenda at its 2044th meeting, held on 11 May 1988:

1. Organization of work of the session.
2. State responsibility.
3. Jurisdictional immunities of States and their property.
4. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
5. Draft Code of Crimes against the Peace and Security of Mankind.
6. The law of the non-navigational uses of international watercourses.
7. International liability for injurious consequences arising out of acts not prohibited by international law.
8. Relations between States and international organizations (second part of the topic).
9. Programme, procedures and working methods of the Commission, and its documentation.
10. Co-operation with other bodies.
11. Date and place of the forty-first session.
12. Other business.

## ABBREVIATIONS

CMEA	Council for Mutual Economic Assistance
ECE	Economic Commission for Europe
EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILO	International Labour Organisation
IMF	International Monetary Fund
IMO	International Maritime Organization
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
WHO	World Health Organization
World Bank	International Bank for Reconstruction and Development

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*I.C.J. Reports* ICJ, *Reports of Judgments, Advisory Opinions and Orders*

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### NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

**MULTILATERAL CONVENTIONS**  
**cited in the present volume**

*Source*

**HUMAN RIGHTS**

- Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948) United Nations, *Treaty Series*, vol. 78, p. 277.
- International Covenant on Civil and Political Rights (New York, 16 December 1966) *Ibid.*, vol. 999, p. 171.
- International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966) *Ibid.*, vol. 993, p. 3.
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968) *Ibid.*, vol. 754, p. 73.
- International Convention on the Suppression and Punishment of the Crime of *Apartheid* (New York, 30 November 1973) *Ibid.*, vol. 1015, p. 243.

**PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS**

- Convention on the Privileges and Immunities of the United Nations (London, 13 February 1946) *Ibid.*, vol. 1, p. 15.
- Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947) *Ibid.*, vol. 33, p. 261.
- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) *Ibid.*, vol. 500, p. 95.
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) *Ibid.*, vol. 596, p. 261.
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973) *Ibid.*, vol. 1035, p. 167.
- Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

**LAW OF TREATIES**

- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) United Nations, *Treaty Series*, vol. 1155, p. 331.
- Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986) A/CONF.129/15.

## LAW OF THE SEA

- Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 516, p. 205.
- Convention on the High Seas (Geneva, 29 April 1958) *Ibid.*, vol. 450, p. 11.
- Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 29 April 1958) *Ibid.*, vol. 559, p. 285.
- Convention on the Continental Shelf (Geneva, 29 April 1958) *Ibid.*, vol. 499, p. 311.
- United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

## LIABILITY FOR DAMAGE CAUSED BY NUCLEAR AND OUTER SPACE ACTIVITIES

- Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 29 July 1960) and Additional Protocol (Paris, 28 January 1964) United Nations, *Treaty Series*, vol. 956, pp. 251 and 335.
- Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 21 May 1963) *Ibid.*, vol. 1063, p. 265.
- Convention on International Liability for Damage Caused by Space Objects (London, Moscow, Washington, 29 March 1972) *Ibid.*, vol. 961, p. 187.

## CHECK-LIST OF DOCUMENTS OF THE FORTIETH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/408	Provisional agenda	Mimeographed. For the agenda as adopted, see p. ix above.
A/CN.4/409 [and Corr.1 and 2] and Add.1-5	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: comments and observations received from Governments	Reproduced in <i>Yearbook . . . 1988</i> , vol. II (Part One).
A/CN.4/410 and Add.1 [and Add.1/Corr.1] and Add.2-5	Jurisdictional immunities of States and their property: comments and observations received from Governments	<i>Idem.</i>
A/CN.4/411 [and Corr.1 and 2]	Sixth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	<i>Idem.</i>
A/CN.4/412 and Add.1 [and Add.1/Corr.1] and Add.2 [and Add.2/Corr.1-3]	Fourth report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	<i>Idem.</i>
A/CN.4/413 [and Corr.1]	Fourth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Idem.</i>
A/CN.4/414	State responsibility: comments and observations of Governments on part I of the draft articles on State responsibility for internationally wrongful acts	<i>Idem.</i>
A/CN.4/415 [and Corr.1 and 2]	Preliminary report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur	<i>Idem.</i>
A/CN.4/416 [and Corr.1 and 2] and Add.1 [and Add.1/Corr.1 and 2]	Preliminary report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	<i>Idem.</i>
A/CN.4/417 [and Corr.1 and 2]	Eighth report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.420	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-second session of the General Assembly	Mimeographed.
A/CN.4/L.421	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts adopted by the Drafting Committee: titles of parts II and III of the draft; articles 8 to 21	See summary records of the 2070th meeting (paras. 30 <i>et seq.</i> ), 2071st meeting (paras. 1-80), 2072nd meeting (paras. 1-77) and 2073rd meeting.
A/CN.4/L.422	Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: articles 4, 7, 8, 10, 11 and 12	See summary records of the 2082nd meeting (paras. 34 <i>et seq.</i> ) and 2083rd to 2085th meetings.
A/CN.4/L.423	Draft report of the International Law Commission on the work of its fortieth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Forty-third Session, Supplement No. 10 (A/43/10)</i> . The final text appears in <i>Yearbook . . . 1988</i> , vol. II (Part Two).
A/CN.4/L.424 [and Corr.1]	<i>Idem</i> : chapter II (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>
A/CN.4/L.425 and Add.1 [and Add.1/Corr.1]	<i>Idem</i> : chapter III (The law of the non-navigational uses of international watercourses)	<i>Idem.</i>
A/CN.4/L.426 and Add.1	<i>Idem</i> : chapter IV (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem.</i>
A/CN.4/L.427 and Add.1	<i>Idem</i> : chapter V (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem.</i>
A/CN.4/L.428 [and Corr.1]	<i>Idem</i> : chapter VI (Jurisdictional immunities of States and their property)	<i>Idem.</i>
A/CN.4/L.429 and Add.1 and 2	<i>Idem</i> : chapter VII (State responsibility)	<i>Idem.</i>
A/CN.4/L.430	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem.</i>
A/CN.4/SR.2042-A/CN.4/SR.2094	Provisional summary records of the 2042nd to 2094th meetings	Mimeographed. The final text appears in the present volume.



# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FORTIETH SESSION

*Held at Geneva from 9 May to 29 July 1988*

### 2042nd MEETING

*Monday, 9 May 1988, at 3.15 p.m.*

*Outgoing Chairman:* Mr. Stephen C. McCaffrey

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

#### Opening of the session

1. The OUTGOING CHAIRMAN declared open the fortieth session of the International Law Commission and extended a warm welcome to members, to the Secretary to the Commission and to all the Secretariat staff.

#### Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN said that the Commission was about to embark on 12 weeks of collective reflection and challenging work in the spirit of co-operation and friendship which was one of its most cherished features. He trusted that the session would be intellectually rewarding for all members, as well as beneficial to the progressive development and codification of international law.

3. He wished to express the grief felt by all members at the untimely death of Ms. Ann Petit, who had served them so competently and helpfully for many years. On the Commission's behalf, he thanked the Secretary for having conveyed its heartfelt condolences to her family.

4. In accordance with the mandate received from the Commission, he had represented it at the forty-second session of the General Assembly. The statement which he had made before the Sixth Committee introducing the Commission's report on its thirty-ninth session (A/42/10)<sup>1</sup> was summarized in the relevant summary record,<sup>2</sup> and there was no need to dwell on it. He would also refrain from giving a detailed account of the debate or of the wealth of interesting comments and instructive ideas put forward, since they were reflected in the sum-

<sup>1</sup> See *Yearbook . . . 1987*, vol. II (Part Two).

<sup>2</sup> *Official Records of the General Assembly, Forty-second Session, Sixth Committee, 35th meeting*, paras. 1-37.

mary records and analytically presented in the topical summary prepared by the Secretariat (A/CN.4/L.420).

5. He wished, however, to stress that the work accomplished at the Commission's thirty-ninth session had generally met with a favourable response and that the conclusions reached by the Commission regarding the planning of its activities for the term of office of its current members had received the general endorsement of the Sixth Committee. He had been particularly struck by the obvious interest which the Commission's report had elicited, by the quality of the debate it had generated and by the Sixth Committee's awareness of the need to maintain a meaningful dialogue with the Commission—an awareness which the General Assembly had expressed in paragraph 6 of its resolution 42/156 of 7 December 1987, in recommending:

. . . the continuation of efforts to improve the ways in which the report of the International Law Commission is considered in the Sixth Committee, with a view to providing effective guidance for the Commission in its work . . .

With that end in mind, the Assembly had decided that the Sixth Committee would, at the commencement of the forty-third session, hold consultations on, *inter alia*, the question of establishing a working group, the character and mandate of which were to be determined, to meet during the debate on the Commission's report in order to allow for a concentrated discussion on one or more of the topics on the Commission's agenda.

6. Referring to the question of co-operation with other bodies, he informed the Commission that, in accordance with his mandate, he had represented it at the meeting of the Asian-African Legal Consultative Committee held at Singapore in March 1988. He welcomed the election of Mr. Njenga, a member of the Commission, as Secretary-General of that Committee: his election would obviously result in even closer relations between the two bodies. Also in accordance with his mandate, he had represented the Commission at the meeting of the Inter-American Juridical Committee held at Rio de Janeiro in August 1987 and had lectured to the seminar held on that occasion, giving an account of the Commission's work.

7. He thanked Mr. Roucounas for representing the Commission, at his request, at the session of the European Committee on Legal Co-operation held at Strasbourg in May 1988. As chairman of the Commission, he had himself attended the meeting at Ottawa in August 1987 of the World Federation of United Nations Associations, at the invitation of its Secretary-General.

8. In conclusion, he expressed his heartfelt appreciation to the other officers of the Commission and to all members for their support and co-operation. He also wished to thank the Legal Counsel, Mr. Fleischhauer, who had been unable to attend the opening of the present session, being detained in New York by the resump-

tion of the forty-second session of the General Assembly, as well as the Secretary to the Commission and the entire Secretariat for their unfailing support.

*The meeting was suspended at 3.35 p.m. and resumed at 3.45 p.m.*

#### Election of officers

*Mr. Díaz González was elected Chairman by acclamation.*

*Mr. Díaz González took the Chair.*

9. The CHAIRMAN thanked the Commission for the confidence it had shown in him.

*Mr. Graefrath was elected First Vice-Chairman by acclamation.*

*Mr. Mahiou was elected Second Vice-Chairman by acclamation.*

*Mr. Tomuschat was elected Chairman of the Drafting Committee by acclamation.*

*Mr. Shi was elected Rapporteur by acclamation.*

10. The CHAIRMAN drew attention to General Assembly resolution 42/156 of 7 December 1987, and suggested that the request in paragraph 5 of that resolution should be taken up under agenda item 9 (Programme, procedures and working methods of the Commission, and its documentation).

*It was so agreed.*

11. Mr. FRANCIS said that it would be helpful if members could know which topic the Commission would be taking up first.

12. Mr. BARSEGOV, agreeing with Mr. Francis, pointed out that the documents pertaining to a number of agenda items had not yet been issued. He believed it had been agreed that the Commission should not deal with any topic if the relevant documents had not been distributed in advance.

13. Following a brief discussion, the CHAIRMAN suggested that the meeting should be adjourned to allow the Enlarged Bureau to consider those points in the general context of the organization of work of the session.

*It was so agreed.*

*The meeting rose at 4.40 p.m.*

### 2043rd MEETING

*Tuesday, 10 May 1988, at 10.05 a.m.*

*Chairman: Mr. Leonardo DÍAZ GONZÁLEZ*

*Present: Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaf-*

*frey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

#### Organization of work of the session

[Provisional agenda item 1]

1. The CHAIRMAN said that, in the light of the information from the special rapporteurs on the stage reached in preparing their reports and the Commission's stated intention, in its report on its thirty-ninth session,<sup>1</sup> "not to discuss at a given session any report made available to its members less than two weeks before the opening of that session, unless special circumstances dictate otherwise", the Enlarged Bureau, which had met the day before, recommended that, in May, the Commission should consider the following agenda items:

International liability for injurious consequences arising out of acts not prohibited by international law (item 7): fourth report by Mr. Barboza (A/CN.4/413) .....	13 to 20 May
The law of the non-navigational uses of international watercourses (item 6): fourth report by Mr. McCaffrey (A/CN.4/412) .....	24 to 27 May
Consideration of that item would be resumed when addenda 1 and 2 to the report were available.	
Draft Code of Crimes against the Peace and Security of Mankind (item 5): sixth report by Mr. Thiam (A/CN.4/411).....	from 31 May

The organization of the Commission's work for the months of June and July would be considered by the Enlarged Bureau at a later stage, when it had a better idea of the dates on which the reports of the other special rapporteurs could be distributed and introduced.

2. Mr. BARBOZA said that if, at the end of the seven meetings allocated for consideration of his report (A/CN.4/413), there were still members of the Commission wishing to comment on it, one or two additional meetings should be scheduled in order to continue the discussion. He recalled that, at the previous session, eight meetings had been found sufficient for a wide-ranging exchange of views on the topic.

3. Mr. BARSEGOV asked for some indication, however sketchy, of the situation regarding the reports to be dealt with in June and July, so that he could express an informed opinion on the Enlarged Bureau's recommendations for the month of May.

4. The CHAIRMAN replied that, for the moment, the Commission had only the three reports he had mentioned. Three other reports still had to be translated and distributed: on jurisdictional immunities of States and their property, on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and on State responsibility. Until they had been distributed, the Commission could not take any decision concerning them. On the other hand, it could allocate part of its time to the Drafting Committee and the Planning Group.

<sup>1</sup> Yearbook . . . 1987, vol. II (Part Two), p. 55, para. 244.

5. Mr. RAZAFINDRALAMBO said it was regrettable that the Commission should begin its work by considering the report on international liability for injurious consequences arising out of acts not prohibited by international law, a document that had been circulated to members only the previous day, whereas the report on the law of the non-navigational uses of international watercourses had been sent to them at their home addresses. He wondered why the Enlarged Bureau had made such a recommendation.

6. The CHAIRMAN explained that Mr. Barboza had to be absent from 23 May and that Mr. Thiam, for personal reasons, had to return immediately to Dakar. That was why the Enlarged Bureau was recommending that priority be given to Mr. Barboza's report.

7. Mr. BARSEGOV observed that relations between States and international organizations (second part of the topic) had not yet been mentioned, and also asked when members would have copies of Mr. Ogiso's report on jurisdictional immunities of States and their property, which apparently ran to 150 pages. As a former staff member of the United Nations, he was fully aware of the work-load involved in translating and reproducing a document of that length. He was also concerned that, if the Drafting Committee was to meet because there was no work for the Commission to do, those members of the Commission who were not on the Drafting Committee might be wasting their time.

8. Mr. MAHIU said that, for reasons of *force majeure*, namely Mr. Thiam being called back to Dakar, and of documentation, in other words only Mr. Thiam's report having been issued in French, the situation was somewhat difficult. Nevertheless, members of the Commission must face up to it squarely. Some of them might, in fact, be prepared to speak after Mr. Barboza had introduced his report. The proposals of the Enlarged Bureau should be adopted, so that after the present meeting it could return in greater detail to the programme of work.

9. Mr. ROUCOUNAS said that Mr. Barboza's topic was of special interest because, on the threshold of the twenty-first century, there were psychological and other reasons why mankind was feeling the need for protection against technological and other risks. He asked whether the discussion could be resumed when the allocated seven meetings were over.

10. The CHAIRMAN said that, if necessary, the discussion could be continued when Mr. Barboza returned. In reply to Mr. Barsegov, he added that he would be submitting his own report on relations between States and international organizations at the Commission's next session.

11. Mr. PAWLAK said that, as a matter of common sense, the Commission should endorse the solution proposed by the Enlarged Bureau. He therefore supported its recommendations and asked if the Secretariat could speed up the translation of the reports submitted to the Commission.

12. Mr. KALINKIN (Secretary to the Commission) said that the Secretariat had not yet received all the reports awaited. Mr. Ogiso's report, which had arrived the previous day, would be distributed at the beginning

of July, Mr. Yankov's report at the beginning of June and Mr. Arangio-Ruiz's report towards the end of June.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the recommendations of the Enlarged Bureau.

*It was so agreed.*

#### Drafting Committee

14. The CHAIRMAN proposed that the Drafting Committee, with Mr. Tomuschat as Chairman, should consist of the following members: Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Hayes, Mr. Koroma, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas and Mr. Sepúlveda Gutiérrez. Mr. Shi would be an *ex officio* member in his capacity as Rapporteur of the Commission.

*It was so agreed.*

*The meeting rose at 10.45 a.m.*

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## 2044th MEETING

*Wednesday, 11 May 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat, Mr. Yankov.

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### Organization of work of the session (continued)

[Provisional agenda item 1]

1. The CHAIRMAN made the following recommendations to the Commission, based on discussions held by the Enlarged Bureau.

1. A preliminary debate on agenda item 9 should be held the following week, while the Legal Counsel was in Geneva, and should cover the points included in paragraph 5 of General Assembly resolution 42/156.

2. Paragraph 244 of the Commission's report on its thirty-ninth session<sup>1</sup> should be interpreted and applied flexibly, the guiding principle being that the Commission should make maximum use of the time available to it, especially when there were special circumstances warranting delay in the presentation of reports by some special rapporteurs, and that all the resources made available by the General Assembly should be fully deployed.

3. The Commission should endorse all the topics on its provisional agenda (A/CN.4/408).

4. The four morning meetings each week should all be plenary meetings: the afternoons should be devoted to the work of the Drafting Committee, the Planning Group or other bodies.

<sup>1</sup> *Yearbook* . . . 1987, vol. II (Part Two), p. 55.

5. The following preliminary plan of work for the month of June should be adopted:

Draft Code of Crimes against the Peace and Security of Mankind (item 5): sixth report by Mr. Thiam (A/CN.4/411).....	until 10 June
The law of the non-navigational uses of international watercourses (item 6): second part of the fourth report by Mr. McCaffrey (A/CN.4/412/Add.1 and 2).....	14 to 21 June
International liability for injurious consequences arising out of acts not prohibited by international law (item 7): fourth report by Mr. Barboza (A/CN.4/413).....	22 to 24 June
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 4): eighth report by Mr. Yankov (A/CN.4/417) (if available).....	28 to 30 June

6. Any time saved from the consideration of the various topics in plenary should be allocated to the Drafting Committee, the Planning Group or other bodies, and the reports of the Drafting Committee should be considered, as appropriate, in plenary, depending on the availability of documentation.

2. The proposed plan of work should, of course, be followed with the necessary flexibility, bearing in mind the progress of the work and with a view to economizing on resources.

3. In accordance with previous practice, the representatives of legal bodies with which the Commission co-operated would make their statements on dates to be decided as the session progressed. Agenda item 10 could thus be dealt with in the light of their wishes.

4. The organization of the Commission's work for the month of July would be decided at a later stage, when the situation regarding the reports not yet submitted by special rapporteurs became clearer. In the mean time, he proposed that the Commission should adopt those recommendations.

*The recommendations were adopted.*

#### **Adoption of the agenda (A/CN.4/408)**

5. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/408).

*The provisional agenda (A/CN.4/408) was adopted.*

6. Mr. CALERO RODRIGUES expressed his concern about two topics: jurisdictional immunities of States and their property, and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. With the timetable just adopted, he saw little chance of the Commission achieving the object it had set itself for the session, namely completing the second reading of draft articles on two topics, and the first reading of draft articles on two others. The second topic he had mentioned should, he thought, have at least two weeks' consideration in the Drafting Committee at the current session. As to Mr. Ogiso's report on the first topic, there would be no opportunity to present it before the end of the session.

7. The CHAIRMAN said that he shared Mr. Calero Rodrigues's concern, but pointed out that the two topics mentioned were those for which reports were not yet available. It should be possible, however, to consider at least part of Mr. Ogiso's report during the session.

8. Mr. FRANCIS said that the delay in submitting certain reports was attributable not to the special rapporteurs concerned, but to Governments which had delayed their response to the request for observations. He suggested that the Commission should include a comment to that effect in its report and inform the General Assembly that, if the trend continued, the Commission would probably be unable to meet its request for a second reading on two topics at the present session.

9. The CHAIRMAN said that, when the Commission dealt with agenda item 9, it should urge Member States to respond promptly to requests by the General Assembly for observations on specific questions.

10. Mr. YANKOV said that he regretted the difficulty of completing, at the current session, the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Because of delays in the transmission of documents, it had not been possible to reflect in his report (A/CN.4/417) the comments and observations received from Governments, but he would try to be ready for the report to be considered, provided its printing could be speeded up.

#### **Drafting Committee**

11. The CHAIRMAN proposed that Mr. Al-Khasawneh should become a member of the Drafting Committee immediately; Mr. Razafindralambo would serve on it from 1 June, and Mr. Roucouas from 1 July. If there were no objections, he would take it that the Commission agreed to those changes in the composition of the Drafting Committee.

*It was so agreed.*

#### **Programme, procedures and working methods of the Commission, and its documentation**

[Agenda item 9]

#### **MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU**

12. The CHAIRMAN announced that, after consultations, Mr. Graefrath, Chairman of the Planning Group, had proposed that the Group should consist of the following members: Prince Ajibola, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Eiriksson, Mr. Francis, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Shi, Mr. Solari Tudela, Mr. Thiam and Mr. Yankov. The Planning Group was not restricted and other members of the Commission would be welcome at its meetings. If there were no objections, he would take it that the Commission agreed to the proposed membership.

*It was so agreed.*

**International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,<sup>2</sup> A/CN.4/405,<sup>3</sup> A/CN.4/413,<sup>4</sup> A/CN.4/L.420, sect. D)<sup>5</sup>**

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 10

13. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report on the topic (A/CN.4/413), containing draft articles 1 to 10, which read:

CHAPTER I. GENERAL PROVISIONS

*Article 1. Scope of the present articles*

The present articles shall apply with respect to activities carried on under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State, when such activities create an appreciable risk of causing transboundary injury.

*Article 2. Use of terms*

For the purposes of the present articles:

(a) (i) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them highly likely to cause transboundary injury throughout the process;

(ii) "Appreciable risk" means the risk which may be identified through a simple examination of the activity and the things involved;

(b) "Activities involving risk" means the activities referred to in article 1;

(c) "Transboundary injury" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in spheres where another State exercises jurisdiction under international law, is appreciably detrimental to persons or objects, or to the use or enjoyment of areas, whether or not the States concerned have a common border;

(d) "State of origin" means the State which exercises the jurisdiction or the control referred to in article 1;

(e) "Affected State" means the State under whose jurisdiction persons or objects, or the use or enjoyment of areas, are or may be affected.

*Article 3. Attribution*

The State of origin shall have the obligations imposed on it by the present articles provided that it knew or had means of knowing that an activity involving risk was being, or was about to be, carried on in areas under its jurisdiction or control.

*Article 4. Relationship between the present articles and other international agreements*

Where States Parties to the present articles are also parties to another international agreement concerning activities or situations within the scope of the present articles, in relations between such States the present articles shall apply subject to that other international agreement.

<sup>2</sup> Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

<sup>3</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>4</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>5</sup> Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

*Article 5. Absence of effect upon other rules of international law*

The fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.

CHAPTER II. PRINCIPLES

*Article 6. Freedom of action and the limits thereto*

States are free to carry on or permit in their territory any human activity considered appropriate. However, with regard to activities involving risk, that freedom must be compatible with the protection of the rights emanating from the sovereignty of other States.

*Article 7. Co-operation*

1. States shall co-operate in good faith in preventing or minimizing the risk of transboundary injury or, if injury has occurred, in minimizing its effects both in affected States and in States of origin.

2. In accordance with the above provision, the duty to co-operate applies to States of origin in relation to affected States, and vice versa.

*Article 8. Participation*

By virtue of their duty to co-operate, States of origin shall permit participation under the present articles by States likely to be affected, so that they might jointly consider the nature of the activity and its potential risks, and determine whether a régime needs to be jointly developed in this area.

*Article 9. Prevention*

States of origin shall take all reasonable preventive measures to prevent or minimize injury that may result from an activity which presumably involves risk and for which no régime has been established.

*Article 10. Reparation*

To the extent compatible with the provisions of the present articles, injury caused by an activity involving risk must not affect the innocent victim alone. In such cases, there must be reparation for the appreciable injury suffered, the question of reparation being settled by negotiation between the parties and in accordance with the criteria laid down in the present articles.

14. Mr. BARBOZA (Special Rapporteur) first recalled that some confusion had been caused by his comments in his second report on the Spanish term *responsabilidad*.<sup>6</sup> In referring to the two separate connotations of that word, namely the duty of prevention and the duty of reparation, for which two separate terms—responsibility and liability—were used in English, he had only meant to indicate that both obligations were covered by the Spanish term, without stretching its meaning.

15. Introducing his fourth report (A/CN.4/413), he suggested that, as the general debate was over, the Commission should concentrate on specific articles, in order to fulfil its mandate from the General Assembly. As far as possible, the comments made had been reflected in the report, with a view to representing the majority opinion in the Commission.

16. Two questions remained outstanding from the debate on the topic at the previous session: whether the

<sup>6</sup> *Yearbook . . . 1986*, vol. II (Part One), p. 146, document A/CN.4/402, para. 5.

draft articles should include a list of the activities covered by the topic and whether polluting activities should be brought within their scope. The idea of including a list of activities had already been objected to, on the ground that such a list would quickly become obsolete owing to the pace of technological progress. A second objection raised was that the concept of danger caused by an activity was essentially relative, since it depended on circumstances: the same industry could be considered dangerous in some circumstances and safe in others. The purpose of preparing such a list would be to give the future convention on the topic a concrete subject-matter, with a view to reproducing the situation in which States negotiated a convention governing a particular activity. In such a case, the task was simpler, since responsibility could be determined on the basis of the characteristics of the activity in question. But the present topic operated at a different stage, prior to that just mentioned. As it now stood, the draft dealt with the juncture at which a State, having identified within its borders an activity involving risk, realized that the continuation of the activity might affect other States.

17. The object of the draft articles was modest: to establish a general convention obliging States to notify and inform other States which might be affected by such a risk, and, as far as possible, to prevent it from arising. If damage occurred, no specific level of compensation was prescribed; instead, there was an obligation to negotiate in good faith and to make reparation for any injury caused, taking into account factors such as those set out in sections 6 and 7 of the schematic outline. At present, there was a gap in international law relating to the negotiation of conventions on specific activities; it was not clear what principles should apply to such negotiations, or what should be done if accidents happened during them. The purpose of the draft articles was to fill that gap. International practice bore out the principle that the State in which the risk originated must take precautions to eliminate the risk and inform States which might be affected. It would be impossible to regulate all specific activities at the present time: the Commission could only try to provide the most complete definition possible of activities involving risk.

18. As to the second outstanding question, that of polluting activities, the preliminary conclusion had already been reached that such activities should be brought within the scope of the draft articles, since he doubted that the Commission accepted the existence of a rule of international law, at an operative level, prohibiting States from causing appreciable injury through transboundary pollution. At the previous session, Mr. Reuter<sup>7</sup> had raised the issue of continuous pollution—the case in which pollutants that caused no appreciable damage in small quantities could, in time, accumulate and cause transboundary injury. As Mr. Reuter had pointed out, it was sometimes difficult to prove the connection between cause and effect in cases of continuous pollution; but, on close examination, it appeared that reparation for such damage was not the primary concern, especially where there was a régime—such as that of the present draft articles—whose provisions prevented the damage from becoming serious. Yet

the difficulty of proving the facts did not justify abandoning the attempt to deal with continuous pollution: it would be better to have a régime of responsibility than to be without any legal safeguards for the affected State. It was therefore considered that the question of continuous pollution should be included within the scope of the topic. Where accidental pollution was concerned, there was little difficulty in proving the facts, the cause being well known; on the other hand, the question of reparation became very important.

19. Introducing article 1, he pointed out that the basic situation contemplated in the draft articles was territorial. The topic dealt with activities in the territory of one State which caused harm in the territory of another State. In modern international law, however, the position was more complicated. The activities in question could be carried on outside the actual territory of the State of origin. For that reason, article 1, instead of referring to the territory of the State of origin, referred to the jurisdiction vested in it by international law. The jurisdiction of a State extended to its ships, its aircraft and its space vehicles and the formulas used in articles 1 and 2 (c) covered activities conducted in such craft and also damage to them. There were also areas where, under international law, the jurisdiction of more than one State was exercised, as in the case of a foreign ship in a State's territorial sea. If an activity of the type in question was conducted in the exercise of one jurisdiction and caused damage in another jurisdiction, the situation would be covered by the draft articles.

20. The words “or, in the absence of such jurisdiction, under the effective control of the State” had been introduced in order to deal with such cases as that of Namibia, where South Africa exercised *de facto* control, although it had no jurisdiction vested in it by international law.

21. He pointed out that, in an earlier version, article 1 had referred to activities which “give rise or may give rise to” transboundary harm. That formula had, however, appeared redundant: if an activity created appreciable risk, it would be covered by the draft articles and, accordingly, its results would also be covered. Therefore, if any reference to activities which caused harm was to be included, it should be qualified. As would be seen later, the reference should be to an activity which created an appreciable risk, whether or not it caused transboundary harm.

22. The concept of “situations” had not been retained in article 1, since most of the comments made during the 1987 discussion had been critical of that concept. The reason for including it had been to cover cases in which the activity concerned could not be described as dangerous in itself, but nevertheless created a dangerous situation. An example was the construction of a dam, which, although not dangerous in itself, could upset hydrological conditions, affect the rainfall in the area or even cause floods. When dealing with the part of his report relating to causality he would explain why it was possible to dispense with the concept of “situations”.

23. The purpose of article 2 was to explain the meaning of terms employed in the various articles submitted so far. As the work progressed it would, of course, become necessary to introduce further definitions.

<sup>7</sup> *Yearbook* . . . 1987, vol. I, p. 142, 2016th meeting, para. 11.

24. Subparagraph (a) attempted to give a comprehensive definition of a “dangerous activity”, without providing a list of such activities. Most, if not all, known dangers arose from the use of dangerous things: *cosas peligrosas* in Spanish or *choses dangereuses* in French. The term “substances”, used in the English text of the report, was not satisfactory: a spacecraft, for example, was not a substance. Besides, the term “things” had a wider meaning: it could be used to refer, for example, to laser beams. The concept involved was essentially a relative one: it depended on the intrinsic properties of the things concerned (e.g. dynamite, nuclear materials), the place in which they were used (near a border), the environment in which they were used (air, water, etc.) and the way in which they were used (e.g. oil transported in great quantities by large tankers).

25. The risk contemplated in the draft articles was the risk created by such things. That element constituted one of the most essential features of responsibility; the “risk” in question had to be greater than a normal risk. It must be remembered that there was some risk involved in most activities; the risk contemplated in the present instance had to be relatively high. Moreover, the existence of the risk had to be visible to the professional eye. Occult risk did not lie within the scope of the draft articles, unless it was known to exist because of some other circumstance: for instance, if it became evident at a later stage by causing some transboundary injury. The purpose of the proposed wording was to protect the freedom of the State of origin. Otherwise, it would be under an obligation to set the procedures of the draft articles in motion for any new activity. The proposed definition was in conformity with Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),<sup>9</sup> which was also reflected in draft article 6. It introduced a new “threshold” which could not be measured with precision. In that connection, he drew attention to footnote 9 in his fourth report (A/CN.4/413), which was particularly important.

26. As stated in subparagraph (b) of article 2, “activities involving risk” meant the activities referred to in article 1.

27. Subparagraph (c) referred to the jurisdiction rather than to the territory of a State, in line with the wording of article 1. He proposed that the inappropriate term “spheres” (*ámbitos*) be replaced by “places” (*lugares*). The provision would thus cover ships, aircraft and space vehicles. Subparagraph (c) dealt with the transboundary element, in other words the fact that the activity concerned and its effects occurred in different jurisdictions. In the commentary, an attempt would be made to construct a general theory of harm for the purposes of the present topic.

28. Much had been said in the previous debate on the subject of terminology. He himself had doubts about the use of the term “injury” to render the original Spanish *daño*, which was a neutral word used to describe anything detrimental to persons or property. Of course, a special rapporteur was in no position to

suggest equivalents in the various languages of terms used in legal systems other than his own. Hence if the debate revealed some difficulties regarding the meaning of a term or expression, he would endeavour to explain the way in which he had used it in the original Spanish text.

29. The position was that not all types of harm had to be compensated for. Everything depended on the type of liability which it was intended to impose on the parties. In international law, not all harm gave rise to compensation. In the *Barcelona Traction* case, as he pointed out in his report (*ibid.*, para. 38), the ICJ had stated:

... evidence that damage was suffered does not *ipso facto* justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility . . .

In other words, the present topic concerned only harm that was appreciable and arose from an activity creating appreciable risk. Risk that was not appreciable was not covered by the draft articles and hence would not be covered by a general convention deriving from them. Of course, other forms of risk would be covered by specific conventions on particular matters; and risks other than appreciable risk would be covered by general international law. The fact that damage must be compensated for when it occurred as a result of dangerous activities made the concepts of “risk” and “harm” a real continuum: harm was compensated for because of the risk created by the activity. There was an *a priori* obligation for whoever created the risk to provide compensation for any harm which occurred in such circumstances. As he stated in his report (*ibid.*, para. 45), compensation was due not merely because injury had occurred, but because it corresponded to “a certain general prediction that it was going to occur”, since the activity which caused it created a risk and was dangerous.

30. It had been seen that, in order to be covered by the topic, harm had to result from the physical consequences of the activity concerned; but harmful social consequences must also be taken into account—an idea underlying the arbitral award in the *Lake Lanoux* case<sup>9</sup>—as well as harmful economic consequences.

31. With regard to transboundary harm, he agreed that subparagraph (b) of former article 3 as submitted in his third report (A/CN.4/405, para. 6) was unnecessary. The situation for which that subparagraph provided, namely the attribution of liability in cases where an activity in one country created in areas beyond national jurisdictions a “situation” which, in turn, caused injury in areas within the jurisdiction of another State, would be covered provided that the chain of causality between the activity in one national jurisdiction and the effect in another remained unbroken. Indeed, that seemed to be the rule laid down by the United States-German Mixed Claims Commission in relation to certain emergency war measures taken by Germany during the First World War, to which he referred in his

<sup>9</sup> 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.

<sup>9</sup> Original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports*, 1957 (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

fourth report (A/CN.4/413, para. 52). He therefore suggested that the case referred to in subparagraph (b) of former article 3 should be omitted from the draft and that the point should be clarified in the commentary.

32. With regard to subparagraph (d) of article 2, he preferred the expression "State of origin" to "source State". The former expression was more neutral and better reflected the basic situation of a purely territorial attribution.

33. Article 3, which dealt with the highly complex question of attribution, introduced a new element into the basic rule by providing that the State of origin must know or have means of knowing that an activity involving risk was being carried on in areas under its jurisdiction or control. The State's liability in such cases was thus the counterpart of its exclusive territorial jurisdiction, as laid down in the arbitral award in the *Island of Palmas* case (*ibid.*, para. 61). If that decision applied within the territory of a State, it must *a fortiori* apply beyond the borders of that State. He could not, however, agree that a State should be made responsible for anything that happened, irrespective of whether or not it had means of knowing that a certain activity was being carried on in its territory: as he stated in his report (*ibid.*, para. 63), he did not believe that the judgment in the *Corfu Channel* case embodied the presumption that States knew, or should know, of all activities being carried on within their territory.

34. The reasoning in the *Corfu Channel* case, however, applied to wrongful acts, whereas the present topic was concerned with causal responsibility, which meant that the mechanisms of the draft should be readily operative. Thus a presumption that the State of origin had means of knowing could work in favour of the affected State, although such a presumption could be rebutted by evidence to the contrary: a developing country would, for instance, merely have to show that it lacked the necessary naval or air facilities to monitor the vast area of its exclusive economic zone.

35. Although attribution of result automatically followed attribution of conduct, there was a conceptual gap between the two. Attribution of an activity to a State meant that, in regard to that activity, the State had all the obligations under the present articles, and such attribution was basically determined by a territorial criterion. Attribution of a result to an activity, on the other hand, was determined by a causal criterion, in that there had to be a causal chain between the activity and the result. There was thus no difference in the latter case between the rules governing responsibility for wrongful acts and those governing the topic under discussion, which was concerned with the realm of causality. There was, however, a world of difference between the two types of responsibility as far as the attribution of an act to a State was concerned. For the purposes of the present topic, attribution of an activity was, generally speaking, purely territorial, whereas in the case of State responsibility the question was far more complex, since it involved the requirements referred to in the fourth report (*ibid.*, paras. 73 and 75).

36. Attribution and knowledge, considered together, raised the question whether the requirement that the State should have prior knowledge that a certain activity

was being carried on in its territory did not distort the nature of causal responsibility. In his view, it did not, for even causal responsibility required a minimum of participation on the part of the person accountable for the activity. That point was underlined by the comparison made in his report (*ibid.*, paras. 80-81) with the liability, under internal law, of a car-owner whose vehicle was involved in an accident when driven by an unauthorized third party.

37. A related concept was that of appreciable risk, concerning which the former article 4 (A/CN.4/405, para. 6) had provided that the State of origin should be bound by the present articles "provided that it knew or had means of knowing that the activity in question . . . created an appreciable risk of causing transboundary injury". He had decided to delete that idea from the draft because the expression "means of knowing" involved subtle distinctions of meaning which, in his view, precluded its application to the concept of appreciable risk. It had been said, for example, that an appreciable risk was one that could be appreciated, in an objective manner, by any expert and by a simple examination of the activity and the things involved. Hence to provide that a State must have the means of knowing that there was an appreciable risk of harm would be tantamount to placing that State in an inferior position *vis-à-vis* a person having professional knowledge.

38. With regard to chapter II of the draft (Principles), he thought that the language of the three principles he had proposed at the previous session was too general. It was, however, essential to have a set of principles for the topic, and the Commission need not concern itself with whether those principles should be regarded as a reflection of general international law or as part of the progressive development of that law. He would welcome members' comments on whether or not the principles were applicable to the topic. It should be remembered that the Commission was breaking new ground and would have to proceed by trial and error.

39. Clearly, the principles should be inspired by Principle 21 of the Stockholm Declaration; that, indeed, was the essence of draft article 6 (Freedom of action and the limits thereto). He considered, however, that the article should speak of "rights" rather than "interests", for, as stated in his fourth report (A/CN.4/413, para. 94), an interest was something which a State wanted to protect because it might represent a gain or advantage for that State or because its elimination might cause a loss or disadvantage, but which did not have legal protection. If there was a legal régime that provided for compensation, or obligations of prevention whose violation had some impact on the way compensation was provided, then that régime would vest certain rights in the affected State, as established by article 6.

40. He had not found it easy to accept that the principle of co-operation, laid down in article 7, constituted one of the bases for the obligations set forth in the draft relating to notification, information and prevention. In his view, the attitude of a person who refrained from causing harm to another could not be interpreted as co-operation when the occurrence of harm depended on that person alone. On reflection, however, that was perhaps a somewhat simplistic approach. In the context

of the topic, things could not be seen as only black or white. In the face of modern technological development and of the introduction of activities which involved risk, but were of use to society, individuals and societies found themselves in a dilemma, because, despite all the precautions taken, the new activities could not be fully controlled. That was perhaps why a disaster which caused transboundary injury was considered, in a sense, as a misfortune for all. Co-operation, therefore, must be one of the foundations of the obligations set out in the draft, although the obligation of reparation rested on justice and equity.

41. The expression "in good faith" had been included in article 7 in order to accommodate the concern expressed at the previous session that States should avoid acts intended to take advantage of accidents such as those falling within the topic. The expression was not meant to imply that co-operation should be free in all cases.

42. Article 8 concerned participation, which appeared to be the reverse side of co-operation and applied to the same types of obligation, namely notification, which informed the affected State that there was a risk and requested its participation in the common task of establishing a régime, and information, which was intended to enable the affected State to participate as a valid partner in the prevention efforts.

43. Article 9 established the principle of prevention, which had occupied a considerable part of the Commission's debates. The drafting of that principle was a central concern, and there were three possibilities: prevention might be linked exclusively to reparation; obligations of reparation might exist together with autonomous obligations of prevention; or, as one member had suggested, the draft might embody only norms of prevention. In the first case, it was clear that the preventive effect, under a régime of liability for risk, was achieved through the conditions imposed by the régime with respect to reparation, which provided the incentive for a State to take precautionary measures by itself. The second possibility gave equal weight to prevention and reparation, although some members had considered that prevention had an acceptable predominance over reparation. Others had seen a contradiction in making obligations of prevention autonomous, since the sanctioning of their violation would bring the Commission into the field of wrongfulness. That was a view to which he personally did not give great weight, but which had been repeatedly expressed. The principle had therefore been drafted in a neutral way, but it could be given more specific meaning in a subsequent article.

44. Article 10 dealt with reparation, a principle which would prevail if there were no agreed treaty régime between the State of origin and the affected State or States. The central concepts were: (a) when injury resulted from an activity covered in article 1, there should be some form of reparation; (b) reparation should be established by negotiations between the State of origin and the affected State; (c) the negotiations should be guided by the principles embodied in the draft, particularly that injury must be assessed as was usually done in the field of strict liability, not in its ac-

tual dimensions, but taking account of other factors. That concept of injury was peculiar to causal responsibility and was very different from injury resulting from wrongfulness, since the activity in question was not prohibited and was presumably a useful activity, not only to the State in which it was conducted, but also to the State accidentally affected by the harm. It must also be taken into account that measures of prevention could impose a heavy financial burden on the State of origin. Activities based on modern technology and involving risk were conducted in nearly all countries, and an affected State might well become a State of origin one day.

45. Mr. McCaffrey said that the topic under discussion overlapped at times with the one for which he himself was responsible, namely the law of the non-navigational uses of international watercourses; but to the extent that the standard of liability under the present topic was one of strict liability, there was a clear line of demarcation between the two subjects.

46. With regard to terminology, he agreed with the Special Rapporteur that "harm" was a more appropriate term than "injury", that "State of origin" was a broader and more satisfactory expression than "source State" and that the term "thing" should replace "substance", which was too narrow a term. He also agreed with the Special Rapporteur's conclusion in his fourth report (A/CN.4/413, para. 7) that it was neither possible nor desirable to draw up an exhaustive list of the activities covered by the draft articles.

47. As for polluting activities, he wondered whether the question asked in the report (*ibid.*, para. 9) was the appropriate one. Perhaps it should rather be asked whether there were instances of transboundary pollution which might be the grounds for a standard of liability higher than normal, that was to say strict liability rather than liability based on fault. For example, a chemical plant or nuclear reactor might go awry, causing extraterritorial harm. In such a case, the activity itself was not prohibited, but the international community assumed that it would be subject to a minimum level of regulation and control. If that minimum level had not been met and a breakdown occurred, resulting in transboundary injury, the State of origin would have committed an internationally wrongful act in failing to fulfil its obligation and its liability would be engaged under State responsibility. If the minimum level of control had been met, however, and a breakdown none the less occurred, there would be damage but no internationally wrongful act. Practically speaking, the problem would be to determine whether the duty of care had been fulfilled. That was a crucial issue, since, if the duty of care had been met and transboundary harm resulted, there was no internationally wrongful act, and therefore no liability under the normal principles of State responsibility. There would, however, be liability under the present topic if the requirements explained by the Special Rapporteur had been satisfied, in other words if the activity in question had created a foreseeable and abnormally high risk of transboundary harm.

48. Those considerations demonstrated the importance of régime building, to enable the States concerned

to agree on which activities would give rise to liability even without the "fault" of the State of origin. That was a crucial question, for without such agreement there would always be a dispute over whether the State had complied with its duty of care. For that reason, he disagreed with the Special Rapporteur when he said he did not think that the Commission unanimously accepted the idea that there was a prohibition under international law against acts giving rise to appreciable injury through transboundary pollution (*ibid.*, paras. 9-10). He himself dealt at some length with that subject in his fourth report on the law of the non-navigational uses of international watercourses (A/CN.4/412 and Add.1 and 2), to which he would refer at another time. If the State of origin had failed to comply with its duty of due diligence, it was clear that it was liable for the resulting transboundary harm. But regardless of whether international law prohibited transboundary polluting activities, the State of origin could not discriminate against another State with regard to a potentially damaging activity by so locating that activity that the resulting pollution would affect a neighbouring State more than itself. That principle of non-discrimination, which derived from the sovereign equality of States, had been developed at length by OECD.

49. With regard to article 3 and the question of attribution, the Special Rapporteur had referred, in his oral introduction, to the requirement of a certain minimum participation of the State of origin. That point was also covered by the obligation of due diligence, which implied a certain degree of vigilance on the part of the State of origin, as he himself discussed in his fourth report. The issue was not the attribution to the State of the conduct of private individuals, but the direct liability of the State for a breach of its international obligation to exercise due care. The question for the Commission was whether the State would be liable even if it had not violated that obligation.

*The meeting rose at 1 p.m.*

## 2045th MEETING

*Friday, 13 May 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat, Mr. Yankov.

### International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/384,<sup>1</sup> A/CN.4/405,<sup>2</sup> A/CN.4/413,<sup>3</sup> A/CN.4/L.420, sect. D)<sup>4</sup>

[Agenda item 7]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Attribution)

ARTICLE 4 (Relationship between the present articles and other international agreements)

ARTICLE 5 (Absence of effect upon other rules of international law)

ARTICLE 6 (Freedom of action and the limits thereto)

ARTICLE 7 (Co-operation)

ARTICLE 8 (Participation)

ARTICLE 9 (Prevention) *and*

ARTICLE 10 (Reparation)' (*continued*)

1. Mr. McCaffrey, continuing his statement from the previous meeting, said he had difficulty with the title of draft article 3 (Attribution). The term had a very specific meaning in the context of the Commission's work and was also used in article 11 of part 1 of the draft articles on State responsibility.<sup>6</sup> As Mr. Ago, the then Special Rapporteur for that topic, had explained in his fourth report,<sup>7</sup> the responsibility of the State of origin had to be regarded as "direct" responsibility and not as attributed—in other words "indirect" or vicarious—responsibility. It was important to bear in mind that point of terminological consistency.

2. With regard to draft article 9, the obligation of prevention had two aspects: one relating to mechanisms and procedures and the other relating to substance. From a procedural point of view, the duty of prevention involved a number of practical steps: assessment of the possible transboundary effects of the activity contemplated; preventive measures on the part of the State of origin to ward off accidents; consultation with those States likely to be affected by the activity; participation by those States in the preventive action; and so on. All those procedures should enable the potentially affected States to protect themselves against the risks they ran, risks that could be very slight in themselves but could well have enormous harmful consequences, as in the case of an accident in a nuclear power-station.

<sup>1</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

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

<sup>5</sup> For the texts, see 2044th meeting, para. 13.

<sup>6</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>7</sup> *Yearbook* . . . 1972, vol. II, p. 100, document A/CN.4/264 and Add.1, para. 72.

3. With regard to substance, the concept of prevention implied that, whether or not there was prior agreement among the States threatened by the harmful effects of the activity undertaken, the State of origin, namely the State on whose territory or under whose control that activity was carried on, had to take the necessary safety measures: for example, enacting special legislative provisions and regulations, ensuring that they were applied, and setting up supervisory machinery. That, however, gave rise to a delicate point: while it was reasonable to assume that the international community would expect an activity involving risk not to be undertaken without appropriate safety measures, it was difficult to determine exactly what the international community did expect in the matter, and more precisely, in what circumstances it would regard a particular activity as lawful. It was doubtless possible to keep to a few very general principles, as had the drafters of the 1982 United Nations Convention on the Law of the Sea with regard to the environment. But the Commission ought to be able to do better than that, and should indicate expressly what measures the State of origin must take to ensure that all activities undertaken on its territory or under its control would be carried on under reasonable safety conditions.

4. On the matter of the consequences of a breach of the obligation of prevention by the State of origin, if an activity had appreciable harmful transboundary effects, the question arose whether the liability of the State of origin would be the same whether or not it had complied with its obligation of prevention. In his view, there were two levels of responsibility: if the State had taken the necessary precautions, that fact could be regarded as an extenuating circumstance in assessing its obligation to make reparation; if it had not done so, that fact could be regarded as an aggravating circumstance. The question of reparation was undoubtedly a broader one, but it could be agreed that a State which failed in its duty of prevention was not entitled to be given the benefit of the doubt.

5. In conclusion, he found himself in general agreement with the analysis of prevention contained in paragraphs 105 and 108-109 of the Special Rapporteur's fourth report (A/CN.4/413). The report was a document which called for extensive comment and which was certain to enable the Commission to make progress in its discussion of the topic at the present session.

6. Mr. CALERO RODRIGUES congratulated the Special Rapporteur on the quality of his fourth report (A/CN.4/413) on a very difficult topic, a difficulty illustrated by the lengthy debates held in the Commission. There were a number of points, however, on which he did not share the Special Rapporteur's views.

7. The Special Rapporteur had been wise not to include a list of the activities to be covered by the articles under preparation. As the Special Rapporteur had himself said, such a list was likely to be a hindrance to the application of the provisions adopted and, besides, it would be confined to activities already provided for in other international instruments, such as the carriage of dangerous goods and space activities. Moreover, technological advances would rapidly render the list obsolete.

8. Nevertheless, the Special Rapporteur had apparently set himself the goal of providing "the most complete definition possible of the activities involving risk that comprise the subject-matter of the topic" (*ibid.*, para. 7). That approach was at variance with the mandate of the Commission, which should focus its work on determining the legal effects of the harmful consequences arising out of acts not prohibited by international law. Besides, the Special Rapporteur himself recognized that it was the harm resulting from such activities that was the decisive factor (*ibid.*, para. 5). As for the concept of "risk", although it played a major role with regard to prevention, it did not have that pre-eminence with regard to reparation and compensation. Of course, if the risk was known and nothing was done to prevent it, that fact would have to be taken into account. In all logic, however, if harm occurred, it was because there had been a risk, whether hidden, known or unforeseeable. Accordingly, it was the legal consequences of transboundary harm arising from certain activities that should form the subject-matter of the Commission's study, keeping in mind the aphorism contained in the previous Special Rapporteur's second report: "Not all harm is wrongful but the law is never indifferent to the occurrence or potentiality of harm when it threatens the rights of other States."<sup>4</sup>

9. There was also no doubt that the Commission had to work on the basis of the two principles of prevention and reparation. The Special Rapporteur gave pride of place to reparation, since he stressed the need "to determine whether reparation is appropriate and, if so, what principles and factors might guide the parties in their negotiations to decide what form it should take" (*ibid.*, para. 15). For his own part, he believed that the nature of the accidents referred to in that paragraph had to be construed more broadly.

10. The Special Rapporteur had submitted 10 carefully drafted articles, along with very perspicacious comments. He (Mr. Calero Rodrigues) intended to review those articles, leaving aside questions of drafting but emphasizing that they were based on an approach he did not share.

11. Draft article 1 (Scope of the present articles) appeared more restrictive than the former text, submitted in the Special Rapporteur's third report (A/CN.4/405, para. 6), because of the use of the formula "when such activities create an appreciable risk of causing transboundary injury". The Special Rapporteur explained that change in his comments: he mentioned the case of harm that was outside the scope of the topic (A/CN.4/413, para. 27); he explained that he was dealing only with liability arising from activities involving risk (*ibid.*, para. 47); and he considered that "the activity which eventually caused" the harm created a risk and was therefore dangerous (*ibid.*, para. 45). He himself, however, was not at all convinced that the scope of the draft articles should be limited in that way.

12. The Special Rapporteur expressed doubts as to whether "there is a norm of general international law which states that there must be compensation for every

<sup>4</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 112, document A/CN.4/346 and Add.1 and 2, para. 40.

injury" (*ibid.*, para. 39). One would be inclined to agree with him had he not proceeded to say that "if the present articles established such a norm, and if a number of States supported them in the form of a convention, the parties would be under an obligation to provide compensation for any type of injury" (*ibid.*, para. 40), and that that solution would correspond "to a degree of international solidarity which is not found in the present-day community of nations" (*ibid.*). By a *reductio ad absurdum* logic, the Special Rapporteur added that, with that approach, "the draft could very well be reduced to a single article stipulating that reparation must be made for all transboundary injury" (*ibid.*, para. 46).

13. That approach to the problem was mistaken: the Commission had a duty to promote the development of international law, namely, in accordance with its statute (art. 15), to prepare "draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". Actually, the topic now under consideration lent itself perfectly to the formulation of international norms. A mere look around was enough to demonstrate that fact. There had, in the past, been examples of compensation being given *ex gratia* for harm caused by lawful activities, on the basis of a sort of moral obligation. It was precisely that obligation that the Commission had to transform into a legal obligation. To that end, the draft articles under consideration should specify in what cases and in what circumstances obligation to make reparation arose, and the problem of risk, whether apparent or hidden, should be left aside.

14. To sum up his position, the scope of the draft as a whole should not be restricted as was done in article 1. The draft should apply to all activities having appreciable harmful consequences and should identify the legal consequences deriving therefrom, even if the risk involved in those activities was not evident. Accordingly, it was preferable to revert to the former text of article 1 as submitted by the Special Rapporteur in his third report (A/CN.4/405, para. 6).

15. Draft article 2 should be reviewed, but the final wording could not be settled until the meaning to be given to each expression became clear in the light of the text of the draft as a whole.

16. Draft article 3 laid down the rule for the attribution of liability. The fact was that liability was not absolute, since a State might well not be in a position to exercise effective control over an activity because it did not know of its existence. Moreover, it was only too true that some States were not in a position to exercise complete control over what happened on their territory. However dubious it might seem in theory, that reality could not be escaped. But the formula "provided that it knew or had means of knowing" was not felicitous and it would be better to say "provided that it knew or should have known". It was also possible to use a negative formulation and say that the State was not bound by the obligation in question if it could establish "that it did not know or could not have known" that the activity was being carried on.

17. Draft articles 4 and 5 did not call for any comment, since they were of a general nature and were similar to the corresponding provisions contained in many international instruments.

18. With reference to chapter II of the draft, entitled "Principles", he urged the Commission not to embark on the formulation of too many principles. At the previous session, Mr. Shi<sup>9</sup> had suggested taking up only three principles, a concise approach that could well be followed.

19. The principle of freedom of action embodied in draft article 6 could be expressed in a more concise manner by simply stressing the idea often repeated since the beginning of the consideration of the present topic, namely that the articles were aimed not at prohibiting the activities mentioned therein, but at regulating them by means of prevention and reparation. The first sentence of the article was redundant, except that it introduced the second sentence, which none the less seemed to contain a reservation, inasmuch as it mentioned only activities "involving risk". Such a reservation did not appear appropriate when applied to the very general legal principle that one State's freedom ended where another State's freedom began and that the exercise of any activity must be compatible with the "protection of the rights" of other States. The qualification "with regard to activities involving risk" should therefore be deleted.

20. Draft article 7 was a useful provision in that it defined the content of co-operation. However, in paragraph 1, the words "both in affected States and in States of origin" should be deleted, because in its present form the article also appeared to cover activities having harmful effects only in the State of origin. Paragraph 2 could also be deleted, since it was obvious that, where there was co-operation, at least two parties were involved and, in the case in point, those parties could only be the affected State and the State of origin.

21. Draft article 8 too, although it set out the principle of participation, was perhaps unnecessary. The duty of participation in question obviously related to consultation machinery, which was already implicit in article 7 on co-operation. Besides, the modalities of such co-operation would have to be the subject of specific provisions. If the idea in article 8 was to be retained, the substance could be included in a reformulated version of article 7.

22. Draft article 9 established the principle of prevention in terms that were not sufficiently broad. It also had the drawback of introducing the reservation: "an activity which presumably involves risk" and "for which no régime has been established". It would be preferable to retain only the first part of the sentence, which clearly established the obligation to prevent or minimize possible harm, and to add that the obligation applied to activities of all kinds.

23. The same remark applied to draft article 10, on the principle of reparation. There was no valid reason to limit its scope by specifying that the injury must be "caused by an activity involving risk" and that the

<sup>9</sup> *Yearbook* . . . 1987, vol. 1, p. 167, 2020th meeting, para. 31.

reparation must be settled “in accordance with the criteria laid down in the present articles”. Furthermore, the words “must not affect the innocent victim alone” were lacking in clarity. No doubt the Special Rapporteur had wished to speak of the burden of the harm.

24. Lastly, it was gratifying that the Special Rapporteur’s report marked out the area of study for the Commission and gave a clear indication of the path it should follow. The Commission knew where it was heading in a topic whose viability was now established.

25. Mr. BEESLEY congratulated the Special Rapporteur on the thoroughness of his fourth report (A/CN.4/413) and on his efforts to reflect what had seemed to be the majority view in the Commission. To a great extent, he shared the opinions of previous speakers and, on the points already discussed, preferred the former draft articles, as submitted in the third report (A/CN.4/405, para. 6). He also noted that, in his report, the Special Rapporteur was presenting new substantive provisions, namely draft articles 6 to 10, which were bound to give rise to debate.

26. The Special Rapporteur seemed to have geared his approach not so much to liability for harm, as to assessment of risk, and that accounted for the observations made by Mr. McCaffrey and Mr. Calero Rodrigues, which he himself supported. Again, he preferred the expression “State of origin” to “source State”. Like the Special Rapporteur (2044th meeting, para. 24), he too had difficulty with the term “substances”, in draft article 2 (a), and would suggest some alternative, for example the term “event”.

27. With respect to polluting activities, he wondered, for the reasons explained by the two previous speakers, whether the Special Rapporteur had stated the problem correctly in his report (A/CN.4/413, paras. 8-15). The Commission’s task was the progressive development, not merely the codification, of the law: must it therefore continue indefinitely to debate the question whether there was a positive-law obligation in that matter? In his view, it would be a retrograde step to appear to cast doubt on the existence of such an obligation. In that connection, he drew attention to Part XII of the 1982 United Nations Convention on the Law of the Sea, an uncontroversial chapter covering not only the marine environment, but also the sources of air and land-based pollution, and which had not been challenged by any State, even among the non-signatories.

28. Mr. McCaffrey had clearly explained why the Commission ought not to base the whole of the draft on the need to assess risk, and had pointed out that low-risk activities could none the less cause appreciable, indeed catastrophic, harm. In fact, the notion of risk, though important in regard to prevention, played a lesser role with regard to liability for harm. For example, an underground nuclear explosion carried out for peaceful purposes by a State—which obviously would not thereby be committing an act prohibited by international law, since such tests were covered by the statute of IAEA—could well have harmful transboundary effects. Similarly, certain activities—manufacture of chemical weapons (not illegal under the 1925 Geneva

Protocol<sup>10</sup>), or even a beneficial activity like building a dam—although not unlawful, could cause appreciable harm, whatever the difference in risks. In the *Gut Dam Claims* case between the United States of America and Canada,<sup>11</sup> Canada had compensated United States property owners for damage resulting from an alleged consequential rise in the level of the lake, caused by a Canadian governmental entity. In any event, irrespective of the divergent views on the matter, the Commission bore the heavy burden of progressively developing international law. He would be happy to see the topic developed purely as an environmental convention, but he did not insist upon it. However, the Commission was coming to the heart of the matter when it had to consider the various kinds of activities or situations which involved transboundary pollution. He particularly endorsed the conclusions reached by Mr. Calero Rodrigues on the need to establish positive-law obligations, and not merely to emphasize the results of taking inadequate measures or of making a poor assessment of the risk. He would not deny that elimination of the risk was a factor to be taken into account, but was convinced that the notion of risk should not be the focus of the draft articles as a whole. If the risk could be anticipated, it was for the State of origin to prove that it had taken the necessary measures to forestall it; if it could not, any harm which arose might still produce legal consequences.

29. The question of the attribution of liability (draft article 3) merited some reflection. The amendments suggested by Mr. Calero Rodrigues would perhaps resolve some problems in that respect. As the draft articles stood, a situation might in fact arise in which market-economy States would never be held liable for transboundary harm, by contrast with planned-economy or mixed-economy States, simply because the latter type of State participated in the activity in question. The Commission must ensure that such a situation did not arise.

30. As to the degree of diligence, he agreed with Mr. McCaffrey’s remarks at the previous meeting. When attributing to States activities that were carried out by individuals, it was important to begin with the notion of direct liability. Many of the difficulties encountered could be explained by the fact that the Special Rapporteur was emphasizing not the activities or situations that caused harm, but the assessment of risk. In that regard, it was worth recalling Principle 21 of the Stockholm Declaration,<sup>12</sup> which read:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The Commission would do a useful job by focusing primarily on harm caused to the environment, but should not lose sight of areas beyond national jurisdiction, such as the high seas, the sea-bed and the ozone layer.

<sup>10</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (League of Nations, *Treaty Series*, vol. XCIV, p. 65).

<sup>11</sup> Arbitral award of 27 September 1968, *International Legal Materials* (Washington, D.C.), vol. VIII (1969), p. 118.

<sup>12</sup> See 2044th meeting, footnote 8.

31. He also quoted Principle 22 of the Stockholm Declaration, on liability and compensation, and wondered whether the Commission's task was as narrowly circumscribed as the Special Rapporteur appeared to believe in his analysis of the subject. What the Special Rapporteur appeared to have expressed was not the majority view, but a position which he felt was capable of leading to consensus. For his own part, he did not believe a perfect consensus should be sought on all matters; if it were, the Commission would never achieve anything. In the present instance, the Commission's mandate should not be confined to drafting a text covering only certain types of risk situations. The actual title of the topic might restrict the Commission to some degree, and it should perhaps be reviewed by the Drafting Committee. The Special Rapporteur's oral introduction (2044th meeting), and the comments made by Mr. McCaffrey and Mr. Calero Rodrigues, were particularly interesting as regards the possible overlap with the topic of State responsibility. Although some members might be concerned that the present topic infringed on areas belonging more to State responsibility, that topic had been on the agenda since 1956, and the Commission could not afford to wait another 30 years before completing a text on protection of the environment. Cases such as *Barcelona Traction* (see A/CN.4/413, para. 38) should not be relied upon, because they dealt with economic matters and not the law of the environment.

32. It was imperative for the Commission to advance its work on the topic, so that it could refer texts to the Drafting Committee and to Governments. In laying down the foundations of the draft articles, it must avoid the dangers of an over-narrow definition, and especially the uncertainty which seemed to prevail in some quarters as to whether the Commission was engaging in a process of codification or of progressive development of the law. He saw no reason for not trying to draft a provision such as article 192 of the 1982 United Nations Convention on the Law of the Sea, which laid down a general obligation, namely: "States have the obligation to protect and preserve the marine environment." By making the requisite drafting changes, the Commission, too, could establish a positive-law obligation. Article 193 of the Convention on the Law of the Sea likewise reflected Principle 21 of the Stockholm Declaration. Indeed, the principles of the Stockholm Declaration had sometimes been seen as a kind of "soft law" which could be changed into "hard law", as had occurred with the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,<sup>13</sup> which had been negotiated by consensus.

33. The principles set forth in articles 192 and 193 of the Convention on the Law of the Sea were therefore a precedent for the Commission's work. Article 207 of the Convention, on pollution from land-based sources, took a very broad perspective on the matter, and he wished to reiterate what he had already had occasion to say about the duty of States not to cause harm to their neighbours or to regions in which all States had a common interest. He also cited article 210 of the Convention—which was based on the 1972 London Conven-

tion—and article 212 on pollution from or through the atmosphere. The latter article did not cover all kinds of pollution; instead, it stipulated that States must adopt laws and regulations to prevent, reduce and control atmospheric pollution in general, whether or not it originated in the atmosphere linked to the airspace under their sovereignty. He also mentioned articles 213, 216, 222, 225 and 235. All those provisions offered precedents which the Commission could adapt to its present needs, especially since no State had rejected Part XII of the Convention on the Law of the Sea, in which they appeared, and even non-signatory States had declared that it reflected customary law.

34. He expressed some reservations regarding paragraphs 10 and 11 of the fourth report, for the reasons explained by other members of the Commission, notably Mr. McCaffrey (2044th meeting). He tended to share the latter's approach to the two aspects of prevention: procedures and substance. As for whether preventive measures and due diligence would preclude liability where serious harm did occur although the risk had been justifiably judged to be slight, that illustrated the weakness of that approach. In other words, it was the harm that was the decisive factor, and the risk was decisive only as far as the preventive measures were concerned.

35. He agreed with the definition of the Commission's mandate given by Mr. Calero Rodrigues, especially with what he had said about accepting a rule relating to harm without apparent risk, and about restricting the application of the present articles.

36. As to the attribution of liability, for reasons he had already explained he was reluctant to accept the Special Rapporteur's proposals. Although it was desirable to take into account that developing countries sometimes lacked adequate means to know fully what transpired within their territory, too broad an exemption based on the condition that States knew or had means of knowing appeared to weaken the draft generally. Moreover, it was conceivable that future scientific advances would make for better forecasting of the long-term effects of the activities in question.

37. He endorsed the remarks made by Mr. Calero Rodrigues concerning draft articles 6, 8, 9 and 10.

38. With regard to certain drafting points which he also intended to raise in the Drafting Committee, he would point out that draft article 1 made only implicit reference to the environment and, unlike the text submitted in the third report (A/CN.4/405, para. 6), no longer mentioned either "situations" or "physical consequence".

39. He agreed with the remarks made by Mr. McCaffrey and Mr. Calero Rodrigues on draft article 2, and queried whether the term "environment" in subparagraph (a) (i) referred to the State of origin, and whether the expression "appreciable risk", in subparagraph (a) (ii), did not involve some subjective element. The definition of the expression "activities involving risk", in subparagraph (b), was tautological, because it referred back to article 1. Subparagraph (c) used the words "appreciably detrimental", an approach that did not seem to reflect the majority view of the Commission, and it would be preferable to revert to the

<sup>13</sup> United Nations, *Treaty Series*, vol. 1046, p. 120.

wording “transboundary loss or injury”, used by the previous Special Rapporteur in paragraph 5 of article 2 as submitted in his fifth report.<sup>14</sup> In subparagraph (d), “State of origin” was indeed preferable to “source State”. With regard to the affected State, a distinction should be drawn in subparagraph (e) between situations involving strict liability and those involving absolute liability.

40. With regard to draft article 4, he had already experienced some difficulty with the corresponding text (art. 3) submitted by the previous Special Rapporteur,<sup>15</sup> and wondered whether the provisions under consideration reflected treaty law or in fact contradicted it. Moreover, the use of the expression “subject to that other international agreement” raised some problems. The wording of article 5 was vague, yet the principle itself was perhaps fundamental. As to article 6, he failed to see why Principle 21 of the Stockholm Declaration had been abandoned. There was no criticism to be made of the substance of article 7, except that the purpose of the articles under preparation was not co-operation. Paragraph 1 posed no difficulty and, as far as paragraph 2 was concerned, he would merely refer members to the comments made by Mr. Calero Rodrigues. He had some reservations regarding article 8 and considered that the form of article 9 would have to be modified slightly if the Commission decided that the principle of prevention should be made a fundamental principle. As to article 10, it must be remembered that the instrument now being elaborated should seek to protect potential victims.

41. Mr. TOMUSCHAT congratulated the Special Rapporteur on his fourth report (A/CN.4/413) and his oral introduction, which had brought sharply into focus the guiding principles of the new draft articles he had submitted. The draft articles had the merit of being based on a well-defined concept of liability and its implications, and the central idea of risk had been introduced: whenever appreciable or significant risk of transboundary harm was involved in a human activity, the proposed rules would apply. The entire draft thus revolved around a unitary premise, and it ought not to be too difficult to derive from that premise the rules needed to establish the future régime of liability.

42. Although he was in broad agreement with the new approach proposed by the Special Rapporteur, he wondered whether the Commission should not take a bolder and more comprehensive tack, now that the topic had been differentiated from that of State responsibility. Whereas the rules on State responsibility were for the most part secondary rules, the Commission’s task in the matter at hand was to establish primary rules concerned essentially with environmental law.

43. It was there that a second central concept came into play, alongside the notion of appreciable or significant risk: the idea of transboundary harm, harm being understood in the sense of physical or material harm. In modern legal terminology, it was environmental law which regulated activities that had or were likely to have harmful effects on the physical components of the

human environment: air, water and soil. And it was precisely the impressive growth of environmental law over the past two decades which justified the drafting of a more ambitious instrument, such as a framework agreement. In that connection, he endorsed the comments made by Mr. Calero Rodrigues. Just as the 1982 United Nations Convention on the Law of the Sea applied to the marine environment, could not a similar instrument applicable to the land surface of the globe, and perhaps also to its airspace, be elaborated? The task was not an impossible one as long as the rules proposed were acceptable to States, which of course did not want to forgo their rights of territorial sovereignty. But in any case environmental protection called for a framework which went beyond the idea of risk.

44. As it was necessary to have a true picture of realities and needs, the draft articles should be considered with full awareness of the main kinds of situations to which they were meant to apply. First, the one activity which was inherently dangerous and which man would never totally control was the handling of fissionable material in large quantities, in particular in modern power plants—with civilian applications, of course. The rules the Commission was called upon to establish must deal with nuclear risk. Fortunately, until now only one major nuclear power plant, one of the reactors at Chernobyl, had run wild, but the fact remained that a major nuclear accident anywhere in the world would inevitably have serious transboundary effects.

45. The second situation to be contemplated was that of pollution from motor traffic or from the burning of fossil fuels, which normally had long-range effects. Specific characteristics were present in that sort of situation. The activities which generated it were socially tolerated, at least within certain limits. The pollution thus generated differed from accidental pollution, because of its cumulative and gradual effect, which was not felt immediately. Finally, attribution of such pollution to a given State was extremely difficult, especially in Europe, where there were so many frontiers in a relatively small area. It would appear that the rules needed to cope with that phenomenon could not be exactly the same as those which were suited to deal with other risk activities.

46. The third situation was illustrated by the *Trail Smelter* case (*ibid.*, para. 2), where an industrial complex, situated near the border of two or more States, emitted noxious gases which damaged the environment. Such an activity not only contributed to the general phenomenon of pollution, but also entailed a specific and easily identifiable damage knowingly inflicted on another State. In the same line of reasoning, but going beyond environmental protection proper, the question must be asked whether the draft should cover biological and genetic experiments. He believed it should, in view of the gravity of such risks. States which permitted their scientific communities to enter into that field of research must take adequate preventive measures and must be aware that they could not evade their international responsibility when the experiments led to catastrophic results.

47. The fourth and final category, which differed from the others, was that in which the victim was not

<sup>14</sup> *Yearbook . . . 1984*, vol. II (Part One), pp. 155-156, document A/CN.4/383 and Add.1, para. 1.

<sup>15</sup> *Ibid.*

another State, with the physical components of its statehood, but the common heritage of mankind, apart from the sea, which was governed by the United Nations Convention on the Law of the Sea. On that subject, he endorsed the comments made by Mr. Beesley and mentioned the case of Antarctica and the different layers of the atmosphere and the stratosphere, particularly the ozone layer. It was not clear from draft article 2 (c), where the expression "transboundary injury" was defined, whether the Special Rapporteur intended to include those areas within the draft articles.

48. Those would appear to be the main factual situations which called for an international régime. It would seem that the Special Rapporteur had taken nuclear risk into consideration, but had not covered continuous, creeping pollution, and that he intended to exclude damage caused by activities which did not *a priori* seem to constitute a risk—in other words, all instances in which the risk was purely accidental.

49. It might be helpful at the present stage to draw a fundamental distinction between situations considered as arising *ex ante*, or at a time when no danger had occurred, and situations characterized by the emergence of harmful effects, hence considered *ex post facto*. In the latter case, the scope of the rules might be broader than in the former. In other words, risk was an excellent guiding criterion for a prospective view; in retrospect, however, actual danger became the main element. In that connection, he was forced to disagree with Mr. Calero Rodrigues.

50. Looking at situations considered *ex ante*, he would establish three rules. The first would of necessity be the rule proposed by the Special Rapporteur in the first sentence of draft article 6, namely that States were masters within their own territory. That rule reflected the basic principle of sovereignty. Every State enjoyed sovereign territorial rights within its borders, but that freedom could not be absolute. Secondly, there should be a clear prohibition on activities which inevitably inflicted "appreciable" harm on other States. On that point, he would go beyond the rule proposed by the Special Rapporteur in the second sentence of article 6 and introduce the principle of territorial integrity. One could imagine, for example, that a dumping site within one State just next to the border of another contaminated the ground water of the second State, or that the construction of a plant that would emit toxic fumes was authorized on the eastern border of the State of origin, with the clear intention of getting rid of the fumes by means of the prevailing westerly winds. For such cases, it would be necessary to specify that no State had the right knowingly and wilfully to inflict on its neighbours the burden of the waste it generated. Thirdly, there was a large group of activities which involved risks but were socially useful: if they were responsibly controlled, those activities must be tolerated. Such was the case with nuclear power plants. In those situations, prevention must obviously be the key concept. The Special Rapporteur acknowledged that fact in draft article 9, the text of which could none the less be refined. To that end, the United Nations Convention on the Law of the Sea afforded many examples of provisions which referred to recognized international standards, whether in international treaties, in

the resolutions and findings of international bodies, or in recommended practices. The same approach could be used for the draft articles under discussion, as prevention must not be left entirely to the discretion of the State of origin: it must be adjusted to more objective standards. An appeal could also be made to States to establish such standards for activities which were generally recognized as being dangerous by their very nature.

51. Cumulative or creeping atmospheric pollution from innumerable individual sources was a difficult problem to tackle, and the Special Rapporteur had in fact declined to do so. The problem could only be resolved globally, by the conclusion of agreements between States.

52. In the case of situations considered *ex post facto*, the legal framework was slightly different: to the extent that a State violated specific treaty rules, it incurred international responsibility. That might sound like a truism, but in fact it was not. The more the corpus of rules of international treaty law grew, the less room there was for a special category of liability for acts not prohibited by international law. That was why the Commission should not hesitate to enter the field of State responsibility in the classical sense. It was true that liability for unlawful acts and liability for non-prohibited acts were so closely interrelated that it was often difficult to know which of the two categories was applicable. Indeed, the Commission had been unable to draw a clear line of demarcation between the two categories in the entire time it had been concerned with the present topic. But in any event, the ordinary rules on State responsibility would apply if a State did not comply with binding treaty obligations which it had accepted of its own free will.

53. It was more difficult to assess the legal position of States if one relied only on the general principles of international law as they had been codified in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>16</sup> In the case of situations considered *ex ante*, there were certainly instances in which a State knowingly and deliberately inflicted particular and easily identifiable damage on another State, as exemplified by the *Trail Smelter* dispute. To hold the State of origin responsible in such instances was not difficult. The Special Rapporteur, however, seemed to believe that even in such cases State responsibility could not be engaged. For his own part, he would challenge that proposition, and point out that the Commission's mandate included the progressive development of international law. In order to dispel any uncertainty, the Commission should consolidate the rule—based on the principle of territorial integrity—that a State which knowingly inflicted appreciable harm on a neighbouring State incurred responsibility. The drafting of such a rule might be somewhat difficult: the *Trail Smelter* type of situation did indeed stand apart, but its distinctive features could nevertheless be conceptualized and generalized.

<sup>16</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

54. Next, there were instances in which the risk inherent in a dangerous activity had materialized. He had some reservations on the rather loose-knit solution proposed by the Special Rapporteur in draft article 10, which called for negotiations between the parties. There, too, a distinction might have to be drawn: the damage might well have occurred in spite of all the preventive measures taken and, in such a case, the law on State responsibility could not apply, and the situation would call for imaginative solutions. One factor that might be taken into account was the amount of damage sustained by the affected State. One could also model the proposal on private insurance régimes which established an upper limit on financial reparation.

55. But what solution should prevail when due diligence had not been exercised by the State of origin, thus enabling the risk to materialize? In such instances, it would in all likelihood be possible to prove negligence. At the previous meeting, Mr. McCaffrey had stressed the notion of due diligence as a yardstick for compliance with the requisites of prevention. But the Commission was obviously entering a twilight zone in that regard. Under the Civil Code of the Federal Republic of Germany and those of a number of other countries, for example, in such cases one always asked whether due diligence had been observed, and if it had not, the activity was considered unlawful. Yet such simple reasoning did not necessarily apply to international law, and it was doubtful whether it counted among the "general principles of law" which, under Article 38 of the Statute of the ICJ, could be borrowed from national legal systems for incorporation in the corpus of international law. Would not the scope of liability for injurious consequences arising out of acts not prohibited by international law be reduced to the minimum if all instances of lack of due diligence were automatically shifted to the realm of State responsibility? How could the affected State find out whether all the necessary preventive measures had been taken in the State of origin? One could therefore well argue that all instances in which the risk materialized should form a single category, irrespective of whether due diligence had been exercised, with the exception of gross negligence. Mr. McCaffrey's idea that failure to apply due diligence should be regarded as an aggravating circumstance had its merits. It was in line with the comments made by the Special Rapporteur in his report (A/CN.4/413, paras. 108 *et seq.*), explaining the difficulties of determining whether the requirement of exercising due diligence was an autonomous standard or a dependent standard, and whether failure to comply with that obligation automatically entailed liability.

56. The final category was that of unforeseen accidents which caused not only appreciable, but great harm to another State. The maxim that the victim should not be left alone to bear the loss must apply in such cases, irrespective of whether the harm was rooted in an activity whose dangerous nature had been foreseen. Liability could in fact be based on two different premises. Risk was obviously one of them, but there were situations in which it did not come into play. If a State, without violating a rule of international law or engaging in an activity involving risk, caused serious physical harm to another State, the latter should be

compensated for its loss in accordance with the principles of equity. Like Mr. Calero Rodrigues, he disagreed with the Special Rapporteur on that point.

57. Lastly, he pointed out that he had raised fundamental policy questions because, in his view, the draft must rest on clear conceptual foundations if it was to be viable.

58. Mr. BARBOZA (Special Rapporteur), clarifying some of the points raised during the discussion so far, particularly by Mr. McCaffrey, said that there was a clear line of demarcation between the present topic and the topic of the law of the non-navigational uses of international watercourses. In the context of watercourses, appreciable harm resulting from failure to comply with the obligation of due care entailed wrongfulness, whereas, in the topic under discussion, wrongfulness was not involved.

59. Mr. McCaffrey had made four points. First, polluting activities should be subject to an extremely rigorous obligation of diligence, and he had mentioned the idea of prohibition in that connection. Secondly, low risk of major harm (disasters) should be covered by the draft. Thirdly, the principle of non-discrimination, in other words that a State must not treat foreign citizens any worse than it treated its own nationals, should come into play. Fourthly, there should be direct attribution to a State, the State being required to exercise diligence, and any failure to comply with that obligation entailing liability.

60. In his own view, the first and fourth points were interrelated. If the draft covered polluting activities, reparation would have to be made for the appreciable harm they caused, whether or not due diligence had been exercised. If it had not, the reparation should be equivalent to the harm caused. If, on the other hand, the State of origin had exercised due diligence, the expenditure incurred for that purpose would have to be taken into account when compensation was granted. Such an approach should be acceptable to Mr. McCaffrey, and there seemed to be no impediment to Mr. McCaffrey using the concept of prohibition in the topic for which he was Special Rapporteur. If he did so, that solution would still be applicable to watercourse cases, by virtue of article 4 of the draft articles under consideration.

61. Attribution of liability was essentially a jurisdictional matter and the proposed system would be seriously disrupted if the requirement was an act of the State, within the meaning of part 1 of the draft articles on State responsibility.<sup>17</sup> Even activities conducted by a State were attributable to it by the very fact that they took place in its territory or under its jurisdiction. Otherwise, attribution would become a question of proof, and that would be contrary to the fundamental rules of causal responsibility, which called for a reliable, clear and easily applicable mechanism. That was precisely what he was proposing in the draft, for the very fact that the activity which had caused damage had been carried out under the jurisdiction or control of a State rendered the State liable. Mr. McCaffrey had criticized the draft as requiring a minimum of partici-

<sup>17</sup> See footnote 6 above.

pation, which was incompatible with jurisdictional attribution; but a minimum of participation was also required in domestic law in matters of strict liability. Human beings were not robots: they must at least know when an activity was dangerous, and they could be presumed to know when the risk was "appreciable".

62. He did agree, however, that low risk of major harm should be covered. Further consideration was required on that point, and the word "foreseeable" might be preferable. As to non-discrimination, whether or not one accepted it as a principle, it was a notion which would have to play an important role in the attribution of liability.

63. Lastly, the question whether, in general international law, there was an obligation to exercise due diligence and a prohibition on causing any appreciable harm was still very much unsettled. In any event, States would decide the matter freely and would accept only those obligations universally recognized in general international law. The only practical result of presuming that such a prohibition existed would be to leave States affected by polluting activities defenceless.

*The meeting rose at 12.55 p.m.*

## 2046th MEETING

*Tuesday, 17 May 1988, at 10.05 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat, Mr. Yankov.

### **Programme, procedures and working methods of the Commission, and its documentation (continued)\* (A/CN.4/L.420, sect. F.4)**

[Agenda item 9]

1. The CHAIRMAN reminded the Commission that it had decided to devote a meeting during the week of 16 to 20 May 1988 to discussion of its programme, procedures, working methods and documentation, with particular reference to the issues raised in paragraph 5 of General Assembly resolution 42/156 of 7 December 1987 (see 2044th meeting, para. 1.1). He welcomed the Legal Counsel of the United Nations, whose presence would be particularly useful while the Commission was discussing its programme and working methods, because the Commission's fulfilment of its functions was closely linked with the assistance provided to it by the Secretariat.

2. The meeting was also being attended by Mr. Jorge Vanossi, Observer for the Inter-American Juridical Committee, whom he welcomed on behalf of all members of the Commission. There was no need to dwell on the long-standing relationship between the Commission and the Committee, or on the fact that co-operation with regional codification organizations was mutually enriching. In paragraph 12 of resolution 42/156, the General Assembly had reaffirmed its wish that the Commission should continue to enhance its co-operation with intergovernmental legal bodies whose work was of interest for the progressive development and codification of international law. The Commission and the Inter-American Juridical Committee had common objectives and dealt with some of the same aspects of international law. Both had members from countries with different legal systems and at different degrees of development. The observer for the Committee would make a statement during the session.

3. To facilitate the Commission's discussion of its working methods, he drew attention to paragraphs 3 to 11 of General Assembly resolution 42/156. In paragraph 5, the Assembly requested the Commission to keep under review the planning of its activities for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics; to consider further its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute to more effective consideration of its report in the Sixth Committee; and to indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments would be of particular interest for the continuation of its work.

4. He also drew attention to the topical summary of the Sixth Committee's discussion of the Commission's report on its thirty-ninth session (A/CN.4/L.420). Suggestions on the planning of the Commission's future activities, the staggering of consideration of certain topics, and the Commission's methods of work, reporting methods and documentation were set out in paragraphs 251 to 262 of that document.

5. Mr. BARSEGOV said that the Commission had to improve its planning and the methods and organization of its work, since a certain discrepancy was felt to exist between the demands arising as a result of the steadily growing importance of international law and the state of the Commission's work. As a member of the Commission, he was well aware of the difficulties of its task; outside observers, however, took a rather sceptical view of the Commission's efficacy and openly expressed doubts as to its ability to complete the many important instruments on which it was currently working within the present generation's lifetime.

6. The question of staggering the Commission's consideration of topics had been under discussion for a long time. To work on a large number of topics simultaneously meant delaying them all. At the end of a five-year cycle, the Commission's membership changed and special rapporteurs succeeded one another. The same issues had to be considered over and over again. The fact that only three of the six reports due for consideration at the current session were so far available

\* Resumed from the 2044th meeting.

showed that the Commission could not realistically expect to handle so many topics at one time. It was clear that consideration of the three remaining reports would have to be planned realistically, since the Secretariat would be unable to produce all of them for the current session, particularly if they were voluminous, as he understood the report on jurisdictional immunities of States and their property was. The Commission might be well advised to concentrate on the shorter reports, for example those on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and on State responsibility—a topic which, despite its importance, had been left untouched for two years.

7. The Commission's methods of work would be greatly improved if, at the beginning of its discussion of a topic, it concentrated on the nature of the text it was aiming at. Once that was decided, work on the substance of the topic would proceed much more smoothly, and the progressive development and codification of international law would be greatly advanced. The content of a text was largely determined by its form. For example, if in the light of the state of advancement of the work it was decided to aim at drafting a set of recommendations rather than a convention, many restrictions would fall away and recommendations of a more radical nature could be contemplated.

8. The Commission's efficacy was often reduced by the fact that it approached its topics the wrong way round: standards were drawn up and basic definitions were supplied only later. Consideration of the draft Code of Crimes against the Peace and Security of Mankind, for example, had begun with the elaboration of conceptual norms without the issue of conceptual definitions being settled first. If the Commission had started by identifying the fundamental issues, the work would be much further advanced.

9. The Commission should devote more attention to the question of sources. Whether it was defining acts constituting crimes, or establishing a general obligation of reparation for transboundary harm resulting from a lawful activity, the Commission should adhere strictly to accepted views on the sources of international law. It could adopt a purely legal approach and refer to Article 38 of the Statute of the ICJ, since the sources listed therein were recognized by all States. Court decisions and the doctrine of the most highly-qualified specialists in public law of all nations were admitted as supplementary means of defining legal norms. Reference to state practice, too, should not be selective. The emphasis should be shifted somewhat from the study of national practice to the study of actual normative material in international law. The Commission should also give attention to the practice of specialized agencies dealing with the same questions at the same time, for example the work of IAEA in the field of liability. Lastly, where there were gaps in international law on a given topic, the Commission should acknowledge the fact that it was breaking new ground, with all the consequences that entailed, including those of a procedural nature. In the elaboration of norms of that kind, arriving at the widest measure of agreement was of the essence.

10. With regard to documentation, he wished to point out that not all members of the Commission were in the

same position, because the summary records were established in English and French only. The Secretariat should take steps to improve the accuracy of summaries of statements delivered in languages other than English or French. For his part, he was prepared to work on a summary record in English or French which was to be translated into Russian.

11. Mr. BARBOZA said he questioned whether it would be possible, or indeed desirable, to increase the volume of material which the Commission submitted each year to the General Assembly, the academic community and the general public. The codification of international law was the result of dialogue between the Commission and Governments, in which the General Assembly also played an essential part. Requests for comments and observations on the Commission's drafts were not always answered promptly by Governments, for the good reason that developing countries, which represented the great majority of the international community, and whose assent was vital to the general acceptance of rules of international law, had only small legal departments, which were invariably overburdened. Moreover, codification was intrinsically a slow-moving process; to hurry it would be like hastening the ripening of fruit. Yet, despite its slowness, the work of codification had made great strides over the 40 years of the Commission's history, during which international instruments had been drafted on many classic problems of customary international law.

12. One of the criticisms made of the Commission's methods of work concerned its practice of splitting up the consideration of agenda items. But the Commission's practices were always rooted in reality. A treaty could not be drafted in a single operation, because all the stages of the process were interrelated; each special rapporteur had to await the document containing the views of representatives in the Sixth Committee of the General Assembly, and that document then had to be translated and reproduced. Thus a special rapporteur normally received the document on the relevant debate in the Sixth Committee no earlier than January, and he then had only three months in which to prepare and submit his own report. Obviously, a full report on the subject-matter of a treaty could not be produced in three months; that was why the work had to proceed article by article, year by year.

13. He believed it was in the nature of things that comprehensive definitions had to be left till last. As in any field of scientific endeavour, topics were initially framed in terms of preconceptions or global ideas, and their scope was gradually defined in the course of discussion in the Commission. He agreed with Mr. Barsegov that an effort should be made to improve the Commission's methods of work so as to achieve greater efficiency; but he thought the chances of any radical improvement in its output were slender.

14. Mr. OGISO said that the submission of his preliminary report as Special Rapporteur for the topic of jurisdictional immunities of States and their property (A/CN.4/415) had been delayed by the late receipt of comments from Governments. The document containing those comments (A/CN.4/410 and Add.1-5) had reached him much later than 1 January, the date originally requested. The comments of Governments on

Mr. Yankov's topic, the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/409 and Add.1-5), had been similarly delayed. That explained why the reports on those two topics had been submitted to the Secretariat later than originally planned. His own report had been given to the Secretariat on the first day of the current session, and he had been told that the volume of translation and reproduction work involved would cause considerable further delay. The Commission and the Secretariat were not wholly responsible for the situation, which was chiefly due to the delayed arrival of comments from Governments. He himself had made great efforts to submit his report as early as possible.

15. One member of the Commission had asked whether it would be possible to divide the report on jurisdictional immunities of States and their property into several parts, so that the Commission could at least make progress on part of it at the current session. Assuming that the translation of the earlier parts could be completed by the end of June or the beginning of July, he would suggest dividing the report into four sections: basic principles, exceptions or limitations to the principle of immunity, enforcement measures and miscellaneous provisions. Since all those sections were interdependent, it would of course be preferable to examine the report as a whole; but the Commission might be able to save time by holding a general discussion on the first two sections. He had no intention of competing for priority with Mr. Yankov's topic, and the Commission might prefer to consider that topic in its entirety before taking up his own.

16. One advantage of holding a general discussion on the first two sections of his report would be that the differing views which still prevailed in the Commission on the subject of jurisdictional immunities could be brought into focus and a proper balance could be struck between them before proceeding to a second reading of the draft articles at the next session. In any event he did not intend to refer draft articles to the Drafting Committee at the current session.

17. Mr. McCAFFREY said that the Commission's fortieth session provided an appropriate opportunity for it to take stock of its achievements. Its work had led to the adoption of the 1958 Geneva Conventions on the Law of the Sea, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Vienna Convention on the Law of Treaties, as well as many other instruments. The Commission, and States themselves, could be well proud of that record. It had rightly been said that the Commission had done more for the progressive development and codification of international law in 40 years than had ever been accomplished before. The Commission's impressive record was set out in a recent publication.<sup>1</sup>

18. One of the reasons for that success was that the Commission maintained regular and continuing dialogue with States. In a sense, that procedure was a mixed blessing, because it inevitably slowed the pace of the Commission's work. Comparisons were sometimes

made between the output of the Commission and that of such bodies as the International Law Association or the Institute of International Law. But those comparisons were not valid, because academic bodies could produce large volumes of material without reference to States; and it was sovereign States which determined the pace of the Commission's progress. It was true, of course, that delays sometimes occurred because of the need to replace a special rapporteur who had ceased to be a member of the Commission. But the main factor was that States were not always ready for rapid progress on the topics on the Commission's agenda. When the Commission completed its work on a topic, however, the outcome did not come as a surprise to Governments, for the material had been predigested by and discussed with them.

19. He wished to make a few general points on agenda item 9. With regard to planning, the Commission should start by identifying its targets for the quinquennium and note them in its report. It should also determine whether the work on certain topics could be staggered, so that more concentrated attention could be given to a few items.

20. As to methods of work, he noted Mr. Barsegov's suggestion that when taking up a topic the Commission should first decide on the nature of the instrument to be drafted. It was suggested that the special rapporteur concerned would then be able to adopt a bolder approach in drafting the substantive articles. There was some truth in that suggestion, but it would be very difficult for members of the Commission to agree on the nature of an instrument before the special rapporteur put his substantive proposals before them. At that early stage, it would be difficult to reach even a tentative conclusion as to whether the draft should take the form of a convention or of a set of recommendations. The Commission's experience had shown the great difficulty of drawing a distinction between what constituted codification and what constituted progressive development. In that respect, the system envisaged in the Commission's statute had not worked in practice. As stated in the publication he had mentioned, the Commission had generally considered that its drafts constituted both codification and progressive development of international law.<sup>2</sup>

21. He suggested that the Commission should try to discuss the reports of the Drafting Committee as soon as the Committee had approved a set of articles. The Drafting Committee should also consider some draft of the commentaries at the same time as the articles. Under the present system, it was difficult for members to give careful consideration to commentaries. At the previous session, there had been some discussion concerning the inclusion of extensive recitals of authorities in commentaries. He himself believed that it was useful, because States often referred to the authorities cited. Some members, however, did not favour the inclusion of such references. Perhaps the Commission would examine that question and take a decision on it, although the decision taken was likely to vary with the topic.

22. On the suggestion that consideration of certain topics should be staggered, he thought that any decision

<sup>1</sup> United Nations, *The Work of the International Law Commission*, 4th ed. (1988) (Sales No. E.88.V.1).

<sup>2</sup> *Ibid.*, p. 15.

could only be taken in consultation with the special rapporteurs concerned. It should be remembered that a special rapporteur usually had professional duties and could not devote all his time to the preparation of a report. In the circumstances, it would be difficult for a special rapporteur to prepare a report extensive enough to keep the Commission occupied for one third of its session.

23. He reserved his more detailed comments for the Planning Group. In conclusion, he observed that the Commission had been remarkably successful over a period of 40 years. There was no point in trying to mend something that was not broken; the Commission could perhaps do with some fine tuning, but it did not need any radical overhaul.

24. Mr. FRANCIS said that, some 25 years before, when he had first participated in the deliberations of the Sixth Committee of the General Assembly, the Committee's approach to the Commission's work had been quite different from what it was now. For one thing, the Committee used to take up the agenda item on the Commission's report very early in the Assembly's session, and it had fewer items on its agenda. The Sixth Committee's approach to the Commission's work was now quite different because of changed circumstances, and it was therefore appropriate for the Commission to re-examine its methods of work.

25. He wished to deal with some of the many interesting points raised by Mr. Barsegov. The first concerned definitions and whether they should be examined at the beginning of the work on a topic. It had been the practice of the Commission to adopt the inductive method, which ruled out the consideration of definitions at the outset except to a limited extent, as definitions generally emerged gradually as work on a topic progressed.

26. Mr. Barsegov had urged the Commission to pay more attention to the sources of law. Actually, it based its work on State practice. As he understood him, Mr. Barsegov wished more research to be conducted on the multiplicity of practice.

27. On the question of the form which the Commission's drafts should take—draft convention or code—the choice was largely determined by the Sixth Committee. It was worth noting, in regard to the law of treaties, that Sir Gerald Fitzmaurice, as Special Rapporteur, had had a code in mind. But the Commission's last Special Rapporteur on the topic, Sir Humphrey Waldock, had worked on a draft convention, leading ultimately to the adoption of the 1969 Vienna Convention on the Law of Treaties.

28. Turning to the suggestion regarding staggering of topics, he pointed out that some years previously the Planning Group had submitted to the Enlarged Bureau a document recommending that consideration of certain topics should be staggered, so that the Commission could deal with only a few items at each session. It was interesting to note that Mr. Barsegov, who had become a member of the Commission only the previous year, was now making a similar suggestion. He himself found some merit in the idea, but believed that the consent of the special rapporteurs concerned would be necessary. He would certainly advise the Commission to try to

stagger the consideration of topics, so as to have fewer items on its agenda for each session.

29. It would be recalled that the Commission had undertaken to endeavour to complete consideration of at least two topics on second reading within the five-year term of office of its current membership.<sup>3</sup> It would be difficult for the Commission to fulfil that task without changing its methods of work. He suggested that the Commission should discuss that organizational problem in plenary at the current session, with a view to concentrating at its next session on two topics, namely the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and jurisdictional immunities of States and their property. He urged special rapporteurs to go ahead with their work even in the absence of comments from Governments. The fact that Governments did not send in their comments in good time, or did not send any at all, should not stand in the way of the Commission's progress. Once the topics of the status of the diplomatic courier and jurisdictional immunities of States had been completed, it would be easier for the Commission to move ahead. The question of strategy needed to be studied in view of the Commission's heavy agenda over the past few years.

30. Mr. YANKOV agreed that the Commission should make it a general rule not to deal with more than two, or at the most three, topics at any one session on the understanding that texts which had reached second reading stage would have priority. Of course, reports on any topic could be submitted during a session.

31. The work of the Drafting Committee should start immediately at the beginning of the session. Furthermore, the Committee should report to the Commission as soon as it had a few articles ready. Indeed, he could recall a case—on the topic of State responsibility—in which the Drafting Committee had submitted one article to the Commission. It should not wait until it could submit a comprehensive report on a topic; it should submit the results of its work to the Commission piecemeal.

32. With regard to consideration of the reports of special rapporteurs, once a special rapporteur had introduced his report as a whole, it would be advisable to examine its various parts separately. There could thus be a debate on each part of the report, with brief statements by members, often in the form of questions and answers. Reading the *Yearbooks* for the Commission's early sessions, he had been struck by the fact that debates then took the form of brief statements and lively exchanges; that was quite different from current discussions, in which all too often members engaged in parallel monologues for some two weeks, at the end of which the special rapporteur made an extensive reply.

33. Before the end of the quinquennium, the Commission should make suggestions regarding its future programme to the Sixth Committee of the General Assembly. Those suggestions would be made in the light of developments in international life, bearing in mind the codification work already being done by other United Nations bodies: for example, the work being done by UNEP on international environmental law

<sup>3</sup> *Yearbook* . . . 1987, vol. II (Part Two), p. 54, para. 232.

through a group of legal experts. Taking care to avoid duplication with other bodies, suggestions should be made for bringing the Commission's long-term programme of work up to date, so that the Sixth Committee and the General Assembly could establish that programme for the next 10 or 15 years.

34. Prince AJIBOLA said that further consideration should be given to the work of special rapporteurs, in which connection he wished to draw attention to article 16 (a) and (d) of the Commission's statute. He had been struck in particular by the problem encountered when a special rapporteur could not attend a session of the Commission or had to leave it. To deal with such situations and to ensure continuity, the time had perhaps come to provide special rapporteurs with assistants. That was in no way contrary to the Commission's statute, and there was no reason why a special rapporteur should not be asked to appoint a member of the Commission to assist him.

35. Another point was the perennial problem of language and, specifically, the difficulties of interpreting from one language into another. In view of those difficulties, it might be desirable for any member wishing to be clearly understood on a particularly important point to make the text of his statement available to the Secretariat, so that there would be a permanent record of exactly what had been said.

36. He agreed that it would help to accelerate the Commission's work if members' statements were more in the nature of contributions to a general discussion, and he saw no objection to allowing members to discuss a report paragraph by paragraph or article by article. In his view, however, that would take up more time than the traditional procedure; so perhaps some other method could be devised to encourage shorter and more general statements.

37. Mr. CALERO RODRIGUES said that, while he did not think the Commission's methods of work were wrong, there was always room for improvement. At the current session, for instance, the Commission found that it did not have much material to work on during the month of May, and that the backlog of work in the Drafting Committee would probably soon be exhausted. That was because not enough reports had been received from special rapporteurs. The fault did not lie with them, however: it was quite impossible for special rapporteurs to expedite the presentation of their reports if they had to wait for comments from Governments or the General Assembly.

38. The existing situation regarding submission of reports was very inconvenient for members. After the reports—some of them very substantial—had been received, members had only a week in which to consider them, while also sitting in the Commission and the Drafting Committee, so that the reports could not possibly receive proper consideration. In the long run, therefore, the solution would be to stagger the debates and to deal with, say, three or four topics at any one session. Members would then have time to study the reports and make a more useful contribution to their discussion.

39. He, too, had noted from the summary records of earlier sessions that members' statements used to be far

shorter. Long statements might be necessary at the beginning of the debate on a topic, when theoretical considerations were at issue and material had to be examined in detail; but once the stage of drafting articles had been reached, they should be much shorter. In many instances, there would be no need to consider a report as a whole and the Commission could at once proceed to discuss it article by article or chapter by chapter, which would be an improvement on the current method of work.

40. There was also the problem of the relationship between the Commission and the Drafting Committee. While not too much time should elapse between the examination of articles by the Commission and their submission to the Drafting Committee, there were times when the Committee was overwhelmed by material and could not produce adequate results. His suggestion, therefore, was that two full weeks should be allotted to the Drafting Committee at the beginning of each session. Although he appreciated that there were certain organizational difficulties, he believed that, once it was decided to adopt that procedure, the difficulties could be overcome. What the Drafting Committee produced in those two weeks would probably compare very favourably what it had previously produced in a whole session.

41. The Commission was faced with a special situation at the current session, since it was supposed to be undertaking the second reading of the draft articles on two topics but had still not received the relevant reports. It might therefore wish already to consider staggering consideration of those topics, perhaps by dealing first with the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier—the less controversial of the two—which could be taken up at the end of the current session and at the beginning of the 1989 session. Even if the report on the other topic—jurisdictional immunities of States and their property—was circulated at the current session, it could not be taken up in plenary until 1989 or in the Drafting Committee until 1990.

42. It was, of course, impossible to state definitely that the Commission would conclude its consideration of a certain topic at a particular time, since views had to be accommodated and difficulties could arise. The Commission had an obligation of performance, but no obligation of result could be imposed upon it.

43. Mr. EIRIKSSON, endorsing the remarks made by Mr. Yankov and Mr. Calero Rodrigues, said he trusted that there would be an opportunity to discuss their proposals in more detail in the Planning Group. He also hoped that the Planning Group would be able to deal more fully with two questions whose consideration it had not completed at the previous session and which were referred to in the Commission's report on that session,<sup>4</sup> namely the format of the Commission's report to the General Assembly and the possibility of the Chairman of the Commission preparing an introduction to the report to be circulated to Governments immediately after the closure of each session. Those questions were of particular interest in view of the General Assembly's recommendation in paragraph 6 of resolution 42/156

<sup>4</sup> *Ibid.*, p. 55, para. 246.

that a working group should be set up by the Sixth Committee to consider specific topics on the Commission's agenda. He hoped that the Legal Counsel would be able to attend the discussion in the Planning Group and perhaps advise the Commission on some of the financial aspects of the proposals made.

44. The success of the Commission's work was largely dependent on the results achieved in the Drafting Committee. He therefore endorsed the suggestion that the Committee's reports should be made available much earlier, and should preferably be accompanied by commentaries. It would also be helpful for those who were not members of the Drafting Committee if the Planning Group could be informed of the status of the Committee's work at the current session. He reminded members of the proposal that the Drafting Committee should be flexible in composition, so as to reduce the heavy burden of work on its members, and of the decision that the Chairman of the Commission should, whenever possible, indicate the main trends of opinion revealed by the debate in plenary.<sup>3</sup> On the topic of international liability for injurious consequences arising out of acts not prohibited by international law, for example, it was evident that there were two schools of thought; but the Drafting Committee should work on the basis of only one. It was therefore incumbent on the Chairman to assist the Special Rapporteur in giving the Drafting Committee the necessary guidance.

45. Mr. PAWLAK said he agreed that the number of topics considered by the Commission at each session should be reduced to two or three. That would not prevent reports on other topics from being submitted, but the Commission should concentrate on topics that were ripe for codification by the drafting of articles.

46. Co-operation between the Commission and the Sixth Committee of the General Assembly should be increased, possibly by means of an annual report submitted in advance by the Chairman of the Commission for the information of the Committee.

47. Very little information regarding the codification process in other international forums was available to the Commission. Possibly the Secretariat could submit a bulletin or an annual report on that subject. Preparations for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, to be held in 1990, were under way, and some of the subjects proposed for discussion were related to the Commission's work, in particular its work on the draft Code of Crimes against the Peace and Security of Mankind. In its future work, the Commission might wish to take up some of the items to be discussed at the Eighth Congress, such as international terrorism and the codification of international criminal law. The Secretariat should find ways of bringing the Commission's work into the mainstream of the process of codification of international law, so as to make it more efficient.

48. Mr. FRANCIS, referring to a point raised by Mr. Pawlak, said that when he had represented the Commission at the nineteenth session of the Asian-African Legal Consultative Committee, held at Doha (Qatar) in 1978, Judge Nagendra Singh, then Vice-President of the

ICJ, had drawn attention to the need for a coordinating agency, given the multiplicity of codification efforts within the United Nations family. He hoped that the matter could be taken further at an appropriate time.

49. The CHAIRMAN, noting that there had been a full discussion on agenda item 9, said that members wishing to make further statements would be free to do so later. As to the suggestion that the question of staggering the consideration of topics should be discussed in plenary, the appropriate time for that discussion would be when the Enlarged Bureau introduced the report on the work of the Planning Group.

*The meeting rose at 1 p.m.*

## 2047th MEETING

*Wednesday, 18 May 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)\* (A/CN.4/384,<sup>1</sup> A/CN.4/405,<sup>2</sup> A/CN.4/413,<sup>3</sup> A/CN.4/L.420, sect. D)<sup>4</sup>**

[Agenda item 7]

### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

- ARTICLE 1 (Scope of the present articles)
- ARTICLE 2 (Use of terms)
- ARTICLE 3 (Attribution)
- ARTICLE 4 (Relationship between the present articles and other international agreements)
- ARTICLE 5 (Absence of effect upon other rules of international law)
- ARTICLE 6 (Freedom of action and the limits thereto)
- ARTICLE 7 (Co-operation)

\* Resumed from the 2045th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

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

<sup>3</sup> *Ibid.*, paras. 238-239.

## ARTICLE 8 (Participation)

## ARTICLE 9 (Prevention) and

ARTICLE 10 (Reparation)<sup>5</sup> (continued)

1. The CHAIRMAN informed members that, according to figures communicated to him by the Secretariat, the Commission had used more than 100 per cent of the time allocated to it during the first week of the session.

2. Prince AJIBOLA, after commending the Special Rapporteur's efforts to fulfil a complex task, said that the very title of the topic was inelegantly drafted and that the expression "not prohibited by international law" appeared to be both unnecessary and too restrictive. Once the words "injurious consequences" were used, perhaps the need was obviated for further explanation as to whether the act was prohibited by international law or not. If there was a need for further explanation as to the subject-matter of the topic, it would be better provided in one of the draft articles, for example by indicating in article 2 (Use of terms) that the word "activities" meant activities of a State which, though not prohibited by international law, resulted in injurious consequences to another State. In general terms, it might be said that the topic concerned illegal consequences of otherwise legal activities. If, therefore, a word such as "consequences" was employed to indicate the realm of the activities being considered illegal, there was logically no need to emphasize the question of legality. The title "International liability for injurious consequences arising out of States' acts" would be preferable to the existing title.

3. Some of the draft articles appeared to be acceptable and others less so; in that respect he was in agreement with most of the points made by Mr. Beesley (2045th meeting), and hence those made by Mr. McCaffrey and Mr. Calero Rodrigues (2044th and 2045th meetings).

4. As to the scope of the subject-matter, perhaps the Commission was not addressing the topic as ambitiously as it should. Certain aspects of the problem were already dealt with in international instruments. For example, the 1982 United Nations Convention on the Law of the Sea, particularly articles 192 to 194, dealt with protection and preservation of the marine environment. Similarly, the 1972 Convention on International Liability for Damage Caused by Space Objects governed liability for damage resulting from or caused by space objects. The United Nations Conference on the Human Environment had touched on the matter by affirming in the Stockholm Declaration<sup>6</sup> that the protection and improvement of the human environment was a major issue which affected the well-being of peoples and economic development throughout the world (para. 2). The elaboration of draft articles should afford the opportunity to develop and codify once and for all that area of international law, which was especially in need of attention in view of increasing technological advances. It was the otherwise legitimate activities of States in the use of their environment within their jurisdiction that, deliberately or inadvertently, caused appreciable risk resulting in injurious consequences to other States. It

would therefore be preferable for the Commission to speak of environmental law in general rather than to attempt in the draft articles strictly to limit its scope. Why, in fact, should the Commission confine itself to the "modest objectives" mentioned by the Special Rapporteur in his fourth report (A/CN.4/413, para. 5)?

5. He agreed with the Special Rapporteur that the draft articles should cover the issue of pollution: first, for the reasons already referred to, and secondly, because it was an integral part of the topic, despite the arguments advanced by the Special Rapporteur in paragraphs 9 and 10 of his report. Referring to the definition of pollution contained in article 1 of the 1979 Convention on Long-range Transboundary Air Pollution,<sup>7</sup> he took the view that the question raised by the Special Rapporteur in the first two sentences of paragraph 9 called for careful analysis. However, pollution was in most cases the result of legitimate activities whose cumulative effects resulted in injurious consequences, and hence it was very much a part of the topic.

6. In the matter of terminology, too much importance was attached to the concept of "risk", which had had the effect of restricting the scope of the topic, and he believed that the concept had no place in the draft. The topic was concerned more with the result of the acts of States and, more precisely, their injurious consequences. In other words, it was concerned not with how the harm was inflicted but with whether or not the harm was the result of a State's act. Perhaps it would be preferable to define terms such as "acts", "injury", "consequences" and "harm" rather than emphasize "risk". Not only did the concept of risk narrow the scope of the topic, but it restricted the extent of liability. He associated himself with the comments already made on that point by several members.

7. It was gratifying that the Special Rapporteur had given the issue of attribution the prominence it deserved in the report (*ibid.*, paras. 56-84). For the reasons given by Mr. Beesley, it might be tempting to move along the line of absolute liability, a solution that had been adopted in article II of the Convention on International Liability for Damage Caused by Space Objects. But in the case at hand, attribution was in fact quite a complex matter. For example, although the draft articles might not present many difficulties for the CMEA countries on that point, since all their activities invariably came to the knowledge of the Government, the same could not be said for market-economy countries, and in particular for the developing countries, which, as pointed out by the Special Rapporteur (*ibid.*, para. 69), were in a very precarious position in that respect. However, draft article 3 used the words "knew or had means of knowing", which constituted an appreciable safeguard and strengthened the decision in the *Corfu Channel* case (*ibid.*, para. 63). Most reluctantly, therefore, his conclusion was that article 3 could be left as it was.

8. With regard to the principles contained in chapter II of the draft, he found the Special Rapporteur's work to be satisfactory and referred in that connection to Principles 1 and 21 of the Stockholm Declaration. However, it might be necessary to review the text of draft article 6.

<sup>5</sup> For the texts, see 2044th meeting, para. 13.

<sup>6</sup> See 2044th meeting, footnote 8.

<sup>7</sup> E/ECE/1010.

He preferred the more explicit wording of the principles as set out in the report (*ibid.*, para. 85).

9. Draft article 7, on co-operation, raised some questions, such as how good faith was to be evaluated. Nevertheless, even if its effect was more psychological than practical, it should be retained, although it should be couched in better terms.

10. Draft article 8, on participation, might present some problems, for it dealt with the situation in which the affected State, although not invited to participate in the enterprise or in sharing its profits, might partly sustain the injurious consequences. For its part, the State of origin might wish to protect its trade secrets and technological know-how. However, the concern to save life, property and the environment must take precedence over subjective approaches. A more practical article, dealing with the issues of notification, information and negotiation, could be suggested in that regard and useful provisions were to be found in articles 4, 5 and 6 of the Convention on Long-range Transboundary Air Pollution.

11. Draft article 9, on prevention, was also of vital importance. The Special Rapporteur had raised significant questions on the role of prevention in the context of the draft (*ibid.*, para. 103), more particularly by asking whether prevention should be linked exclusively to reparation, whether it should be autonomous, or whether it should predominate in the instrument to the exclusion of reparation. He himself shared the latter point of view. In the words of the proverb, prevention was better than cure, especially if the patient died in the mean time. A predominant place in the draft for the concept of prevention would be in keeping with Principle 2 of the Stockholm Declaration.

12. Reparation could always be claimed under international law, whether or not the draft articles contained any provision in that regard. However, the insertion of such a provision would help to develop the law in that area and make it possible to spell out what was meant by reparation and what could be claimed. Draft article 10 could be kept in its present form for the time being, but it would require further drafting improvement in order to make it clearer and to avoid a narrow concept of "risk". In the matter of the "innocent victim", he believed that the expression "appreciable injury suffered" was not felicitous, for it restricted the scope of the affected State's claim. It was not the "appreciable injury" that justified that State's action, but the "injurious consequences", for which the State of origin was directly liable. The article should be redrafted on that point.

13. Lastly, it would be useful to insert an article providing for the establishment of judicial machinery through which the affected State might bring an action against the State of origin. A good example was provided by article 26 of the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region.<sup>8</sup>

14. Mr. PAWLAK congratulated the Special Rapporteur on his work on a most difficult and controver-

sial topic, but one that was all the more important because of the constant advances in science, technology and industry. Thanks to the Special Rapporteur's fourth report (A/CN.4/413), the Commission was at last on the right track. Nevertheless, a few comments could be made on a number of fundamental issues raised by the Special Rapporteur.

15. The first comment was of a general character, namely that by its scope and nature, the present topic was closely connected with that of State responsibility. The Commission could therefore continue its consideration of the two topics, but should complete that of State responsibility before undertaking the final drafting of the articles now under consideration. It should be remembered that the topic of State responsibility had important repercussions on the present one.

16. The Commission had to determine the main purpose of the work, which was to establish a system of reparation for harm caused by a State to another State, its inhabitants or property when the harm could not be linked to the breach of a norm of international law. If that was indeed the actual objective, draft article 1 could not limit the scope of the subsequent articles to activities which "create an appreciable risk of causing transboundary injury". As pointed out by Mr. Calero Rodrigues (2045th meeting), it was necessary to remove from article 1 the limitation based on the concept of risk and to concentrate on defining the legal consequences of harm.

17. It followed that articles 6 to 9 had to be modified accordingly. The limitation based on risk should be eliminated from draft article 6, so as to make the article cover all activities involving harm, irrespective of any risk involved. One of the best established principles of law was that one should not do to others what one did not wish done to oneself (*sic utere tuo ut alienum non laedas*). That principle could be applied to international practice: States had the duty to exercise their rights in a way which did not harm the interests of other States. Principles 21 and 22 of the Stockholm Declaration<sup>9</sup> were themselves derived from that rule, although they were of a declaratory rather than a legal character. Those principles should be reflected in article 6. In any event, the article should mention the freedom of action of all States to undertake any activity they wished on their territory or in areas placed under their control, *de facto* or *de jure*, and should stress the need for such freedom to be compatible with the safeguarding of the sovereign rights of other States. The language proposed by the Special Rapporteur only partly reflected that requirement; it should above all be freed from the strait-jacket of "risk" and lay down the more general limitation of "harm".

18. He agreed with Mr. Calero Rodrigues that draft article 7, which laid down the duty to co-operate, should be framed in the broadest possible terms. Paragraph 2 was perhaps unnecessary, since paragraph 1 stated a sufficiently general principle.

19. Draft article 8 was also unnecessary, since it dealt only with one manifestation of co-operation. Its content could probably be transferred to the commentary.

<sup>8</sup> See *International Legal Materials* (Washington, D.C.), vol. XXVI (1987), p. 38.

<sup>9</sup> See 2044th meeting, footnote 8.

20. Draft article 9 was satisfactory, but its scope should not be limited to "an activity which presumably involves risk". As in the case of article 6, article 9 should apply to all activities which could occasion transboundary harm.

21. The same reasoning could be applied to draft article 10, on reparation. It was a crucial article. As the Special Rapporteur explained in his report (A/CN.4/413, para. 112), he had had in mind in that connection causal responsibility, namely a system whereby harm must not be assessed by the exact amount of individual damage caused by the incident in question, and which meant that the victim would have to bear the resulting harm to some extent. That approach was perhaps justified in the case of two economically equal partners. But since such equality did not always exist, it was better to treat that principle as an exception rather than the rule. Accordingly, he supported not causal responsibility, but full responsibility for damage, with the harm being assessed by the exact amount of damage actually sustained, or the best approximation to it, as the Special Rapporteur indicated (*ibid.*, para. 114).

22. Mr. SHI said that the discussions in the Sixth Committee of the General Assembly at its forty-second session had shown that a large number of delegations attached great importance to the present topic. Some had in fact expressed disappointment at the slow headway being made. The Special Rapporteur's fourth report (A/CN.4/413), however, represented distinct progress and the Commission would no doubt be able to complete its work on the topic in accordance with the schedule contained in the annex to its report on its thirty-ninth session.<sup>10</sup>

23. The Special Rapporteur had made a strenuous effort to include a list of activities to be covered by the draft articles, but for the reasons stated by him (2044th meeting, paras. 16-17)—the relativity of the concepts of risk and danger, the emergence of new hazardous activities, the impossibility of equating the situation envisaged in the draft with the regulation of specific activities—his endeavours in that direction had remained fruitless. Accordingly, he himself did not insist on a list, an idea which he had previously endorsed, and would be satisfied with the solution adopted by the Special Rapporteur.

24. As to pollution, the Special Rapporteur was right to include in the draft polluting activities that caused transboundary harm, on the assumption that they were not expressly prohibited by general international law. One thing was certain, however, namely that there existed a number of treaty régimes which prohibited polluting activities causing transboundary harm.

25. The draft articles were acceptable on the whole, but he wished to make a few specific comments.

26. Draft article 1 took into account the views expressed by members of the Commission at the previous session. Thus the term "jurisdiction" had replaced the term "territory" used in the previous version, submitted by the Special Rapporteur in his third report (A/CN.4/405, para. 6). Moreover, the earlier version had restricted the scope of the draft to activities which

gave rise or could give rise to "a physical consequence". That limitation was not to be found in the present wording and could only be inferred from draft article 2. It was perhaps desirable to make the text more precise and mention expressly those activities which gave rise to "physical consequences".

27. Furthermore, the new article 1 appeared to put emphasis on risk instead of on transboundary harm. As already pointed out in the Commission, however, it was harm which constituted the decisive factor in reparation or compensation; the concept of risk was more relevant to prevention, and it must be remembered that reparation was the main object of the draft. If risk were to give rise to a form of liability without fault, the activities which caused grave transboundary harm would not be covered by the draft, because, as several members of the Commission had noted, a number of activities involved slight risks but could none the less result in very serious damage.

28. Draft article 2 could perhaps be better dealt with later, upon completion of the first reading. For the moment, he agreed with Mr. McCaffrey (2044th meeting) and Mr. Beesley (2045th meeting) that the expression "State of origin" was preferable to "source State". It was worth noting that, in international trade, the more flexible term "country of origin" was used, since it did not necessarily connote a sovereign independent State.

29. Draft article 3, on attribution of liability, was very clearly explained in the report (A/CN.4/413, paras. 56-84): attribution was based primarily on territoriality. Accordingly, the characteristic features of an "act of the State" did not come into play in the case of transboundary harm (*ibid.*, para. 59) and both activities undertaken by the State itself and those carried on by persons under its jurisdiction fell within the scope of the draft. The article also confirmed the notion of liability based on causality. The attribution of a particular activity to a State therefore implied attribution of liability for that activity, with the proviso concerning "knowledge or means of knowing". The Special Rapporteur explained very intelligently the compatibility of that proviso with the nature of causal liability. The condition was necessary, since it took into consideration the situation in developing countries, for which it was primarily designed.

30. Draft articles 6 to 10, comprising chapter II of the draft, had been elaborated on the basis of the three principles stated by the Special Rapporteur in his summing-up of the debate on the topic at the Commission's previous session,<sup>11</sup> which were also to be found in section 5 of the schematic outline. Although he himself fully subscribed to those principles, he agreed with Mr. Calero Rodrigues (2045th meeting) that it might be better to delete draft article 8—which could lead to some misunderstanding—and incorporate its content in draft article 7 on co-operation.

31. Draft article 9 dealt with prevention, and the principle should be retained on the understanding that any failure to take preventive measures could not in itself give rise to liability, as indicated in the schematic outline. It was only when such failure resulted in harm

<sup>10</sup> *Yearbook . . . 1987*, vol. II (Part Two), p. 58.

<sup>11</sup> *Yearbook . . . 1987*, vol. I, p. 182, 2023rd meeting, para. 2.

that liability could be attributed to the State of origin. Of course, as pointed out by Mr. McCaffrey (*ibid.*), the concept of due diligence had a role to play in the assessment of reparation.

32. Lastly, he proposed that the draft articles should be referred to the Drafting Committee for consideration in the light of the views expressed during the debate.

33. Mr. GRAEFRATH thanked the Special Rapporteur for his efforts to respond to questions raised by members of the Commission and representatives in the Sixth Committee of the General Assembly. The fourth report (A/CN.4/413) was very stimulating. The statement by the Special Rapporteur that he regarded the principles proposed in chapter II of the draft as “part of the progressive development of international law” (*ibid.*, para. 90) paved the way for a consensus, because it precluded any argument that the rules and principles drafted by the Commission already formed part of existing law, something which many States would be unable to accept.

34. The Special Rapporteur had not tried to establish a system of absolute liability or of general strict liability for every kind of activity that might cause transboundary harm, and made it clear that there was no “norm of general international law which states that there must be compensation” for all damage caused (*ibid.*, para. 39). That was an important premise which might be helpful in the Commission’s future work. However, while it was advisable to try to limit the scope of the articles which defined liability, he was not convinced that the proposed criteria were clear enough to define the necessary thresholds.

35. He agreed with the Special Rapporteur that the draft articles should serve as an incentive to States to conclude agreements establishing specific régimes to regulate particular activities in order to minimize potential damage. That did not, however, seem to be a valid argument for deciding not to draw up a list of dangerous activities. Indeed, many instruments on transport and environmental protection used lists of toxic or dangerous materials to define their scope clearly, and the inevitable defects in such lists were cured by means of a periodic review procedure. Perhaps it would be worth while to study that method and not simply abandon the idea of such a list. The Special Rapporteur proposed an alternative method, namely to limit the scope of the draft by introducing some general criteria. That might not be the easier method, and the success of such a course would depend very much on how clear the criteria were and how they were applied in practice. The purpose of the criteria was to ensure, first, that not every kind of lawful activity entailed liability; secondly, that not every kind of transboundary harm founded a claim for reparation; and, thirdly, that a State could not be held liable for everything that happened on its territory and caused transboundary harm. That seemed to be a reasonable approach, in keeping with State practice.

36. Under draft article 1, the scope of the articles would be confined to activities which “create an appreciable risk of causing transboundary injury”. By “appreciable risk”, the Special Rapporteur meant a risk which could be identified by a simple examination of the

activity and the things involved (art. 2 (a) (ii)) or, as he said in his report, of the “way in which they are used” (A/CN.4/413, para. 24); and, as he himself understood the word “appreciable”, it meant that the danger—not the actual incident, but the possibility of an incident or of a harmful effect—was foreseeable. It was that foreseeability of danger that led to the demand for preventive measures and for the establishment of a régime of liability.

37. It had rightly been said that risk called for the adoption of preventive measures. Accordingly, if the Commission did not wish to control, under the draft, lawful activities in general, nor to recognize that States were liable for any kind of transboundary harm caused within their territory, the concept of risk could be useful, but it should be defined in one way or another. The term “appreciable”, however, lacked precision and its value as a filter was questionable. The Special Rapporteur equated “appreciable risk” with “significant risk”, an expression often used in environmental instruments. The latter expression, however, contained a far greater quantitative element than did “appreciable risk”: it was no mere chance that the Special Rapporteur explained that an appreciable risk could be identified by simple examination. Did that mean activities that were known to create a risk of causing transboundary harm, or activities that created a significant risk? The Commission should replace the word “appreciable” by a clearer and narrower term, particularly if it wished to relate the obligation to take preventive measures to the risk involved in the activity. For instance, article 11 of the proposed principles for environmental protection and sustainable development adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development (Brundtland Commission)<sup>12</sup> referred to activities which created a significant risk of substantial harm. That seemed to be much narrower and clearer than the expression “appreciable risk”. Furthermore, he did not see why, in draft articles 3, 6, 9 and 10, the Special Rapporteur referred to activities involving “risk”, when according to article 1 the draft was concerned with activities which created an “appreciable risk”. If the word “appreciable” was used as a means of limiting the scope of the draft, it should not appear in that article alone.

38. To limit the scope of the draft, the Special Rapporteur had also introduced the criterion that not all transboundary harm would be automatically covered, but only such harmful effects as were caused by the physical consequences of an activity (art. 2 (c)), which meant that economic and financial activities were excluded. Yet those were the very activities which, in modern times, produced the most widespread harmful transboundary effects. If the real intention was to limit the scope of the topic entrusted to the Commission, as members wanted, then why not say so, without further ado?

<sup>12</sup> *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (Dordrecht, Martinus Nijhoff, 1987); summarized in the report of the World Commission on Environment and Development, “Our common future” (A/42/427), annex I.

39. Another criterion intended to limit the scope, as provided for in draft article 3, was knowledge, in the sense of knowledge of an activity which created an appreciable or significant risk, and not merely of an activity involving risk. If the Commission adopted the term "appreciable" or "significant", however, it should use that term throughout the draft wherever reference was made to an activity involving risk. He therefore proposed that an attempt should be made to pin-point an activity involving risk more closely, and once a suitable adjective had been found, not to depart from it.

40. Admittedly, nobody could be held responsible for acts he had no knowledge of or of which he had no means of knowing. Since the *sedes materiae* was territorial sovereignty, it was necessary that the State had knowledge of what was happening on its territory. It should not be forgotten that the Commission was dealing not with civil-law liability or responsibility for an act attributable to a State, but with the liability of a State for transboundary harm caused by activities conducted within its territory. That raised the question of the need for a preventive rule whereby all activities likely to create an appreciable risk would have to be licensed and monitored by the State in order to ensure that certain safety standards were observed. Under such a rule, in the event of accident the accountability of the State would be reduced to mere liability if it had taken preventive measures. In other words, a State which did not take measures to prevent, as far as possible and within its jurisdiction, activities which created an appreciable risk of causing transboundary harm would be violating an international obligation and, should harm be caused, would be responsible for an internationally wrongful act. But did the Commission wish to go that far? In his view, that important aspect of the question required clarification.

41. He did not understand why, in his report (A/CN.4/413, paras. 82-84), the Special Rapporteur seemed to relate the criterion of knowledge to the activity as such. That seemed to be in contradiction with his earlier statement that "there must be a general knowledge of the existence *and characteristics*\* of that activity" (*ibid.*, para. 79). The Special Rapporteur should instead refer to the appreciable risk of causing transboundary harm which stemmed from the characteristics of the activity.

42. He was not sure that those various criteria sufficed to limit the scope of the topic: "appreciable risk" and "means of knowing" left so much room for disputes regarding interpretation that States might encounter many problems. Also, he did not think that the draft articles solved or excluded the problem of liability for damage caused by permanent pollution. Many activities led to creeping pollution, which involved an appreciable risk of transboundary harm. That was tolerated, in a sense, because there were no technical or economic means of avoiding or replacing such activities. The principles, rights and obligations concerning transboundary natural resources and environmental interferences laid down by the Expert Group on Environmental Law took those economic factors into account, distinguishing between, on the one hand, situations where the overall technical and socio-economic cost involved in risk prevention or reduction far exceeded in the long run the

benefit of preventing or reducing the risk, and on the other, situations where the transboundary environmental interference involved harm which was far less than the cost of prevention.

43. It seemed that the Special Rapporteur wanted to exclude permanent pollution from the draft as long as it did not result in substantial transboundary injury. Unfortunately, that could not be deduced from the text of the articles proposed. The oft-quoted provisions of the 1982 United Nations Convention on the Law of the Sea and of article 11 of the proposed legal principles adopted by the Expert Group on Environmental Law did not, in the matter of liability for substantial transboundary harm, make the State liable, but they imposed an obligation on the State to ensure that compensation was provided. If, however, restricting the draft to activities involving an appreciable risk was to serve any real purpose, accidents caused by activities which had not thus far been regarded as involving any appreciable risk must necessarily be excluded. The Commission should give thought to the matter so as to avoid any unjust consequences. The Expert Group on Environmental Law, which had also discussed the matter, had overcome that difficulty in paragraph 2 of its article 11, which required States to ensure that compensation was provided should substantial transboundary harm occur even when the activities were not known to be harmful at the time they were undertaken.

44. A system of preventive measures was needed. Such a system should, on the one hand, lay down the criteria for defining the obligations which were involved in the concept of due diligence and which, when violated, could trigger State responsibility. On the other hand, where the State complied with its commitments, that would reduce, or even extinguish, its accountability in the event of an accident. Obviously, preventive measures could serve different legal purposes. Furthermore, it might perhaps be useful to recognize that there were different kinds of precautionary measures, depending on whether they were intended to reduce the risk of accident or to minimize the damage. In both cases, there might be a duty to notify and inform States that might be affected and to co-operate in minimizing the danger or damage.

45. With regard to attribution of liability, the territorial criterion did not really cover the scope of the draft, because there were many other areas of activity under the control of the State. That did not mean that all reference to territory should be dropped, for it was exclusive territorial sovereignty that produced duties in relation to other States. The Special Rapporteur had tried to overcome the difficulties by introducing the terms "jurisdiction" and "control", which were widely used in the United Nations Convention on the Law of the Sea and in a number of other international instruments. Unfortunately, for the purposes of the draft, those terms were not as clear as they should be. For instance, a company established under the law of the United States of America, with its head office in Madrid, controlled by Canadian shareholders and working mainly in the Sudan, would fall under several jurisdictions. Again, had the accident at the Union Carbide plant at Bhopal in India in 1984 caused transboundary harm, it would perhaps have been difficult to say

which State had jurisdiction or effective control in the matter. States were now very often seen to claim and enforce extraterritorial jurisdiction on foreign companies simply because they manufactured under licence or used certain foreign technology. It was not quite clear from the draft articles whether a State claiming to have jurisdiction in such cases could or should be held liable in the event of an accident which caused transboundary harm. Most activities involving appreciable risk were closely connected with modern technology, which was to a large extent in the hands of multinational corporations and was often protected by provisions on industrial secrecy. Consequently, a corporation would more readily know and have the means of knowing the potential dangers than the State on whose territory it carried on its activities. In his view, therefore, the references to jurisdiction in draft article 1 and draft article 2 (c), (d) and (e) were not sufficiently clear and required further reflection. It was easy to refer to national jurisdiction so long as the State was being asked to protect some interest by adopting laws, regulations or other measures. It was a different matter when the question was to determine who was liable for activities which, in one way or another, fell under that jurisdiction, especially in cases of several simultaneous jurisdictions.

46. The Special Rapporteur had tried to formulate the basic principles of liability in the form of draft articles. If the Commission was successful in that undertaking, it would make an important contribution to the progressive development of international law. It should therefore take a careful look at the proposed wording. He agreed with some of the suggested drafting improvements, but supported the general approach adopted by the Special Rapporteur. It was also true that the word "reparation" was much broader than "compensation" and that reparation in the case of State responsibility could be quite different from reparation in the field of liability. Perhaps a more detailed provision than draft article 10 was required in that connection in order to determine which damage should be covered by the duty to make reparation, and to what extent. He would also be grateful if the Special Rapporteur could explain what was meant by the expression "appreciable injury" in article 10, where it appeared for the first time. Should it be given the same meaning as in draft article 16 submitted by Mr. McCaffrey (see 2062nd meeting, para. 2)? He would make his drafting suggestions at a later stage.

### Co-operation with other bodies

[Agenda item 10]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

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

48. Mr. VANOSSO (Observer for the Inter-American Juridical Committee) said he was honoured to be able to address the Commission on behalf of the Inter-American Juridical Committee, the doyen of legal consultative bodies in the field of international law. The

Committee had been unable to hold its usual January session because of financial constraints, and he would accordingly outline the work accomplished over the past year and the topics on the agenda for the August 1988 session.

49. The Committee's activities in 1987 had culminated in a seminar on improvement of the administration of justice in the Americas, and the Committee had adopted a resolution on that subject. It had also adopted a resolution on the establishment of an inter-American system for nature protection. The usual course on international law had also been held. Progress had been made on studies already under way: the development of directives concerning extradition in cases of drug trafficking; the drafting of an additional protocol to the 1969 American Convention on Human Rights (Pact of San José);<sup>13</sup> environmental law; co-operation in prosecutions involving bank accounts; and review of the inter-American conventions on industrial property.

50. Special attention should be drawn to the seminar he had mentioned. While it might be of little interest to countries of the northern hemisphere, which had a satisfactory legal apparatus, the South and Central American countries still had great difficulties to overcome and significant gaps to fill. That situation accounted for the initiative taken by Mr. Seymour Rubín, a member of the Committee, with the co-operation of Mr. Roberto MacLean, to include the subject in the work programme and to convene a seminar on it. The Committee had decided to request the two Rapporteurs to continue their work and had resolved to establish a working group comprising experts in various branches of the law, and particularly representatives of specialized agencies. The purpose was not so much to obtain immediate results as to pursue long-term objectives, so that the shortcomings of the administration of justice could be discerned and remedied on the basis of inter-American co-operation, for the problem could not be solved by each country on its own.

51. The development of an inter-American system for the protection of nature was a subject which had been included on the agenda after a visit to the Committee by the Vice-President of Argentina, Mr. Víctor Martínez, who was a specialist on the matter. The resolution adopted in that connection was intended to move ahead with the revision of a fairly old instrument, namely the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere,<sup>14</sup> which dated back to 1940. Using the experience acquired in other parts of the world, and prompted by scientific advances, the new threats to nature and developing standards on the subject, the Committee wished to establish an inter-American system for nature protection by updating the 1940 Convention and by looking into other regional integration schemes so that the efforts made by each country could be used to benefit the entire continent. For that purpose, the Committee had deemed it advisable to set up, within OAS, a permanent technical bureau that would act as an information and co-ordination centre to reinforce and promote national training and research initiatives and serve as a sec-

<sup>13</sup> United Nations, *Treaty Series*, vol. 1144, p. 123.

<sup>14</sup> *Ibid.*, vol. 161, p. 193.

retariat for any regional agreements that might be concluded. The Committee had determined that it would be useful to convene a specialized conference for that purpose and had decided to recommend that the OAS secretariat undertake the technical studies required for the preparation of a draft convention.

52. The fourteenth course on international law had afforded the customary opportunity for dealing with issues in public international law, private international law and matters directly related to the inter-American system, as well as topics of general interest.

53. As for studies already under way, the first was on the development of directives concerning extradition in cases of drug trafficking. Instead of producing a new international instrument, the Rapporteur, Mr. Manuel Vieira, intended to investigate more practical and expeditious enforcement machinery, since the drafting of a convention required lengthy negotiations and action by parliaments. The purpose was accordingly to develop something comparable to a uniform law that would achieve the desired objective as quickly as possible. In the case of drug trafficking, broad-based co-operation was required, for without it the action taken might be inadequate or even invalid. The Rapporteur envisaged a rule under which, when a State learned of the presence in its territory of a drug trafficker, it would notify States which wanted to prosecute the individual so that they could request his or her extradition, a request which that State would grant. As he was reluctant to confer powers on the executive to order that a drug trafficker be handed over to another State, the Rapporteur had proposed a formula under which a decision adopted by the executive must conform to certain rules of law. He had indicated that it would be desirable to standardize procedure and the enforcement of penalties and was continuing to investigate the prohibition of double jeopardy, which, if followed mechanically, might be detrimental to requests for extradition.

54. The draft additional protocol to the American Convention on Human Rights (Pact of San José) had been included on the agenda on the understanding that the existing rules related essentially to the rights of the individual and that the protocol would cover economic, social and cultural rights, which were currently addressed only in article 26 of the Pact of San José. One matter still pending was systems for protecting the rights enunciated in the protocol, for in the rapporteur's opinion some régimes should be instituted forthwith (in the area of labour), whereas others should be developed progressively (in education, culture and family matters). In the first area, existing procedures within the bodies instituted by the Pact of San José (the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights) would be followed. In the other fields, it had been suggested that periodic reports should be submitted to OAS's technical councils, which would be assisted by groups of experts and the specialized agencies that worked closely with the Inter-American Commission on Human Rights, and would also be called upon to make recommendations. It had been said that the Inter-American Juridical Committee was competent to prepare or review instruments on human rights, while the role of the Inter-American Court of

Human Rights was to give advisory opinions and hand down decisions.

55. The rapporteur on environmental law had submitted a well-reasoned report that would probably result in the adoption by the General Assembly of OAS of a draft declaration or resolution on various aspects of transboundary pollution. The rapporteur, conscious of the legal and cultural dimensions to the problem, had sought to formulate general principles on prevention of transboundary pollution in the marine environment, on land and in the atmosphere, and on the international responsibility of States in cases of pollution for which they themselves or their nationals were responsible. The rapporteur had drawn on the 1972 Stockholm Declaration,<sup>15</sup> but owing to the deterioration of the natural environment since that date had also scrutinized the laws adopted by many countries of the region on environmental protection, pollution control, penalties (imprisonment, fines, partial or total shut-down of the sources of pollution, confiscation of polluting objects) and liability. The countries concerned were Barbados, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Mexico and Venezuela. It was worth noting that some of the laws in question specified the standards for measuring environmental quality, so that any deterioration could be assessed and the acts which thus constituted infractions could be determined. In his opinion, environmental law was one of the most interesting topics before the Inter-American Juridical Committee, particularly as the Committee was considering it not merely from the financial point of view, which was limited to the "polluter pays" principle, but in connection with five domains: penal (sanctions), civil (compensation), fiscal (withdrawal of privileges of those whose activities had harmful effects), administrative (prevention) and cultural (public opinion).

56. The Committee had also undertaken a study of co-operation in prosecutions involving bank accounts, including the question of numbered accounts and their use for drug-trafficking purposes. The rapporteur on the subject would soon be submitting detailed documents to the Committee.

57. The Committee was considering one other matter: a review of the inter-American conventions on industrial property in the light of technical progress and, in particular, the need to protect new inventions in the fields of biotechnology and genetic engineering and integrated circuit and software designs. Inter-American regulation was required in order to reflect the interests of the Latin-American countries in the protection of intellectual property in general—a sphere which encompassed copyright and industrial property (patents, industrial designs and models, trade marks, commercial marks and service marks) and constituted an area of confrontation between highly industrialized countries and developing countries. In some countries, like his own, even if the Paris Convention for the Protection of Industrial Property had been ratified, there was some resistance to granting patents for certain types of inventions or products, such as pharmaceuticals.

58. The agenda for the Committee's next session, to be held in August 1988, comprised items proposed by

<sup>15</sup> See 2044th meeting, footnote 8.

OAS and by the Committee itself, namely: legal issues pertaining to drug trafficking, including principles governing the extradition of drug traffickers, cooperation in prosecutions involving bank accounts, and harmonization of national legislation on drug trafficking; environmental law; the draft additional protocol to the American Convention on Human Rights; international legal problems relating to multilateral guarantees of foreign private investments; improvement of the administration of justice in the Americas; review of the inter-American conventions on industrial property; interpretation and development of the principles of the Charter of OAS, as amended by the 1985 Cartagena Protocol,<sup>16</sup> with a view to strengthening relations between the States members of OAS; the principle of self-determination and its scope of application; the right to information; expulsion and international law; maintenance grants for minors in international law; and returning of minors as between States. In addition, at its seventeenth session, in November 1987, the General Assembly of OAS had called on the Committee to investigate why more States were not parties to the 1948 Pact of Bogotá.<sup>17</sup>

59. The Inter-American Juridical Committee's work over nearly 50 years attested to the foresight of the founders of OAS, who had acknowledged that specialized legal consultative services were the keystone of the inter-American system.

60. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his statement. The Committee's work, some aspects of which were related to the Commission's endeavours, was of great interest not only for inter-American law, but also for international law in general. One example was the Committee's work on drug trafficking and environmental law. He was convinced that members of the Commission, and particularly the special rapporteurs, would benefit from the comments made and the information provided by the Observer for the Inter-American Juridical Committee, and that the relations between the two bodies could only be mutually advantageous. As a member of the Commission and as a Latin-American, he welcomed the Committee's past achievements and its ongoing efforts.

61. Mr. BARBOZA, speaking on behalf of the Latin-American members of the Commission, thanked the Observer for the Inter-American Juridical Committee for his statement. He was particularly impressed by the size and scope of the Committee's agenda and the utility of its course on international law. The benefit to be derived from exchanges between the Commission and other international law bodies had been demonstrated once again.

62. Mr. McCAFFREY, speaking on behalf of the Western European and other members of the Commission, thanked the Observer for the Inter-American Juridical Committee for his statement and asked him to convey to the other members of the Committee his gratitude for the welcome he had received when he had

spoken on the Commission's behalf at the Committee's most recent session at Rio de Janeiro in August 1987, during which he had been able to acquaint himself with its working methods. He had also spoken to participants in the course on international law organized by the Committee and thought that that procedure should become a regular practice, in so far as time permitted. He was particularly interested in the Committee's activities in connection with environmental law and hoped that its documentation on the subject would be made available to the Commission, and particularly the special rapporteurs.

63. Mr. PAWLAK, speaking on behalf of the Eastern European members of the Commission, thanked the Observer for the Inter-American Juridical Committee for his statement, which had provided much food for thought. The problems of Central and South America, as the statement had shown, were very serious and called for very careful consideration by the Inter-American Juridical Committee. They were similar to many of the problems faced by the Eastern European countries, although they occurred in differing degrees. He wished the Committee every success in its endeavours.

64. Mr. MAHIOU, speaking on behalf of the African members of the Commission, thanked the Observer for the Inter-American Juridical Committee for the detailed information he had provided. The Committee's work programme and the number and diversity of topics it covered were impressive. Those subjects were of interest for international law in general and also of regional, purely intra-American value. Africa, whose legal problems were not without some similarity to those of the American continent, could not fail to follow the work of the Inter-American Juridical Committee with interest.

*The meeting rose at 1 p.m.*

## 2048th MEETING

*Thursday, 19 May 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Visit by a member of the International Court of Justice

1. The CHAIRMAN, speaking on behalf of the members of the Commission, extended a warm welcome

<sup>16</sup> See OAS, *Anuario Jurídico Interamericano 1985* (Washington (D.C.), 1987), p. 113.

<sup>17</sup> American Treaty on Pacific Settlement (United Nations, *Treaty Series*, vol. 30, p. 55).

to Mr. Ago, a Judge of the International Court of Justice and a former member of the Commission. Mr. Ago was well known to members for the valuable contribution he had made as Special Rapporteur for the topic of State responsibility. Besides the personal ties by which members of the Commission and the ICJ were bound, the two bodies were both concerned with the rules of international law, the Commission progressively developing those rules and the Court applying them in specific cases. The latter function was exemplified by a recent case that would have far-reaching effects on international organizations and the reaffirmation of the rule of international law in international relations. He asked Mr. Ago to convey the greetings of the Commission to the members of the Court.

2. Mr. AGO, thanking the Chairman for his kind words, said that the collaboration between the Commission and the International Court of Justice was extremely important and a matter of particular satisfaction to him. He wished the Commission every success in its continued work on the progressive development and codification of international law.

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)** A/CN.4/384,<sup>1</sup> A/CN.4/405,<sup>2</sup> A/CN.4/413,<sup>3</sup> A/CN.4/L.420, sect. D)<sup>4</sup>

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

- ARTICLE 1 (Scope of the present articles)
- ARTICLE 2 (Use of terms)
- ARTICLE 3 (Attribution)
- ARTICLE 4 (Relationship between the present articles and other international agreements)
- ARTICLE 5 (Absence of effect upon other rules of international law)
- ARTICLE 6 (Freedom of action and the limits thereto)
- ARTICLE 7 (Co-operation)
- ARTICLE 8 (Participation)
- ARTICLE 9 (Prevention) *and*
- ARTICLE 10 (Reparation)<sup>5</sup> (*continued*)

3. Mr. EIRIKSSON said that the draft articles submitted by the Special Rapporteur in his fourth report (A/CN.4/413) represented a breakthrough in the Commission's consideration of the topic. They made it possible to look forward with confidence to the development of a satisfactory response to the international commun-

ity's desire for results in an important field. In the light of the draft articles, he joined in the appeal for consideration of the topic to be extended to cover all transboundary harm. He hoped that the Commission and the Special Rapporteur would adopt a bolder approach, since, under the scheme as he envisaged it, the articles would form a separate subgroup of the topic as a whole.

4. Owing to the difficulties caused by the need to avoid any overlap with the topic of State responsibility, and by the strait-jacket imposed by the words "acts not prohibited by international law" in the title of the topic, the Special Rapporteur had had to perform a kind of juridical balancing act on the question whether pollution was prohibited under international law. That was unfortunate, and under the scheme which he and many other members would like to see adopted would be unnecessary.

5. It had been more or less agreed that the scope of the topic should be confined to the physical consequences of harm arising out of acts not prohibited by international law and that transboundary economic harm—including harm caused by cultural influences from a neighbouring country—should be excluded. However, if the scope of the topic was to be restricted in some areas, he saw no reason why it should not be expanded in others. Any overlap with the topic of State responsibility could be dealt with by a "no prejudice" clause along the lines of draft article 5, and also in the guidelines for negotiating reparation under draft article 10. The Special Rapporteur's scepticism about the will of States to accept broader liability for harm was perhaps justified, but the Commission should not ignore the dramatic developments in that field, to which a number of members had referred, as well as the evidence provided by numerous public appeals for action.

6. The articles, as he would like to see them, would have as their core the category of activities which created an appreciable risk of causing transboundary harm—already covered by the draft articles submitted by the Special Rapporteur—but would also deal separately with "other activities causing transboundary harm". The three principles referred to by the Special Rapporteur in paragraph 85 of his report would apply to both categories of activity, but the duties of prevention, co-operation and notification would be confined to activities creating risk. The guidelines for negotiating reparation would differ for the two categories; in preparing those guidelines, the views of Mr. McCaffrey and Mr. Calero Rodrigues (2044th and 2045th meetings) could perhaps be taken into account. In his view, such a system would be more complete than the régime described by the Special Rapporteur (A/CN.4/413, para. 46). The following general changes, which would not involve any radical departure from the present draft articles, would have to be made in order to incorporate his proposed system.

7. First, the title of the draft would be amended to read: "Draft articles on international liability for transboundary harm". Draft article 1 would include a subparagraph (*a*), referring to "activities which create an appreciable risk of causing transboundary harm", and a subparagraph (*b*), referring to "other activities which

<sup>1</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

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

<sup>5</sup> For the texts, see 2044th meeting, para. 13.

do not create such a risk but none the less cause transboundary harm". As a consequential amendment, in subparagraph (b) of draft article 2, "activities involving risk" would be defined as "the activities referred to in article 1, subparagraph (a)". In draft article 3, the reference to "an activity involving risk" would be generalized to read "an activity referred to in article 1".

8. Draft article 5 would be amended to take account of the question of State responsibility and could read: "The present articles are without prejudice to the operation of any other rule of international law establishing responsibility for transboundary harm resulting from a wrongful act or omission."

9. The words "activities involving risk" and "an activity involving risk" in draft articles 6 and 10, respectively, would be replaced by "activities referred to in article 1". The commentary to draft article 10 would provide a detailed explanation of the differences between the guidelines for the two categories of activity giving rise to liability.

10. On more detailed points, with regard to draft article 1 he endorsed the basic premise that accountability was a territorial matter, although he sympathized with the concern expressed about extraterritorial jurisdiction.

11. With regard to subparagraph (a) (ii) of draft article 2, he could accept the limitation imposed by the notion of "appreciable" risk, for the reasons stated by the Special Rapporteur. As to subparagraph (c), he could accept the essential physical characteristics of the activities that caused harm, but that did not mean that the harm itself had to be physical: it should include harm to amenities and other legitimate uses of areas. He could also accept the notion of appreciable harm or, in the words of subparagraph (c), an "appreciably detrimental" effect.

12. He agreed that, throughout the draft, the word "harm" should be used rather than "injury" and the expression "State of origin" rather than "source State".

13. He approved of the limitation imposed in draft article 3 by the reference to knowledge and "means of knowing", but suggested that the article be amended to read:

"The State of origin shall not have the obligations imposed on it with respect to an activity referred to in article 1 unless it knew or had means of knowing that the activity was being, or was about to be, carried on in areas under its jurisdiction or control."

He further suggested that the title of the article, "Attribution", should be replaced by "The basis of obligations under the present articles", in keeping with the recognized distinction regarding scope dealt with in articles 1 and 3, respectively.

14. Draft article 4, though clear in intention, might require some redrafting. Draft article 6, particularly the first sentence, required redrafting, though the meaning was clear from the Special Rapporteur's comments (*ibid.*, paras. 92-95). He endorsed the comments made by Mr. Calero Rodrigues (2045th meeting) and Mr. Shi (2047th meeting) on draft articles 7 and 8.

15. He had some doubts about the phrase "and for which no régime has been established", in draft article 9, and thought that the word "presumably" might be unnecessary in view of the definition of risk in article 2 (a). He could accept the use of the word "reparation", in draft article 10, for the reasons stated by the Special Rapporteur, and—as a concession to reality—agreed that the article should simply provide that the amount and nature of the reparation were to be determined by the parties to the negotiations.

16. If the Commission could work along those lines, it might well be possible to prepare, and eventually submit to the General Assembly, draft articles forming the basis of an instrument that could become a landmark in the progressive development of international law.

17. Mr. MAHIU said that the Special Rapporteur's fourth report (A/CN.4/413) marked a turning-point in the work on the topic, because it advocated a new and more specific approach with a view to delimiting the topic. The core of the report lay in paragraphs 37 to 47, in which the Special Rapporteur explained his approach and, more particularly, the respective places of risk and harm in the system of liability he proposed. From those paragraphs it was clear that he had opted for liability for risk. Risk thus became the central element around which the Commission was invited to construct the régime of liability.

18. The question therefore arose whether risk provided a sufficiently solid foundation to bear that régime. For his part, he was ready to endorse the Special Rapporteur's approach, although he appreciated that it did not solve all the problems. Indeed, he doubted whether it was possible to do so. The Commission should not set itself an impossible task and try to cover everything that fell outside the sphere of State responsibility, but should seek to deal with what was essential. That would be difficult enough.

19. In his view, liability based on risk presented three definite advantages. The first was that the notion of risk made it possible to pin-point the topic and its limits. The topic had, after all, been on the Commission's agenda for 10 years, and it was no use continuing to wander aimlessly around in such a broad field as liability. What was needed was an anchor, and the Special Rapporteur had rightly endeavoured to convince the Commission that risk would provide a better one than harm, although he had followed the idea of his predecessor, the late Robert Q. Quentin-Baxter, in recognizing the continuum of risk and harm.

20. The second advantage of the notion of risk was that it gave greater unity and coherence to the topic and would thus make it easier to define the area of progressive development and codification of the law in that field. Risk, by introducing a clearer line of demarcation, made the whole topic more specific, as compared with that of State responsibility. Harm, on the other hand, was common to both systems of liability, and transboundary harm could result from lawful or unlawful acts, or indeed from a combination of both. It was in seeking to determine the conditions governing reparation, and hence the origin of the harm caused, that the differentiation appeared. It was therefore necessary to

move back along the chain of causality to the source of the harm, as the Special Rapporteur had suggested, in order to determine liability. If the source lay in a fault, the injured State had to prove the existence of that fault. If the source lay in risk, the injured State simply had to prove that there was a causal link between the source and the harm.

21. The third advantage was that risk went to the heart of the topic, for it was the main source of the harmful transboundary effects of dangerous activities or things. Most harm likely to affect a State, originating in another State, arose from activities or things involving risk. It would be a major step forward, therefore, if the international community could now provide, by way of prevention or reparation, for the consequences of all activities involving risk.

22. He appreciated the concern of those who wished to go further, but the Commission should not be over-ambitious. It was better to start with a hard core of liability arising out of dangerous activities or things not prohibited by international law and, from that point of departure, pave the way for subsequent developments. Once the hard core question had been resolved, it would be easier to persuade States to accept an extension of liability. For all those reasons, he was in favour of considering risk as the basis of the structure of the draft, though he was aware of the limits of that approach. Those limits could be considered further in due course.

23. The Special Rapporteur had said (*ibid.*, para. 39) that he did not believe there was a rule of general international law which imposed an obligation to make reparation for harm; but he had also intimated that such a rule might possibly exist if reference were had to risk, for he seemed to deduce (*ibid.*, para. 44) that an obligation arose *a priori* for States on the basis of the notion of risk. That very subtle reasoning was based on the idea of a continuum of risk and harm. Thus there was what might be termed a potential obligation based on the existence of risk, which became an actual obligation as soon as harm occurred. In the existing state of international law, however, an obligation linked to risk was more a matter for progressive development of the law than for its codification, for it was hard to find any rule based on an obligation related simply to risk. None the less, he would favour such a development of international law, provided it was delimited by risk.

24. He would submit, however, that there was a more solid basis in international law for the attribution of responsibility relating to risk. One of the fundamental principles of relations between States was good-neighbourliness, a concept incorporated in the Preamble and in Article 74 of the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.<sup>6</sup> The principle of good-neighbourliness went beyond mere geographical proximity and had larger implications. An example was to be found in the arbitral award of 17 July 1986 in the *Gulf*

*of Saint Lawrence* case.<sup>7</sup> Paragraph 27 of that award stated that, while the concept of neighbourliness was generally used to designate a situation of geographical proximity, it was used more specifically in legal language to characterize situations of proximity which, because they threatened to create constant friction, required continual collaboration on the part of nationals or public officials of two or more States whose activities overlapped in a single geographical area. Thus where, in the interests of good-neighbourliness, States refrained from creating situations that might be injurious, the element of risk was clearly involved.

25. As to the nature of risk, which the Special Rapporteur analysed in his report (*ibid.*, paras. 24-31), it was clear that one could expand or reduce the scope of liability according to the definition of risk adopted. The Special Rapporteur proposed three criteria to help define appreciable risk: it must be identifiable by virtue of the physical characteristics of the thing or activity concerned; it must be related to a general activity, not to a specific case; and it must be objective, not dependent on the point of view of a single party, be it the State of origin or the affected State.

26. Those criteria were useful in preventing the notion of risk from remaining unduly abstract. But, in his search for precision, the Special Rapporteur had met with a serious difficulty relating to the notion of hidden or imperceptible risk; he acknowledged that difficulty in the report (*ibid.*, para. 27), where he stated that hidden risk might be outside the scope of the draft. He himself was inclined to agree with that analysis, because the definition of risk as it now stood was clearly inadequate. For example, if major injury was inflicted in a situation where no perceptible risk could be discerned, would the affected State alone be required to bear the burden? Such a position would be extremely difficult to justify, especially as some legal systems already attributed responsibility for such events. Of course, internal law and international law were not really comparable, but the logic underlying the liability régime in some countries could be applied to the Commission's reflections on hidden risk. Linking liability with dangerous activities or things was already a good beginning, and the Commission could go further into the problem in the future.

27. Another deficiency in the draft articles became evident in connection with activities whose injurious effects occurred by accumulation or with the passage of time. An example could be drawn from another topic on the Commission's agenda, that of the law of the non-navigational uses of international watercourses. Suppose affluents from country A and country B ran into a river that passed through country C; that country A discharged pollutants into its affluent in reasonable amounts, and subsequently country B began to do the same; and that, when the waters of those affluents reached country C, the acceptable level of pollution had been exceeded. What could country C do? Was country A exonerated because its activity was not injurious in itself? Should country B bear the full responsibility for

<sup>6</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>7</sup> For the text of the award (in French), see *Revue générale de droit international public* (Paris), vol. 90 (1986), pp. 713 *et seq.*

the pollution? Such a situation was clearly unacceptable: it involved the sovereignty of States in performing lawful activities. It was clear from that example that the identification and description of risk were still surrounded by a great many problems that had yet to be solved.

28. He endorsed the new version of draft article 1 and approved of the Special Rapporteur's strategy of limiting the scope of the draft to risk and omitting any reference to the concept of "territory". He particularly approved of the incorporation in article 1 of language used in the 1982 United Nations Convention on the Law of the Sea, and suggested that that approach should be taken a step further. The phrase "activities carried on under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State" should be replaced by "activities under the jurisdiction or control of a State", which was shorter, clearer and less problematic wording. The reference to "effective control" was not appropriate in article 1 and could cause more difficulties than it resolved.

29. Mr. FRANCIS said that the fourth report of the Special Rapporteur (A/CN.4/413) provided an excellent basis for progress in the Commission's work. The scholarship was of a high order, the content was evocative, and all the elements on which further reflection was necessary were touched upon. The Special Rapporteur was also to be commended for his efforts to accommodate all points of view. He (Mr. Francis) supported referral of the draft articles to the Drafting Committee.

30. Despite the merits of the report, however, he could not say that he agreed with every aspect of the draft articles. As others had pointed out before him, the Special Rapporteur had confined the scope of the draft within narrow limits. In draft article 1, he had deliberately omitted the reference to "situations" which had appeared in the draft articles submitted in 1984<sup>9</sup> and had retained only the word "activities". He would urge that the Commission consider reinstating the former wording, because it was more comprehensive than the present text. For example, contamination of a river arising from a deficient sewerage system in an upper riparian State which did not have the technical or financial resources required for pollution control could not be described as an "activity"; it was a "situation" that threatened to persist indefinitely unless corrected.

31. He did not entirely agree with Mr. Mahiou about the draft's emphasis on the notion of risk, because the effect was to leave in a twilight zone transboundary harm originating from activities not involving obvious risk. In principle, the difference between activities involving risk and those involving hazard and ultra-hazardous elements was minimal. A hazardous or ultra-hazardous situation would alert the State of origin to the need for effective preventive mechanisms that would enable it, in the event of an accident, to contain the damage and reduce the extent of reparation. For the affected State, the same situation would cause more exten-

sive damage, and more extensive reparation would be required.

32. Unless the Commission so decided, the Special Rapporteur could not broaden the scope of the articles beyond the confines of the schematic outline or extend it to areas in which prohibitions had already been laid down by international law. In that context, Mr. Beesley's comments (2045th meeting) about the sea-bed beyond national jurisdiction and the ozone layer were most pertinent. Such matters should be given urgent consideration, as should the question whether initiatives could be taken, and if so, by what authorities. He therefore agreed with those members who would like to see the Commission's work cover matters that fell within the scope of the topic but had not yet been addressed. Yet the slow pace at which the work was advancing, and the need to take the latest scientific developments into account, had already caused much concern within the United Nations. If broader aspects of the topic were introduced into the Commission's work at the present stage, its conclusion would be delayed still more. The Commission should therefore pursue its efforts along the lines laid down in the original schematic outline and leave other areas of concern for parallel action at a higher institutional level.

33. Some members had said that the Special Rapporteur had devoted greater attention to risk than to harm. Personally, he could not fault him on his formulation; it had been necessary to focus on risk in order to deal properly with commensurate reparation. But he was not quite satisfied with the expression "appreciable risk" in draft article 1; he wondered how appreciable the risk had to be. For example, with regard to the expression "appreciable harm", tear-gas used by security forces caused passing discomfort, but its effect was hardly comparable with that of toxic fumes. If the eyes began to burn, the harm caused was likely to be appreciable. There, "appreciable" could, he suggested, be taken as meaning more than superficial. However, with regard to "risk", any more detailed formulation would be unnecessary. As the previous Special Rapporteur had pointed out in his preliminary report on the topic:

. . . It satisfies the internal logic of the present topic that . . . States have a duty to find the specific content of the criterion of "harm" whenever the occasion arises, and to govern themselves accordingly.<sup>9</sup>

34. Regarding the attribution of liability, he agreed with the Special Rapporteur's basic analysis and conclusions, but entered the *caveat* that developing countries, notwithstanding the mitigating circumstances mentioned in the report (A/CN.4/413, para. 69), needed to promulgate legislation to protect their basic interests against the consequences of transboundary harm arising from the activities of private enterprises.

35. He suggested that the expression "transboundary injury", as it appeared in draft article 1, tended to widen the scope further than intended. The definition of "transboundary injury" in draft article 2 (c) was over-restrictive and tended to ignore States which exercised authority, but not jurisdiction as such, over an area

<sup>9</sup> See 2045th meeting, footnote 14.

<sup>9</sup> *Yearbook . . . 1980*, vol. II (Part One), p. 265, document A/CN.4/334 and Add.1 and 2, para. 64.

under their control. He thought that the jurisdiction of a State should not be qualified in article 1 by the phrase "as vested in it by international law". Article 2 drew a distinction between ordinary and hazardous activities; but he thought that the least that could be done was for the commentary to make it clear that the definition was all-embracing. To legislate against risk only would be very dangerous. To improve the definition of risk in article 2, he suggested that it should focus on the inherent danger of the substances or things used, or the manner of use, which in the circumstances made it probable or possible that harmful consequences would arise. There appeared to be some contradiction between the identification of "appreciable risk" as defined in article 2 (a) (ii) and the manner of identification described in paragraph 82 of the report.

36. As to draft article 5, he was satisfied that the intention was to leave room for situations where harm could be caused by wrongful acts covered by State responsibility. In draft article 9, the inclusion of the word "reasonable" tended to weaken the force of the preventive measures.

37. On the question of reparation, the underlying principles had been brought together in draft article 10, a particularly important article which covered the innocent party, reparation and negotiation. In that regard, he quoted a passage from the previous Special Rapporteur's third report:

... It is at the point of failure to make due reparation—and not until that point—that the procedures available under rules made pursuant to the present topic should become exhausted. Then—as in the case, for example, of the régime established by the Convention on International Liability for Damage Caused by Space Objects—it will be the failure to provide due reparation in respect of a loss or injury, and not the mere occurrence of that loss or injury, that engages the State's responsibility for wrongfulness.<sup>10</sup>

38. Mr. RAZAFINDRALAMBO paid tribute to the work of the Special Rapporteur. His fourth report (A/CN.4/413) constituted genuine progress towards the elaboration of an international instrument on the topic. As already pointed out, it was a topic which had been on the Commission's agenda for 10 years, since the appointment of the late Robert Q. Quentin-Baxter as Special Rapporteur in 1978. Nine successive reports had been submitted since then, four of them by the Special Rapporteur. Both past and present members of the Commission had thus had ample opportunity to express their views on the general orientation of the topic and its basic principles, as defined by the first Special Rapporteur, and their views were faithfully reflected in the schematic outline.

39. It was in the light of those views, and the views expressed in the Sixth Committee of the General Assembly, that the present Special Rapporteur had considered it an opportune moment to formulate the draft articles afresh in his fourth report. As he explained (*ibid.*, para. 4), the aim of the draft articles was to mark a stage prior to the drafting of detailed agreements concerning specific activities, a stage at which general obligations could be laid down. The report did not ex-

clude *a priori* the future extension of the topic to other fields. That point was clear from the statement that:

... the only obligations are those governed by the general duty to cooperate, namely to notify, inform and prevent. If injury occurs, there is no precisely specified compensation; instead, there is an obligation to negotiate in good faith to make reparation for the injury caused, possibly taking into account various factors such as those set forth in sections 6 and 7 of the schematic outline. (*Ibid.*, para. 6.)

He had much sympathy with the efforts of the Special Rapporteur to improve on the draft articles submitted in his third report (A/CN.4/405, para. 6).

40. He was chiefly concerned with the scope of the articles, as defined in draft article 1. He noted that the Special Rapporteur had eliminated the notion of a "situation". In his third report, that notion had embraced situations arising from human activities in the context of a causal chain of physical events. It was linked to such activities, and was an essential part of the causal connection between risk and harm. Although now omitted from draft article 1, the word "situations" remained in draft article 4, perhaps merely by an oversight.

41. In article 1, the term "jurisdiction" had replaced the term "territory". It had been explained that "jurisdiction" could denote areas larger than "territory". But that change required a more detailed formulation: it would be more accurate to refer to activities "in areas where another State exercises jurisdiction", as in draft article 2 (c). Article 1 referred to "the jurisdiction of a State as vested in it by international law": he did not find that a very useful formula. It was explained in the report (A/CN.4/413, para. 54) that the expression "under international law" (in art. 2 (c)) made it unnecessary to include the concept of "control". Yet article 1 continued to use the term "control" as an alternative to "jurisdiction". The Special Rapporteur explained (*ibid.*, para. 57) that the definition in article 1 was intended to cover not only activities carried on in territories over which a State had *de facto* jurisdiction, but also activities carried on by the State itself in any jurisdiction, its own or another. It must therefore be assumed that he was drawing a distinction between the State of origin and the affected State; but the juxtaposition of the two notions of jurisdiction under international law and control would be redundant in the case of the affected State. That was clear from draft article 2 (c), which did not mention control, but only the exercise of jurisdiction by a State other than the one having suffered transboundary injury. If he was correct in assuming that such a distinction had been made, it was a most unfortunate one. In his view, the notion of control would be justified in both cases, that of the State of origin and that of the affected State.

42. The idea of control should also be more closely defined: was it political, legal, economic, or some other kind of control? A definition would not, of course, be necessary if control were taken to refer to the activities and not, like the concept of jurisdiction, to geographical areas. But the precise scope of the term "control" was not an academic question; it had, indeed, been raised in the Sixth Committee. What the Special Rapporteur had in mind was "effective control", indicating that it referred only to the activities. That appeared also to have been the intention of the previous Special Rapporteur in

<sup>10</sup> Yearbook ... 1982, vol. II (Part One), p. 55, document A/CN.4/360, para. 17.

section 1.1 of the schematic outline, which had been followed by the present Special Rapporteur in article 1 as proposed in his third report (A/CN.4/405, para. 6). As then worded, the article had been clearer, because what was controlled was the territory; but when the notion of jurisdiction had been substituted for that of territory, the article had suffered a loss of clarity, at least in French. To avoid ambiguity, the Special Rapporteur should elaborate on the point in the commentary. It should be made clear that the State of origin was responsible only for activities directly under its control. Many foreign enterprises located in developing countries were outside the effective control of the authorities of those countries, which did not have adequate financial or technical means to control their activities. A noteworthy example had been the disaster at Bhopal in India. Since the concept of control was integral to the system, he wondered if it was really necessary for article 1 to specify that jurisdiction was vested in a State by international law. That was a point for the Special Rapporteur to reconsider.

43. Previous speakers had maintained that the Special Rapporteur had over-emphasized "risk" to the detriment of "harm", and had pointed out that significant harm sometimes occurred where the risk appeared to be minimal or non-existent. In his view, however, because the Special Rapporteur had sought to justify a régime of basic, non-binding obligations, he had been correct to identify two successive stages: the *ex ante* stage and the *ex post facto* stage. Most of the obligations he had defined could not be fully justified at the first stage, and to proceed forthwith to the second stage, at which the harm became manifest, would deprive the preventive measures of much of their substance. Under the system recommended by the Special Rapporteur, the risk must exist at the beginning of the causal chain, the harm being simply its culmination. Ultimately, if there was no risk, there was no harm, since, as the Special Rapporteur explained in his fourth report (A/CN.4/413, para. 44), the risk formed a continuum with the harm; harm arising from another cause was not part of the subject-matter. For developing countries, the notion of risk was crucially important, since it offered a vital protective barrier against the harmful consequences of activities pursued on their territory by foreign enterprises, which they had initially been assured would be free of risk.

44. The amended wording proposed for draft article 3, dealing with the attribution of liability, was not entirely satisfactory. The expression "activity involving risk" appeared to reduce the force of the condition laid down in the article. The expression was, in fact, defined in draft article 2 (b) as meaning the activities referred to in article 1. Article 1, in turn, defined the activities contemplated as those carried on under the jurisdiction or effective control of a State, and creating appreciable risk. Logically speaking, that dual condition was therefore contained in the expression "activity involving risk"; but such interlocking references were not wholly felicitous, and for the sake of clarity a more detailed formulation should be attempted, such as the one in draft article 4 as submitted in the third report. He agreed with other speakers that the new draft article 3 raised a question of evidence, and that it was for the

State of origin to prove that it neither knew nor had means of knowing of the risk. Accordingly, as the Special Rapporteur explained (*ibid.*, para. 70), there was a presumption that, in principle, a State had means of knowing of the risk.

45. With regard to chapter II of the draft, on principles, he believed that the obligations there set out were the only ones which States could realistically be expected to endorse in the present state of international law and State practice. They were inspired by Principles 6 and 21 of the Stockholm Declaration,<sup>11</sup> and emphasized the sovereignty of States over their natural resources. Draft article 7, on co-operation, could, like article 15 [16] of the draft articles on the law of the non-navigational uses of international watercourses (see 2050th meeting, para. 1), be understood to refer to the obligations to notify, inform and prevent. If it was decided to retain draft article 8, on participation, it could form the third paragraph of article 7. In his view, prevention was sufficiently important to warrant a separate article. As to reparation, there seemed to be no justification for the negative formulation used in draft article 10 to relieve the innocent victim of the sole burden. In his view, it would be better to require the State of origin to assume liability for some part of the harm caused by activities carried on within its jurisdiction or under its effective control.

46. Subject to those comments, he saw no reason why the draft articles should not be referred to the Drafting Committee. He congratulated the Special Rapporteur on his efforts to complete the drafting of a set of articles during the Commission's current term of office.

47. Mr. SEPÚLVEDA GUTIÉRREZ commended the Special Rapporteur for his lucid and thorough fourth report (A/CN.4/413) on a very controversial topic, one on which there were many different views among legal scholars and divergent positions among States. For his part, he felt bound to express reservations on some points in the report, which nevertheless provided an excellent basis for the Commission's work.

48. In the first place, the title of the topic needed improvement. He found the formula "acts not prohibited by international law" lacking in clarity. It was difficult to see what acts it was intended to cover, bearing in mind the effects of technological progress and the threats to the environment. The amended title suggested by Mr. Eiriksson (para. 7 above) should therefore be given careful consideration.

49. As to the approach to be adopted, like some other members he favoured basing the draft on the concept of harm (*daño*). That formulation would give a clearer and more precise idea of the attribution of liability to the State in which the cause of the harm originated. The concept of risk embodied in the draft articles tended to obscure the concept of liability, as well as that of reparation.

50. He approved of the decision not to include in the draft any list of activities which caused harm. The greatest possible number of such activities should,

<sup>11</sup> See 2044th meeting, footnote 8.

however, be listed in the commentaries, including even activities not carried on in the territory of a State. A case in point was that of the dumping of toxic substances or nuclear waste in the high seas. There were also some activities, such as those causing acid rain, which originated in more than one State. It had to be admitted that the study of the many factors which produced harm to another State—including a remote State—was still at a very early stage.

51. With regard to the proposed draft articles, he reiterated his strong preference for replacing the concept of "risk" by that of "harm", which should govern the drafting throughout.

52. Draft article 1 referred to activities carried on "under the jurisdiction of a State" or "under the effective control of the State". That formulation was inadequate, because there existed other activities and situations that were neither under the jurisdiction of a State nor under its effective control. Article 1 would have to be reformulated to cover those other activities and situations. From that viewpoint, the expression "causing transboundary injury" was not sufficiently precise and should be replaced by a reference to "harm to another State".

53. In draft article 2, on the use of terms, it should be possible to include more terms in the list. Among the terms defined, he found the expression "the use of things" in subparagraph (d) unduly restrictive. The term "things" would exclude operations or experiments, which could cause appreciable harm to other States.

54. Referring to draft article 3, he stressed that attribution was a key concept with regard to liability. The rule in article 3 should therefore be carefully revised and expanded. The time had not yet come to propose a rewording of the article, but the matter should be kept under review. He agreed with Mr. Beesley (2045th meeting) that draft article 4 was unnecessary and could be deleted.

55. He had some reservations on draft article 5, which weakened the concept of liability. The drafting of the article should perhaps be tightened.

56. Draft article 6, the first article in chapter II (Principles), laid down the vital principle of the freedom of action of States. The article should be drafted with the utmost precision, since the recognition of freedom for States should be balanced by recognition of responsibility for their activities.

57. With regard to draft article 7, he agreed with those speakers who had advocated a more thorough treatment of the duty to co-operate by specifying timely exchange of information, consultation and effective international arrangements to avoid harm.

58. Draft article 8 could conveniently be deleted without loss to the draft, as already suggested by some previous speakers.

59. The principle of prevention, on the other hand, which was the subject of draft article 9, was vital. That article should therefore be expanded by introducing references to the notion of harm and to the duty of reparation.

60. Lastly, he had some doubts regarding draft article 10, on reparation. The question of retaining that article in the draft had been raised during the discussion. For his part, he thought it should be included, but carefully revised so as to cover such matters as the obligation to suspend dangerous or harmful activities. Some reference should also be made to means of settlement, either in article 10 or elsewhere in the draft, though perhaps it was too early to discuss that point.

61. Mr. BEESLEY drew the Commission's attention to two documents of the forty-second session of the General Assembly which were particularly relevant to the present topic, as well as to that of the law of the non-navigational uses of international watercourses. Those documents were the Environmental Perspective to the Year 2000 and Beyond, prepared by UNEP,<sup>12</sup> and the Brundtland Commission's report, "Our common future".<sup>13</sup> Both documents stressed the need to safeguard the environment and to develop resources rationally in order to avert a global catastrophe. Both singled out the key role which the progressive development of international law must play in meeting that need.

62. The Brundtland Commission report called for a universal declaration on environmental protection and sustainable development, to be the basis for a convention, and emphasized the need to consolidate and extend the relevant legal principles. To that end, a set of draft legal principles was included in an annex to the report.<sup>14</sup> In resolution 42/187 of 11 December 1987, the General Assembly welcomed and endorsed the report and decided to transmit it to all Governments and all organs, organizations and programmes of the United Nations system. Under the terms of that resolution, it might have been expected that the International Law Commission would have been among the recipients of the report, but that had not been the case. His comments applied similarly to the UNEP study, which contained a call for progressive development of international environmental law "with a view to providing a strong basis for fostering co-operation among countries" (para. 103). Paragraph 7 of General Assembly resolution 42/186 called for special attention to section IV of that study, which was the section containing the call for progressive development of legal principles.

63. He therefore suggested that the Secretary to the Commission should make arrangements for the two documents in question to be made available to members in all the official languages.

64. The CHAIRMAN said that the Secretariat would ensure that those documents were made available.

*The meeting rose at 1 p.m.*

<sup>12</sup> General Assembly resolution 42/186 of 11 December 1987, annex.

<sup>13</sup> A/42/427, annex.

<sup>14</sup> See 2047th meeting, footnote 12.

## 2049th MEETING

Friday, 20 May 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/384,<sup>1</sup> A/CN.4/405,<sup>2</sup> A/CN.4/413,<sup>3</sup> A/CN.4/L.420, sect. D)<sup>4</sup>

[Agenda item 7]

### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

- ARTICLE 1 (Scope of the present articles)
- ARTICLE 2 (Use of terms)
- ARTICLE 3 (Attribution)
- ARTICLE 4 (Relationship between the present articles and other international agreements)
- ARTICLE 5 (Absence of effect upon other rules of international law)
- ARTICLE 6 (Freedom of action and the limits thereto)
- ARTICLE 7 (Co-operation)
- ARTICLE 8 (Participation)
- ARTICLE 9 (Prevention) and
- ARTICLE 10 (Reparation)<sup>5</sup> (continued)

1. Mr. ROUCOUNAS stressed the importance of the Special Rapporteur's fourth report (A/CN.4/413) and of the discussion to which it had given rise and pointed out that the Special Rapporteur appeared to be fully aware of the fact that the topic, despite its promising title, was really intended to establish a residual régime for those intermediate cases in which an activity that was not governed by international law caused harm which called for compensation. Accordingly, the proposals in paragraphs 10, 11 and 47 of the report seemed to go too far.

2. Similarly, the Special Rapporteur's decision not to submit an indicative list of harmful activities, which cast doubt on the existence of a rule of international law pro-

hibiting transboundary pollution, seemed surprising. Indeed, one could not fail to note the proliferation in recent years of multilateral, and still more of bilateral, instruments on international protection of the environment, particularly the 1982 United Nations Convention on the Law of the Sea, which confirmed and developed rules already contained in the IMO conventions relating to the protection of the marine environment, as well as the Convention on Early Notification of a Nuclear Accident<sup>6</sup> and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency,<sup>7</sup> both adopted by IAEA in 1986, the 1985 Vienna Convention for the Protection of the Ozone Layer<sup>8</sup> and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>9</sup> In addition, there was abundant legal opinion along the same lines, as well as texts prepared by learned societies, such as the resolution on transboundary air pollution adopted by the Institute of International Law at its Cairo session on 20 September 1987.<sup>10</sup> The preamble and articles 2 and 6 of that resolution deserved particular mention. The fact that the international case-law on the question was not abundant could be attributed mainly to the preferences of the parties with regard to jurisdiction. It should be emphasized, however, that the ICJ had for some 20 years consistently and boldly reaffirmed the fundamental role of custom in the international legal order.

3. The Commission should not stand aside from such endeavours to regulate the matter of pollution, even though a bold approach might be needed, as had already been the case with the distinction drawn between "international crimes" and "international delicts" in article 19 of part I of the draft articles on State responsibility.<sup>11</sup> If one admitted that there existed a general rule of international law under which it was prohibited to cause harm to the territory of another State by either lawful or wrongful activities, the Commission had to define the scope of the topic, since the boundary between what was lawful and what was wrongful was not watertight. In fact, that question had arisen from the outset and the situation had not changed since. The draft articles under consideration were intended to be applied in at least three different situations: (a) where no procedural rules existed for the reparation of appreciable harm; (b) where an activity was in the process of being prohibited; (c) lastly, and chiefly, where the question of the lawfulness or wrongfulness of an activity having harmful consequences did not arise for the States concerned, which were in any event ready to deal with the harm.

4. Strictly speaking, the draft articles were intended solely for the purpose of linking an activity having harmful transboundary effects with the duty to make reparation, a duty that would then become a primary obligation: non-performance of the primary obligation would entail the responsibility of the State concerned

<sup>1</sup> Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

<sup>5</sup> For the texts, see 2044th meeting, para. 13.

<sup>6</sup> IAEA, Legal Series No. 14 (Vienna, 1987), p. 1.

<sup>7</sup> *Ibid.*, p. 9.

<sup>8</sup> UNEP, Nairobi, 1985.

<sup>9</sup> UNEP, Nairobi, 1987.

<sup>10</sup> See *Yearbook of the Institute of International Law, 1987*, vol. 62 (part II), p. 296.

<sup>11</sup> See 2045th meeting, footnote 6.

for what was a wrongful act. From the start, however, the two Special Rapporteurs successively entrusted with the topic had sought to formulate an obligation of prevention which would also be considered as a primary obligation. The draft articles thus revolved around two poles: reparation and prevention, with risk as the legal basis. The concept of risk appeared expressly for the first time, and very emphatically, in the present fourth report. He saw no difficulty in maintaining that concept of risk, which, as Mr. Calero Rodrigues (2045th meeting) had pointed out, could in a way strengthen prevention, provided of course that it did not have the effect of restricting even more a scope of application that was already limited. Hence, like other members of the Commission, he did not favour the concept of "appreciable" risk, in the first place because it would shorten still further the list of dangerous things, but chiefly because it would exclude "hidden" risks which, in the event of harm, should also give rise to reparation.

5. Draft articles 1 to 3 made unduly frequent, and perhaps excessive, use of the term "risk". As to draft article 1, in the first place it did not specify who was to be the beneficiary of the right to reparation, and in the second place the scope of the draft should be extended to cover activities which were conducted in areas that were not under the jurisdiction or control of any State but nevertheless produced harmful effects from those areas. Technical developments had made frontiers meaningless and any appreciable harm could be expected sooner or later to affect some third State. It would therefore be useful to reaffirm, in addition to the principle of the protection of the territorial sovereignty of States, another principle, cherished by the Commission, namely the "interest of the international community as a whole", so that the draft could encompass all possible sources of injury.

6. It would be appropriate to define in draft article 2 (b) the concept of an "activity involving risk". Since natural events were not to be covered, it was necessary to specify that the risks envisaged were those directly or indirectly caused by man, as in the case of the 1976 Convention for the Protection of the Mediterranean Sea against Pollution<sup>12</sup> (art. 2 (a)), not to mention the risks resulting from man's failure to take action.

7. Care should be taken to give certain terms used in draft article 3, such as "attribution", the same meaning as in other instruments. In that connection, the Special Rapporteur might include among the opening provisions a new article along the lines of article 139, paragraph 1, of the United Nations Convention on the Law of the Sea, which would provide:

"States shall have the responsibility to ensure that activities carried out by them or by State enterprises or natural or juridical persons which possess their nationality or are effectively controlled by them or their nationals shall be carried out in conformity with the provisions that follow relating to prevention."

In addition, the problem of the burden of proof and, with regard to imputability, such questions as the consent of the injured State were bound to arise. With

regard to knowledge by the State that an activity involving risk was being or was about to be carried on in areas under its jurisdiction or control, he was indeed ready to discuss the matter. But he would stress that the observation made by the ICJ in its judgment in the *Corfu Channel* case (see A/CN.4/413, para. 63)—and actually repeated by the Court in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*<sup>13</sup>—concerned wrongful activities which were conducted on the territory of a State and of which that State had a more or less precise knowledge. That observation did not therefore appear to be applicable to the present draft articles, the basic purpose of which was the reparation of harm caused by modern techniques.

8. Draft article 4 still referred to "situations", a term which the Special Rapporteur had decided to discard. Lastly, it would be enough to redraft article 5 so as to indicate the residuary character of the draft, reaffirming at the same time the primacy of general international law.

9. Mr. OGISO, after congratulating the Special Rapporteur on his fourth report (A/CN.4/413), said that, of the three principles put forward in paragraph 85, the third—to the effect that "an innocent victim of transboundary injurious effects should not be left to bear his loss"—appeared to be new and should accordingly be examined with greater care. The Special Rapporteur added that the three principles were stated only for preliminary guidance (*ibid.*, para. 86), that the report was not concerned with establishing whether the principles reflected general international law (*ibid.*, para. 89) and that they were being proposed simply as part of the progressive development of international law (*ibid.*, para. 90). Moreover, the Special Rapporteur had rejected the suggestion by some members of the Commission that a list of dangerous activities be drawn up and had explained his reasons for doing so (*ibid.*, paras. 4, 6 and 7). His own conclusion was, therefore, that the Special Rapporteur recognized that any activity presupposed a precise, exacting obligation of prevention, without which no international measures of prevention and reparation could be effective, and that the Commission, in order to continue its consideration of the topic, stood in need of the co-operation of competent international organizations such as IAEA and UNEP.

10. It was gratifying that the Special Rapporteur had considered the question of creeping pollution, or pollution by accumulation (*ibid.*, paras. 8-15). Japan had had an unfortunate experience in that regard and, although the experience had not been international in dimensions, it could help to shed light on the question. In 1953, an extremely serious disease of the nervous system had emerged in the Kumamoto region in southern Japan, on the shores of Minamata Bay. It had later been discovered that a factory producing a chemical which was not poisonous had been discharging into the Bay methyl chloride and mercury in quantities which were not considered dangerous but which, over the years, had contaminated the marine flora and fauna by accumulation. The inhabitants of the area used to eat

<sup>12</sup> UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983), p. 448.

<sup>13</sup> Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

fish from the Bay, whence the name of Minamata disease. At the time the disease had first appeared, however, the injury could not be connected with any “appreciable risk” and only in 1968 had the Ministry of Public Health officially acknowledged that the cause had been the waste discharged by the factory. Thus it had taken more than 10 years after the first appearance of the disease for the Government officially to recognize its origin. Numerous lawsuits had followed, and most of them were still pending. Certain important decisions, however, had already been rendered in those cases. First, the president of the company concerned and the manager of the factory had been convicted of accidental homicide by the district court and also on appeal. Secondly, the district court had in one case sentenced the company to pay damages to the persons affected by the disease or to the dependants of persons who had died of it. Thirdly, the same district court had ruled that the Government, because it had not reacted fast enough when the disease had appeared, was liable to the affected persons because of that negligence. The characteristic feature of all those decisions was that the liability attributed to the company, the State or the local authorities was based on fault: the courts, while admitting that the operator of a factory manufacturing chemical products had a duty to observe particularly strict safety standards, had not based their decisions on strict liability. Despite their purely internal character, those cases could be of interest for the topic under consideration, if only because, when the disease had appeared for the first time, the risk had not been “appreciable” since the disease had been unknown.

11. Turning to the draft articles, the concept of “appreciable” risk, which was being proposed as the threshold for attributing liability under draft article 1, was unduly subjective. Unlike injury, which was also qualified as “appreciable” but which constituted a physical phenomenon, risk was an abstract notion, a probability or a possibility of a scale that was much more difficult to assess. Besides, if that notion were to be retained, the effect would be to exclude the case—already mentioned—of an extremely low risk which, once it materialized, could cause major harm. The Special Rapporteur, moreover, appeared to use the expressions “appreciable risk” and “appreciable injury” interchangeably, stating as he did (*ibid.*, para. 41) that “for the time being, the focus should be on appreciable injury, since we have already seen that there seems to be a universal consensus that, below this threshold, injury should be tolerated”. By tolerable injury, the Special Rapporteur appeared to mean negligible injury, whether it had its origin in appreciable risk or not. On the other hand, in draft article 10, which stated that “injury caused by an activity involving risk must not affect the innocent victim alone”, the Special Rapporteur appeared to be saying that only injury caused by an activity involving risk should give rise to reparation. Some clarification was desirable on that point. In any event, it would have to be decided whether the concept of risk, or appreciable risk, was to be adopted as the threshold of liability.

12. With regard to draft article 3, the condition contained in the formula “provided that it knew or had means of knowing that an activity involving risk was be-

ing, or was about to be, carried on in areas under its jurisdiction or control”, a proviso which related to the special position of developing countries, might in fact detract in part from the effectiveness of the principle whereby the innocent victim must not be left to bear the loss alone. Accordingly, the proviso should be deleted or at least altered so that the burden of proof lay with the State of origin to prove that it did not know, or had no means of knowing. It should be noted that the affected State as well as the State of origin could well be a developing State.

13. With reference to draft article 6, he agreed with the Special Rapporteur that it was preferable not to refer to “interests”, a term which could be a source of ambiguity. Nevertheless, if the exercise of the freedom recognized in that article affected the health of the population of a neighbouring State as a result of transboundary pollution and a causal relationship was established, the State of origin could be regarded as having abused its freedom, and the question would then be one of State responsibility.

14. The Special Rapporteur had been right to stress in draft article 9 the duty of the State of origin to take measures to prevent or minimize injury that might result from an activity involving risk. Personally, however, he was not at all convinced that the concept of risk should play a role at the reparation stage. Draft article 10 provided that injury resulting from an activity involving risk must not affect the innocent victim alone. Yet, according to the explanation given by the Special Rapporteur, if appreciable injury was caused by an activity, that activity would be assumed to have involved a certain risk from the outset, so that the State of origin was under an obligation to make reparation for the injury, regardless of the extent of the risk before the incident occurred. Why, therefore, was it necessary to state, as did article 10, that only “injury caused by an activity involving risk” gave rise to liability?

15. Although he was not at all certain of its utility, he was not opposed to retaining draft article 10, if it was intended to state general guidelines for the elaboration of conventions on specific activities. Admittedly, there had been cases in which the principle of strict liability had been included by agreement of the parties, for specific activities, but that had been done only with regard to those activities, in the light of their specific features and with the aim of adopting a special legal régime, for example in order to concentrate liability upon an operator or to set a maximum ceiling in the matter of insurance. He had no objection to the question of strict liability being examined at a later stage, particularly in respect of activities involving a low risk but capable of causing large-scale harm if the risk materialized. If, however, the Special Rapporteur intended to open the door to the application of strict liability as a general principle of international law, he was likely to encounter the resistance of a great many Governments. It should be noted in that respect that even the 1963 Vienna Convention on Civil Liability for Nuclear Damage had so far been ratified by only 10 States, none of them a nuclear power. In addition, the internal legislation of many countries was still based on fault liability.

16. Mr. FRANCIS said he wished to dispel a misunderstanding which had arisen on his part at the previous meeting in connection with Mr. Mahiou's statement and wished to make it clear that he was now in full agreement with Mr. Mahiou's views on the concept of risk. In addition, his own remarks on that concept, and in particular on draft article 1, might have been misunderstood. He had sought essentially to say that the article should cover not only activities involving risk, but also other activities. In any case, he would be submitting a suggested definition of "risk" to the Drafting Committee. He had not been present when Mr. Eiriksson had spoken on article 1 at the previous meeting, but having since been informed of his views, he entirely agreed with him about that article.

17. The Special Rapporteur had not incorporated in the draft articles the provisions of article 5 as proposed by the previous Special Rapporteur,<sup>14</sup> whereby the rules of the draft were made conditionally applicable to international organizations. The 1982 United Nations Convention on the Law of the Sea (art. 156) provided for the establishment of an International Sea-Bed Authority which could very well find itself in the same position as an affected State or a State of origin. He therefore suggested that the Special Rapporteur should consider the desirability of including similar provisions making the rules conditionally applicable to international organizations.

18. Mr. McCAFFREY invited the Commission to reflect on three specific points raised in the course of a discussion that was particularly rich because of the calibre of the report on which it was based.

19. The first point was the concept of "effective control" appearing in draft article 1. The Special Rapporteur dealt with it in his fourth report (A/CN.4/413, paras. 19 and 21) without really explaining it, whereas a distinction should be made between *de facto* control and *de jure* control. In a general manner, in any case, the concept was tied in with the requirement of "knowledge or means of knowing" (*ibid.*, paras. 61-70). Clearly, it was impossible to control an activity unless its existence was known. The reasoning developed by the ICJ in the *Corfu Channel* case (*ibid.*, para. 63) seemed to concern *de jure* control. The distinction was an important one in that, if "effective control" was to be retained as the criterion for the attribution of liability, consideration would also have to be given to the allocation of the burden of proof—a question that could well be crucial in an actual case.

20. In that connection, it was also necessary to consider, as the Special Rapporteur had rightly done, the situation of developing countries, some of which were major exporters of substances involving risk. If a case arose between one of those countries and another developing country, it would not be possible to determine who should bear the burden of proof solely on the basis of "knowledge or means of knowing". The "effective control" criterion therefore deserved more detailed scrutiny.

21. The second point was the concept of jurisdiction, which called for great caution, since it lay at the root of the attribution of liability. According to the Special Rapporteur, "the basis for attributing responsibility to a State is primarily territorial" (*ibid.*, para. 18). The origin of transboundary harm could indeed be on the territory of a State, but to what extent could a State be held responsible for all transboundary harm having its origin in any area, sphere or place under its jurisdiction? The answer was not simple, for, as pointed out by Mr. Graefrath (2047th meeting) it could happen that more than one State claimed "jurisdiction" over the same area. The Special Rapporteur referred briefly to the matter, but only incidentally (A/CN.4/413, para. 20). One might add that, even in the territory of some States there were sectors over which other States claimed to exercise jurisdiction. The ambiguity would have to be resolved in some way, in so far as jurisdiction could be claimed "extraterritorially", so to speak.

22. The third point was the concept of causal responsibility, viewed from the standpoint of "proximate cause", to use the expression employed by the Special Rapporteur (*ibid.*, para. 52). The idea of "proximate cause", which was so commonly used in academic circles, set a limit on the defendant's liability, by contrast with the notion of "cause in fact": in law, a sufficiently close link had to exist between the acts of the defendant and the harm imputed to him. The ruling by the United States-German Mixed Claims Commission, which the Special Rapporteur cited in that connection (*ibid.*), related to the "cause in fact" rather than the "proximate cause". The Special Rapporteur appeared to believe that, provided the event which caused the harm could be connected by an uninterrupted chain of causal links with the conduct of a State, the latter could be held liable. The notion of causal responsibility therefore had to be clarified, inasmuch as it was bound to emerge at the reparation stage, in other words in the assessment of the duty of reparation and of the amount of compensation.

23. In a different way, the notion of causal responsibility also arose at the stage of the attribution of liability. Mr. Ogiso had already mentioned the *Minamata* case. It was also possible, however, to mention other substances or products which had previously been considered harmless but had suddenly caused widespread harm: such had been the case in the United States of America with asbestos and with a particular contraceptive product. In the case of asbestos, the responsibilities involved had been so vast as to be beyond the capabilities of the judiciary and had had to be settled by legislation. Lastly, a case of transboundary pollution, namely *Michie v. Great Lakes Steel*, was interesting from the point of view of the burden of proof. In that instance, a number of Canadian citizens had instituted proceedings in the United States courts against a group of industries close to the border and the problem of causal responsibility had arisen because the defendants had claimed that the plaintiffs were incapable of specifying exactly which firm was producing the pollutants. The court had ruled that it was sufficient for the plaintiffs to establish the harm and that it was for the defendants themselves to identify which firm was ac-

<sup>14</sup> See 2045th meeting, footnote 14.

tually responsible. The burden of attributing liability had thus shifted onto the defendants.

24. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 11.30 a.m.*

## 2050th MEETING

*Tuesday, 24 May 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1)**

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPporteur\*

### PART IV OF THE DRAFT ARTICLES

1. The CHAIRMAN invited the Special Rapporteur to present the first part of his fourth report on the topic (A/CN.4/412 and Add.1 and 2), i.e. chapter I on the status of work on the topic and plan for future work, and chapter II, which dealt with exchange of data and information and which contained article 15 [16], reading as follows:

#### *Article 15 [16]. Regular exchange of data and information*

1. In order to ensure the equitable and reasonable utilization of an international watercourse [system], and to attain optimal utilization thereof, watercourse States shall co-operate in the regular exchange of reasonably available data and information concerning the physical characteristics of the watercourse, including those of a hydrological, meteorological and hydrogeological nature, and concerning present and planned uses thereof, unless no watercourse State is presently using or planning to use the international watercourse [system].

2. If a watercourse State is requested to provide data or information that are not reasonably available, it shall use its best efforts, in a spirit of co-operation, to comply with the request but may condition its compliance upon payment by the requesting watercourse State or other entity of the reasonable costs of collecting and, where appropriate, processing such data or information.

\* The international instruments referred to during the discussion are listed in the annex to the fourth report.

<sup>1</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

3. Watercourse States shall employ their best efforts to collect and, where necessary, to process data and information in a manner which facilitates their co-operative utilization by the other watercourse States to which they are disseminated.

4. Watercourse States shall inform other potentially affected watercourse States, as rapidly and fully as possible, of any condition or incident, or immediate threat thereof, affecting the international watercourse [system] that could result in a loss of human life, failure of a hydraulic work or other calamity in the other watercourse States.

5. A watercourse State is not obligated to provide other watercourse States with data or information that are vital to its national defence or security, but shall co-operate in good faith with the other watercourse States with a view to informing them as fully as possible under the circumstances concerning the general subjects to which the withheld material relates, or finding another mutually satisfactory solution.

2. Mr. McCaffrey (Special Rapporteur) reminded the Commission that, at its previous session, in 1987, it had provisionally adopted articles 2 to 7,<sup>3</sup> but had agreed to leave aside for the time being article 1 (Use of terms), and the question of using the term "system". It had decided to continue its work on the basis of the provisional working hypothesis accepted in 1980, and it had referred to the Drafting Committee draft articles 10 to 15<sup>4</sup> which he had submitted in 1987. The Drafting Committee thus remained seized of those six articles, as well as of article 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States)<sup>5</sup> which the Commission had referred to it at its thirty-sixth session, in 1984.

3. In his fourth report (A/CN.4/412 and Add.1 and 2, para. 7), he gave a tentative outline for the treatment of the topic as a whole. Part I of the draft articles (Introduction) would consist of articles 1 to 5. Part II (General principles) would contain articles 6 and 7, as well as the former articles 9 and 10, to be renumbered 8 and 9.<sup>6</sup> He proposed to include article 9 [10] among the general principles, in deference to the views expressed at the previous session. Part III (New uses and changes in existing uses) would contain articles 11 to 15, which would be renumbered 10 to 14. Part IV (Exchange of data and information) would consist of a single article, article 15 [16], which he would introduce shortly. Part V would deal with environmental protection, pollution and related matters, part VI with water-related hazards and dangers and part VII with the relationship between non-navigational and navigational uses.

4. Under the heading "Other matters", the outline mentioned a number of points on which the Commission might wish to make recommendations. They were matters on which no definite rules of international law had yet emerged and some of them were perhaps not capable of being the subject of such rules. He suggested that they should be dealt with in annexes to the draft articles, but the Commission might wish to cover some of them in the body of the draft.

<sup>3</sup> For the texts of articles 2 to 7 and the commentaries thereto, provisionally adopted by the Commission at its thirty-ninth session, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 25 *et seq.*

<sup>4</sup> For the texts, *ibid.*, pp. 21-23, footnotes 76 (art. 10) and 77 (arts. 11-15).

<sup>5</sup> *Ibid.*, p. 23, footnote 80.

<sup>6</sup> Since from article 8 onwards the draft articles had been renumbered in the Special Rapporteur's fourth report, the numbers attributed to them originally are indicated in square brackets.

5. He also proposed (*ibid.*, para. 8) a schedule for dealing with the remaining material, subject to any decisions the Commission might take concerning the substantive coverage of the topic and to the Commission's overall programme of work, including the possible staggering of the consideration of topics. He planned to submit one report each year, however, even if its consideration was to be deferred, so as to maintain a regular flow of material and avoid submitting too extensive a report in any one year.

6. The Commission would note that he planned to present, at the current session, the material relating to parts IV and V of the draft articles and, in 1989, that relating to parts VI and VII. Material on the annexes would be submitted in 1990 so that the Commission might complete its work on the whole topic on first reading in 1991, during the term of office of its current members, thereby achieving the objective it had set itself in its report on its previous session.<sup>7</sup>

7. Part V (Environmental protection, pollution and related matters), dealt with in chapter III of his fourth report, would be submitted later in the session. At the present stage, he would deal with part IV, on exchange of data and information. That subject had been introduced in his third report (A/CN.4/406 and Add.1 and 2), but the Commission had been unable to devote much time to it at the previous session. The Commission had discussed it at its thirty-second session, in 1980, and had referred to the Drafting Committee an article proposed by the then Special Rapporteur, Mr. Schwebel, entitled "Collection and exchange of information". The Committee, however, had been unable to consider the article for lack of time.

8. He wished to stress at the outset that the regular exchange of data and information was an issue distinct from that of notification of planned uses and new uses of an international watercourse, which had been dealt with in his third report and formed the subject of articles 10 [11] to 14 [15] now before the Drafting Committee. The text which he now proposed as article 15 [16] dealt with the ongoing form of exchange of information, not with *ad hoc* notification of plans for new uses.

9. The bedrock of the provision concerning the regular exchange of data and information was the general obligation of co-operation between States for the purpose of achieving the equitable and reasonable utilization of a watercourse. That point had been particularly stressed in the discussions in the Sixth Committee of the General Assembly. Clearly, in the absence of information on the watercourse outside its territory, it was difficult for a State to be sure that it was fulfilling its obligation to use the waters in an equitable and reasonable manner.

10. The fourth report contained a survey of State practice, of the work of intergovernmental and non-governmental bodies and of expert opinion on the topic (A/CN.4/412 and Add.1 and 2, paras. 15-26). Most of the authorities were given in the footnotes to make for easier reading of the text, which gave examples of the

action being taken by States to facilitate the regular exchange of information.

11. The material furnished could be divided into eight categories: (i) instruments containing general provisions on the regular collection and exchange of information, e.g. the 1964 Agreement between Poland and the Soviet Union concerning the use of water resources in frontier waters, article 8 of which required the parties to establish principles of co-operation governing the regular exchange of hydrological, hydrometeorological and hydrogeological information (*ibid.*, para. 16); (ii) the many international agreements requiring the exchange of data and information for the specific purpose of ensuring the equitable allocation and optimum utilization of waters (*ibid.*, para. 17); (iii) instruments providing for the exchange of information relating to the measurement of water flow, extractions, releases from reservoirs and the like (*ibid.*, para. 18); (iv) international instruments whereby States established observation stations, sometimes even on each other's territories, to facilitate the regular gathering of data and information (*ibid.*, para. 19); (v) agreements for joint research to determine the hydrological characteristics and development potential of a watercourse (*ibid.*, para. 21); (vi) agreements, declarations, resolutions and studies calling for the regular exchange of data and information for the effective protection of international watercourses, preservation of water quality and prevention of pollution (*ibid.*, para. 22); (vii) international instruments providing for the exchange of data and information when planned uses might adversely affect the other party (*ibid.*, para. 24); frequently the same article of a treaty dealt with both subjects; (viii) agreements concerning the duty to warn of water-related hazards or dangers (*ibid.*, para. 25); provisions of that kind were usually intended to deal with threats posed by floods, floating ice and pollution.

12. Introducing article 15 [16], which was alone to constitute part IV of the draft articles (Exchange of data and information), he observed that it could also have been placed immediately after article 9 [10], dealing with the obligation to co-operate. He himself did not attach much importance to the question of its position.

13. Paragraph 1 of the article set out the two purposes of the duty to exchange data and information. The first was "to ensure the equitable and reasonable utilization of an international watercourse"; the second was "to attain optimum utilization" thereof. Paragraph 1 also specified that watercourse States "shall co-operate in the regular exchange" of data and information. It was thus emphasized that provision was being made not for an *ad hoc* process but for a continuing one.

14. It was important that the exchange of data and information should take place not only on a regular basis, but also in a timely fashion, since information often lost its value as time passed. That point was stressed in paragraph (4) of the comments to article 15 [16]. Perhaps the time requirement should be moved to the body of the article.

15. The data and information referred to were qualified as being "reasonably available". The purpose of that qualification was to make it clear that a water-

<sup>7</sup> Yearbook . . . 1987, vol. II (Part Two), p. 54, para. 232.

course State was under an obligation to provide only such information as it had already collected for its own use or as was easily accessible. No additional research was called for.

16. The words “and concerning present and planned uses thereof” were not redundant, despite the treatment of planned uses in earlier articles. Regular information on both kinds of uses was valuable to watercourse States.

17. The concluding proviso released watercourse States from the obligations under paragraph 1 when no watercourse State was “presently using or planning to use the international watercourse”.

18. Paragraph 2 dealt with the case in which a watercourse State was requested to provide data or information that were not reasonably available. In that situation, the watercourse State was required to use its best efforts to comply with the request in a spirit of cooperation. It could, however, charge appropriate costs to the requesting State.

19. Paragraph 3 provided that the data and information must be supplied in a form which facilitated their utilization by the other watercourse States. The point was quite an important one, because systems of collection of data varied from one State to another.

20. Paragraph 4 dealt with conditions or incidents that posed a threat to the watercourse or to other watercourse States; it provided that watercourse States should inform each other expeditiously of such conditions or incidents. He had in mind, for example, floods, pollution, floating ice, the breaking of dams and perhaps the planned release of large quantities of water to protect a dam or other hydrological system.

21. Paragraph 5 dealt with sensitive information, and in essence provided that watercourse States were under no obligation to share it. Under the terms of the paragraph, watercourse States would, however, be required to do their best to provide a general description of any such information, so that the other watercourse States would be informed of the matters in question as fully as possible in the circumstances.

22. As explained in paragraph (1) of the comments, the proposed article set out the minimum requirements necessary to ensure application of the principle of equitable utilization, and the rules it laid down were residual. As recognized in article 4, there was a need for watercourse States to conclude specific agreements among themselves and to provide for modalities of exchange of information in keeping with the requirements of the international watercourse concerned.

23. As explained in paragraph (3) of the comments, the term “reasonably available” was employed in paragraph 1 of the proposed article to indicate that a watercourse State was obligated to provide only such information as was reasonably at its disposal, i.e. that which it had collected for its own use or which was easily accessible. Although the data and information provided would not have to be processed unless otherwise agreed, appropriate processing would obviously be of assistance to the receiving State. As noted in paragraph

(4) of the comments, the information had to be exchanged on a timely basis; that requirement should perhaps be incorporated in paragraph 1 of the article.

24. Paragraph (6) of the comments discussed paragraph 2 of the proposed article, which dealt with requests for data and information that were not reasonably available. The underlying idea was that, if a watercourse State was willing to meet the cost of acquiring the data and information it requested, that showed that it placed a fairly high value on them. Accordingly, as stated in paragraph (6) of the comments, no reasonable request for such information should be refused.

25. As noted in paragraph (7) of the comments, the purpose of the reference in paragraph 2 of the proposed article to an “other entity” was merely to provide for the frequent cases in which the watercourse States involved had set up a joint commission or other body through which data and information were regularly exchanged. The previous special rapporteurs had made provision for the establishment of such bodies in the articles on exchange of data and information, and the Commission might wish to consider whether such provision should be made in the text of the article or whether the point should be covered by a recommendation in an annex. He favoured the latter approach.

26. Paragraphs (9) to (11) of the comments discussed paragraph 3 of the proposed article, concerning the need to provide information in a usable form.

27. Paragraphs (12) and (13) dealt with the obvious need for an early warning system to provide information about incidents or conditions that endangered the watercourse or other watercourse States. That point was covered in paragraph 4 of the proposed article, mainly because the same channels as those used for the regular exchange of data and information would often be used. The obligation to warn could, however, be dealt with in a separate article in a later part of the draft articles.

28. Paragraphs (14) *et seq.* of the comments concerned paragraph 5 of the proposed article, which dealt with the problem of sensitive information. The aim of paragraph 5 was to achieve a balance between the legitimate needs of the States concerned, namely the need to uphold the confidentiality of sensitive information and the need to have data and information relating to the watercourse. As stated in paragraph (17) of the comments, the previous special rapporteurs had dealt with the subject of sensitive information by dividing it into two categories—information that was vital to national security, and information that was merely restricted—and had elaborated separate régimes for each category. He had not adopted that approach, on the ground that any provision of restricted data and information would most probably be preceded by consultations, and that separate treatment of such material might therefore introduce unnecessary complications into the paragraph, which stated only a residual rule. The Commission might wish to consider whether the exchange of sensitive information required more detailed regulation, as proposed by the previous special rapporteurs.

29. He awaited members' comments with interest, particularly on draft article 15 [16], and would be glad to answer any questions.

30. Mr. BEESLEY commended the Special Rapporteur for a report that showed a highly analytical and scholarly approach, and expressed his agreement in principle with the projected outline (A/CN.4/412 and Add.1 and 2, para. 7).

31. He noted, however, that paragraph 1 of draft article 15 [16] referred specifically to data and information of a hydrological, meteorological and hydrogeological nature; he would like to know whether the Special Rapporteur would be prepared to consider the inclusion of other kinds of data in that basic provision. He was thinking in particular of ecological and environmental data and of the need to conserve the living resources of rivers and to attain their optimum utilization, as was also mentioned in paragraph 1. Although, in his view, such matters would be covered by implication, he would prefer an express reference to ecological and environmental data and information to be added to the provision, unless there was some objection of which he was unaware.

32. Mr. SEPÚLVEDA GUTIÉRREZ endorsed the schedule submitted by the Special Rapporteur, and commended him for his fourth report (A/CN.4/412 and Add.1 and 2), which would provide the Commission with an excellent basis for its further work.

33. Paragraph 1 of draft article 15 [16] should, in his view, be brought into line with draft articles 1, 6 and 8 [9], since they dealt with closely related matters.

34. He agreed with the Special Rapporteur on the need to provide for the establishment by watercourse States of joint bodies or technical agencies responsible for considering all factors affecting riparian States, including the regular exchange of data and information. A modern treaty on international watercourses without such a provision was inconceivable, and some thought should therefore be given to the type of body or agency required.

35. The nature of the proposed legal obligation to inform required closer definition of its precise elements, including the sanction for failure to comply with such an obligation, which had not been specified. True, the article and the Special Rapporteur's comments both spoke of the principle of good faith, but that principle too had yet to be defined in all its legal aspects. Moreover, an obligation to inform might well impose a heavy burden on smaller watercourse States when it came to payment for information that was not immediately available. That point could perhaps be taken up in detail in the Drafting Committee.

36. Mr. FRANCIS thanked the Special Rapporteur for his excellent report (A/CN.4/412 and Add.1 and 2), which brought the Commission closer to the goal of concluding its first reading of the draft articles within the current quinquennium. The report was remarkable for its close analysis of State practice with regard to the exchange of information and data in the context of co-operation. That analysis was all the more welcome because there had in the past been some criticism, in the

case of certain topics, of the paucity of material on State practice, especially where countries of the third world were concerned.

37. As to the right place for the provision on the duty to alert other States of impending danger, his own view, bearing in mind the possible consequences of tardy transmission of information to other watercourse States, was that it should appear early in the draft. That would serve to indicate the urgency of the provision.

38. Mr. MAHIOU said that article 15 [16] was comprehensive, and that the Special Rapporteur's comments effectively illuminated its content. He thanked the Special Rapporteur for proposing a schedule that would enable the Commission to complete its work on the draft articles as a whole by the end of the current quinquennium, in accordance with the decision it had taken at its thirty-ninth session. The impediments mentioned by the Special Rapporteur, namely the staggering of consideration of topics and the possibility that the Drafting Committee might be unable to cope with the volume of material before it, were unlikely so to retard the progress of work as to prevent the Commission from keeping to the schedule.

39. In his fourth report (A/CN.4/412 and Add.1 and 2, para. 12), the Special Rapporteur said that the need for data and information was implicit in article 7, which had been provisionally adopted by the Commission at its thirty-ninth session. He himself believed that that need was explicit in article 7, paragraph 1 of which laid down the obligation to take into account all factors and circumstances relevant to the equitable and reasonable utilization of a watercourse. The need for an exchange of data and information was confirmed in paragraph 2 of the same article, which provided that the watercourse States concerned should enter into consultations in application of paragraph 1.

40. With regard to article 3 of the Charter of Economic Rights and Duties of States, which the Special Rapporteur cited in his report (*ibid.*, para. 17), he pointed out that, while some provisions of that Charter had not gained universal approval, article 3 had been accepted by all States and accordingly expressed a view that was shared by all. That was an important element to consider, the article being worded quite strongly, since it stated that "each State must co-operate on the basis of a system of information and prior consultations". It enunciated an obligation that was fully in line with the subject of the draft articles and in conformity with the requirement of co-operation incorporated in draft article 9 [10], which was before the Drafting Committee. Article 3 of the Charter of Economic Rights and Duties of States was especially relevant to the Commission's work since it referred to prior consultations between States, an obligation that was laid down in a number of bilateral and regional agreements on watercourses cited by the Special Rapporteur.

41. Although the question of exchange of information was an important one, he did not think that it deserved to be the subject of a separate section, as suggested by the Special Rapporteur, whose article 15 [16] alone constituted part IV of the draft articles. He therefore con-

curred with the other solution suggested by the Special Rapporteur, namely that the article be placed at the beginning of part III (see para. 12 above).

42. It might be asked whether a clearer indication of the type of data and information to be exchanged should not be given in paragraph 1 of article 15 [16]. In 1980, the general view had been that the article should refer to data and information only in general terms, as an exhaustive listing might raise more problems than it resolved. He therefore favoured the more flexible approach adopted by the Special Rapporteur. On the other hand, the drafting of paragraph 1 seemed to need some attention. The phrase “unless no watercourse State is presently using or planning to use the international watercourse [system]” was difficult to understand without consulting the comments and seemed to contradict the opening phrase of the paragraph, which indicated that data and information would be exchanged “in order to ensure the equitable and reasonable utilization of an international watercourse [system]”. In paragraph (4) of the comments, the Special Rapporteur said that data and information should be provided “in a timely fashion”. That idea was not expressed in paragraph 1 of the draft article, although it might be useful there.

43. In regard to paragraph 2, he agreed with Mr. Sepúlveda Gutiérrez that the payment of costs might create a number of problems. He did not oppose the idea of such payment, but would suggest that the different levels of development reached by States should be taken into account in determining the amount. He also endorsed Mr. Sepúlveda Gutiérrez’s suggestion, with regard to paragraph 3, that joint bodies should be established to ensure that the information collected was compiled in a consistent manner and could be easily used by the States concerned. As Mr. Sepúlveda Gutiérrez had noted, the subject of joint bodies might best be covered in an annex rather than in the draft articles.

44. Paragraph 4 of draft article 15 [16] shared a number of elements with the work being done on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The wording of the paragraph should perhaps be revised to reflect the Commission’s work on that topic, particularly the development of the notion of risk and its consequences. Instead of enumerating the implications of incidents concerning which watercourse States should inform one another as rapidly and as fully as possible (“loss of human life, failure of a hydraulic work or other calamity”), the draft article should simply refer to “dangerous or disastrous situations for the other watercourse States”.

45. The Special Rapporteur had asked for the views of the members of the Commission on whether a distinction should be drawn between sensitive information and restricted information in paragraph 5 of the draft article. He had no firm opinion on that point, but would tend to support the view expressed by the Special Rapporteur.

46. Draft article 15 [16] should be referred to the Drafting Committee for further consideration.

47. Mr. GRAEFRATH agreed in general with the approach adopted by the Special Rapporteur and endorsed draft article 15 [16] as submitted. He would point out, however, that earlier versions had referred to the collection and processing of data and information, whereas the present version mentioned only exchange. The means of collection and processing of information might vary from State to State, and it might be more correct to refer to that activity before broaching the subject of information exchange.

48. He suggested the deletion of the last part of paragraph 1, reading “and concerning present and planned uses thereof, unless no watercourse State is presently using or planning to use the international watercourse [system]”. The reference to “planned uses” was out of place in the general description of information that should be exchanged.

49. Earlier versions of paragraph 2 of the article had mentioned the need to conclude agreements on the collection and processing of information, but the latest version spoke only of co-operation, which he took to be a broader concept that nevertheless extended to the conclusion of specific agreements. The heading of the article, “Regular exchange of data and information”, did not cover the subject of paragraph 4, which was information exchange in emergency situations. It might be preferable to devote a separate article to that important subject. He did not think that the phrase “on a timely basis” should be included, because “regular” meant precisely that.

50. The CHAIRMAN, noting that there were no further speakers, suggested that the Commission adjourn to allow the Drafting Committee to meet, and that it should continue consideration of the topic at the next meeting.

51. Mr. TOMUSCHAT said that the fact that members were somewhat reluctant to comment on draft article 15 [16] showed that it was linguistically accurate and logically sound. It might therefore be possible to complete the discussion at the next meeting and move on to another topic.

52. The CHAIRMAN suggested that it might be premature to take a decision to that effect at present. In response to a comment by Mr. THIAM, he said that the projected timetable should be adhered to until it became clear how many more members would speak on draft article 15 [16].

*The meeting rose at 12.10 p.m.*

## 2051st MEETING

*Wednesday, 25 May 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey,

Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucouñas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (continued) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1)**

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

PART IV OF THE DRAFT ARTICLES:

ARTICLE 15 [16] (Regular exchange of data and information)<sup>3</sup> (continued)

1. Mr. SHI congratulated the Special Rapporteur on his excellent fourth report (A/CN.4/412 and Add.1 and 2), and said that draft article 15 [16] was acceptable on the whole. He thanked the Special Rapporteur for reminding members of the distinction between exchange of data and information within the meaning of the article under consideration and exchange of data and information within the meaning of the provisions on notification of planned measures. The primary issue before the Commission was whether, as noted by the Special Rapporteur in his comments, regular exchange of data and information could be made a general rule of a residual character in the absence of specific agreements between States. There was no doubt that numerous agreements on international watercourses attested to the existence of specific régimes on regular exchange of different categories of data and information. Furthermore, although the Charter of Economic Rights and Duties of States might belong to the realm of "soft law", the importance and authority of article 3 of the Charter, to which the Special Rapporteur had referred (*ibid.*, para. 17), could not be underestimated, for it had been the subject of a consensus in the General Assembly. In the circumstances, States would probably have no difficulty in accepting a régime for the regular exchange of data and information under a general framework agreement on international watercourses. Also, the fulfilment of the obligations under articles 6 (Equitable and reasonable utilization and participation) and 7 (Factors relevant to equitable and reasonable utilization), which the Commission had provisionally adopted,<sup>4</sup> made the exchange of such data and information necessary. Article 15 [16], therefore, was the logical complement to articles 6 and 7.

2. With respect to paragraph 1, he agreed with Mr. Beesley (2050th meeting) that there was no reason to limit regular exchange to data and information concerning the physical characteristics of watercourses. He also agreed that information concerning planned uses, which

fell within the scope of the articles on notification, should be excluded from the paragraph. Moreover, although the effective functioning of a régime for the regular exchange of data and information depended on co-operation between watercourse States, and although article 15 [16] was a specific application of the general obligation to co-operate imposed on watercourse States, greater emphasis should be placed on the obligation of exchange in a provision on the regular exchange of data and information. For that reason, he preferred the alternative proposed by the Special Rapporteur in paragraph (2) of the comments, which read: "watercourse States shall exchange, on a regular basis and in a spirit of co-operation, reasonably available data and information", to the wording used in paragraph 1 of the draft article: "watercourse States shall co-operate in the regular exchange of reasonably available data and information".

3. Paragraph 2 of the draft article called for two comments. First, the obligation to provide data and information which were not reasonably available was reasonably qualified by the formal equality of States. When it came to pecuniary compensation, however, account should be taken of the real situation of States, namely of the gap between developed and developing States in financial terms. Secondly, the words "other entity" were confusing and nothing would be lost if they were deleted. There was no need to refer, in an article that set forth residual rules on the obligation of States to exchange information, to any entity that might be created by watercourse States. It might be preferable instead to recommend the creation of such entities in the part of the draft entitled "Other matters" envisaged by the Special Rapporteur.

4. The important rule set out in paragraph 4 commanded unreserved support, but the obligation to warn, as rapidly and fully as possible, of any condition or incident or immediate threat thereof affecting the international watercourse could hardly be considered part of the obligation of regular exchange of data and information. The proper place for that rule would be in part VI of the draft, dealing with water-related hazards and dangers.

5. It was important to maintain a proper balance, as provided for by the Special Rapporteur under paragraph 5 of the article, between national defence and security needs and the need of States for data and information. The Special Rapporteur had rightly emphasized the principle of good faith, since the concept of a State secret could easily be abused.

6. Article 15 [16] could be referred to the Drafting Committee for consideration before the Committee concluded its work on the draft articles referred to it at the Commission's previous session.

7. Mr. ROUCOUNAS said he was gratified to note that the Special Rapporteur's fourth report (A/CN.4/412 and Add.1 and 2) contained a wealth of information on State practice without, however, disregarding trends in legal thinking, something that would assist the Commission in evaluating developments in the law and the possibilities for drawing up rules that reflected reality, which was a prerequisite for the satisfactory conduct of its work.

<sup>1</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>3</sup> For the text, see 2050th meeting, para. 1.

<sup>4</sup> See 2050th meeting, footnote 3.

8. Draft article 15 [16], which was undoubtedly of a residual nature and contained a minimum of elements, could encourage States to conclude more detailed agreements. Its intrinsic value lay in the fact that it specified the areas where the principle of co-operation, which derived from the concept of equitable and reasonable utilization, could be highlighted. As the article was also meant to cover cases in which the watercourse was not being used, it took as its objective the exchange of reasonably available data and information, thereby indicating that no State could assert that it lacked information. The words “reasonably available”, although restrictive, denoted that such exchange should cover data and information which must be produced continuously, in objective terms, and not data or information of an isolated nature, while the words “regular exchange”, as indicated by Mr. Schwebel in his third report,<sup>5</sup> meant that each State should be responsible for compiling and dispatching such information. The proviso reading “unless no watercourse State is presently using or planning to use the international watercourse [system]”, was of doubtful value at the present stage of State activity and in face of the phenomenon of pollution, which spared not a single drop of water.

9. The Special Rapporteur should encourage States to set up joint or international entities and entrust them with the special tasks of collecting, compiling and processing data and information. A mechanism of that kind would be of the greatest interest for purposes of co-operation. The Special Rapporteur and the Commission would probably consider the general question of joint commissions at a later stage. Some thought should none the less be given to providing such entities with grounds for meeting, for sometimes they looked well on paper but had little, if any, practical existence.

10. Given its importance, the notion of advance warning, as provided for in paragraph 4 of the article, could form the subject of a separate draft article.

11. Mr. TOMUSCHAT said that it was difficult not to endorse draft article 15 [16], the terms of which were firmly rooted in State practice. His comments would therefore pertain solely to points of detail.

12. With regard to the general structure of the article, as reflected in the title, he agreed with the observations made by Mr. Mahiou (2050th meeting) and by Mr. Roucounas, namely that paragraph 4 introduced a new idea which went beyond the framework of a regular exchange of data and information, since it dealt with exceptional circumstances, which would seldom occur. Logic therefore dictated either that the article should be split up or that the title should be amended. He would opt for deletion of the word “regular” in the title, since paragraph 5 referred to both situations: the regular exchange of data and information, and information about incidents and accidents.

13. He also wondered whether, in general, more emphasis should not be placed on the obligation to exchange data and information. Accordingly, like Mr. Shi, he preferred the alternative proposed in paragraph (2) of the comments.

14. Should the clause in paragraph 1 reading “unless no watercourse State is presently using or planning to use the international watercourse [system]” be deleted? It could doubtless be argued that it was not necessary to exchange information in the case of a watercourse which States did not use or intend to use in a manner that might affect the downstream States, and that there was therefore no need to specify the point. But why not spell out explicitly what could otherwise only be inferred from complex reasoning, namely that States should not be deterred from accepting the future convention by economic considerations? Whenever a watercourse was used to a considerable extent, States would have the necessary data, but States should not for that reason be under the impression that they were duty-bound to establish complex mechanisms of data collection. He disagreed with Mr. Roucounas on that point. In his view, it would be too burdensome for States to create mechanisms of that kind even—or above all—when no use was made of the watercourse. Assuming that a river flowed through several African States which had not thus far been able to set up a network of observation stations, should those States be required to create such a network even if they had not made use of the river? It was important not to lose sight of the costs involved in such an undertaking.

15. He understood the reasons which had prompted the Special Rapporteur to include a reference to an “other entity” in paragraph 2. Such a reference, however, presupposed that the entity was entitled to make a formal request for data and information. However, the Commission was confined to drafting law applicable between States, leaving aside the question of management of international watercourses by international organizations or bodies. At the present stage, nothing was known about the importance of co-operation through those bodies, and the Commission could not prejudice their powers. Moreover, why speak of an “entity” only in paragraph 2 and not in paragraph 1, for instance? The idea was attractive, but it was too early to give it concrete expression.

16. He agreed with the central idea in paragraph 3, concerning the need to ensure that the data and information were usable. Obviously, at the present time, the best means of communication was to establish direct computer links so that data were automatically transmitted to neighbouring States, provided the data related to the basic features of the watercourse. There were, however, risks involved in a plethora of information. How could a small State, for instance, digest tons of data dumped on its doorstep? “Usable” data should therefore be understood to refer to data that were simplified, but not excessively so.

17. It had been said in regard to paragraph 4 that the examples cited were too concrete and should be replaced by a general clause. He did not agree with that opinion. A common denominator already existed, namely the words “other calamity”. It was in the event of a natural disaster that warnings and additional information would be given, and there was no need to add the words *inter alia*.

18. He agreed with the Special Rapporteur that the Commission should consider the question of the place-

<sup>5</sup> *Yearbook* . . . 1982, vol. II (Part One), p. 121, document A/CN.4/348, para. 236.

ment of the article in the draft as a whole. In his view, it should come immediately after the part concerning principles and before that concerning notification of planned measures. Lastly, he was of the opinion that article 15 [16] should be referred to the Drafting Committee.

19. Mr. CALERO RODRIGUES said that the outline of the topic and the schedule for the submission of the remaining material, as shown in chapter I of the fourth report (A/CN.4/412 and Add.1 and 2), were very useful. The last part of the draft should indeed include provisions on the settlement of disputes, but he had doubts about the advisability of including in a framework convention detailed provisions on the regulation of international watercourses, the management of international watercourses and the safety of waterworks. States could deal with those problems in agreements on particular international watercourses. In any event, he himself would wait until the Special Rapporteur submitted the draft articles on the subject before adopting a position in the matter.

20. On the whole, the Special Rapporteur, possibly following in Mr. Evensen's footsteps, had submitted a small number of draft articles that could well be subdivided into more numerous but shorter texts, but that was a problem that could be settled by the Drafting Committee.

21. In his report, the Special Rapporteur supported his arguments by documentation on State practice, the work of intergovernmental and non-governmental bodies and expert opinion. As usual, the documentation was extensive, perhaps even too extensive. For example, the Special Rapporteur cited a provision from the Charter of Economic Rights and Duties of States (*ibid.*, para. 17) which was not relevant in the context, since it was based on the concept of shared natural resources. Nevertheless, he had no intention of discouraging the Special Rapporteur from continuing to cite in his forthcoming reports any instruments he might consider useful.

22. He supported draft article 15 [16] as a whole. Like Mr. Tomuschat, he believed that paragraph 1 provided a basis for the regular exchange of data and information, but the expression "optimal utilization" seemed ill-advised. He would go still further and affirm that there was no real need to explain why the exchange of data and information was required: the reason was all too obvious and such an exchange was even imperative. Again, it was inappropriate to say that the data and information should concern "the physical characteristics of the watercourse". The essential thing was to communicate data and information on the fundamental hydrological, meteorological and hydrogeological characteristics of the watercourse, as well as on present and planned uses thereof. He also had doubts regarding the inclusion of the proviso "unless no watercourse State is presently using or planning to use the international watercourse [system]". If a watercourse State possessed data and information, it should communicate them to the other watercourse States, even if those States were not for the time being planning to use the watercourse. Paragraph 1, which had a fundamental

role to play, should be simplified in order to make it clearer.

23. Paragraphs 2 and 3 concerned specific aspects of co-operation for the regular exchange of data and information. The provision in paragraph 2 to the effect that a watercourse State requesting data or information which were not reasonably available must bear the reasonable costs of collecting and, where appropriate, processing such data or information, was quite normal. The provision contained in paragraph 3 was useful, for the collection and processing of data and information, far from constituting a burden, were a manifestation of co-operation. He had no settled view as to whether paragraph 4 should form the subject of a separate article or not: it could in fact be maintained in draft article 15 [16] if the article remained in its present form. Paragraph 5 involved the delicate issue of striking a balance between the national security requirements of a given watercourse State and the information needs of the other watercourse States. The Special Rapporteur had manifestly made an effort to achieve that balance, but the proposed text called for further scrutiny to see if it could be improved.

24. In his opinion, draft article 15 [16] could be referred to the Drafting Committee.

25. Mr. BARSEGOV congratulated the Special Rapporteur on his fourth report (A/CN.4/412 and Add.1 and 2), which contained a wealth of useful information, and on his effort to submit realistic and mutually acceptable provisions on a topic which, because of its specificity and innovative character, called for careful consideration.

26. The practice of States in regard to the exchange of data and information was expressed in a multitude of treaties, whence its variety. To attempt to deduce a common denominator from the general practice could lead only to an impoverishment of that practice. A very great measure of co-operation was necessary in order to view an international watercourse as an entity and not as the sum of distinct parts, yet such co-operation could be achieved only through agreements between States belonging to the same region or States of one and the same watercourse. Accordingly the draft articles could not lay down requirements in that regard: they could only offer recommendations precisely as a basis for the negotiation of such agreements.

27. Co-operation for the purpose of equitable, reasonable and optimal utilization of a watercourse must not detract in any way from the principle of the territorial sovereignty of States on the portion of the international waterway within their boundaries or from the principle of the permanent sovereignty of States over their natural resources. For that reason, it would serve no useful purpose to try to regulate such co-operation in excessive detail. To do so would be tantamount to imposing upon States more obligations than they were prepared to shoulder or, in certain cases, fewer. The reciprocal exchange of data and information was of definite value, but it need not be regular in character: the exchange could also take place in accordance with needs as they arose and with the prevailing conditions, not only physical and natural, but also

political conditions, although it was to be hoped that co-operation between States would continue even in the case of difficult relations.

28. The Special Rapporteur, after proposing a general international obligation to exchange data and information, had gone on to propose exonerating States from the obligation if “no watercourse State is presently using or planning to use the international watercourse”. However, that general obligation could not be made dependent on the extent or degree of the uses of the watercourse. In particular, the obligation to communicate data that were not available, or not readily available, could not be imposed, any more than the obligation to establish specialized entities for the collection, processing and exchange of data and information. Admittedly, there were precedents for co-operation in that field, for example between the Soviet Union and the neighbouring countries. International law, however, was not based on precedents; a precedent in itself did not create a rule of law and still less a rule of international law. Again, the communication of data that were confidential or vital to a State’s national defence or security was a matter to be decided by the State concerned, and it would be sufficient on that point to say that the information to be communicated should be as complete as possible.

29. As for accidents or the immediate threat thereof, if States at the present time did not readily report them in great detail, that was because they feared undesirable reactions. Mankind, however, was a single entity and any calamity could become a disaster for everyone. A solution would therefore have to be found, perhaps by specifying that in such cases information had to be given as rapidly and as fully as possible. That could be done either in the draft on international liability for injurious consequences arising from activities not prohibited by international law, or in the draft on the topic under consideration. In either case, the question was sufficiently important to warrant a separate article.

30. Lastly, he agreed that draft article 15 [16] should be referred to the Drafting Committee.

31. Mr. YANKOV congratulated the Special Rapporteur on an excellent report (A/CN.4/412 and Add.1 and 2) and also thanked him for submitting a projected outline of the topic, albeit a preliminary one.

32. Draft article 15 [16] had a prominent place in the draft as a whole, because it illustrated the principle of international co-operation and the role of such co-operation in the matter of prevention. In that connection, he agreed with the Special Rapporteur that the rules contained in the article were general rules of a residual nature, and would apply only in the absence of a special agreement. It was from that standpoint that he would assess the merit of the proposed provisions and make his own observations. While the Special Rapporteur appeared to have achieved the objective he had set himself—to formulate general rules—there were still a number of details which could be eliminated from the proposed text in order to avoid placing an unduly restrictive and excessively strict interpretation on rules which were intended to be general in character.

33. Paragraph 1, which was well drafted, had to be read in conjunction with articles 6 (Equitable and reasonable utilization and participation), 7 (Factors relevant to equitable and reasonable utilization) and 9 [10] (General obligation to co-operate). However, in the interests of consistency with the proposed objective, and in order to avoid laying down an excessively heavy obligation, it would be perhaps desirable to delete the adjective “regular” from both the title and the text of the article. As Mr. Barsegov had pointed out, it was essential to cover the case of occasional exchanges of data and information; otherwise it would be necessary to specify in detail all the modalities of the desired communication of data and information. Such data and information had to relate to existing or planned uses of the waterway, on the understanding that communication would be reciprocal; for reciprocity was the very essence of the principle of international co-operation.

34. The words “or other entity” in paragraph 2 had attracted some comments and it would be advisable to revert to that point when it was known what the exact extent of the powers of such “entities” under the draft would be.

35. Paragraph 3 did not call for any particular comment. Opinion appeared to be divided as to whether paragraph 4 should be maintained in its present form or converted into a separate article or articles. It should not be forgotten that the paragraph contained a provision which could have an impact on the exchange of information in a very specific case. Moreover, it had some connection with part V of the draft, on environmental protection and pollution, and even with part VI, on water-related hazards and dangers. For his part, he would be inclined to maintain paragraph 4 in article 15 [16], but would perhaps add a cross-reference to the provisions on water-related hazards or even include an express mention of those various hazards. In the interests of clarifying the scope of the text, express mention should be made of ecological harm, in addition to the consequences arising from actual incidents or the immediate threat thereof. True, ecological considerations could be inferred from the present wording, but the term “calamity”, or *catastrophe* in the French version, although it had in common usage the accepted meaning of an event which normally affected the environment, did not cover all cases. It suggested a particular event of a spectacular kind rather than the phenomenon of continual deterioration, as in certain forms of pollution.

36. In paragraph 5, the Special Rapporteur had succeeded in striking a balance between the legitimate interests of all the States concerned, and his comments (paras. (15)-(16)) showed that he was fully aware of the delicate character of considerations of national defence and security. It was precisely for that reason that the Special Rapporteur laid stress on good faith and on a spirit of co-operation between watercourse States. Nevertheless, it would be advisable to scrutinize that provision further.

37. In conclusion, he supported the proposal to refer draft article 15 [16] to the Drafting Committee.

38. Mr. McCaffrey (Special Rapporteur), replying to the comments of Mr. Beesley (2050th meeting) and Mr. Shi, said that he was fully prepared to introduce in paragraph 1 a reference to other types of "readily available data and information", and not to confine the text to physical characteristics—hydrological, meteorological, hydrogeological or other. The importance of information of an ecological character would become apparent on examination of the articles in parts V and VI, relating to environmental protection and to water-related hazards and dangers. Exchange of data in those two areas was essential.

39. It was his intention to reply in greater detail to the various comments made during the debate when the Commission completed its consideration of article 15 [16].

40. Mr. BEESLEY said that ecological and environmental considerations required the collection and exchange of information to play a significant role in the future convention on watercourses: the regular monitoring of water quality and research into the causes and effects of pollution were an essential component of efforts to improve the *status quo*. Ecological and environmental considerations also required the obligation to collect and exchange information to be qualified as little as possible by competing considerations.

41. With regard to paragraph 1 of the draft article, he noted that it contained no reference to the role of joint fact-finding bodies, which had been found to be a useful mechanism in international water disputes. The omission was deliberate, for the Special Rapporteur had explained that, if the draft articles did not provide for the establishment of joint fact-finding bodies, reference to them might best be cast in a recommendation contained in an annex; but he had also invited the Commission to consider including a reference to such bodies in draft article 15 [16] itself. That suggestion was worth considering, because paragraph 1, as now drafted, gave the impression that information-gathering was envisaged only for States acting unilaterally.

42. Secondly, in paragraph 1, the obligation to collect and exchange data was qualified by the requirement that such data be "reasonably available" and by the proviso that the obligation did not apply where a State was not using or planning to use a watercourse. Yet the collection of data relating to environmental effects might well require some degree of effort and special research, and there might be cases in which the duty to co-operate should comprise the acquisition of data which were not easily available. The phrase "reasonably available" was conceivably flexible enough to cover those situations, but equally States might argue on the basis of the text that they were not obliged to go beyond a minimal effort to collect data. Furthermore, while it was eminently sensible that States should not have to exchange information on unused watercourses, that was but one case where the obligation to collect and exchange depended on the use to which the watercourse was put. The obligation really operated on a sliding scale: there was more need to exchange information on the Great Lakes than on the Yukon River.

43. The Special Rapporteur and other members of the Commission had placed emphasis on the role which information exchange played in ensuring the success of the substantive provisions of the future convention. It might be useful, in the text of the draft article itself, to link the attainment of the convention's objectives to the obligation to collect and exchange data, in which case the reference to unused watercourses at the end of paragraph 1 and the words "reasonably available" would prove redundant. Paragraph 1 could accordingly be revised to read as follows:

"1. Watercourse States shall co-operate in the collection and regular exchange of data and information concerning the physical characteristics of the international watercourse [system], including those of a hydrological, ecological, environmental, meteorological and hydrogeological nature, and concerning present and planned uses thereof, to the extent necessary to ensure the equitable and reasonable utilization of the watercourse [system], and to attain the optimum utilization thereof."

Extending the scope of co-operation so as to cover the collection of data was more suggestive of joint fact-finding. In addition, moving the opening phrase to the end and linking it to the obligation to collect and exchange data, while removing the other qualifications, tended to ensure that the obligation was flexible enough to extend to all situations in which it might prove necessary or useful.

44. With regard to paragraph 2, the reference to data or information "not reasonably available" could still stand, as it sought to guard against vexatious and expensive requests for information. There might, however, be situations in which extensive and costly research would be indispensable in order to prevent or abate harmful or inequitable use. In other words, the data might be necessary, but not "reasonably available". If the costs of collection were significant and the data related to transboundary pollution, there was no reason why the victim State rather than the State of origin should have to pay.

45. In most instances, the costs of data collection should, *prima facie*, be shared. To the extent that data were necessary to achieve the objectives of the future convention, namely to ensure the equitable and optimum use of international watercourses, there seemed to be no need to indicate that the requested State might require reimbursement from the requesting State. On the other hand, it was impossible to know in advance exactly what information would be required to achieve the convention's objectives, since that would in all likelihood be determined on the basis of the information itself. A requested State was likely to dispute the need for the data and information requested, and it was desirable to provide a mechanism for the collection of data which were not, strictly speaking, necessary. In that sense, paragraph 2 performed a useful function.

46. To cover situations in which it would be inequitable to require the victim State to pay for the collection of data on transboundary pollution that were not "reasonably available", the costs being properly a part of the "true costs" of the polluting enterprise, a

second subparagraph might be added to paragraph 2, reading as follows:

“Where the request for data and information relates to effects on the watercourse [system] exclusively attributable to uses by the State so requested, that State shall be responsible for the costs of collecting such data and information, provided that the data and information are reasonably necessary to ensure the attainment of the objects of this Convention.”

Alternatively, the costs could be shared by the requested and requesting States.

47. A formulation of that kind would cover trans-boundary pollution and uses such as dams or diversions. In each case, it would seem fair to ask the State of origin to pay for the collection of information relating exclusively to the effects of such watercourse uses. Even in the case of pre-existing uses, there was no reason why the obligation to provide information should not be parallel to the obligation in article 10 [11] relating to the notification of proposed new uses. True, that obligation, as it stood in that article, applied only to the provision of “available” data, and did not extend to special research; but that approach had been criticized in the Sixth Committee of the General Assembly (A/CN.4/L.420, para. 178).

48. Paragraph 3 was judicious and required little comment. However, it might be preferable to recast it as a recommendation, to appear in the commentary or in an annex.

49. The scope of paragraph 4 seemed rather narrow: the obligation to warn should apply beyond situations where there was a threat of “loss of human life” or “calamity”, and should include threats to living resources and the environment. For example, a spill of low-level radioactive waste or mildly toxic substances might not threaten loss of life or be a calamity, but might still be significant enough for downstream States reasonably to expect notification so as to take steps to protect the public.

50. The scope of paragraph 4 might have been deliberately limited to avoid raising fears about the possible liability of the State of origin under the general principles of international law, but such fears could be dispelled by adding a saving clause. The first sentence of paragraph 4, which might, for example, end as follows:

“. . . that could result in a threat to human life or health, major damage to property, to ecological systems or the environment, or other such serious consequences in the other watercourse States”

would be followed by the saving clause:

“The duty to inform as set out in this paragraph exists without prejudice to any question of liability for failure to warn under general principles of international law.”

51. The Special Rapporteur had recognized that paragraph 5, whatever its merits, was open to abuse. The reference to “good faith” was therefore meant to serve as a safeguard. Although the solution appeared

acceptable, the paragraph warranted further reflection because of its possible consequences.

52. Lastly, he agreed that draft article 15 [16] should be referred to the Drafting Committee.

53. The CHAIRMAN, speaking as a member of the Commission, said that in the course of the Commission’s work on the topic a great many opinions had been expressed, not only on the substance of the issue but also on the scope and form of the instrument to be produced. As opinions had changed and evolved, the purpose of the work itself had seemed to be lost from view. The foundation for the standards that the Commission was elaborating was, after all, to be found in another standard, namely the sovereignty of all States over their resources, and particularly over the waters in the watercourses passing through their territories. That basic difficulty had been averted by proposing to elaborate a framework agreement on the basis of which watercourse States could enter into agreements among themselves on watercourses. In that case, the articles proposed by the Commission would merely form a set of residual rules.

54. Draft article 15 [16] as submitted by the Special Rapporteur was the logical outcome of that consensus. It was designed to foster co-operation among States—not to develop a right that already existed—and to facilitate the best possible use of international watercourses. Its theoretical foundation comprised the concepts of co-operation, good neighbourliness and good faith. Good faith was always presumed in international law. As for co-operation and good neighbourliness, they were nebulous concepts that the resolutions of the General Assembly did nothing to elucidate. The Special Rapporteur turned them into a general legal obligation, but it was perhaps more of a moral obligation, for the spirit of co-operation was nothing more than the will to act like a good neighbour. Accordingly, article 15 [16] could only constitute a general recommendation to States to engage in co-operation in particular instances. The contemporary world had already done exactly the same thing by imposing interdependence upon States in a number of areas: pollution of the earth’s surface and its atmosphere, and so on.

55. Draft article 15 [16] itself covered much too much ground and it would be preferable to break it up into a number of separate articles.

56. In paragraph 1, the English and Spanish versions used the word “reasonably”, whereas the French version said *normalement*—a matter the Drafting Committee would no doubt look into. The paragraph raised a more important problem, however, namely that of “physical characteristics” which were to be the subject of the regular exchange of data and information. The term was somewhat vague. In general, States were well acquainted with the physical characteristics of their watercourses and, if they needed information, it was on the possible effects on the watercourse of its utilization or the construction of hydraulic works. The last part of the sentence (“and concerning present and planned uses [. . . of] the international watercourse [system]”) was superfluous and dangerous. A State which was not using and not planning to use a watercourse or its

resources did not surrender its rights over the watercourse. On the contrary, it was still concerned by everything which another State might do and which might affect its own use of the watercourse later on.

57. Paragraph 2 presented the same linguistic problem as did paragraph 1: a wavering between "reasonably" and "normally", in the matter of both the availability of information and of payment by the requesting State. But another, more significant divergence also appeared: the French text said that the requested State *pourra exiger du demandeur* payment of the reasonable costs of its research, while the Spanish version said that that State might "condition" (*condicionar*) the supply of the information requested upon payment of the costs by the requesting State. It was an extremely important difference and one that the Drafting Committee should examine.

58. The Spanish version of paragraph 3 spoke of *utilización cooperativa*, which was a calque of the English, but the Special Rapporteur had probably had in mind *utilisation concertée*, as in the French version. Generally speaking, attention should be given to protecting the interests of countries which, like the developing countries, did not possess the technical and financial resources required to "collect and process data and information". The idea of setting up permanent joint bodies was a possible solution, particularly if they were so constituted that the contributions by countries with limited means were not too onerous.

59. Paragraph 5 must be handled very carefully if States were to accept its provisions, and the problem of form represented by the expression "data or information vital to . . ." raised a problem of substance that must be given due consideration.

60. He hoped the Drafting Committee would endeavour to streamline a long and dense draft article which, at present, tended to complicate rather than facilitate the drafting of a framework agreement.

*The meeting rose at 12.50 p.m.*

## 2052nd MEETING

*Friday, 27 May 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses** (*continued*) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

PART IV OF THE DRAFT ARTICLES:

ARTICLE 15 [16] (Regular exchange of data and information)<sup>3</sup> (*continued*)

1. Mr. RAZAFINDRALAMBO observed that of the five paragraphs composing draft article 15 [16], only the first three dealt with the regular exchange of data and information; the information referred to in paragraph 4 was of an occasional nature, and paragraph 5 stated an exception to the obligation. Consequently, if the Commission wished to keep paragraphs 4 and 5 in the draft article, the word "regular" should be deleted from the title, as had been suggested during the debate. The Special Rapporteur might consider whether paragraph 4 should not become a separate article, perhaps in part VI, on water-related hazards and dangers, although he himself had no objection to its remaining in article 15 [16].

2. Several points concerning the position of developing countries required careful consideration. The regularity of exchanges advocated by the Special Rapporteur presupposed that watercourse States had information available, which was constantly kept up to date. But it would be over optimistic to assume that all countries, particularly developing countries, had the financial and technical means to compile such information. Several speakers had stressed the high cost of data collection. If a developing country was interested in collecting data, that could only be done as part of a development project with technical and financial assistance, under a bilateral or multilateral co-operation agreement. Studies carried out in such a framework would be highly specific and irregular, and it would be difficult to place them at the disposal of third countries that were not beneficiaries of the bilateral or multilateral assistance in question. At the very least, a special agreement would have to be concluded between all the interested parties, including any assistance bodies concerned. He therefore agreed with Mr. Barsegov and Mr. Yankov (2051st meeting) that the exchange of data should be allowed to take place on an *ad hoc* basis, with as flexible a procedure as possible.

3. More consideration should be given to the possibility of requests for further information. If a watercourse State needed more complete information, it should be entitled to request it, provided that it was willing to meet the costs of collection and, if necessary, of use. That might complicate the proposed mechanism, however, and discourage States from accepting the principle of an obligatory exchange of information. Hence there was some merit in the idea of establishing a mixed

<sup>1</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>3</sup> For the text, see 2050th meeting, para. 1.

entity, one of whose functions would be to finance the collection or use of information so that States would not need to do so individually. As pointed out by the Special Rapporteur in his third report, such bodies had been established with success, especially among the States of the African river basins (A/CN.4/406 and Add.1 and 2, paras. 22-28). An explicit provision on the establishment of such entities should be embodied in a separate paragraph of draft article 15 [16].

4. Subject to those observations, he found the wording of draft article 15 [16] generally satisfactory. He wondered, however, why the obligations prescribed were not linked to a penalty for non-compliance, as in the case of draft articles 10 [11] to 12 [13], non-compliance with which was covered in draft article 13 [14]. Obviously, such obligations would lose some of their importance if the exchange took place only on the basis of mutual agreement. In any event, draft article 13 [14] appeared to him to contain an explicit provision on the responsibility of a State which failed to meet its obligation to inform other potentially affected States of potential danger to the watercourse. That brought the Commission into the area of State responsibility and perhaps even into that of responsibility in general. The safeguard clause proposed by Mr. Beesley (2051st meeting, para. 50) should guide the Drafting Committee in its search for the most complete and adequate formulation.

5. Mr. PAWLAK said that from the wealth of material he had provided in his fourth report (A/CN.4/412 and Add.1 and 2), the Special Rapporteur had rightly drawn the conclusion that State practice was a sound basis for draft article 15 [16]. As indicated in his comments, the Special Rapporteur was proposing residual rules which could not alter existing agreements on watercourses or change established international practice, and which could be considered only as part of a framework agreement which States were free to ignore if they chose. It was only on that understanding that he supported the inclusion of article 15 [16] in the draft. He shared the opinion of the Special Rapporteur that the regular exchange of data on the utilization of international watercourses was an important example of co-operation, but the extent and scope of that exchange should not be forced on States.

6. He had noted with interest the reference in the fourth report (*ibid.*, para. 16), to the 1964 Agreement between Poland and the Soviet Union concerning the use of water resources in frontier waters. As far as the obligation to exchange information was concerned, article 8 of that Agreement was of a general character. It did not establish any particular rules, but delegated that duty to the parties. He wondered whether that approach could not be adopted by the Commission in draft article 15 [16]. Paragraph 1 should then be worded in as general terms as possible, and should stress that watercourse States "shall exchange, on a regular and reciprocal basis . . . data and information"; it might possibly be added that the principles of the exchange should be worked out by the States concerned, taking account of the characteristics of the watercourse in each particular case. Stressing only the principle of the regularity of exchange of information was not enough;

such questions as the scope, timing, form and mechanisms of the exchange should also be considered.

7. Paragraphs 2 and 3 were useful, but should be subordinate to the main idea expressed in paragraph 1. He agreed with other speakers that the reference in paragraph 2 to an "other entity" should be deleted.

8. Paragraph 4 should be made into a separate article and formulated rather as a principle of conduct for watercourse States than as part of an article on the regular exchange of data and information.

9. Paragraph 5 dealt with a very sensitive issue, and the Commission should not attempt to deal with every aspect of it in the draft articles. As the Special Rapporteur pointed out in paragraph (15) of his comments, the OECD countries had agreed that "documents which are classified as confidential according to national law may, however, be excluded from the exchange of information" and that "the country of origin should nevertheless co-operate with the exposed country with the aim of informing it as completely as possible, or of finding another satisfactory solution". The Special Rapporteur also cited the following sentence from the OECD study, where it was underlined: "The key principle in the matter of information and consultation is good faith." He doubted that States would accept any reference in the framework agreement to information concerning their defence and security; in his opinion, paragraph 5 should be deleted.

10. Subject to those remarks, he proposed that draft article 15 [16] should be referred to the Drafting Committee.

11. Mr. ARANGIO-RUIZ said that an international watercourse, like the atmosphere, was a shared resource, yet that was perfectly reconcilable with the sovereignty of each State over the part of a watercourse flowing through its territory. It was from that point of view that all the draft articles proposed by the Special Rapporteur should be considered. He approved, essentially, of the wording of draft article 15 [16]. As Mr. Calero Rodrigues had pointed out (2051st meeting), it was not necessary to specify the economic purpose of the exchange of information or to make the exchange conditional on actual or prospective use. On the other hand, the financial burden of the collection of data had to be borne, as noted by Mr. Razafindralambo. He was sure the Drafting Committee would take into consideration the many valuable suggestions that had derived from Mr. Calero Rodrigues's remarks, in particular those made by Mr. Beesley.

12. Once the essentially "shared" nature of international watercourses in general was acknowledged, the principle of co-operation stated in draft article 15 [16] applied as a matter of course, on the strength of the Charter of the United Nations and the relevant General Assembly recommendations. Draft article 15 [16] therefore appeared to be fully justified, on the basis of that principle, as a matter *de lege lata*. The extent of the obligation to co-operate should be assessed on the basis of the exclusive right of each sovereign State, but also in proportion to the need for development of the resource and protection of the environment.

13. Any rules or principles proposed by the Special Rapporteur that were not part of the existing legal

régime of international watercourses should be carefully studied by the Commission as matters *de lege ferenda*, in particular the pollution problem raised by Mr. Beesley (2050th meeting). It should not be forgotten that the most essential function assigned by the General Assembly to the Commission was the progressive development of international law. Given the physical features of international watercourses, and their connection with the most vital interests of mankind, the law of international watercourses should be not only codified, but also adequately developed. The entire content of draft article 15 [16], together with the amendments proposed, should accordingly become an integral part of the draft articles; the annex should contain only additional institutional provisions, which might take the form of recommendations.

14. Mr. THIAM proposed that the Planning Group should consider the Special Rapporteur's suggestion that priority be given to those topics whose first reading might be completed before the end of the term of office of the members of the Commission.

15. Referring to draft article 15 [16], he observed that, whether or not the obligation to co-operate was a legal obligation in the strict sense of the term, it met a generally recognized need and all proposals in support of it should be taken into consideration. The draft article contained one rule, one restriction and one exception. On the rule, all members seemed to be in agreement. The restriction, in paragraph 2, appeared to be a matter of common sense; but it should be stated, either in the text or in an explicit formulation in the commentary, that the concept of information "reasonably available" must be applied to States having regard to their degree of development. He doubted whether it was necessary to include the words "reasonably available" in paragraph 1.

16. The exception, in paragraph 5, also appeared to be a matter of common sense. National security should not, however, be used by States as a pretext for refusing to provide information. That problem was difficult to resolve, even applying the idea of good faith, which was a useful concept provided that it was evaluated by a competent court. He noted that the Special Rapporteur had included the settlement of disputes under "Other matters"

17. He agreed with other speakers that draft article 15 [16] could be shortened, and that the paragraphs containing the restriction and the exception could be made into separate articles.

18. Mr. HAYES expressed his approval of the projected outline of the topic submitted by the Special Rapporteur in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7), and his schedule for completion of the first reading during the current quinquennium (*ibid.*, para. 8).

19. Any attempt at progressive development and codification of a topic had to be based on certain essential concepts. The essential underlying concepts for the present topic included a general obligation of States to co-operate, and the twin objectives of optimum utilization and equitable and reasonable utilization.

20. He noted that the rules in draft article 15 [16] were intended to be residual rules and that they provided for

no more than the minimum necessary exchange of information. In his view, the content of the article adequately reflected the concepts to which he had referred; the provisions were well supported by the material contained in the Special Rapporteur's fourth report. He accordingly endorsed the general thrust of the draft article and had only a few reservations on points of detail.

21. In response to the views of some members, the Special Rapporteur had agreed that the listing of categories of information should be extended, while remaining non-exhaustive. In particular, the Special Rapporteur had agreed that categories relating to environmental or ecological considerations could be added. In that connection, Mr. Beesley (2051st meeting) had suggested that paragraph 1 of the article should be reformulated to require a greater effort at collecting information, and that paragraph 2 should impose a more onerous burden on the requested State in respect of the costs of such collection. It would be of interest to have the Special Rapporteur's views on those suggestions.

22. He supported the idea of dropping the concluding proviso of paragraph 1, since the obligation imposed covered only "reasonably available" data and information.

23. The provision in paragraph 4 was particularly important and he agreed that it should form a separate article, to be placed in part VI of the draft articles. Careful attention should also be paid to the comments made on the content of that paragraph, particularly by reason of its possible effect on the liability of a State arising from a disaster. The best way to deal with that problem was to include a "without prejudice" clause.

24. Paragraph 5 dealt with a very sensitive subject. The text struck the right balance between the protection of information on national defence or security, which no State would be prepared to share with others, and the need to prevent the abuse of invoking alleged defence secrecy to avoid the obligation to exchange information.

25. Draft article 15 [16] should be referred to the Drafting Committee for consideration in the light of the discussion.

26. Mr. McCAFFREY (Special Rapporteur), summing up the discussion on the first two chapters of his fourth report (A/CN.4/412 and Add.1 and 2), thanked members for their generous comments and their constructive and useful suggestions.

27. His projected outline of the topic as a whole (*ibid.*, para. 7) had proved broadly acceptable. The same was true of his tentative schedule for submission of the remaining material (*ibid.*, para. 8). All the members who had spoken during the discussion had approved of that schedule. It would be possible for him to submit his reports earlier than indicated if the Commission's overall programme of work justified it.

28. A number of preliminary points regarding the content of draft article 15 [16] had arisen during the discussion. The first was whether the exchange of data and information was a requirement under international law. There had been a division of opinion on that point during the discussion; some members had asserted that such a requirement existed, whereas others had disputed that

assertion. He himself did not believe it was necessary to settle that issue—or the similar issue of the duty of co-operation—since the exchange of data and information was in any event necessary for the purposes of implementing articles 6, 7 and 8 [9]. That point had been made by a number of speakers. Nevertheless, the abundant materials from State practice which he had cited in his report provided strong evidence in support of the duty to exchange data and information. He noted Mr. Thiam's interesting comment that there was in any case a need for the exchange of data and information, whether it was a legal requirement or not.

29. Several members had suggested that draft article 15 [16] should be moved to part II (General principles), following article 9 [10] (General obligation to cooperate). That would avoid having a part IV containing only one draft article. Another possibility was to move draft article 15 [16] to part III (New uses and changes in existing uses), where it would follow the provisions on notification.

30. As to the text of the article, which had proved broadly acceptable, he noted the suggestion that the adjective "Regular" should be deleted from the title. The adoption of that suggestion would depend on whether paragraphs 4 and 5 remained part of draft article 15 [16]; if they did, the change in the title would be justified. That point could be left to the Drafting Committee.

31. Several members had criticized the reference in paragraph 1 to the "physical characteristics" of the watercourse as making the provisions unduly restrictive, and had proposed that the language should be made broader, so as to cover ecological and environmental considerations. He himself would favour such broader language.

32. It had also been proposed that the concluding proviso "unless no watercourse State is presently using or planning to use the international watercourse [system]" should be dropped. Some members thought that it was not really necessary; others believed that there was a duty to transmit data and information, even if the watercourse was not being used. He himself had no very strong views on the question of retaining that clause, but stressed that it should be read in conjunction with the qualification "reasonably available" applied to the data and information to be exchanged. Reference had been made to the financial burden that would have to be borne by the State requested to furnish the data and information. If no watercourse State was using or planning to use the watercourse, however, very little information would be involved and the financial burden would be light.

33. It had been suggested by some members that the text of the article should refer expressly not only to the need for "regular" exchange of information, but also to the requirement that the data and information should be supplied in a "timely" fashion. According to another view, since the exchange under paragraph 1 had to be "regular", the element of timeliness was necessary only in regard to the incidents or disasters referred to in paragraph 4.

34. It had also been suggested that the article should contain an express reference to an obligation of the State in regard to the collection and processing of data. Bearing in mind that paragraph 1 dealt only with data and information that were "reasonably available", he thought that difficulties might arise on that point. The matter could be referred to the Drafting Committee.

35. Some members had supported the inclusion in paragraph 1 of a reference to "planned uses"; that suggestion had been opposed on the grounds that the matter was already dealt with in draft articles 10 [11] *et seq.* It should be borne in mind, however, that those articles dealt only with planned uses that could have an appreciable adverse effect on other watercourse States. He himself had no strong views on the matter.

36. With regard to the opening clause of paragraph 1, several members had expressed a preference for the formulation given at the end of paragraph (2) of his comments, namely "watercourse States shall exchange, on a regular basis and in a spirit of co-operation, reasonably available data and information". A formulation of that kind would place greater emphasis on the duty to exchange data and information and would relegate the concept of co-operation to a lower place in the paragraph.

37. There had been suggestions that provision should be made, in either paragraph 1 or paragraph 2, for the establishment of joint bodies or of a network for the exchange of data and information, or alternatively, that an optional provision should be included, to the effect that watercourse States should co-operate in the collection and regular exchange of data and information; the possibility of establishing joint bodies would be implicit in such a stipulation. Another suggestion related to the need for joint fact-finding machinery; that was particularly important, because it related to a number of other articles in the draft and also to the whole area of dispute settlement. It would be advisable to provide for the institution of such machinery, either in the draft articles or in an annex.

38. With regard to the word "regular", while a number of members agreed that there should be a requirement to exchange data and information on a regular basis, others considered that a regular exchange might not always be necessary for practical reasons, and that exchanges should then be effected *ad hoc* and on the basis of reciprocity.

39. That led to the question of the relationship between regularity of exchange and the extent to which data and information were "reasonably available". Some members thought that to require the regular exchange of data and information would impose a heavy financial burden on States, which they might be unable to bear. It had therefore been suggested that the creation of a joint body to facilitate the collection, exchange and financing of data and information should be envisaged, and Mr. Razafindralambo had put forward some very interesting ideas on that question. The Commission might therefore wish to consider the inclusion in the draft articles of a provision along the lines of the provisions incorporated in the 1982 United Nations Convention on the Law of the Sea, particularly those in

part XIV of that instrument. Alternatively, an optional provision could be included in the draft to allow for the possibility of setting up such bodies; or again, the Commission might decide that the expression "reasonably available" was sufficiently elastic to cover the problem. His own preference would be for an optional provision, which would make for a positive approach to the matter. The point could perhaps be discussed further in the Drafting Committee.

40. In the view of at least one member, the expression "reasonably available" was too restrictive and the duty to co-operate might in some cases impose a requirement that information which was not reasonably available should be obtained. That point too required further consideration. If the Commission wished to impose a positive obligation, it should be specific as to the kind of data and information to which that obligation would apply.

41. It had been said that the nature of the obligation to exchange data and information required further consideration, with particular reference to the elements of that obligation and the consequences of a breach of it. Mr. Razafindralambo had asked why no sanctions had been provided for in draft article 15 [16], as in other articles, for failure to comply with the obligation. It was perhaps because the provision on liability in such cases, which had been submitted at the previous session, had not attracted much support, and because the obligation under consideration was of a far more general nature than the obligation to notify planned measures.

42. Referring to paragraph 2, he noted that some members had expressed doubts about the expression "data or information that are not reasonably available", which they feared would provide a loophole and lead to abuses. One member had considered that special research might sometimes be necessary.

43. With regard to the duty of compensation, a number of members thought that due account should be taken of the inequality in the level of economic development of States and of the financial burden that would be imposed on a State requesting data and information. Perhaps the Commission should seek a formulation whereby compensation would be made on an equitable basis. Often, however, there might be no problem. For instance, where a developing country requested information from a developed country, the latter would often have that information available. In some cases, there would be no inequality because all the countries in the region were developing countries. The problem was therefore more one of financing than of redressing inequality. The point raised by Mr. Razafindralambo in that connection would be worth pursuing.

44. It had also been mentioned that in most instances the costs of collection should be shared, since the data and information were necessary for the utilization of an international watercourse in an equitable and reasonable manner and also for the attainment of its optimum utilization; and it had been said that paragraph 2 would be useful in guarding against requests that might be vexatious or expensive. In particular, it had been suggested that, where the effects on a watercourse State or watercourse were exclusively attributable to uses by the State

from which the data and information were requested, that State should bear the costs of collecting the data and information, at least in so far as they were reasonably necessary for the attainment of the objects of the draft articles. That was a valid point and should be reflected either in the articles or in the commentary.

45. A further point concerned the term "other entity". While some members favoured the inclusion of a provision for the establishment of an entity or a joint body which might help to relieve the financial burden on States of collecting and exchanging data and information, other members took the view that the reference to such an entity should be deleted, as it was too vague and would imply that the entity had the right to request data and information. Some thought that the Commission should wait to see what form the draft as a whole took before deciding on the need for such a reference, which could perhaps be dealt with in an annex, since the draft articles contained only residual rules. His own view was that the reference to an "other entity" could probably be deleted from paragraph 2, unless it was decided to refer to joint bodies in paragraph 1. It was important to be consistent in the article.

46. While all members agreed with the idea underlying paragraph 3, which dealt with the need to ensure that the data and information collected were usable, it had been pointed out that too much information could create problems and that in some cases simplification might be necessary.

47. It was the view of many speakers that the subject dealt with in paragraph 4 was sufficiently important to warrant a separate article, which could perhaps be placed in part VI of the draft, on water-related hazards and dangers. Some members also thought that paragraph 4 should be broadened to include ecological and environmental dangers. Since there was a clear need for a provision of some kind on that subject, it might be well to consolidate in a single article all the relevant provisions, including those of draft article 18 [19] (Pollution or environmental emergencies), which would be submitted to the Commission during the current session. It had also been pointed out that paragraph 4 overlapped to some extent with the topic dealt with by Mr. Barboza (International liability for injurious consequences arising out of acts not prohibited by international law), and might therefore benefit from the Commission's work on that item of the agenda. Several members thought that some kind of saving clause was required for a number of reasons, including that of clarifying the relationship between the obligations laid down in paragraph 4 and the provisions on liability in Mr. Barboza's draft.

48. In regard to paragraph 5, a number of members had recognized the need to protect sensitive data and information, and at least one member had considered that any obligation to exchange such data and information should be expressly excluded. Some members had considered that the matter was already adequately dealt with in paragraph 1, which struck the right balance between the interests of the requesting State and the other State. It had also been pointed out that paragraph 5 should not serve to create a loophole and thus become a source of abuses. In view of the highly sensitive nature

of the question, it had been said that the matter required further examination; at least two members had taken the view that it should simply be left to States themselves to decide.

49. In the opinion of Mr. Thiam, if the draft articles did not provide for a procedure for the settlement of disputes, there would be no point in referring to good faith. Some members had expressed the view that the draft should contain provisions on dispute settlement for the purposes not only of article 15 [16], but also of other articles as well. Since the general view was in favour of some provision along the lines of paragraph 5, the matter could perhaps be examined further in the Drafting Committee.

50. He thanked members for their constructive comments and suggestions; they would provide a sound basis for work in the Drafting Committee, to which article 15 [16] could now be referred for further consideration.

51. The CHAIRMAN, noting that the Commission had concluded its consideration of the first two chapters of the Special Rapporteur's fourth report (A/CN.4/412 and Add.1 and 2), said that, if there were no objections, he would take it that the Commission agreed to refer draft article 15 [16] to the Drafting Committee for consideration in the light of members' comments.

*It was so agreed.<sup>4</sup>*

*The meeting rose at 11.35 a.m.*

<sup>4</sup> For consideration of draft articles 10 [15] [16] and 20 [15] [16] proposed by the Drafting Committee, see 2071st meeting, paras. 6 *et seq.*, and 2073rd meeting, paras. 62 *et seq.*, respectively.

## 2053rd MEETING

*Tuesday, 31 May 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

### L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR

#### ARTICLE 11 (Acts constituting crimes against peace)

1. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on the topic (A/CN.4/411), as well as the revised draft article 11<sup>4</sup> contained therein, which read:

#### CHAPTER II. ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

##### PART I. CRIMES AGAINST PEACE

#### *Article 11. Acts constituting crimes against peace*

The following constitute crimes against peace:

1. The commission by the authorities of a State of an act of aggression.

##### (a) *Definition of aggression*

(i) Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition;

(ii) *Explanatory note.* In this definition, the term "State":

a. is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

b. includes the concept of a "group of States", where appropriate.

##### (b) *Acts constituting aggression*

Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression:

(i) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(ii) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(iii) the blockade of the ports or coasts of a State by the armed forces of another State;

(iv) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(v) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(vi) the action of the authorities of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(vii) the sending by or on behalf of a State of armed bands, groups, irregulars (or mercenaries) which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

##### (c) *Scope of this definition*

(i) Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful;

<sup>4</sup> Revised text of draft article 11 submitted by the Special Rapporteur at the Commission's thirty-eighth session (*Yearbook . . . 1986*, vol. II (Part Two), pp. 42-43, footnote 105).

- (ii) Nothing in this definition, and in particular subparagraph (b), could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

2. Recourse by the authorities of a State to the threat of aggression against another State.

### 3. FIRST ALTERNATIVE

Interference by the authorities of a State in the internal or external affairs of another State. The term "interference" means any act or any measure, whatever its nature or form, amounting to coercion of a State.

### 3. SECOND ALTERNATIVE

Interference by the authorities of a State in the internal or external affairs of another State:

- (i) by fomenting, encouraging or tolerating the fomenting of civil strife or any other form of internal disturbance or unrest in another State;
- (ii) by organizing, training, arming, assisting, financing or otherwise encouraging activities against another State, in particular terrorist activities.

#### (a) Definition of terrorist acts

The expression "terrorist acts" means criminal acts directed against a State or the population of a State and calculated to create a state of terror in the minds of public figures, a group of persons, or the general public.

#### (b) Terrorist acts

The following constitute terrorist acts:

- i. any act causing death or grievous bodily harm or loss of liberty to a head of State, persons exercising the prerogatives of the head of State, their hereditary or designated successors, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;
  - ii. acts calculated to destroy or damage public property or property devoted to a public purpose;
  - iii. any act likely to imperil human lives through the creation of a public danger, in particular the seizure of aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity;
  - iv. the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.
4. A breach of the obligations of a State under a treaty designed to ensure international peace and security, in particular by means of:
- (i) prohibition of armaments, disarmament, or restriction or limitation of armaments;
  - (ii) restrictions on military training or on strategic structures or any other restrictions of the same character.

5. A breach of the obligations of a State under a treaty prohibiting the emplacement or testing of weapons in certain territories or in outer space.

### 6. FIRST ALTERNATIVE

The forcible establishment or maintenance of colonial domination.

### 6. SECOND ALTERNATIVE

The subjection of a people to alien subjugation, domination or exploitation.

7. The recruitment, organization, equipment and training of mercenaries or the provision of facilities to them in order to threaten the independence or security of States or to impede national liberation struggles.

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (e) is not a member of the armed forces of a party to the conflict;
- (f) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. Mr. THIAM (Special Rapporteur) said that his sixth report (A/CN.4/411) consisted of three main parts: part I related to the crimes against peace enumerated in the 1954 draft code; part II proposed new characterizations of acts as crimes against peace; and part III contained the revised text of draft article 11.

3. The report was entirely about one particular category of crimes against the peace and security of mankind, namely crimes against peace, which were acts that threatened international peace and security, either because they constituted a breach of the peace or because they constituted a threat to peace. They differed from crimes against humanity because they affected the sovereignty or territorial integrity of States and accordingly involved State entities. Aggression was a typical example. Crimes against humanity threatened human entities—peoples, populations or ethnic groups—on the grounds of race, religion, political opinion, and so on. Genocide was the best illustration of that kind of crime. The Commission had already discussed that distinction at length at its thirty-seventh session, in 1985, when it had considered his third report on the topic.<sup>5</sup>

4. Referring to part I of the sixth report, it would be noted that nine crimes against peace were enumerated in the 1954 draft code, and the question now before the Commission was the possible revision of that list.

5. The first difficulty concerned the crime of aggression and preparation of aggression. The concept of preparation, which had been taken from the Charter of the Nürnberg International Military Tribunal<sup>6</sup> and from the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal),<sup>7</sup> had also been used by the Commission in the Nürnberg Principles,<sup>8</sup> but the Commission had not given a sufficiently precise indication of the content of that concept. For example, when did preparation of aggression commence? What distinguished it from preparation for defence? When aggression did take place, should the perpetrator be prosecuted both for the crime of preparation and for the

<sup>5</sup> *Yearbook . . . 1985*, vol. II (Part One), p. 63, document A/CN.4/387.

<sup>6</sup> Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

<sup>7</sup> *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

<sup>8</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

crime of aggression? Lastly, if aggression did not take place, how could criminal intent be established? He did not have answers to all those questions and was relying on the Commission to enlighten him. If the Commission wished to retain preparation of aggression among the crimes against peace, which seemed somewhat unlikely, it would always be possible to make it the subject of an express provision.

6. Two other crimes listed in the 1954 draft code could be removed from the list, since they were specified in the 1974 Definition of Aggression.<sup>9</sup> They were annexation, and the crime of sending armed bands into the territory of another State. The Commission would therefore have to decide whether it wished to treat those acts as separate crimes.

7. The greatest difficulties, however, were posed by the crime of intervention in a State's internal or external affairs. The concept itself was not in dispute; it was the content that called for further reflection. As he argued in his report (*ibid.*, paras. 12-14), wrongfulness depended on the form and extent of the intervention. If intervention was military in character, it became aggression. It was difficult, however, to exclude from international relations the influence which certain States exerted on other States and which was sometimes mutual. Hence coercion was the factor which made it possible to draw a distinction between lawful intervention and wrongful intervention.

8. The legal basis of the principle of non-intervention raised fewer doubts because it was very firmly established, first of all in treaty law, such as the Charter of the United Nations, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty<sup>10</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>11</sup> and also in judicial precedents. Thus, in its Judgment of 27 June 1986 in the *Nicaragua* case, the ICJ had ruled that the principle of non-intervention was "part and parcel of customary international law".<sup>12</sup> The Commission itself had gone still further by stating, in the commentary to article 50 of the final draft articles on the law of treaties, adopted in 1966, that the prohibition of the use of force constituted a conspicuous example of a rule in international law having the character of *jus cogens*.<sup>13</sup>

9. The most interesting problem raised by the concept of intervention, however, was its legal content. Generally speaking, the tendency was to make it very broad in scope, as could be seen from the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the Charter of

OAS (Bogotá Charter) (*ibid.*, para. 24), resolution 78 of 21 April 1972 of the General Assembly of OAS (*ibid.*, para. 25) and the ICJ's judgment in the *Nicaragua* case. Those texts confirmed that it was the element of coercion that marked the dividing line between lawful intervention and wrongful intervention.

10. In view of that broad legal content, there had to be room for exceptions, such as the "colonialism exception", which would justify intervention designed to assist colonial peoples struggling for independence. There was also the case of intervention on the basis of the attributes of the United Nations, and that of intervention at the request of the Government in whose territory the intervention occurred.

11. In the 1954 draft code, however, the concept of intervention was very restricted, since it was limited to "coercive measures of an economic or political character" (art. 2, para. (9)). It was for that reason that the 1954 draft code treated as separate offences certain acts—such as the encouragement of civil strife in another State—that it would be difficult nowadays to distinguish from intervention. Furthermore, the 1954 code did not cover certain acts which had become commonplace today: training camps for rebels against the Government of another State, financing terrorism, and so on. Accordingly, he would be inclined to favour broadening the definition of intervention adopted in 1954. Of course, the Commission would still have to decide what was to be done with regard to fomenting civil strife and to terrorism in all its forms: would they or would they not be included in the general definition of intervention in a State's internal or external affairs?

12. Another consideration was that intervention could not be confined to measures of coercion *in* another State, for it would seem to encompass certain activities which, although occurring *outside* the territory of a State, were aimed at intervention in its internal affairs. That was true of military training of armed nationals, of supplying arms and equipment, of financing subversive movements, etc.

13. In part II of his sixth report he had added two new situations that could constitute crimes against peace: colonial domination, a problem on which the Commission had engaged in very lively debate at its thirty-seventh session, in 1985, and mercenarism, which it had also discussed at length. A new provision concerning mercenarism was proposed in paragraph 7 of draft article 11, in the realization that an *Ad Hoc* Committee of the United Nations was working on the matter. The Committee's conclusions were not binding on the Commission, but the Committee's work was not yet completed and the definition of mercenarism he had proposed could only be provisional.

14. Part III of the report contained the revised draft article 11. Most of its provisions were followed by brief comments summarizing the discussions already held thereon and citing the various international instruments on which the provisions were based.

15. Mr. BENNOUNA said that the Special Rapporteur had displayed an interesting approach to the presentation of the problem of intervention, a very complex problem to which the Commission would un-

<sup>9</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>10</sup> General Assembly resolution 2131 (XX) of 21 December 1965.

<sup>11</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>12</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 106, para. 202.

<sup>13</sup> *Yearbook . . . 1966*, vol. II, p. 247, document A/6309/Rev.1, part II, para. (1) of the commentary.

doubtedly have to revert. For the time being, he would confine his statement to a few preliminary remarks.

16. Several principles of international law had a bearing on the question of intervention. The first was the rule on the non-use of force. While cases of military intervention such as armed attack, the sale of arms, the training of armed groups, etc. were fairly well known, international law was much less clear with regard to economic or political intervention. For example, economic coercion was left more or less aside even in the 1969 Vienna Convention on the Law of Treaties, because the practice of States was too fluid to establish a general rule.

17. The concept of intervention was also tied in with the right of peoples to self-determination, but that right also had internal aspects. It implied that a people was entitled to adopt the government of its choice; if it was prevented from doing so from outside, the case was one of intervention. Moreover, the right to self-determination was not confined to liberation from the colonial yoke: it also meant that political debate within the State was to be free of any outside coercion. Besides, international law did not impose in that connection any principle of legitimacy and did not pass judgment on the régimes—whether democratic or authoritarian—chosen by peoples. It was sufficient for a régime to emanate from the State itself.

18. The Special Rapporteur had analysed very clearly the problem of the legal content of the concept of intervention. Was intervention neutral, and did it become wrongful when it took certain forms, or was it wrongful in itself? It should be noted, in passing, that the term “intervention” was no longer neutral, in view of its pejorative connotations in legal opinion and in General Assembly resolutions: perhaps it would be better to use the word “interference”, which did not have such ominous implications. The Special Rapporteur seemed to favour the solution of laying down a general principle of non-intervention, followed by an enumeration of exceptions to that principle. The Commission would have to clarify its position on that particular point, for intervention had become the commonest form of coercion and the commonest manifestation of power relations in the world; it could take very subtle forms to avoid the sanctions on aggression, yet it sometimes led to the same results.

19. That was true, for example, of so-called “intervention by consent” or “requested intervention”, in other words intervention by one State in the territory of another with the latter’s consent. Over the past 30 years, that exception had been frequently invoked in order to justify certain events. On the grounds that the Government concerned had given its consent—whether beforehand or afterwards was another question—the interventions in question had been claimed to be lawful. He did not share that view. In the first place, the right of every people to adopt the régime of its choice was a general and absolute right; any act committed in breach of it had to be declared wrongful, and it was not possible to invoke any other circumstance as an exception. Moreover, the legitimacy of a political régime was often a very uncertain question, for example in the case of civil war.

20. Lastly, the Special Rapporteur could have carried further his analysis of intervention, which was a very common method of practising compulsion and coercion in the world of today. If the Commission failed to pinpoint intervention in legal terms, it would run the risk of bypassing a major aspect of modern international practice.

21. Mr. ARANGIO-RUIZ said that, if he had understood him correctly, he could not agree with Mr. Bennouna’s conception of the right of peoples to self-determination. He was referring, in particular, to Mr. Bennouna’s remark that international law did not pass judgment on the régimes—whether democratic or authoritarian—chosen by peoples and that it was sufficient for a régime to emanate from the State itself. In his own view, that was not exactly the attitude of modern international law with regard to the political régimes of States. In accordance with the international instruments which governed the right of peoples to self-determination—whether originating in the United Nations or in other bodies—and in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>14</sup> all peoples, including metropolitan peoples, possessed the right to self-determination, and not only colonial peoples. That interpretation was confirmed by the instruments adopted by the United Nations after 1970 and by the Helsinki Final Act adopted on 1 August 1975.<sup>15</sup>

22. The chapter of the Helsinki Final Act on “Questions relating to security in Europe” included in particular a “decalogue”, i.e. 10 principles of conduct which the States participating in the Conference had declared to be in conformity with the Charter of the United Nations and had undertaken to respect in their mutual relations and in their relations with third States.<sup>16</sup> Principle VI concerned non-intervention in internal affairs, which was defined in accordance with the relevant United Nations instruments and framed with even greater precision. Principle VIII concerned the equal rights and self-determination of peoples. Its second paragraph stated that “*all\* peoples always\* have the right, in full freedom, to determine, when and as they wish\*, their . . . political status\**”; and its third paragraph stated that “*the participating States reaffirm the universal significance\* of respect for and effective exercise of equal rights and self-determination\**” and “*also recall the importance of the elimination of any form of violation of this principle\**”.

23. Hence there was unquestionably an internal aspect as well as an external aspect of the right to self-determination. Under the external aspect, States were called upon to respect the right to self-determination of other peoples and States. Under the internal aspect, every State—and thus every Government—was called upon to respect the right of its own people freely to choose its political régime and freely to change it whenever it saw fit. That inevitably implied condem-

<sup>14</sup> See footnote 11 above.

<sup>15</sup> *Final Act of the Conference on Security and Co-operation in Europe* (Lausanne, Imprimeries Réunies, [n.d.]).

<sup>16</sup> *Ibid.*, pp. 77 *et seq.*, sect. 1 (a), “Declaration on Principles Guiding Relations between Participating States”.

nation of any régime which, being undemocratic, was constitutionally or by definition unable to guarantee the exercise of the freedoms without which no popular self-determination was conceivable. In other words, every Government had to ensure its own people's right to adopt a free régime and to change its Government at any time, that was to say the right to internal self-determination. The advent of dictatorships in Europe in the 1930s could be explained by the fact that some countries had tolerated that new state of affairs, and they had suffered the consequences later.

24. He would point out that, in emphasizing the internal aspect alongside the external aspect of the right of peoples to self-determination, the Helsinki Final Act—in which 35 States, including four permanent members of the Security Council, had participated—had stated no new rules compared with the Charter. With regard particularly to freedom of decision, it only made more explicit the universal character of self-determination which was already set out in the Charter and which rightly entailed an internal dimension alongside the external dimension to that right.

25. Mr. CALERO RODRIGUES said that he would caution the Commission against deviating from its task, which was in fact more restricted and more specific. He even wondered whether each crime should not be discussed in turn. As the Special Rapporteur had pointed out, the Commission had devoted no less than 11 meetings at its thirty-seventh session, in 1985, to various aspects and consequences of the crimes against peace covered by draft article 11. Hence there seemed to be no point in reopening that discussion and it would be better to concentrate on the proposed new version of the article.

26. Commenting generally on the draft code, he said that the Commission was required to decide not on the lawfulness of certain acts, but rather on the responsibility of the individual who had committed a particular act. For example, while there was no doubt that intervention in the affairs of a State was forbidden, that did not necessarily mean it fell within the ambit of the draft code. Furthermore, the fact that a particular act was excluded from the code certainly did not mean that the act was lawful.

27. The Special Rapporteur's sixth report (A/CN.4/411), although understandably less comprehensive and detailed than his previous ones, met the needs of the present session. The proposed draft article 11 none the less called for one comment on methodology: in principle, it would be preferable to have as many articles as crimes, rather than deal with all crimes against peace in one single article. But that question could be settled later by the Commission, or by the Drafting Committee.

28. The first of the seven crimes against peace covered by article 11 was, of course, aggression, and it was established at the outset that those guilty of such a crime must be the authorities of a State. Neither a private individual nor even a group of individuals could commit an act of aggression. The same problem would be encountered in the case of all crimes against peace, hence the need to link the responsibility of the individual to the act of a State, whether or not that act was a crime within the meaning of article 19 of part I of the draft ar-

ticles on State responsibility.<sup>17</sup> Was it enough to refer, as did paragraph 1 of article 11, to the "commission by the authorities of a State of an act of aggression"? Possibly a more direct reference could be made, to make it clear that the individual, as an authority of the State, was held accountable in his individual capacity for his participation in an act committed by the State.

29. The Special Rapporteur gave a definition of aggression which was accompanied by an explanatory note and a list of acts constituting aggression. The text was based on the 1974 Definition of Aggression,<sup>18</sup> with some changes to take account of the political elements, for the Commission was concerned only with the legal aspect of the matter. He was not certain, however, that that presentation was satisfactory, and regretted in particular that the definition and the explanatory note, apparently proposed for inclusion in the draft article itself, preceded the list of acts constituting aggression. In his view, the definition of aggression was not essential for the article. As with criminal law in general, the Commission should be concerned with specific acts to which a sanction attached. In his view, the article should be limited to the introductory statement in paragraph 1 and the list of acts constituting aggression. The clarifications given elsewhere were perhaps useful, but they were not indispensable. Also, the more the Commission tried to clarify points, the more it would run into difficulties. A feature of criminal law was its conciseness: it set forth the facts and established the consequences of those facts.

30. Nor was he convinced that the threat of aggression had a place in the draft article. The Special Rapporteur had been wise not to include preparation of aggression and should do likewise in the case of the threat of aggression, which did not of course mean that it would thereby be legalized. How could individuals be punished for the threat of aggression? And what would happen if the threat was not carried out? To cover the threat of aggression would be to extend the scope of the draft code unduly and thus make its acceptance even more difficult.

31. The second crime was "intervention", which, in English, was preferable to the term "interference". It was not necessary, however, to retain intervention as such in the draft code. In 1985, he had recommended that the concept of intervention be broken down and that the acts of intervention to be covered by the code be specified, without dwelling on the actual concept of intervention,<sup>19</sup> which was extremely complex and would give rise to much difficulty. Some of the elements constituting intervention in fact appeared in the second alternative of paragraph 3, which included a reference to terrorist activities. In that connection, there was no reason why the subject of paragraph 7, the activities of mercenaries, should not be added to terrorist activities. Mercenarism was admittedly a problem, particularly so in some parts of the world, but it lacked the specificity necessary for inclusion in the code. The concern of many States on that score was certainly understandable, but the Commission would achieve the same result by

<sup>17</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>18</sup> See footnote 9 above.

<sup>19</sup> See *Yearbook* . . . 1985, vol. I, p. 17, 1880th meeting, para. 38.

referring to the use of mercenaries in paragraph 3, while preserving the economy of the draft and avoiding points of friction.

32. The Special Rapporteur provided a definition and a list of terrorist acts and, there again, a definition was, strictly speaking, unnecessary, although a general definition, like the one proposed, might be useful. Unlike intervention, the concept of terrorism was relatively easy to understand.

33. In paragraphs 4 and 5, both of which dealt with a breach of the obligations of a State, there was the recurring problem of the relationship between the responsibility of the individual and the nature of the act for which that responsibility was incurred and for which the individual would be liable to punishment. In the cases covered, a breach of the treaty obligations in question could only be an act of a State, and the individual could only be part of the mechanism of the State that had caused the breach. The proposed wording was certainly not judicious. On a point of form, since the nature of the obligations was the same in both cases, namely treaty obligations of a military nature, the two provisions could easily be combined.

34. As to paragraph 6, on colonial domination, it would be noted that neither alternative referred to an act of a State, yet only an act of a State could be involved. The proposed wording, at least in the first alternative, was similar to that used in paragraph 3 (b) of article 19 of part 1 of the draft articles on State responsibility, and an act of State was common to all other crimes covered by draft article 11, including aggression, intervention and a breach of the obligations of States. One solution might be to invert the proposition in paragraph 2 of article 3 (Responsibility and punishment), provisionally adopted by the Commission at the previous session,<sup>20</sup> so as to provide in chapter 1 of the draft that the responsibility of the individual was subordinate to the establishment of the responsibility of the State. How, for instance, could an individual who had taken part in an act of aggression be punished if the State concerned was not considered to have committed the act in question? That comment applied equally to intervention and colonial domination. It would perhaps be advisable, therefore, to provide expressly in the draft code for a connection between the act giving rise to the responsibility of the individual and the fact that such an act was ultimately an act of a State.

35. With regard to paragraph 7, he would refer members to his earlier comments on mercenarism (para. 31 above).

36. In conclusion, he considered that there should be one article for each crime; that the threat of aggression and mercenarism should be excluded from the list of acts constituting crimes; and that paragraphs 4 and 5 of article 11 should be combined. In particular, the Commission should, in the light of members' comments, take a decision on the text to be referred to the Drafting Committee, in other words on the content of the list of criminal acts proposed by the Special Rapporteur, and indicate whether the list was to be retained in its present form, expanded or reduced. He trusted that the Com-

mission would be able to do so at the present session. The Commission was not required to draft a general code of international criminal law, and the draft code dealt not with the responsibility of States, but with that of individuals for certain specific acts. For that reason, the code must be specific and precise; otherwise it would be unrealistic and could not be applied.

37. Mr. FRANCIS said that, having listened to the Special Rapporteur, he wished to make a few preliminary comments on preparation of aggression, and to respond to Mr. Calero Rodrigues on one point.

38. Since he understood that the Special Rapporteur did not intend to include preparation of aggression in the draft code, he wished, bearing in mind recent history and particularly the Second World War, to point out that some aggression was inevitably preceded by preparations. He therefore believed that preparation of aggression should be covered by the draft, but it should not affect the legitimacy of activities related to a State's right to self-defence. Indeed, the threat of aggression should also be included.

39. As to Mr. Calero Rodrigues's remarks on mercenarism, no matter what interpretation was given to mercenarism in the Definition of Aggression, it should also be possible to apply the code to cases in which an individual committed a crime against the peace and security of mankind independently of any underlying act of State.

40. He reserved the right to speak on the Special Rapporteur's sixth report (A/CN.4/411) at a later date.

41. Mr. KOROMA pointed out that the Helsinki Final Act was not the only instrument that recognized the right to self-determination at the internal level.

*The meeting rose at 11.35 a.m.*

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## 2054th MEETING

*Wednesday, 1 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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1. The CHAIRMAN said members would surely be pleased to hear that, during the week of 23 to 27 May, the Commission had used 100 per cent of the time and conference service facilities allocated to it.

<sup>20</sup> *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

ARTICLE 11 (Acts constituting crimes against peace)<sup>4</sup>  
(continued)

2. Mr. BARSEGOV thanked the Special Rapporteur for his punctual submission of material which fully and objectively reflected the views expressed by States so far and thereby facilitated the Commission's task.
3. He had intended to speak on specific provisions of draft article 11, but a number of conceptual issues had resurfaced during the discussion at the previous meeting and he wished to address them. His main concern was that solutions were being proposed which, by their very nature, could lead the Commission into an impasse. Without casting doubt upon the premise that the code must cover the crimes of individuals, he could not agree with conclusions being drawn with regard to the definition of acts constituting a crime. In particular, the view had been expressed that, since the code was to cover crimes committed by individuals, what was to be regarded as constituting a crime should be separate facts divorced from the crime as a whole—aggression, interference in the internal affairs of States, colonialism, etc. Criminal law, it was said, was specific in nature and required only the establishment of the facts of the case and appropriate measures of punishment. On that basis it was proposed that no definition of an international crime should be included in the code.
4. At first glance that position would seem to be legally justified: clearly an individual could not be held responsible for crimes committed by a State, such as aggression or colonialism. But, on close examination, the deficiencies of such an approach became clearly apparent: it could imperceptibly lead to the destruction of the whole edifice of the code. International crimes against the peace and security of mankind, which were characterized by their scale, their mass nature and their gravity, were to be split up into discrete, isolated acts that constituted nothing more than ordinary criminal offences. Aggression would be reduced to a series of individual killings, violations of national frontiers, etc. The code's universal import as a means of preventing crimes perpetrated by a State through the criminal acts of its agents—individual persons, members of the police or of the armed forces—would inevitably be undermined.
5. Such fragmentation was wrong not only in the case of crimes committed by individuals as part of crimes committed by a State (e.g. aggression), but also in that

of crimes which could be committed directly by individuals (e.g. mercenarism). The code must provide a general definition of acts constituting crimes against the peace and security of mankind, which would not only reveal those crimes to be phenomena of international life, but also expose the pandemic threat to mankind posed by the criminal acts of individuals.

6. Mr. FRANCIS said that the Special Rapporteur had produced an interesting and well-written sixth report (A/CN.4/411). He could not, however, agree with the view (*ibid.*, para. 9) that, since annexation was mentioned in the 1974 Definition of Aggression,<sup>5</sup> there was no need for it to appear in the code. The Definition of Aggression referred to "annexation by the use of force of the territory of another State or part thereof" (art. 3 (a)). But annexation could be effected by means other than the use of force. He cited the example of an indigenous people aspiring to independence, which was finally granted by the metropolitan Government. That Government was then ousted in legislative elections by a party opposed to liberation of the territory, and like-minded groups in the territory were encouraged to stage a *coup*, declaring it to be part of the metropolitan country again. In such a case, the new Government of the metropolitan country would not have to send armed forces into the territory to regain it: it could accomplish that purpose by legislation, backed by the will of the new "majority".

7. The Definition of Aggression would clearly not apply in such a situation. He drew attention to the broader, more flexible formulation contained in article 2 (8) of the 1954 draft code: "annexation . . . by means of acts contrary to international law". The Commission should remember that the purposes served by the Definition of Aggression and by the draft code were not always identical.

8. He was inclined to agree with the Special Rapporteur (*ibid.*, para. 10) that the sending of armed bands into the territory of another State was already covered in the Definition of Aggression. Perhaps the Commission had no need to take the matter further, but he would reserve his judgment until the provision on terrorism had been finalized.

9. The Special Rapporteur was quite right to refer, in his discussion of intervention in the internal or external affairs of a State (*ibid.*, paras. 12 *et seq.*), to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>6</sup> to resolution 78 of 21 April 1972 of the General Assembly of OAS (*ibid.*, para. 25) and to the judgment of the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (*ibid.*, para. 17). He fully endorsed the Special Rapporteur's conclusion (*ibid.*, para. 27) that the element of coercion established the point at which interference or intervention became unlawful. The Special Rapporteur suggested either of two courses of action for determining whether intervention had occurred (*ibid.*, para. 34). He

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>4</sup> For the text, see 2053rd meeting, para. 1.

<sup>5</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>6</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

himself would favour the adoption of both courses in the draft code, rather than the selection of one of them.

10. The Special Rapporteur explained (*ibid.*, paras. 41-42) that, in deference to members of the Commission who had argued that the phrase "colonial domination" was an anachronism, he proposed that it be replaced by "alien subjugation, domination and exploitation". He himself strongly favoured the original formulation. In the wake of the decolonization process, the draft code was intended to cope with the last remaining cases of deeply entrenched colonial domination and to guard against the resurgence of such situations in the future. Colonial domination was an unpalatable notion but it was still a reality in today's world and some situations in which it was still sustained involved crimes against international peace and security and against humanity. The purpose of the draft code was not to condemn States that had formerly possessed colonies, or to censure territories that had elected to remain under the umbrella of a metropolitan power, but essentially to rectify the injustice inherent in the remaining cases in which indigenous peoples were so committed to gaining independence that they were prepared to stake their lives on attaining it.

11. As to the text of draft article 11, he agreed with the proposed format. In paragraph 1, dealing with aggression, it might be advisable to include a rider or saving clause similar to the one in article 4 of the Definition of Aggression, stipulating that the list of acts constituting aggression was not exhaustive, thus preserving the authority of the Security Council to determine other acts of aggression.

12. With regard to paragraph 3, on intervention/interference, his expressed preference for a combination of the two alternatives suggested by the Special Rapporteur could be achieved by making the first alternative part of a *chapeau*, ending with the expression "and includes", so as to allow for cases not specified in subparagraphs (i) and (ii) of the second alternative.

13. In the definition of terrorist acts, the Special Rapporteur relied rather too heavily on the 1937 Convention for the Prevention and Punishment of Terrorism.<sup>7</sup> He would prefer the emphasis to be shifted away from the head of State and public property, and the scope extended to all individuals and to property in general. Paragraph 3 (a) might be broadened to embrace passive coercion, but must in any event remain an extremely general formulation, in order to allow for the more classical enumeration of acts of terrorism, some of which were mentioned in paragraph 3 (b).

14. On the matter of colonial domination, he preferred the first alternative of paragraph 6, which was consistent with article 19 of part 1 of the draft articles on State responsibility.<sup>8</sup> He believed that the second alternative was a compromise intended to cover the situation in the Middle East. The Commission should retain the reference to colonial domination, without prejudice to the Palestinian cause.

15. Although the definition of a mercenary in paragraph 7 was taken from article 47 of Additional

Protocol I<sup>9</sup> to the 1949 Geneva Conventions, the General Assembly had recently shown unease about certain aspects of the 1949 solution and had revised the text of the negotiating document at its forty-second session, in 1987. It would therefore be inappropriate for the Commission to make a positive recommendation on that point at the present stage.

16. Mr. REUTER said that, when dealing with a topic such as the present one, there was always a temptation to depart from the specific framework of the topic and deal with general questions. The only possible way to attenuate that tendency, which was certainly necessary, was to try to link the general problems to the text as and when it justified such linkage.

17. The subject of aggression was not an undeveloped one, and the Special Rapporteur had cited treaties, the Charter of the United Nations and legal texts of lesser importance, such as the 1974 Definition of Aggression<sup>10</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>11</sup> Other data were more relative, such as the consistent jurisprudence of the ICJ.

18. In view of such a large body of material, it was difficult to know whether the Commission should organize those texts and add its own development, or classify the material to produce a compendium of principles. The question was not simple; and it was more complicated in the case of aggression than in that of the other problems the Commission would meet with later on. For besides the normative aspect, there was an institutional aspect to the matter, since there were, or might be, concrete decisions on cases of aggression. That had not escaped the attention of the Special Rapporteur, who, in his comments on draft article 11, paragraph 1, noted that interpretation and evidence were "matters within the competence of the judge". By way of illustration, he (Mr. Reuter) pointed out that the Security Council had decision-making powers with respect to aggression, but did not have judicial powers, in that its primary concern was peace. If there was a decision by the Security Council recognizing aggression, States were not free to say that there had been no aggression. If the Security Council decided there had been no aggression, he did not see how a national judge could make a different ruling.

19. The foregoing considerations illustrated some of the difficulties in the relationship between the text before the Commission, treaty law and customary international law. He did not believe that the ICJ, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (A/CN.4/411, para. 17), had really sought to establish a parallel between treaty and custom, although it had been obliged to do so for jurisdictional reasons. What the Court was saying essentially was that treaty law, like custom, derived from principles.

20. The Special Rapporteur had shown extreme care in drafting article 11, but perhaps something clearer could be proposed. The article contained, first, a general

<sup>7</sup> Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 3).

<sup>10</sup> See footnote 5 above.

<sup>11</sup> See footnote 6 above.

<sup>7</sup> League of Nations, document C.546.M.383.1937.V.

<sup>8</sup> See 2053rd meeting, footnote 17.

definition of aggression and an explanatory note, which was both an element of the text of the article and an element that might be included in the commentary. The Special Rapporteur appeared to be asking for members' comments on that point.

21. With regard to paragraph 1 (b), he shared Mr. Calero Rodrigues's concern (2053rd meeting) that the Commission should try to produce more precise drafting for the complex group of acts constituting aggression. Paragraph 1 (c), on the scope of the definition, called for the same comment as did the explanatory note in paragraph 1 (a) (ii).

22. In making its choice, the Commission should not attempt to quote all the relevant passages of the Charter, the Definition of Aggression and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, but should refer to each in turn, adding judgments of the ICJ and other concrete cases as illustrations. Perhaps the seven points proposed by the Special Rapporteur in paragraph 1 (b) might be used: that would show that the Commission respected that customary procedure of elaboration and had no intention of replacing it, but had simply mentioned the most pertinent cases. An escape clause would also be needed, relating to all the reservations concerning grounds for exoneration under general international law, but not mentioning those grounds. The Commission would thus show respect for higher authorities, while providing something concrete and noting the relative character of the practical application of the definition. Those general remarks would have a specific application later on; for example, when dealing with a convention on *apartheid*, the Commission would have to decide whether to improve the text, add to it, attenuate it, or choose an intermediate solution.

23. Referring to a point raised by Mr. Calero Rodrigues, he said he wondered whether the Commission should provide that the individual crimes to which the text referred would come under the code only if there were a parallel crime by the State as such. On that point he preferred not to give a general reply, since unfortunately the idea of an international crime by a State was not yet very clear, although the Commission had established some facts about it. For example, he could imagine a situation in which a State was responsible internationally, although not for a crime. Some of its agents could conceivably be held responsible, while the State itself could not be punished; and the Commission had carefully avoided the question of penalties for crimes by States. He would not take a position on the matter, but on the general principle he believed that flexibility was in order.

24. As to the exact meaning of "preparation of aggression", in his view that expression did not apply to military exercises intended to provide for all eventualities. An example of such preparation was provided by the 1938 Munich Agreement, involving Hitler's coldly thought-out decision to carry out aggression and use the entire State apparatus to prepare for it. France had always held that the plan to annex Czechoslovakia had been decided before the Munich Agreement, so that the French signature had been obtained by fraud.

A precise definition should be drafted to cover that possibility.

25. On the question of threat, Mr. Calero Rodrigues's concern was shared by all. But whereas Mr. Calero Rodrigues was not in favour of making threat an individual crime, his own reaction was the opposite. It was unlikely that threats of aggression would be made in the future, since they would have to be made in a form that could not be qualified as aggression. And it would not be the State, but an agent of the State, who would threaten, in a secret and discreet way. Furthermore, it was doubtful whether a threat not followed by incipient action of some kind constituted a crime. Hence, if the concept of "threat" were retained, it would have to be made more explicit. He was open to any proposals if members of the Commission wished to develop that idea.

26. With regard to paragraph 7 of article 11, it was difficult to imagine a situation involving mercenaries that did not have a State or States behind it. That was a form of aggression by the State and reference should be made to it in the definitions relating to armed bands. One aspect of the question that escaped Western scholars was the extreme fragility of certain States which, because of their colonization, had structures that placed them at the mercy of a gang of criminals. His own experience working with international bodies on the traffic in drugs had shown the enormous means available to organized crime, against which a defence was needed. Since it was very difficult to obtain evidence in such cases, he saw no reason not to include, as an international crime, mercenarism in which there was no concrete proof of a State's involvement.

27. Mr. McCAFFREY congratulated the Special Rapporteur on his lucid and precise sixth report (A/CN.4/411), which dealt with matters that the Commission had been discussing since 1985. He had thus had an opportunity of expressing his views on many points and could at the present stage be brief.

28. At the outset, he wished to express his continuing and serious doubts about the appropriateness of the topic. Those doubts did not, of course, detract in any way from his admiration of the Special Rapporteur's work. The fact was, however, that the topic was a highly political one, which was not appropriate for treatment by the Commission.

29. There was a clear lack of political will on the part of States to implement a code of the type being discussed. It was significant that, since the end of the trials of the major war criminals, no individual officially connected with a State had been prosecuted for crimes such as those mentioned in the draft code. Cases such as that of Klaus Barbie did not involve a State, but only an individual. There was no evidence of any willingness on the part of States to prosecute officials for the crimes under consideration, and still less to extradite any of their own officials for such crimes and allow another State to try them. In fact, he would venture to say that any attempt to introduce rules of that kind was more likely to endanger international peace and security than to safeguard them.

30. In recent years, there had been many flagrant acts on the part of States which constituted aggression, in-

tervention in the affairs of other States or even genocide: there was at present an example of a State starving part of its own population. All those acts had been ignored by the international community.

31. Those facts showed the sensitive nature of the present topic and the absence of any will to implement a code of the type under consideration. Yet the question of implementation was a vital one; the Commission had on more than one occasion requested instructions from the General Assembly on the formulation of the statute of an international criminal jurisdiction, but it had received no answer. The only way in which the proposed code could be implemented was with the aid of an international criminal tribunal having compulsory jurisdiction.

32. Mr. Calero Rodrigues (2053rd meeting) had raised the question as to how to determine whether an individual could be held responsible for the crimes identified in the draft code, considering that those crimes had traditionally been regarded as acts of a State. The solution would be for the relevant article to specify that those responsible were the persons who had ordered the act, planned it or been guilty of complicity in its perpetration. The individuals responsible would hold very high positions.

33. With regard to aggression in general, he noted the Special Rapporteur's discussion (A/CN.4/411, paras. 6-10) of the question whether preparation of aggression, annexation and the sending of armed bands into the territory of another State should be retained as crimes distinct from aggression. From the outset, he had inclined to the view that those acts should not be treated as separate crimes. During the present discussion, however, Mr. Reuter and Mr. Francis (2053rd meeting) had made a strong case for treating preparation of aggression as a separate crime. Careful consideration should therefore be given to that suggestion, provided always that a sufficiently precise definition of preparation of aggression could be formulated; specificity should be the watchword in all the provisions of a draft code.

34. Referring to the subject of intervention in the internal or external affairs of a State, he stressed his preference for the term "intervention", rather than the more general term "interference". The crux of the difficulty regarding intervention was stated very clearly by the Special Rapporteur in his report thus: "It is, of course, difficult to exclude from international relations the influence which certain States exert on other States and which is sometimes mutual." (A/CN.4/411, para. 13.) The Special Rapporteur very rightly added that that type of intervention was "not at issue here". The problem was how to draw the line between permissible intervention and non-permissible intervention. At the thirty-seventh session, in 1985, he had stressed the drawbacks of adopting too general a definition of coercion, which would have the effect of outlawing diplomacy and such frequent acts in international relations as the withholding of benefits, the withholding of a vote on a loan in an international financial institution and the use of import quotas to exercise pressure.<sup>12</sup> Everyone recognized those acts as permissible, but the

use of vague and general terms would bring them within the scope of "coercion".

35. The Special Rapporteur cited the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States<sup>13</sup> as among the legal bases for the principle of non-intervention (*ibid.*, para. 16). It was worth noting that the relevant part of that Declaration was quite specific. It read: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights . . ." (third principle, second paragraph). The reference was clearly to a specific criminal intent on the part of the coercing State to obtain such subordination. For any provision on the subject of intervention, it would be desirable to draw on the language of that Declaration, adjusting it to make it applicable to individuals.

36. He then drew attention to Principle VI of the Declaration contained in the Helsinki Final Act,<sup>14</sup> which dealt with non-intervention in internal affairs. That provision specifically referred to "armed" intervention and to coercion designed to subordinate the sovereign rights of another State. The emphasis was thus clearly placed on intervention which involved the use of force. Hence he could not agree with the Special Rapporteur's suggestion that "the term 'force' must be understood here in the broad sense: the use not only of armed force, but also of all forms of pressure of a coercive nature", or with his conclusion that the term "therefore covers all forms of intervention" (A/CN.4/411, para. 20).

37. Precision was essential in a code of crimes that was to be applicable to individuals, and observance of the rule *nullum crimen sine lege* required specificity. In that regard, the Special Rapporteur's general statement that "it is thus the element of coercion which constitutes the dividing line between lawful intervention and wrongful intervention" (*ibid.*, para. 27) was of little assistance. The use of such a general term would be acceptable only if there were an international court to determine what constituted "coercion". In the absence of such a court, he would much prefer the second alternative proposed by the Special Rapporteur for paragraph 3 of draft article 11, on intervention. Because of the vagueness of the notion of coercion, it was essential to confine it to acts involving the use of force. That approach would be consistent with the Commission's decision that the draft code would cover only the most serious crimes, and there was also the practical consideration that coercion involving the use of force was easier to establish. Other forms of persuasion were much more difficult to prove.

38. He endorsed Mr. Calero Rodrigues's suggestion that article 11 should be drafted in terms of individual criminal responsibility, which should be dependent on State responsibility. As he understood it, Mr. Calero Rodrigues was not suggesting that the criminal responsibility of the State should necessarily be engaged. Nevertheless, practical difficulties would arise if, in order to bring a charge against an individual under the code, it was necessary to wait for the State concerned to

<sup>12</sup> See *Yearbook . . . 1985*, vol. I, p. 55, 1885th meeting, para. 51.

<sup>13</sup> See footnote 6 above.

<sup>14</sup> See 2053rd meeting, footnote 16.

be declared responsible. Great delay would result, and State responsibility might never be established.

39. The acts of aggression dealt with in paragraph 1 of article 11 involved grave difficulties. The General Assembly had worked for more than 20 years on the elaboration of the Definition of Aggression,<sup>15</sup> and had ultimately adopted a text which, after listing a series of acts that constituted aggression, went on to state (art. 4): "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."

40. It was now proposed that, under the code, it would be possible to convict individuals of the crime of aggression. In the absence of an international criminal jurisdiction it would be necessary to rely on universal jurisdiction for such convictions. It would thus be left to national courts to apply the provision on the crime of aggression, and the result would inevitably be a wide variety of different interpretations.

41. As to the threat of aggression, he had initially been opposed to the inclusion of that concept. On reflection, however, he was prepared to consider it, provided the threat was tied to the specific intent and purpose of subordinating the exercise of the sovereign rights of the threatened State.

42. On the question of intervention, he proposed the inclusion in the second alternative of paragraph 3 of article 11, which he preferred, of a reference to acts which "disturbed or threatened the national sovereignty or security of another State".

43. He welcomed the Special Rapporteur's definition of "terrorist acts" (para. 3 (a)), but wondered whether the word "criminal" might not cause difficulties, since it would be necessary to decide under which law such acts were deemed to be criminal. Usually, of course, the acts would be so heinous that they would be criminal under the law of any State, but situations might conceivably arise that did not satisfy the requirement of dual criminality included in most extradition treaties. He did not think that the question of terrorism should necessarily be dealt with under the heading of intervention, though he had an open mind on the matter.

44. The list of terrorist acts was helpful. He doubted, however, whether damage to public property or property devoted to a public purpose (para. 3 (b) ii.) would normally be serious enough to warrant inclusion in the code.

45. Paragraphs 4 and 5 both dealt with breaches of treaty obligations of certain kinds and should, in his view, be far more specific regarding the kind of breach and the treaties involved. A breach of certain treaties, which could be regarded as covered by the provisions of those two paragraphs, might not rise to the level of a crime against the peace and security of mankind; only the most extreme breach of a treaty should qualify as such.

46. Of the two alternatives proposed for paragraph 6, on colonialism, he had a strong preference, for the reasons he had explained at the thirty-seventh session,<sup>16</sup>

for the second, which drew on the language of the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>17</sup> The Commission might, however, wish to consider amplifying the provision by including a clause to the effect that subjugation was a violation of the right of peoples to self-determination, or a reference to denial of fundamental human rights along the lines of that contained in the Declaration (para. 1).

47. The issue of mercenarism, which was an extremely sensitive one, might well be deferred until the completion of the work of the *Ad Hoc* Committee on that question.

48. Mr. CALERO RODRIGUES said that Mr. Francis (2053rd meeting) had raised a valid point in observing that, if the question of mercenarism were dealt with under the heading of aggression or intervention, or both, activities connected with mercenaries and undertaken not by States but by individuals or groups of individuals would not be covered. He agreed that the Commission should bear that point in mind. True, there were mercenaries other than those who acted on behalf of a State and were thus covered by the provisions on aggression or intervention, but did the Commission really believe that those cases should be elevated to the level of the code? Moreover, if the Commission decided to follow up that question, it would have to face the problems encountered by the *Ad Hoc* Committee, which was currently preparing a convention on the matter. The code should be directed not at mercenaries as such but, in the words of draft article 11, paragraph 7, at the "recruitment, organization, equipment and training" and, indeed, at the financing of mercenaries.

49. The difficulty stemmed from the fact that the Commission, the General Assembly and the *Ad Hoc* Committee had all been relying on the text of Additional Protocol I<sup>18</sup> to the 1949 Geneva Conventions, which had been drafted for a very different purpose, namely to deal with the status of mercenaries in war, whereas the code should be concerned with those who organized and trained mercenaries. Furthermore, under the definition of mercenaries in that Protocol, a mercenary was any person who took part in hostilities (art. 47, para. 2 (b)). Accordingly, if a person was trained to act as a mercenary, but did not actually engage in combat, the recruitment, organization, equipment, training and financing could not be said to be of a mercenary. That flaw, which had already been noted by the General Assembly, had yet to be eliminated.

50. The definition of a mercenary had other flaws, one of which was the requirement in paragraph 7 (c) of draft article 11 that a mercenary be promised "material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces". Consequently, all a State had to do to prevent a mercenary from being regarded as such was not openly give a substantial amount of official pay. But pay could be called by some other name, or be given secretly.

51. The main flaw for the purposes of the code, however, was that, if a person must have taken part in

<sup>15</sup> See footnote 5 above.

<sup>16</sup> *Yearbook* . . . 1985, vol. 1, p. 55, 1885th meeting, para. 55.

<sup>17</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>18</sup> See footnote 9 above.

hostilities to be regarded as a mercenary, the whole endeavour to define who prepared a mercenary, by recruitment, organization, equipment or financing, failed; for if there was no mercenary, the definition could not be applied.

52. He tended to agree that the question of mercenarism should perhaps be left open, at least until the General Assembly had concluded its work on a convention on the subject, at which time the Commission could revert to the matter if need be. He continued to believe, however, that the action of a State which made use of mercenaries for certain purposes prohibited by the code could be dealt with under the heading of aggression or intervention, and he very much doubted that the preparation of mercenaries by private persons was of such importance that it should be covered by the code. The code should not seek to be all-embracing. It would be an important instrument, and something new in terms of the international criminal responsibility of individuals, but the Commission should try to be as modest as possible, especially as the persons concerned might be responsible and punishable under other instruments, including the future convention on mercenaries, and under internal systems of law.

53. Mr. FRANCIS said that he was gratified by Mr. Calero Rodrigues's comments. He wished, however, to reserve his position on the matter, as he would like to read the records of the relevant discussions in the United Nations before arriving at a conclusion.

54. The main issue was quite straightforward. Paragraph 1 of article 47 of Additional Protocol I<sup>19</sup> to the 1949 Geneva Conventions dealt with a very important aspect of the topic. It read: "A mercenary shall not have the right to be a combatant or a prisoner of war." Paragraph 2 of that article contained the definition reproduced in draft article 11, paragraph 7. It was thus clear that the draft code did not cover the case of a person recruited locally or abroad other than through the instrumentality of a State, and therefore did not cover cases in which such a person participated as a mercenary in a war and committed some serious crime, such as murder or setting fire to public or private property. That gap in the code could not be allowed to remain, and there was a strong case for introducing some hybrid provision to take account of mercenarism not covered by other provisions, so as to ensure that it would not go unpunished.

55. Mr. KOROMA said that mercenarism, which affected weak and fragile States in particular, was a very real problem and should have its place in the code. It involved not only an attack on the territorial integrity of a State, but also the infliction of serious harm on the indigenous population, and met all the criteria submitted to the Commission for determining whether an offence should be classified as a crime against the peace and security of mankind. Moreover, mercenarism involved utter contempt for the population. In Mozambique, for example, mercenaries with no political purpose had caused devastation and perpetrated the most inhuman acts, which certainly qualified as crimes against the peace and security of mankind.

56. Although mercenarism was not so effective against stronger States, mercenaries could none the less attack a central Government and could even affect the destiny of a people. Mention had been made of recruitment and training, but some mercenaries were former army officers who needed no training. Unable to settle back into civilian life, they sought further adventure at the cost of many innocent victims. The crime of mercenarism should not be omitted from the draft code because of difficulties concerning recruitment and training.

57. As to whether it was appropriate for the Commission to consider the topic, his answer would be in the affirmative, provided the code was seen not as an attempt to legislate between victor and vanquished, but as a politically neutral instrument intended to benefit mankind. One reason for having a code was to prevent any recurrence of past atrocities. With the approach he had advocated, there was no reason why some of those responsible for wholesale and massive crimes in the past and who had still not been prosecuted should not be brought to book for their misdeeds in the future.

58. Mr. BENNOUNA said that he, too, had certain doubts about the Commission's approach, although he was convinced of the importance of its work and of the contribution made by the Special Rapporteur. Highly political and sensitive questions were at issue, in the face of which lawyers had some difficulty, since they liked precise definitions and wished to avoid the vagueness that sometimes surrounded political debate. Above all, when it came to a draft criminal code, they wished to provide the individual charged under that code with the maximum protection by means of tightly drawn definitions.

59. As he had already stated (2053rd meeting), intervention involved various interlocking concepts which it was difficult to isolate completely. The use of the words "of such gravity" in article 3 (g) of the 1974 Definition of Aggression<sup>20</sup> denoted that the General Assembly, in keeping with the spirit of the Charter, had wished to emphasize the gravity of aggression as a way of using force. From the legal standpoint, therefore, a distinction had to be drawn between Article 2, paragraph 4, of the Charter of the United Nations, which prohibited the use of force in general terms, and aggression of the kind that had to be recognized by the Security Council under Article 37 of the Charter, which was a manifestation of the most serious use of force. In other words, a minor use of force not amounting to aggression was allowable.

60. That raised the problem of intervention involving a less serious use of force than aggression. The Special Rapporteur stated in his sixth report that "military intervention, which is covered in the definition of aggression, will not be dealt with here" (A/CN.4/411, para. 12). Did that mean an entire military operation, or a military operation of a certain gravity? It had been said that indirect, as opposed to direct, aggression consisted of a few incursions or of more limited military measures not amounting to a full frontal attack on a State. Thus the concept of intervention could perhaps be confined to military acts that were not of sufficient gravity to

<sup>19</sup> *Ibid.*

<sup>20</sup> See footnote 5 above.

qualify as acts of aggression under article 3 of the Definition of Aggression.

61. The whole problem stemmed from the fact that a code of crimes against the peace and security of mankind had to include acts of a minor character that could nevertheless be of a certain gravity in human terms in that they could involve loss of life, such as the elimination of political opponents. Such crimes might violate the sovereignty of a State, but did they amount to aggression? There was a borderline to be drawn, as well as a problem of method, which would have to be clarified as work on the draft progressed. His own view was that intervention could cover military acts, but that not all military intervention amounted to aggression: it was for the Commission to decide whether minor acts involving the use of force should be covered by the code or not. He had no definite position on the matter, although in his view acts of minor gravity could be crimes even if they did not amount to aggression. That should be made clear from the legal standpoint.

*The meeting rose at 1 p.m.*

## 2055th MEETING

*Thursday, 2 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

ARTICLE 11 (Acts constituting crimes against peace)<sup>4</sup>  
(continued)

1. Mr. PAWLAK recalled that it was in 1947 that the General Assembly had referred the present topic to the

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook* . . . 1954, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>4</sup> For the text, see 2053rd meeting, para. 1.

Commission, which should endeavour to lose no time in completing the work. It would be remembered that the General Assembly, in resolution 42/151 of 7 December 1987, had invited the Commission, in particular, to elaborate a list of crimes against the peace and security of mankind. Draft article 11 and the comments thereon submitted by the Special Rapporteur in his sixth report (A/CN.4/411) formed a sound basis for that task.

2. In general, he agreed with the list of crimes against peace in draft article 11, on the understanding that it was simply a proposal and that it would need further consideration before it could be referred to the Drafting Committee. The Commission's task in that respect would have been easier if it had adopted at the previous session—at least provisionally—a conceptual definition of crimes against the peace and security of mankind; it would thus have had a criterion to facilitate the preparation of the list of crimes. In fact, the Commission had decided that it would revert to the question of the conceptual definition later.<sup>5</sup> The discussion in the Sixth Committee of the General Assembly at its forty-second session had shown that many States supported the idea of including a definition of that kind (see A/CN.4/L.420, paras. 26-27). He himself had submitted a draft definition to the Commission at the thirty-ninth session.<sup>6</sup>

3. He generally endorsed the list of "acts constituting aggression" in paragraph 1 (b) of article 11. While he shared the Special Rapporteur's position that each crime described in the draft code should have a general definition at the beginning of the article relating to it, he supported the suggestion by Mr. Calero Rodrigues (2053rd meeting) that, for the purpose of defining acts constituting aggression or other crimes against peace, the Commission could draw on some of the techniques used in internal criminal law. Furthermore, it would be better if paragraph 1 (b) (vii) spoke only of "irregulars" and if there were a separate article dealing with all the aspects of mercenarism. In fact, the idea of dealing with mercenarism in a separate paragraph (para. 7) had been proposed by the Special Rapporteur and had attracted substantial support during the discussion.

4. Again, "recourse by the authorities of a State to the threat of aggression against another State" (para. 2) should be kept as a separate crime. The code was intended to help deter would-be aggressors from preparing aggression, as so eloquently explained by Mr. Reuter at the previous meeting.

5. The question whether the code should refer to "interference" or to "intervention" in the internal or external affairs of another State was not purely a matter of language. The term "intervention" was preferable, because it had a broader connotation. In any case, the definition of that crime would require further elaboration on the basis of the provisions of the Charter of the United Nations, of existing treaties and of judgments of the ICJ. International declarations and other documents of a political or regional character could only be regarded as indicative material. The second alternative of paragraph 3 proposed by the Special Rapporteur

<sup>5</sup> See paragraph (1) of the commentary to article 1 (Definition), provisionally adopted by the Commission at its thirty-ninth session (*Yearbook* . . . 1987, vol. II (Part Two), p. 13).

<sup>6</sup> See *Yearbook* . . . 1987, vol. I, p. 227, 2031st meeting, para. 16.

would provide the best basis for formulation of the definition.

6. The second alternative of paragraph 3 mentioned terrorist activities. Since the first study of terrorism by the United Nations in 1972, the international community had been unable to arrive at a universally agreed definition of terrorism. The Special Rapporteur had relied heavily on the 1937 Convention for the Prevention and Punishment of Terrorism,<sup>7</sup> while drawing attention at the same time to certain new forms of terrorism; but that did not exhaust the subject. There were three sometimes interrelated types of activities: internal terrorism, organized by individuals or local groups without any support from abroad; and two forms of international terrorism, namely State terrorism and terrorism by internationally-operated groups and organizations. Internal terrorism did not concern the Commission, but international terrorism did. Although it was probable that the Commission could not invent a legal remedy for the phenomenon, it none the less had to face the realities of the world by including in the draft code provisions which adequately reflected those realities.

7. In speaking of international terrorism, it had to be borne in mind that the interests and territories of more than one State were involved, for example when the perpetrator or the victim of the act of terrorism was not a national of the country in which the act was committed, or when the perpetrator fled to another country.

8. Various attempts—both official and private—had been made to define international terrorism. In the United States of America, in the 1986 report of the Vice-President's Task Force on Combating Terrorism, terrorism had been defined as the unlawful use or threat of violence against persons or property to further political or social objectives. According to that report, terrorism was usually intended to intimidate a Government, individuals or groups so as to modify their behaviour or policy, or compel them to do so. Robert Oakley had written that the United States Government used the expression "international terrorism" to describe "the premeditated use of violence against non-combatant targets for political purposes, involving citizens or territory of more than one country".<sup>8</sup> Another specialist on the question, the Egyptian General Ahmed Galal Ezaldin, had defined terrorism as a systematic and persistent strategy of violence practised by a State or a political group against another State or political group through a campaign of acts of violence—such as murder, assassination, unlawful seizure of aircraft, and bomb attacks—with the intention of creating a climate of terror and intimidating the population to achieve political ends.

9. Those were but a few examples of studies on international terrorism which could help the Commission to grasp the problem in all its dimensions, formulate the subject in a more up-to-date manner and shape a definition which adequately reflected the concrete manifestations of terrorism.

10. State terrorism constituted the most dangerous form of international terrorism and should therefore be dealt with in the draft code. It included operations which were financed, organized, directed or supported either severally or collectively, materially or logistically, by a State or group of States for the purpose of intimidating another State, person, group or organization.

11. The problem of international terrorism called for urgent action by the international community and for the strengthening of co-operation among its members. There now seemed to be a more favourable climate for solving the problem, as illustrated by an article published in September 1987 in which Mr. Gorbachev had advocated the establishment under United Nations auspices of a tribunal to investigate acts of international terrorism.<sup>9</sup>

12. In its work on the subject, the Commission had to take into account not only the provisions on terrorism contained in the four conventions mentioned by the Special Rapporteur in paragraph (2) of his comments on paragraph 3 of draft article 11, but also all the other international instruments—regional or bilateral—on the matter.

13. The Special Rapporteur was right to supplement the 1954 draft code with a provision in paragraph 5 of draft article 11 specifying that "a breach of the obligations of a State under a treaty prohibiting the emplacement or testing of weapons in certain territories or in outer space" constituted a crime. To the treaties mentioned by the Special Rapporteur in paragraph (2) of his comments on that provision, one could add the 1959 Antarctic Treaty<sup>10</sup> and the treaties on the nuclear-free zones in South America and the South Pacific.

14. Lastly, the Commission should not defer its consideration of mercenarism (para. 7) until the *Ad Hoc* Committee had prepared a convention on the subject. The Commission could work alongside the Committee and benefit from its experience and from the drafts it had already prepared. Mr. Koroma had rightly pointed out at the previous meeting that peoples, especially in Africa, were suffering greatly from the activities of mercenaries, and it was essential to bring those activities promptly to an end.

15. Mr. FRANCIS, reverting to his comments at the previous meeting on paragraph 3 of draft article 11, said that his suggestion had been to merge the two alternatives submitted by the Special Rapporteur. The substance of the first alternative would be retained and would become, with appropriate drafting changes, the introductory part of the new paragraph; subparagraphs (i) and (ii) of the second alternative would then follow.

16. Mr. GRAEFRATH said that the Sixth Committee of the General Assembly regarded the drafting of the code as a task of high political, moral and legal importance, particularly in view of the international community's growing awareness of the need to strengthen existing mechanisms of co-operation or to create new ones in order to face up jointly to the threats posed by weapons of mass destruction, continued regional con-

<sup>7</sup> See 2054th meeting, footnote 7.

<sup>8</sup> R. Oakley, "International terrorism", *Foreign Affairs* (New York), vol. 65, No. 3 (1987), p. 611.

<sup>9</sup> "Reality and the guarantees for a secure world", *Pravda*, 17 September 1987.

<sup>10</sup> United Nations, *Treaty Series*, vol. 402, p. 71.

flicts, acts of aggression and terrorism. In a world becoming more and more interdependent, such cooperation was essential. The code of crimes against the peace and security of mankind, which should become a standard-setting document reflecting the basic values of the international community, could contribute, if States so wished, to the survival of mankind, because of its deterrent effect. The Commission should bear those considerations in mind and adopt a bold and realistic approach in carrying out its task of fighting against crimes of the utmost gravity and against policies and activities that caused loss of life and undermined the achievements of civilization. Far from militating against the drafting of the code, the fact that, since the end of the Second World War, virtually no individual had been punished for crimes against the peace and security of mankind only underlined how timely it was, for such acts were occurring virtually every day.

17. He agreed with the approach adopted by the Special Rapporteur regarding the list of crimes but wished, before entering into the substance of the matter, to make certain comments on methodology.

18. First, he supported Mr. Calero Rodrigues's suggestion (2053rd meeting) that each crime should form the subject of a separate article, which would be in keeping with the Commission's usual method of work and with the normal structure of criminal codes.

19. Secondly, as provided for in article 3 (Responsibility and punishment), provisionally adopted by the Commission at its thirty-ninth session,<sup>11</sup> all the articles in the code should be drafted with a view to the formulation of the criminal responsibility of individuals. Hence it was necessary to start with the words "a person" or "any person" and not with "the authorities of a State". Obviously, an individual could not be punished for the crime of aggression if there was no aggression—which was an act of a State—but once aggression had been committed it was not the responsibility of the State concerned that had to be defined but that of the persons responsible for planning and initiating the aggression. An individual, of course, could commit such a crime only by exercising the power of the State, which meant that he must occupy a position of responsibility, whether political, economic or military. Two further aspects were involved. On the one hand, the planning of an aggressive war could be carried out not only by persons acting as a State authority, but also by persons who, because of their economic power, exerted more influence over such decisions than did ministers or generals. Members would recall that, at Nürnberg, Krupp and others had been among the accused. On the other hand, even in the case of an aggressive war, it would be wrong to hold every soldier who had taken part in the war responsible for a crime against peace. Caution was therefore necessary in attributing responsibility to individuals.

20. Similarly, every breach of an international obligation of a State did not entail the criminal responsibility of individuals. Consequently, the Commission must determine in which cases the breach of an international obligation of a State could be regarded as sufficiently serious to give rise to the criminal responsibility of the

individuals concerned and to amount to a crime punishable under the code. That did not, of course, mean that all other breaches of international law were no longer wrongful acts.

21. It was not possible, when defining individual criminal responsibility, simply to transfer to the code the definition of State acts that had been recognized as violations of international law. It might not always be necessary to list all the possible ways of committing a given crime: a definition of the main elements might suffice. If the latter course were followed, as under municipal law, the definition of each crime would be much clearer than if detailed definitions, which already existed elsewhere, were simply repeated, as in the case of aggression. While it was true that the Definition of Aggression<sup>12</sup> provided guidelines for the Security Council, it could not be overlooked that the existence of aggression, as well as the right to react to it, did not depend on a finding by the Security Council.

22. Any court would, of course, have to rely on internationally accepted instruments in determining the responsibility of an individual for his contribution to one of the crimes concerned. Moreover, irrespective of whether aggression, genocide, colonialism or any other crime was involved, an act recognized as an internationally wrongful act of a State necessarily involved many different acts by individuals forming part of the whole. The court could not, however, simply take note of the occurrence of a breach of international law: it had to determine the individual contribution of those responsible for the act of State. In most cases, therefore, the degree of responsibility of the individual would depend on his participation in the act of the State.

23. The Special Rapporteur had raised the question whether planning and preparation of aggression should be included in the list of crimes covered by the code, since he was concerned about the difficulty of laying down specific criteria in the matter and also about overburdening the code with such provisions. For his own part, he shared Mr. Reuter's views (2054th meeting) in that connection and considered that planning and preparation of aggression should be made a specific crime.

24. In the first place, there could be no aggression without planning, and the main responsibility therefore lay with those who were in a position to do the planning and organizing. To illustrate that proposition, he quoted the last paragraph of article 6 of the Charter of the Nürnberg Tribunal,<sup>13</sup> which read: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes", namely crimes against peace, war crimes and crimes against humanity, "are responsible for all acts performed by any persons in execution of such plan." Participation in the formulation of a "common plan" had been one of the counts in the indictment at Nürnberg and had also been referred to in the judgment. It was thus possible for a court to hold that a particular individual had par-

<sup>11</sup> *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

<sup>12</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>13</sup> See 2053rd meeting, footnote 6.

ticipated in the formulation of a plan of aggression even if he did not participate in the actual execution.

25. Secondly, in modern times aggression involved far more complex techniques than formerly, and hence more sophisticated planning: the planning stage assumed greater importance. It was necessary to include planning as part of the crime, otherwise it would be impossible to reach those who were really responsible.

26. Lastly, the inclusion of preparation of aggression among crimes against peace would have a preventive and deterrent effect. To take the case of a nuclear war or a conventional war in Europe, for example, if it were not possible to stop it at the planning stage there would not be much left for a court—national or international—to do at the end of such a war. In the modern world, the preventive function was a vital one, and responsibility for planning a war of aggression should therefore be covered by the draft code.

27. The Commission should not try to make a distinction between lawful and wrongful intervention but should instead decide which acts of intervention were so dangerous for the international community that they entailed not only the responsibility of the State, but also the criminal responsibility of those who planned, organized and implemented the intervention. The second alternative of paragraph 3 of draft article 11 was the more satisfactory, first because it was directed at the goals of intervention and not at the means applied, and secondly because it took special account of the most dangerous forms of terrorist activity. In that connection, one of the aims to be covered by the definition of terrorism should be intimidation of the population. That had been done in Additional Protocol I<sup>14</sup> to the 1949 Geneva Conventions, which prohibited, in article 51, paragraph 2, “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”.

28. He agreed that paragraphs 4 and 5 of draft article 11, dealing with breaches of a State's treaty obligations concerning disarmament, should be combined. There again, however, the provision should focus on serious violations and be directed at persons in responsible political, military or economic positions who participated in the perpetration of such crimes.

29. Of the alternative formulations for colonialism and colonial domination in paragraph 6 he preferred the first, which had been convincingly supported by Mr. Francis (*ibid.*). The Drafting Committee would no doubt find a formula to make it clear that a person in a responsible political, military or economic position who participated in the forcible establishment or maintenance of colonial domination should be held responsible for a crime against peace and hence be liable to punishment.

30. The Special Rapporteur was right to say that a provision on mercenaries should be included in the code, particularly as they were used to destabilize vulnerable States and Governments. In that connection, he endorsed Mr. Koroma's remarks at the previous meeting. Mercenarism might perhaps be covered in part by the concepts of intervention and terrorism, but it called for a separate article or paragraph stipulating that

any person who organized the recruitment, equipment, training or use of mercenaries or who provided them with the means to carry out their activities would be responsible for a crime against peace. It was clear from recent practice that mercenarism was quite often carried out by private persons or non-governmental organizations, and that it might be difficult to prove direct State involvement, where it existed. It should therefore be dealt with as a separate crime. That was already the position under the law of many countries with different legal systems which applied a definition of a mercenary that was not as narrow as that laid down in article 47 of Additional Protocol I to the Geneva Conventions, since it did not depend on the actual participation of the mercenary in hostilities. It should not be difficult, therefore, to persuade most States to punish that particular kind of activity.

31. Mr. BEESLEY said he welcomed the prudence and judgment displayed by the Special Rapporteur, who in both his sixth report (A/CN.4/411) and his oral introduction (2053rd meeting) had not attempted to give definitive answers to some of the problems he was raising. The Commission thus had the opportunity to reflect on the issues and to examine the variety of approaches possible in regard to the drafting of the text. At the present stage, he too would not try to give definitive answers, but would be content to raise general points or questions which he believed would illuminate the specific decisions the Commission would have to make. In a later statement, he would apply those questions to the text of draft article 11.

32. His first question was what was the purpose of the code? In the matter of the significance of the task the Commission had undertaken, he believed Mr. Francis's argument (2054th meeting) concerning the basic purpose of the code was convincing. It was not enough to say that the General Assembly had given the Commission a job to do: there had to be a precise objective, whether the punishment of crimes, or better still deterrence. But it was also possible to go further and consider that the essential purpose was to contribute to the system of collective security under the Charter of the United Nations. In that case, it became easier to raise certain problems whose importance, theoretical complexity and political sensitivity might otherwise give rise to hesitation. As Mr. Francis had said, the code ought to be a constructive contribution to collective security. It would be too easy to say that the present system did not work as well as the drafters of the Charter had expected and to conclude that the code would be of no use, for its use would lie precisely in the fact that it might provide a further means of achieving the purposes of the Charter. A situation could easily be imagined in which the Security Council could not agree on whether or not there had been a crime against peace: it was at that point that a tribunal—if it was decided to establish one—could find individuals guilty of some aspect of the crime of aggression. In any event, members of the Commission should have a common purpose in mind.

33. His second question was whether there actually had to be a breach of the peace to constitute a crime against peace and security. Members' opinions had been divided about the definition of a crime against peace. Some considered that a code not confined to the actual use of force would not be viable, while others, invoking

<sup>14</sup> See 2054th meeting, footnote 9.

history, held that the code should be extended to include the preparation, planning and threat of aggression. He for one felt that the Commission's work would be incomplete if the draft were limited to cases in which force was actually used, even though preparation of aggression did raise some delicate problems, particularly with regard to proof. It was difficult to prove intent and to judge a potential crime. The same questions arose with respect to threat, with an extra complication in that the threat of using force might make the actual use of force unnecessary. Would the person responsible for the preparation be any less guilty?

34. A third question that had emerged during the debate was whether the code should be restricted to acts of State. In that connection, it had been pointed out that private individuals could commit extremely serious acts that were not acts of State, and that in modern times new forms of crimes against peace and mankind, privately and skilfully organized, were becoming widespread. His preliminary reaction was therefore that the code should not be confined to acts of State, although he appreciated the juridical and political problems that would raise.

35. His fourth question concerned what kind of body should make the judgment that a crime against peace and security had been committed, which raised again the issue of an international tribunal or a national tribunal with international judges—an issue discussed at the previous session. Initially, he had been of the opinion that responsibility called first for a finding by the Security Council that a crime against peace had been committed. He was not so persuaded at the present time, for it was easily conceivable that the Security Council might be divided and not succeed in reaching a decision in that regard. There would then be room for another kind of process under the code. He did not believe that the findings of the Security Council could be disregarded—having in mind the references to the Council in articles 2 and 4 of the Definition of Aggression<sup>15</sup>—but they might not be indispensable.

36. With regard more specifically to the text of draft article 11, he was troubled by the arguments—however well founded—of some members who wished to introduce a distinction between lawful intervention and unlawful intervention. It was the word “intervention” that bothered him in that respect. The term did not have the same meaning for a major Power as for a small country. In his opinion, the term “intervention” should be used by the Commission as a term of art and be confined to its specific legal meaning in international law, without prejudice to the legitimate cases of self-defence provided for in Article 51 of the Charter.

37. The Definition of Aggression had required seven years' work—close to half a century if one considered the efforts of the League of Nations—but it was now referred to as an authoritative text. Thus there was no reason for the Commission to allow itself to be overwhelmed by the difficulties presented by the definition of crimes against peace. Similarly, the elaboration of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

States<sup>16</sup> had taken seven years of difficult negotiations. However, the ICJ was now citing the Declaration, which had also acquired some authority. That was a second encouraging precedent.

38. It was in terms of the four questions he had raised that he would evaluate the future draft code. The fact that the Special Rapporteur, despite his obvious talents, had not been able to answer all the questions raised by so wide-ranging a topic was not in the least surprising. The Commission itself would certainly not be able to settle everything. But it should develop a juridically sound instrument that would help to strengthen the system of collective security provided for in the Charter. Much discussion in the past had concerned the value of extending the Commission's mandate to questions of international criminal law. If that had appeared valid in a more peaceful world, it was even more necessary now. Members of the Commission might well feel some scepticism, but they should not be defeatists.

39. Mr. REUTER said that paragraph 3 of draft article 11 called for a few comments. The first alternative was not acceptable, because the Commission, whose task was to draft a criminal law in the present instance, could not limit itself to a text of a general nature that would inevitably be criticized for its lack of substance. If, for example, a State or a political party intervened in elections organized by another State by openly financially supporting one of the parties participating in the elections, could that be termed intervention threatening the sovereignty of a State? Conversely, were trade negotiations possible without any coercion at all?

40. He was grateful to Mr. Graefrath for reverting to and emphasizing a point extensively developed by Mr. Calero Rodrigues (2053rd meeting), namely that the Commission must never lose sight of the fact that it was not States, but individuals that would be covered by the code. Yet there was a tendency to forget that, among the acts of State prohibited by international law, many were not covered in the draft code, for the code dealt only with acts which, under certain circumstances, might be attributable to State officials, but which were of a highly specific nature in that they constituted crimes as acts of the individual.

41. That did not mean that the Commission could simply choose the second alternative of paragraph 3, which was obviously based on the idea that the forms of intervention involved would in one way or another be linked to armed action, in other words recourse to violence, although the Special Rapporteur had gone further—and, in so doing, had raised certain thorny problems.

42. In regard, for example, to subparagraph (ii) of the second alternative, and more particularly the expression “or otherwise”, reference could be made to the case—discussed by conferences of specialists—of the use of radio in one State by another State, or at the instigation of another State. Could that be termed intervention in the internal affairs of a State? Many delegations to the conferences in question had taken that view and considered that such activity should be subject to control. However, as a whole the second

<sup>15</sup> See footnote 12 above.

<sup>16</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

alternative of paragraph 3 essentially covered direct or indirect means of coercion and neglected other forms of intervention. It was therefore inadequate, and he would be in favour of a formula based on article 18 of the Charter of OAS (see A/CN.4/411, para. 24), which concerned action that might be qualified as neo-colonial: that of a State which, while appearing to respect the sovereignty of another State, took that State's action into its own hands on fundamental points. Admittedly, the idea was not an easy one to formulate, and the most important aspect was the notion of identity. Beyond a certain point, indirect intervention caused the State to change its identity, and—what was even more serious—without it being noticeable. That type of intervention was unacceptable. The State must not be distorted and its structures must not be changed, any more than it was lawful to corrupt the public authorities.

43. He was not opposed to a formula expressed in fairly general terms, but the text would have to be more precise than the first alternative of paragraph 3. Moreover, it should cover persons who, through their *de jure* or *de facto* power, bore primary responsibility for intervention which, because of its systematic nature and breadth, had the purpose or effect of jeopardizing a State's identity. He agreed with Mr. Calero Rodrigues that, to secure acceptance of the idea of punishment of the individual, the acts included should be so systematic and extensive as to merit forming the subject of a provision. Yet he also believed that the final text could include examples taken from those appearing in the two proposed alternatives. Nevertheless, in subparagraphs (i) and (ii) of the second alternative, terms such as "tolerating the fomenting of civil strife" and "activities against another State" should be clarified. In the first case, the texts on neutrality in cases of international armed conflict might be of some help. In any event, the Commission would not fulfil its mandate by remaining vague.

44. As to the important new element represented by the words "in particular terrorist activities", in subparagraph (ii), his limited knowledge of the question unfortunately prevented him from making a better contribution to the legal formulation of rules, but he wondered whether terrorism as such did not call for a definition and a régime separate from those of intervention. He shared the view that the most serious terrorism was "State terrorism", in other words terrorism inspired, financed, assisted or directed by a State. But he unreservedly endorsed Mr. Pawlak's comment that mankind was currently suffering from a disease, from a nihilism, from a spontaneous terrorism that eluded the control of each State on its own. In France, for instance, the police had been able to identify the French perpetrators of certain murders, acts of pure and simple collective insanity that demanded an international reaction. Perhaps the Africans had been the first to see matters clearly, for they had included in the Charter of OAU<sup>17</sup> a provision protecting heads of State (art. III.5).

45. Nevertheless, however warranted the disapproval of terrorism, some terrorists were motivated not by insanity but by idealism. Terrorism was at times the weapon of despair, and in that sense perhaps some cau-

tion was needed. It would be remembered that, during the discussion of the draft articles which had formed the basis for the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, some members of the Commission had hesitated to condemn terrorism categorically and had called for moderation. For his own part, he categorically condemned terrorism. But the Commission could not ignore the causes, which were not always devoid of a certain nobility, and it might err in being too absolute.

46. Mr. FRANCIS said that, on the basis of the Nürnberg Principles,<sup>18</sup> the Commission should, in appropriate circumstances, attribute the commission of criminal acts to States, on the understanding that, as the State constituted an inanimate entity, it was by punishing the individual that respect for international law could be ensured. Under those circumstances, the problem was to find an umbrella formula under which State officials could be prosecuted for any act, such as aggression, falling under the code.

47. Mr. Reuter had indicated his reservations regarding the inclusion of terrorism in the second alternative of paragraph 3 of draft article 11, on intervention. In that respect, a comparison could be made with mercenarism. Just as mercenarism was encompassed by aggression when it was the act of a State and would appear in other provisions when it involved private individuals acting independently or for an entity other than the State, so too should terrorism be encompassed by intervention when it was the act of a State and appear in other provisions when the act of another State was not involved.

48. Again, State sovereignty must be the target of the intervention dealt with in paragraph 3. The list of acts of intervention would therefore be of little value in itself if the Commission did not combine the two alternatives proposed by the Special Rapporteur and indicate that intervention meant any illicit act or measure, whatever its nature, which constituted constraint on the sovereignty of a State.

49. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 11:30 a.m.*

<sup>18</sup> See 2053rd meeting, footnote 8.

## 2056th MEETING

*Friday, 3 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo,

<sup>17</sup> United Nations, *Treaty Series*, vol. 479, p. 39.

Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)**

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

ARTICLE 11 (Acts constituting crimes against peace)<sup>4</sup>  
(continued)

1. Mr. THIAM (Special Rapporteur) said that he wished to clarify certain points in the hope of obviating the need to revert to matters that had already been discussed.

2. He agreed that terrorism and preparation of aggression should be the subjects of separate articles. The Commission would recall that it had been decided from the outset that the draft code should deal solely with the criminal liability of individuals.<sup>5</sup> That did not, of course, preclude the possibility of States being held criminally responsible for the consequences of acts committed by individuals against the peace and security of mankind. The notion of the criminal responsibility of States remained very imprecise, however, and it was unlikely that Governments would accept it.

3. The main point was whether the individuals who incurred responsibility under the code had acted in their private capacity or as agents or representatives of the State. He had decided to leave that point aside until the question of complicity was discussed. For the time being, he would like the Commission to discuss only those acts that were listed in his sixth report (A/CN.4/411) as crimes against the peace and security of mankind.

4. Mr. TOMUSCHAT, congratulating the Special Rapporteur on his concise and pithy sixth report (A/CN.4/411), said that, although the history of the crimes covered by draft article 11 was well known, serious problems remained.

5. In the first place, the Commission should remember that its task was to lay down rules on the international criminal responsibility of individuals, as opposed to inter-State law regulating relationships between States as juridical entities. The draft article submitted by the Special Rapporteur broke new ground, for although the Nürnberg Principles<sup>6</sup> stigmatized aggression as a crime against the peace and security of mankind, little if

anything had thus far been done by way of implementation. There was a vast difference between words solemnly pronounced in the General Assembly and actual practice. It was particularly shocking to him that nobody had ever thought of prosecuting the members of a certain Government in South-East Asia which had in recent years killed more than a million of its own nationals simply because they were intellectuals who stood in the way of a "cultural revolution". The representatives of that Government had later appeared at the United Nations, asserting that their acts had all been a deplorable mistake. It seemed that the tolerance of the international community knew no bounds.

6. The Commission should therefore guard against excessive zeal. Only if the proposed list were limited to the hard core of abhorrent crimes could the code hope to win sufficient support later. It was a sad fact that Nürnberg had not set a precedent, but remained an isolated phenomenon. Thus the Special Rapporteur had been right to reject such hazy notions as economic aggression and subversion.

7. A second problem was the characterization of punishable acts, which, as had rightly been said, called for a greater effort. It was not easy to see how, under the Definition of Aggression,<sup>7</sup> which represented typical inter-State law, an individual could incur personal criminal responsibility, since the Definition provided at the outset that aggression was committed by the authorities of a State. The personal link must be spelt out everywhere, for otherwise it would be almost impossible to limit the number of authors of a crime in a reasonable manner. Furthermore, although aggression was never a single-handed operation, since it involved all those who took part in the military action, there would be no sense in seeking to punish every member of the armed forces of the country concerned. The code should therefore be directed at the leading figures, who bore responsibility because they had prepared and planned the aggression.

8. At Nürnberg, the Allied Powers had adopted a pragmatic approach: they had known who the main culprits in the Nazi Government were and had prosecuted them accordingly. The Commission should aim at the same approach by appropriate legal drafting. He would like to see used some such wording as "whoever plans or orders": a mere reference to aggression was too abstract. It should be immediately apparent from a perusal of the draft that it set out rules on individual criminal responsibility, not on inter-State relations, and that it was confined to persons who were the driving force behind the various crimes. For instance, paragraph 1 (c) (i) of draft article 11, on the scope of the definition of aggression, was taken word for word from article 6 of the 1974 Definition of Aggression. The disclaimer it embodied, however, would be necessary only if the intention was to elaborate rules governing inter-State relations. In that case, the rules of the Charter of the United Nations would coexist side by side, as it were, with the more specific rules of the definition; but that could lead to inconsistencies. If rules concerning personal conduct were framed, there

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>4</sup> For the text, see 2053rd meeting, para. 1.

<sup>5</sup> *Yearbook . . . 1984*, vol. II (Part Two), p. 17, para. 65 (a).

<sup>6</sup> See 2053rd meeting, footnote 8.

<sup>7</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

would be no need to explain that the rules of the Charter took precedence, because the subject-matter would be different.

9. His third point concerned the relationship between the code and existing instruments. Where there was a vacuum, there was, of course, a need for new rules. On aggression and intervention, for instance, there were no rules of international law under which such acts were punishable, nor had any treaty been concluded on those subjects. Customary law could not be said to exist either, since the element of practice was completely lacking. Where there was a treaty, however, as in the case of genocide, what would be the point of including the crime in the code? One possible answer was that the code should serve as a compendium of all crimes that might affect international peace and security: but that answer was more political than legal. Another interpretation was that the Commission wanted a general repertory because of the limitations *ratione personae* by which many treaties were still characterized. Since the status of ratifications often left much to be desired, was the aim perhaps to compel States which had hitherto reserved their position to accept obligations under the code? Such an aim was hardly realistic, for the code would be subject to the general logic of a conventional régime, which was still governed by the maxim *pacta tertiis nec nocent nec prosunt*, as reflected in articles 34 to 36 of the 1969 Vienna Convention on the Law of Treaties. The question deserved careful consideration, and he would welcome the Special Rapporteur's comments on the legal consequences of assembling in one instrument all crimes against the peace and security of mankind, including those already regulated elsewhere.

10. His last general point concerned the criteria by which the Commission should be guided in selecting crimes for inclusion in the code. Focusing essentially on authorship, he saw four different categories, the first of which comprised acts that were the individual reflection of State conduct. The best example of a crime of that type was aggression which, though it could never be committed by one individual alone, inevitably entailed decisions and measures taken by individuals. There was therefore a clearly identifiable need to legislate in regard to individual contributions to State activity. Whereas State agents normally enjoyed immunity with respect to official acts, no such immunity was recognized under the draft code, particularly in cases of aggression and genocide. No one could invoke as a defence the fact that he was acting as a member of the public service and not in a private capacity. It was in that area that the code had its primary meaning, piercing the veil of the domestic legal order.

11. The second category comprised individual conduct unconnected with any State activity, such as piracy, drug trafficking, slavery, forced labour, and individual acts of terrorism, all of which were ordinary crimes and should not be included in the code: to do so would only give them a higher degree of respectability. The international community needed a closely-knit network of mutual obligations to try or to extradite; no other innovative steps were needed. In particular, notwithstanding the allegedly noble motives of certain terrorists, he would prefer to continue to treat individual terrorism at the level of the ordinary law against

criminal offences, all the more so because it seemed that completion of the code was going to be an arduous task.

12. The third category comprised cases in which public servants, in the performance of their duties, committed serious violations of the law that were not attributable to the Government concerned. Such violations were covered by the 1949 Geneva Conventions<sup>8</sup> and their 1977 Additional Protocols.<sup>9</sup> It might perhaps be advisable to provide expressly that, for the purposes of criminal law, individual responsibility would be incurred notwithstanding the proviso in article 10 of part I of the draft articles on State responsibility<sup>10</sup> whereby, even if an organ of a State had exceeded its competence, the act in question was still to be considered as an act of the State. It might not be superfluous to provide that immunity could not be claimed in that type of case. On the other hand, the question arose as to how useful it would be to restate the terms of the Geneva Conventions, which were adhered to by virtually all States.

13. The fourth category comprised acts by private organizations of a gravity equal to that of acts normally committed only by a hostile State, such as financing mercenaries with a view to overthrowing a Government. It could, of course, be argued that activities of that kind were simply common crimes. But the criminal codes of most countries might not be concerned with protecting the Governments of other countries, in which case there was an obvious gap in the law, which the draft code should attempt to fill.

14. In general, he considered that the Commission's efforts should focus on individual acts that formed an intrinsic part of a grave breach by a State of its basic obligations under international law. Any other categories of acts were merely incidental and, as such, could be dealt with under the classical instruments of international criminal law.

15. He did not believe that all the evils of the world could be remedied by criminal-law judges. Diplomacy would never lose its pre-eminent position. For instance, no one knew who had started the war between Iran and Iraq, which was why Security Council resolution 598 (1987) had provided for the establishment of an impartial commission to inquire into the causes (para. 6). But, if a Government was faced with a real threat of prosecution on the cessation of hostilities, it might do all in its power to prolong a war, even at the cost of human life; and if, after every armed conflict, trials became a legal necessity, the art of achieving peace through reconciliation would fall even further into decay.

16. To qualify as international crimes under the code, acts should not only derive their unlawful character from inter-State law, but also be capable of being qualified as serious misdeeds even if regarded in isolation. A prerequisite for the inclusion of an act in the code, therefore, was that it must be of an abhorrent nature. Acts which simply reflected current foreign

<sup>8</sup> Geneva Conventions of 12 August 1949 for the Protection of War Victims (United Nations, *Treaty Series*, vol. 75).

<sup>9</sup> Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, both adopted at Geneva on 8 June 1977 (*ibid.*, vol. 1125, pp. 3 and 609).

<sup>10</sup> See 2053rd meeting, footnote 17.

policy practices, although they might involve serious harm for the victim State, should not be included; the more selective the Commission was in its choice of crimes, the more seriously the code would be taken.

17. With regard to the content of draft article 11, he agreed that each crime should be the subject of a separate article. In the case of aggression, the Commission might wish to follow the wording of the last paragraph of article 6 of the Charter of the Nürnberg Tribunal,<sup>11</sup> which referred to the responsibility of “leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy”. That would avoid making every member of the armed forces responsible under the code. The explanatory note in paragraph 1 (a) (ii) of draft article 11, which was unnecessary in his view, could be transferred to the commentary.

18. He agreed that the threat of aggression differed from the planning of aggression. If the Commission wished to take account of threats, it should do so in a provision under which the criminal responsibility of the authors of the plan would be excluded if they did not execute it.

19. In paragraph 3 of article 11, he would prefer the word “intervention”, which was more commonly used. He also preferred the second alternative, since the first was far too broad in scope. He noted that the 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States<sup>12</sup> would inevitably be used to interpret the code. That was a matter of concern to him since that Declaration, too, was extremely broad in scope. He doubted, for instance, whether hostile propaganda, referred to in section II (j) of the Declaration, should qualify as a crime against the peace and security of mankind. And what was meant by “the exploitation and the distortion of human rights issues”, referred to in section II (j)? Even the second alternative of paragraph 3 of draft article 11 was too broad, in his view: the terms “internal disturbance” and “unrest” (subpara. (i)) were extremely vague. The wording of the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty<sup>13</sup> and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States<sup>14</sup> was far more restrictive. Also, what did “activities against another State” (subpara. (ii)) mean? More precise language was needed to focus on the use of violent means between States.

20. As to terrorism, he would prefer to concentrate on State terrorism, and agreed with much of what Mr. Pawlak (2055th meeting) had said.

21. He had some doubts about paragraphs 4 and 5 concerning breaches of treaty obligations. If, for example, a State agreed to far-reaching disarmament measures, going beyond what other States were prepared to accept, should State agents be internationally

responsible for any breach of the commitments entered into by that State? In his view, such violations should qualify as crimes against the peace and security of mankind only if there were a general and universally applicable international standard for disarmament.

22. He preferred the second alternative of paragraph 6, the wording of which was in harmony with existing instruments and in particular with the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>15</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.

23. With regard to mercenarism, he was not certain whether the Commission wished the code to be directed at mercenaries themselves or at the persons and organizations recruiting them and organizing and financing their activities. As he read paragraph 7, it applied to the latter, but that should be made quite clear.

24. Mr. BARBOZA congratulated the Special Rapporteur on his excellent sixth report (A/CN.4/411), whose significance was in inverse proportion to its length.

25. He would not make any general observations; they had been made during the discussion at the thirty-seventh session, in 1985. Nor was it the time to question the viability of the topic; the Commission had a mandate from the General Assembly which it must fulfil. He would confine his comments to aggression, the threat of aggression and the preparation of aggression. The first two notions were covered in paragraphs 1 and 2 of draft article 11, but the Special Rapporteur had decided, rightly or wrongly, not to include a reference to the third. He noted in passing that the status of the explanatory note on the term “State” (para. 1 (a) (ii)) was not clear: was it meant to be part of the text or of the commentary?

26. By subdividing paragraph 1 on aggression so as to include a definition of aggression and a list of acts constituting aggression, the Special Rapporteur had remained faithful to the 1974 Definition of Aggression,<sup>16</sup> which had resolved the dispute between the proponents of a definition and those who preferred a list by providing both. The suggestion that the definition of aggression be deleted and the acts constituting aggression set out in separate articles had been supported by a number of speakers, but he found it difficult to accept. It would mean departing from the system established in the 1974 Definition and would amount to taking sides in the dispute on the relative merits of a definition and a list. Precedents for the incorporation of an exhaustive list included the 1933 Convention for the Definition of Aggression,<sup>17</sup> which had been used as a basis for discussion during the drafting of the Charter of the Nürnberg Tribunal.<sup>18</sup> The proponents of a definition, on the other hand, argued that it would be a more flexible formula, allowing unforeseen situations to be taken into account.

<sup>11</sup> *Ibid.*, footnote 6.

<sup>12</sup> General Assembly resolution 36/103 of 9 December 1981, annex.

<sup>13</sup> General Assembly resolution 2131 (XX) of 21 December 1965.

<sup>14</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>15</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>16</sup> See footnote 7 above.

<sup>17</sup> League of Nations, *Treaty Series*, vol. CXLVII, p. 67.

<sup>18</sup> See 2053rd meeting, footnote 6.

27. Failing a very good reason for doing so, he believed it would be better not to discard the compromise solution arrived at after so many years of discussion. The deletion of the definition would leave only the seven specific examples listed in paragraph 1 (b). The effect would be similar to that of an article on homicide in a criminal code that read:

“Each of the acts listed below constitutes homicide:

- (i) the killing of a person by another person using a knife;
- (ii) the killing of a person by another person using a revolver;
- (iii) the killing of a person by another person using poison;
- (iv) the killing of a person by another person using a hammer.”

And so on. Although one could easily imagine many ways of killing a person, it would be difficult to include them all in a code. For a judge would then be unable to apply the provisions of that code to an unforeseen event, and the perpetrator would, under a liberal system of criminal law, go unpunished. As paragraph 1 was currently worded, however, a judge would have no difficulty in deciding that a case not listed in it fell under the general definition and thus constituted an act of aggression. The definition of aggression might even, *mutatis mutandis*, be drawn from the criminal code of an internal legal system. In the Argentine Penal Code, the article on homicide simply stated that anyone who killed another person incurred a penalty of 8 to 25 years' imprisonment. Nothing could be less ambiguous, and the system had worked perfectly well for more than 60 years.

28. As to whether article 11 should refer to the authorities of a State or to individuals, it had been pointed out that sometimes individuals who could not be described as authorities of a State were capable of influencing a decision to commit an act of aggression, and that they should be punishable. He concurred with that view, but would add that they must be prosecuted as accomplices or accessories, depending on the part they had played in the crime. It was only the authorities who could be held directly responsible, since aggression was a crime that could be committed only by a State or by its organs, whose activities could be attributed to the State.

29. He favoured inclusion of the threat of aggression, for it was a very serious matter that constituted an attack on international public order, peace and security. There again, it was the authorities of a State that were responsible, for even if an individual made threats of aggression, his behaviour was attributable to the State of which he was an organ.

30. The Special Rapporteur had warned that inclusion of preparation of aggression would raise difficulties. When did it begin? How was it to be distinguished from the preparation of a defence against possible aggression? And if the aggression did not take place, how was criminal intent to be established? Although it was not easy to pin-point the commission of the crime, he was not sure that that justified omitting any reference to the preparation of aggression from the draft code. The problem was one of legislative policy: what was to be the scope of the protection against aggression? Was ag-

gression alone to be punishable, or would the Commission set up a wider shield covering acts that did not constitute aggression itself? It should be borne in mind that some criminal codes provided, as a special public-safety measure, that the mere possession of a military weapon without a permit was a crime, even if the weapon was never used. Furthermore, omitting a reference to the preparation of aggression would be a deviation from the line established by the Charter of the Nürnberg Tribunal (art. 6 (a)) and the Charter of the Tokyo Tribunal<sup>19</sup> (art. 5 (a)), and subsequently incorporated by the Commission in the Nürnberg Principles<sup>20</sup> (Principle VI (a) (i)).

31. As to the question whether a perpetrator should be prosecuted for both the crime of preparation and that of commission of aggression, he thought the lesser crime could be absorbed by the more serious one if there was only one perpetrator. But what of cases in which an individual, acting as an agent of a State, had prepared an act of aggression but had been replaced before the act was carried out? If the act was not carried out, it would be very difficult to prove that an individual had committed the crime of preparation of aggression. But it was possible that the perpetrators of that crime might be surrendered by the very State of which they were formerly the agents—for example, after the replacement of a dictatorial régime by a democratic one.

32. The Special Rapporteur should therefore reflect further on the problem before omitting all reference to the preparation of aggression from the draft code.

33. Mr. REUTER, commenting on paragraphs 4 and 5 of draft article 11, said he agreed that they should be combined, because they referred to similar obligations and had similar objectives. Like other members of the Commission, he believed the paragraphs should be redrafted in order to place greater emphasis on individual responsibility. It was true that only a State could be held responsible for a breach of its obligations, but individuals could play a decisive part in the adoption of decisions leading to such breaches. It should be made clear that not only a head of State, but also the officials and other individuals around him, were responsible for breaches.

34. The gravity of a breach should be stressed, and for that purpose it might be useful to refer to the formulation he had suggested for the definition of intervention, namely “an act having the object or effect of threatening international peace and security”. Finally, the ultimate criminal responsibility of the competent authorities should be emphasized. Referring to a time in French history when public figures had unwittingly committed acts that had severely undermined international peace and security, he observed that individuals in positions of authority did not have the right to be wrong.

35. As to paragraph 6, he was equally in favour of both alternatives proposed by the Special Rapporteur. The first seemed to have been chosen for its historical resonances: “colonial domination” evoked events and attitudes that would hardly be condoned today, yet he could recall a time when the term “colonial” had not

<sup>19</sup> *Ibid.*, footnote 7.

<sup>20</sup> *Ibid.*, footnote 8.

been pejorative in the least. In view of its current connotations, however, it might be advisable to delete the reference to the "establishment" of colonial domination, because it was difficult to imagine such an enterprise as being admissible, or even feasible, in the world today. "Maintenance" was the only term that could properly apply to colonial domination.

36. The United Nations system had already done a great deal to end colonialism, and the mechanisms it had established would ensure that the process was carried through to the end. The criminals who must be pursued under legislation such as the code were those who consistently flouted the international community's efforts to rectify existing injustices. Some might say that that description was too limited, but to his mind it had the advantage of being clear and precise.

37. The second alternative of paragraph 6 served a useful purpose, but required drafting improvements. A great deal would depend on the decisions taken regarding the definitions of "intervention" and "colonial domination". He would also suggest adding the words "or State" in the second alternative; he doubted that in modern times there were peoples that did not belong to a State. The Commission should carefully weigh the advantages and disadvantages of a formula that had the effect of carrying to extremes the right of peoples to self-determination, that was to say a secessionist formula. If the Special Rapporteur and other members wished to retain the formula, he would not oppose it, but the risks involved in a political decision of that kind should be carefully considered.

38. Referring to remarks made by Mr. Tomuschat, he said it was true that, in some cases when drafting legal texts, the Commission should not allow itself to be influenced by existing agreements; but he doubted whether that applied to subjects such as mercenarism and *apartheid*. It should be remembered that the General Assembly adopted conventions by simple majority, and that the adoption of a convention on mercenarism would be decided by the countries most threatened by that crime. Similarly, with regard to *apartheid*, many members of the Commission might have preferred a convention that was more respectful of the legal precepts of the Western countries. But those issues were viewed differently by people living in provincial France and by those who lived in the heart of Africa. He, for one, would hesitate to "improve" conventions by restricting their effects, especially when they were already in force and had the approval of the States most concerned. One possible solution would be to include in the draft code a provision to the effect that accession to the code would entail the obligation to ratify existing United Nations treaties, unless a reservation were made.

39. Mr. FRANCIS, referring to Mr. Tomuschat's remarks, expressed his agreement with the Special Rapporteur's approach to the question whether the draft should emphasize crimes by individuals. First, it was clear that certain acts specified in article 19 of part 1 of the draft articles on State responsibility<sup>21</sup> fell within the ambit of the draft code. Moreover, the judgment of the

Nürnberg Tribunal<sup>22</sup> had made it clear that crimes under international law were committed by men, not entities, and that the individuals committing the crimes should be punished. It was therefore legally correct for the Special Rapporteur first to draft a text clearly specifying crimes committed by States, and then to establish a juridical link between each act and the individual committing it.

40. On the matter of colonial domination, he had stated earlier (2054th meeting) his preference for the first alternative of paragraph 6 of draft article 11, the reasons for which did not detract from the validity of the second alternative. He was, on reflection, prepared to accept a combination of the two, either separate or in the same paragraph. He was heartened to hear that Mr. Reuter also favoured including both ideas, and he would go so far as to say that the second alternative was also appropriate even out of the colonial context.

*The meeting rose at 11.35 a.m.*

<sup>22</sup> See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7).

## 2057th MEETING

*Tuesday, 7 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

1. The CHAIRMAN, speaking on behalf of all members of the Commission, welcomed the participants in the International Law Seminar, who would be attending the Commission's meetings.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>21</sup> *Ibid.*, footnote 17.

SIXTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

ARTICLE 11 (Acts constituting crimes against peace)<sup>4</sup>  
(continued)

2. Mr. ROUCOUNAS said that he agreed with the Special Rapporteur's approach to the definition of aggression, which repeated in part the 1974 Definition of Aggression.<sup>5</sup> The 1974 Definition, which the General Assembly had adopted by consensus after years of discussion, had been fairly well received by Governments. As the definition proposed in draft article 11, paragraph 1, was only in the nature of a general introduction followed by a list of acts to be regarded as crimes, the Drafting Committee should be able to break down the text into a provision for each crime, as already proposed.

3. It should not be forgotten that, whereas the 1974 Definition dealt with the matter from the point of view of the responsibility of the State, the draft code was concerned with acts of the individual. Accordingly, responsibility for the crime of aggression must rest with those who prepared, ordered and directed it. The wording of the introductory clause of paragraph 1, which referred simply to the "authorities of a State", should therefore be broadened.

4. As to the threat of aggression, it should be borne in mind that criminal acts often bore no relation to each other, that they could be committed in various ways and that they could give rise to different consequences. Threat of aggression, which had been covered in the 1954 draft code, was also mentioned in Article 2, paragraph 4, of the Charter of the United Nations, on the prohibition of the use of force; and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations<sup>6</sup> referred to it in seven places as an act constituting a violation of international law and of the Charter and giving rise to the responsibility of the State.

5. As referred to in the 1974 Definition of Aggression (art. 3 (a)), annexation was a crime only if it resulted from the use of armed force: that was also the sense of draft article 11, paragraph 1 (b) (i). Yet annexation was a crime whatever the violation of international law that preceded it, since it involved the acquisition, against the wished of a State, of part or all of its territory by another State and could result not only from the actual use of force, but also from the threat of force. Those writers—very few, incidentally—who made the use of force a condition for the wrongfulness of annexation were misreading history. In his view, the threat of force should be made a separate crime, in accordance with the Charter, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>7</sup> the Manila Declaration on the Peaceful

Settlement of International Disputes<sup>8</sup> and the 1987 Declaration to which he had already referred (para. 4 above). The same applied to annexation, contrary to what the Special Rapporteur proposed in his sixth report (A/CN.4/411, para. 9).

6. With regard to colonialism, he preferred the first alternative proposed for paragraph 6 of article 11. That wording corresponded to the text approved by the Commission in article 19, paragraph 3 (b), of part 1 of the draft articles on State responsibility,<sup>9</sup> which it did not seem advisable to change without good reason. Another crime which should appear separately in the code was the establishment of settlements in occupied territory and altering the demographic composition of a foreign territory, which was referred to as a crime in article 85, paragraph 4 (a), of Additional Protocol I<sup>10</sup> to the 1949 Geneva Conventions.

7. The fact that there was already a definition of mercenaries, contained in article 47 of Additional Protocol I, which the Special Rapporteur proposed to reproduce, and that the efforts of the *Ad Hoc* Committee had not yet been successful should not stop the Commission from considering the matter. In so doing, it should take account of the parallel work being done by the General Assembly, but of two other factors as well. The first was that the definition in article 47 of Additional Protocol I dealt with the author of the crime from the standpoint of the protection granted under humanitarian law and was therefore wider than the definition to be embodied in a code of crimes. The second factor was that, at the forty-first session of the General Assembly, the Third Committee had also dealt with the question of mercenarism, on that occasion from the standpoint of human rights: the Commission should therefore give due weight to General Assembly resolution 41/102 of 4 December 1986 adopted at that time, which described mercenarism as a threat to international peace and security (fourth preambular paragraph).

8. The question of terrorism was one of the most sensitive issues. Despite prolonged efforts, United Nations bodies had still not been able to arrive at a generally acceptable definition. Whenever the international community did reach a consensus on the matter, it did so in relation to specific acts, such as the hijacking of aircraft, violence against internationally protected persons or the taking of hostages. Even the 1977 European Convention on the Suppression of Terrorism<sup>11</sup> did not lay down a general definition of terrorism, contrary to what one might think at first sight. For his part, he was prepared to accept the Special Rapporteur's proposal in the second alternative of paragraph 3 of article 11 to begin with an abstract statement of principle (subpara. (a)), followed by a list of acts deemed to be criminal (subpara. (b)). He had two remarks to make in that connection. First, the Special Rapporteur was apparently confining the crime of terrorism to "State" terrorism, since the proposed text, which referred to criminal acts directed against another State or its population, came

<sup>4</sup> For the text, see 2053rd meeting, para. 1.

<sup>5</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>6</sup> General Assembly resolution 42/22 of 18 November 1987, annex.

<sup>7</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>8</sup> General Assembly resolution 37/10 of 15 November 1982, annex.

<sup>9</sup> See 2053rd meeting, footnote 17.

<sup>10</sup> See 2054th meeting, footnote 9.

<sup>11</sup> United Nations, *Treaty Series*, vol. 1137, p. 93.

immediately after the second alternative text on intervention, which was an act committed by a State. The acts regarded as crimes should not, however, be restricted to that particular form of terrorism. Secondly, the question arose whether all terrorist acts should be covered by the draft code or, as in the case of other acts, only the most abhorrent, namely those whose purpose or effect was to undermine international peace.

9. Lastly, the question of the relationship between the rules envisaged and other international instruments was an important one and the Commission should revert to it in due course.

10. Mr. NJENGA said that there was no doubt about the need for a code of crimes against the peace and security of mankind: such an instrument would fill an obvious gap, since it would make it possible to prosecute the perpetrators of such acts. More importantly, however, it would serve as a deterrent and a means for convincing recalcitrant Governments to refrain from pursuing policies contrary to their obligations relating to the peace and security of mankind.

11. In his sixth report (A/CN.4/411, para. 6), the Special Rapporteur requested the Commission to decide whether certain offences included in the 1954 draft code, namely preparation of aggression, annexation and the sending of armed bands into the territory of a State, should be retained as offences distinct from aggression. In his view, since annexation was covered by the 1974 Definition of Aggression<sup>12</sup> and the sending of armed bands by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>13</sup> they did not have to be dealt with separately in the draft code.

12. Preparation of aggression, which was a very important phase of the crime of aggression, must, however, be included as a separate offence. Aggression was never accidental: it was always preceded by calculated, deliberate preparation and, when that preparation resulted in a credible imminent threat to the peace, sovereignty and territorial integrity of another State, it might very easily achieve the same objective as actual aggression. It should therefore be considered a crime, and the individuals who had been the instruments of the State in such preparation should be prosecuted so long as the objective—subordinating the will of the threatened State—was achieved, even when actual aggression had not taken place. When aggression had occurred, it would be strange if its chief architects were to escape prosecution merely because they had not actually participated in the action they had planned and prepared. The precedent set in the Charter of the Nürnberg Tribunal<sup>14</sup> and the Charter of the Tokyo Tribunal<sup>15</sup> should be followed in that regard. As Mr. Graefrath (2055th meeting) had pointed out, at the Nürnberg trials many persons had been accused of both preparation of aggression and aggression.

13. The concept of intervention in the internal or external affairs of a State was rather elusive, as most international relations involved some kind of intervention in the form of pressure to influence the conduct of a State for the benefit of the intervening State. Ruling out military intervention, which constituted aggression in all circumstances, it was difficult to determine when political or economic intervention became wrongful. Like Mr. Beesley (*ibid.*), he was wary of speaking of “licit” and “illicit” intervention, since intervention was always a weapon used by strong States to subvert weaker States for their own benefit. In that connection, he referred to a passage from the ICJ’s judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* cited by the Special Rapporteur in his report (A/CN.4/411, para. 18). He tended to agree with the Special Rapporteur that the essential element that transformed any type of pressure, whether direct or indirect, into wrongful intervention to be proscribed in the draft code was coercion, which sought to prevent a State from exercising its sovereignty to decide freely on matters within its competence. Seen from that angle, wrongful intervention could take many forms. On the other hand, not all forms of intervention could be seen as wrongful. For example, cultural, economic and social sanctions, which might or might not be compulsory and were designed to coerce a State to fulfil its international obligations, could not be condemned.

14. In part II of his report, the Special Rapporteur dealt with the characterization of colonial domination and mercenarism as crimes against peace. He personally did not believe that colonialism could now be regarded as a historical and obsolete crime. Quite apart from the fact that pockets of classical colonialism continued to exist, as in Namibia, new and more subtle forms of colonialism were starting to appear. He thus believed that the crime of colonial domination should be included in the draft code and he agreed with Mr. Francis (2056th meeting) that the two alternative texts proposed for paragraph 6 of draft article 11 should be merged.

15. Mr. Arangio-Ruiz (2053rd meeting) had referred to what might be called a people’s “perpetual right to self-determination”. That concept was dangerous because, without a clear definition of the term “people”, it might be an invitation to secessionist tendencies, especially in multi-ethnic or multitribal States, and it would therefore be counter-productive to international peace and security.

16. He shared the view expressed by Mr. Reuter and Mr. Koroma (2054th meeting) that the problem of mercenarism had taken on new dimensions and now posed a very serious threat to the sovereignty and territorial integrity of many fragile and isolated States. The use of mercenaries to subvert another State could be said to be covered in the Definition of Aggression. There were, however, quite a few cases of hooligan elements or drug barons acting independently to organize, arm and use mercenaries to subvert the sovereignty and territorial integrity of the States where they operated. In Africa, where the problem was particularly acute, there was even one country where the Government had come to power and was being kept in power by such hooligan elements. He therefore fully

<sup>12</sup> See footnote 5 above.

<sup>13</sup> See footnote 7 above.

<sup>14</sup> See 2053rd meeting, footnote 6.

<sup>15</sup> *Ibid.*, footnote 7.

supported the inclusion of mercenarism in the draft code.

17. Referring to the text of draft article 11, he agreed with Mr. Calero Rodrigues (2053rd meeting) that each crime should be the subject of a specific article.

18. In paragraph 1, the explanatory note on the meaning of the term "State" (subpara. (a) (ii)) had no place in the text; it should be transferred to the commentary. He was, however, grateful to the Special Rapporteur for having faithfully reproduced the 1974 Definition of Aggression, which had been adopted by the General Assembly after more than 50 years of efforts in both the League of Nations and the United Nations. That Definition reflected a very careful balance and any tampering with it could only lead to confusion. He could therefore not support the suggestion that paragraph 1 (a) (i) should be deleted and that only paragraph 1 (b), dealing with specific acts constituting aggression, should be retained.

19. With regard to interference by the authorities of a State in the internal or external affairs of another State, he preferred the first alternative of paragraph 3, which could, however, be further refined to bring the element of the coercive nature of interference into sharper focus. Whether or not that alternative was retained, it was important to include terrorism and terrorist acts as specific elements of the draft code. In that connection, he believed that, although the text submitted by the Special Rapporteur in the second alternative reproduced the 1937 Convention for the Prevention and Punishment of Terrorism,<sup>16</sup> while drawing upon some new forms of terrorism, it did not adequately meet the needs of the international community.

20. One form of terrorism was State or governmental terrorism, under which an incumbent régime committed serious acts of arbitrary violence against a defenceless population. The most glaring example of that type of terrorism was that practised by the *apartheid* régime in South Africa, where violence was directed not only against the majority of the population of the country, but also against the population of neighbouring States, such as Mozambique, whose infrastructure had been totally destroyed.

21. The second form of terrorism, which, for some, was the only relevant one, was individual or group terrorism, defined by the United States Task Force on Disorders and Terrorism in 1976 as a tactic or technique by which a violent act or threat thereof was used for the prime purpose of creating overwhelming fear for coercive purposes. In the United Kingdom, the 1973 Northern Ireland (Emergency Provisions) Act defined that form of terrorism as the use of violence for political or sectarian ends, including violence for the purpose of putting the public or any section of the public in fear.

22. Those definitions tended to concentrate only on the end result of terrorism and made little or no distinction between violent acts which were politically inspired and those which were criminally motivated or committed by psychologically deranged individuals. However, the Commission was concerned only with terrorism that

was politically motivated and had an international element. As one leading author, Robert Friedlander, had put it: "Political terrorism, whether selective or randomized, is basically a strategy for revolutionary ends. . . . when violence is directed against innocent third parties, if there is an international element contained in the illegal act, then it becomes an international crime."<sup>17</sup>

23. The 1937 Convention for the Prevention and Punishment of Terrorism, which contained an interesting definition of international terrorism, had been ratified only by India and had become a dead letter as a result of the outbreak of the Second World War. The Convention had, however, tended to emphasize the criminal nature of terrorism and had specified a number of prohibited acts, including attempts against the life and person of heads of State or their families, damage to public property and the endangering of human life, if done by citizens of one State against the citizens of another.

24. Perhaps what made it most difficult to arrive at a generally acceptable definition of terrorism was that some States insisted on regarding certain acts committed by liberation movements recognized by regional organizations and by the United Nations itself as acts of terrorism. He could not agree with Friedlander's thesis that it was not necessary to have an exact legal definition if terrorism was dealt with as a common crime, for the international community would never come to grips with the problem of terrorism if some of its most influential members continued to equate liberation struggles for self-determination and independence with terrorism. As another writer, Thomas Franck, had pointed out, "the military and technological balance of power so favours the modern State that it is virtually certain that terrorists will seek out the most cost-effective strategies that create the best prospects for maximum havoc with minimum risk of confronting the superior power of the State."<sup>18</sup> In such circumstances, no liberation movement would be in a position to achieve its goals if it were to eschew all the methods regarded by some as being terroristic.

25. Subject to those reservations, the limitations placed by most States on extradition for political offences and the requirements for the right of asylum, international terrorism might be defined in the following way:

"Violent acts or attempts at such acts perpetrated by States or individuals or groups of individuals against innocent civilians or nationals of States not involved in an on-going conflict, calculated to cause fear and panic to the general public and intended to coerce a State or an institution to conform to a course of conduct dictated by political considerations of the perpetrators."

26. In that connection, it had to be decided whether motive and intent were relevant in determining whether or not an act was to be considered terroristic. In his view, intent in the sense of *mens rea* would be as rel-

<sup>16</sup> See 2054th meeting, footnote 7.

<sup>17</sup> R. A. Friedlander, *Terrorism: Documents of International and Local Control* (Dobbs Ferry (N.Y.), Oceana Publications, 1979), vol. I, p. 5.

<sup>18</sup> T. M. Franck, "International legal action concerning terrorism", *Terrorism* (New York), vol. 1, No. 2 (1978), p. 189.

evant in terrorist acts as in parallel ordinary crimes. On most occasions, of course, the act itself, so long as it was voluntary, implied intent. Thus, in a hostage-taking case, it would be no defence to plead that the victim had been taken because of an error as to his nationality. However, a greater problem arose with regard to motive. In article 2 of the draft articles which formed the basis for the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,<sup>19</sup> the Commission, being of the view that it was appropriate to require the element of intent, but improper to take motive into account, had used the expression “regardless of motive”. However, those words had been dropped when the final text had been adopted by the General Assembly. Similarly, the 1937 Convention included the element of motive to distinguish between violent acts committed for purposes of “international terrorism” and other acts of violence.

27. Lastly, he believed that paragraphs 4 and 5 of draft article 11 should apply in cases where the obligations violated had been contracted by a State under a treaty or multilateral convention, but not in the case of a bilateral treaty.

28. Mr. BENNOUNA, noting that the Special Rapporteur’s concise and closely reasoned sixth report (A/CN.4/411) would undoubtedly enable the Commission to make progress, said he agreed that theoretical debate should now be avoided and that specific proposals should be analysed. The Commission must keep the gravity of the crimes to be covered by the code uppermost in mind—after all, it was not drafting a general code of criminal law—and must not lose sight of the distinction between acts attributable to the individual and those attributable to the State.

29. Members had thus been fully justified in highlighting the relationship between acts of the individual and those of the State by questioning whether, for example, an individual could be convicted of an act of aggression which was not characterized as such in respect of the State. He believed those two elements should not be linked, for, if they were, the code would lose some of its specificity. At the international level and particularly in the Security Council, the characterization—or non-characterization—of an act was often a matter of expediency, of political balance or simply of a desire to appease, but its non-characterization at that level did not make it any less real or serious. A distinction therefore had to be drawn between the responsibility of a legal person and that of the individuals acting on its behalf, in much the same way that a distinction was made between the responsibility of companies and that of their directors. Criminal responsibility of a legal person such as a State was, however, difficult to conceive and, unlike the criminal responsibility of the individual, was not in keeping with the idea of penalties or criminal law.

30. The draft code had to deal with particularly grave acts whose purposes or consequences had an international element and which were committed by in-

dividuals, but directed against international peace, by contrast with ordinary crimes, which threatened the peace of a single country. The codification of crimes against peace should thus focus on acts of aggression, which formed the core of such crimes, and the concept of a crime against peace must not be watered down by including less important uses of force, even if they were wrongful under Article 2, paragraph 4, of the Charter of the United Nations.

31. The category of acts of intervention was particularly important in that regard and it should be confined to the acts referred to in draft article 11, paragraph 1 (b) (vii), namely acts of armed subversion which were designed to destabilize a State and whose objective was forcibly to deprive a people of its right to the political, economic and social régime of its own choosing. The idea of identity, as referred to by Mr. Reuter (2055th meeting), would be difficult to define in legal terms. In any event, the element of gravity referred to in paragraph 1 (b) (vii) had to be incorporated in the text.

32. The Special Rapporteur and the Drafting Committee would also have to characterize acts of terrorism and mercenarism in terms of their gravity. The draft code was intended not to punish all acts of terrorism and all mercenary activities, but only those which had the most serious consequences. If that were made clear, there would be no need to deal with the problem of the code’s relationship to certain other instruments, such as the conventions against those two phenomena now being drafted by other bodies. Terrorist acts and the use of mercenaries were not in themselves crimes against international peace: it was because of their objective that they might be characterized as such. When separated from aggression, such acts came under ordinary law, under which they were punished in most countries.

33. Threat of aggression did not in itself constitute a crime against peace, but attempted aggression should be punishable if intent could be established and commencement of execution proved, as in general criminal law.

34. The breaches of treaty obligations dealt with in paragraphs 4 and 5 of article 11 seemed too loosely defined to fall into the category of crimes against peace. Such breaches must be linked to the core formed by acts of aggression: only if they were committed as part of preparation for aggression or attempted aggression should they be characterized as crimes under the draft code. Taken by themselves, they were covered by the provisions of the relevant treaties or by general treaty law.

35. He agreed with Mr. Njenga that the two alternatives proposed for paragraph 6 should be combined. Denying a people the exercise of its right to self-determination under international guarantee should also be condemned in that paragraph. It was not a question of universalizing the right of peoples to self-determination, at the risk of provoking a world-wide fragmentation of existing State entities. But it was also quite possible to define what constituted a people and provide guarantees to ensure that self-determination was achieved properly and lawfully. It was perhaps along those lines that the Commission should be working.

<sup>19</sup> *Yearbook* . . . 1972, vol. II, pp. 312 *et seq.*, document A/8710/Rev.1, chap. III, sect. B.

36. In conclusion, he suggested that the Commission should request the Drafting Committee to underline the exceptional gravity of crimes against peace by a reference to acts of aggression, which epitomized crimes against peace, and by bearing in mind the absolute necessity of safeguarding the right of peoples to self-determination. That right, which, as the Special Rapporteur had pointed out, was not covered by the 1974 Definition of Aggression,<sup>20</sup> should perhaps also be dealt with in a saving clause in a separate article of the draft code.

37. Mr. OGISO said that his comments on the Special Rapporteur's excellent sixth report (A/CN.4/411) would focus on the issues raised in the discussion to date.

38. In his report, the Special Rapporteur had submitted two alternatives for the definition of aggression: one reproducing the 1974 Definition of Aggression and the other simply referring to that Definition.<sup>21</sup> The sixth report revealed his preference for the first alternative, as he had reproduced the text in question in draft article 11. The reason for that choice was apparently that certain crimes, such as annexation, the sending of armed bands and mercenarism, were already covered by the Definition of Aggression and did not need to be repeated in the list of crimes against peace set out in the draft code.

39. Mr. Calero Rodrigues (2053rd meeting) had suggested replacing the textual repetition of the Definition of Aggression by a provision stating simply that aggression was a crime against peace; that would be almost the same as the second alternative proposed in the third report. The question of how to formulate draft article 11 was thus essentially a choice between those two alternatives. However, if crimes such as annexation, the sending of armed bands and mercenarism, which were already covered by the 1954 draft code, were to be deleted from the list of crimes against peace, readers of the future code might wish to have a ready reference so that they could determine whether and to what extent those acts were covered by the definition of aggression. The Commission therefore had to decide whether those three crimes should be deleted from the list on the grounds that they were included in the concept of aggression.

40. In his sixth report (A/CN.4/411, para. 8), the Special Rapporteur submitted for the Commission's consideration a number of questions relating to the preparation of aggression and he had explained that the problem was to determine whether that crime could be attributed to individuals constituting the authority of a State if the aggression had not actually taken place. If it had taken place, the participants would be punished sufficiently for the crime of aggression itself and it would be unnecessary to wait for the outcome of a difficult criminal investigation on the preparation of aggression. Yet individuals could participate in the preparation of war without taking part in its execution. History showed that a war of aggression was always planned and

prepared—at least on paper—as a defensive war. In order to punish individuals who participated only in the preparation of war, it was necessary to establish their criminal intent. It would, however, be difficult to distinguish between individuals who participated in the preparations for the purpose of a future aggression and those who took part only because they believed they were preparing for a defensive war.

41. The Special Rapporteur proposed to omit the reference to annexation included in the 1954 draft code on the grounds that it was expressly mentioned in the Definition of Aggression (*ibid.*, para. 9). One slight problem, however, was that the Definition of Aggression covered only annexation by force and did not refer to annexation by the threat of force. He personally believed that annexation by the use of force implicitly included the threat of force, but the interpretation of that particular aspect of the Definition of Aggression might create some problems, since Article 2, paragraph 4, of the Charter of the United Nations distinguished between the threat of force and the use of force. One way out might be to amend paragraph 1 (a) (i) of draft article 11 to read:

“Aggression is the use of armed force, including the threat of force, by a State against the sovereignty, territorial integrity or political independence of another State . . .”

The events in Europe which had led up to the Second World War had shown that it was possible to annex a territory by the mere threat of force and the draft code should not fail to cover that possibility. Another alternative would be to maintain annexation as a separate crime.

42. With regard to the sending of armed bands into the territory of another State, he had no objection to its deletion from the list of crimes, since such acts were fully covered in the Definition of Aggression. It would simply be necessary to explain in a footnote the reason for the deletion of a crime which had been included in the 1954 draft code.

43. The Special Rapporteur was justified in drawing attention to the difficulty of determining exactly when intervention, especially political intervention, became wrongful and rightly concluded that it was “the element of coercion which constitutes the dividing line” (*ibid.*, para. 27). He went on to say (*ibid.*, para. 31) that intervention was not limited to coercive measures of an economic or political character, as the 1954 draft code had put it, and referred by way of example to such acts of subversion as the organization of armed bands with a view to incursions into the territory of another State, encouraging civil strife and terrorist activities. Those examples could, however, all be classified as coercive measures of a political character and the definition in article 2, paragraph (9), of the 1954 draft (“coercive measures of an economic or political character”) was sufficiently broad. The main problem was that it was also too vague and could therefore be interpreted in different ways. International political activity consisted to a large extent of political or economic measures by which one State exerted pressure upon another so as to influence its will. In order to prevent legitimate international political activity from being regarded as

<sup>20</sup> See footnote 5 above.

<sup>21</sup> See *Yearbook . . . 1985*, vol. II (Part One), pp. 81-82, document A/CN.4/387, art. 4, sect. A.

wrongful or even criminal, the definition of intervention had to be made more specific. He preferred the second alternative of paragraph 3 of draft article 11. He agreed with the Special Rapporteur (*ibid.*, para. 34) that, if the acts of intervention punishable under the code were to be enumerated, the enumeration must be exhaustive, although to make it so would be difficult. Lastly, he failed to understand why subversive activity should not be mentioned in subparagraph (i) of the second alternative of paragraph 3 and requested the Special Rapporteur to explain the reasons for including a separate provision to deal with it.

44. Most members of the Commission were in favour of including colonial domination in the list of crimes against peace. The only problem was to determine how that provision should be worded. He had no particular difficulty with the term "colonial domination", but believed that the wording used in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>22</sup> namely "subjection of peoples to alien subjugation, domination and exploitation", was more explicit and had the advantage of covering all the elements of colonial domination, not only colonialism in its historical form. He therefore preferred the second alternative proposed by the Special Rapporteur for paragraph 6.

45. It would appear from the second alternative of paragraph 3 that the Special Rapporteur intended to deal with terrorism as a separate crime and it was therefore important to think about the dual nature of terrorism, which was both a crime against peace and a crime against humanity. The particularly immoral character of modern terrorism derived from the fact that it was calculated to create a state of terror in the minds of public figures or the general public through indiscriminate killing, the taking of hostages or threats to the lives of innocent people, as in the case of the seizure of aircraft or bombings of public places. To the extent that it was directed against an innocent population, terrorism also had the characteristics of a crime against humanity. When the provision on terrorism was referred to the Drafting Committee, the Commission should clearly indicate the category of crimes to which it belonged. The Commission should also carefully re-examine the definition of terrorist acts proposed by the Special Rapporteur in order to ensure that all of the most serious forms were included: acts such as the destruction of nuclear installations or the poisoning of reservoirs, which could significantly endanger a population, should be considered, but did not seem to be covered by the present wording.

46. With regard to the breach of obligations of a State under a treaty, he considered that only breaches of a serious nature which affected the balance of power between opposing groups and might therefore endanger the peace and security of mankind should be covered. Purely technical breaches of a treaty were not crimes against peace.

47. Lastly, with regard to mercenarism, the Special Rapporteur pointed out (*ibid.*, para. 44) that the study of that phenomenon had been entrusted to an *Ad Hoc*

Committee which had not yet completed its work. The Commission should examine the question in the light of the *Ad Hoc* Committee's conclusions, otherwise there would be a danger that two different United Nations bodies might draw conclusions which could be interpreted differently.

48. Mr. BARSEGOV raised the question of the source documents containing definitions of acts constituting crimes under the draft code. It had been pointed out by some members that some of the instruments which the Special Rapporteur was citing did not concern all States. Since the list of parties was never the same between one convention and another, invoking the principle *pacta tertiis nec nocent* cast doubt upon the possibility of elaborating universal norms at all. To accept such an approach would mean abandoning the very idea of development of international law, since there was not a single convention to which all States were parties. Yet the Commission did not, for all that, restrict its activities, and actually went so far as to consider topics on which there existed not only no universal international agreements, but also no significant normative material of any kind. Moreover, at present the process of creation of rules of international law had become accelerated: it was not uncommon for international agreements to be implemented even before they had officially entered into force, as had been the case in the field of the law of the sea. In the modern world, which was characterized by interdependence, there were rules and principles of international law that concerned the entire international community, in other words all States, whether or not they were parties to a particular convention. That had been confirmed by the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17) and it was all the more true of the rules relating to international peace and security. Among those rules could be counted the provisions of the draft code, which, as Mr. Beesley (2055th meeting) had said, was to represent a constructive contribution to the system of collective security under the Charter of the United Nations.

49. An important aspect of the Commission's work on the draft code was that, in striving for maximum precision in formulating definitions of acts which constituted crimes on the basis of existing instruments, it must never overlook their meaning, purpose and content as determined by the development of society. The code should reflect existing morality and the degree of awareness of peoples. As the jurists of antiquity used to say, law was what the people considered good. That point of view and that concept of international morality had lost none of their relevance.

50. A major task, that of drawing up a list of crimes against peace, lay ahead. In that connection, the Special Rapporteur had adopted the right approach. He had taken article 2 of the 1954 draft code as his starting-point and had added to and expanded the list contained therein in the light of current developments in international law. In his own view, that approach was excellent and he also endorsed the idea of referring specifically to the various crimes covered by the 1974 Definition of Aggression.<sup>23</sup>

<sup>22</sup> See footnote 7 above.

<sup>23</sup> See footnote 5 above.

51. Noting that the Special Rapporteur was proposing that the Commission itself should settle the question of the placement of the crimes which were connected with aggression and had been mentioned in the 1954 draft code, namely the planning and preparation of aggression, annexation and the sending of armed bands into the territory of another State, he pointed out that some members had expressed doubts about the advisability of including the planning and preparation of aggression in the code, either because it would be difficult to distinguish between preparation of aggression and defence or because, in the event of preparation not followed by actual aggression, no one could be prosecuted. There was no need to repeat the ideas put forward by Mr. Reuter (2054th meeting) and Mr. Graefrath (2055th meeting) on the content of those crimes or to quote from the relevant documentation, particularly the records of the Nürnberg Trial. He nevertheless stressed that, in order to decide where those crimes should be placed, they should not be regarded as isolated acts by isolated individuals and should not be dissociated from acts of aggression proper: the starting-point should be that, for an act of aggression to be committed, it had to be planned and carefully prepared. Yet aggression was prepared by the entire State apparatus. That could be a fairly long-term undertaking and, at every stage, it would involve particular persons. In the circumstances, could persons who had deliberately prepared an act of armed aggression against another State be relieved of all responsibility? They would be persons who occupied key posts in the military or economic apparatus, took decisions, saw to the preparation of the armed forces, planned military operations, carried out diplomatic manœuvres and transferred the economy to a war footing. Without such elements of preparation, aggression was a practical impossibility. That was why, according to the Nürnberg logic, all those who participated in the planning and preparation of aggression, as well as in the aggression itself, were liable to trial and punishment. In that connection, Mr. Graefrath had been right to refer to article 6 (a) of the Charter of the Nürnberg Tribunal,<sup>24</sup> as well as to the relevant passages of the judgment of the tribunal. In 1950, in its formulation of the Nürnberg Principles,<sup>25</sup> the Commission had also included the planning and preparation of a war of aggression among crimes against peace (Principle VI (a) (i)). It was logical that they should be included among the crimes to be covered by the draft code. That would be correct from the point of view of the codification of existing norms and would enhance the role of the code as a legal means of preventing the unlawful use of armed force.

52. The two other elements of aggression, namely the sending of armed bands into the territory of another State and annexation, were already covered by the Definition of Aggression. He had listened with interest to Mr. Roucouas's well-founded views on annexation as a crime against peace. Annexation was the crowning act of aggression and its logical conclusion. Legal opinion in the matter had taken shape thanks to Lenin's definition of aggression, as reproduced in the Soviet

Constitution: the key element of aggression was the violation of the principle of self-determination, in other words the acquisition and domination of a foreign territory against the will of its population. If the Definition of Aggression were reproduced in the draft code, it must be borne in mind that the list of acts covered was not exhaustive. Draft article 11, paragraph 1, should contain an additional provision stating that the Security Council could decide that other acts also constituted aggression in accordance with the Charter.

53. Draft article 11, paragraph 1 (c), was general in scope and related to the title as a whole, namely "Crimes against peace". A separate article might also be added, specifying that:

"None of the provisions of article 11 may be interpreted as prejudicing the rights set forth in the Charter of the United Nations, the right to individual and collective self-defence and the fundamental right of peoples to self-determination, freedom and independence."

54. For understandable reasons, the Special Rapporteur was proposing that mercenarism should not be included in the general list of acts constituting aggression and that it should be dealt with in a separate paragraph. At the present time, when it was more difficult to resort to open forms of aggression, the same ends were being achieved by covert forms of aggression, including mercenarism, which had to be eliminated from international life. He nevertheless believed that it would be more logical to deal with mercenarism in paragraph 1, in the general context of aggression. Since the question of mercenarism was being considered by the *Ad Hoc* Committee, any definition of mercenarism formulated by the Commission would be only preliminary in nature. He would have no objection if the Commission took as its point of departure the definition contained in article 47 of Additional Protocol I<sup>26</sup> to the 1949 Geneva Conventions. As was known, that definition had also been adopted in article 1 of the third revised consolidated negotiating basis for a convention against the recruitment, use, financing and training of mercenaries.

55. One of the most sensitive aspects of the formulation of the draft code was undoubtedly that of questions connected with non-interference in the internal affairs of other States. Although contemporary international law recognized the peremptory nature of that principle, the legal rules which gave shape to it were unfortunately still few and far between. The study of legal writings on the subject had accordingly led the Special Rapporteur to propose two alternative texts on intervention (para. 3). The first was too general and dealt with forms of interference which, although illegal, did not directly threaten the peace and security of mankind and therefore could not be regarded as entailing the criminal responsibility of individuals, for example a statement by the head of a diplomatic mission on matters relating only to the internal affairs of the State to which he was accredited. Only the dangerous forms of intervention should be covered by the draft code; hence the need for precise wording.

<sup>24</sup> See 2053rd meeting, footnote 6.

<sup>25</sup> *Ibid.*, footnote 8.

<sup>26</sup> See 2054th meeting, footnote 9.

56. The second alternative of paragraph 3 was close to article 2, paragraphs (5) and (6), of the 1954 draft code and the forms of interference listed therein directly endangered the State, its independence and its territorial integrity. According to article 2, paragraph (9), of the 1954 draft, "intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind" would entail the responsibility of that State. That provision should be retained in the new text, because economic and political pressures calculated to disorganize the life of a country, to threaten its Government and to undermine its economy were unfortunately very topical and it would be useful for the draft code to supplement the legal means now available for the protection of States against such external attacks. A further provision should be added to subparagraphs (i) and (ii) of the second alternative of paragraph 3 to deal with responsibility for another form of interference, namely pressure aimed at undermining the legitimacy of a State and its political and economic foundations.

57. The discussion of draft article 11 had shown that the question of terrorism was also a thorny one. For many a decade, the international community had been seeking to give a legal definition of that phenomenon as a prerequisite for specific action to deal with it. The complexity of such a definition was due to the fact that it was difficult to make a clear-cut distinction between terrorist acts and ordinary crimes and the fact that they could also not be totally dissociated from political crimes. Terrorism was, however, taking increasingly heinous forms and its pernicious consequences were growing. The so-called traditional forms, directed against persons whom the terrorists rightly or wrongly saw as symbols of social injustice, were still prevalent. But terrorist acts still more serious in terms both of their scope and of their possible consequences were already occurring. There was a danger that terrorism might spread to weapons of mass destruction—chemical, bacteriological and nuclear—and that it might be directed at nuclear power stations, irrigation works and other facilities essential to life, as well as at arms depots (western Europe was the site of 4,800 nuclear warheads for NATO as well as 1,100 French and United Kingdom units and some 340 military and civilian installations). So far, the hostages taken by terrorists had been private individuals, but it was not impossible that the situation might change in the near future and that entire regions or countries might fall into the hands of terrorists. To which of the crimes against the peace and security of mankind should terrorism therefore be linked? Because of its objectives, that crime could be directed against peace, especially when it was organized or ordered by a State; but because of the way it was perpetrated and its scope, which could be unlimited, it might be identified with an act as unnatural as genocide.

58. He also welcomed the idea that the list of crimes should include breaches of treaty obligations concerning arms limitation and disarmament, since full compliance with treaty obligations was the basis for civilized relations between States. At a time when the survival of mankind depended on the strict implementation of

arms-limitation and disarmament agreements, the question of the punishment of individuals guilty of that type of violation took on key importance. The provision on that subject in paragraph 4 of article 11 had to be worded more precisely in order to indicate that it referred to the breach of treaty obligations which, because of their magnitude or nature, constituted a threat to peace.

59. Colonialism had been discussed in sufficient detail for him not to have to dwell on it at length. The anticolonialism of Soviet doctrine and practice was well known. In his view, the draft code should expressly refer to that form of international crime; but the Commission should not oppose colonialism to alien domination. Colonialism necessarily involved subjugation, and national servitude led to colonization and a change in the national identity of the subjugated people. But the fact that colonialism and alien subjugation were similar in many respects did not mean that they were identical. The Commission should therefore not be asked to choose between the two alternatives proposed for paragraph 6. The only solution was to combine the two alternative texts, as shown by a number of political documents and texts of international law, especially the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>27</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>28</sup>

60. It also had to be decided whether the draft code should include other crimes that might, if committed, have disastrous consequences. One example was the preparation, formulation and dissemination of political and military doctrines which were designed to justify the first use of nuclear weapons, or, more simply, nuclear war itself. In that connection, there was a whole set of General Assembly resolutions that were based on the idea that States and statesmen that resorted first to the use of nuclear weapons would be committing the gravest crime against the peace and security of mankind. As stated in the Declaration on the Prevention of Nuclear Catastrophe:<sup>29</sup> "There will never be any justification or pardon for statesmen who take the decision to be the first to use nuclear weapons" (para. 2). In the circumstances, that approach held the key which might protect mankind from nuclear destruction.

61. As to the vital question of the implementation of the code and the related question of its very existence, it was quite obvious to him that, no matter what form the list of crimes and the other provisions finally took, the draft code might well remain a dead letter unless it provided for implementation machinery specific enough to make it an obligation of States to observe the rule on the non-applicability of statutory limitations to crimes against the peace and security of mankind and, at the same time, flexible enough to enable the majority of the members of the international community to endorse it.

62. One possible solution would be universal jurisdiction: every State which had accepted the obligations of the code would be bound either to try the perpetrator of a crime arrested in its territory or to extradite him at the

<sup>27</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>28</sup> See footnote 7 above.

<sup>29</sup> General Assembly resolution 36/100 of 9 December 1981.

request of another State, in accordance with a system of pre-established priorities. Another solution would be to establish an international criminal court. In the view of some who had spoken on that point both in the Sixth Committee of the General Assembly and in the Commission itself, failure to establish such a court would make the code meaningless. Mr. McCaffrey (2054th meeting) had said that the fate of the code depended on the existence of an international court. Unfortunately, however, the realities of the modern world had for a long time prevented that idea from taking shape. The radical and far-reaching changes that were now taking place in the world, the new thinking that was emerging in relations between States and the pressing need for an order that would make the rule of law prevail in political affairs nevertheless called for a different approach to such questions.

63. The question of an international criminal court had to be viewed in the general context of the task of guaranteeing the peace and security of mankind. States had to establish an international criminal court or courts which would meet the strictest requirements of international legitimacy, guarantee the irreversibility of the penalties imposed on individuals convicted of grave crimes against mankind and thereby contribute to the maintenance of the peace and security of mankind.

64. It was possible to imagine several types of international courts. Courts could be set up to deal with cases involving specific crimes. Mr. Gorbachev, for example, had had occasion to suggest the idea of the establishment under United Nations auspices of a tribunal with jurisdiction in cases of terrorism.<sup>30</sup> The Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of *Apartheid* both made provision for special tribunals. He himself would have no objection if the Commission also discussed the possibility of establishing an international criminal court of a general nature: the idea of combining international criminal jurisdiction and universal jurisdiction should also be carefully considered. A flexible mechanism that could be adapted to international criminal law might find its place among the many international bodies that were called upon to guarantee stability and order in the world by specific means. The role of mechanisms of that kind was becoming increasingly important. That was particularly true in the case of the ICJ. In that connection, he recalled that, in view of developments in the international situation, the Soviet Union had put forward the idea of the acceptance by all States of the compulsory jurisdiction of the ICJ on the basis of mutually agreed conditions. Obviously, the first step in that direction would have to be taken by the permanent members of the Security Council.

65. Those developments merely confirmed that the draft code had a promising future. He was convinced of its undoubted usefulness as an instrument of peace. The formulation of the draft code would be a sign of the international community's maturity. The Commission should therefore focus its efforts on the drafting of the text in order to complete it as soon as possible and thus

comply with the request made of it by the General Assembly. In conclusion, he supported the suggestion that draft article 11 as submitted by the Special Rapporteur be referred to the Drafting Committee.

*The meeting rose at 1 p.m.*

## 2058th MEETING

*Wednesday, 8 June 1988, at 10 a.m.*

*Chairman: Mr. Leonardo DÍAZ GONZÁLEZ*

*Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)**

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

ARTICLE 11 (Acts constituting crimes against peace)<sup>4</sup>  
(continued)

1. Mr. SHI thanked the Special Rapporteur for his excellent sixth report (A/CN.4/411), which was a valuable continuation of and complement to his third report on the topic.<sup>5</sup>

2. He noted that draft article 11 as submitted in the sixth report had, in accordance with the Commission's decision, been formulated on the basis of the 1954 draft code, with revisions and additions in the light of new developments.

3. Despite the unity of the concept of crimes against the peace and security of mankind, he found the subdivision of those crimes into three major categories—crimes against peace, war crimes and crimes against humanity—fully justified. He also subscribed to the Commission's decision that the draft code should cover

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>4</sup> For the text, see 2053rd meeting, para. 1.

<sup>5</sup> *Yearbook . . . 1985*, vol. II (Part One), p. 63, document A/CN.4/387.

<sup>30</sup> See 2055th meeting, footnote 9.

only the most serious international crimes, determined by reference to a general criterion and to the relevant conventions and declarations. Furthermore, he agreed with the Special Rapporteur that, in order to maintain a certain unity of approach, the general criterion should be in line with article 19 of part 1 of the draft articles on State responsibility;<sup>6</sup> it should accordingly emphasize the weight of opinion of the international community and the importance of the subject-matter of the obligation violated. Crimes against the peace and security of mankind were distinguished from other international crimes by their brutality and barbarity and by the fact that they constituted attacks against the very foundations of contemporary civilization and the values on which it was based.

4. With regard to crimes against peace in particular, he agreed with the Special Rapporteur that they resulted from a breach of an international obligation of essential importance for the maintenance of international peace and security; that they took the form of a breach of, or threat to, peace; and that they had the common characteristic of being crimes which directly and seriously attacked or threatened the sovereignty, independence or territorial integrity of a State.

5. Turning to the sixth report, his first comment was that crimes against peace could be committed only by a State against another State; hence, where such crimes were concerned, the transgressions of individuals were inseparable from those of the State. Nevertheless, at the present stage of the Commission's work, criminal responsibility under the draft code was to be confined to individuals. In that connection, he agreed with many other speakers that draft article 11 did not give clear expression to the intention to attach criminal responsibility to individuals. The text should perhaps be refined.

6. He had no objection to paragraph 1 of article 11, concerning acts of aggression as crimes against peace, since it adhered closely to the 1974 Definition of Aggression.<sup>7</sup> The explanatory note in subparagraph (a) (ii) should, however, be transferred to the commentary.

7. He agreed that the threat of aggression against another State, dealt with in paragraph 2, constituted a crime against peace. It was a concrete manifestation of a State's intention to commit an act of aggression, which might take the form of intimidation, troop concentrations or military manoeuvres near another State's border, mobilization, etc. The purpose was to put pressure on a State to make it yield to demands; the result was thus exactly the same as that of aggression itself. The Special Rapporteur was therefore fully justified in making the threat of aggression a specific crime against peace.

8. The concept of "preparation of aggression" as a crime against peace had been omitted because of its controversial character and lack of precise content. The Special Rapporteur had, however, invited the Commission to decide whether preparation of aggression should be retained as a separate crime. It had been included in

Principle VI (a) (i) of the Nürnberg Principles and in the Charters of both the Nürnberg and Tokyo Tribunals (see A/CN.4/411, para. 7); but the intention then had probably been to ensure that major war criminals did not go unpunished. Moreover, in the case of the Second World War, preparation of a war of aggression had not been difficult to determine. The fact was that, before the former Fascist countries had launched wars of aggression against neighbouring countries, both the major Western Powers and the victim States had been fully aware of the active preparations being made. If sanctions could have been imposed in time, the world might have been spared the horrors of the Second World War. It was true, as the Special Rapporteur had pointed out, that criminal law sanctioned offences, but did not authorize measures to prevent them. As he saw it, however, measures taken against the preparation of aggression would not be preventive, but punitive.

9. Many years before the outbreak of the Second World War, there had been attempts to make preparation of aggression an act prohibited by international law. It was worth noting that the criminal codes of some countries, including China, treated preparations for committing a crime as a criminal act in itself. The necessary elements of that crime were the criminal intent and the material preparation and creation of conditions for the implementation of the criminal intent. He urged the Commission, bearing those elements in mind, to search for factors which constituted preparation of aggression as a separate crime against peace. Generally speaking, that preparation would not consist simply of military measures such as the increase of armaments and armed forces, which would be difficult to distinguish from preparation of defence. It would consist rather of a high degree of military preparation far exceeding the needs of legitimate national defence, the planning of attacks by the general staff, the pursuit of foreign policies of expansionism, intervention and domination, propaganda of aggression in various disguises, and persistent refusal of the pacific settlement of disputes. Preparation of aggression should be made a crime against peace because it clearly endangered international peace and security. The difficulty of determining such preparation was no argument for not including it in the code.

10. Intervention in the affairs of another State contravened the fundamental principles of modern international law, but only serious acts of intervention constituted crimes against peace. The first alternative of paragraph 3 was a general definition of intervention, which seemed rather too broad, giving a judge too much latitude in determining whether an act constituted intervention that could be characterized as a crime against peace. The second alternative was acceptable; the specific acts it enumerated were no less serious than acts of aggression.

11. Acts of terrorism were given a prominent place in draft article 11, in response to the need of the international community to combat that crime. The Special Rapporteur had been right in distinguishing acts of terrorism, as understood in the draft code, from terrorist acts under ordinary criminal law. Acts of terrorism under the draft code were international in character and were directed by a State against another State to

<sup>6</sup> See 2053rd meeting, footnote 17.

<sup>7</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

threaten its security and stability, although terrorist acts also affected the security of the inhabitants of a State and their property. He therefore hesitated to endorse the sufficiency of the definition proposed by the Special Rapporteur.

12. He preferred the first alternative of paragraph 6, on colonialism, although the wording of the second was taken from the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>8</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>9</sup> His reasons for that preference were, first, that the word "colonialism", although perhaps not a legal term, was well known to ordinary people, particularly in the developing countries; and secondly, that despite the advances of decolonization, remnants of old colonialism still existed and there was no assurance that new forms of colonialism would not appear.

13. He agreed that mercenarism, which had been treated as a form of aggression in the 1974 Definition of Aggression, should be dealt with in a separate paragraph of the draft code. The wording of the paragraph could, however, be left open, pending the outcome of the work of the *Ad Hoc* Committee on the subject.

14. Mr. RAZAFINDRALAMBO said that, as he had already had occasion, at the thirty-seventh session, in 1985, to express his views on the general questions raised by the present topic, he would concentrate on draft article 11 as submitted by the Special Rapporteur in his sixth report (A/CN.4/411).

15. First, in the interests of greater clarity, he suggested that the provisions on the various acts constituting crimes under the draft code should form separate articles, instead of the seven paragraphs of article 11. Each article should contain the definition of a specific crime, followed by an exhaustive enumeration of the acts which constituted that crime. Explanatory passages relating to the scope of a definition had no place in the body of the articles: the explanatory note in paragraph 1 (a) (ii) on the use of the term "State", together with paragraph 1 (c) (i) on the relationship of the code to the Charter of the United Nations, could perhaps be placed under "Miscellaneous provisions", which would apply to the whole code. All those points could be left to the Drafting Committee.

16. The formulation of the draft code centred on the criminal responsibility of the individual. In that connection, he drew attention to paragraph 1 of article 3 (Responsibility and punishment), provisionally adopted by the Commission at its thirty-ninth session,<sup>10</sup> which read: "Any individual who commits a crime against the peace and security of mankind is responsible for such crime . . . and is liable to punishment therefor." In view of the adoption of that approach, it would be necessary to amend the passages in draft article 11 which referred, for example, to aggression being committed by a State. Of course, it would be difficult to say that aggression

had been committed by an individual. But in the interests of uniformity, and bearing in mind that crimes against peace could be committed on behalf of entities other than States, he suggested that the articles of the code should not refer to the party responsible. The provision on aggression could then read:

"Aggression is the use of armed force against the sovereignty, territorial integrity or political independence of a State . . ."

That formulation would bring the text broadly into line with paragraph 1 (b) (iv), (v), (vi) and (vii).

17. For the various provisions on individual acts of aggression, he was in favour of using the actual terms of the 1974 Definition of Aggression.<sup>11</sup> That Definition had resulted from the persevering efforts of the international community and there was no reason to depart from it. The only question that might arise was whether paragraph 1 (b) (vii) of article 11, on the sending of armed bands, groups, irregulars or mercenaries, did not duplicate the provisions of paragraph 7, on mercenarism. As he saw it, there was no such duplication. Paragraph 7 referred to the recruitment, organization, equipment and training of mercenaries, in other words the preparation of aggression by the use of mercenaries. The crime envisaged was then a separate one from that of sending armed bands into the territory of a State. Another difference between the two crimes was that preparations for the sending of mercenaries could be the act not only of the authorities of a State, but also of private persons or entities.

18. The act of preparation of aggression had always been regarded as a crime against the peace and security of mankind. It had been listed among crimes against peace in Principle VI (a) (i) of the Nürnberg Principles<sup>12</sup> formulated by the Commission in 1950. Due note had been taken of the fact that aggression was always preceded by specific preparatory acts, such as rearmament in breach of international treaty obligations, mobilization and troop concentrations. Those acts were more than theoretical plans worked out by a general staff; they involved a concrete threat of the use of force. A court called upon to deal with a case of preparation of aggression should have no difficulty in drawing a distinction between hypothetical planning and actual preparations.

19. The advantage in treating preparation of aggression as a separate crime, distinct from aggression itself, became particularly clear in two cases. The first was the case in which the preparations did not lead to actual aggression, for reasons beyond the control of the potential aggressor, for example as the result of an injunction by the Security Council; the second was the case in which the preparation was the work of authorities other than those committing the aggression.

20. For those reasons he suggested that, in paragraph 2, the words "the threat of aggression against another State" be replaced by "preparation of the use of force against another State". His position was that the threat in itself, if not accompanied by a physical act, could not

<sup>8</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>9</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>10</sup> *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

<sup>11</sup> See footnote 7 above.

<sup>12</sup> See 2053rd meeting, footnote 8.

serve as a criterion, because of the difficulty of applying it.

21. The concept of intervention in the internal or external affairs of another State had been clearly defined by the ICJ in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17). The terms used by the Court, however, were somewhat broader than those of the second alternative proposed for paragraph 3, which he preferred. The text should begin with the definition set out in subparagraph (a), and be followed by an exhaustive list of terrorist acts. The acts in question were not terrorist acts in general, but only those constituting intervention by the authorities of one State in the internal or external affairs of another State. In brief, the reference was to what was known as "State terrorism"; acts of terrorism by individuals or private groups fell outside the scope of the terrorist acts contemplated in paragraph 3.

22. If the Commission decided to treat breaches of treaty obligations as crimes against peace, he would suggest that paragraphs 4 and 5 of article 11 should form a single article. Consideration could also be given, if the General Assembly so wished, to the insertion of a third paragraph dealing with the use of nuclear weapons other than in self-defence against a nuclear attack.

23. As to colonial domination, he could not understand those who were afraid to call a spade a spade, particularly since colonial domination was a phenomenon that persisted even in modern times. That was clear from the list—kept by various international organizations—of territories which had formerly been under colonial administration but had still not attained independence, and which were known in the United Nations as Non-Self-Governing Territories and in ILO as Non-Metropolitan Territories. While it was barely conceivable that a State would nowadays try to establish the traditional type of colonial domination over the people of another country, there were none the less many instances of the maintenance of such domination. In his view, therefore, paragraph 6—which, as he had said earlier, should form a separate article—should consist of two paragraphs, the first dealing with the maintenance of colonial domination and the second with the establishment of new domination or exploitation that could be classified as foreign. It could perhaps also be made clear in the commentary that the crime of colonial domination applied only to the domination of a non-metropolitan people which had not yet attained independence, and did not cover the case of a minority wishing to secede from the national community. He noted that OAU had taken a firm stand against any policy which, under cover of the principle of self-determination, might encourage secession and destabilize established régimes by calling in question the borders inherited from the colonial era. Examples of such a situation had been the wars in Biafra and Katanga.

24. Mercenarism, as defined in paragraph 7, involved acts other than those covered by paragraph 1 (b) (vii), which dealt with aggression. It was a matter of great concern to young States, and especially to African States, against which mercenaries had often been used.

No State was prepared to take the risks involved in openly sending bands of mercenaries to another State: such operations generally took the form of covert action carried out under the direction of an official or semi-official agency. If the crime of mercenarism was to be wiped out, it was necessary to strike at its roots, namely the recruitment, organization, equipment and training of mercenaries. It was a crime that could be committed by private entities, such as multinational corporations, or even by individuals acting on their own initiative, such as heads of State who had fallen from power. In such cases, however, there might well be complicity on the part of the Governments that had facilitated the recruitment of the mercenaries and provided their training camps.

25. He was not in favour of postponing consideration of the question of mercenarism until the *Ad Hoc* Committee had concluded its work. The Commission should be guided by its own timetable, which was dictated by, among other things, the fact that its members served for a term of five years; it should not be bound by the pace of work of bodies that were more political than legal, although the work of such bodies could be taken into account if necessary.

26. Finally, he agreed that draft article 11 should be referred to the Drafting Committee.

27. Mr. HAYES joined previous speakers in thanking the Special Rapporteur for his sixth report (A/CN.4/411), one of a series remarkable for their clarity and conciseness.

28. A code would be worth while even if it were not possible to provide in it for effective enforcement measures, since identification of certain crimes against the peace and security of mankind would not be without effect. That remark should not be construed as opposition to effective enforcement measures: indeed, he had been encouraged by some of the statements made which indicated that there was an enhanced possibility of such measures being proposed in the Commission. He agreed that, to be effective, the code should clearly specify a number of crimes which, having regard to their content and implications for the international community, were particularly serious. The Commission had therefore been right to decide at its thirty-sixth session, in 1984, to adopt a minimalist, rather than a maximalist approach to the list of crimes.<sup>13</sup>

29. There was one problem regarding the draft articles that he wished to explore a little further. The Special Rapporteur's sixth report dealt specifically with crimes against peace, which was one of the three categories of crimes against the peace and security of mankind covered by the draft code. Furthermore, it had been agreed that the code would be confined for the time being to the criminal responsibility of individuals, an approach reflected in article 3 (Responsibility and punishment), provisionally adopted by the Commission at its thirty-ninth session.<sup>14</sup> Paragraph 1 of that article established the responsibility of the individual and his liability to punishment, while paragraph 2 reserved the

<sup>13</sup> See *Yearbook . . . 1984*, vol. II (Part Two), pp. 15-17, paras. 52 *et seq.*

<sup>14</sup> See footnote 10 above.

position with respect to State responsibility. The question therefore arose whether the criminal responsibility of an individual for an act falling within the category of crimes against peace arose only with respect to action by the authorities of a State and, if so, whether the draft articles should be formulated accordingly. While he did not disagree with the Special Rapporteur, who apparently favoured such a course, since he had explained in his third report that the scale of the action would be such that it could only be carried out by a State entity,<sup>15</sup> he thought it might be useful to consider how the overall scheme would be affected.

30. There was no requirement under paragraph 1 of article 3 that the individual concerned must be a servant or agent of a State or Government, or that his responsibility must be otherwise linked to State involvement; even paragraph 2 of that article merely implied that State involvement was possible, rather than essential. Accordingly, the provisions of draft article 11 might be expected to provide for a link between personal and State activity, and they did so in all cases except that of the definition of mercenarism (para. 7). Assuming that mercenarism, within the meaning of the code, consisted of organizing mercenaries and sending them into action, there would be many instances in which it would be impossible to establish a link between the organizer and a State, and others in which the organizer would not be acting for a State at all. But if the organizer was working for a State, his crime would come under the definition of aggression, at least in so far as the mercenaries went into action. If involvement of State authorities was an essential ingredient of the crime and if the organizer was not working for a State, his crime would fall outside the scope of that definition and also outside the scope of article 11 as a whole. Logically, therefore, the Special Rapporteur's question as to whether there should be a separate provision on mercenarism (A/CN.4/411, para. 43) seemed to call for a negative answer. Yet the activities of mercenaries had been particularly harmful in Africa, and the Commission had heard Mr. Koroma's appeal (2054th meeting) that they should be adequately covered.

31. A similar question arose in connection with terrorism, which was included under intervention in the second alternative of paragraph 3 of article 11 and, as such, would be confined to State-sponsored terrorism. Again, however, there were many instances of international terrorism that were not overtly State-sponsored, or not State-sponsored at all. Should those cases be covered by the code, or be left to the international anti-terrorist measures already devised by States? If they were to be covered by the code, should a suitable provision be included under crimes against humanity? On the other hand, he did not think that non-State mercenarism could be adequately covered under that category; and even if it could, there was still no system of international measures against mercenarism comparable to those against terrorism. Thus mercenary activities might fall outside the code, although they were no less heinous than similar acts that fell within it.

32. Those arguments added weight to the suggestion that any decision on mercenarism should be deferred until the *Ad Hoc* Committee had finished its work on the subject. It also seemed too early to decide that the involvement of State authorities was an essential element in the category of crimes against peace.

33. Turning to the text of draft article 11, he agreed that it would be more appropriate for each of the crimes covered to be dealt with in a separate article.

34. He endorsed the Special Rapporteur's approach to the crime of aggression, which was based on the 1974 Definition of Aggression.<sup>16</sup> The link with the Charter of the United Nations was essential, in order to avoid any danger of inconsistency that might arise as a result of parallel development of the concept of aggression. The explanatory note in paragraph 1 (a) (ii) of article 11 provided clarification and should be included in the commentary, rather than in the body of the article.

35. The threat of aggression should be included in the list of crimes, for the reasons already stated by other members. The commentary on that subject would be of particular importance.

36. Preparation of aggression raised some very difficult problems, as pointed out by the Special Rapporteur in his sixth report (A/CN.4/411, para. 8). The concept was particularly important, however, as evidenced by the fact that it appeared in a number of instruments to which the Special Rapporteur referred (*ibid.*, para. 7). The Commission should therefore consider the matter in depth and seek solutions to the problems, so that it could include preparation of aggression in the list of crimes.

37. The Special Rapporteur referred in his report to a number of developments that were relevant to a definition of intervention (*ibid.*, paras. 16-20), including the facts that the Commission had concluded in 1966 that certain provisions in the Charter prohibiting the use of force were declaratory of customary international law and that that prohibition amounted to a rule of international law having the character of *jus cogens*; and that the ICJ, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, had decided that the rules on the non-use of force and non-intervention formed part of customary law. As to the difficult question of the point at which intervention became wrongful, according to the authorities, coercion was the determining factor, but that was only part of the answer. In response to the Special Rapporteur's question regarding methodology (*ibid.*, para. 34), a combination of a broad definition and a non-exhaustive list of acts constituting intervention would seem to be the most effective approach.

38. Terrorism was also covered under the heading of intervention in the second alternative of paragraph 3 of article 11, and on that point the remarks made by Mr. Njenga (2057th meeting) and Mr. Razafindralambo merited consideration.

39. He agreed that paragraphs 4 and 5, on the breach of the treaty obligations of a State, should be combined in a single provision.

<sup>15</sup> *Yearbook . . . 1985*, vol. II (Part One), pp. 65-66, document A/CN.4/387, para. 12.

<sup>16</sup> See footnote 7 above.

40. His initial reaction regarding colonialism was to favour the second alternative of paragraph 6, since it was wide enough to cover the traditional forms of colonialism as well as any other forms of domination. That alternative could perhaps be adopted, with the addition of the word “colonial”. That would also help to remedy the vagueness of the term “exploitation”.

41. Mr. YANKOV thanked the Special Rapporteur for his sixth report (A/CN.4/411) and for a very useful conference document (ILC(XL)/Conf.Room Doc.3 and Corr.1) which brought together all the draft articles proposed since the submission of the third report<sup>17</sup> in 1985.

42. In the sixth report, the Special Rapporteur had clearly identified the areas in which the search for the most important components of crimes against peace should be concentrated. Although the methodological problems relating to the scope and implementation of the code could be assumed to have been solved, general problems kept re-emerging in connection with specific items. Such issues were important, but the Commission would be best advised to focus on matters directly related to draft article 11.

43. With regard to the scope and content of crimes against peace, fundamental criteria needed to be elaborated in three areas: the special features which differentiated such crimes from other offences; ways of measuring the gravity of the crime; and the means of characterizing an offence as a crime against peace. It was the threat or use of force, however, which was the common denominator of all crimes against peace, and which could indicate the dividing line between offences under general international law and the crimes under the draft code. The main problem was to identify those offences against peace which constituted international crimes engaging the responsibility of the individuals making decisions or giving orders to commit the act. The use of force could take a multiplicity of forms and could involve aggression, annexation, intervention, colonial domination, terrorism or mercenarism. The interrelations of acts constituting crimes against peace should be considered, but the main component must always be the use of force, for it determined the higher degree of common danger to peace.

44. While the threat or use of force was one element that could enable a distinction to be drawn between various illicit acts or offences, another factor was whether the act was of such gravity that it could constitute or cause a breach of peace. In his report, the Special Rapporteur quoted the Commission’s statement in 1966 that the prohibition of the threat or use of force was a “conspicuous example of a rule in international law having the character of *jus cogens*” (A/CN.4/411, para. 20). The 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations<sup>18</sup> went even further in spelling out the prohibition of recourse to force and the injunction to maintain international peace and security. The provisions of paragraphs 1 to 3 of that Declaration were particularly relevant to the Commission’s work: paragraph 1 affirmed, *inter alia*,

that the threat or use of force against the territorial integrity or political independence of any State constituted a violation of international law and entailed international responsibility.

45. Of course, the most devastating use of force was the use of nuclear weapons. He drew attention to paragraphs 1 to 3 of the Declaration on the Prevention of Nuclear Catastrophe,<sup>19</sup> which included the provision that there would “never be any justification or pardon for statesmen who take the decision to be the first to use nuclear weapons” (para. 2).

46. With regard to the preparation of aggression, reference had been made to the Charter and Judgment of the Nürnberg Tribunal<sup>20</sup> and to Principle VI (a) (i) of the Nürnberg Principles.<sup>21</sup> The Nürnberg experience had provided history’s first lesson in establishing an international legal order incriminating the use of force, and the draft code should follow up that work by taking preventive measures into account. It should pursue the worthy objectives of helping to prevent a war that might endanger the survival of humanity and establishing a set of rules that would be applicable to all crimes against peace.

47. The Special Rapporteur was fully justified in raising questions concerning the precise content of preparation of aggression (A/CN.4/411, para. 8). The law should define the crime as such, on the basis of a serious threat to peace, but the organ which was to adjudicate should be entitled to identify the facts constituting the criminal act. The Nürnberg experience had shown that national legislation and State practice could help in determining the criminal character of preparations for grave and dangerous criminal acts. The Bulgarian Penal Code had recently been amended to qualify preparation of aggression as a crime in itself, no longer covered by the general provisions on terrorism. It was entirely possible to distinguish preparation of aggression from defensive measures on the basis of existing military, technical, legal and political criteria. Of course, preparation of aggression and the use of force were inter-related.

48. Annexation should also be identified in the draft code. The 1987 Declaration on refraining from resort to force in international relations (see para. 44 above) contained a number of relevant points, particularly in regard to the sending of armed bands into the territory of another State. Article 2, paragraph (4), of the 1954 draft code had identified the criminal character of acts endangering the stability of public order and disrupting peaceful relations between States.

49. He agreed with other speakers that intervention had hidden components and an elusive character. Unfortunately, interference in the internal affairs of States and in the conduct of their international affairs had become a part of contemporary international relations—like a chronic illness which was tolerated because its causes could not be revealed or because it was considered to be incurable. The question was how to identify such intervention. Clearly, in a code which dealt

<sup>17</sup> See footnote 5 above.

<sup>18</sup> General Assembly resolution 42/22 of 18 November 1987, annex.

<sup>19</sup> General Assembly resolution 36/100 of 9 December 1981.

<sup>20</sup> See 2056th meeting, footnote 22.

<sup>21</sup> See 2053rd meeting, footnote 8.

with the most serious crimes of all, namely crimes against the peace and security of mankind, intervention had to be characterized by its gravity as a crime against peace. Of the two alternatives of paragraph 3 of draft article 11, he preferred the second, which provided more substantial grounds for qualifying intervention as a crime against peace and stressed the threat or use of force. It should be remembered that article 2, paragraph (9), of the 1954 draft code contained a definition of intervention in which the use of force or of coercive measures was emphasized.

50. Terrorism in itself could constitute a crime against peace only under certain conditions: for example, terrorist acts that involved the use of weapons of mass destruction, acts calculated to destroy life-supporting installations for large populations, etc. The sixth report covered some of those elements, but the gravity and intensity of the harm should perhaps be emphasized in stronger terms. It was also necessary, as Mr. Razafindralambo had pointed out, to draw attention to international ramifications: otherwise, the acts would fall under domestic jurisdiction.

51. Previous speakers had eloquently described the main characteristics of colonial domination as an offence against the peace and security of mankind. With regard to the suggestion that the two alternatives of paragraph 6 of article 11 on colonial domination should be combined, he thought that the use of force should retain a prominent position.

52. The gravity of the crime should also be used in defining the scope of mercenarism as a crime against peace. Not all acts of mercenarism should come under that heading: in most instances the involvement of States would be required, but that was not obligatory. Moreover, as the Special Rapporteur pointed out in his report (A/CN.4/411, para. 43), mercenarism was already covered in the 1974 Definition of Aggression,<sup>22</sup> article 3 (g) of which dealt specifically with that phenomenon. It had been suggested that the Commission's work on mercenarism should take into account the work being done on the subject by the *Ad Hoc* Committee. He could not accept that approach if it meant that the attempt to identify the legal parameters of mercenarism was to be deferred. The Commission might be able to help the *Ad Hoc* Committee by furnishing the legal elements of a definition.

53. In conclusion, he emphasized that general recognition of the criminal character of the offences dealt with in the code was an important element, which had been expressed in the second alternative of draft article 3 as submitted by the Special Rapporteur in his third report,<sup>23</sup> and in draft article 4 as submitted in his fourth report.<sup>24</sup> Draft article 11 should now be referred to the Drafting Committee.

*The meeting rose at 11.40 a.m.*

<sup>22</sup> See footnote 7 above.

<sup>23</sup> *Yearbook . . . 1985*, vol. II (Part One), p. 81, document A/CN.4/387.

<sup>24</sup> *Yearbook . . . 1986*, vol. II (Part One), p. 82, document A/CN.4/398.

## 2059th MEETING

*Thursday, 9 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued)** (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

ARTICLE 11 (Acts constituting crimes against peace)<sup>4</sup>  
(continued)

1. The CHAIRMAN, speaking as a member of the Commission, said that, although he would have preferred to confine himself to specific comments on draft article 11, as the Special Rapporteur had requested, some aspects of the topic, particularly regarding intervention, should be dwelt on at greater length because they were of the utmost interest to the countries of Latin America.

2. Intervention and its counterpart, the principle of non-intervention, lay at the heart of American international law and the political and diplomatic history of the Latin-American republics was basically no more than the history of the foreign interventions of which they had been the victims. It was no mere chance, therefore, that the absolute principle of non-intervention was the corner-stone of American international law, whereas traditional doctrine, in Europe or elsewhere, regarded intervention as a right belonging to States and considered that it was legally justified, at least in certain cases. It was a known fact that that doctrine dated back to the era when the concept of national sovereignty and legitimacy, framed and implemented by the European Powers prior to the French revolution, had yielded to the concept of intervention as conceived by the Holy Alliance. As for America, with the arrival of the Spaniards, certain jurists in Spain, like Vitoria and Suárez, had used the term "intervention" in an attempt to justify Spain's occupation of America. Once

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>4</sup> For the text, see 2053rd meeting, para. 1.

again, therefore, it was no mere chance that, from the moment of independence, the American States, being resolutely opposed to intervention, had framed the concept of non-intervention, which had turned into doctrine and had then become a legal norm formally recognized by American international law. Intervention, as an instrument in the policy of the major Powers which had reached its peak with colonial imperialism and as a weapon of aggression which only the powerful could brandish, was a crime that should be covered by the draft code, as, indeed, the Commission had already decided.

3. He emphasized the point because of the turn the discussion was taking. It sometimes seemed that, instead of trying to define the crimes in question as precisely as possible, the Commission was endeavouring to find formulae that lessened their gravity or even to commit them to the realm of historical fable. Yet, in the more than 40 years since the end of the Second World War, the world had seen a recurrence of the same crimes as those that had been committed during the war and that had been punished by the Nürnberg Tribunal. Those crimes were, moreover, being committed with explicit or tacit consent and, indeed, with the overt assistance of States which, given their responsibilities, should be the first to prevent such crimes. What was the reason for the international community's failure to act in the face of such a state of affairs? Must it resign itself to the fact that, even when it came to typically legal issues—the case in point being the definition of the crimes to be prevented and punished—politics would prevail? Must memory yield to oblivion? One of the reasons for the failure of the League of Nations was that it had been powerless to prevent the perpetration of the self-same crimes. He hoped the United Nations would not meet with the same fate.

4. The work done on the 1954 draft code had served little purpose from the standpoint of defining crimes against peace and mankind in a legally binding instrument, and he could not be optimistic about the present efforts so long as the code was not accompanied by peremptory norms providing for appropriate penalties and the establishment of a court empowered to apply those norms and ensure that they were respected.

5. It had been suggested that a distinction should be made between "lawful" intervention and "wrongful" intervention and the question had arisen as to the point at which "lawful" intervention became wrongful. In his view, there could be no such thing as "lawful" intervention, of any kind whatsoever. No expert in international law had managed to adduce any irrebuttable argument in support of the lawfulness of intervention, for intervention was always a violation of the right to independence or, in other words, of the sovereignty of a State. If there were certain cases when intervention had been accepted by international custom, it was because only acts of a political nature, not acts of a legal nature, had been taken into account on those occasions. Sovereignty, however, was the corner-stone of international law: how then was it possible to accept the existence of a right that would violate another right? That was precisely what a French author, Pradier-Fodéré, one of the rare experts in traditional international law

not to defend intervention in his time, had stated: there was no right of intervention, since there could not be a right that conflicted with another right. That principle was so absolute that, even where there was consent on the part of the injured State, it was possible to speak of intervention, since the essence of intervention was unrelated to the attitude of the victim State and stemmed from the will of the intervening State to impose its authority by coercion.

6. Reference had also been made to collective intervention, as provided for in the Charter of the United Nations and the Charter of OAS (see A/CN.4/411, para. 24). The condemnation of intervention as a crime against the peace and security of mankind was, however, directed at unilateral action by a State or a group of States that wanted to intervene in the internal or foreign policy of another State, and certainly not at collective action by the international community as a sanction for an act of rebellion against international law. Such collective action was not incompatible either with the principle of the legal equality of States or with that of their sovereignty. That was why article 22 of the OAS Charter did not condemn collective action carried out with a view to "the maintenance of peace and security". On the other hand, international law did condemn intervention aimed at replacing national sovereignty by an alien sovereignty.

7. He noted that Article 2, paragraph 7, of the Charter of the United Nations, which set certain limits to the prerogatives, authority and powers conferred on the United Nations *vis-à-vis* the States of which it was composed, stipulated that the Organization could not "intervene in matters which are essentially within the domestic jurisdiction of any State" and that nothing contained in the Charter could "require the Members to submit such matters to settlement under the present Charter". Accordingly, intervention in internal affairs was authorized only where those affairs did not fall exclusively within domestic jurisdiction and, in external affairs, only as expressly provided for in the Charter. The provisions in question did not mean that collective intervention was lawful in every case.

8. The Seventh International Conference of American States, held at Montevideo in 1933, had marked an historic point in relations between the States of America, for it was from the time of that Conference that the Government of the United States of America had endeavoured to change its policy towards Latin America, under the guidance of President Roosevelt. Not only had United States jurists not opposed the idea of embodying the principle of non-intervention as a binding rule of law in a legal instrument—as they had done at the Sixth International Conference of American States, held at Havana in 1928—but the Secretary of State himself, Cordell Hull, had said that no country had cause to fear intervention by the United States during President Roosevelt's term of office. That had been the start of the policy of good-neighbourliness, the principle of which was to be embodied in the Charter of the United Nations. The Conference had thus been able to adopt the Convention on Rights and Duties of States,<sup>5</sup>

<sup>5</sup> League of Nations, *Treaty Series*, vol. CLXV, p. 19.

article 8 of which provided that no State had the right to intervene in the internal or external affairs of another State. The Conference had approved the following wording defining intervention: "Any act committed by a State by means of comminatory diplomatic representations, armed force or any other means of coercion with the object of asserting its will over that of another State and, in general, any direct or indirect interference in the affairs of another State, for whatever reason, shall constitute intervention and, consequently, a breach of international law." In a clear and forthright statement, Cordell Hull, upholding the new policy of good-neighbourliness, had stated that one of the principles to be followed by the United States in its relations with Latin America should be strict adherence to the principle of non-intervention.

9. In the interests of the further strengthening of that principle, the Inter-American Conference for the Maintenance of Peace, held at Buenos Aires in 1936, had adopted the Additional Protocol relative to Non-Intervention.<sup>6</sup> In article I of the Protocol, the States parties had declared inadmissible any intervention, direct or indirect, by any of them and for whatever reason, in the internal or external affairs of the others: any violation of the provisions of that article would give rise to mutual consultations with a view to finding means of peaceful settlement. Under the terms of that Protocol, the American international community had thus proclaimed, among other principles, the condemnation of intervention by any State in the internal or external affairs of another. Also, under article II of the Protocol, any disagreement as to interpretation which it had not been possible to settle through diplomatic channels would be submitted to a conciliation procedure, or to arbitration or judicial settlement.

10. That trend, which had begun in 1826 with the Congress convened by Bolívar in Panama, had culminated in the Ninth International Conference of American States, held at Bogotá in 1948, at which the principle of non-intervention had been definitively laid down as a rule of American international law in the Charter of OAS adopted on that occasion (arts. 18-22). As defined in that Charter, the principle of non-intervention prohibited not only the use of armed force, but also any other form of interference or attempted threat against the personality of a State (art. 18). It further prohibited the use of coercive measures of an economic or political character to obtain advantages of any kind from a State (art. 19). The OAS Charter also referred directly or indirectly to non-intervention both in its preamble and in chapters I to III on the nature and purposes of the Organization, on principles and above all on the fundamental rights and duties of States. The principle of non-intervention and the condemnation of intervention therefore had to be regarded as rules of international law on the American continent.

11. Moreover, in a resolution adopted on 10 September 1959, the OAS Council had requested the Inter-American Juridical Committee to prepare an instrument listing cases of intervention. The Commission

should take account of that work in preparing the relevant provisions of the draft code.

12. He had dwelt at length on the subject of intervention not only because it was of great importance for the American countries, but also because it would be difficult to accept a universal instrument that was less comprehensive than the instruments which had already been adopted by the American States and whose provisions were now in force on the America continent.

13. Turning to the text of draft article 11 submitted by the Special Rapporteur in his sixth report (A/CN.4/411), he said that he, too, would prefer a separate article to be devoted to each of the crimes, or at least to the most serious of them.

14. Aggression (para. 1), like intervention, was of capital importance and those two concepts had to be defined exactly. In the case of aggression, the parallel with the 1974 Definition of Aggression<sup>7</sup> had to be maintained. In the light of that Definition, it might be enough to indicate in the draft code that the commission by the authorities of a State of an act of aggression constituted a crime. At the same time, however, the Commission must remember that its objective was to draft a code that was applicable to individuals, not to States, even though the acts in question could normally not be committed without the support of a State. He was not certain that acts constituting aggression had to be spelled out: as he had just explained, the Latin-American countries had decided to do so in a separate legal instrument. In any event, a list of such acts could by no means be exhaustive.

15. In paragraph 1 (b), the words "regardless of a declaration of war" were superfluous and should be deleted, since war had been outlawed by the Charter of the United Nations.

16. Intervention (para. 3) should be more fully defined, as in the OAS Charter, which characterized certain acts that did not involve the use of armed force as intervention.

17. With regard to terrorism, it must be borne in mind that the draft code was meant to deal with State terrorism: acts of terrorism committed by individuals who had no link with a State were already punishable under ordinary law. But defining the crime of terrorism was a sensitive matter and agreement had to be reached on acts which were deemed criminal by all. The Commission must demonstrate great restraint and settle on a very general definition, drawing as much as possible from the work on terrorism being done by the United Nations, which was designed to identify the root causes of the phenomenon. As Mr. Reuter (2055th meeting) had pointed out, terrorism was often merely the last resort of persons who had been denied the most fundamental rights. In the colonial countries, however, the entire State apparatus was involved in the struggle against those who were branded as terrorists, but who were in fact victims fighting to achieve their country's independence and to rout those who occupied it: in such

<sup>6</sup> *Ibid.*, vol. CLXXXVIII, p. 31.

<sup>7</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

cases, it was the State itself which committed the crime of terrorism.

18. Some held that colonialism was a thing of the past and that the forms of alien domination referred to in paragraph 1 of the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>8</sup> had nothing to do with colonialism, which no longer existed. The truth was that the major colonial Powers had always managed to disguise situations which were actually colonial ones under other names. In 1923, one Asian Power had passed off what was really a colony as an independent empire. Even now, there was a State that was nothing more than a colony on the American continent—the “continent of liberty”. The two alternatives of paragraph 6 of article 11 proposed by the Special Rapporteur should be combined and efforts should be made to use the definition of colonialism contained in article 19 of part 1 of the draft articles on State responsibility<sup>9</sup> and the one set out in the aforementioned Declaration, in order to show clearly that what was being condemned was colonialism and all the elements of subjugation, domination and exploitation implicit in it.

19. The concept of mercenarism was also extremely ambiguous. In paragraph 7 (c), for example, a mercenary was defined as any person who “is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party”. There could, however, be mercenaries who were members of the armed forces of one State, although they were fighting in the territory of another. It was therefore necessary to specify what was meant by such compensation, or rather what criteria should be used to decide whether such compensation constituted a crime. Paragraph 7 (d) was equally ambiguous: were persons who had not so long ago euphemistically been called “advisers” and who were armed, paid and maintained by States not parties to a conflict mercenaries? The same was true of paragraph 7 (e): were persons who were members not of the armed forces of a party to a conflict, but of those of another country, and who were made available to an invasion army, mercenaries? As Mr. Njenga (2057th meeting) had pointed out, a great deal of caution had to be exercised in that regard, but there was no doubt that mercenarism should be referred to as a crime in the draft code. It could be left to the Special Rapporteur and the Drafting Committee to find wording that would take account of all the concerns expressed.

20. The rich discussion over the past few days had revealed the importance of the Commission’s study of the present topic, which was, as Mr. Reuter had said, more political than legal. For all that, the Commission could not evade the responsibility entrusted to it by the General Assembly. It should, rather, take advantage of the opportunity to carry out a considered, in-depth study of the question, in line with the example set by the Special Rapporteur, for the purpose of submitting to the General Assembly a draft legal instrument, which might or might not be a code and which would help to

prevent and punish crimes that now went unpunished for lack of political will on the part of States, particularly those which bore the main responsibility for maintaining peace.

21. Mr. BEESLEY said that he would consider draft article 11 in the light of the four criteria he had listed in his earlier statement (2055th meeting): (a) would the text serve the purpose of the draft code, which was, as he saw it, to make a constructive contribution to the system of collective security under the Charter of the United Nations? (b) must there have been an act of State in order for the provisions of the code to be applicable? (c) must there have been an actual breach of the peace or use of force for an offence to be deemed a crime against peace? (d) in the case of aggression, must there have been a prior finding by the Security Council that an act of aggression had been committed in order for the code to apply?

22. The Special Rapporteur had given pride of place in article 11 to the crime of aggression and he personally fully endorsed that decision, because, on the basis of the first of the above-mentioned criteria, namely a constructive contribution to the Charter system of collective security, it was obvious that a draft code of crimes against peace had to cover the gravest of all crimes, which was the act of aggression. Moreover, if the code was to have the desired deterrent effect, it had to identify as precisely as possible both punishable acts and punishable persons and it had to provide for determination by a forum that was accepted by the international community as legitimate—in other words, as lawful and authoritative.

23. While it was true that the need to include a definition of aggression in the draft code had not been disputed during the discussion, views differed with regard to methodology. Would it be enough, as Mr. Calero Rodrigues (2053rd meeting) had suggested, to list the acts of aggression and leave it to the judge to determine whether or not to take account, either in whole or in part, of the 1974 Definition of Aggression?<sup>10</sup> Or should there be an abridged definition—a *chapeau*—that would repeat part of the 1974 Definition? The second of those methods could give rise to problems of interpretation and, in particular, the problem of the weight to be given to the elements of the 1974 Definition which would not be repeated in the definition given in the code. The method proposed by the Special Rapporteur, namely to repeat part of the 1974 Definition and to add the words “as set out in this definition” (para. 1 (a) (i)), was juridically sound, but it had the drawback of being selective.

24. Theoretically, another method would be to incorporate the 1974 Definition by reference; but that did not seem advisable. Since that Definition had been the outcome of nearly 50 years of discussions and efforts to achieve a balanced formulation and since the topic was a politically sensitive one, he believed that it would be preferable to reproduce that Definition in its entirety: that course would offer the advantage of avoiding the problems of interpretation that would result from poss-

<sup>8</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>9</sup> See 2053rd meeting, footnote 17.

<sup>10</sup> See footnote 7 above.

ible differences between the 1974 Definition and the one included in the code. He nevertheless appreciated the arguments put forward during the debate, particularly by Mr. Calero Rodrigues, and he might be able to accept some other solution. The most important point to bear in mind was that both the 1974 Definition and the one now proposed by the Special Rapporteur made it clear that the list of acts of aggression was not exhaustive: the Commission was therefore completely free to add other acts to the list.

25. The second question, namely the existence of an act of State, was a very sensitive one. The 1974 Definition of Aggression obviously applied to relations between States. Similarly, the reference in the Charter to the suppression of "acts of aggression" (Art. 1, para. 1) meant acts of States. As Mr. Graefrath and Mr. Reuter (2055th meeting) had pointed out, however, the Nürnberg Tribunal had found individuals guilty and there were, moreover, offences of a new kind that were committed by individuals acting independently of any State. The possibility that an act of aggression might be committed by individuals in the absence of any act of State should therefore not be ruled out. Yet it was ruled out in paragraph 1 (a) (i) of draft article 11. If the Commission decided that aggression could take place independently of an act of State, one alternative would be to amend the 1974 Definition by deleting the words "by a State" wherever they occurred, or by adding to the list of acts of aggression some acts that were not acts of State.

26. A second, and preferable, alternative would be simply to delete the words "by the authorities of a State" in the introductory clause of paragraph 1 of draft article 11, which tended to prejudge the issue. The retention of the many references to acts of State and the fact that the code obviously applied to individuals would suffice to ensure that individuals who were "authorities of a State" would be covered by the code. The deletion of the words "by the authorities of a State" would also ensure that the code applied to other individuals, such as Krupp—a case referred to by other members—or arms merchants and drug traffickers, if it was established that they had committed acts of aggression. Admittedly, those were questions of legal policy, which Governments would have to decide in due course. It was, however, important that they should be fully aware of the consequences of the choices they made.

27. The third question was whether an actual breach of the peace or use of force had to have occurred in order for the code to be applicable. In that connection, it should be noted that all the examples of acts of aggression listed in article 3 of the 1974 Definition did entail the use of armed forces or, in one case, of armed bands or groups. Since it was reasonable to consider that the use of armed forces was the same as the use of force, that third question had to be answered in the affirmative.

28. His view was that, even though preparation of aggression might be difficult to prove, it should be included in the draft code, first, because it had been explicitly referred to in the Charter of the Nürnberg Tribunal<sup>11</sup> (art. 6 (a)), and secondly—and perhaps most

importantly—because it would, if accompanied by sufficiently credible threats, serve the same purpose as the use of force. According to Article 1 of the Charter of the United Nations, the "removal of threats to the peace" was, like "the suppression of acts of aggression or other breaches of the peace", one of the main purposes of the United Nations, and that alone was enough to warrant including threats of aggression in the draft code. Even if the Commission did not take a decision on that important matter of principle, the draft code should offer States a clear choice.

29. The fourth question was whether there had to be a prior finding of aggression by the Security Council before the code could be invoked against an individual for an alleged act of aggression. The 1974 Definition of Aggression (art. 4) recognized the authority of the Security Council to determine the existence of an act of aggression and, for some members of the Commission, that seemed to dispose of the matter. He nevertheless wondered whether it might not be possible to prosecute an individual under the code even if the Security Council had not found that an act of aggression had been committed by a State or if the Council had been prevented from doing so by the veto of a permanent member. Since the Commission's aim was to draft a code that would be applicable to all, the guiding principle on that particular point had to be the sovereign equality of States. If the code were to allow an individual to be prosecuted even in the absence of a prior finding by the Security Council of an act of aggression by the State on whose behalf that individual had acted, it would fill a gap in the system of collective security and have a deterrent effect. The Commission should therefore not rule out that possibility, on which States would have to decide.

30. Of course, if States agreed to take that possibility into account, it would then be necessary to determine which forum would have jurisdiction to prosecute individuals under the code. Since it was unlikely that States would agree to recognize the jurisdiction of national courts—a solution that would appear to derive from the concept of "universal jurisdiction"—there would have to be an international criminal court offering the necessary guarantees of authority, independence and impartiality. In that connection, he recalled that, at its second session, in 1950, the Commission had, in response to General Assembly resolution 260 B (III) of 9 December 1948, arrived at the conclusion that the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes was both desirable and possible.<sup>12</sup> At the thirty-ninth session, he had made a proposal which had attracted some support and had related to the idea of mixed jurisdiction consisting of judges not only from the interested State, but also from the State of which the accused was a national and from third States.<sup>13</sup> The Commission would have to consider that proposal, and although there would perhaps be legal and jurisdictional problems to overcome, it was encouraging to note that the proposal had received support in the Sixth Commit-

<sup>12</sup> *Yearbook . . . 1950*, vol. II, p. 379, document A/1316, para. 140.

<sup>13</sup> See *Yearbook . . . 1987*, vol. I, p. 19, 1994th meeting, para. 49, and p. 57, 2000th meeting, paras. 53-54.

<sup>11</sup> See 2053rd meeting, footnote 6.

tee of the General Assembly and in the Commission during the present debate.

31. With regard to a question of methodology raised by several members and by the Special Rapporteur, he said that he would prefer each act of aggression covered by the draft code to be dealt with in a separate article. If the Commission adopted that approach, however, it would be departing from the 1974 Definition of Aggression, which listed the various acts of aggression in separate subparagraphs of article 3; that might give rise to some problems of interpretation. He would also like the explanatory note in paragraph 1 (a) (ii) of draft article 11 to be included in the commentary rather than in the text; the same comment would apply to paragraph 1 (c) if the 1974 Definition was reproduced in full in the draft code.

32. He had already expressed reservations with regard to the distinction the Commission was trying to draw between lawful intervention and wrongful intervention. As he saw it, the term "intervention" should be used in the draft code as a "term of art", applying only to wrongful acts and not to various legitimate actions between States. A protest note, for example, was not wrongful intervention, even if it was designed to exert pressure. The reply was not so clear-cut in the case of measures relating to trade, but it would be noted that, in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17), the ICJ had found that economic pressure did not constitute intervention. With regard to aid or the cessation of aid, a question which had been raised by some members of the Commission, the ICJ had also decided in the same case that humanitarian aid was not intervention. The Commission should therefore focus on acts of some gravity or, in other words, primarily on acts intended to affect adversely the political independence or territorial integrity of a State, whether by destabilizing its Government or by some other means. Although the Special Rapporteur had been right to refer to "all forms of pressure of a coercive nature" (*ibid.*, para. 20), he might be going too far, especially in the light of the recent judgment of the ICJ, in suggesting that all forms of "intervention" would be covered, unless, of course, that term were defined very strictly. That was why he himself preferred the term "intervention" to "interference" and why he was in favour of the second alternative proposed by the Special Rapporteur for paragraph 3 of article 11. The word "tolerating" in subparagraph (i) of that second alternative would require further consideration and, in the introductory clause, the words "by the authorities of a State" should be deleted so that the paragraph would take account of the increasing incidence of modern forms of intervention committed by individuals, not by States.

33. Referring to the definition of "terrorist acts" in the second alternative of paragraph 3 (subpara. (a)), he said that, in English, the use of the term "state" in two entirely different senses was unfortunate, even if it was only a matter of form. The words "a state of terror" might therefore be replaced by "a condition of terror" or some similar expression. The references to a "head of State" and to "public property" in the list of terrorist acts (subpara. (b)) also had an oddly old-fashioned ring,

since, at present, terrorist acts were more often directed against ordinary citizens and private property. Some additional wording along those lines would be necessary.

34. The problem of international terrorism was as old as international law itself and, in that connection, he read out several passages from the first three sections of chapter III of book III of Grotius's *De Jure Belli ac Pacis*,\* which might not provide any answers but could shed some light on the problems the Commission was discussing, since those passages were still entirely relevant. Those passages described how, even in antiquity, States had found the distinction between "pirates and brigands" and other States to be a difficult one. The distinction was in part subjective, so that Pomponius had said: "Enemies are those who in the name of the State declare war upon us, or upon whom we in the name of the State declare war; others are brigands and robbers." It was also in part moral, for, according to Grotius, "a gathering of pirates and brigands is not a State", because "pirates and brigands are banded together for wrongdoing". Yet States, too, could act wrongfully. Thus: "The Illyrians without distinction were accustomed to plunder on the sea, yet a triumph was celebrated over them; Pompey celebrated no triumph over the pirates." Most relevant of all to the Commission's work, Grotius had explained that a group of pirates and brigands could be transformed into a State. In the twentieth century, as in the seventeenth, today's terrorist might be tomorrow's statesman, or vice versa.

35. The definition of terrorism gave rise to some of the most complex political, moral and legal problems with which the Commission had to deal. The wisest course might be to leave it to the competent court to determine which acts of terrorism were covered by the code, instead of providing for exceptions whose formulation would be extremely difficult if they were to stand the test of time. How could a distinction be made between individuals and groups, however noble their motives might be, while some acts were legitimated and others were condemned? It would be better simply to formulate an objective and legally sound definition of terrorism. The judge would then rule on the basis of the facts during a fair trial and in the light of any mitigating circumstances or grounds of exoneration that might exist in each particular case.

36. The members of the Commission appeared to approach the question of colonialism from different points of view according to whether or not they came from countries that had a colonial past. He tended to favour the second alternative of paragraph 6 of draft article 11. He also supported Mr. Hayes's suggestion (2058th meeting) that the word "colonial" should be added to that provision.

37. Although an *Ad Hoc* Committee of the General Assembly was working on the question of mercenarism, the Commission could neither abdicate nor delegate its responsibilities. According to its mandate, it had to continue its consideration of that question, but wait until

\* English translation by F. W. Kelsey (Oxford, Clarendon Press, 1925).

the *Ad Hoc* Committee had completed its work, the results of which it might have to take into account. He noted that, in the 1974 Definition of Aggression, "the sending by or on behalf of a State of . . . mercenaries, [who] carry out acts of armed force against another State" (art. 3 (g)) was only one form of aggression; but the Commission now intended to make it a separate crime, something that was not necessarily justified. In the modern world, there were several forms of mercenarism, some of which had become a real scourge for young and fragile States. In addition, the wording proposed by the Special Rapporteur in paragraph 7 of article 11 seemed to focus on the motivation of mercenaries and not on the acts they committed; that was a departure from the rest of the draft. Lastly, paragraph 7 (b) stated that a mercenary was any person who "does, in fact, take a direct part in the hostilities". That raised the question whether within the definition there would have to be a pre-existing conflict; for example, would it cover the case of a drug baron or politically motivated billionaire ordering the mining of the port installations of a State?

38. Mr. SEPÚLVEDA GUTIÉRREZ congratulated the Special Rapporteur on his thorough analysis and on the exactitude of his sixth report (A/CN.4/411). The material the report contained would provide guidelines for the Commission's consideration of a changing topic that was difficult to grasp.

39. The first major problem raised by the report was one of methodology. In his view, the Commission had to follow the technique used in the penal codes of most States, first characterizing each of the acts to be covered and then giving a precise definition of their perpetrators. That would mean that the Commission had to set forth the material or substantive elements of the wrongful act—in other words, the *corpus delicti*—define the criteria for the attribution of responsibility, and then, where feasible, provide for possible exceptions. From that point of view, it might be asked whether a framework article on aggression and its variants was necessary or whether it might not be better to divide it up and have a separate provision for each type of crime, it being understood that the acts to be covered would be linked together by a *chapeau*. There was, however, no denying the fact that the solution proposed by the Special Rapporteur had its appeal.

40. Once the offence had been established, it was necessary to designate the persons, groups or State agents to whom it could be attributed. It was at that stage that the extent of the responsibility of the State came into the picture, either because the State had directly committed the crime or because it had done nothing to prevent it. The problem was not an easy one, but several definitions adopted by various bodies were already available and the Special Rapporteur had explicitly referred to them.

41. Turning specifically to the sixth report, he said that, although a time-honoured definition of aggression did exist, it could not be used for the purpose of attributing individual responsibility. Moreover, as the report clearly indicated, some forms of aggression should be given special treatment: that was the case of terrorism, preparation of aggression, and possibly com-

plicity in aggression, a delicate concept to which the Commission would have to give further consideration. The Special Rapporteur was proposing a definition of aggression similar to the 1974 Definition of Aggression<sup>14</sup> and it was the latter Definition that should be taken as a basis for that part of the draft code, although it might have to be adapted to the acts of the individuals or groups that were ultimately responsible for acts of aggression.

42. Threat of aggression should be defined more precisely, in order to determine the scope of the criminal responsibility of the individuals or groups that initiated and carried out the preparations, but it must not be forgotten that there were many different forms of aggression, some of which were hidden or disguised: a veiled threat might be as decisive as an act of force. The closest attention thus had to be given to the subtle forms that aggression and preparation of aggression could take.

43. The second alternative proposed by the Special Rapporteur for paragraph 3 of draft article 11, on intervention, seemed to be the better one, although the subject was extremely difficult to grasp. Latin-American jurists had endeavoured to work out a precise definition of that type of act in the light of the continent's particular circumstances and the eminent Argentine author, Carlos Calvo, had produced the first definition of intervention, which he had approached from the viewpoint of the principle of non-intervention. In 1928, the Latin-American countries had attempted to develop that concept and those efforts had led to the definition contained in the Charter of OAS (art. 18). Since that text still had not covered all cases, those jurists had subsequently sought, first in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty<sup>15</sup> and then in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>16</sup> to obtain recognition for the universality of the principle of non-intervention, which lay at the heart of the inter-American regional system. It was, however, not enough simply to cite legal writings, even if they had become universally accepted. There were hidden forms of intervention in the modern world that made it extremely difficult to attribute responsibility to State agents, individuals or groups. In his view, the concept of intervention therefore had to be developed further by the Commission.

44. The Special Rapporteur had made terrorism one of the forms of intervention. That was another phenomenon that was difficult to grasp and one concerning which it was not enough simply to refer to legal writings.

45. As to paragraphs 4 and 5 of article 11, which dealt with breaches of States' treaty obligations, he had nothing to add to the thorough statement made by Mr. Reuter (2056th meeting).

<sup>14</sup> See footnote 7 above.

<sup>15</sup> General Assembly resolution 2131 (XX) of 21 December 1965.

<sup>16</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

46. With regard to colonial domination, the second alternative of paragraph 6 appeared, for the time being, to be the more interesting one, but it was obvious that the Commission had not exhausted the subject and that it would have to continue its discussion before taking a decision.

47. Mercenarism (para. 7) now seemed to have a kind of romantic quality about it: mercenaries took care of their own publicity and did not seem to have any trouble finding a steady supply of new recruits. An *Ad Hoc* Committee of the General Assembly was currently looking into the problem, but that did not mean that the Commission should interrupt its work, even if there was a risk that the two bodies might not reach the same conclusions.

48. Finally, he believed that the topic had been discussed sufficiently and that draft article 11 could be referred to the Drafting Committee, subject to further consideration in plenary.

49. Mr. FRANCIS said that the problem of the drafting of the code was primarily one of distinguishing between the responsibility of individuals and that of States. The judgment of the Nürnberg Tribunal<sup>17</sup> had laid down two basic principles: first, that a crime under international law could not be committed by an abstract entity, such as a State, and that it was always attributable to an individual; and secondly, that it was by punishing the individual that international law should be applied. The Commission had taken those basic principles even further, particularly in part 1 of the draft articles on State responsibility,<sup>18</sup> article 19 of which made it possible to hold a State responsible. It would, however, be an illusion to try to punish States and, in any case, that task was not part of the Commission's current mandate. The problem was thus that of the link between individual responsibility and State responsibility.

50. In that connection, two related steps had to be taken by the Commission. The first was to include in part II (General principles) of chapter I of the draft a new principle derived from article 19 of the draft articles on State responsibility, which now overrode the first principle he had referred to as being laid down by the Nürnberg judgment. The second step was to provide a related, substantive provision in the draft articles, indicating that wherever in the code criminal responsibility was, or could be, attributed to a State, such responsibility was, for the purposes of the code, attributable to the appropriate individuals in that State.

51. Mr. BEESLEY recalled that he had suggested the deletion of the words "by the authorities of a State" in the introductory clause of paragraph 1 of draft article 11 on the understanding that they would continue to appear in the rest of the text. The wording he was proposing, namely "the commission of an act of aggression", did not indicate the perpetrator of the act and would offer the advantage of applying both to individuals and to States.

*The meeting rose at 1 p.m.*

<sup>17</sup> See 2056th meeting, footnote 22.

<sup>18</sup> See 2053rd meeting, footnote 17.

## 2060th MEETING

*Friday, 10 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (*continued*) (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

#### ARTICLE 11 (Acts constituting crimes against peace)<sup>4</sup> (*continued*)

1. Mr. BARBOZA, referring to annexation as a crime of aggression, noted that the 1954 draft code made annexation a separate crime when it was committed by means of acts contrary to international law (art. 2 (8)). Perhaps finding that definition too broad, the Special Rapporteur had limited the reference in paragraph 1 (b) (i) of draft article 11 to annexation by the use of force, as in the 1974 Definition of Aggression<sup>5</sup> (art. 3 (a)). But as Mr. Roucounas (2057th meeting) had indicated, another possibility should be provided for, namely annexation by threat of the use of force, which had occurred throughout history. For example, if the governor of a small island, badly protected by a handful of soldiers, yielded his territory in the presence of a warship of a major Power, and even if there had been no gun-fire, it could hardly be said that there had been no use of force. If annexation in such a case was not considered to be a crime, the definition in paragraph 1 (b) (i) of draft article 11 was too narrow.

2. Another point raised by Mr. Roucounas concerned the establishment of foreign settlements in a territory, resulting in its domination. He agreed that, because of the very harmful consequences for the life of such a territory, such cases should be included in the draft code. Most of the conflicts in the world were the result of foreign settlements established by force; although a few

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>4</sup> For the text, see 2053rd meeting, para. 1.

<sup>5</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

such cases had occurred in Europe, most of them related to colonial territories.

3. Regarding intervention, he agreed with Mr. Díaz González (2059th meeting) that the principle of non-intervention had originated and evolved in South America. The use of a general definition in the code, however, even that of the Charter of OAS (see A/CN.4/411, para. 24), might lead to the characterization of intervention as a crime, rather than simply as an internationally wrongful act. It should also be borne in mind that many cases of intervention, throughout the history of international relations in Latin America, would be considered as cases of aggression under the draft code, since they had involved the use of armed force.

4. Referring to the two alternatives of paragraph 3 of draft article 11, he noted that the second was rather vague, in that it did not indicate exactly which acts were included. Furthermore, there were other forms of intervention: in particular, for reasons of methodology, the sending of armed bands, dealt with in paragraph 1 (b) (vii), should be included under intervention rather than under aggression. All the other cases mentioned in paragraph 1 (b) involved the use of the regular armed forces of a State. He would not press the point, however, for he did not wish to lead the Commission away from the 1974 Definition of Aggression, which all members agreed should be the basis for paragraph 1.

5. For terrorism, the technique of providing a general definition followed by concrete cases was correct. He agreed that the code should cover only State terrorism, since the purpose of the code was the protection of international, not internal, peace. Terrorism by private individuals or non-State entities should also be condemned, but perhaps in another chapter of the code or another international instrument. The same applied to mercenarism, which was also being dealt with by an *Ad Hoc* Committee of the General Assembly.

6. Paragraph 4 of article 11 provided an additional protection against aggression, and should be maintained in its existing form.

7. The two alternatives of paragraph 6 were not incompatible and could form a single provision, which might include other cases of the subjugation or exploitation of a people by force. He would be inclined to retain the expression "colonial domination", as being the most descriptive of such a situation.

8. Mr. MAHIU thanked the Special Rapporteur for his concise and dense sixth report (A/CN.4/411), which had been enriched by discussions in the Commission and in the Sixth Committee of the General Assembly. At the present stage of identification and enumeration of crimes against peace, he supported the Special Rapporteur's approach, which was to rely on existing texts that the Commission could use or adapt in drafting the articles. It should be borne in mind, however, that some existing texts needed to be updated and reviewed—which could be a task more delicate than their original elaboration—and that the goals of the code often differed from those of existing instruments. He would provide specific examples later.

9. As to the crimes themselves, he would like first to respond to the Special Rapporteur's invitation in paragraph 6 of his report. The offence of preparation of aggression raised certain doubts, because the code should be concerned with acts already committed; yet aggression should be discouraged before the fact. The difficulty lay in identifying the preparation of aggression. Thus, if preparation of aggression was to be retained as a crime, additional elements, such as the notion of "imminence", should be found to qualify it. If the definition was too flexible, it might lead to the exact opposite of what the Commission desired: a State might accuse another State of preparation of aggression simply to justify its own measures of aggression against that State. There had been examples of such conduct recently.

10. Annexation, as the Special Rapporteur pointed out (*ibid.*, para. 9), was mentioned in both the 1954 draft code and the 1974 Definition of Aggression.<sup>6</sup> There was a difference, however, in that the Definition of Aggression (art. 3 (a)) referred to annexation by the use of force, while the 1954 draft code (art. 2 (8)) referred to annexation by means of acts contrary to international law. The 1954 formulation was thus much broader, and brought annexation quite close to intervention. It must therefore be determined whether all types of annexation were to be treated as crimes against peace, or only annexation by the use of force, and whether annexation should be treated as a crime separate from aggression or linked to it. He believed that any annexation, whatever its modalities, should be treated as a crime against peace distinct from the other crimes; he was therefore in favour of distinguishing annexation from aggression, although they did sometimes coincide. The sending of armed bands was a form of aggression and should not be separated from it.

11. Turning to the text of draft article 11, he supported the Special Rapporteur's decision not to include a general definition of the crimes in question, as he had done in his third report.<sup>7</sup> The Commission should avoid excessively general definitions in the area of criminal law.

12. Paragraph 1 of draft article 11 was based on the 1974 Definition of Aggression, omitting certain elements which the Special Rapporteur considered to be outside the purview of the draft code, in particular those relating to the intervention of the Security Council. That raised a problem going beyond the simple matter of definition, namely the relationship between the Security Council and any international criminal court that might be established. A similar issue had already arisen in connection with the relationship between the ICJ and the Security Council. The fact that a matter fell within the purview of two organs at the same time did not, in principle, prevent each one from exercising its function. The international criminal court would have an exclusively juridical function, which the Security Council did not have. The juridical function of the ICJ was recognized in Article 36, paragraph 3, of the

<sup>6</sup> See footnote 5 above.

<sup>7</sup> See *Yearbook* . . . 1985, vol. II (Part One), p. 81, document A/CN.4/387 (art. 3).

Charter of the United Nations and in the case-law of the Court itself, in particular in its important judgment of 26 November 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility)*, in which the Court had stated:

... The Council has functions of a political nature assigned to it, whereas the Court exercises purely juridical functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.<sup>8</sup>

That dictum might apply to a future international criminal court. In any event, paragraph 1 of article 11 could be satisfactorily drafted only if the role of each organ empowered to deal with the crime of aggression was clearly defined.

13. The link between draft article 11 and draft article 4 (*Aut dedere aut punire*), as submitted by the Special Rapporteur in his fifth report (A/CN.4/404, sect. II), was obvious. He did not believe that the crime of aggression could be left to the jurisdiction of a national court. Whatever members' doubts might be, the establishment of an international criminal court was indispensable. Perhaps the code should make a distinction between crimes that could be tried by national courts and those that could be dealt with only by an international organ. As to the relationship between the international criminal court and the Security Council, it was true that, if a matter was referred to the court after the Security Council had reached a decision on it, the position of the court would be difficult to determine. That was a problem the Commission would have to solve at a later stage. He agreed with other speakers that only those elements of the Definition of Aggression that related to the strict definition of the crime should be retained in paragraph 1 of article 11. Other elements, such as the relationship with the Security Council, should be dealt with at a later stage.

14. Paragraph 2 of article 11 dealt with the threat of aggression, a subject on which he had already expressed his views at the Commission's thirty-seventh session, in 1985.<sup>9</sup> He found the text proposed by the Special Rapporteur acceptable, subject to some clarifications; in particular, it was important not to allow any confusion between an actual threat of aggression and mere verbal excesses. There was also the delicate problem of proof, as in the case of preparation of aggression. It was essential to avoid a loosely drafted definition which could serve to justify aggression in the guise of counter-measures against an alleged threat. Some useful guidance could be derived from the ICJ's judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Merits)*, in which the Court had dwelt on the distinction between aggression and the threat of aggression, and between the latter and intervention.<sup>10</sup>

15. For paragraph 3 of article 11, dealing with intervention, the Special Rapporteur had proposed two alternative texts. The first was much too general and

vague to serve as a basis for the Commission's work. The second sentence of that alternative, which defined the unduly broad term "interference", did not establish the principle with sufficient precision. The proposed wording would make for uncertainty in interpretation. He therefore preferred the second alternative, but suggested that its wording should be tightened. The Commission should be guided by the eighth and ninth paragraphs of the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>11</sup> which read:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

He was not, of course, suggesting that the whole of that passage be used, merely that it would provide useful elements for clarifying the notion of intervention, as would the 1986 judgment of the ICJ to which he had already referred.

16. On the subject of terrorism, the Special Rapporteur had relied for his definition on the 1937 Convention for the Prevention and Punishment of Terrorism.<sup>12</sup> The purpose of that Convention, however, was not the same as that of the draft code. The 1937 Convention was directed at all acts of terrorism committed by individuals, whether politically motivated or not and irrespective of the involvement of States. The draft code was intended to deal only with acts of terrorism which constituted crimes against the peace and security of mankind. Since the 1937 Convention was intended to cover a much wider field, the provisions derived from it were inadequate. Thus, in the second alternative of paragraph 3 of draft article 11, subparagraph (b) ii referred to "acts calculated to destroy or damage public property". It would be going too far to treat damage to public property caused within the offender's own country as a crime against the peace and security of mankind. Clearly, an international aspect was essential for an act to constitute a crime under the draft code.

17. There was some duplication between subparagraphs (b) i and (b) iii. The persons mentioned in subparagraph (b) iii were also "charged with public functions", and hence were covered by subparagraph (b) i. The unlawful seizure of aircraft and the taking of hostages were dealt with in specific international instruments and did not always affect international peace and security.

18. On paragraphs 4 and 5, dealing with breaches of States' treaty obligations, he supported the Special Rapporteur's proposed text, subject to drafting improvements.

19. With regard to paragraph 6, on colonialism, for which the Special Rapporteur had submitted two alter-

<sup>8</sup> I.C.J. Reports 1984, p. 435, para. 95.

<sup>9</sup> Yearbook . . . 1985, vol. I, p. 31, 1882nd meeting, para. 14.

<sup>10</sup> I.C.J. Reports 1986, pp. 103-104, para. 195, and pp. 125-126, paras. 244-245.

<sup>11</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>12</sup> See 2054th meeting, footnote 7.

natives, he supported the suggestion by Mr. Hayes (2058th meeting), Mr. Beesley (2059th meeting) and other members that those texts should be merged. The combined text could read: "The subjection of a people to colonial domination or to alien subjugation, domination or exploitation."

20. The provision on mercenarism in paragraph 7 would be affected by the treatment of aggression in paragraph 1. If paragraph 1 referred to mercenarism, it would be included under the crime of aggression. He himself would prefer mercenarism to be treated as a separate crime. There was a marked difference between aggression and mercenarism, in that aggression was always committed by a State, whereas mercenarism could be an activity of private individuals.

21. For the wording of paragraph 7, the Special Rapporteur had drawn on article 47 of Additional Protocol I<sup>13</sup> to the 1949 Geneva Conventions. There were two arguments in favour of that approach. The first was that the definition of mercenarism in that Protocol had been the result of long debates and compromises, so that it would not be advisable to reopen discussion on the matter. The second was that it was not desirable to have two different definitions of mercenarism in two international instruments. At the same time, it had to be remembered that the Protocol was intended for application in war, while the problem of mercenarism had arisen with unusual gravity, particularly in Africa, in time of peace. The terms of the definition in the Protocol would therefore have to be adjusted so as to be applicable in both cases.

22. In conclusion, he proposed the addition to draft article 11 of a further crime against the peace and security of mankind, namely the massive expulsion by force of the population of a territory. Such acts invariably affected the peace and security of mankind and should be identified as a crime under the code.

23. Mr. ARANGIO-RUIZ commended the Special Rapporteur for the very clear and precise terms in which his sixth report (A/CN.4/411) placed before the Commission the possible choices for the draft articles.

24. The Commission had moved away from general principles and was now faced with the most difficult part of its task. In their discussion of the general principles and scope of the draft code, members had been able to rely on concepts taken from the criminal law of their respective countries; but at the present stage they had to face the difficult task of defining, one by one, the individual crimes to be included. In that task, models taken from internal law were not helpful, since the crimes to be included in the code were not comparable, in their essential features, to the crimes covered by national criminal law.

25. The only international precedents available were those of the trials held in Europe and the Far East at the end of the Second World War. The rules applied in those cases, however, were *ad hoc* rules adopted *ex post facto*. They had been made, albeit quite felicitously, for certain categories of individuals and had served to

punish acts which those individuals had already committed. It had been technically as easy for lawyers to adapt those rules to the only cases for which they had been intended as for a good tailor to adapt a custom-made suit to the figure of a client.

26. The fact, to which some members had drawn attention, that for the past 40 years no individual had been charged with the commission of any of the acts now being discussed—namely crimes against peace—was, of course, not a good reason for excluding those acts from the draft code. On the contrary, the condemnation of those acts in the code would have the advantage of defining the crimes before, not after, they were committed. There remained, however, apart from the enormous difficulties that would be involved in any case in the implementation of the condemnation of individual crimes against peace, the great difficulty of defining such crimes in concrete terms without the benefit—available to national criminal legislators—of pre-existing criminal-law provisions and the innumerable precedents offered by the jurisprudence of criminal courts.

27. The Commission would find it difficult to remedy the absence of genuine international legal precedents for two reasons. One was the atypical nature of the crimes to be included in the code, which were connected with political relations between States, as compared with the typical criminal offences covered by national criminal law. The other reason was the natural reluctance of members to cite examples from recent or relatively recent events and to point to the transgressions of present or past leaders of a country—whether it was the speaker's own country or not.

28. The Commission's debates on the crimes to be included in the code were thus fated to be conducted in a foggy atmosphere, in which the only criminals dimly visible were the ghosts of Italian Fascists, German Nazis and Japanese militarists of the 1920s, 1930s and 1940s, who had long since paid their debt to humanity. It would now be useful if members could give some thought to examples from more recent history, and reflect on what their reactions would be if the code were to be applied to the leaders—past, present or future—of their own countries. He would stress the word "own".

29. A further difficulty was that not all members of the Commission had specialized knowledge of criminal law. Furthermore, the crimes under discussion were so closely connected with inter-State relations that ordinary specialists in criminal law would not be able to deal with them alone. Some consultation between international-law and criminal-law specialists would be needed, both before and after the Drafting Committee reported back to the Commission.

30. He was inclined to favour most of the choices made by the Special Rapporteur for paragraph 1 of draft article 11, on aggression, and agreed that there should be a general definition followed, in a separate subparagraph, by an enumeration of the various forms of aggression. The explanatory note in paragraph 1 (a) (ii) should be deleted or perhaps be incorporated in the commentary. The various forms of aggression should be analysed to determine whether they all qualified equally

<sup>13</sup> *Ibid.*, footnote 9.

as crimes against peace. Some of them should perhaps not be regarded as criminal, or should not be subject to the same sanctions as other forms of aggression. For instance, could a partial blockade of part or all of the coast of another State, or a very limited attack on one of a State's naval vessels or military aircraft, be regarded as a crime against peace as serious as an all-out attack against, or invasion of, a country? He questioned neither the gravity of such acts or of any other acts included in the list, nor their characterization as attacks for the purpose of justifying self-defence under Article 51 of the Charter of the United Nations or any equivalent rule of general international law. He doubted, however, whether it would be correct to impose the same penalty for all those acts as for outright aggression.

31. Similar doubts were prompted by a comparison of subparagraphs (v) and (vi) of paragraph 1 (b) with subparagraphs (i) and (ii). He wondered whether the words "the use of any weapons", in subparagraph (ii), should not be qualified in some way, perhaps by specifying what effect those weapons must have had on the territory of the other State. Mr. Barboza (2056th meeting) had drawn an analogy between the forms of aggression enumerated in paragraph 1 (b) and the various acts classified under a national penal code as murder or manslaughter. He was not sure that the analogy was valid, because not all the forms of aggression listed would result in the annexation, dismemberment or other kind of destruction of the State in question. A distinction should perhaps be drawn between the purposes for which the various acts were qualified as acts of aggression under the 1974 Definition of Aggression<sup>14</sup> and the purposes of prevention and punishment of the corresponding individual acts.

32. As far as the 1974 Definition of Aggression was concerned, it seemed to him that those purposes were probably connected with the need to identify the State that had started the aggression and the existence of an armed attack within the meaning of Article 51 of the Charter, and with the need for the Security Council to decide on or recommend the necessary measures. In both cases, either the rule of proportionality—which was a condition of lawful self-defence—or the exercise of some discretionary power to evaluate the nature of the collective measures envisaged by the Security Council would come into play. Criminal responsibility, however, and in particular that of individuals, was a different matter, and a monolithic, all-embracing approach to such a very sensitive area as an "international criminal law" seemed to be unwarranted.

33. Another problem was the question whether the possibility of an individual being charged with the international (individual) crime of aggression was or was not subject to a finding of aggression on the part of its State. There were not many institutions that could make a valid and binding determination that an act of aggression had been committed by a State. The ICJ did, of course, have compulsory jurisdiction, but only in exceptional cases. Hopes had recently been raised, for a more or less distant and problematic future, by the statements

of the leader of a major Power; but unfortunately the mere expression of a wish or vow by a single State surely did not suffice to bring about a real change in what seemed to be the unsatisfactory settled attitude of States towards the Court. His own country, Italy, which had accepted the compulsory jurisdiction of the PCIJ between the two world wars, had not decided to accept the compulsory jurisdiction of the ICJ, for reasons of which he did not approve. The position with regard to the compulsory jurisdiction of the ICJ was further complicated by the reservations that usually accompanied any acceptance of that jurisdiction.

34. The Security Council, which under the terms of the Charter had the equivalent of a compulsory "jurisdiction", was hampered not so much by the veto as by its tendency to act as fireman rather than judge. Indeed, reluctance to take a definite stand on a specific act of aggression and on the identity of the aggressor was manifest throughout United Nations practice and evident from the tendency to classify as intervention what were often acts of outright aggression. In that respect, the United Nations was perhaps less effective than the League of Nations, which had not hesitated to name a Power as an aggressor on at least three occasions. So long as that deficiency remained, it would be very difficult to implement the code properly. Even if an international criminal court were established—and he was very much in favour of such a court as an indispensable instrument for the implementation of any piece of international criminal law—it should not be burdened with tasks that more properly fell to the legislator or to a political body such as the Security Council.

35. Two further points, both arising out of the relationship between draft article 11 and the 1974 Definition of Aggression, required study. First, the phrase in the last preambular paragraph of the Definition of Aggression reading "it is nevertheless desirable to formulate basic principles as guidance for such determination" raised serious doubts in his mind as to whether draft article 11, and in particular the list of acts in paragraph 1 (b), was sufficiently precise for the definition of a crime. In particular, the words "basic principles as guidance for such determination" seemed to refer to a finding by a political body rather than by a court of law. The only way to overcome the difficulty would be to provide expressly that no individual would be subject to prosecution for the crime of aggression unless a positive finding of aggression had been made by the Security Council against the State on behalf of which he was alleged to have acted.

36. Secondly, article 2 of the Definition of Aggression stipulated that "The first use of armed force by a State . . . shall constitute *prima facie* evidence of an act of aggression". The introductory clause of article 3 then provided that any of the acts listed would qualify as an act of aggression "subject to and in accordance with the provisions of article 2". It would therefore seem logical to include a reference to "first use" in the definition of each of the acts listed in paragraph 1 (b) of draft article 11, since that list corresponded to the list in article 3 of the Definition of Aggression. He would welcome the Special Rapporteur's comments on that point.

<sup>14</sup> See footnote 5 above.

37. While he agreed that preparation of aggression and threat of aggression should be covered in the draft code, and also that paragraphs 4 and 5 of draft article 11 should be combined, he had some difficulties with intervention, and they had been increased by Mr. Díaz González's thought-provoking statement (2059th meeting). The Special Rapporteur had observed (A/CN.4/411, para. 12) that the concept of intervention was an elusive one: that was an understatement. As Wolfgang Friedmann had written, virtually the only point of agreement among writers was that the term "intervention" covered an area of great confusion.<sup>15</sup> The picture with regard to practice was no brighter, for the term was widely used to cover not only innocent diplomatic transactions, but also acts of wholesale aggression. At a time when attempts to define the unlawful forms of intervention had not yet been made at the official, inter-State level, P. H. Winfield had observed that a reader of Phillimore's chapter on the subject might close the book with the impression that intervention could be anything from a speech by Lord Palmerston in the House of Commons to the partition of Poland.<sup>16</sup>

38. A number of definitions of the term were, however, available. They included several to be found in courses he himself had given at The Hague Academy of International Law;<sup>17</sup> the definition incorporated in article 18 of the Charter of OAS (*ibid.*, para. 24), following a series of conferences in Latin America at which definitions had also been drafted; and the definitions laid down in a number of United Nations resolutions, in article 3 of the draft Declaration on Rights and Duties of States,<sup>18</sup> in article 2 (9) of the 1954 draft code, and in Principle VI of the Declaration contained in the Helsinki Final Act.<sup>19</sup> Since those definitions varied widely, the best course might be for the Commission to consider two of them, in conjunction with the second alternative of paragraph 3 of draft article 11 proposed by the Special Rapporteur, with a view to arriving at a precise form of wording. He suggested in particular that the Commission should take as the basis for consideration of its definition the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>20</sup> and specifically the third of those principles, concerning "the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter", as well as the above-mentioned Principle VI of the Helsinki Final Act. The former was perhaps closest to the definitions

adopted in Latin America, while the latter, adopted by the States of the Euro-Atlantic area, was in his view a more accurate reflection of the principles of the Charter of the United Nations.

39. In considering those two definitions, four elements had to be taken into account. First, the opening sentence of the third principle of the General Assembly's 1970 Declaration, reading "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State", though close to the first paragraph of Helsinki Principle VI, differed from it in that it did not include the phrase "falling within the domestic jurisdiction of another . . . State". That was not a felicitous phrase, in his view, and it should not be incorporated in the draft code: it would be strange indeed if armed intervention were permitted simply because its purpose related to a matter that did not fall within the domestic jurisdiction of the victim State. Another difference concerned the words "regardless of their mutual relations", which again appeared in Principle VI but not in the 1970 Declaration. There were sound arguments for retaining those words, however, since they would mean that the prohibition of intervention would apply also as between two member States of the same regional organization, geographical area or even alliance, and would thus enhance the universality and cogency of the principle of non-intervention.

40. The second element he wished to compare in the two texts was their specific mention of armed force. In his view, the Helsinki formulation was the better of the two, since it was clearer and more concise. The 1970 Declaration spoke of "armed intervention" and "attempted threats"; he had always wondered what an "attempted threat" might be. Helsinki Principle VI, on the other hand, referred to "armed intervention or threat of such intervention", thus extending the condemnation to coercion by threat of armed force.

41. The third element to be compared was the condemnation of economic and political forms of coercion. There was a high degree of coincidence between the two texts and between them and the provisions in the 1954 draft code relating to intervention. The choice not to refer to armed force would, in his view, be a felicitous one, in that the prohibition of force and the prohibition of intervention were better dealt with separately. The use of armed force went beyond the crime of intervention to form a case of aggression, which was undoubtedly a more serious unlawful act than intervention. One point on which the wording of the two texts should be improved was their reference to the use of economic or political coercion for the purpose of "securing advantages". Economic and political forms of coercion might actually be used by a State for legitimate purposes, for example to induce another State to comply with an international obligation. He would therefore suggest, for the Drafting Committee's consideration, that if it adopted wording similar to that of Helsinki Principle VI (third paragraph) and of the third principle (second paragraph) of the 1970 Declaration, the word "undue" should be inserted before "advantages". Such wording would ensure that political and economic forms of co-

<sup>15</sup> W. G. Friedmann, *The Changing Structure of International Law* (London, Stevens, 1964), p. 267, footnote 24.

<sup>16</sup> P. H. Winfield, "The history of intervention in international law", *The British Year Book of International Law, 1922-1923* (London), vol. 3, p. 130.

<sup>17</sup> G. Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of principles of friendly relations", *Collected Courses of the Hague Academy of International Law, 1972-III* (Leyden, Sijthoff, 1974), vol. 137, pp. 547 *et seq.*; and, "Human rights and non-intervention in the Helsinki Final Act", *Collected Courses . . . , 1977-IV* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1980), vol. 157, pp. 252 *et seq.*, and p. 325, footnote 130.

<sup>18</sup> Adopted by the Commission at its first session, in 1949; see *Yearbook . . . 1949*, pp. 286 *et seq.*

<sup>19</sup> See 2053rd meeting, footnote 16.

<sup>20</sup> See footnote 11 above.

ercion would be condemned only when used for illegitimate purposes.

42. The final element of comparison was the condemnation of subversive and terrorist activities directed towards the violent overthrow of the régime of another State. He would suggest that, if the relevant provisions of the two texts were incorporated in the draft code, it should be made clear that it was unarmed intervention—meaning the use of political or economic pressure or coercion, or subversive activities not involving armed force—that was being condemned. Once again, he believed the Commission should avoid blurring the distinction between aggression and intervention.

43. Finally, he would commend to the Commission's attention, as containing important elements that should be incorporated in the draft code, the third and fourth paragraphs of the third principle of the 1970 Declaration, which condemned external interference in the life of a nation.

44. On terrorism and mercenarism, he endorsed the comments made by other speakers. With regard to colonialism, he agreed that the two alternatives of paragraph 6 of draft article 11 should be combined. In his opinion, the reference to subjugation should be given precedence over colonialism. His reasoning was that a general rule of international law could be strong only if it could be uniformly and impartially applied. The principle of self-determination, proclaimed as a universal principle in the Charter of the United Nations, had been applied mainly in eradicating colonialism, but there were other cases in which it could and should be used. By not tying it exclusively to colonial contexts, the strength of its general character would be greatly enhanced. He was sure that that legal point could be taken into account by the Drafting Committee.

45. Mr. EIRIKSSON said that the area covered by draft article 11 should be confined to the acts of States rather than of private individuals, since those were the acts most likely to cause breaches of the peace. True, the acts of individuals could have serious consequences for the territorial integrity of a State: billionaire fanatics, narcotics barons and terrorists had been mentioned, but such cases could be dealt with in other ways, and the draft code should not be made to depart from the purpose for which it was intended.

46. It must be recognized, however, that the scope of the draft code was limited to individuals: those responsible for the State acts identified as crimes against peace had to be brought to justice. Whatever the deterrent value of the future code, there must in any case be no doubt *ex post facto* that a given act was a crime covered by the code. Hence political positions must be eschewed, even if that meant that the Commission's objectives would have to be less ambitious. He would favour the establishment of an international tribunal to operate at least on an optional basis.

47. He was by no means convinced that the code should follow the 1974 Definition of Aggression<sup>21</sup> as closely as it did. That Definition had been developed for

an entirely different purpose, namely to facilitate action by the Security Council under Articles 39, 41 and 42 of the Charter of the United Nations. It was accordingly imbued with political concerns and, for the Commission's purposes, was both incomplete and dependent on a system which might or might not be applicable when the code came to be implemented. He would therefore prefer a general definition of aggression based only on article 1 of the 1974 Definition.

48. Paragraph 1 (c) (ii) of draft article 11, which was based on article 7 of the Definition of Aggression, was not appropriate as it stood. It should either be deleted or be incorporated in the general definition itself. It should be recalled that the list of acts in article 3 of the Definition of Aggression was not exhaustive and could be supplemented by the Security Council. The Commission only had to ask itself whether there could be any doubt that the acts listed in paragraph 1 (b) of draft article 11 constituted aggression.

49. He would suggest that the Commission's purposes would best be served by a general paragraph, which could read:

“1. The commission of aggression, that is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”

The same approach had been used for the definition of innocent passage in the 1982 United Nations Convention on the Law of the Sea (art. 19, para. 2 (a)).

50. He endorsed the formulation regarding the threat of aggression in paragraph 2 of draft article 11, and supported the inclusion of preparation of aggression as a crime against peace. The objections raised, which were based on analysis of the Nürnberg and Tokyo trials, would be rendered groundless if preparation of aggression were characterized as a crime before the fact. He acknowledged the difficulties identified by the Special Rapporteur in his sixth report (A/CN.4/411, para. 8) and believed that the burden of proof must be heavy. On a specific point raised by the Special Rapporteur, he saw no reason why a perpetrator could not be prosecuted for both preparation of aggression and aggression itself. It was possible to be guilty of preparation but not aggression, and vice versa.

51. For the provision on intervention, he would suggest that the Commission return to the wording of article 2 (9) of the 1954 draft code. The most important element should be coercion, but it must be clearly distinguished from aggression. In his view, the second alternative of paragraph 3 of draft article 11 was mainly about aggression.

52. He agreed that paragraphs 4 and 5 of article 11, dealing with breaches of treaty obligations, should be combined. As to paragraph 6, he agreed that colonial domination should be included in the draft and endorsed Mr. Hayes's comments (2058th meeting) on that point.

53. With regard to paragraph 7, he had some doubts as to whether mercenarism should be included in the draft code as a crime against peace. Mercenaries were an

<sup>21</sup> See footnote 5 above.

instrument used to commit a crime, and their acts, if sponsored by another State, constituted aggression. He looked forward to the results of the work being done by the *Ad Hoc* Committee on the subject, but did not think the Commission need await those results before taking a position.

54. Finally, he thanked the Special Rapporteur for once again providing a firm basis on which the Commission could take action on the matters before it.

55. Mr. TOMUSCHAT said he wished to make a short statement with specific reference to the crimes referred to in paragraph 6 of draft article 11.

56. He did not wish to enter into a discussion on the difficult question whether, under international law, self-determination could also operate internally—in other words, between a people and its Government. The International Covenant on Civil and Political Rights would not appear to support such internal operation, since, in article 25, it specifically referred to the democratic rights of citizens. The question that really deserved the Commission's attention was whether the right to self-determination was a perpetual right or might be considered as consummated once a people had attained statehood. He believed that every people enjoyed a perpetual right of self-determination. The relevant international instruments consistently assigned that right to "all peoples", without any temporal conditions or requirements. In fact, a people might need the right of self-determination in many instances over the course of its history. Normally, the holder of the right to self-determination would be a people which had created its own State; in fact, it was through State-building that a people usually exercised its right to self-determination. Inasmuch as it provided protection against outside interference, self-determination could not disappear as soon as a people had finally been able to establish a State.

57. That was why he thought that the first alternative proposed by the Special Rapporteur for paragraph 6 was too narrow. The right of all peoples to self-determination must be protected. He had not meant to suggest, in his earlier statement (2056th meeting), that the last vestiges of colonialism had disappeared altogether: remnants of the colonial past still clung stubbornly to existence and should be eliminated as quickly as possible by peaceful means. But present-day realities must not be overlooked: self-determination was a fragile good. Accordingly, the draft code could mention colonialism, but that was not the only form of violation of the right to self-determination that should be taken into account.

58. One might ask whether it was necessary to refer to self-determination in a separate article when, in the same code, aggression would be qualified as a crime against the peace and security of mankind. Yet that description of aggression, drawn from the 1974 Definition of Aggression,<sup>22</sup> did not cover all the facets of violations of the right to self-determination which, because of their gravity, deserved the Commission's attention. The 1974 Definition was more concerned with

the actual process of aggression—its modalities—than with its consequences. As other members had pointed out, annexation could also be brought about by covert means, and it might therefore be useful to mention it in a separate article.

59. Another plague of the twentieth century was the forcible transfer of populations. No just world order could tolerate such grave abuses of political and military power. The forcible expulsion of a people from its traditional area of settlement amounted to a clear violation of the right to self-determination. The elaboration of the possible forms of violation of that right might be all the more necessary because many problems could not be solved by a criminal code, but required a negotiated solution. Conflicts such as those over the Falkland Islands (Malvinas) and Gibraltar were not suitable for treatment under the code: only what was clearly identified as a violation of the right to self-determination could be considered. He fully agreed with Mr. Mahiou on that point.

60. To sum up, a general provision concerning grave violations of the right to self-determination should be incorporated in the draft code. Colonialism, which had been the most prominent form of violation of that right in the past and still persisted in the present, could be mentioned as a specific example. It might be advisable to highlight or identify the most abhorrent forms of violation of the right to self-determination, namely annexation and the forcible expulsion of a people from its traditional area of settlement.

61. Another important issue was attacks on the integrity of the environment. He would not dwell on that matter, but took it that, within the framework of crimes against humanity, the Commission would draw up a provision on deliberate and grave forms of such infringements, parallel with what had been stipulated in article 19, paragraph 3 (d), of part 1 of the draft articles on State responsibility.<sup>23</sup>

62. Mr. KOROMA said it was clear that, in its internal aspect, the act of self-determination could be continuous, but it could not be a continuum in its external manifestation. In a young State, for example, continuation of the act of self-determination could lead to disintegration or secession.

63. He agreed with Mr. Mahiou and Mr. Tomuschat that the mass expulsion of a population threatened international peace and was a massive violation of human rights. It was therefore a good candidate for inclusion in the draft code.

64. Mr. Sreenivasa RAO endorsed the comments made by Mr. Koroma.

*The meeting rose at 1.05 p.m.*

<sup>22</sup> *Ibid.*

<sup>23</sup> See 2053rd meeting, footnote 17.

## 2061st MEETING

Tuesday, 14 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

#### ARTICLE 11 (Acts constituting crimes against peace)<sup>4</sup> (concluded)

1. Mr. AL-KHASAWNEH, commending the Special Rapporteur for the elegance and compactness of his sixth report (A/CN.4/411) and the wealth of sources on which it drew, said that the approach the Special Rapporteur had adopted might be the only way to tackle a topic which touched everyone's deepest convictions and in which doctrinal certainty was not necessarily a virtue. The Commission thus had to face up to its responsibilities and give the Special Rapporteur clear-cut answers to the questions he had raised. It had to consider the topic in theoretical terms and in terms of the formulation of the draft articles.

2. In theoretical terms, the first problem was that of the purpose of the Commission's work. As Mr. Graefrath (2055th meeting) had rightly pointed out, the elaboration of the draft code served a high moral, legal and political purpose. It could not be claimed that the Commission's work served no purpose because States lacked the political will to implement the future code. It was true that no one, or practically no one, had been prosecuted for a crime against the peace and security of mankind since the Second World War. It was, however, precisely because crimes of that kind were being committed every day that a concerted legal response by the international community was required.

3. It was also true that there were few texts which could serve as a basis for the Commission's codification

work, apart from the penal codes of members' countries, whose significance had been stressed by Mr. Tomuschat (2056th meeting) and Mr. Arangio-Ruiz (2060th meeting). The authors of the draft code did not, however, necessarily have to be criminal-law experts. The drafters of the 1954 code had not all been specialists in criminal law, and the Commission, in its present composition, would certainly be able to perform the task entrusted to it. The situation had been no different in the case of the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft<sup>5</sup> or in that of the legal instruments relating to international terrorism and the taking of hostages. There was, moreover, little in national penal codes to define the latter crime and even less by way of precedents, even though the problem itself was not a new one. But that had not prevented the General Assembly from adopting the 1979 International Convention against the Taking of Hostages,<sup>6</sup> thus establishing a penal régime in that regard. Despite what Mr. Arangio-Ruiz thought, the problems arising from the relationship between international criminal law and internal criminal law were not insurmountable: with political will and some measure of boldness they could be overcome.

4. The question of the relationship between the draft code and internal law should not discourage the Commission, for, regardless of the legal régime or the internal law to which reference was being made, some criminal-law concepts were so widely accepted as to have become "settled law". That was the case of the individuality of punishment and the presumption of innocence. Those principles were now firmly established—in human rights matters, for example—in instruments that had been accepted by a very large number of States. To be sure, emphasis on those universally accepted criminal-law concepts varied from one legal system to another, but the problems created by such disparities were not insurmountable either.

5. The Commission's real problem lay in the opposition between the positivist and the natural schools of law. In other words, should the characterization of an act as a crime against the peace and security of mankind be based on the maxim *nullum crimen sine lege*—regardless of how the term *lex* was interpreted—or on the fact that the act in question was a *malum per se*? The answer to that question would have a direct bearing on the drafting of the code and on the approach to be adopted by the Commission. He would opt for the natural-law approach. That would, of course, give the Commission the formidable privilege of defining *malum per se*. It should, however, not be forgotten that the tragic events leading to the trial of the major criminals of the Second World War had taken place in a context of extreme legal positivism and that, when the international community had decided to punish those criminals, it had been guided more by considerations of justice than of law *stricto sensu*. The Commission would thus also have the advantage of being in a better position to appreciate the relevance of

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook* . . . 1954, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>4</sup> For the text, see 2053rd meeting, para. 1.

<sup>5</sup> United Nations, *Treaty Series*, vol. 704, p. 219.

<sup>6</sup> United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 124.

such crimes as *apartheid*, colonialism and mercenarism, which had not been included in the 1954 draft code but should be covered in the future instrument.

6. In addition to the relationship between law and justice, the second major theoretical problem raised by the drafting of the code was that of the relationship between peace and justice. Mr. Tomuschat had rightly pointed out that world problems could not be solved by judges and that the preponderant role of diplomacy had to be maintained. He had also cited the example of an aggressor who prolonged a war in order to delay the proceedings to which he might be liable at the end of the conflict. If the argument were taken to its logical conclusion, however, it might lead to absurd results, for would it be acceptable to allow a few criminals to go unpunished in order to put an end to the suffering of the many? That argument would not be very different from maintaining, as Leibniz had done, that evil was a necessary part of the general good. Mankind did not in fact live in the best of all possible worlds and judges should have an opportunity to correct it, if only because they, unlike diplomats, had rarely had such an opportunity. In any event, Mr. Tomuschat had put his finger on a problem that would trouble anyone interested in upholding justice and, at the same time, maintaining peace.

7. The problem was that peace and justice seemed to be irreconcilable. That irreconcilability, which was the result of differences in nature—since justice was a logical concept, while peace was a compromise required by human nature and by circumstances—could be expressed at many levels of abstraction and some would even go so far as to say that the two concepts were mutually exclusive. However, from the practical point of view, which was the Commission's main concern, the problem could be stated in the following terms: in which cases and to what extent should justice, as embodied in the draft code, give way to the pragmatic, but effective, solutions available to diplomacy? Should negotiations be held with terrorists who, under the draft code, would be perpetrators of crimes against peace? In the event of aggression, could justice be done only when there was a victor and a vanquished? Those questions were not easy ones and the only justification for asking them was to draw attention to the limits of human reason and moral law. The answer was not to provide in the code for flexibility to accommodate the realities of political life or, in other words, to set aside moral considerations: that would suppress the problem, but would not solve it. In that connection, he recalled that, in the early stages of Islamic law—and therefore well before Leibniz—jurists had adopted the principle *Dar' o al-shar al-a'dham bil al-shar al-asghar* (درء هشر الذنم بشر الذمغر), which referred to "the permissibility of averting a greater evil through a smaller one". The application of that principle was, however, very strictly regulated.

8. With regard to the relationship between peace and justice, it could therefore be concluded that the need to keep a role for diplomacy did not obviate the need to complete the draft code; that justice was the main reason for the Commission's present work; that it might be difficult for it to reconcile such different concepts as peace and justice; that the most difficult aspect of its

work was that it was trying to draft an instrument of criminal law; and that, even though it might be theoretically possible to complete such an instrument, that would involve difficult moral choices.

9. That question of moral choices raised the general problem of subjectivity. The Special Rapporteur had already referred to that problem in his third report<sup>7</sup> and the reason for such subjectivity was obvious: the degree of reprobation elicited in the public conscience by a particular act could never be uniform. According to the Special Rapporteur, that problem could be solved by linking the seriousness of a crime to the interests and property protected by law. Such interests and property were, however, easier to identify in an internal-law setting than in an international one. International law was thoroughly steeped in subjectivity, as the discussion had shown. Mr. Reuter (2055th meeting), for example, had recalled that, during the discussion of the draft articles which had formed the basis for the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, some members of the Commission had been ready to understand, if not to condone, the motives of terrorists; Mr. Beesley (2059th meeting) had said that objectivity with regard to mercenarism was easier for those whose countries were not plagued by it; Mr. Sepúlveda Gutiérrez (*ibid.*) had pointed out that mercenarism was often glorified; and, as was well known, colonialism had in the past been regarded as a civilizing mission.

10. The last example provided a good illustration of the problem of subjectivity: should colonialism be included in the draft code because of its belated condemnation by the international community or because the Commission was convinced that it was the most brutal form of the denial of the right of peoples to self-determination and that it was a *malum per se*? In his own view, the second reason was the correct one. Any other approach would be tantamount to admitting that justice was possible only after a phenomenon had become part of history. Crimes such as colonialism, *apartheid* and mercenarism should, however, not be condemned *a posteriori*.

11. The drafting of the code also raised the more technical problem of definitions and classification. As was well known, when the drafters of a penal code made no attempt to define the crimes included in it and rated criminal offences by the severity of the punishment imposed or simply by providing a list, the same problems arose in connection with classification as with definition. Worse still, it was impossible to draw up an exhaustive list, for the simple reason that life rarely followed the same course as the law. The Special Rapporteur had used both methods—definition and enumeration—in so far as legal reasoning would allow. Mr. Graefrath had nevertheless pointed out that, in order to define a crime, all the forms it could take did not have to be described: it was enough to identify its chief elements according to a principle that Grotius had established on the basis of what Cicero had said in a passage which he himself read out.

<sup>7</sup> See *Yearbook* . . . 1985, vol. II (Part One), p. 69, document A/CN.4/387, para. 47.

12. He reminded the Commission that, in dealing with the theoretical problems raised by the draft code, it was not starting with a clean slate, since there were many instruments that had a bearing on the subject-matter under consideration. It could even be said that the Commission was engaged in a codification of codifications. The compendium of relevant international instruments prepared by the Secretariat<sup>8</sup> was, however, a disparate collection of texts that could hardly serve as a basis for codification. It included texts adopted by some regional conferences, a pre-war treaty that had never entered into force and a regional instrument that had become part of the United Nations system. Also available to the Commission were the 1954 draft code—now somewhat outdated—a few widely accepted treaties and the judgment of the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17). Those texts obviously did not all have the same weight. In any event, criminal responsibility was too important to be decided on the basis of obscure interpretations of political resolutions and instruments intended for other purposes.

13. With regard to draft article 11 as submitted by the Special Rapporteur, he said that more careful thought should be given to the classification of the acts under consideration as crimes against peace, war crimes or crimes against humanity. Many crimes belonged to two of those categories, if not all three. It was also becoming increasingly difficult to draw a distinction between a state of war and a state of peace. Perhaps the classification could be dispensed with, since the distinction for the purpose of criminal prosecution would ultimately depend on the consequences of each crime.

14. During the discussion, it had been suggested that each of the crimes listed in draft article 11 should form the subject of a separate article. That was a problem of form that could be left to the Drafting Committee. The explanatory note in paragraph 1 (a) (ii) could be transferred to the commentary without affecting the proposed definition. On a final point of drafting, there seemed to be some doubt about the terms "intervention" and "interference", but they were practically synonymous; in Arabic, at least, a single word was used for both.

15. For the reasons he has already given, he supported the idea of including preparation and planning of aggression as separate crimes against the peace and security of mankind. The difficulties to which the Special Rapporteur had referred in that connection could be obviated if the Commission's work led to the establishment of an international criminal court.

16. The crime of annexation was unfortunately not a historical phenomenon, as shown by the criminals who had recently reinstated it and who had been referred to in Security Council and General Assembly resolutions. For that reason and also because annexation could be accomplished by threat, especially when a belligerent occupant was actually in possession of a territory, it had to be dealt with as a separate offence.

17. Intervention in the internal or external affairs of States created infinite problems, because States con-

ducted their relations in an infinite number of ways. The passage from lawful and perhaps desirable intervention to wrongful intervention was often imperceptible. Fortunately, however, the element of coercion established a dividing line. In any event, the crime of intervention should be formulated in the strictest possible terms.

18. The crime of terrorism called for a number of comments. First, the list of terrorist acts contained in subparagraph (b) of the second alternative of paragraph 3 of article 11 should be updated by including acts against airports and maritime safety, so as to take account of the adoption in early 1988, at Montreal and at Rome, of international instruments on those questions.<sup>9</sup> Moreover, as Mr. Ogiso (2057th meeting) had pointed out, consideration also had to be given to the poisoning of drinking-water supplies and acts against nuclear installations. The words "any form of violence directed against persons who enjoy international protection or diplomatic immunity", in subparagraph (b) (iii), had to be given further consideration, for it was hard to see how a fight with a diplomat could constitute a crime against humanity.

19. Paragraph 4, relating to breaches of the obligations of a State under a treaty, would be more readily understandable in the context of a balance of power such as the one that had existed between the two world wars. In formulating a provision that would be composed of the two elements of such treaty obligations and the maintenance of international peace and security, however, it was important not to put States which were not parties to a treaty designed to ensure international peace and security in a more advantageous position than States which were.

20. The two alternatives of paragraph 6, on colonialism, could be combined by adding the words "including colonialism" at the end of the second alternative. Although most third-world jurists had reason to view the right to self-determination in terms of a metropolitan-colonial relationship, it should not be forgotten that it was a right to which all peoples were entitled. Although the exercise of that right often led to the establishment of States, that did not mean that the right would then be extinguished and that it could not be exercised again.

21. An *Ad Hoc* Committee of the General Assembly was working on a definition of mercenarism, but the Commission did not have to wait for its conclusions, just as it did not have to refrain from considering any subject relating to the collective security system simply because an *Ad Hoc* Committee had been set up to deal with the strengthening of the provisions of the Charter of the United Nations.

22. In conclusion, he said that the definitions and classifications the Commission was formulating were

<sup>9</sup> Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, signed at Montreal on 24 February 1988 (*International Legal Materials* (Washington, D.C.), vol. XXVII, No. 3 (1988), p. 627); and Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, both signed at Rome on 10 March 1988 (*ibid.*, p. 668).

<sup>8</sup> A/CN.4/368 and Add.1.

imperfect; its sources were disparate and often conflicting; the subjectivity of criminal law was acute; and considerations of justice left little room for flexibility. Those were real problems that could be discussed by jurists endlessly. They were, however, not insoluble problems and the search for justice was bound to succeed.

23. Mr. Sreenivasa RAO said that the Special Rapporteur's sixth report (A/CN.4/411) introduced several important ideas and elements that ought to enable the Commission to complete the drafting of the code without further delay. At present, he would refer only to a few of the many issues that had been raised and would consider them from his personal point of view.

24. It had been agreed that the draft code should cover only crimes that were serious enough to endanger international peace and security. In that context, crimes against the peace and security of mankind were not very different from the threats to international peace and security referred to in the Charter of the United Nations. Thus, as Mr. Beesley (2055th meeting) had noted, the code should make a constructive contribution to the system of collective security under the Charter.

25. In characterizing particular crimes, there was no need to draw fine distinctions between crimes against peace, crimes against humanity and war crimes, which were all interrelated in terms of effect and differed only in terms of content. While the Commission should draw upon the 1954 draft code and not overlook crimes such as aggression, intervention and colonial or alien domination, it should also include more recent crimes that were now quite common, such as the use or threat of use of nuclear weapons, terrorism and mercenarism. In dealing with the two latter crimes, the Commission, which had its own mandate, did not have to await the outcome of the work being done by other United Nations bodies, although it did, of course, have to keep up with such developments; indeed, the decisions it adopted on those questions might be helpful to those other bodies.

26. A crime eligible for prosecution under the code did not have to be attributable to a State, even though State involvement in the commission of the crime might be of concern for the purposes of the code. Of late, there had been an increase in crimes against the peace and security of States and their peoples and institutions committed by individuals and organizations that seemed to have their own identity and not to be associated with any State. Frequently, too, terrorists or mercenaries interfered in the internal affairs of a State while other States vociferously denied any direct or indirect involvement in such acts. For the sake of effectiveness, the Commission should therefore not exclude from the scope of the draft crimes against the peace and security of mankind committed or attempted by private individuals or organizations. The draft code should, of course, also focus on agents or authorities of a State who committed crimes, even though State responsibility—criminal or otherwise—was a separate matter not within its scope.

27. While it would be desirable to set up an international criminal court, the preparation of the draft

code should not be hampered because that goal might not be achievable in the near future. There were other, more immediate forms of implementation, such as recognition of the principle of universal jurisdiction, with an obligation for every State to prosecute or extradite persons guilty of a crime under the code. A number of recently concluded treaties, such as the Extradition Treaty between Canada and India of 6 February 1987, the Regional Convention on Suppression of Terrorism signed by the member States of the South Asian Association for Regional Co-operation on 4 November 1987 and other similar instruments already mentioned by several members of the Commission, provided examples of decentralized systems of jurisdiction which relied on national tribunals to deal with offences relating to terrorism and mercenarism. As matters now stood, and in the absence of willingness on the part of States to accept the jurisdiction of the ICJ or of an international criminal court, the determination of crimes of aggression and intervention would continue to be the responsibility of the Security Council and, naturally, of the General Assembly. There was thus no need to make the completion of the Commission's mandate to draft the code conditional on the question of the establishment of an international criminal court. The Commission should, however, affirm the importance of such an institution in order to avoid the sort of valid criticism made against the Nürnberg and Tokyo Tribunals set up only to try the war crimes committed by the vanquished Powers.

28. Even in the absence of neutral, independent international machinery, the draft code would not lose any of its value. Like other instruments of international law, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>10</sup> the Manila Declaration on the Peaceful Settlement of International Disputes<sup>11</sup> and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,<sup>12</sup> the code would serve the cause of peace and security. The clarity with which it reflected the common values and interests of the international community and the precision with which it was drafted would help to enhance its usefulness to all decision makers, national and international alike.

29. Once the Commission had decided to include a crime such as terrorism or mercenarism in the code, it did not have to list too many examples by way of illustration or definition. Moreover, an example need not necessarily be chosen on the basis of the gravity of the act in question, although it was desirable that it should be. It had to be remembered that even a minor act constituting a crime against the peace and security of mankind could have far-reaching consequences. If the code was to have a truly deterrent effect, it must not overlook any conduct, however minor its consequences, that was recognized as constituting a crime against the peace and security of mankind.

<sup>10</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>11</sup> General Assembly resolution 37/10 of 15 November 1982, annex.

<sup>12</sup> General Assembly resolution 42/22 of 18 November 1987, annex.

30. Turning to draft article 11 and, first of all, to the question of aggression, he said that the 1974 Definition of Aggression<sup>13</sup> was politically the most acceptable one and should be adopted by the Commission for the purposes of the code. Paragraph 1 of article 11 should be drafted in such a way that responsibility for the act in question would not be attributable solely to a State. In other words, the paragraph should be drafted in neutral terms so that it would cover acts committed by States, but also those committed by other entities, the essential criterion being the use or threat of use of force or the existence of a threat to the peace and security of mankind. While it was true that acts of aggression of the type most relevant to the code would normally be committed by States or by State authorities, other crimes included in the code could be committed by private individuals and an introductory clause drafted in neutral terms would avoid the need to define the term "State" in the article itself. The explanatory note in paragraph 1 (a) (ii) might therefore be better placed in the commentary.

31. For the reasons already given by several members, the threat of aggression deserved to be included in the code. A threat could sometimes accomplish much the same purpose as an act of aggression itself. In his view, the concept of threat included the preparation and planning of aggression. He would, however, have no objection if the Commission investigated the matter further to see whether the preparation of aggression should be listed as a separate crime, even though he shared many of the doubts expressed by other members as to the complexities involved in a definitional exercise to differentiate between intention of aggression and defensive preparedness.

32. With regard to the question of interference in the affairs of another State, the Commission might use the same term—"intervention"—in English and in French. As the ICJ had indicated, interference could take many forms, some of which were perfectly in order. However, intervention which threatened the territorial integrity, independence or sovereignty of a State could also take several forms and did not always have to involve the direct use of armed force. In that connection, the Commission might refer to the Agreement on the Principles of Mutual Relations, in Particular of Non-Interference and Non-Intervention, signed by Afghanistan and Pakistan at Geneva on 14 April 1988,<sup>14</sup> which referred to several international instruments setting forth the principle of non-interference and non-intervention and listed 13 obligations that were to be complied with for the purpose of implementing that principle (art. II). He thus agreed that intervention should be included in the draft code, but considered that it should be defined in such a way as to cover various forms of interference which were prohibited under international law and constituted a threat to the peace and security of mankind. That task could be entrusted to the Drafting Committee.

33. The code should also deal separately with annexation, with the sending of armed bands into the territory

<sup>13</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>14</sup> *Official Records of the Security Council, Forty-third Year, Supplement for April, May and June 1988*, document S/19835.

of another State and with mercenarism. It was true that those acts were subsumed under the 1974 Definition of Aggression, but, even if their consequences were not the same as those of an act of aggression, they were sufficiently grave and deserved to be included in the code in their own right.

34. Terrorism was a characteristic feature of modern times and should be included in the code separately from intervention. There was a growing body of international instruments defining the most serious terrorist acts. Terrorism had many objectives, but the most important was to threaten the authority of the State through the systematic killing of innocent civilians, arson, destruction of public and private property and attempts on the lives of heads of State or Government and other agents of the State. Whether the objective was a ransom, the release of other terrorists or the recognition of a new State, acts of terrorism undermined the authority of the State and threatened its territorial integrity even when they were committed by private individuals or groups without the support of any other State.

35. Many international agreements provided for inter-State co-operation with regard to terrorism. For example, a provision of the 1987 Extradition Treaty between Canada and India had been reproduced in the Regional Convention on Suppression of Terrorism adopted by the South Asian Association for Regional Co-operation (see para. 27 above). The Treaty contained a very detailed list of terrorist acts which had been based on the list contained in the 1977 European Convention on the Suppression of Terrorism.<sup>15</sup> It covered crimes within the meaning of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, crimes within the meaning of any convention to which the two contracting States were parties and under which they were bound to prosecute or extradite persons responsible for terrorist acts and, lastly, crimes connected with terrorism. All those elements had been reproduced by the Special Rapporteur in the second alternative of paragraph 3 of draft article 11. However, the list in the Extradition Treaty also included acts that might usefully be mentioned in any list of terrorist acts, namely murder, grievous bodily harm, kidnapping, the taking of hostages, crimes causing serious damage to property or disruption of public services and crimes involving the use of weapons, explosives or dangerous substances. The list was so detailed that it could, for example, apply to the poisoning of watercourses. It also covered any attempt or conspiracy to commit one of the crimes mentioned, as well as the giving of advice to any person on how to commit those crimes. Together with a general definition of terrorism, the list would usefully supplement the draft code.

36. He agreed with the view that the draft code should not deal with all breaches—without distinction—of the obligations of a State under an arms-control or disarmament

<sup>15</sup> See 2057th meeting, footnote 11.

ment treaty. Only the most serious breaches having major consequences for the peace and security of mankind should be covered; he had in mind, for example, the first use by a State of nuclear weapons.

37. As to colonial domination, he concurred with the views expressed by Mr. Francis (2054th and 2056th meetings), Mr. Koroma (2054th meeting) and Mr. Njenga (2057th meeting) and noted that a consensus appeared to be taking shape in favour of combining elements of the two alternatives of paragraph 6 of article 11, so that neither old nor new forms of colonialism would remain outside the scope of the code.

38. The principle of the right of peoples to self-determination formed the basis for many other rights and duties under international law. There was no need to discuss the principle at length in the context of the draft code. No reference to it could, however, ignore its distinct facets, namely, at the international level, the struggle of colonial peoples for freedom, sovereignty and national independence and, at the internal level, the achievement of freedom of expression, association and organization. The latter aspect of human rights was a legitimate part of the right to self-determination and, as the result of a voluntary and peaceful consensual process, it could, in some cases, find expression in the founding of a new State. On the other hand, to invoke the right to self-determination in order to threaten the territorial integrity and independence of a State and to seek to achieve that objective through outside interference, violence, terrorist acts or other acts prohibited under international law would constitute a serious crime against the peace and security of mankind. It would therefore be improper and even ironical to argue, as had been attempted, in favour of such a right in the name of promoting the objectives of the draft code, and he suggested that the Commission should refrain from dealing directly with the right to self-determination in the instrument it was drafting.

39. The question of mercenarism should be dealt with in the draft code and, in that connection, the Commission could draw on the work being done by other bodies. As already stated, however, it should proceed with its task without waiting for the *Ad Hoc* Committee of the General Assembly to complete its work, which was to draft a convention focusing on the prevention of mercenarism. The *Ad Hoc* Committee needed a definition of mercenarism that would take account of the recent developments in the phenomenon in situations other than international armed conflict. In that connection, it should be noted that some delegations in the *Ad Hoc* Committee had taken the view that article 47 of Additional Protocol I<sup>16</sup> to the 1949 Geneva Conventions was not relevant and did not meet the future convention's requirements. The definition of the criminal responsibility of States which had failed to take effective measures to combat mercenarism was another aspect of the problem with which the *Ad Hoc* Committee had to deal. There, the point at issue was the punishment not only of mercenaries themselves, but also of the organizations that recruited, financed and trained them. The questions of judicial guarantees, co-operation

among States—whether in connection with the exchange of information, extradition, prosecution or the adoption of uniform legislative measures—and the drafting of appropriate international instruments were some of the ideas that should be considered in that regard. The Commission should take account of those trends and affirm that, when mercenarism constituted a threat or involved the use of violence, when, through the activities of organized armed bands, it interfered in the internal affairs of a State, or when its purpose was the suppression of national liberation movements recognized by the United Nations, it constituted a crime against the peace and security of mankind and was a violation of the fundamental rights and principles provided for in Articles 1 and 2 of the Charter of the United Nations. The most important point in a definition of mercenarism was to stress the element of private gain rather than the fact that a mercenary was or was not a national of a party to the conflict or that his salary was or was not comparable to that of combatants of equal rank in the regular armed forces. What mattered was to recognize that the mercenary sought to serve his personal ends, whoever employed him.

40. In conclusion, he said that, if the code were drafted along those lines, it would be of great value to all countries by reminding States, and especially the most powerful among them, that they must refrain from committing the acts in question and destabilizing other States. Only with the elimination of such crimes would the weak and developing countries be able to achieve freedom and organize themselves economically, politically, socially and culturally in the interests of the human dignity, peace and well-being of their peoples.

41. Mr. ROUCOUNAS, commenting first on intervention, noted that the term lacked precision, since it embraced direct and indirect, and lawful and unlawful, intervention, as well as interference. The main point, however, was that contemporary international law proscribed intervention in both the internal and the external affairs of States. Any interference of a significant kind by one State—usually the more powerful—in the decisions of another State—usually the weaker—amounted to an infringement of the latter's sovereignty. Furthermore, the legal threshold beyond which it was possible to speak of intervention had often led commentators to state the principle of non-intervention in relatively abstract terms, and then to rely on specific cases to determine whether it had occurred.

42. In 1965, the General Assembly, in response to an initiative by the Latin-American Group, had declared intervention to be inadmissible in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.<sup>17</sup> That principle had since been confirmed in other texts, including the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States<sup>18</sup> and, more recently, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of

<sup>16</sup> See 2054th meeting, footnote 9.

<sup>17</sup> General Assembly resolution 2131 (XX) of 21 December 1965.

<sup>18</sup> See footnote 10 above.

Force in International Relations.<sup>19</sup> A virtually identical form of wording was used in the various texts: paragraph 7 of the latter Declaration, for example, read:

7. States have the duty to abstain from armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.

That standard formula should be read together with paragraphs 5, 6 and 8 of the same Declaration.

43. In the final analysis, what was prohibited under contemporary international law was interference that prevented the free exercise of the sovereign rights of a State, namely of the rights recognized by international law as falling exclusively within national jurisdiction. That explained the need for a precise definition of intervention in the draft code. Account also had to be taken of the fact that the principle of non-intervention covered in part other principles, such as respect for territorial sovereignty and the prohibition of the use of force. He noted in that connection that, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17), the ICJ had held that certain activities could seem to constitute intervention without doing so. Accordingly, paragraph 3 of draft article 11 should be more narrowly worded.

44. The same remarks applied to paragraphs 4 and 5 of article 11. There, however, the matter was more complicated, for it fell, in some respects, within the 1974 Definition of Aggression<sup>20</sup> and also touched upon the law of treaties. The Commission should not forget that its contribution to the disarmament process would depend on the extent to which it encouraged States to seek general, lasting and comprehensive disarmament by way of treaty. He therefore agreed with Mr. Sreenivasa Rao that only the most serious violations of treaty obligations should come within the scope of the draft code. That part of the code should, moreover, be considered together with the provisions of the Charter of the United Nations concerning the natural right of self-defence and the prohibition of the use of force. He was pleased to note in that connection that many members shared his view that threat was a fundamental element to be taken into consideration in the code. If a State was faced with a potential aggressor which used threat, or armed force, against it, that State had the right of self-defence and it was the possibility that it might make use of that right to protect its sovereignty and territorial integrity that discouraged the potential aggressor. The Commission should therefore make it quite clear, in the course of its work, that it was taking account of self-defence.

45. Mr. BARSEGOV said that the particularly rich and dynamic discussion on the draft code which had taken place at the current session prompted questions that called for detailed consideration. For the past few days, the Commission had, for instance, been considering whether violations of the principle of the self-determination of peoples and nations should be included

in the list of crimes against peace. There was no need to recall the place of that fundamental principle in international life or its *jus cogens* character, both of which were confirmed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States<sup>21</sup> and in a number of other international instruments, including the Helsinki Final Act.<sup>22</sup> It was now said that the right of peoples to self-determination was a right that belonged to the third generation of human rights, and its exercise was rightly regarded as a prerequisite for the realization of those rights. In any event, the emergence of that principle had been the result of the efforts of mankind as a whole and it was no exaggeration to say that all peoples had contributed to it.

46. As the representative of the Soviet socialist legal system, he took pride in the role the USSR had played in developing that democratic and humanist idea and affirming it in international relations. Even before the October Revolution, Lenin had elaborated the economic, political and legal aspects of the principle of self-determination. As stated in the theses of the Central Committee of the Communist Party, the Soviet State had performed outstanding work of historic significance in affirming that principle, both in relations between the peoples of which the USSR was composed and in relations between States at the international level. The principle had, moreover, provided the basis in international law for decolonization, and the countries which had become independent had in turn played a vital role in its further elaboration and consolidation as one of the fundamentals of contemporary international law and international relations. Since reality was infinitely complex, the best norms could obviously not prevent the occurrence of certain specific problems which had to be taken into account: in the Soviet Union, problems in relations between nationalities were a direct legacy of Stalinism. Those problems would be settled democratically as part of the process of *perestroika*.

47. As stated in the United Nations special study on the right to self-determination,<sup>23</sup> the principle of self-determination exercised an influence on all, or virtually all, areas of international law. The question as to the need to include violations of that principle in the list of crimes against peace had been raised in the Commission. The suggestion was obviously legitimate. In his view, in order to define the relationship between the principle of self-determination and the future code, it was necessary first to have a good understanding of what was covered by self-determination. Mr. Arangio-Ruiz, in his two detailed statements (2053rd and 2060th meetings), had developed the idea—which he himself could only endorse—that self-determination had two aspects. The first and, as it were, external aspect, which could be defined in Lenin's words, "With whom do we want to live?", concerned the determination of frontiers on the basis of the free expression of the will of a territory's population. The second, internal aspect con-

<sup>21</sup> See footnote 18 above.

<sup>22</sup> See 2053rd meeting, footnote 15.

<sup>23</sup> *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, study prepared by A. Cristescu (United Nations publication, Sales No. E.80.XIV.3).

<sup>19</sup> See footnote 12 above.

<sup>20</sup> See footnote 13 above.

cerned the free choice by the people of each country of their social, cultural, ideological and other institutions. That idea went back a long time: in his book entitled "Territory in international law", published in 1958, he had quoted a commentary on the Charter of the United Nations whose authors had first adopted and then, during the cold war, dropped that interpretation of the principle of self-determination. In Soviet doctrine of international law, that interpretation was axiomatic. The two aspects had to be borne in mind in deciding where, and in what form, violations of the principle of self-determination could be included in the draft code.

48. Violations of the principle of self-determination took different forms and were specific in nature. It was therefore necessary to determine which violations gave rise to criminal responsibility under the draft code as crimes against the peace and security of mankind. The list of crimes against peace in draft article 11 as submitted by the Special Rapporteur in his sixth report (A/CN.4/411) already included a number of extremely serious violations of the principle of self-determination, such as colonialism, foreign domination, annexation, intervention and the use or threat of force against independence, etc. In particular, there was an obvious link between the external aspect of the principle and annexation, which it was proposed to include in the draft code and which already appeared in the 1974 Definition of Aggression.<sup>24</sup> In Soviet doctrine, the key element in the definition of annexation formulated by Lenin was precisely the violation of the right of peoples freely to decide their own destiny. That idea was also to be found in various normative instruments, such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and the Helsinki Final Act, as well as in the decisions of the ICJ.

49. Since the question of the relationship between self-determination and the principle of territorial integrity was already settled in international law, and in the texts he had cited in particular, he would merely point out that, although both principles had their own content, they none the less interacted with one another and were not mutually exclusive. For example, the principle of self-determination excluded neither the possibility of union within multinational States, nor the creation of two States out of a single nationality, nor the union of a people or part of a people with another people within a common State, nor, finally, secession. Indeed, the territorial integrity of the State should be founded on the self-determination of peoples. Similarly, the self-determination of peoples united within the framework of a national or multinational State was not possible if the principle of territorial integrity, which protected them against any external interference, was not observed. The Soviet Constitution was based on those principles and established no hierarchical order between them.

50. Intervention, too, was linked to violation of the principle of self-determination, but more to its internal aspect, since the purpose of intervention was to prevent

a people from freely choosing its economic and cultural destiny and way of life.

51. If the Commission adopted the viewpoint of those members who considered that violation of the principle of self-determination was not confined to the crimes listed in the draft code, it would have to proceed from definitions of acts constituting crimes that were not artificial and far-fetched but actually existed, being recognized in other instruments, and in particular in the decisions of the Nürnberg Tribunal. Failing that, it might enter into the realm of relations between peoples and Governments and come into direct conflict with the principle of non-intervention, which had a place in the draft code.

52. Lastly, he considered that, when defining the crimes to be included in the draft code, the Commission should spell out the link between certain crimes and the principle of self-determination. He therefore proposed that a kind of saving clause be added to draft article 11 to indicate that violations of the principle of self-determination were related to the various crimes covered by the code.

53. The CHAIRMAN invited the Special Rapporteur to sum up the discussion.

54. Mr. THIAM (Special Rapporteur) thanked all the members of the Commission for their comments, which he would take fully into account. The present topic was like a capricious and elusive animal and the Commission had to beware of all its traps and tricks, which included abstraction and generalities; vague and ambiguous concepts, such as self-determination, which were borrowed from political discourse and therefore defied analysis or codification; and the over-ambitiousness to which Utopian reverie could lead.

55. Those were the reasons why he had suggested at the very start that the Commission should concern itself with specific problems and delimit the scope of the topic *ratione materiae* by including only the most serious crimes—those so odious and barbarous that they affected the very foundations of human civilization—and *ratione personae* by taking account only of the criminal responsibility of the individual, the responsibility of the State remaining for the moment purely hypothetical. The distinction between private individuals and authorities of the State could be left aside, since the principle of the criminal responsibility of individuals covered all eventualities, whether the individual had acted as a private citizen or as an authority of the State. The text would only be needlessly overburdened if the words "An individual who . . ." were repeated in each article: once the principle—the fundamental principle, as Mr. Al-Khasawneh had pointed out—of the criminal responsibility of the individual had been laid down, nothing more needed to be added.

56. Some members of the Commission, for example Mr. Calero Rodrigues (2053rd meeting), had questioned whether the text of the 1974 Definition of Aggression had to be reproduced in the provision on aggression and had expressed a preference for dealing with each of the acts constituting aggression in separate articles. In his own view, such an approach would not be logical, since

<sup>24</sup> See footnote 13 above.

the Commission had waited 30 years for a definition of aggression to be adopted before continuing its work on the draft code. The Definition now existed and it must be duly taken into account. Like many members of the Commission, moreover, he believed the combination of a general definition with a list of acts constituting aggression was entirely justified: since the topic was a relatively new one, it was appropriate to illustrate the definition by specific acts, in keeping with the practice in criminal law.

57. Mr. Reuter (2054th meeting) and Mr. Mahiou (2060th meeting) had raised another question: whether, for the purposes of the code, there had to be a finding by the Security Council that an act of aggression had been committed. Opinions differed on that point. Mr. Beesley (2055th meeting) took the view that the court which had jurisdiction should be left free to institute proceedings, even if there had been no finding of aggression by the Security Council, while Mr. Arangio-Ruiz (2060th meeting) held the opposite view. Stated in different terms, the problem was whether action by a court of law, which was—by definition—*independent*, should be subordinated to the decision of a political body. He believed that, if the question were answered in the affirmative, any attempt to characterize aggression as a crime under the draft code might just as well be abandoned. In most of the cases brought before it, the Security Council either was unable expressly to determine that an act of aggression had been committed because one of its permanent members exercised its right of veto, or it refrained from doing so for political reasons. As Mr. Al-Khasawneh had pointed out, the legal sphere must be separated from the political.

58. The question had also been raised as to whether national courts should have jurisdiction in cases involving acts of aggression. Clearly, if the court before which such a case was brought was in the State which had been the victim of the act of aggression, its ruling could hardly be impartial. In that light, Mr. Beesley's proposal (2059th meeting, para. 30) for the establishment of a mixed court, comprising judges from a number of States, should be given further consideration.

59. He was aware that all members of the Commission were in favour of the inclusion of preparation of aggression in the draft code, but he had raised the question because doctrine was not consistent on that point. At Nürnberg, the United States Judge Francis Biddle had taken the view that preparation of aggression should not be treated as a crime. The matter was a complex one indeed, as shown by the example given by Mr. Barboza (2056th meeting) of an act of aggression prepared and carried out by two different individuals or two different groups. Should preparation of aggression then be construed as a form of complicity? The problem then was that the concept of complicity did not have the same scope under all legal systems. If preparation of aggression was to be included in the draft code, it would be necessary, as Mr. Yankov (2058th meeting) had pointed out, to indicate which acts constituted aggression, if only to ensure that it could not serve as a pretext for counter-aggression. Similarly, should a State which, after having prepared to commit aggression, decided, for its own reasons, not to carry out the act be pros-

ecuted? Those might well be questions of fact that would have to be left to the judge of the competent court to decide in each particular case.

60. He agreed that the term "threat" was used differently in paragraph 2 of draft article 11 than in Article 2, paragraph 4, of the Charter of the United Nations, but thought that the Charter nevertheless covered threat in the sense of a word or an act aimed at exercising coercion. The question as to where threat ended and preparation began, for the purposes of the draft code, was an extremely delicate one, even though it did appear that the threat of aggression, as a form of pressure, could be distinguished from preparation. That was, in any event, another question of specific fact that would have to be decided by the competent court in each particular case.

61. He agreed with Mr. Roucounas (2057th meeting) that, under the draft code, the commission of an act of annexation must not be made contingent upon the use of force: history showed that annexation could be achieved through threats, pressure and other means not requiring the use of force.

62. As to intervention in the affairs of another State, it had only been for the purposes of the discussion that he had drawn a distinction between lawful and unlawful intervention, as the ICJ had done in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17), and it would be noted that the distinction had not been drawn in draft article 11 itself. He agreed with Mr. Díaz González and Mr. Sepúlveda Gutiérrez (2059th meeting) that it would be difficult to restrict the content of the concept of intervention to armed intervention, as Mr. McCaffrey (2054th meeting) would like. The term "coercion" which he used in the first alternative of paragraph 3 of article 11 did, in fact, have some merit.

63. Although the members of the Commission all agreed that terrorism should be included among the crimes covered by the draft code, the text he had proposed had been criticized on two counts. The first criticism, which had been formulated by Mr. Mahiou, among others, was that the text reproduced the wording of an instrument adopted long ago, the 1937 Convention for the Prevention and Punishment of Terrorism. In his own view, that criticism was not justified, first because the 1937 Convention covered nearly all possible cases and even the means that might be used to commit terrorist acts, and secondly because he had taken care to supplement its provisions to take account of new forms of terrorism. The second criticism was that the text he had proposed applied to acts such as damage to public property that were not serious enough to constitute crimes under the draft code. In his view, it was not the magnitude of the harm, but the complicity, involvement or participation of a State which should determine that an act would be characterized as terrorist. As Mr. Bennouna (2057th meeting) had pointed out, the involvement of a State was the decisive criterion. In his third report on the present topic, he had made the following comment with regard to international terrorism:

... It is characterized and given an international dimension by State participation in its conception, inspiration or execution. . . .

...

For the purposes of the present draft, any definition of terrorism must highlight its international character, which is linked to the nature of the targets, in this case States. . . .<sup>25</sup>

Acts of terrorism committed by private individuals were covered by the draft code only if a State was implicated as an accessory, participant or accomplice; otherwise, they were covered by ordinary law.

64. A distinction could not be drawn between "good" and "bad" terrorism. Although there might be cases, such as national liberation struggles, in which terrorism was intended to achieve lawful ends, it was the lawfulness of the means used that counted for the purposes of the draft code. Terrorism *per se*, which usually struck innocent victims, could not be justified by any cause, however legitimate.

65. Replying to Mr. Reuter (2056th meeting) and Mr. Ogiso (2057th meeting), who had advocated applying the criterion of gravity to breaches of the obligations of States under treaties designed to ensure international peace and security, he said that the element of gravity was inherent in the very commission of such breaches. In such instances as well, however, questions of fact would have to be decided. As Mr. Tomuschat (2056th meeting) had pointed out, no one would reproach a State for reducing the size of its arsenal, even if, in so doing, it was going against the terms of a disarmament treaty. He would have no objection if paragraphs 4 and 5 of draft article 11 were combined: he had separated them because the first reproduced almost verbatim a provision contained in the 1954 draft code, while the second dealt with new situations.

66. Members of the Commission were divided into three camps in their views on colonial domination: Mr. Tomuschat, Mr. Sreenivasa Rao, Mr. Njenga and Mr. Razafindralambo preferred the first alternative of paragraph 6 of article 11; Mr. Ogiso, Mr. Shi, Mr. Sepúlveda Gutiérrez and Mr. Hayes preferred the second; and Mr. Reuter, Mr. Francis, Mr. Bennouna, Mr. Barsegov and Mr. Díaz González believed that the two alternatives should be combined. He would not have any objection to the latter approach so long as two separate paragraphs were retained: even if it was now part of history, colonial domination had affected a great many countries, and on those grounds it deserved to be covered in a separate paragraph.

67. The question of self-determination had been raised in connection with the provision on colonial domination. In his view, "self-determination" was a term that referred to a principle and, as such, it had no place in a criminal-law text providing for penalties. Because that term had so many connotations, it could only hamper progress on the drafting of the code, which dealt with self-determination in international relations—in other words, with non-intervention in the internal affairs of States—but not with the right to self-determination of peoples within States. As Mr. Francis (2054th meeting), Mr. Njenga (2057th meeting) and Mr.

Koroma (2060th meeting) had pointed out, there would be enormous problems if internal situations were covered: the African countries, in particular, would be unable to accept such an approach, as they had established the principle of the unalterability of frontiers in order to combat centrifugal tendencies caused by the existence of so many different ethnic groups.

68. Turning to the concept of preparation of aggression, which Mr. Graefrath (2055th meeting) had asked to have included in the draft code, he said he believed that it was too early to take a decision on that point. He had dealt with the question in this third report,<sup>26</sup> in analysing the concept of conspiracy, which, he had noted, involved the idea of collective responsibility, which was far from being accepted by all legal systems. The Nürnberg Tribunal had applied the concept to crimes against peace, but had refused to apply it to crimes against humanity and war crimes. The Commission should wait until it had considered crimes against humanity before taking a stand on the matter.

69. Mr. Mahiou's proposal that the expulsion of populations from their territories should be treated as a crime was an interesting one, but he was not sure whether such expulsion was a crime against peace or a crime against humanity. The idea could certainly be taken up at the next session, during the consideration of crimes against humanity.

70. Lastly, the Drafting Committee should take account of all the drafting suggestions that had been made.

71. Mr. KOROMA said that, although it was unfortunate that he had been unable to speak before the Special Rapporteur had summed up the discussion, he had no fundamental disagreement with the Special Rapporteur, who had in fact referred to most of the points he himself had intended to raise. The discussion might have been more productive if each of the crimes had been considered separately, but members had still been able to make whatever comments they had deemed necessary. Like many others, he would have preferred, for historical and other reasons, that annexation be dealt with as a separate crime: the Special Rapporteur appeared to have forgotten to comment on that suggestion in the statement he had just made.

72. The productive debate, ranging over problems such as the use of force, aggression, massive violations of human rights and the denial of the right of peoples to self-determination, which characterized the current international situation, had shown how relevant the topic was and had made it clear that the Commission should continue its work on the draft code.

73. Mr. THIAM (Special Rapporteur) said he had indicated that annexation would be covered by a separate provision.

74. The CHAIRMAN said that differences of opinion on draft article 11 related exclusively to form and not to content and he therefore suggested that the text, together with the comments made by members of the Commission and by the Special Rapporteur in his

<sup>25</sup> *Yearbook . . . 1985*, vol. II (Part One), pp. 77-79, document A/CN.4/387, paras. 126 and 142.

<sup>26</sup> *Ibid.*, pp. 73-75, paras. 93-105.

summing-up of the discussion, be referred to the Drafting Committee. If there were no objections, he would take it that the Commission agreed to refer draft article 11 to the Drafting Committee.

*It was so agreed.*<sup>27</sup>

75. Mr. McCAFFREY, recalling that the Commission had decided in principle not to refer draft articles to the Drafting Committee prematurely, said that he had some reservations about the advisability of referring to the Committee the provisions of draft article 11 relating to mercenarism and terrorism, as well as paragraphs 4 and 5.

76. The CHAIRMAN said that the Drafting Committee would take Mr. McCaffrey's reservations into account.

*The meeting rose at 1.05 p.m.*

<sup>27</sup> See draft articles 11 and 12 as proposed by the Drafting Committee (2084th meeting, paras. 68 *et seq.*, and 2085th meeting, paras. 23 *et seq.*).

## 2062nd MEETING

*Wednesday, 15 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*later:* Mr. Bernhard GRAEFRATH

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

1. The CHAIRMAN announced that, in the week of 6 to 10 June 1988, the Commission had used 100 per cent of the conference servicing time allotted to it.

**The law of the non-navigational uses of international watercourses (continued)\* (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)**

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

\* Resumed from the 2052nd meeting.

<sup>1</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

PART V OF THE DRAFT ARTICLES:

ARTICLES 16 [17] TO 18 [19]

2. The CHAIRMAN invited the Special Rapporteur to introduce chapter III of his fourth report (A/CN.4/412 and Add.1 and 2), containing draft articles 16 [17], 17 [18] and 18 [19],<sup>3</sup> which read:

### PART V. ENVIRONMENTAL PROTECTION, POLLUTION AND RELATED MATTERS

*Article 16 [17]. Pollution of international watercourse[s] [systems]*

1. As used in these articles, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct and which produces effects detrimental to human health or safety, to the use of the waters for any beneficial purpose or to the conservation or protection of the environment.

2. Watercourse States shall not cause or permit the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system].

3. At the request of any watercourse State, the watercourse States concerned shall consult with a view to preparing and approving lists of substances or species the introduction of which into the waters of the international watercourse [system] is to be prohibited, limited, investigated or monitored, as appropriate.

*Article 17 [18]. Protection of the environment of  
international watercourse[s] [systems]*

1. Watercourse States shall, individually and in co-operation, take all reasonable measures to protect the environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas, from impairment, degradation or destruction, or serious danger thereof, due to activities within their territories.

2. Watercourse States shall, individually or jointly and on an equitable basis, take all measures necessary, including preventive, corrective and control measures, to protect the marine environment, including estuarine areas and marine life, from any impairment, degradation or destruction, or serious danger thereof, occasioned through an international watercourse [system].

*Article 18 [19]. Pollution or environmental emergencies*

1. As used in this article, "pollution or environmental emergency" means any situation affecting an international watercourse [system] which poses a serious and immediate threat to health, life, property or water resources.

2. If a condition or incident affecting an international watercourse [system] results in a pollution or environmental emergency, the watercourse State within whose territory the condition or incident has occurred shall forthwith notify all potentially affected watercourse States, as well as any competent international organization, of the emergency and provide them with all available data and information relevant to the emergency.

3. The watercourse State within whose territory the condition or incident has occurred shall take immediate action to prevent, neutralize or mitigate the danger or damage to other watercourse States resulting therefrom.

3. Mr. McCAFFREY (Special Rapporteur) said that chapter III of his fourth report (A/CN.4/412 and Add.1 and 2) dealt with environmental protection, pollution and related matters.

<sup>3</sup> The numbers originally assigned to the articles appear in square brackets.

4. Referring to the part of the chapter devoted to background material, he noted that one of the Commission's most important functions was to help crystallize the thinking of the international community on certain subjects of current importance, in the light of rapidly changing international circumstances and the increased interdependence of nations and peoples. In *The Global 2000 Report*, a study prepared by the United States Council on Environmental Quality and quoted in his report (*ibid.*, para. 34), it was estimated that there would be a fivefold increase in the demand for water by the year 2000. When juxtaposed with the evidence that the amount of water on Earth was constant and could never be increased, that estimate gave cause for alarm and underlined the need to conserve water supplies, both quantitatively and qualitatively—a need that had been recognized by UNEP in its study entitled “The environmental perspective to the year 2000 and beyond”.<sup>4</sup> One of the conclusions of that study was that mankind must conserve the Earth's resources in order to permit sustainable development, and that development was sustainable when it met the needs of the present without compromising the ability of future generations to meet theirs. In other words, the Earth's future must not be mortgaged in order to realize present gains.

5. The interest of States in protecting fresh water quality was demonstrated in numerous international agreements, only a few of which were mentioned in the report (*ibid.*, paras. 39 *et seq.*). In those agreements, it was possible to discern an evolution in the approach of States to the question of pollution. The earliest approach had been to ban pollution outright, often in order to protect fisheries. The 1904 Convention between France and Switzerland for the regulation of fishing in their frontier waters (*ibid.*, para. 40) had prohibited the discharge into the water of “any waste or substances that may be harmful to fish”. Thus even the earlier agreements had set water quality standards and provided for means of measuring the amount of pollution that was permissible: in the 1904 Convention, the standard adopted had been anything that was “harmful to fish”.

6. Perhaps because man's capacity to pollute had increased tremendously, the more recent agreements defined water quality standards with reference to objective criteria, established water quality objectives, or actually regulated the discharge of various types of pollutants. An example of a recent agreement classifying pollutants on the basis of their harmful effects and regulating their discharge accordingly was the 1976 Convention on the Protection of the Rhine against Chemical Pollution (*ibid.*, para. 44), which contained a “black list” of dangerous substances whose discharge into the Rhine was to be eliminated, and a “grey list” of less dangerous substances whose discharge was to be reduced.

7. Other agreements adopted a different approach, requiring consultation with, or approval of, the parties or a joint commission before any action was taken that would alter water quality. The use of joint commissions had been particularly successful, and in some cases they

were empowered to elaborate and implement general standards on pollution. A number of recent agreements went even further than the regulation of pollution and took very well defined steps to protect the environment: one example was the 1975 Statute of the Uruguay River, cited in the report (*ibid.*, paras. 40, 45 and 46).

8. A problem now becoming quite serious was that of pollution of the marine environment via international watercourses, and provisions to remedy it had been incorporated in the 1982 United Nations Convention on the Law of the Sea, as well as in a number of regional conventions cited in the report (*ibid.*, footnote 107) of his report. The recent news story about a floating slime mass in the North Sea attributed to agricultural runoffs and waste carried by rivers, which had killed thousands of fish and a great many seals, was a dramatic example of the problem of pollution of the marine environment via international watercourses.

9. In his report (*ibid.*, paras. 49-59), he had reviewed recent action by international non-governmental and intergovernmental organizations. As the material was voluminous he would not dwell on the subject, but only draw attention to the fundamental principle of harmless use of territory laid down in Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (*ibid.*, para. 55), and to the set of principles adopted by ECE in 1987 relating to co-operation in the field of transboundary waters (*ibid.*, para. 56). ECE principle 1 used language almost identical with that of Principle 21 of the Stockholm Declaration, thereby attesting to the broad acceptance of that principle; it provided that States must ensure that activities carried out within their territory did not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction. ECE principle 8 (*d*) called attention to the importance of controlling the release of hazardous substances. A number of more recent instruments also focused on toxic substances, either banning their release or providing that measures must be taken to eliminate them rapidly following their release into the aquatic environment.

10. He had also referred in his report (paras. 60-79) to a number of studies prepared by international intergovernmental and non-governmental organizations. They included studies on the pollution of international watercourses recently prepared by the Institute of International Law, the International Law Association, and the Experts Group on Environmental Law of the World Commission on Environment and Development, otherwise known as the “Brundtland Commission”.

11. Recent works by individual experts, cited in his report (*ibid.*, footnote 167), confirmed the existence of an international legal obligation to use the waters of international watercourses so as not to cause “appreciable”, “substantial”, “significant” or “sensible” harm to other watercourse States, and some commentators had even found that there was an obligation not to harm the environment of other States. The writers often used decisions by international courts and tribunals as the starting point for their analysis. The *Corfu Channel* case (*ibid.*, para. 83), in which the ICJ had referred to “every State's obligation not to allow

<sup>4</sup> General Assembly resolution 42/186 of 11 December 1987, annex.

knowingly its territory to be used for acts contrary to the rights of other States”, was often cited. In the *Lake Lanoux* case (*ibid.*, para. 84), the tribunal had recognized in *dicta*, not in a holding, a rule “prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State”. A similar principle had been announced by the arbitral tribunal in the *Trail Smelter* case (*ibid.*, para. 85). The *Gut Dam* case, involving Canada and the United States of America (*ibid.*, para. 86), could be taken as an instance of State practice in which the “State of origin” had recognized an obligation to provide compensation for transfrontier harm resulting from its use of an international watercourse. The *Poplar River* negotiations (*ibid.*, para. 87) had shown how two States could resolve, in a mutually satisfactory manner, the problem of the possibly injurious activity of a generating station before the station even began to operate.

12. In general, the background materials he had surveyed illustrated the long-standing concern of States about the pollution of international watercourses and showed that modern agreements recognized the intimate relationship between nature and mankind by providing for measures to safeguard the natural environment and ensure sustainable development.

13. Referring to the three draft articles submitted in his fourth report (see para. 2 above), he suggested that draft article 18 [19] should not be discussed extensively at the current session, since he would submit a new article entirely devoted to water-related hazards and dangers in a report to the next session. As for the other two draft articles, article 16 [17] set out the basic obligations of States with regard to pollution and article 17 [18] dealt with environmental protection.

14. Paragraph 1 of article 16 proposed a definition of pollution which might ultimately be incorporated in an introductory article with other definitions. The definition concentrated on the notion of alteration in the composition or quality of waters that resulted from human conduct and produced harmful effects. Paragraph 2 was the core of the article and represented a specific application of the principle of “no appreciable harm” contained in draft article 9, which had been referred to the Drafting Committee in 1984.<sup>5</sup> Paragraph 2 did not prohibit all pollution, only that which caused appreciable harm. As explained in paragraph (4) of his comments on article 16, “appreciable harm” was harm that was significant, in other words not trivial or inconsequential, but less than “substantial”. The term “harm” was used in the factual sense to mean actual impairment of use, injury to health or property or a detrimental effect on the ecology of the watercourse. The word “harm” had been preferred to “injury”, which had a number of additional legal connotations.

15. In paragraphs (6) *et seq.* of the comments, he explained that the obligation set out in paragraph 2 was not intended to be one of strict liability, but rather of due diligence: the duty to see that appreciable harm was not caused to other watercourse States or to the ecology

of an international watercourse system. That concept was flexible and took account of practical realities and difficulties in controlling pollution, yet provided adequate protection for States affected by transfrontier water pollution. The vigilance of States, which was implicit in the requirement of due diligence, must be adapted to individual circumstances and depended on the extent to which the State could exercise effective control over its territory. In that sense, there was a parallel with the work on international liability for injurious consequences arising out of acts not prohibited by international law, since States which had no means of knowing what was happening in every part of their territory should not be penalized.

16. The obligation of due diligence raised the question whether a distinction should be made, as it was in some instruments, between existing pollution and new pollution. For the reasons set out in his report (A/CN.4/412 and Add.1 and 2, footnote 229), he did not think that would be useful for the purposes of controlling the pollution of international watercourses, and therefore did not propose that any such distinction should be made in the draft article. The modern trend in treaty practice seemed to be to distinguish between different pollutants by their harmfulness and to regulate their discharge accordingly.

17. The other issue that must be raised was the relationship of the obligation under article 16, paragraph 2, to the rule of equitable utilization stated in article 6, provisionally adopted by the Commission at its thirtieth session.<sup>6</sup> As he pointed out in paragraph (13) of his comments to article 16, water uses that caused appreciable pollution harm to other watercourse States and to the environment could well be regarded as being *per se* inequitable and unreasonable. The Commission would therefore be best advised to show its recognition of the importance of the prevention of pollution and environmental protection by adopting a rule of “no appreciable pollution harm” that was not qualified by the principle of equitable and reasonable utilization.

18. Paragraph 2 of article 16 also provided that watercourse States should not “cause or permit” the pollution of an international watercourse in such a manner as to produce the effects identified in paragraph 1. That meant that the State was obligated not only to refrain from causing the specified harm itself, but also to prevent its agencies or instrumentalities, as well as private parties within its territory or under its control, from causing such harm. The matter of the effect of pollution on the ecology of the watercourse was discussed in paragraph (18) of the comments. The need for a provision on protection of the ecology was borne out by the interrelationship between environmental protection and sustainable development, to which he had referred earlier.

19. Paragraph 3 was intended to reflect the emphasis placed in most recent international agreements on hazardous or dangerous substances, and the growing practice of States of preparing lists of substances that were to be banned, severely restricted or monitored. In

<sup>5</sup> See *Yearbook . . . 1987*, vol. II (Part Two), p. 23, footnote 80.

<sup>6</sup> See 2050th meeting, footnote 3.

that connection, he drew attention to the "List of selected environmentally harmful chemical substances, processes and phenomena of global significance", established by UNEP, which might be helpful (*ibid.*, footnote 253).

20. Draft article 17 concerned the protection of the environment of international watercourses, a subject which members would recognize as being of tremendous importance. As indicated in paragraph (3) of the comments to that article, such protection was most effectively achieved through individual and joint régimes specifically designed for that purpose. Unlike the previous special rapporteurs, he did not propose that watercourse States be required to adopt such measures and régimes, but the Commission might wish to consider adding such a provision.

21. Paragraph 2 addressed the important problem of pollution of the marine environment. As stated in paragraph (6) of the comments, it was important to note that the obligation set out in paragraph 2 was distinct from other obligations concerning pollution of international watercourses and protection of their environments.

22. Draft article 18 concerned pollution or environmental emergencies and addressed the kind of emergency situation that resulted from serious incidents, such as a toxic chemical spill or the sudden spread of a water-borne disease. Paragraph 1 gave a definition, and paragraph 2 required the State within whose territory such an incident had occurred to notify all potentially affected watercourse States. There was ample precedent for that requirement in the 1982 United Nations Convention on the Law of the Sea and in the 1986 Convention on Early Notification of a Nuclear Accident, both of which were quoted in paragraph (3) of the comments. Since watercourse States often established joint commissions or other competent international organizations, provision for notification of such organizations was made in paragraph 2.

23. Paragraph (5) of the comments referred to two subjects on which the Commission might wish to consider adding provisions to article 18, namely, joint preparation and implementation of contingency plans and the extent to which third States should be required to take remedial action. In keeping with his spare approach to the topic, he had not included such provisions, but he would not be averse to doing so.

24. As stated in the report (*ibid.*, para 90), the compact treatment of the subject of environmental protection and pollution in the draft articles in no way reflected a judgment that it lacked importance, but was an effort to concentrate on those areas that were most firmly rooted in State practice or for which there was especially compelling authority. He had referred to other subjects whose coverage in the draft articles would be desirable (*ibid.*, para. 91), concerning which he would welcome members' comments.

25. Regarding the organization of the Commission's debate, he suggested that draft articles 16, 17 and 18 should be discussed one at a time. He would not propose the referral of article 18 to the Drafting Commit-

tee, however, since he believed it would be more effective to incorporate it in a general article on water-related hazards and dangers, to be submitted in his next report. He would welcome members' comments on whether article 18 sufficiently covered the subject of emergencies.

26. Mr. BARBOZA said that because his remarks were of a preliminary nature, he would not follow the Special Rapporteur's suggestion and would discuss draft articles 16, 17 and 18 together. Chapter III of the report was broader in scope than the other chapters, which dealt only with the rights and duties of States parties to a treaty and, especially, of States sharing the same watercourse system. In that context it would be inadvisable to omit the word "system" when referring to such relations.

27. Article 16, paragraph 1, contained a sound definition of the term "pollution", which included the idea of thermal pollution, as the Special Rapporteur observed in paragraph (2) of his comments. But since, according to that definition, pollution resulted directly or indirectly from human conduct, he wondered whether it included natural causes of pollution of a watercourse. The State of origin had an obligation to prevent the passage of the pollution to another State, whatever its cause, and the duty of due diligence should apply to pollution by natural causes as well as to pollution due to the action of private individuals.

28. He agreed with the Special Rapporteur's view, expressed in paragraph (6) of his comments, that the liability of the State of origin was not a strict liability. The activity referred to was not a dangerous activity, in other words, one creating a risk of pollution, but a harmful activity, because if permitted it would certainly cause pollution above the threshold of tolerance. The State would therefore know of the pollution, or should know of it, and the passage quoted at the end of paragraph (6) of the comments rightly stated that there was violation of the obligation of due care only if the public organs of the State knew or "should have known" that certain conduct would give rise to inadmissible transfrontier water pollution. The word "should" indicated a value judgment to the effect that the State should give priority to ascertaining the result of certain activities and hence to obtaining the means to do so. That situation differed from the one covered by article 3 of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law,<sup>7</sup> the topic for which he was the Special Rapporteur, in that it concerned the harmful effects of an activity whose existence was easy to establish.

29. Paragraph 2 of article 16 prohibited the causing or permitting of the pollution of an international watercourse or its ecology; and paragraph 3 referred to the preparation of lists of substances or species to be prohibited. As he himself had found in the case of his own topic, the Special Rapporteur had found that it was not feasible to include such lists in a general convention and had left their preparation to a subsequent stage, as an obligation of the watercourse States at the request of one of them.

<sup>7</sup> See 2044th meeting, para. 13.

30. Article 17, in both paragraphs, established a duty of due diligence for States, both individually and in co-operation. Again, the liability was not strict, since it arose from failure in the duty of due diligence. But the question arose who held the subjective right corresponding to the obligation to exercise due diligence where the ecology of a watercourse was concerned. In other words, which was the State that was harmed within the meaning of article 5 of part 2 of the draft articles on State responsibility?<sup>8</sup> Perhaps article 17 could be interpreted as meaning that any State of the watercourse system which was a party to the proposed treaty could take action against the polluter, even though it was not directly harmed, for instance in the case of pollution outside its territory.

31. The words “or serious danger thereof”, in both paragraphs, should be analysed. The obligation established in article 17 appeared to be one of prevention of a result, corresponding to article 23 of part 1 of the draft articles on State responsibility;<sup>9</sup> and the phrase “all reasonable measures” appeared to leave the means of preventing that result to the choice of the State having the obligation. The situation might be different if article 17 had referred to “internationally accepted standards”.

32. Article 17 established an obligation for watercourse States to protect the environment of an international watercourse (para. 1) and the marine environment (para. 2) “from any impairment, degradation or destruction, or serious danger thereof”. The article thus placed a “serious danger” of impairment, degradation or destruction on exactly the same plane as their actual occurrence. In other words, watercourse States would be required to take measures to prevent not only impairment, degradation or destruction, but also the creation of a “serious danger thereof”.

33. A watercourse State would thus be placed in a very strange position. If it wished to avoid responsibility, it would have either to take measures that would totally prevent the creation of a “serious danger” or to prohibit the dangerous activity concerned altogether. The first course would be extremely difficult, for the State concerned might be obliged to prohibit all dangerous activities—a result which he did not believe the Special Rapporteur had intended.

34. Paragraph 2 of article 17 was much too broad. It could perhaps be read as also covering the marine environment within the jurisdiction of the affected State. That State, however, did not need the protection of article 17, because the part of the watercourse running through its territory would be polluted first and the marine environment only afterwards. Paragraph 2 would thus be establishing a protection for that State against itself. Could a State have an international obligation to prevent the pollution of its own watercourses in order to avoid pollution of its own marine environment?

35. Clearly, paragraph 2 of article 17 had a different purpose, which was to protect the marine environment

against pollution from a downstream riparian State whose section of the watercourse flowed into the sea. It was a well-known fact that a major part of the pollution of the marine environment came from rivers. Provisions on the subject had already been adopted in article 194 of the 1982 United Nations Convention on the Law of the Sea.

36. Among the sources cited by the Special Rapporteur in support of article 17, he noted, in paragraph (2) of the comments, the passage from the third report by Mr. Schwebel to the effect that there had emerged “a normative principle making protection of the environment a universal duty even in the absence of agreement”. In the same paragraph, the Special Rapporteur quoted a passage from the *Restatement of the Law, Foreign Relations Law of the United States (Revised)*, by the American Law Institute, which would make a State “responsible to all other States” for any violation of its obligations with respect to the environment and for any significant injury resulting from such violation. By including those quotations, the Special Rapporteur seemed to suggest that the obligations set out in article 17 should have an *erga omnes* effect in general international law. He had not, however, adduced much legal material in support of that view, except the provisions on protection of the marine environment in the 1982 United Nations Convention on the Law of the Sea, which did not appear to establish *erga omnes* obligations.

37. If a right of action were to be granted to “all other States” in the event of a violation of the obligations relating to the environment, the effect would be to attach to that violation one of the consequences of an international crime, namely, the right for all the States of the international community to consider themselves affected. That result could perhaps be admitted in the situation envisaged in paragraph 3 (d) of article 19 of part 1 of the draft articles on State responsibility,<sup>10</sup> which referred to “massive pollution of the atmosphere or of the seas”; but it would not be acceptable in regard to “appreciable harm”.

38. Moreover, recognition of an *erga omnes* obligation would mean that a State accepting the instrument resulting from the draft articles would not be able to refuse to supply information requested by any State in the world concerning pollution at the mouth of a watercourse in its territory. He himself would have no objection to such a comprehensive measure of protection of the marine environment, but he seriously doubted whether it was feasible to propose it at the present time.

39. He had no comments at the present stage on article 18, which, in its broad lines, was consistent with the terms of the 1986 Convention on Early Notification of a Nuclear Accident and the relevant provisions of the 1982 United Nations Convention on the Law of the Sea.

*Mr. Graefrath, First Vice-Chairman, took the Chair.*

40. Mr. McCaffrey (Special Rapporteur) said he would reply briefly to Mr. Barboza’s question about pollution by natural phenomena. It had not been his in-

<sup>8</sup> See *Yearbook . . . 1986*, vol. II (Part Two), p. 39.

<sup>9</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 32.

<sup>10</sup> *Ibid.*

tention that article 16 should cover that situation. Under article 18, however, a State would be under the obligation to notify other watercourse States and to take appropriate measures of protection to prevent further harm. It should be noted that pollution due to cattle was the result of a human activity and not a natural phenomenon; that type of pollution would be covered by article 16.

41. Mr. Barboza had also raised the question of the possible *erga omnes* effect of the provisions of article 17 and of their relationship with the provisions of articles 21 and 23 of part 1 of the draft articles on State responsibility. In reply, he drew attention to paragraph (6) of his comments on article 16, to the effect that there was no intention to establish a régime of strict liability, but rather "one of due diligence to see that appreciable harm is not caused to other watercourse States".

42. Nor was there any intention to give an *erga omnes* effect to the obligations under article 17. In that regard, he drew attention to article 5 of part 2 of the draft articles on State responsibility, which defined the term "injured State" for the purposes of those articles. In that definition, the term "injured State" was said to cover, *inter alia*, a State party to the treaty which had been violated, where the obligation was expressly stipulated "for the protection of the collective interests of the States parties". The concept of "collective interests" was not clearly defined, but the idea embodied in paragraph 2 (e) (iii) of article 5 of part 2 of those draft articles was in clear contradistinction from that in article 19 of part 1 of that draft. He himself drew a very sharp distinction between the level of responsibility envisaged in his proposed article 17 and that contemplated in the aforementioned article 19. The obligations which flowed from the two provisions were entirely different. Those under article 19 on State responsibility had an *erga omnes* effect, but those under draft article 17 now under discussion certainly did not. Article 17 imposed an obligation akin to that under article 5 of part 2 of the draft articles on State responsibility, in which the focus was on collective interests.

43. Mr. YANKOV asked the Special Rapporteur whether the protection against pollution as defined in paragraph 1 of article 16 was intended also to cover the protection of natural amenities. He also wished to know whether pollution by radioactivity was covered.

44. Mr. McCaffrey (Special Rapporteur) said that the reference at the end of paragraph 1 of article 16 to "the conservation or protection of the environment" would seem to cover natural amenities in the broad sense. Admittedly, it was not altogether clear to what extent those amenities would be protected. Some clarification could be introduced in the commentary.

45. On the second question, he thought that the reference to "any physical, chemical or biological alteration" covered pollution by radioactivity. The commentary could explain that point, but consideration might also be given to introducing the words "substances or energy" in the text of article 16 at an appropriate place.

46. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 11.40 a.m.*

## 2063rd MEETING

*Thursday, 16 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)**

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)<sup>3</sup> (*continued*)

1. Mr. CALERO RODRIGUES said that he hesitated to speak at such an early stage of the discussion on draft article 16, since he disagreed with the Special Rapporteur on some points and had doubts with regard to the article. While sharing the view that pollution was the most serious problem arising in connection with international watercourses, he did not attach the same importance to the article as did the Special Rapporteur and some other members of the Commission. In his view, a single article on pollution was either too little or too much: too little if the Commission intended to develop rules on pollution, and too much if it considered that pollution was not different from other causes of harm.

2. As it stood, article 16 contained a definition (para. 1) and two rules (paras. 2 and 3). The definition, unlike those proposed by the previous special rap-

<sup>1</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>3</sup> For the texts, see 2062nd meeting, para. 2.

porteurs, did not indicate that "alteration in the composition or quality of the waters" was the result of the introduction by man of certain substances or elements in those waters. Consequently the provision applied also to those cases where alteration was the result of the withdrawal of certain substances. For example, the construction of the Aswan Dam had meant that certain elements which had fertilized lands downstream of the dam were no longer carried down the Nile, with the result that crops, as well as Mediterranean fishing, had suffered. It would therefore be better if the notion of introduction were reinstated, making the definition less broad; the formulation suggested by the Special Rapporteur in his report (A/CN.4/412 and Add.1 and 2, footnote 207) might be used for that purpose.

3. Paragraph 2 of article 16 set forth the obligation not to cause appreciable harm to other watercourse States or to the ecology of the watercourse. That obligation already appeared, as regarded other States, in article 8, and as regarded the ecology of the watercourse, in article 6 and article 7, paragraph 1 (e). Thus the paragraph merely reaffirmed the obligation not to cause appreciable harm, and he wondered whether, if pollution was to be treated separately from other causes of harm, it should not receive rather fuller treatment. It would be noted that the Special Rapporteur envisaged drafting some additional articles.

4. In paragraph (6) of his comments, the Special Rapporteur said that the intention was not that the State in which the pollution originated should be held liable for any appreciable harm caused by that pollution, but simply to affirm the obligation to exercise due diligence. Personally, he did not think that was sufficient and remained unconvinced by the explanations drawn from the work of Pierre Dupuy and Johan G. Lammers. The exercise of due diligence might limit, but did not exclude, liability. As in the case of injurious consequences arising out of acts not prohibited by international law, anyone whose polluting activity caused appreciable harm should incur liability for that harm even if he had exercised due diligence.

5. In paragraph (13) of the comments, the Special Rapporteur, discussing the question of the relationship between harm and equitable utilization, concluded that the exception of equitable use did not apply to harm caused by pollution. Actually, the same should be true of all other forms of harm, for it was difficult to imagine that equitable utilization could cause appreciable harm to other States or to the environment. J. G. Lammers, quoted in paragraph (15) of the comments, appeared to take the same view in saying that there was "hardly any evidence of State conduct which would be in line with the no substantial harm principle . . . but not with the principle of equitable utilization". The no harm principle should prevail over the principle of equitable utilization; and the obligation to exercise due diligence, to which the Special Rapporteur reverted in paragraph (17) of the comments, was not sufficient for the purposes of drafting an effective provision on the subject.

6. The second obligation, set out in paragraph 3 of article 16, was to engage in consultation with a view to approving lists of substances or species the introduction of

which into the waters of the international watercourse was to be prohibited, limited, investigated or monitored. The usefulness of preparing such lists of polluting substances was not in doubt, but should they be the sole object of consultations among States? Other articles provided for exchanges of data and information, consultations and negotiations, and the Commission might well draw on them when dealing with the specific problem of pollution. In his report (*ibid.*, para. 91), the Special Rapporteur indicated that he might prepare further articles, in particular on the exchange of data and information relating to pollution and the environment and on the concerted development of régimes of pollution control and environmental protection. Since the exchange of data and information was already covered by article 10 and the principle of the development of concerted régimes by article 9, it would seem logical to adapt those general provisions to the case of pollution.

7. Lastly, the Commission should consider article 16 in the light of the draft articles as a whole in order to decide whether pollution should form the subject of special provisions and, if so, how they should be connected with more general provisions, on the obligation to avoid causing appreciable harm, on exchange of information, and on consultation. Should a special régime be provided for consultations on pollution, or should the provisions on the exchange of information be sufficiently broad as to encompass the problem of pollution? The question needed to be considered. In his view, the problem of pollution, important as it was, did not seem to be so specific as to warrant totally separate treatment from other issues. In any case, article 16, as drafted, failed to meet the needs of the draft articles as a whole.

8. Mr. BEESLEY said that draft article 16 raised fundamental issues concerning the duties of States with respect to pollution and, by bringing out that aspect of the subject, demonstrated the need for a multilateral approach to the law of international watercourses. For that reason, while recognizing the validity of Mr. Calero Rodrigues's reasoning, he considered that a separate chapter should be devoted to pollution and that, in the particular case under consideration, pollution warranted special treatment.

9. All States had an interest in the creation of a régime applicable to all international rivers, if only because the ecosystem of the biosphere was indivisible; rivers flowed into oceans, and consequently pollution could affect States other than watercourse States. The proposed article reflected the increasing interdependence of States, as well as the interpenetration of different branches of international law, of national and international law, and of bilateral and multilateral rules.

10. The Special Rapporteur had sought to achieve a balance with other topics on the Commission's agenda, such as State responsibility and liability for injurious consequences arising out of acts not prohibited by international law, as was necessary in order to produce an integrated system of law rather than a series of independent and sometimes contradictory conventions.

11. Article 16 was well grounded in State practice, judicial decisions and treaty law. The Special Rap-

porteur was right to refer to Principles 21 and 22 of the Stockholm Declaration and to the provisions of part XII of the 1982 United Nations Convention on the Law of the Sea, which imposed upon States a positive obligation to preserve the marine environment as well as obligations specifically concerning land-based sources of pollution, particularly through rivers (articles 194, 207, paras. 1 and 4, and 213). As to whether those provisions reflected customary law, no State, either signatory or non-signatory, had denied them. The number of signatories was unprecedented, namely 159. While it should not be necessary to refer in that connection to article 18 of the 1969 Vienna Convention on the Law of Treaties, it was worth recalling that it provided that:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; . . .

12. The Special Rapporteur thus had good reason for including provisions on pollution in the draft. However, if the Commission decided to present those provisions in a special chapter, it should bring them into line with other provisions of the draft in the manner suggested by Mr. Calero Rodrigues.

13. With regard to the definition of pollution given in paragraph 1 of article 16, he agreed with Mr. Calero Rodrigues that the term "alteration" could also be understood to cover the extraction of substances; conversely, however, he was inclined to think that precisely for that reason the wider definition was preferable to the formulation suggested in the report (*ibid.*, footnote 207).

14. The Special Rapporteur had attempted in paragraph 2 to provide a basis for standard-setting by using the words "to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system]". Ideally, any harm ought to be forbidden, but in practice that could never be possible. As a framework agreement, the draft convention could not lay down precise standards, but acceptable standards based on available scientific and technical knowledge should be provided in the form of black lists/grey lists and, if those standards were exceeded, that would by definition constitute appreciable harm. The criterion of "appreciable harm" was adequate to avoid giving the impression that the standards could be elastic, although of course they might vary between different régimes, places and points in time. The Commission was certainly capable of working out a satisfactory formulation. For the time being, and bearing in mind the necessity for a process of negotiating specific watercourse agreements and devising specific standards, he could accept the Special Rapporteur's term of "appreciable harm" as providing sufficient guidance.

15. While he generally agreed with Mr. Calero Rodrigues's remarks on the interrelationship between the concept of appreciable harm and that of equitable utilization, his own conclusion was somewhat different. If an activity caused appreciable harm to a watercourse State or to the ecology of the watercourse, it could on

no account be consistent with equitable utilization. Some might see that as an argument for eliminating the provision on pollution, but he personally thought the subject sufficiently important to warrant separate treatment.

16. As to some points raised by Mr. Barboza (2062nd meeting), the 1982 United Nations Convention on the Law of the Sea did indeed provide a series of specific obligations relating to the areas beyond the jurisdiction of any State. It might be asked whether such provisions had any point if there was no one to assert the rights recognized by them. Perhaps the paradox could be resolved by considering that all States were responsible for the planet as a whole and exercised a form of custodianship over the natural environment. That idea was currently gaining ground, more particularly in connection with outer space.

17. Paragraph 3 of article 16 underscored the need to identify the most dangerous forms of pollution and envisaged the possibility of establishing a list of prohibited substances or species. The actual contents of such lists should be left to specific watercourse agreements and should be both specific and flexible, for the lists would have to be reviewed periodically in the light of new technological developments. Joint fact-finding groups and international water management commissions could play a useful role in that connection. Without wishing to reopen a complicated debate, he wondered whether the Commission should not seek to draw on expert advice; if it wanted to define pollution, its formulation had to be irreproachable.

18. There might be some virtue in further reinforcing the obligation to consult, set out in paragraph 3, for consultation, especially through mechanisms such as joint commissions, was particularly important in the establishment and updating of black and grey lists. The Special Rapporteur seemed ready to develop further his analysis of the problem.

19. Lastly, it was difficult to envisage a text—whether guiding principles or a framework convention of a binding nature—that did not contain a provision on pollution. On that specific subject, which was entirely within its purview, the Commission could at least demonstrate to the international community the possibility of a multilateral approach.

20. Mr. GRAEFRATH congratulated the Special Rapporteur on his excellent fourth report (A/CN.4/412 and Add.1 and 2), which very properly stressed the need to protect the environment, to fight pollution and to safeguard the quality of water, a natural resource which was becoming increasingly scarce.

21. The material assembled by the Special Rapporteur demonstrated clearly the existence of a considerable gap between the opinion of experts, the proposals of non-governmental organizations and the resolutions of international organizations on the one hand, and the existing law on the other. In support of that remark, he cited the language employed in passages of treaties between Pakistan and India and between Canada and the United States of America. In addition, he pointed out that a draft convention against international watercourse pollution had been pending since 1974 at the Council of

Europe and drew attention to the careful wording of the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, particularly article 207.

22. On that point, therefore, there was a wide gap between what constituted the law and what was considered to be the law—as shown by the cautious approach reflected in the report of the Experts Group on Environmental Law and its “General principles concerning natural resources and environmental interferences”, which were proposed as elements for a draft convention (*ibid.*, para. 75). The Commission, however, was not mandated to draft a lofty proclamation of desirable goals: it was called upon to draft a framework convention to help States in their endeavours to protect watercourses and to co-operate for that purpose. To that end, the Commission should try to bridge the gap between existing law and desirable law, without losing sight of the fact that it was seeking above all to promote the progressive development of international law. It was therefore necessary that the proposed rules should, first and foremost, be feasible under existing circumstances and, in addition, should prove acceptable to a large number of States. That would be so if the rules were based on reasonable premises and if they were applicable in the context of international co-operation.

23. Draft article 16 set out a definition and a prohibition. It did not seem a good idea to combine those two elements in a single article and to confine the substance of the article to a naked prohibition. Article 10 [15] [16]<sup>4</sup> began with a general rule, stating the duty to co-operate in relation to planned measures. Since the aim of the draft convention was to organize co-operation between watercourse States and enable them both to protect and to make the best use of the watercourse, it would perhaps be preferable to formulate a rule on co-operation at the beginning of the provisions on pollution.

24. The rule in question would specify the general duty already stated in article 9 [10]<sup>5</sup> with regard to the “adequate protection of an international watercourse [system]”. That was all the more necessary since article 9, as now worded, was extremely general in scope and did not adequately identify the area covered by the concrete obligation to co-operate. The former Special Rapporteur, Mr. Evensen, had begun chapter IV of his draft (Environmental protection, pollution, health hazards, natural hazards, safety and national and regional sites) with a provision which defined in a more detailed and precise manner the obligation of watercourse States to take, individually and in co-operation, “to the extent possible”, the necessary measures to protect the environment” not only against man-made pollution but also against pollution from natural causes. He had not limited the provision to a prohibition.

25. Furthermore, to proclaim at the beginning of part V of the draft articles the principle of the duty to co-operate would also be consistent with the structure of the provisions of the 1982 United Nations Convention on the Law of the Sea, and in particular with the ap-

proach adopted in article 194 (paras. 1 and 2) and article 207, which dealt precisely with co-operation among States in combating pollution. That method had the merit of being realistic, because it took as its starting point the existing situation. In his view, it would be advisable to follow the various examples which he had cited and which also had the advantage of having been accepted by States.

26. It was also necessary to consider not only the prevention of pollution, but also the abatement of existing pollution. They were two very different aspects of one and the same problem, but both of them called for a concerted effort on the part of watercourse States. The Special Rapporteur referred to that problem in paragraph (10) of his comments on article 16, but without making the distinction in question or introducing it into the text of the article itself. In paragraph (11), however, he admitted that States showed a “tendency to allow each other a reasonable period of time” to comply with their obligations. While that statement was true, it did not give a complete picture of State practice. Nearly all watercourse agreements which contained detailed provisions on pollution necessarily drew a distinction between existing pollution and new pollution, if only for the reason that different measures were necessary in the two cases. Again, it could not be assumed that any State would be prepared to accept a rule which from today would convert the existing practice into an internationally wrongful act. A State would be more likely to accept an obligation to reduce existing pollution in order to mitigate the harm it caused, in keeping with the means at its disposal or in co-operation with other States. That was why existing treaties often used phrases such as “as far as practicable” or “to make maximum efforts” or “using for this purpose the best practicable means at their disposal and in accordance with their capabilities”. Other treaties set priorities in establishing lists of polluting products, beginning with the most dangerous or toxic contaminants—a solution to which the Special Rapporteur had given some thought but which was only reflected in paragraph 3 of the draft article under consideration.

27. He therefore proposed that article 16 should start by stating a general rule providing for co-operation in reducing, preventing and controlling watercourse pollution in order to abate and prevent harmful effects and to ensure adequate protection of the ecological environment. Such a formula was consonant with the approach reflected in article 10 of the General principles adopted by the Experts Group on Environmental Law, which the Special Rapporteur himself quoted in his report (*ibid.*, para. 75).

28. Such an approach would be especially necessary if the proposed broad definition of pollution were to be accepted. The Special Rapporteur should explain the difference between the “detrimental effects” spoken of in paragraph 1, which characterized pollution, and the “appreciable harm” mentioned in paragraph 2, which was used as a criterion for a wrongful act. The difference must be considerable, because the Special Rapporteur stated in paragraph (4) of his comments that paragraph 2 of the article “does not proscribe all pollution” and that it was only “when such pollution

<sup>4</sup> Article adopted by the Drafting Committee, see 2071st meeting, para. 6, below.

<sup>5</sup> *Idem*, see 2070th meeting, para. 71.

causes appreciable harm to another watercourse State that it becomes internationally wrongful". It therefore seemed that paragraph 1 dealt with pollution which produced detrimental effects to human health or safety but without causing appreciable harm within the meaning of paragraph 2. While it was perhaps useful to rely on a very general definition of pollution, it was all the more necessary to be careful in formulating the obligation incumbent upon States and the definition of pollution damage that triggered State responsibility. It was not sufficient to formulate a prohibition which practically made State responsibility a result of not having prevented pollution.

29. Paragraph 2 of article 16 prohibited pollution that caused "appreciable harm", a term used in article 8 [9], which the Commission had already examined.<sup>6</sup> In both cases, the rule looked like a strict liability rule. It referred to appreciable harm as a factual event and not to the violation of a right. That was a considerable departure from the proposal of the previous Special Rapporteur, Mr. Evensen, which had expressly related the appreciable harm to the rights and interests of other watercourse States. The present Special Rapporteur explained in paragraph (6) of his comments that his formula, in paragraph 2, was not intended as a rule of strict liability but as referring to the duty of due diligence. Did that mean that a State which caused appreciable harm would be committing an internationally wrongful act only if it had not fulfilled its duty of due diligence in the use of the watercourse—in other words, if it had violated the obligations laid down in article 6? In that case, the State in question would be bound to cease the polluting activity, to undo the damage caused and to compensate the injured parties—at least under the terms of article 21 of the General principles adopted by the Experts Group on Environmental Law (*ibid.*). But the Group considered even substantial harm—which according to the Special Rapporteur was more than appreciable harm—only as entailing liability, meaning a duty to ensure that compensation was provided for.

30. According to the experts, substantial harm was harm that was not "minor" or "insignificant". For his part, the Special Rapporteur explained that "appreciable" harm meant harm that was "significant—i.e. not trivial or inconsequential—but less than substantial". In the Special Rapporteur's view, for appreciable harm to exist, there "must be an actual impairment of use, injury to health or property, or a detrimental effect upon the ecology of the watercourse". It should be noted in that connection that the expression "detrimental effect" was the one used in the English version to define pollution, so that it was difficult to draw a distinction between "appreciable harm" and "detrimental effect". When therefore the Special Rapporteur made "appreciable harm" the criterion for the wrongfulness of an activity and the threshold of State responsibility, he was formulating an extremely rigid rule.

31. The problem was obvious: one Special Rapporteur used "appreciable harm" to define liability, and the other used it as the criterion for State responsibility. In

other words, what was considered a lawful activity under one topic was wrongful under another. The explanations given by the present Special Rapporteur in paragraphs (6) to (8) of his comments did not shed any light on the question. Unfortunately, "appreciable harm" as such was not a proper criterion for determining that a State had not acted with due diligence and had therefore incurred responsibility. What would happen in a case in which a State had taken the necessary administrative and legislative measures but was none the less at the origin of pollution which caused appreciable harm? State responsibility could not simply result from appreciable harm caused: it presupposed a breach of the obligation to prevent the harm and that the harm was due to the failure of the preventive measures. All that presupposed an obligation of the State to make impact assessments, to take preventive measures, etc., all of which could not be couched in a single phrase stating simply that States must not "cause or permit" the pollution of international watercourses.

32. Several times, the Special Rapporteur referred to article 9, now article 8 [9], seeing it as a rule which established the responsibility of the State causing appreciable harm by violating the rights or infringing the agreed standards of equitable and reasonable use laid down in article 6. However, such a content could not be deduced from the wording of either article 8 [9] or article 16, paragraph 2.

33. Furthermore, in paragraph (13) of his comments the Special Rapporteur proposed a different interpretation of the wording of article 16: the expression "appreciable harm" should not be related to article 6, which set forth the rights and the duties of watercourse States in regard to equitable and reasonable use of a watercourse, but should be understood as an independent rule. In other words, causing appreciable pollution harm would be regarded as being *per se* inequitable and unreasonable. The act would be wrongful, and would entail State responsibility even if the State had fulfilled the obligation of due diligence. In view of the broad definition of pollution and the extremely low threshold of harm, the proposed rule would be very rigid and would be unlikely to command acceptance by States. It would also be confusing to use identical wording to define different régimes of State responsibility, which had nothing in common except for the fact that they both looked like liability rules built on causing harm without violating an international obligation.

34. The Special Rapporteur stated in paragraph (11) of his comments that the "list" approach was "not appropriate in a framework instrument". Personally, he was not at all convinced of the truth of that statement, since much depended on how the list was used. It might very well be possible to recommend that States should, in fighting existing pollution, start with the elimination of the most toxic substances. Such a goal could be achieved quite efficiently with the help of a list. It was common practice, but the Special Rapporteur accepted that approach in paragraph 3 of the article only if it was requested by a State. In that case, the Special Rapporteur seemed to accept a distinction between existing and new pollution. He even envisaged that pollution by certain substances should not be prohibited but only

<sup>6</sup> *Idem*, para. 34.

limited, investigated or monitored, and did not entail State responsibility or the obligation to make reparation in accordance with paragraph 2. The fact remained that existing pollution could not be ignored, nor could it be eliminated by a mere prohibition. The list approach was particularly useful in that respect. It was therefore necessary not only to specify that lists could be prepared at the request of States but also to encourage that practice, which was a useful form of co-operation.

35. Mr. YANKOV, stressing the importance of the protection and conservation of the environment of watercourses, said that more than 80 per cent of marine pollution came from land-based sources and almost all of that came from rivers. The situation was particularly critical for enclosed and semi-enclosed seas. Yet the number of international agreements containing provisions on that subject was very limited, and the provisions were themselves very general in nature. By way of example, he cited the relevant provisions of the 1958 Convention concerning Fishing in the Waters of the Danube, the 1961 Protocol concerning the Establishment of an International Commission to Protect the Moselle against Pollution, the 1963 Act regarding Navigation and Economic Co-operation between the States of the Niger Basin, and the 1968 European Agreement on the Restriction of the Use of Certain Detergents in Washing and Cleaning Products. It was exceptional to find provisions as precise as those of the 1976 Convention on the Protection of the Rhine against Chemical Pollution, with annexes containing lists of pollutants classified according to their harmfulness.<sup>7</sup>

36. First of all, the very notion of "protection of the environment" had to be clarified. Traditionally, the term had been used to designate measures to reduce and control pollution hazards and damage. Today, however, the concept had become broader, and modern environmental law focused more on prevention and on the objectives of preservation; it was a matter not only of fighting existing pollution but of "preserving" the natural environment, in other words, preventing its future deterioration but also, where possible, improving its quality, a matter of particular importance in the case of watercourses. Those aspects of the issue would have to be taken into account in the definition of pollution, if indeed the Commission decided to include one in the draft article. In that connection he would suggest drawing on article 195 of the 1982 United Nations Convention on the Law of the Sea:

*Article 195. Duty not to transfer damage or hazards or transform one type of pollution into another*

In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.

That provision was particularly relevant to watercourses, which by their nature were in perpetual movement. Similarly, the Commission could make use of paragraph 1 of article 196, a provision more concerned with the future:

<sup>7</sup> The texts of the instruments mentioned in this paragraph are reproduced in UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983).

*Article 196. Use of technologies or introduction of alien or new species*

1. States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or in the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.

37. He was however inclined to query the need for a definition, which would doubtless offer the advantage of highlighting the importance of the protection and preservation of the environment of international watercourses, and would contribute towards a more coherent presentation of the set of rules. Indeed, if no reference at all were made to pollution, it might be asked why that had not been done. However, the prevailing practice of States in the law of the sea, for example, was to provide a definition of pollution only in conventions specially dealing with protection of the environment; the United Nations Convention on the Law of the Sea formed an exception in that respect.

38. In any case, if a definition was thought necessary, it should appear in a separate article or, better still, in the part of the draft containing definitions. It should also be more in line with modern concepts of environmental law as evidenced by the most recent examples, such as the United Nations Convention on the Law of the Sea or certain regional conventions on the protection and preservation of the marine environment: the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (art. 2, para. 1), the 1976 Barcelona Convention for the Protection of the Mediterranean Sea (art. 2 (a)), the 1978 Kuwait Regional Convention (art. 1 (a)), or the 1974 Paris Convention on the Prevention of Marine Pollution from Land-Based Sources (art. 1, para. 1).<sup>8</sup> Account should also be taken of the definition prepared by the Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP), which had become something of a model in the field.

39. Accordingly, the elements missing from the definition proposed in paragraph 1 of article 16 should be supplied by adding the following: (a) the idea—mentioned by Mr. Calero Rodrigues—of the introduction by man of substances or energy into the environment of watercourses (that would link up with the provisions of article 196 of the United Nations Convention on the Law of the Sea); (b) the concept of effects detrimental to all legitimate activities, such as fishing, leisure, health, etc., rather than merely to the use of the waters for any beneficial purpose, as was the case at present; (c) alteration in quality from the point of view of the utilization of the watercourses, which was one of the elements of the GESAMP definition; (d) the reduction of amenities. The Special Rapporteur should also give some thought to the question of alteration in the properties of the water, mentioned by Mr. Calero Rodrigues and Mr. Beesley.

40. With regard to the scope, content and legal implications of the obligations set out in paragraphs 2 and 3 of article 16, he considered that the provisions of part

<sup>8</sup> *Ibid.*

XII of the United Nations Convention on the Law of the Sea, and particularly the basic principles of articles 192, 193 and 195, although formulated as general norms, nevertheless entailed legal obligations which were spelt out further on in the sections of the Convention on standard-setting, enforcement and safeguards.

41. As to paragraph 3, it was necessary, as Mr. Graefrath had said, to emphasize the importance of international co-operation. One way would be to add an article or a paragraph, based on article 195 of the United Nations Convention on the Law of the Sea, on the obligation not to transfer damage or hazards and not to transform one type of pollution into another. Such a provision would be useful, for in cases of accidental pollution the remedy might sometimes seem worse than the evil; such a question had arisen in the wake of accidents such as that of the *Torrey Canyon* (1967).

42. Paragraphs 2 and 3, as drafted, seemed sometimes to be merely the illustration—or the application to a specific field—of certain general principles, particularly those appearing in articles 6, 8 [9], 9 [10], and 10 [11] to 14 [15] of the draft. As Mr. Calero Rodrigues had pointed out, any duplication of general provisions by the provisions relating to the protection of the environment should be avoided.

43. The question of drawing up a black list had been raised. True, some conventions, particularly among those on the protection of the marine environment, contained lists of that kind (such was, for example, the case in the aforementioned 1974 Paris Convention). But the question was whether, in articles as general as those being considered, it was possible to include a list detailed enough to cover all sources of pollution in various watercourses using criteria such as persistence, bio-accumulation, radioactive impact, etc. The Commission might perhaps confine itself to stating in general terms that, in order to prevent, reduce and control pollution of the environment of a watercourse, States should, by agreement among themselves, adopt specific rules on various sources of pollution and harmful substances.

44. In addition to his suggestions with regard to the definition of pollution, he wished to propose some amendments to article 16: (a) it would seem more judicious to entitle part V "Protection of the environment of international watercourses"; (b) the word "ecology", in paragraph 2, was too vague; it would be preferable to speak of "ecosystems"; (c) the draft article in its present form was heterogeneous, containing, as it did, a definition as well as two obligations; it should be split up; (d) a distinction should be drawn in the obligations set forth in the text between responsibility for wrongful acts and the obligation to compensate harm, when the matter was not regulated by a particular convention.

45. In his opinion, article 16, together with members' comments and the Special Rapporteur's replies, could be referred to the Drafting Committee.

46. Mr. BEESLEY, noting that useful suggestions had been made concerning the definition of pollution, said that it might well be appropriate to have a section on definitions at the beginning of the whole set of draft ar-

ticles, as in the United Nations Convention on the Law of the Sea.

47. While it was true that many regional agreements on international river systems were very general when they dealt with the preservation of the environment and the prevention of pollution, or laid down specific standards to be followed in the matter, they were very often hortatory on that issue. The Commission might therefore wish to suggest that more specific provisions were needed in that particular case, if all members agreed that the degradation of biological resources eventually affected the whole of mankind, and bearing in mind Mr. Yankov's comment that 80 per cent of the pollution of the marine environment came from land-based sources, and mainly from rivers.

48. He would have difficulty in interpreting part XII of the United Nations Convention on the Law of the Sea as being merely hortatory. The first obligation set forth in that part, which he regarded as a breakthrough in terms of the protection and preservation of the marine environment and the environment as a whole, was couched in the following terms: "States have the obligation to protect and preserve the marine environment." (art. 192); the article did not, however, say that States ought to co-operate. Article 193, of course, reflected Principle 21 of the Stockholm Declaration, stipulating the sovereign right of States to exploit their natural resources pursuant to their environmental policies, but adding, it should be noted, "in accordance with their duty to protect and preserve the marine environment". Paragraphs 1 and 2 of article 194 both opened with the words "States shall take", not "States should take" or "States ought to consider taking". Similarly, paragraph 3 contained the words "the measures taken . . . shall deal", while paragraph 3 (a) specifically referred to the release of toxic, harmful or noxious substances, especially those which were persistent, from land-based sources. Article 195, relating to the duty not to transfer damage or hazards or transform one type of pollution into another, contained the words "States shall act", while article 196 started with the words "States shall take all measures". In the light of such wording, it was difficult to see how the United Nations Convention on the Law of the Sea could be regarded as merely indicating guidelines of a hortatory nature.

49. It was an acknowledged fact that it was not possible to legislate for co-operation. Nevertheless, the United Nations Convention on the Law of the Sea went as far as it was possible to go in that direction. Article 197, which provided for co-operation on a global or regional basis, started with the words "States shall co-operate". He would not cite all the relevant articles in support of his proposition, but would simply draw attention to the opening words of article 200, concerning studies, research programmes and exchange of information and data, reading "States shall co-operate", although the second sentence of the article, starting with the words "They shall endeavour", was of a hortatory nature. Article 201, entitled "Scientific criteria for regulations", contained the same words, "States shall co-operate" and, while that article could not be interpreted to mean that all knowledge in that field was ripe

for codification in the form of “black” or “grey” lists, it none the less placed very clear-cut obligations on States. Again, paragraph 1 of article 207, on pollution from land-based sources, began with the words “States shall adopt laws and regulations” and paragraph 2, with the words “States shall take . . .”. Owing to their content, however, paragraphs 3 and 4 were drafted in different terms: “States shall endeavour”.

50. He had quoted those provisions of part XII of the Convention in order to dispel any misunderstanding as to the nature of the obligations they set forth and in light of the fact that part XII not only constituted a precedent but was also a part of a treaty which was regarded as reflecting customary international law. In addition, part XII of the Convention had deliberately been drafted as an umbrella or framework convention and did not attempt to be exhaustive. Indeed, the Commission might well take as a precedent article 311 of the Convention, which governed the relation of the Convention to other conventions and international agreements.

51. As the Special Rapporteur had requested, he would refrain from commenting on the effects of the topic under consideration on the topic of liability, without, however, questioning the right, or even duty, of anyone who wished to address the matter. He read out article 213 of the United Nations Convention on the Law of the Sea, which dealt with the enforcement of regulations with respect to pollution from land-based sources and which was again drafted in language that was not hortatory, starting: “States shall enforce”. The tendency to interpret the whole of part XII of the Convention as a series of provisions designed to establish a régime of liability was understandable, but he would point out that, even in that case, article 235, entitled “Responsibility and liability”, provided in paragraph 3 that “States shall co-operate in the . . . development of international law relating to responsibility and liability”. While that rule might not bind the Commission, it did have a certain relationship with its work. As far as he was concerned, all those provisions of part XII of the Convention on the Law of the Sea were norms, not general guidelines. While he recognized that other conventions did not go so far, he trusted that the Commission would once again look upon the Convention in that light.

52. Although he had no definite opinion in the matter, he did not think a clear-cut distinction could be made between pre-existing and new pollution. The difficulty was that pre-existing pollution could be aggravated by creating pollution that was not necessarily new. He was not, however, belittling the difficulties in reaching agreement on how to deal with the problem and how to prevent further degradation and to preserve the environment, which was the ultimate objective. Lastly, he endorsed Mr. Yankov’s comments, for the reasons he had already explained.

53. Mr. Sreenivasa RAO, commenting on the reasons for the disagreement as to whether there should be a flexible definition or, as Mr. Beesley wanted, a strict one, said that the central issue was to decide, on the one hand, what constituted pollution and, on the other, what were the obligations of States parties to the United

Nations Convention on the Law of the Sea. In that connection, the relevant practice and instruments demonstrated the great importance of protecting and preserving the natural environment and preventing pollution. He therefore sought the Special Rapporteur’s clarification as to the kind of standards the Commission was required to develop and the kind of activities regarded as unreasonable.

*The meeting rose at 1 p.m.*

## 2064th MEETING

*Friday, 17 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*later:* Mr. Bernhard GRAEFRATH

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses** (*continued*) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

#### PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)<sup>3</sup> (*continued*)

1. Mr. BENNOUNA congratulated the Special Rapporteur on his fourth report (A/CN.4/412 and Add.1 and 2), chapter III of which contained a wealth of material on doctrine and practice. The Special Rapporteur rightly emphasized therein the interdependence of ecosystems and the need for a global and co-ordinated approach to the dangers of pollution (*ibid.*, paras. 29-37). The urgent need for robust international action matched the growing demands on water resources and the increasingly advanced technology

<sup>1</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>3</sup> For the texts, see 2062nd meeting, para. 2.

which, if not harnessed and controlled, could cause grave and sometimes irreparable degradation. That major challenge of the times would be met only when solidarity prevailed over short-sighted self-interest. Priority should therefore be given to co-operation, while foresight and prevention must be the core of any legal provisions to protect the environment. Arrangements for compensation should be devised which would have a deterrent effect on potential offenders.

2. Protection of the environment was not an autonomous activity, divorced from other human activities. As was clear from the UNEP study, "The environmental perspective to the year 2000 and beyond",<sup>4</sup> such protection should be omnipresent in the quest for the right balance between man and his environment. That point was relevant to articles 16, 17 and 18 in part V of the draft articles, which raised a question of methodology: whether, from a practical standpoint, part V could be isolated from the other parts of the draft, concerning the various non-navigational uses of watercourses. He noted that article 2 (Scope of the present articles), provisionally adopted by the Commission,<sup>5</sup> provided for a link between the uses of international watercourses and measures of conservation, thus recognizing the difficulty of separating the two. It might therefore be preferable to deal with conservation in each of the provisions on uses. Protection of the environment and pollution were issues very much in evidence in a number of provisions concerned with general principles governing utilization and procedure, such as articles 2, 4 (para. 2), 6, 7 (para.1 (e)) and 10.

3. The Special Rapporteur had had the choice between confining his draft to general principles, in which case the principles already adopted should simply be developed further to cover environmental protection and pollution, and introducing a separate part to deal with those matters. He himself would prefer the latter course, but it would then be necessary to enter into far more technical detail.

4. With regard to draft article 16, he agreed with Mr. Graefrath and Mr. Yankov (2063rd meeting) that it was too heterogeneous. The definition of pollution in paragraph 1 should be separated from the rest of the article and could perhaps be placed in article 1 (Use of terms), or in one of the articles on protection of the environment. He also agreed that the definition was too broad and that it was not designed to produce legal effects, since pollution was defined by reference to effects detrimental to human health or safety and was not prohibited as such; what was prohibited was appreciable harm caused to other States. It might therefore be advisable to draft a narrower definition for the purposes of the future convention, confined to toxic substances to be specified in lists compiled by agreement between watercourse States.

5. Paragraph 2 referred to the ecology of the international watercourse system, which was a very vague notion if it was intended to be an element in a prohibition of pollution having legal effect, it should be more clearly defined. A more important point, however, was

the Special Rapporteur's view that the obligation under article 16 not to cause appreciable harm differed from the obligation under article 8. The distinction between damage caused by a use of a watercourse and damage caused by pollution was, however, very uncertain. He was not convinced by the Special Rapporteur's arguments and saw no reason why there should be strict liability in one case and a duty of due diligence in the other.

6. The Special Rapporteur also raised the fundamental question of the relationship between the obligation not to cause appreciable harm and the obligation of equitable and reasonable utilization, and had decided, for the purposes of article 16, paragraph 2, to give priority to the former. There again, however, he provided no convincing reasons for the separate treatment of the obligations set forth in article 6 and those set forth in article 8.

7. The Special Rapporteur's reasons for choosing due diligence as the basis for responsibility (paras. (8) *et seq.* of his comments) seemed to be defective in certain respects. The duty of due diligence as the basis for responsibility would be more readily acceptable were it preceded, as suggested by Mr. Graefrath, by positive rules concerning co-operation. A State could then be held responsible if it failed to take the necessary measures or to use the means of prevention at its disposal. The rule of due diligence should perhaps be the consequence of the obligations imposed by article 17, and the Commission might wish to take as a model the text prepared by the American Law Institute, which the Special Rapporteur cited in paragraph (2) of his comments to article 17. In article 16 as it stood, however, the basis of responsibility seemed *a priori* to be one of strict liability, whereas the Special Rapporteur explained in his comments that he had taken due diligence as the basis. That, however, would not be sufficient when it came to drafting a convention.

8. He agreed entirely with Mr. Graefrath regarding paragraph 3, and did not understand why the Special Rapporteur had dropped the very useful distinction between existing and new pollution. Possibly paragraph 3 should distinguish between existing and new forms of pollution while also referring to part III of the draft on planned measures, which contained very detailed provisions on the obligation of States to co-operate.

9. As one not well versed in the topic under consideration, he had learnt much from an informative report. He was however concerned about some apparent methodological difficulties, as compared with the Commission's earlier work, and it appeared necessary to build a bridge between that work and the present proposals.

10. Mr. OGISO congratulated the Special Rapporteur on a very interesting fourth report (A/CN.4/412 and Add.1 and 2) concerning a topic in which he took a personal interest. He noted that the reference to "human health or safety", in paragraph 1 of draft article 16, was in general terms and was not restricted to watercourse States. The reference to the ecology of a watercourse, in paragraph 2, could likewise be construed as covering all areas affecting the ecology of an international water-

<sup>4</sup> General Assembly resolution 42/186 of 11 December 1987, annex.

<sup>5</sup> See 2050th meeting, footnote 3.

course, whether or not they were within the jurisdiction of a watercourse State. For instance, groundwater originating from an international watercourse might be used as drinking water by the population of a non-watercourse State; or sea water polluted by an international river might cause appreciable harm to non-watercourse States through adverse effects on the marine ecology. Again, draft article 17 referred in paragraph 1 to “the ecology of the watercourse and of surrounding areas”, and in paragraph 2 to protection of “the marine environment”. Those references seemed to indicate the possible involvement of non-watercourse States in environmental protection and prevention of pollution. He therefore wished to ask the Special Rapporteur whether some provision should not be included on co-operation, including exchange of information between watercourse States and non-watercourse States that might be affected by pollution.

11. Article 16, paragraphs 1 and 2, could be construed as distinguishing between pollution that caused appreciable harm and pollution that was less harmful. In article 23, paragraph 2, of the draft articles submitted by the previous Special Rapporteur, Mr. Evensen, a distinction had been drawn between pollution that caused harm and pollution that merely caused inconvenience.<sup>6</sup> Did the prohibition of “appreciable harm” in paragraph 2 of article 16 apply also to inconvenience?

12. In the discussion on another topic (2049th meeting), he had referred to a case in which chemical substances emitted by a factory over a long period had gradually accumulated in fish, causing a high incidence of a serious nerve disease in the local population, whose diet consisted largely of fish. The definition of pollution in article 16, paragraph 1, would seem to apply to such cases, but the language might need to be revised to ensure that indirectly produced effects detrimental to human health were covered. In the case he had mentioned it was not the “composition or quality of the waters” which had been harmful to human health, but the chemicals accumulated in the fish eaten by the population. Indeed, the fact that the harm had been discovered not by analysis of the waters but by diagnosis of a disease pointed to a need for co-operation, not only between watercourse States but also with non-watercourse States that might be affected by the pollution of international waters.

13. He assumed that the “lists of substances or species” referred to in article 16, paragraph 3, would comprise “black lists” of substances that were strictly prohibited and “grey lists” of those whose emission should be monitored, and that they could be supplemented at any time and items moved from one list to the other. It was possible, however, to interpret the provision as meaning that, once approved, the lists would be permanent. It might therefore be appropriate to explain in the commentary, or in the article itself, that the lists could be amended.

14. Some members had suggested that the phrase “At the request of any watercourse State”, in the same paragraph 3, should be deleted. Since it seemed to refer

to notification procedures, it might be useful to insert the words “where necessary”, to show that the procedure was not intended to be a formal one.

15. It would be difficult, for practical reasons, to treat strict liability as a general principle of international law, since a number of Governments did not seem prepared to adopt it unconditionally. As a general approach in a framework agreement on international watercourses, the Special Rapporteur’s view that liability should depend on the condition of due diligence was therefore most appropriate, and it was unfortunate that article 16 did not take account of that reasoning; it might be advisable to revise the text accordingly. If that approach was not acceptable, a separate clause might be added, stipulating that liability should be provided for, where necessary, in watercourse agreements envisaged under article 4, paragraph 1.

*Mr. Graefrath, First Vice-Chairman, took the Chair.*

16. Mr. BARBOZA, noting that a number of speakers had asked whether separate provisions on pollution were needed in the draft, said that it depended on the scope of the protection the Commission wished to provide. If the intention was to extend protection of the marine environment beyond national jurisdiction to include “the ecology of the international watercourse [system]”, then of course separate provisions on pollution would be required. Otherwise, a State whose environment was not directly affected by pollution would be unable to initiate procedures to stop the pollution of the watercourse.

17. Article 16, paragraph 2, established a prohibition by virtue of which a watercourse State might not act in such a way that the level of pollution in the waters of other riparian States or in the ecology of the system rose above the threshold of tolerance. As that was a prohibition, the responsibility which derived from its violation was responsibility for a wrongful act: it was not within the field of strict liability, which, by definition, attached to acts not prohibited by international law. He emphasized that distinction because it had been contended, in the context of his own fourth report (A/CN.4/413), on item 7 of the agenda, that, in all the years it had been working on the subject, the Commission had been unable to trace the dividing line between the two types of responsibility. That was not so. The strict liability mechanism, which applied to acts not prohibited by international law, could in no way be confused with responsibility for wrongfulness.

18. Since the draft articles under consideration dealt with the wrongful acts of States, there would be a number of consequences, as Mr. Graefrath had pointed out (2063rd meeting). The State of origin must cease causing a level of pollution that was unacceptable, re-establish the situation that had existed before the act, and probably provide appropriate guarantees against a repetition of the act. As it was sometimes impossible to re-establish the situation, the payment of a sum of money as compensation might be in order. If the obligation were in the nature of strict liability, however, the acts of the State leading to the prohibited level of pollution would be lawful acts, the State of origin would be under no obligation to stop the polluting activity and

<sup>6</sup> *Yearbook . . . 1984*, vol. II (Part One), p. 120, document A/CN.4/381, para. 86.

would be expressly authorized to continue its pollution on payment of some sort of compensation.

19. The Special Rapporteur was right in maintaining that article 16 established an obligation of due diligence, because paragraph 2 imposed an obligation of result—prevention of a certain event. According to article 21 of part 1 of the draft articles on State responsibility,<sup>7</sup> an obligation of result was violated when the State, through means it had selected, did not obtain the result required by the obligation. Article 23 of the same draft provided that, when the obligation of the State was to prevent the occurrence of a given event, that obligation was violated only if the State, through the means it had selected, did not achieve that result. Those articles seemed to mean that there was no breach of the obligation if the result—to prevent a given event—was achieved. But what if the result was not achieved, or the given event not prevented? It was there that the line separating responsibility for wrongfulness and causal responsibility could be perceived. If the State which did not obtain the required result was automatically responsible for the consequences, what would be the difference between those two types of responsibility? If the result was not obtained, then, under article 23, it was necessary to examine the means employed in order finally to determine the responsibility of the State.

20. Paragraph (6) of the Commission's commentary to article 23 of part 1 of the draft articles on State responsibility<sup>8</sup> illustrated that point. The Special Rapporteur's statement that there was an implicit obligation of due diligence was therefore acceptable. Perhaps there should be a reference in article 16 to the accepted international standards regarding the measures of prevention required of the State of origin, which were mentioned in the *Restatement* of the American Law Institute (see para. (2) of the Special Rapporteur's comments on article 17). That would change the nature of the obligation to one of conduct, thereby satisfying the wish for precision voiced at the previous meeting. Although he had doubts about the practicality of applying that formula in a convention of a general nature, the possibility might be examined by the Special Rapporteur.

21. Mr. Graefrath's remark that the prohibition, in its present terms, was too harsh, had solid grounds in view of the state of inter-pollution prevailing in the world and the repercussions the prohibition would have on industrial activities. Perhaps there should be a transitional provision establishing that States must agree on the means of reducing the present pollution to acceptable levels within a number of years through co-operation or unilaterally, after which the prohibition, in its present or other precise terms, would begin to be enforced.

22. He saw no inconsistency between the "appreciable" harm referred to in paragraph 2 of article 16 and the "effects detrimental to human health or safety" in paragraph 1. Whether the detriment or harm was to human health or to any other of the legally protected interests of man made no difference to the application of the concept of "appreciable". Strictly speaking, no

harm was negligible. But the circumstances of interdependence in modern life and the rules of *bon voisinage* had imposed a rule which he believed was already customary international law; harm took on legal significance when it went further than being merely a small disturbance and began to be "appreciated" as such. As the Romans used to say, *de minimis non curat praetor*. Even human health fell within the scope of "appreciation". For example, should an occasional headache be regarded as "appreciable harm"? Or should a factory employing 2,000 workers be closed because some of them were allergic to a substance contained in its residues?

23. The Commission should not attempt to be too precise in handling elements that did not lend themselves to such treatment. In the future, no doubt, experts would determine what amount of mercury or cadmium was tolerable per litre of water, and tables would probably take the place of concepts such as "appreciable harm".

24. Mr. SEPÚLVEDA GUTIÉRREZ said that the previous speakers had made clear the crucial importance of the pollution issue. For pollution, whether gradual or sudden, could affect a whole area, part of a country or, in extreme cases, an entire nation. So serious a problem called for a very precise system of rules and standards, and the three articles under consideration appeared too concise to cover it. The Special Rapporteur himself had acknowledged that the concept, or definition, of pollution could be broadened, and he should perhaps devote a full chapter of the report to the subject.

25. If a definition of pollution was to be included in article 16, it should be more comprehensive and be based on more legal assumptions and other requirements than that which was proposed. As there were differences of opinion on the matter, further debate was needed before a decision could be taken. However, amplification of the definition would not, in itself, be sufficient, since it would be useful only together with a set of rules determining cases of pollution and remedies, as well as the legal effects produced.

26. He also had some reservations about the expression "effects detrimental to", in paragraph 1. The proper relationship should be sought between that concept, which was quite difficult to measure, and articles 8 [9] and 9 [10], which the Commission had already considered. He endorsed Mr. Graefrath's view that there should be a reference to co-operation, on which some rules appeared in previous articles.

27. One difficult choice before the Commission was whether it should take advantage of part XII of the 1982 United Nations Convention on the Law of the Sea, relating to protection and preservation of the marine environment. He had doubts on that point, because taking provisions from other instruments would reduce the possibility of developing international law in such a rapidly changing field as that of pollution. Moreover, the existing rules referred to geographical areas other than rivers, and each watercourse system had its own special characteristics and required rules specific to its particular environment. Furthermore, the uses of water-

<sup>7</sup> *Yearbook* . . . 1980, vol. II (Part Two), p. 32.

<sup>8</sup> *Yearbook* . . . 1978, vol. II (Part Two), pp. 82-83.

courses and the causes of pollution were not the same in third world and in industrialized countries.

28. He would hesitate to say that the draft articles should include all the references to protection of the environment contained in the United Nations Convention on the Law of the Sea. That might discourage States from accepting the draft convention on international watercourses. What was needed was a flexible convention that could be used by countries in different contexts, and it should not, therefore, be overloaded with provisions.

29. Another question to consider was whether the rules on pollution, given their special nature, should be placed in an annex or in a separate document—a possibility raised by the Special Rapporteur in his report. Because of its obvious importance, pollution called for specialized treatment, with particular types of responsibility for violation of the relevant provisions.

30. With regard to paragraph 2 of article 16, the Commission must be more precise on how to determine the concept of appreciable harm, which varied from one legal system to another, and that of due diligence, which was a very elusive idea. He was sure that satisfactory formulas could be found for both.

31. Since the approval of lists of substances, referred to in paragraph 3, would be rather difficult to achieve in practice, he suggested that provision should be made for mechanisms and institutions to carry out the many types of co-operation between States that would be required.

32. Mr. Sreenivasa RAO stressed the practical importance of the exchange of data and information, which was vital to the application of a watercourse régime. That subject was dealt with in draft article 15 [16],<sup>9</sup> which had received broad approval in the Commission.

33. In examining the subject, he had found his experience of the management of the 1960 Indus Waters Treaty between India and Pakistan<sup>10</sup> very helpful. The provisions of article 15 [16] proposed by the Special Rapporteur had the merit of encouraging watercourse States to co-operate in the management of the watercourse so as to derive optimal benefit from it. Water was becoming increasingly scarce, and at the same time the uses of water were becoming more numerous and varied. As explained in paragraph (1) of the Special Rapporteur's comments, article 15 [16] set out the minimum requirements for the exchange of data and information "necessary to assure the equitable and reasonable utilization of an international watercourse [system]". Article VI of the Indus Waters Treaty went into much greater detail: it specified the various types of data and information to be supplied, the intervals at which they were to be collected—daily in some cases—and how they should be processed and presented. His conclusion was that an article such as article 15 [16], establishing the principle of the obligation to exchange data and information, was certainly essential, but was not sufficient in itself. It was also necessary to specify

the types of data to be supplied, the intervals at which they should be collected, and how they should be processed. The general provision on exchange of data and information should therefore be followed by more specific provisions on those particulars, perhaps through bilateral or regional agreements.

34. The general terms in which the obligation to exchange data and information was set out in article 15 [16] could place an unduly heavy burden on certain States, particularly developing States. Even India, which was well provided with scientific talent and had a good network of facilities for collecting information, would find it difficult to provide, in timely fashion, all the information which another watercourse State would find helpful. It was significant that the Indus Waters Treaty contained flexible provisions requiring the parties to supply data and information "to the extent that these are available" or "as necessary" or "as practicable".

35. Another point to be borne in mind was that a regular supply of data and information unrelated to any specific need, or particular problem or situation, was of no great value; it would lead only to the accumulation of voluminous data collected in a routine fashion. If the obligation to supply data and information was stretched too far it could result in the building up of a mass of unmanageable material that was of little or no use.

36. If one applied the tests of "pollution" and "appreciable harm" and looked at the restrictions established by treaty or by history on the use of international watercourses, the scope of the data to be exchanged would differ considerably from that suggested by the generalized approach of article 15 [16]. Hence, while he was not opposed in principle to that article, he urged that consideration be given to the points he had raised, so that they could be taken into account when the text was reviewed.

37. Another important point was that the supply of data sometimes created a need for more data, which might well bring the law of diminishing returns into play. There was a real danger that a country, in an effort to fulfil its obligation to supply data and information, might hasten to furnish ill-prepared data that would cause unnecessary fears and arouse avoidable suspicions, possibly leading to an inter-State dispute. The aim should be to ensure that there was an exchange of accurate and well organized data that adequately met the needs of co-operation.

38. There was also the question of the exchange of data and information on new uses of an international watercourse, which should be dealt with in close connection with the articles on new uses in part III of the draft.

39. He supported the inclusion of a general article on the obligation to exchange data and information, but believed that it should be made more specific with respect to the other articles of the draft with which it was connected.

40. Mr. McCaffrey (Special Rapporteur) assured Mr. Sreenivasa Rao that many of his points would be taken into account in the consideration of article 15 [16] in the Drafting Committee. Moreover, that article

<sup>9</sup> For the text, see 2050th meeting, para. 1.

<sup>10</sup> United Nations, *Treaty Series*, vol. 419, p. 125.

required the regular exchange only of data and information that were "reasonably available", so that the State called upon to provide them was not required to make a special effort or incur much additional expense.

41. The possibility of an excessive accumulation of data had also been mentioned by Mr. Tomuschat (2051st meeting). In such a case, the State receiving the data could ask for an abatement of the flow. That problem would be dealt with in the commentary, if not in the body of the article.

42. He had prepared some preliminary drafts of commentaries on the articles which were before the Drafting Committee, and would be glad to supply any member with advance copies of the texts being processed by the secretariat.

43. Mr. Graefrath (2063rd meeting) had raised the question of the definition of "pollution" in paragraph 1 of article 16 [17] and its relation to the "appreciable harm" standard in paragraph 2 of that article. The definition in paragraph 1 spoke of "effects detrimental to human health or safety", which could include causing a headache—an effect falling far short of "appreciable harm". The same problem arose in other international instruments. For example, article 1, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, in its definition of "pollution of the marine environment" referred to the introduction by man of "substances or energy" resulting in "deleterious effects", such as harm to marine life or hazards to human health. But article 194, paragraph 2, of that Convention required States to take measures to ensure that their activities were so conducted as not to cause "damage by pollution to other States and their environment". The concept of "damage by pollution" was rather similar to that of "harm" in article 16 [17], and the contrast between "damage" and "deleterious effects" was similar to that between "appreciable harm" and "effects detrimental to human health or safety". One way out of the difficulty might be to replace the expression "appreciable harm", in paragraph 2 of article 16 [17], by the word "pollution". He himself would prefer to retain the concept of "appreciable harm".

44. The question of reconciling the rules on the present topic with those on State responsibility had been raised by Mr. Barboza. That point would be dealt with in the commentary he was preparing for draft article 8 [9] (Obligation not to cause appreciable harm). If appreciable harm occurred, and the State of origin had exercised due diligence to avoid it, no responsibility was entailed. International responsibility arose for the State of origin only if it had not exercised due diligence.

45. It had been asked whether the present topic involved issues of responsibility for wrongful acts or of liability for lawful acts. It was perhaps attractive to say that the only duty of the State of origin was to pay compensation to the injured State. That approach, however, raised some serious questions. One could imagine an upper riparian State which, being rich, found it convenient to pay compensation in order to be able to pollute the watercourse, thereby causing harm to a lower riparian State, which received the compensation. The undesir-

able effect would be to force a pollution servitude upon the lower riparian State.

*The meeting rose at 1.05 p.m.*

## 2065th MEETING

*Tuesday, 21 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*later:* Mr. Bernhard GRAEFRATH

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)**

[Agenda item 6]

### FOURTH REPORT OF THE SPECIAL RAPporteur (*continued*)

#### PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)<sup>3</sup> (*continued*)

1. Mr. MAHIOU congratulated the Special Rapporteur on having adopted the method, in chapter III of his fourth report (A/CN.4/412 and Add.1 and 2), of presenting the problem and the sources in sections A and B, and the text of the draft articles in section C; that would enable the Commission to make a well-informed decision on the proposed provisions.

2. He wished to respond to certain points raised by the Special Rapporteur. The first, which was referred to in paragraph (12) of the comments on article 16, concerned the relationship between the rule of equitable utilization (art. 6), the prohibition to cause appreciable harm (art. 8 [9]) and the obligation embodied in paragraph 2 of article 16, now under consideration. On that subject, the Special Rapporteur invited the Com-

<sup>1</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>3</sup> For the texts, see 2062nd meeting, para. 2.

mission to adopt a solution that recognized the importance of the prevention of pollution and the protection of the environment, irrespective of the decision it took with respect to the link between articles 6 and 8 [9]. If the Commission did not agree that there could be an exception to article 8 [9] on the basis of article 6, the problem was resolved, for in that case paragraph 2 of article 16 was merely a special application of the general prohibition to cause appreciable harm. Even if the position was reversed, the exception, according to the Special Rapporteur, would not operate for paragraph 2 of article 16. In other words, appreciable harm would never be justified by equitable utilization. He agreed with that view, for in his opinion the exception under article 16 would preclude any satisfactory policy for the protection of the environment. It was also a matter of common sense, because pollution considerably restricted the uses of watercourses and, in particular, made them too costly for some developing countries owing to the expense involved in removing the pollution.

3. In paragraph (20) of the same comments, the Special Rapporteur sought the Commission's views on whether certain substances should be prohibited by means of lists of the kind referred to in paragraph 3 of article 16. Paragraph 3 embodied two closely related ideas: on the one hand, it contained a prohibition on the discharge of dangerous substances, which simply set forth in more concrete and precise terms the general obligation laid down in the previous paragraph; on the other hand, it indicated the procedure to be followed to give effect to that prohibition, namely, the establishment of lists of dangerous substances. It would be best, in his view, to provide for that procedure in general terms only, since details concerning the number and types of lists to be drawn up were more a matter for watercourse agreements.

4. His response to the question whether the provisions on pollution and protection of the environment should form a separate part of the draft was in the affirmative, for three reasons. First, the dangers of pollution were extremely serious, threatening most of the watercourses of the world. The subject could probably be dealt with throughout the draft, in the articles on the various uses of watercourses, but that would have the drawback of taking the edge off the problem instead of underlining how acute it was. Secondly, the other parts of the draft dealt solely with the rights and obligations of watercourse [system] States, whereas pollution could very well extend to third States or even to the international domain, including the common heritage of mankind; and in fact, part V applied as well to States other than watercourse States. Parenthetically, he awaited with interest the Special Rapporteur's reply to Mr. Ogiso's extremely interesting question (2064th meeting) regarding the relations between watercourse States and other States. Thirdly, as already noted by Mr. Bennouna (*ibid.*) and Mr. Yankov (2063rd meeting), once it was decided to draft comprehensive and detailed rules on the protection of the environment, a special part of the draft should properly be devoted to them. He had listened most carefully to the comments made on article 16 by Mr. Yankov, who, as chairman of the committee appointed at the Third United Nations Conference on the Law of the Sea to draft provisions on

pollution and protection of the marine environment, was an expert in the matter. Those comments, as well as those Mr. Yankov would undoubtedly make on future draft articles, certainly deserved the Special Rapporteur's closest attention. Coming as he did from a country bordering on the Mediterranean, a semi-enclosed sea in a critical state almost entirely due to land-based pollution, particularly from rivers, he was particularly aware of the fact that, although pollution of watercourses was primarily the concern of riparian States, it could also affect a sea in its entirety—semi-enclosed and enclosed seas being especially vulnerable in that regard—and could thus, as he had already mentioned, affect third States.

5. With regard to the régime of responsibility provided for under paragraph 2 of article 16, since that paragraph laid down an obligation of due diligence, the responsibility attaching thereto was responsibility for wrongful acts. The polluting State was guilty of the violation of an obligation to prevent a certain occurrence, and that fell under article 23 of part 1 of the draft articles on State responsibility.<sup>4</sup> Mr. Barboza (2064th meeting) had in fact made a comment along the same lines. The Drafting Committee would no doubt find a way of removing the ambiguities in the present wording, to which Mr. Graefrath (2063rd meeting), among others, had referred.

6. He would not dwell on the problems of a separation between the various topics with which the Commission was concerned, but would revert to a question he had already raised (2048th meeting) concerning an obvious point of contact between responsibility under paragraph 2 of article 16 and liability for the consequences of lawful acts, which was Mr. Barboza's topic. To take the example he had cited in that connection, assuming that State A polluted the tributary of an international watercourse without, however, causing appreciable harm—and thus without coming within the ambit of article 16—and that State B likewise polluted another tributary of that watercourse, what would be the position of State C, a riparian of the same watercourse, if the combination of both pollutions caused it appreciable harm? State C could not invoke the provisions of article 16 either against State A or against State B. Would responsibility be incurred in that case for harmful consequences arising out of lawful activities? It would seem reasonable. A problem of interpretation would then arise, however, for it could be argued that in such a case a special convention (on the uses of watercourses) would be superseded by a general convention (on liability for the consequences of lawful activities). He would be grateful for clarification on that point.

7. His misgivings with respect to the distinction between pre-existing pollution and new pollution had not been removed on reading Mr. Schwebel's conclusion, in his third report, which the Special Rapporteur cited in paragraph (10) of his comments. Mr. Schwebel had explained in a few lines that there was no point to the distinction but had not supported his conclusion with arguments that made it possible to form an opinion. The question the Commission should ask related more

<sup>4</sup> See 2062nd meeting, footnote 9.

to the choice between a comprehensive régime to combat pollution, involving both remedial and preventive aspects, and a régime geared solely to prevention. In the former case, the distinction was pointless, but in the latter it acquired full value. He would prefer the first choice for, in order to combat pollution effectively, both prevention and remedy were needed. At the same time, he recognized that prevention and remedial action involved the introduction of separate mechanisms, and that the draft should provide for collaboration between riparian States in reducing and eliminating pre-existing pollution under equitable and reasonable conditions.

8. In his report (A/CN.4/412 and Add.1 and 2, para. 91), the Special Rapporteur declared his readiness to extend the coverage of the draft articles on pollution and protection of the environment. The views thus far expressed should encourage him in that path, in the greater interest of all States.

9. Mr. SHI said that rational utilization and conservation of water resources were questions that affected the very existence of mankind. Man could not live without water: measures were therefore needed to improve a situation that was deteriorating year by year owing to certain natural phenomena, population growth, and the destruction caused by man. For international watercourses, Principle 21 of the Stockholm Declaration, which imposed an obligation on riparian States not only to use watercourses in a reasonable and equitable manner but also not to cause harm to the environment, was of vital importance, and it was that principle which, together with the concept of sustainable development, should in the long term shape thinking on the subject.

10. Provisions relating to pollution and environmental protection should certainly be included in the draft articles. The Commission should not be troubled by the question whether a prohibition of pollution existed in general international law: the urgent needs of the international community called for a progressive development of the law, something that was within the Commission's mandate. In that connection, the paragraph of the report entitled "Our common future", prepared by the World Commission on Environment and Development, quoted by the Special Rapporteur in his report (A/CN.4/412 and Add.1 and 2, footnote 249), was very pertinent. At the same time, however, account must be taken of the fact that, for various reasons, including technological possibility and availability of financial resources, the prevention, control, abatement and elimination of pollution and environmental depredation of international watercourses were no easy task for States and required long-term efforts.

11. With regard to article 16, he considered it necessary to incorporate a precise definition of pollution in the draft articles but, like some other members of the Commission, he would prefer the definition to be moved to article 1 (Use of terms), for reasons of coherence and also of consistency with the Commission's normal practice.

12. The proposed definition, unlike the definitions in some international agreements, did not mention the means whereby the pollution was produced. Personally, he did not believe it would be useful to specify the point,

first because, as the Special Rapporteur stated in paragraph (2) of his comments, the indication of the types of alterations envisaged covered the manner in which the pollution was produced, and chiefly because so broad a definition had the merit of filling in practically all gaps.

13. First of all, paragraph 2, which was the essence of article 16, did not prohibit pollution as such, for, as noted by the Special Rapporteur, contemporary international law did not bear out such a prohibition; it prohibited pollution only to the extent that pollution caused appreciable harm. The Special Rapporteur's view was that appreciable harm constituted the threshold of international wrongfulness. That would appear to mean that any breach of the obligation not to cause appreciable pollution harm gave rise to State responsibility based on fault. While there appeared to be no objection to laying down an obligation not to cause appreciable harm as such, the question nevertheless arose how to reconcile that rule with the rules on no-fault liability, on which Mr. Barboza was working. Actually, transboundary pollution harm to another watercourse State often stemmed from activities not prohibited by international law. If such harm could give rise to State responsibility, that would represent an exception to the rules formulated in the framework of no-fault liability, and it was doubtful whether such an exception would be proper or even feasible.

14. Secondly, it was difficult to understand the concept of "appreciable harm", in paragraph 2, in relation to that, in paragraph 1, of "effects detrimental to human health and safety", notwithstanding the Special Rapporteur's explanation that it was theoretically possible for such effects not to amount to appreciable harm. Once appreciable harm was objectively determined, responsibility might well play an important role in the abatement, control and elimination of pollution, but that might be too late from the point of view of the health of the population endangered by the polluted waters of a watercourse. From the moral standpoint, should not pollution producing effects detrimental to human health be prohibited outright? In any case, it was necessary to establish "black" and "grey" lists; if it was not deemed appropriate to include such lists in a framework instrument of a general nature, paragraph 3 should provide for an obligation on the part of watercourse States to negotiate such lists and to prohibit the discharge of any substance appearing on the "black" list.

15. Thirdly, for practical reasons, a distinction should be made between new and existing pollution, even though modern treaty practice tended rather to distinguish between different types of pollutants. Perhaps if both distinctions were made in the articles, they might prove more acceptable to States as a whole.

16. Fourthly, although the Special Rapporteur had adequately explained in his comments that the obligation not to cause appreciable harm constituted an obligation of due diligence, he himself had doubts regarding the propriety of linking the concept of due diligence with an international minimum standard to be expected of a "good government" or a "civilized State", a doctrine propounded by Pierre Dupuy that

was reminiscent of the controversial international minimum standard doctrine of traditional international law. The obligation to exercise due diligence would be more acceptable to States as a whole if it was linked to vigilance consonant with a State's degree of development.

17. Lastly, the Special Rapporteur was right not to regard the principle of equitable and reasonable utilization as a possible exception to the obligation not to cause appreciable pollution harm. Draft article 16 should be referred to the Drafting Committee for consideration in the light of the comments made by members of the Commission.

18. Mr. ARANGIO-RUIZ, after paying tribute to the Special Rapporteur's excellent work, said that he was always hesitant to speak on subjects like that of draft article 16, relating to the environment, because of the obvious difficulties of that matter at the international level. The subject was already complex at the national level, where the multiplicity of forms of pollution was fortunately offset by the existence of central and local authorities vested with all the necessary legislative, administrative and judicial powers to protect the environment, but the struggle against the scourge of pollution often seemed an almost desperate enterprise at the international level. More than in any other area, there was no comparison between the need for a universally accepted and enforced regulation on the one hand, and on the other, the legislative—and still more, the institutional—means available to adopt and implement adequate rules.

19. A very recent example had been provided by the 21 legal principles for environmental protection and sustainable development proposed by the Experts Group on Environmental Law of the World Commission on Environment and Development.<sup>5</sup> If the universal declaration and the convention on the environment and development contemplated by that Commission in its report, entitled "Our common future", were to draw on such vague and general concepts as the 21 principles in question, there was every reason to fear for "our common future", at least with regard to the environment. It was therefore gratifying to note that the Special Rapporteur had allocated a separate part of the draft articles to pollution and had submitted draft articles on the subject; he thus provided the Commission with an opportunity to give an example by framing texts that went beyond general principles and had the character and scope of genuine legal rules.

20. As to draft article 16 itself, Mr. Shi was right to say that it could be improved by placing greater emphasis on the progressive development of the law.

21. With regard to the character of the responsibility involved—construed in the sense of the English term "liability"—he agreed with Mr. Barboza, who had already expressed the idea in 1980 and 1981, an idea endorsed at the time by Mr. Reuter and Mr. Ushakov, that

paragraph 2 of article 16 should state an obligation of result, namely the obligation of every watercourse State to exercise due diligence to avoid causing appreciable harm to other watercourse States, to the ecology of the watercourse or indirectly to the marine environment.

22. Nevertheless, that obligation of due diligence did not seem sufficient, for how would the affected State prove that the conduct of the State of origin did not meet that criterion? The search for evidence, which was difficult enough in the national framework, could here come into conflict with the practically unsurmountable obstacles of independence and territorial sovereignty. Would the State of origin open its frontiers to permit the on-site investigations necessary to determine the degree of diligence it had, or had not, exercised? The rule which established responsibility thus ran the risk of remaining a dead letter. It was thus in the general interest, as well as in the interest of watercourse States, to improve the position of the affected State, perhaps by drawing on certain rules of internal law.

23. In the Italian Civil Code, for example, the aspects of responsibility covered by article 1384 of the French Civil Code—an old provision that was generally regarded as much too terse—were the subject of provisions that dealt in much greater detail with the various situations which, in France, had given rise to a case-law based on the said article 1384. Articles 2048 and 2050, which reversed the burden of proof (*onus probandi*), were particularly interesting in that respect. Article 2048, on the responsibility arising from the acts of minors, specified that parents, guardians and other persons in charge were not released from their responsibility for acts of minors in their care unless they could prove that they had been unable to prevent the occurrence of the act. Article 2050, relating to dangerous activities, specified that any person causing harm to another in the course of an activity that was either inherently dangerous, or hazardous because of the nature of the means employed to perform it, was obliged to make reparation, unless he could prove that he had taken all the measures calculated to prevent the harm. Admittedly, those rules still fell far short of strict responsibility, since they made express provision for exoneration by proof that due diligence had been exercised; they also fell far short of the rules embodied in the 1960 Paris and 1963 Vienna Conventions on the liability of operators of land-based nuclear installations, or of the similar rules of the 1962 Brussels Convention on the responsibility of operators of nuclear vessels.<sup>6</sup> They nevertheless had the merit, from the standpoint of justice and in terms of the general interest, of releasing the affected persons from the onus of proof and making the burden thereof rest on the persons who were in a position to assess the hazards and to take the appropriate measures to eliminate or reduce them.

24. A similar reversal of proof should be considered for paragraph 2 of article 16. That would enable the Commission, in addition to improving the wording of the article, to give a useful indication to those whose

<sup>5</sup> *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (Dordrecht, Martinus Nijhoff, 1987); summarized in the report of the World Commission on Environment and Development, "Our common future" (A/42/427), annex I.

<sup>6</sup> For the texts of the conventions cited in this paragraph, see IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series No. 4, rev. ed. (Vienna, 1976).

task it would be to formulate the universal declaration and the convention on the environment advocated by the World Commission on Environment and Development.

25. With regard to the criterion of "appreciable harm", in paragraph 2 of article 16, while the adjective "appreciable" was the least controversial, it was nevertheless superfluous. The real issue was to determine whether harm had been done, and that was a matter for the natural sciences and technology. If harm existed, it was necessarily appreciable. The danger in using the adjective "appreciable" was that it made for restrictive interpretations of the obligation of result, interpretations that would inevitably end up by disregarding the phenomenon of creeping pollution, an example of which had been given earlier by Mr. Mahiou. Deletion of the adjective "appreciable", which also raised certain problems with respect to the distinction between new and existing pollution, would be useful. He requested the Drafting Committee to consider that suggestion both for paragraph 2 of article 16 and for the other provisions in which the word was to be found, for instance in article 8 [9].

26. Mr. REUTER, while commending the quality of the texts submitted by the Special Rapporteur, said that reading draft article 16 and hearing his colleagues' statements had filled him with something approaching dread. He would in no way deny the great importance of the problem of pollution, but the task facing the Commission was indeed a crushing and fearsome one. The question therefore was whether it should give part V of the draft articles the careful study it deserved or whether it should abide by the text already drafted, recognize its incomplete nature and pursue the work on pollution, yet dissociate it materially from the rest of the draft. If the Commission proposed to treat part V with all the requisite attention, it would find itself, as the Special Rapporteur had surely sensed in declaring his readiness to develop that part of the text, confronted with an extremely heavy task which would delay completion of the work on the topic. As Mr. Bennouna (2064th meeting) had said on the subject of the draft articles submitted, it was either too much or too little. While there was no question of abandoning the study of the problem of pollution, it was legitimate to doubt the wisdom of tying the immediate fate of the first 15 articles in with the drafting of the subsequent articles.

27. The very concept of pollution was neither simple nor obvious. The number of treaties concluded on the subject was very large—a welcome fact, but they were usually highly specific and limited in scope, either geographically or in terms of subject-matter. Again, could pollution problems be resolved in the same way in all foreseeable cases? For example, in his fourth report (A/CN.4/412 and Add.1 and 2, footnote 207), the Special Rapporteur defined pollution as any alteration in the composition or quality of waters resulting from the introduction of substances, species or energy. The word "species" suggested that the quality of water was determined, *inter alia*, by the fish it contained. But would it be a case of pollution if a watercourse State placed in the watercourse a quantity of pike which later fed on fish being bred by another watercourse State? He

doubted it, noting in that connection that the drafters of the 1982 United Nations Convention on the Law of the Sea had taken care to refrain from juxtaposing fishing and pollution. Other hypotheses envisaged in the proposed definition, if carefully examined, could well give rise to similar difficulties.

28. The question of responsibility also raised a major problem; that was evidenced, as Mr. Arangio-Ruiz and Mr. Mahiou had pointed out, by the fact that the Commission had not yet decided on a precise terminology in the matter. In referring to Mr. Ago's definitions of the obligation of conduct and the obligation of result in connection with the topic of State responsibility, the Commission should not forget that in Mr. Ago's view the obligation of conduct was more binding on the State than the obligation of result inasmuch as it deprived the State, so to speak, of its choice of means. Yet some members placed a different interpretation on things, so that the obligation of conduct was transformed into the "duty of diligence". Unfortunately, the latter concept lacked precision, for it was generally possible to speak of "normal diligence" or "reasonable diligence in the light of the circumstances", but that was not the case in the particular field of pollution or of the environment. It was said, for example, that pollution became wrongful when it exceeded a certain threshold, which implied the existence of a quantified level of products, substances, or even heat units. But in that case, how did the obligation of conduct differ from the obligation of result?

29. From that point of view, the provisions of paragraph 2 of article 16 were not free from ambiguity. Taken literally, they imposed an absolute obligation of result based on the idea that wrongfulness in environmental matters consisted of the violation of the territorial sovereignty of another State. That had been the thesis of the late Robert Q. Quentin-Baxter, one that could not be completely rejected, since there were cases where it was necessary to impose a very strict obligation, for instance in the case of "immissions", to use the term employed by the publicist Hans Thalmann in his innovative thesis of 1951.<sup>7</sup> In the *Lake Lanoux* arbitration, the tribunal had taken the view that the construction of a dam did not create a particular hazard, but he wondered whether the tribunal would have approached the problem in the same way immediately after the catastrophic bursting of a dam. A specific standard of a very strict kind could well make a dam an "abnormal" hazard, as was the case with nuclear power stations. More generally, in a legal area still to be delimited, it was perhaps possible to establish an unconditional rule to the effect that strict State responsibility was incurred as a result of the mere fact of a phenomenon's extending beyond the State's frontiers.

30. The concept of obligation was just as ambiguous everywhere else it occurred in the text under consideration. How could it be established, for example, that a State had failed to observe the obligation to negotiate? The obligation was apparently a "slight" one, another nuance which mitigated the very principle on which the notion of obligation was based.

<sup>7</sup> H. Thalmann, *Grundprinzipien des modernen zwischenstaatlichen Nachbarrechts* (Zurich, Polygraphischer Verlag, 1951).

31. It was surprising that no special rapporteur since 1963 had tackled the problem of causality in connection with State responsibility in the area under consideration. True, the problem was a difficult one and was made still more complex by the fact that it was not considered from the same angle by all national legislations. Paragraph 1 of article 16 spoke of "alteration . . . which results directly or indirectly from human conduct", and Mr. Ogiso (2064th meeting) had welcomed the word "indirectly" because in his view it covered situations such as pollution through shellfish, of which he had given an example. Under French law, the discharge into a river of a toxic product that would not kill fish but would eventually poison human beings when concentrated in the human organism would be considered a matter of causality which, because it was exclusive, was direct. Paragraph 1 would then apply, even in the absence of the word "indirectly". If the Commission intended to develop the concept of indirect responsibility, it would have to go a great deal further and take a step that should give it pause. For example, was there or was there not responsibility in the event of torrential rains leading to the pollution of a watercourse? The answer seemed obvious, and yet, if a State had stored a toxic product near the watercourse concerned and done so under less than perfect conditions, and if, as a result of the rain, the toxic product had been washed away and become mixed in with the waters of the river, the inescapable conclusion would be that the pollution had two causes. Surprisingly enough, no member of the Commission had so far raised the question of multiple causes.

32. Later on, in drafting the articles on reparation, the Special Rapporteur would have to tackle that aspect of responsibility. In any event, if the draft was to be consistent, the Commission would have to agree on a particular vocabulary and keep to it. In order to do so, it would have to decide upon the degree of effectiveness it wished to give to the provisions on pollution. The outcome of its work on the question of international rivers had been awaited so long that the Commission was, as it were, driven into a corner and forced to make a choice.

*Mr. Graefrath, First Vice-Chairman, took the Chair.*

33. Mr. BARSEGOV said he thought it perfectly legitimate for the Commission to concern itself with provisions on pollution in its work on the topic under consideration. However, the real point at issue was the means of preventing pollution, which had to be acceptable to States. For his part, he based his approach to the subject on the premise that the draft in course of preparation constituted a set of recommendations, or a framework agreement establishing general principles based on international practice in the matter.

34. Once again, therefore, it was necessary to consider the sources of the law on the non-navigational uses of international watercourses which the Commission was seeking to define. He was returning to that point because only a realistic and objective assessment of the available normative materials could ensure success for the Commission's work. It had been stated that 159 States had signed the 1982 United Nations Convention on the Law of the Sea, but how many States had ratified it six years later? Fewer than 40, and some major coun-

tries, whose conduct was decisive for environmental protection, were still not parties. It was therefore necessary to take account of the fundamental differences existing in legal situations: the problem of the utilization of international watercourses must be seen in terms of territorial jurisdictions, whereas that was not the case for the law of the sea. Realism required that the provisions contemplated should be considered in the light of the legal status of the areas concerned.

35. Protection of the marine environment was an established principle of international law. Unfortunately, the will for international regulation was inversely proportional to the extent of national sovereignty over specific marine areas: the approach to protection of the high seas was different from that concerning protection in the exclusive economic zone, and different again from that concerning territorial seas or internal waters. In the exclusive economic zone, for example, the coastal State's sovereign right to exploit the natural resources was conditional upon that State's duty to preserve the marine environment in accordance with its own environmental policies. Thus the coastal State's laws and regulations became mandatory for other States in the zone, while the coastal State itself was not subject to any control. The situation was still worse in the case of territorial or internal seas: there, the coastal State could use its own rules to remove foreign competition from its ports. The question thus arose of the coastal States' respect of their duty to protect the quality of the territorial and internal waters, which formed part of the world ocean, whereas pollution from land-based sources was exempt from international regulation, although, as had been pointed out, such pollution represented 80 to 90 per cent of all marine pollution. The harsh reality was that, in that domain, States seemed particularly lacking in the will to exercise self-discipline.

36. It was also difficult to agree with the increasingly widespread tendency to consider that the entire contents of conventions which had not yet entered into force automatically constituted "custom". While customary norms were emerging more rapidly by reason of the interdependence of the contemporary world, the action of the mass media and the fact that agreements which had been signed but not ratified could be regarded as *opinio juris*, it was hardly correct to invoke the entire content of a convention that had not yet been ratified as a basis of customary law.

37. The section of the United Nations Convention on the Law of the Sea which had a direct bearing on the subject under consideration was that on pollution from land-based sources. Should the Commission take it upon itself to deal with a problem which the Third United Nations Conference on the Law of the Sea had been unable to resolve after 10 years of effort? In his view, such an initiative would have little chance of success.

38. In view of the Soviet Union's vast size and the large number of its watercourses, and given the importance of State practice in the matter under consideration, he had devoted some study to the bilateral and multilateral agreements concluded between the Soviet Union and neighbouring countries. Under the multi-

lateral agreement on the protection from pollution of the waters of the river Tissa and its tributaries, " 'pollution' means a process which directly or indirectly causes the deterioration of the composition or properties of the waters. The waters are considered polluted if their composition or properties have been altered as a result of human activities and they have become partly or wholly unsuitable for any specific use". The definition of pollution, thus worded, covered both the introduction and the extraction of certain elements. The existence of pollution was determined on the basis of result, i.e. of alteration in the composition or properties of the waters resulting from human activity which rendered the water partly or wholly unsuitable for a given use. Thus the other criterion for evaluating pollution was the reduction or complete loss of the possibilities of using the water. Another agreement contained a definition, not of pollution, but of protection from pollution, in other words protection of the waters from the direct or indirect introduction of solids, liquids or gaseous substances or heat in quantities capable of deteriorating the waters' composition or properties in relation to the standards approved by the parties.

39. Another feature of practice which should not be ignored was that watercourse agreements did not speak of pollution in general and did not prohibit pollution completely; they established specific parameters for each particular watercourse which, for that reason, were not universally applicable. The point had been made that, without standards and criteria, it was impossible to combat pollution; in that connection, Mr. Beesley had remarked that standards should be flexible and adaptable and that, while having objective significance, they could vary in time and place. But in practice, the idea taken as the starting-point was that the conditions applicable to each watercourse corresponded to certain parameters which were established by agreement among the watercourse States themselves and which determined both the quality of the water at a specific time and the acceptable margin of alteration.

40. The same procedure must be applied with regard to lists of pollutants. He could not agree that such lists could be drawn up by the Commission or that they should be universally applicable; first, because such an operation required specialist knowledge and, secondly, because it would be impossible in practice to draw up an exhaustive list corresponding to the specific situation of all watercourses. As for selective lists, they would not meet the specific requirements of each particular watercourse. In fact, lists of pollutants could be drawn up by the watercourse States themselves on the basis of consultation and agreement among themselves. In his view, the text of paragraph 3 of article 16 should be drafted along those lines.

41. With regard to the legal import of those standards and lists, it could be understood only in the context of a particular interpretation of responsibility. But responsibility could take various forms, each based on different concepts. That was what created the impression that the Commission was groping without success, although in reality it had made progress, at least in respect of responsibility taken in the English sense of "liability".

42. How did the Special Rapporteur treat the question of responsibility for transboundary pollution? In paragraph (4) of the comments on article 16, he acknowledged that "it is doubtful that pollution, *per se*, of an international watercourse can be said to be proscribed by contemporary international law", going on to say: "Rather, it is when such pollution causes appreciable harm to another watercourse State that it becomes internationally wrongful." In other words, a watercourse State should not cause appreciable harm, through pollution, to another watercourse State or to the ecology of the watercourse, as stated in paragraph 2 of article 16.

43. According to the Special Rapporteur, the concept of appreciable harm as a criterion for evaluation constituted a factual standard, compliance with which could be objectively defined. Personally, he had doubts about the accuracy of that statement, for in regard to harm the dividing line between what was appreciable and what was not appreciable was extremely subjective. Any attempt to define the concept could only confuse the issue. In paragraph (4) of the comments, the Special Rapporteur explained that " 'appreciable' harm is harm that is significant—i.e. not trivial or inconsequential—but . . . less than 'substantial' ". It was difficult to see how that concept could be defined—although the real problem lay elsewhere.

44. The Special Rapporteur considered that, under paragraph 2 of article 16, a State in which the pollution originated could necessarily be held responsible for any appreciable harm caused by such pollution. Paragraph 2 dealt with "one of the" obligations to exercise due diligence in order to avoid causing appreciable harm. But what of the others? That question had not been answered. Like Mr. Barboza, the Special Rapporteur drew a distinction between responsibility for wrongfulness and causal responsibility, and introduced the concept of due diligence as the basis of responsibility. If a State clearly failed to exercise due diligence, it apparently violated an obligation. But if it acted with all due diligence, it did not violate an obligation, and the harm caused would be linked to events or factors independent of its will. In other words, the case would be one not of fault, but of accidental harm. The Special Rapporteur based his reasoning on the idea that the degree of diligence depended on the circumstances, and that the activity which had caused the harm, as well as the harm itself, should be foreseeable: the State knew or should have known that a given activity might result in pollution. That was one of the distinctions between that form of responsibility and what was termed, in English, liability.

45. The Special Rapporteur held that, in order to establish responsibility, it was necessary to consider the means employed by States to prevent pollution; and he proposed, among the other criteria to be applied in determining whether a State had fulfilled its obligations, an assessment of the diligence that could be expected of "a State acting in good faith". In the opinion of the Special Rapporteur, the degree of diligence also depended on the circumstances in which harm had occurred or might occur, and on the procedures for ensuring effective control. Moreover, the degree of diligence

might depend on the level of development of the State in question—a differentiation that lightened the burden of developing countries in which pollution originated, but offered scant consolation to their neighbours, possibly developing countries, too, which were the victims of a polluting activity. Nevertheless, such pragmatism was laudable, especially since State practice took account of differences in technical and economic capabilities. By establishing the category of due diligence, the Special Rapporteur sought to lighten the responsibility established for a wrongful activity; he sought to rid it of its automatic character and to render it dependent on certain conditions.

46. However, if accepted international standards were established, their breach, irrespective of the consequences, must automatically be considered as a violation of the law. Mr. Barboza (2064th meeting) had expressed doubts as to the feasibility of introducing such a formulation in a general convention, even though it was certainly desirable to establish clear and precise international standards. He himself agreed with the members of the Commission who thought that the prohibition as it now stood in article 16 was too peremptory; it was not in line with the actual state of international relations and could have an adverse impact on economic activity.

47. Mr. Barboza had suggested a more realistic, and consequently more productive solution, namely, a transitional regulation based on the idea that States would agree among themselves on the means of reducing the pollution to acceptable levels within a given time-frame through co-operation. It would seem difficult to reject such a solution, which was in keeping with actual practice in the interdependent world of today, where all States sought, on the basis of mutual interest, to strike a balance between the requirements of economic development and the need to protect the environment and to keep pollution down to a tolerable level. In support of that argument, he referred to a number of provisions in the agreements he had cited earlier. In the context of anti-pollution measures, those agreements enumerated steps to be taken in case of unforeseeable and unforeseen pollution: obligatory and immediate notification of the watercourse States concerned, elimination of the causes and consequences of the pollution, and prevention and reduction of the damage caused by the pollution of the waters; they also indicated ways of acting jointly against pollution in so far as that was feasible and necessary and taking advantage of opportunities for mutual assistance on the basis of reciprocal agreements. The fact that none of the agreements to which he had referred contained special provisions on responsibility did not mean that the question of compensation had been overlooked. The authors of the texts simply appeared to consider that the problem could be resolved by agreement among the parties directly concerned and in accordance with the procedures laid down in the agreements themselves.

48. It would be preferable not to refer draft articles 17 and 18 to the Drafting Committee until the Commission had before it all the draft articles on the subject under consideration. It would be virtually impossible to determine whether the draft articles fulfilled the desired objective if they were considered separately. Under the cir-

cumstances, the Commission could neither decide whether it was appropriate to combine the draft articles on pollution with the other draft articles, nor determine the form they must take in order to be incorporated in the law of the non-navigational uses of international watercourses. He had no intention whatsoever of questioning the calibre of the work done by the Special Rapporteur; he believed, however, that the Commission must have the entire text before it in order to see the problem clearly.

49. Mr. BENNOUNA said that the discussion on the three draft articles had brought out a problem of method in that the Commission did not know what the Special Rapporteur proposed to do with part V. Before the discussion proceeded further, he would like to hear about the Special Rapporteur's intentions regarding both the scope and the very purpose that were to be assigned to that part of the draft articles.

*The meeting rose at 1.05 p.m.*

## 2066th MEETING

*Wednesday, 22 June 1988, at 10 a.m.*

*Chairman: Mr. Leonardo DÍAZ GONZÁLEZ*

*Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)**

[Agenda item 6]

**FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)**

**PART V OF THE DRAFT ARTICLES:**

**ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])**

**ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) and**

**ARTICLE 18 [19] (Pollution or environmental emergencies)<sup>3</sup> (*continued*)**

<sup>1</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>3</sup> For the texts, see 2062nd meeting, para. 2.

1. Mr. TOMUSCHAT said that, in formulating draft article 16, the Special Rapporteur had relied on a wealth of supporting material, so that in adopting that text the Commission would be in broad agreement with current thinking on environmental pollution.

2. It had been argued that article 16 said either too much or too little, and that it should either be amplified or deleted. He considered that the text was too succinct and should be expanded. If it was deleted, the Commission would be failing in its duty to deal with the most crucial problem affecting watercourses in industrialized countries. Pollution was due not so much to the use of water for irrigation, the building of dams or other works, as to the discharge of waste water into rivers and lakes. Thus article 16 responded to a bitter necessity, and to delete it from the draft would be tantamount to closing one's eyes to danger in ostrich-like fashion.

3. He supported the idea of splitting up article 16 in two separate articles. The definition of pollution should be moved elsewhere, possibly to an introductory article on the use of terms. The crucial provision, in paragraph 2, should be given its proper place as an essential element of the whole draft.

4. It did not seem appropriate, however, for the article to start with a proposition enjoining States to co-operate in preventing or abating pollution. Every State was the master in its own territory, and the means of preventing pollution were at its disposal. Since no Government could take action in the territory of another State, the burden of combating pollution rested with the individual States concerned. Co-operation between States was certainly necessary, but it came one step behind. It would be of interest in that connection to consider the system of the 1982 United Nations Convention on the Law of the Sea, which focused on co-operation. The sea beyond the limits of national jurisdiction was *res communis omnium* and no State had preferential rights in it; consequently, any meaningful efforts to prevent pollution must rely on co-operation. Rivers and lakes were different in that they were placed under national sovereignty, although ultimately all rivers, with the pollution they carried, flowed into the sea.

5. He could agree, in general, with the definition contained in paragraph 1 of article 16. It was sufficiently broad to cover all the important phenomena involved. It covered even the Minamata situation; the discharge of mercury or copper into a watercourse caused a significant physical or chemical alteration of the water, which adversely affected the possibility of using it for any beneficial purpose. The discussion had not revealed any gaps in the definition that needed to be filled. As pointed out by the Special Rapporteur in paragraph (2) of his comments, thermal pollution was covered by the definition, since heating the waters constituted a physical alteration.

6. The distinction between simple pollution and prohibited pollution appeared convincing and well justified. Pollution could never be totally excluded so long as there was human activity on the banks of a watercourse, since waste water could only be discharged into watercourses. The ideal solution would be for all waste

water to be purified and reused, but what had been achieved in some advanced branches of industry could not be generalized. Pollution was therefore unavoidable, but there had to be some limit to it.

7. The Special Rapporteur had set that limit by specifying an obligation not to cause appreciable harm. He had preferred the term "appreciable" to "substantial", thereby producing an unduly rigid provision. Pollution was inevitable. The rivers of Central Europe, for example, all carried pollutants which made their waters unsuitable for drinking; elaborate and expensive treatment was needed to make them fit for human consumption. That inconvenience was far from insignificant. The test of significant inconvenience, however, would hardly serve to draw the line between lawful and unlawful conduct. The qualification "appreciable", did not express what was needed for dealing effectively with pollution. The intended purpose was to avoid serious or substantial damage, and the test of prevention of appreciable harm set rather too idealistic a standard. The Special Rapporteur had defined it as a standard of due diligence. Accordingly, the obligation not to cause appreciable harm became a distant goal, and one to be attained by all reasonable means. It could be compared to the right to work under the International Covenant on Economic, Social and Cultural Rights.<sup>4</sup> States parties to that Covenant recognized the right to work, but they were not under an obligation directly to ensure it; they were only required to use their best efforts to achieve its full realization. That kind of flexibility constituted too low a standard, however. It might even be used to argue that populous States should enjoy greater rights to pollute than others. Similar problems arose in regard to economically or geographically disadvantaged States.

8. As he saw it, more should be done by way of concretization and specification. The "due diligence" approach was fraught with too many uncertainties. It was true that a framework agreement could not go into great detail; nevertheless, some inspiration could be drawn from the 1982 United Nations Convention on the Law of the Sea. In particular, an attempt should be made to set objective standards: for instance, the discharge of toxic substances that were not biodegradable should be banned altogether. Reference should be made to internationally recognized standards. It was true that no international organization had competence extending to international watercourses, unlike the situation obtaining in regard to the sea. Nevertheless, what was prohibited for the sea must necessarily also be prohibited for international watercourses. The subjective discretion of States in the matter should be limited. It was in that light that he viewed paragraph 3 of article 16, which specified one of the categories of measures which States had a duty to take jointly by way of co-operation.

9. On the whole, he agreed with the Special Rapporteur that any distinction between old and new pollution should be rejected in principle. Nevertheless, States considering the adoption of the future convention might be deterred from ratification by the thought that they could not do away overnight with a negative record of pollution inherited from the past. Thus to establish specific rules might be warranted in order to avoid

<sup>4</sup> United Nations, *Treaty Series*, vol. 993, p. 3.

retroactivity. The sins of the past could not be wiped out by the effects of a treaty; some time might be needed to phase out existing pollution. It should be made clear, however, that such a régime for old pollution was an exception to be applied only during a transitional period.

10. Because of the generality and flexibility of the standards set out in article 16, some provision should be made for procedural mechanisms. Very detailed procedures had been devised for planned measures. In Central Europe, those proposed rules would rarely be applicable; pollution was not caused by an identifiable individual project, but by thousands of different sources producing creeping pollution. He believed there was a need for procedural safeguards. At the request of a State claiming to be adversely affected, the State of origin should be required to enter into consultations and negotiations with a view to settling the matter peacefully and equitably. The onus would thus be on the polluting State to give the necessary explanations and to specify what effective measures it had taken to combat existing pollution. The result would be to improve the process of implementation of the substantive rules and to promote co-operation between the watercourse States concerned.

11. Mr. AL-KHASAWNEH said that he feared he would be striking a discordant note in the debate, because he had doubts about some of the assumptions on which the draft articles were based. His comments were not, however, intended to detract from the progressive development and codification of the law of international watercourses; on the contrary, he had always believed that a general convention on the subject was not only possible, but long overdue.

12. The experience of the Third United Nations Conference on the Law of the Sea and the 1982 United Nations Convention were relevant to the present work, and not only in regard to the problem of pollution. The 1982 Convention and the present draft articles dealt with the same subject-matter and some of the problems to be resolved were the same: in particular, the need to reconcile the division of the world into political sovereignties with the unbending laws of nature. It was therefore surprising that the Special Rapporteur should not have made greater use in his earlier reports of the United Nations Convention on the Law of the Sea. The modalities it provided for co-operation and for reconciling questions of national sovereignty with the reality of interdependence would have served to narrow the gap between the law as it was and the law as it should be. Firmer grounds would thus have been provided for some of the obligations proposed. The discussion had shown that they had their source in instruments that were not universal in character and that they could not therefore be incorporated in a draft intended for worldwide acceptance.

13. The Convention on the Law of the Sea, however, was not a framework agreement that provided for system agreements and operated as a set of residual rules in their absence. Of course, where there was a special need to deal with a particular situation, the Convention expressly stipulated for the possibility of supplementary agreements, as for example in articles 69 and 70.

14. A general convention need not be a monolithic structure permitting no derogations from its provisions. That had been recognized in article 41 of the 1969 Vienna Convention on the Law of Treaties, and it was not uncommon for multilateral treaties to be modified as between some of the parties. The 1961 Vienna Convention on Diplomatic Relations was notable for the number of agreements whereby some of the parties to it had undertaken more stringent obligations than those specified in the Convention itself. Yet that Convention did not start from the assumption that, since diplomatic missions varied, no codification of diplomatic relations was possible. To suggest that differences in the characteristics of the subject were a barrier to codification would be to cast doubt on the whole undertaking.

15. The decision to leave almost everything to watercourse States, offering them as guidance only the elastic concepts of equitable utilization and prevention of appreciable harm, did not provide the necessary certainty of the law applicable, which was an essential means of avoiding disputes between States.

16. The Commission should not ignore the disparities in power between watercourse States, which resulted not only from differences in their political power, but also from the caprices of geography.

17. Part I of the draft articles did not contribute much to the concept of codification. Part V, now under consideration, dealt more with the real problems inherent in the law of international watercourses in that it raised a number of questions: whether State responsibility or liability was involved; whether a list of prohibited pollutants should be included; and, in regard to pollution, whether the rule of "no harm" should be given priority over the principle of equitable utilization. It might also be asked to what extent the effect of watercourse pollution on non-riparian States should be taken into account, and whether it was realistic to speak of a watercourse and its ecology as an independent ecosystem when 80 per cent of sea pollution reached the sea through rivers. All those problems should have been identified from the start of the consideration of the present topic, but they had been left to a later stage. Some speakers had suggested that it would be too ambitious to try to resolve those problems in the draft; but if that view was accepted, the draft articles would be of very little use as guidance or programmes of action.

18. There appeared to be a contradiction between part I of the draft articles and some of the more specific provisions of the draft. The Special Rapporteur's reaction to that contradiction was exemplified by his endeavour to make no exceptions to the prohibition of appreciable harm in the case of pollution. That problem could have been easily resolved by giving primacy to the prohibition of appreciable harm from the start. In his view, it was untenable to give primacy to equitable utilization at the expense of the prevention of appreciable harm in the case of new uses, but to reverse that formulation in the case of pollution. New uses could, and usually did, cause pollution.

19. It was stated in the Special Rapporteur's comments (paras. (10) and (11)) to article 16 that to provide a list of pollutants was in keeping with the modern trend

of treaty-making, but that it would be inappropriate to provide such a list in a framework agreement. But that was an argument for dropping the framework approach, rather than for lagging behind the times.

20. Instead of providing watercourse States with normative rules clarifying their rights and duties, part I of the draft suggested to those States that their disputes could best be settled, and the optimum utilization of their watercourses best achieved, through system agreements. Article 4 defined those agreements and article 5 specified the parties entitled to negotiate them. The pre-eminence thus given to system agreements and the formal entitlement conferred on watercourse States in that matter could lead to the interpretation that the law of international watercourses consisted essentially of system agreements.

21. Articles 4 and 5 of part I of the draft were based on two articles originally proposed by the former Special Rapporteur, Mr. Schwebel. Their acceptance by the Commission at its thirty-second session, in 1980, had not been without opposition by some members, for the reasons explained in paragraph (36) of the commentary to article 3, adopted at the time by the Commission.<sup>5</sup>

22. At the thirty-sixth session, in 1984, the previous Special Rapporteur, Mr. Evensen, had attempted to introduce some measure of flexibility in that article by using the word "arrangements".<sup>6</sup> At the previous session, however, the Commission had adopted articles 4 and 5<sup>7</sup> without that element; in fact, it had gone even further since, under paragraph 2 of article 5, States whose use of water might be affected appreciably by the implementation of an agreement applying to only a part of the watercourse had the right not only to participate in consultations and negotiations, but also to become parties to such an agreement.

23. He did not doubt the appropriateness of the term "arrangements" in a multilateral treaty. To cite but one of many examples, article 69, paragraph 5, of the United Nations Convention on the Law of the Sea stated: "The above provisions are without prejudice to arrangements agreed upon in subregions or regions . . .".

24. In the discussions in the Sixth Committee of the General Assembly, one representative had even suggested that recognition of the right of participation of a third State in the circumstances set out in article 5 would be incomplete if the draft articles did not also include a provision establishing the obligation of other States to refrain from negotiating such agreements without the participation of a third State whose territory was also affected by the uses of the watercourse (see A/CN.4/L.420, para. 139). That totally inadmissible conclusion showed that a dictum of the arbitral tribunal in the *Lake Lanoux* case, which called on the two parties to engage in consultations and negotiations with the aim of concluding a treaty, had been inadvertently—and in-

admissibly—transformed into a general entitlement of watercourse States to become parties to agreements. No State was likely to accept such a proposition, which would completely overturn the principle *pacta sunt servanda*.

25. As to the acceptability of the draft by States, it was not realistic to give watercourse States a right to become parties to partial watercourse agreements, since that right was not supported by State practice or by legal opinion. Political relations between watercourse States might be such that State A found it desirable to conclude a system agreement with State B, but impossible to enter into treaty relations with State C, for political reasons unrelated to watercourse uses.

26. In paragraph (12) of the commentary to article 4 ([Watercourse] [System] agreements), provisionally adopted in 1987,<sup>8</sup> it was stated that: "A major purpose of the present articles is to facilitate the negotiation of agreements concerning international watercourses". A rigid formulation such as that contained in article 5, paragraph 2, might well defeat that major purpose.

27. The legitimate concern to prevent third States from suffering appreciable adverse effects as a result of partial system agreements could be met more realistically by providing for an obligation of States intending to conclude such agreements to negotiate with third States if the latter so wished. That solution would take account of the need for consultations without encroaching unduly on the freedom of States to choose their treaty partners.

28. Another question arising out of articles 4 and 5 was the requirement in article 4, paragraph 2, that a watercourse agreement should define the waters to which it applied. The purpose was to give "other potentially concerned States notice of the precise subject-matter of the agreement".<sup>9</sup> It was difficult to see the usefulness of that requirement except perhaps in the case of an agreement between two upper riparian States. For if the agreement was between two lower riparians, an upper riparian would not be a "potentially concerned State". The fact that the waters of a river flowed in one direction was something from which certain conclusions had to be drawn; successive watercourses and contiguous watercourses were not always amenable to the same treatment.

29. The obligation to give notice to other "potentially concerned States" also raised another problem. The Drafting Committee had adopted article 12 [11],<sup>10</sup> which required a watercourse State to give notice before it permitted the implementation of planned measures that might have an appreciable adverse effect on another State. Why should the burden thus be lighter for a single State, which was required to give notice to other States only if the measure might have that effect? In article 4, on the other hand, watercourse States were prohibited from concluding agreements that adversely affected, to an appreciable extent, uses by other watercourse States. It was difficult to see why States contemplating a measure jointly, through an agreement,

<sup>5</sup> *Yearbook* . . . 1980, vol. II (Part Two), p. 112.

<sup>6</sup> See para. 3 of the revised draft article 4 submitted by Mr. Evensen in his second report (*Yearbook* . . . 1984, vol. II (Part One), p. 108, document A/CN.4/381, para. 37).

<sup>7</sup> See 2050th meeting, footnote 3.

<sup>8</sup> *Ibid.*

<sup>9</sup> Para. (6) of the commentary to article 4.

<sup>10</sup> See 2071st meeting, para. 65.

should be required to give notice regardless of the degree of possible harm, and be under an obligation to define the waters to which the agreement applied.

30. The exact relationship between the concepts of equitable utilization and appreciable harm was far from clear, mainly because of the different approaches adopted by the various special rapporteurs. Mr. Schwebel, for instance, had taken the view that appreciable harm should be prohibited, save where it was permissible in the context of equitable sharing, whereas Mr. Evensen had given primacy to the rule that no appreciable harm should be inflicted. While the present Special Rapporteur had reverted to Mr. Schwebel's approach, he too considered that the prevention of appreciable harm should have primacy. The confusion was further compounded by the fact that in some cases the word "harm" was used to refer to a factual state of affairs, and in others to a legal wrong. He therefore suggested that, for the sake of clarity and consistency, the words "appreciable harm" should be understood throughout the draft to refer to a factual state of affairs. The threshold of appreciable harm could be determined objectively, provided that provision was made in the draft for fact-finding machinery and procedures for the settlement of disputes by a third party. Any harm that was more than appreciable would very probably be irreparable, in that once it had occurred it would be impossible to restore the *status quo ante*. Moreover, under a régime of liability, compensation would hardly be adequate—a point that militated in favour of strengthening the preventive provisions of the draft and of conferring on the State likely to be affected a right conditional on the occurrence of appreciable harm, objectively determined.

31. While he doubted whether watercourse States had a general duty to co-operate, as provided for in article 9 [10], he considered that the inclusion of such a duty *de lege ferenda* was highly desirable, given the need to secure optimum utilization and adequate protection of an international watercourse. Article 9 [10], however, was formulated in unduly rigid terms. The duty to co-operate was expressed in a more flexible and comprehensive manner in article 197 of the United Nations Convention on the Law of the Sea. He regretted, in particular, that article 9 [10] and the subsequent articles dealing with procedural obligations did not envisage a role for international organizations which, traditionally, were important instruments for co-operation and for the collection and processing of data and information with a view to the prevention or mitigation of floods, droughts and other natural or man-made disasters. The need for technical and financial support from the international agencies had been stressed both at the United Nations Water Conference (Mar del Plata, March 1977) and at the Interregional Meeting of International River Organizations (Dakar, May 1981), and he did not understand why their obvious role had been overlooked.

32. The fact that 80 per cent of marine pollution reached the sea through rivers was ample proof of the need to cover the problem of pollution in the draft articles. Since the scope of the draft would then extend beyond watercourses, due regard should be had to the provisions of part XII of the United Nations Conven-

tion on the Law of the Sea, relating to the protection and preservation of the marine environment. The topic would thus encroach on that of international liability for injurious consequences and on that of State responsibility. While it was difficult at that stage to say whether a standard of due diligence or one of strict liability should be the governing principle, he would have no difficulty if the latter were introduced in the draft. He agreed with Mr. Shi (2065th meeting) that the definition of pollution should be moved to the first part of the draft and that an attempt should be made to provide a "black list" of pollutants. The problem of river pollution was so serious that it called for a comprehensive régime providing for both preventive and curative measures. Hence any distinction between old and new pollution would not be useful.

33. Mr. AL-QAYSI said that with the Chairman's permission he would speak on draft article 15 [16] (Regular exchange of data and information),<sup>11</sup> as he had not yet had an opportunity of doing so.

34. He endorsed the Special Rapporteur's approach to the subject dealt with in the article. That subject was straightforward, and there was an urgent need to include it in the draft articles. The need for exchange of data and information reflected the duty to co-operate, which would itself make for the equitable and reasonable utilization of an international watercourse; the exchange of information would allow water uses to be planned with a minimum of conflict and possibly also promote the development of integrated systems of planning and management of watercourses. As the Special Rapporteur pointed out in his fourth report (A/CN.4/412 and Add.1 and 2, paras. 12 and 14), the exchange of information was implicit in the terms of articles 6 and 7, dealing with the obligation of equitable utilization and with the factors relevant to its fulfilment.

35. While the thrust of article 15 [16] merited support, certain points of drafting required further consideration. Paragraph 1 set out the basic obligation to co-operate in the regular exchange of "reasonably available" data and information, a term which, as explained in paragraph (3) of the comments to the article, was intended to apply to information collected by a watercourse State for its own use and information that was easily accessible on the basis of an "objective" evaluation of certain factors in each particular case. It seemed clear, from the saving clause at the end of paragraph 1 that the obligation would not arise where a watercourse State was not actually using or planning to use the watercourse. The presentation of the obligation in those terms could be defended on grounds of cost effectiveness, but it was important not to lose sight of the educational value of the draft articles as a whole, or of their role in encouraging States to set in motion mechanisms for the equitable and reasonable utilization of international watercourses in the collective interest of all watercourse States and with a minimum of conflict. On that basis, the obligation should be cast in terms of a duty to collect and regularly exchange data and information as and when they were reasonably available. That seemed to conform to the approach adopted by the two preceding special rapporteurs.

<sup>11</sup> For the text, see 2050th meeting, para. 1.

36. As to the alternative mentioned in paragraph (2) of the comments, he thought the existing wording should be retained, since a mere "spirit of co-operation" did not convey the idea that there was a duty to co-operate.

37. In paragraph 2 of article 15 [16], the words "or other entity" should be deleted, since the draft articles should be addressed solely to States. That should not cause any difficulty, since the draft formed the basis for a framework agreement which could, if necessary, be supplemented by States for the purposes of any given situation. A reference to the possibility of including other entities as required should be made in the commentary.

38. He commended the Special Rapporteur for a series of well-documented reports and for placing a number of options before the Commission, which would help it to make progress on a topic that had remained on the agenda far too long. He was grateful for the Special Rapporteur's schedule for completion of the first reading of the draft articles during the current quinquennium; he trusted that the final product would be meaningful in terms of substantive obligations and thus serve the needs of States.

39. Mr. Sreenivasa RAO expressed his appreciation to the Special Rapporteur for the wealth of source material he had compiled on the prevention, control and abatement of the pollution of watercourses. His comprehensive treatment of a complex topic would enable members to arrive at appropriate conclusions.

40. The pollution of watercourses and the environment was no longer a matter of merely esoteric concern but a daily occurrence, the seriousness of which was highlighted by the fact that India had launched an extensive programme to clean up the Ganges, whose once pure and sacred waters were now heavily polluted. Environmental pollution had been the focus of international attention since the 1970s, i.e. since the spate of oil spills along the Santa Barbara coast and since the *Torrey Canyon* incident. More recently, there had been the accidents at Chernobyl and Bhopal. Everyday life was marked by scores of other incidents which people apparently accepted as an inevitable part of the pursuit of modern values. Consumerism, reckless industrialization, the need to fight poverty and disease, competitiveness in the social and economic fields, employment of mass communication techniques, high energy generation by atomic power plants, extensive drilling for oil and, above all, the mindless pursuit of militarization and arms production all contributed to pollution.

41. Developed countries, multinational corporations and other institutions rarely passed on to less developed States the experience gained from industrialization and the technological revolution; hence there was a timelag before that experience was available all over the world. Some institutions and corporations even attempted to transfer their unsafe and discredited practices to other parts of the world that were ignorant of the dangers involved, luring them with the symbols of so-called civilization. The shifting of polluting industries, the dumping of unsafe chemicals and pharmaceutical products, and the transfer of old technology and systems management were all too common to need elaboration.

42. In the face of that situation, a variety of long-term strategies was needed to achieve the objective of preventing, controlling and abating the pollution of watercourses and the environment. Detailed regulations to govern the uses of watercourses were particularly important, since rivers were commonly used for the dumping of waste and toxic substances. But any attempt to treat watercourse systems alone, without dealing with the root causes of pollution and the basic attitudes of States, would meet with little success. The fact of interdependence and the common interest in promoting universal strategies without sectarian motivation must be recognized and emphasized.

43. If the draft articles were to be universally acceptable, they must serve mainly to promote the objectives of prevention, control and abatement of pollution. Accordingly, the provisions on the duties of States should be drafted in the light of the current realities of social organization and of actual levels of knowledge regarding pollution and its management. Above all, those duties must be undertaken by States in full appreciation of the common interests involved and by consent expressed through joint arrangements or agreements. Many treaties and bilateral agreements prepared by learned associations emphasized the importance of willing acceptance by States of reciprocal and mutually beneficial obligations. That was a point the Commission might wish to consider, and he was gratified to note that in the presentation of his materials the Special Rapporteur had stressed the need for a consensual approach.

44. The role of international organizations and the development of international standards to be observed by States in their respective regions had also received attention in the Special Rapporteur's report (A/CN.4/412 and Add.1 and 2). In proposing article 16, the Special Rapporteur rightly emphasized that the test of State responsibility was not strict liability but *due diligence*, a concept that was firmly rooted in the law of torts and the principles of State responsibility and which had the merit of promoting such desirable objectives as co-operation, consultation and exchange of data and information.

45. Moreover, the Special Rapporteur had consistently maintained that appreciable harm should be a test for determining whether a State had incurred responsibility. The use of the term "appreciable harm" by the Special Rapporteur as opposed to "substantial harm"—a term used by some others to denote the same degree of harm—need not be contested. What was at issue was harm in the legal sense, meaning not harm that occurred in the day-to-day use of a watercourse, but harm that was significant, unreasonable and material in terms of its adverse effect on the equitable and reasonable use and enjoyment of the watercourse by other States in the system. Defined thus, appreciable harm was a reasonable concept, although it had been suggested that any adjective qualifying the word "harm" should be dropped. But to provide that any harm at all would give rise to responsibility would expose the draft to criticism, make it unacceptable universally and detract from the general orientation of the development of the obligations presented by the Special

Rapporteur and accepted by the Commission and indeed in international State practice.

46. A further question was whether the duty not to cause appreciable harm should be subordinate to the general principle of the reasonable and equitable use of the watercourse by States. The conclusions reached on that question by various international associations differed widely. His own view was that the duty not to cause appreciable harm and the right to equitable and reasonable enjoyment of the watercourse were not antithetical, and that the relationship between the two had to be analysed in the context of a given situation. He noted that the Special Rapporteur, who proposed that the duty not to cause appreciable harm should be related to the right of States to equitable and reasonable enjoyment of the watercourse, considered that, as a matter of preferred objective or policy, the duty not to cause appreciable harm by pollution should be dealt with in more absolute terms. Given the world-wide trend towards the absolute control of pollution, as reflected in judicial decisions and national laws, the Special Rapporteur's point was well taken. The Indian Supreme Court had recognized the need to adopt absolute standards and, in a recently decided case, had dismissed the relevance of certain exceptions to absolute liability.

47. There remained, however, a gap between the identified objectives and the strategies adopted at various levels of State practice. There should be an awareness of that gap and a very careful accommodation of the multiple interests involved. The Commission should not try to set a higher or a lower degree of priority between the two objectives of reasonable and equitable use and enjoyment of watercourses and the duty to avoid appreciable pollution harm but, bearing in mind the specific nature of the framework type of agreement, should seek to identify the objectives clearly, while allowing States in different regions to come to grips with the problem in their own way and in the light of their own experience. That would help to make the articles more acceptable.

48. On the question whether the draft articles should include "black lists" and "grey lists" of substances to be prohibited or controlled, he would advocate a promotional approach: on the basis of available scientific data, a consensus should be reached on the substances and clear guidance be given in the draft articles. Instead of specifying the actual substances that were prohibited, the draft articles might refer to their compounds, such as arsenic compounds, mercury compounds, cadmium compounds, etc. That approach had been found useful in India. At all events, States should be left free to act on the basis of their own practical experience and to include in their bilateral and multilateral agreements those elements that were really relevant to the management of specific watercourse systems.

49. Lists alone were not sufficient, however; standards, e.g. for heat levels and equipment that should be prohibited or controlled, were also needed. The setting of such standards was a very complex procedure; a consensus must be achieved before they could be made applicable to interactions between States, and a tremendous amount of scientific data and expertise had to be brought to bear on the task. The question arose whether

the Commission should attempt to establish such comprehensive standards for international watercourse systems. It should certainly reflect further on the balance it wished to strike and the elements it would emphasize in the draft articles, and it should not delve too deeply into subjects that had ramifications far beyond matters directly related to international watercourse systems. Pollution, for example, would have to be dealt with, but the emphasis to be placed on it should be determined by common consent. A concern for timing was also in order; as Mr. Reuter (2065th meeting) had said, if the Commission tried to develop the topic in a really comprehensive manner, it would further delay the completion of the draft articles on which it had already been working for so long.

50. As to article 16, he had no difficulty in accepting paragraph 1, but thought it would be improved if the words " 'pollution' means" were replaced by the words " 'pollution' includes", which was a more flexible and more comprehensive formulation. Similarly, in the reference to detrimental effects on human health, the word "safety" should be replaced by the word "well-being".

51. He would like to see paragraph 2 redrafted to switch the emphasis from mandatory or prohibitive language to the promotional approach he had mentioned. The words "or to the ecology of the international watercourse [system]" should be replaced by the words "and shall take all appropriate measures to prevent, control and abate such harm". As Mr. Reuter had pointed out, "ecology" was a very broad concept, and it might be difficult to establish that the ecology had been harmed.

52. He would also suggest that paragraph 3 be redrafted to stress the promotional approach, which would render it more acceptable to a large number of States. The words "At the request of any watercourse State, the watercourse States concerned shall consult with a view to preparing and approving . . ." should be amended to read "Watercourse States shall co-operate with each other through consultation and exchange of data and information, to prepare and approve wherever possible . . .".

53. He had no objection to articles 17 and 18.

54. The prevention, control and abatement of pollution could not be divorced from the basic objective of achieving development, which was rightly being pursued by a great many States. As their development effort required the enlargement of their resource base through the introduction of technology, certain kinds of pollution were sure to occur. The problem for the Commission was to strike a balance between promoting the right to development and controlling pollution. It was widely recognized that there was no conflict between development and ecology, and that the developing countries wished to pursue their efforts to achieve development in a safe and habitable environment.

55. Given those objectives, the topic under discussion was of great importance. The background materials submitted by the Special Rapporteur provided excellent guidance for making choices in the drafting of the

articles. The obligation not to cause appreciable harm should be stated in clear terms, but in concordance with the general objectives of promoting ecologically safe progress and preventing, controlling and abating pollution.

56. Mr. ROUCOUNAS suggested that the Commission might consider changing the order of articles 16 and 17 to conform to a progression from the general to the particular. Article 17, setting out the obligation to protect the physical environment, would come first, followed by article 16, which dealt with pollution itself, and then by article 18, describing the extreme situations of environmental crisis.

57. With regard to article 16, he agreed that the Commission must draft a set of provisions on pollution, for otherwise it might appear to have wilfully overlooked an element that was central to the development of environmental law. In its work on definitions and rules of conduct, the Commission must do its utmost to promote legislative consistency. The multifarious bodies, agencies and departments dealing with pollution control, sometimes even within a single State, often met with difficulties because a variety of standards were used for a single purpose. The Commission could render great service by helping to reduce the provisions on pollution control to manageable proportions, thereby assisting government and international agencies in their important tasks. If it were to encourage the development of a variety of legal régimes, the Commission would not be responding properly to the expectations of the international community.

58. In his opinion, an important feature of international watercourses, namely that they ran to the sea, had been neglected in the draft articles: the line of demarcation between régimes for the protection of sea water and fresh water had not been clearly drawn. Obviously, the standards set out in the 1982 United Nations Convention on the Law of the Sea would have to be taken into consideration; the Commission could hardly establish standards inferior to those of that Convention, especially as 80 per cent of marine pollution came from rivers.

59. The definition of pollution proposed by the Special Rapporteur was firmly based on scientific and academic work, and would help to promote consistency in international regulations. Other international bodies were also working on definitions of pollution. UNEP had done an in-depth study of the relationship between regional protection against pollution and the framework established under the 1982 United Nations Convention on the Law of the Sea, and had concluded that there were only minor divergences between the two which could easily be overcome.

60. The Commission was quite capable of drafting a definition of pollution, and he believed that a list of pollutants should be included in the draft articles. A reference to the need to furnish available physical, biological and chemical data on pollutants should also be included, as a parallel to the obligation stated in draft article 9 [10], drawing on the wording of paragraph 12 of draft article 10 submitted by Mr. Schwebel in his

third report,<sup>12</sup> according to which States had the duty "to share with one another the available physical, chemical and biological data on pollutants". He had some doubts whether the draft articles as currently worded made that obligation clear enough; if not, they should be amended.

61. He understood "due diligence", in connection with article 16, as establishing an obligation for States to behave in such a way that pollution was not caused by their actions. He did not see it as liberating States from international responsibility for pollution; but, as it was a fundamentally subjective notion, he was unsure whether it could be incorporated in the draft articles. In response to Mr. Tomuschat's point about due diligence in the context of collection and provision of data and information by developing countries, he said that it might be possible to adopt a flexible approach and, as Mr. Mahiou had suggested many years ago, to provide for the plurality of the content of a standard as it applied to developing countries.

62. In the course of the work done on the topic over the years, the concept of appreciable harm had become generally accepted. However, as Mr. Barboza (2064th meeting) and Mr. Arangio-Ruiz (2065th meeting) had pointed out, that notion was being refined in the context of two other topics on the Commission's agenda. He wished to take advantage of the fact that discussion on it had been reopened to ask the Special Rapporteur whether the concept of appreciable harm was already part of international law on watercourses, or whether the Commission was breaking new ground.

63. Article 17 comprised general guidelines for environmental protection and provided for international co-operation; the existing rules of international law on the matter were unfortunately not every comprehensive. The reference to the marine environment in paragraph 2 raised the question of concordance with the 1982 United Nations Convention on the Law of the Sea. A number of multilateral agreements had expressly recognized the higher authority of that Convention, even before it had been adopted. Examples were the 1973 International Convention for the Prevention of Pollution from Ships and the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution,<sup>13</sup> both of which contained articles specifically referring to the United Nations Convention, which had not been adopted until 1982. A reference to the Convention on the Law of the Sea appeared in paragraph 3 of article 20 submitted by Mr. Evensen in his second report on the topic.<sup>14</sup> It was also worth noting that the revised statutes of the Inter-Governmental Oceanographic Commission (IOC) merely contained a sentence to the effect that everything pertaining to marine research must be in conformity with the rules of international law, and that at the forty-second session of the General Assembly some representatives had criticized the failure of IOC to refer specifically to the United Nations Convention on the Law of the Sea. For all those reasons, he believed that a

<sup>12</sup> *Yearbook . . . 1982*, vol. II (Part One), p. 145, document A/CN.4/348, para. 312.

<sup>13</sup> See 2063rd meeting, footnote 7.

<sup>14</sup> *Yearbook . . . 1984*, vol. II (Part One), p. 118, document A/CN.4/381, para. 82.

reference to the need for conformity with that Convention should be inserted in paragraph 2 of article 17.

64. Referring to article 18, he observed that the requirement to notify "any competent international organization" of a pollution or environmental emergency was useful even in the absence of an international organization having direct competence in that field, since it drew attention to the need for concerted international action in such a situation. Referring to paragraph (5) of the Special Rapporteur's comments on article 18, he supported the suggested addition of a provision along the lines of article 199 of the United Nations Convention on the Law of the Sea on the joint development and promotion by States of contingency plans for responding to pollution incidents in the marine environment.

65. Mr. PAWLAK associated himself with previous speakers in congratulating the Special Rapporteur on chapter III of his fourth report (A/CN.4/412 and Add.1 and 2). His extensive and scholarly comments on the new draft articles 16, 17 and 18 reflected both the contemporary practice of States and opinions from other sources. However, the Special Rapporteur had not only put forward suggestions; he had also raised questions to which there was no easy answer.

66. The fundamental questions relating to article 16 were the definition of "pollution" and the problem of the responsibility of watercourse States for harm caused by pollution to other watercourse States. On the first of those issues, the definition proposed in paragraph 1 of the article, comprehensive although it appeared to be, failed to reflect the full reality of the pollution of rivers and other watercourses as known at present. In particular, the definition did not specify what it was that produced alterations in the composition or quality of waters, and did not mention the distortion of the ecological balance of watercourses or the changes in river beds resulting, for example, from the disposal of toxic wastes. Such changes, as was known, were liable to make themselves felt for many years. The Special Rapporteur should consider including those elements in his definition. As to the precise point at which the definition of pollution should appear in the draft, he associated himself with previous speakers who had recommended that it should be moved to the introductory article on the use of terms.

67. On the problem of responsibility, he subscribed to the view that a clear formulation should be provided, setting out the international obligation of States not to cause pollution harm to other watercourse States. Paragraph 2 of article 16 represented, in a sense, the concretization of article 8 [9] already adopted by the Drafting Committee.<sup>15</sup> Since pollution was, at least in part, a by-product of the utilization of a watercourse, the question arose whether a concretization of the general obligation already provided for in article 8 was really necessary. In view of the importance of curbing the pollution of watercourses, he considered that a separate provision independent of the general obligation under article 8 was justified.

68. He agreed with Mr. Tomuschat and Mr. Roucounas that the expression "appreciable harm" was too weak and too subjective; the term "substantial", mentioned by the Special Rapporteur in paragraph (4) of his comments to article 16 would be preferable, as it would provide a more objective basis for technical standards. He would also prefer the term "injury", used in the Helsinki Rules, to the term "harm".

69. The relationship between the present articles and existing conventions, regulations and agreements between States was an important matter, which had already been raised by Mr. Barsegov (2065th meeting) and Mr. Sreenivasa Rao. The diversity in the régimes of international watercourses had to be taken into account and the standards specified in existing agreements should be applied in determining the fulfilment by States of their obligations under the framework convention being drafted. He agreed with Mr. Sreenivasa Rao that article 16 should include a provision setting out the obligation of States to prevent and control the pollution of international watercourses.

70. Mr. KOROMA congratulated the Special Rapporteur on his fourth report (A/CN.4/412 and Add.1 and 2) on a topic whose great importance was self-evident. The scarcity of water supplies, the harm caused to the human environment and to marine life by pollution and the need to check the discharge of hazardous and toxic wastes into watercourses were recognized by all. It was against that background that the Commission was called upon to draw up rules with a view to the prevention or abatement of pollution of international watercourses.

71. Article 16 responded to the international community's needs by acknowledging that States were under an obligation to exercise care in conducting or permitting, within their jurisdiction, actions with potentially harmful consequences to other watercourse States, and to refrain from discharging harmful or hazardous wastes into watercourses to such an extent as to cause appreciable harm to other watercourse States. As to the use of the term "appreciable harm", he thought it might be advisable to revert to the term "substantial harm" or "significant harm" as being more readily quantifiable; the difference in meaning was slight.

72. On the question of the criterion of due diligence, he observed that all the elements contained in the definition supplied by Pierre Dupuy, quoted in paragraph (6) of the Special Rapporteur's comments to article 16, were also included in the concept of strict liability. The text as it stood could be interpreted to mean that no liability arose if the harm caused to other watercourse States was not "appreciable". That was surely not the Special Rapporteur's intention. The important point to bring out was that harm should not be caused by any watercourse State to other watercourse States.

73. On reflection, he was inclined to agree that paragraph 1 of article 16 should be included in article 1 (Use of terms). The wording of the paragraph should be amended in the light of the definition of pollution used in the 1982 United Nations Convention on the Law of the Sea (art. 194); in particular, the reference to the use of the waters "for any beneficial purpose" was confusing and should be deleted.

<sup>15</sup> See 2070th meeting, para. 34.

74. The best approach would have been to predicate article 16 on article 9 [10], which set out the general obligation to co-operate. The majority of States, whether industrialized or not, were not prepared to accept the standard of strict liability for damage in case of pollution. He therefore agreed with Mr. Roucouas that article 17 should be brought forward to the position now occupied by article 16; the next article might then specify the obligation of individual watercourse States not to cause or permit pollution, and recommend various ways of ensuring its prevention.

75. The law on pollution control of watercourses should hinge on international co-operation; it was failure to observe the obligation to co-operate that should entail liability. That, in his view, was as far as the international community was prepared to go at present, and he saw little point in drafting articles, however commendable their spirit, which would not receive the international community's approval.

76. The CHAIRMAN announced that, in the previous week, the Commission had once again used 100 per cent of the time and conference service facilities allotted to it.

*The meeting rose at 1 p.m.*

## 2067th MEETING

*Thursday, 23 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (continued) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)**

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) and

ARTICLE 18 [19] (Pollution or environmental emergencies)<sup>3</sup> (continued)

1. Mr. YANKOV said that his comments on articles 17 and 18 would be of a preliminary nature. In his previous statement (2063rd meeting) on some general points relating to part V of the draft, and more particularly to article 16, he had already expressed his views on the notion of protection and preservation of the environment of international watercourses. He would not, therefore, revert to the matter, although the consideration of article 17 offered an opportunity to do so, since the article dealt directly with that issue and treated it as an obligation of States. In fact, article 17 dealt with it much more comprehensively than did article 16. By its very title (Protection of the environment of international watercourse[s] [systems]), which should have been worded "Protection and preservation of the environment of international watercourse[s] [systems]", article 17 sanctioned a concept of protection and preservation of the environment that was much broader in scope than the obligation not to cause or permit pollution.

2. On that subject, two different trends had emerged. The first, which could be described as "traditional", was to avoid pollution of the environment: a concept that belonged to the past and perhaps to the present, but certainly not to the future. The other, much broader, was to give a legal content to the concern to protect, preserve and if possible improve the environment, because it was no longer enough for mankind to combat the increase in pollution.

3. Pollution had already reached such proportions that some rivers were dead and others were turning into channels to spread pollution. It was therefore imperative to take preventive and corrective measures at the same time as conservation measures and, where possible, measures to improve the environment. Article 16, and especially paragraph 2, although it focused on the obligation not to cause or permit pollution, did not, for all that, reflect the classical notion of *non facere*. It did not state simply the obligation to refrain from doing something but, rather, the obligation to refrain from doing something specific: causing harm to the environment. Article 17, for its part, focused more on the obligation to take all reasonable measures to protect the environment of an international watercourse. Accordingly, the idea of placing article 17 before article 16, which had been put forward by Mr. Roucouas (2066th meeting) and supported by Mr. Koroma (*ibid.*), was quite justified, considering that paragraph 1 of article 17 enunciated the general obligation to protect and preserve the environment.

4. That was in fact the approach underlying part XII of the 1982 United Nations Convention on the Law of the Sea, in which the first article, namely article 192, proclaimed the general obligation of States to protect and preserve the marine environment. In that connection, incidentally, the provisions of the Convention relating to deep sea mining always used the expression

<sup>1</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>3</sup> For the texts, see 2062nd meeting, para. 2.

“States parties”, so as to emphasize the treaty obligations of States, whereas in most of the other provisions of the Convention, especially those in part XII, the general term “States” had been deliberately employed, in order to make it clear that the obligation enunciated was of a general character and binding upon all States, whether coastal or land-locked, and to enunciate a principle which the Convention, the bilateral and multilateral agreements and the domestic legislation of States could make into a legal tenet recognized by all.

5. State practice, as evidenced by numerous international instruments concluded both before and after the adoption of the United Nations Convention on the Law of the Sea, as well as by national legislation in some 20 countries, showed that States had already subscribed to that obligation to protect and preserve the marine environment. For example, only a few months earlier, the Bulgarian National Assembly had adopted a comprehensive law on the marine areas under Bulgaria’s sovereignty and jurisdiction. The law reiterated the obligations incumbent upon States under those various instruments and under the 1982 Convention, namely to “take, both individually or jointly as appropriate, all measures . . . necessary to prevent, reduce and control pollution of the marine environment from any source” (art. 194, para. 1), and to “take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights” (art. 194, para. 2). That approach, which amounted essentially to placing the emphasis on measures of prevention and conservation as a general obligation, was also to be found in article 3 of the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, in article 3 of the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, in article 1 of the 1972 London Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter, and in article 1 of the 1973 International Convention for the Prevention of Pollution from Ships.<sup>4</sup> The Commission was engaged in formulating rules which had to meet the challenges of today and also those of tomorrow. It should therefore stress measures of prevention, protection and preservation, bearing in mind particularly that it would be a number of years before a final text of the draft articles on the present topic was adopted.

6. Turning to article 17 itself, he pointed out that it comprised two paragraphs which were very different from one another and could well form two separate articles. Paragraph 1 set out a general obligation, whereas paragraph 2 could be considered as a provision deriving from that general obligation but centred on the marine environment. It would therefore be convenient to consider the two paragraphs separately, despite the fact that they were closely interconnected.

7. Paragraph 1 could be split into two paragraphs, the first expressing the general obligation to protect and preserve the environment of an international water-

course, including its ecosystem and surrounding areas, and the second, more specific in character, stating the obligation to take measures to protect and preserve the environment of the watercourse, including measures to prevent, reduce and control toxic wastes from industry, agriculture and communities, and in particular persistent wastes having a tendency to bio-accumulation. Some substances were biodegradable or could be rendered biologically harmless by natural processes of self-purification, but unfortunately that was not the case with the substances found in most rivers at the present time. For that reason, it was necessary to place the emphasis on the discharge or disposal of substances characterized by their persistence, their toxicity or their noxious properties and by their tendency to bio-accumulation. Those three criteria had already been used in a number of conventions, in particular in the 1974 Paris Convention on the Prevention of Marine Pollution from Land-based Sources.<sup>5</sup>

8. Paragraph 2 of article 17 could form a separate article, not only to bring out the question involved but also because the main sources of pollution of the marine environment were rivers, canals and the like, and because the provision should state the obligation of States to take all appropriate measures to protect and preserve the marine environment, including estuaries or mouths of rivers which flowed directly into the sea. It should not be forgotten that the sea penetrated deeply into some estuaries: the East River or the Hudson River, for example. In that connection, he associated himself with the remarks made by Mr. Roucouas on the repercussions of the contamination of international watercourses on the marine environment. Efforts should therefore be made to promote uniformity of the law in the matter, for in areas only a few kilometres from the coasts, the two régimes—the law of the sea and the law of international watercourses—might well have to be applied concurrently. In that case, the criteria he had mentioned with regard to paragraph 1 were of special relevance to pollution of the marine environment from land-based sources originating in rivers, estuaries, pipelines and outfall structures, as provided for in article 207 of the United Nations Convention on the Law of the Sea.

9. As to the drafting, the words “including estuarine areas and marine life”, in paragraph 2, gave the impression that marine life was not part of the marine environment. It would be better to say “particularly estuarine areas and marine life”.

10. In short, article 17 contained the basic elements but needed further elaboration, especially if the idea of placing it before article 16 were accepted and if some of his own observations were taken into consideration.

11. Turning to article 18, he said that it had some points in common with former article 15 which, after consideration by the Drafting Committee, had become article 19, on measures of utmost urgency,<sup>6</sup> but there were also differences. Both articles dealt with measures to be taken in emergency situations, i.e. in the event of serious and imminent threat to health, safety or other

<sup>4</sup> See 2063rd meeting, footnote 7.

<sup>5</sup> *Ibid.*

<sup>6</sup> See 2073rd meeting, para. 8.

vital interests. Article 19 spoke of the implementation of planned measures in general, while article 18 concerned measures to be taken in the event of pollution or other environmental emergency. Paragraph (1) of the Special Rapporteur's comments on article 18, which indicated the sources for that provision, referred to article 25 of Mr. Evensen's draft and to paragraph 9 of article 10 of Mr. Schwebel's draft; there might be other relevant texts as well. The Special Rapporteur drew attention, in his report (A/CN.4/412 and Add.1 and 2, footnote 264) to other possible sources for the drafting of article 18.

12. Paragraph 1 of article 18 contained a definition of "pollution or environmental emergency". He was not against such a provision, although it was a moot point whether it should appear there or elsewhere in the draft articles. However, he would be inclined not to confine the scope of the draft too strictly by a definition of that kind, which, general as it was, entailed a risk of leaving out certain important aspects. The text of draft article 18 would not suffer from the deletion of the definition.

13. As to paragraphs 2 and 3, the Special Rapporteur might find help in certain similar provisions, such as articles 198 and 199 of the United Nations Convention on the Law of the Sea, concerning notification of imminent or actual damage and contingency plans against pollution, as well as provisions of the same type appearing in various regional conventions. In addition, the reference to "any competent international organization", in paragraph 2, should appear in the plural, as there could be more than one competent organization in the case in point. With a few rare exceptions, the expression was to be found in that form in the United Nations Convention on the Law of the Sea. In paragraph 3, the term "neutralize" appeared for the first time. What did it mean as distinct from "mitigate"? Would not the terms used in various conventions—to "prevent", "reduce", "control" pollution—be appropriate? It seemed necessary to standardize the vocabulary employed in the articles.

14. In his introductory statement (2062nd meeting), the Special Rapporteur had said that he would not insist on having draft article 18 referred to the Drafting Committee at the present stage of the work. In his own view, the text needed further elaboration. Moreover, the title should be better suited to the contents, for instance "Preventive measures in an emergency".

15. Mr. BEESLEY said that he associated himself with everything Mr. Yankov had just said and had only a few observations to add. It was encouraging that every member who had spoken recognized the importance of the preservation of the environment; it could thus be taken for granted that the provisions of draft article 17 would be approved without much difficulty. True, the Commission had, in a way, put the cart before the horse by holding, in connection with draft article 16, a debate on the question of liability and on the relationship between the topic under consideration and others before the Commission, a debate which, although undoubtedly of interest, had at the same time been something of a digression from environmental issues, before debating the basic issue giving rise to such liability. However, although he would favour reversing the order of ar-

ticles 16 and 17, he still thought that the approach adopted in that respect by the Special Rapporteur struck the right balance.

16. The Commission should now try to see how it might visualize the whole of part V of the draft. Even if it were decided to place paragraph 2 of article 16 between square brackets—something he was not suggesting—the definition of the term "pollution", in article 16, paragraph 1, would still be required. However, in accordance with normal practice, it should appear in article 1, on the use of terms. Part V could therefore start with a provision along the lines of paragraph 1 of article 17. Mr. Yankov's idea of splitting the paragraph in two seemed altogether acceptable. Even if the provision set forth a positive duty, that of protecting the environment, it would be difficult not to employ the word "pollution"; however, he would not press the point.

17. Paragraph 2 of article 17 could, as Mr. Yankov had just said, become a separate article. The text would also have to be harmonized with that of corresponding provisions to be found in other conventions, and particularly in the United Nations Convention on the Law of the Sea. It had been suggested that the Commission should revert to the approach adopted by Mr. Schwebel, but that was not absolutely essential. On the other hand, it would seem difficult to avoid using the expression "protection from pollution", which once more raised the question of the usefulness of defining the concept of pollution.

18. Paragraph 3 of article 16, concerning consultations with a view to preparing and approving lists of substances or species, would come next. The importance of that provision would stand out more clearly if the articles were presented in that order.

19. He was not in favour of deleting paragraph 2 of article 16. The Commission undoubtedly had to take into account the views expressed by States on certain issues, but it should not seek to substitute itself for States. He was not persuaded by the argument that a provision should not appear in the text because it would not be deemed acceptable by States. If, as Mr. Yankov had suggested, the positive obligation set out in paragraph 1 of article 17 were placed at the beginning of part V, the liability issue would, in his view, fall into place.

20. Lastly, concerning article 18, the expression "water resources" was too limited and should be replaced by a more general expression, such as "ecology of watercourses". The matter could be left to the Drafting Committee.

21. Mr. CALERO RODRIGUES said that draft article 17 was a specific application of the obligation to co-operate as set forth in article 9 [10] and also mentioned, in particular, in article 6, paragraph 2, and article 7 (e). The obligation to co-operate in the protection of the environment of watercourses was formulated in general terms, it being stated simply that watercourse States should take "all reasonable measures", the details to be settled through special agreements. Article 17 was therefore perfectly acceptable, and he wished to raise only a few points of detail.

22. Paragraph 1 spoke of the “environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas”. The latter part of the sentence seemed unnecessary inasmuch as the concept of the environment was sufficiently well known to include ecology—unless the provision meant that protection should extend to the environment of the watercourse but be confined to ecology in the case of the surrounding areas. Some clarification of that point would be welcome.

23. The provisions of paragraph 2, whether or not they appeared in a separate article, deserved a place in the draft. The “marine environment” could, in fact, be regarded as forming part of “surrounding areas”, not perhaps in terms of geographical proximity but in the sense that those areas could be affected by watercourses. The provision should, as far as possible, be harmonized with the text of the 1982 United Nations Convention on the Law of the Sea. Since the Convention defined “pollution of the marine environment” (art. 1, para. 1 (4)) without, however, specifying what the “marine environment” was, except to say that it included estuaries, a definition of the term was not necessary in the present context either. Lastly, to the extent that draft article 17 set forth an obligation to co-operate in the protection of the environment, it should be as wide as possible in scope. For that reason, the term “environment” should be understood in a broad sense. For the same reason, the expression “due to activities” was too restrictive: States should co-operate in the protection of watercourses against all impairment, degradation or destruction from any source, including natural causes.

24. In paragraph (3) of his comments to article 17, the Special Rapporteur contemplated the possibility of adding a provision on the adoption of protection régimes. There was no need for such a step; at most, a general indication of the type of measure or régime States might wish to apply could be included in the commentary.

25. Since the Special Rapporteur intended to review draft article 18 for the next session, he would confine himself to making a few suggestions. The title seemed to be too restrictive; the article should, as the definition in paragraph 1 entitled it to do, cover all emergencies, whatever the causes, even if they were not man-made.

26. Furthermore, article 18 set forth an obligation for the watercourse State to notify all potentially affected watercourse States in the event of an incident, as well as the obligation to take immediate action to prevent, neutralize or mitigate the danger of damage to other watercourse States resulting therefrom. In his view, there was a good case for expanding those provisions by adding a general obligation to co-operate with a view to minimizing the effects of emergencies. As to the obligation to inform, set forth in a general manner in article 10 [11], it should perhaps be made more strict in the present context, and some indication might be given of the mechanisms to be used in that connection.

27. Mr. AL-QAYSI welcomed the fact that the Special Rapporteur, as stated in his report (A/CN.4/412 and Add.1 and 2, para. 90), had reduced the part of the draft articles dealing with environmental protection and

pollution to a bare minimum. Notwithstanding the importance of the subjects referred to at the end of the report (*ibid.*, para. 91), he was not in favour of expanding the scope of those provisions; the Commission’s objective was to draw up a framework convention on the non-navigational uses of international watercourses, not on pollution control.

28. In connection with draft article 16, doubts had been expressed concerning the usefulness of the definition of pollution. To his mind, such a definition, whether it appeared in article 16 or in article 1, was absolutely necessary. While it might be appropriate, as the Special Rapporteur suggested (*ibid.*, footnote 207), to refer to the causes of pollution, as had Mr. Schwebel in his draft, the inclusion of the question of acid rain, as the Special Rapporteur seemed to contemplate, would certainly be going too far. Once again, it should not be forgotten that pollution control was only an ancillary aspect of the topic.

29. The expression “use of the waters for any beneficial purpose”, in article 16, paragraph 1, was perplexing: uses for purposes which were not beneficial were difficult to imagine, and it would be preferable to speak simply of “uses”.

30. Paragraph 2 of article 16, which set forth the obligation not to cause appreciable pollution harm to other States, had given rise to a good deal of questioning, particularly as to the meaning of “appreciable harm”. Some members, taking the view that the criterion was a subjective one and did not lend itself to quantification, had suggested that it would be better to speak of “substantial” or “significant” harm. However, the Special Rapporteur had explained that he was using the expression in the same sense as it was used in article 8 [9]; moreover, the Commission should beware of reading too much into certain comments made by the Special Rapporteur without relating them to the text as a whole. For example, in paragraph (4) of the comments on article 16, the sentence “Rather, it is when such pollution causes appreciable harm to another watercourse State that it becomes internationally wrongful” was ambiguous if taken out of context. However, the Special Rapporteur was clear enough when he explained further that appreciable harm was harm that was “not trivial or inconsequential—but . . . less than ‘substantial’”. “Substantial” harm might perhaps be easier to quantify, but if the standard adopted was too stringent, the provision ran the risk of not being applied. And indeed, was the expression “substantial harm” so much more objective? The difficulty might lie in the fact that the appreciable harm referred to in the text under consideration related to “other watercourse States”; one solution might be to relate it to the equitable and reasonable utilization of the watercourse. That suggestion should not be confused with what the Special Rapporteur said in paragraph (5) of his comments and developed further in paragraphs (16) and (18).

31. In his view, the matter was quite simple; the same standard must be used throughout the draft. If the criterion of “appreciable harm” was applied for the purpose of the rule of equitable and reasonable utiliz-

ation, it should also be applied for the purposes of the ancillary obligation to prevent pollution.

32. Another issue frequently raised in connection with paragraph 2 of article 16 was the nature of the liability entailed by a breach of the obligation. The Special Rapporteur explained in paragraph (6) of his comments that it was not his intention to institute strict liability. Admittedly, paragraphs (12) and (13) of the comments gave the impression that the Special Rapporteur was none the less attracted to the concept of strict liability. But it was pointed out in paragraph (15) that, in practice, the obligations concerning equitable and reasonable utilization and participation and those defined in paragraph 2 of article 16 would "often, and perhaps usually, be compatible", that being no doubt partly explained by the fact that equitable utilization would usually entail the avoidance by watercourse States of appreciable pollution harm to other watercourse States. That was a fundamental point. For how could utilization be considered equitable and reasonable if appreciable pollution harm was being caused? In his opinion, it would be neither wise nor realistic to introduce strict liability in that connection. Subject to some drafting changes, the text before the Commission would seem to remain within appropriate bounds in that respect.

33. In paragraph (6) of his comments, the Special Rapporteur indicated that the obligation enunciated in paragraph 2 of article 16 was "one of due diligence to see that appreciable harm is not caused to other watercourse States or to the ecology of the international watercourse". In that regard, it was surprising to find that paragraph (7) of the same comments mentioned such notions as "good government" or "civilized State", concepts which predated the Paris Conference of 1856 and implied a value judgment that sufficed to render them meaningless. The obligations of due diligence and due care and other obligations of conduct with respect to international watercourses clearly illustrated the unquestionable interconnection—already referred to by several members—that existed between the present topic and the one assigned to Mr. Barboza. While the consequences of a breach of the obligations within the scope of the present topic had a vital part to play in the settlement of disputes on international watercourses, they also came within the scope of the topic of liability for injurious consequences arising out of acts not prohibited by international law.

34. Again, it was essential not to lose sight of the particular situation of developing countries, and he therefore welcomed the statement in paragraph (8) of the comments that "the degree of vigilance or care required depends both upon the circumstances in which pollution damage is, or may be, caused and the extent to which the State has the means to exercise effective control over its territory". Moreover, while it could be held, as did Mr. Roucouas (2066th meeting), that an obligation of due diligence was not legally strong enough, any attempt to go beyond that might mean returning to the concept of strict liability. Several members had referred to the provisions of the United Nations Convention on the Law of the Sea which dealt with the question; it might be possible to draw on paragraph 2 of article 194 of the Convention and recast the

opening of paragraph 2 of article 16 to read: "Watercourse States shall take all necessary and appropriate measures in order not to cause or permit pollution . . .".

35. On the subject of lists of toxic substances and the distinction between existing and new pollution, he shared the views outlined in the Special Rapporteur's comments. His position was similar with regard to the need for progressive development of the law in the matter—in a measured way, of course—and also with regard to the reasonableness of inserting in paragraph 3 a prohibition on the discharge of toxic pollutants into international watercourses.

36. He had no firm opinion concerning the suggestion that article 17 should precede article 16, but would draw attention to the fact that the Commission's task was to elaborate draft articles on international watercourses, not on protection of the environment. In addition, while it was true that the content of article 17 related to the law of the sea, such a provision in the draft was none the less useful and reasonable, first because of the unity of the environment, and secondly because it was equitable not to place the burden for protecting the environment solely on the coastal State on whose territory an international watercourse flowed into the sea. It might also be appropriate to consider a situation in which the discharge of pollutants into the sea by a State that was not a watercourse State resulted in the pollution of a watercourse through the action of tides.

37. As to article 18, he questioned, as a matter of drafting, whether it was correct to use the verb "to prevent" in paragraph 3 concerning damage that had already occurred.

38. In conclusion, he urged the Commission to be both realistic in its approach and modest in its goals: unduly general provisions would not suffice in the absence of concrete solutions, nor would detailed rules if they went beyond the bounds of the topic.

39. Mr. BENNOUNA said that he wished to offer some comments on the Special Rapporteur's approach and on the way of dealing with the question of pollution and protection of the environment, with a view to continued work on the topic.

40. Article 17 should be placed before article 16. On that point, he shared the view of Mr. Roucouas that the general provision should come first and the specific one second. Moreover, as pointed out by Mr. Yankov, combating pollution was only one of the aspects of protection of the environment. Protection of the marine environment, which was the subject of paragraph 2 of article 17, should form a separate article, with wording close to that of the provisions of the 1982 United Nations Convention on the Law of the Sea.

41. It was also necessary to remember, as Mr. Al-Qaysi had pointed out, that the Commission was assigned the task of formulating draft articles on the non-navigational uses of international watercourses, not on the protection of the environment of those watercourses. The question therefore arose whether that latter subject should be dealt with in detail or else be examined solely in the framework of the uses envisaged.

Personally, he favoured the second solution, for the same reasons as Mr. Reuter (2065th meeting).

42. In the circumstances, it would be premature to refer articles 16 and 17 to the Drafting Committee: their content was not clear, the plan for part V had not been established, the actual order of the articles had not been settled upon and the Commission had not yet decided what type of provisions and what type of law it was aiming at. Those were all questions that it was not for the Drafting Committee to settle. The Commission should therefore give the Special Rapporteur guidelines on how to deal with the issue of protection of the environment and pollution, so that proposals could be submitted at the next session and then referred to the Drafting Committee along with the observations made during the discussion.

*The meeting rose at 11.35 a.m.*

## 2068th MEETING

*Friday, 24 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses** (*continued*) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)<sup>3</sup> (*continued*)

<sup>1</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>3</sup> For the texts, see 2062nd meeting, para. 2.

1. Mr. THIAM congratulated the Special Rapporteur on his well-documented fourth report (A/CN.4/412 and Add.1 and 2), with its valuable systematic approach to a complex subject.

2. Draft article 16 consisted of three very different elements: a definition of pollution; the statement of a principle of responsibility; and a rule of co-operation. Those three elements were based on different concepts, and the article as it stood attempted to cover too wide a field. He therefore suggested that the three elements, all of them important, should be dealt with in separate articles; it would then be possible to treat them more fully.

3. With regard to the definition of "pollution" in paragraph 1 of article 16, he agreed that no exhaustive enumeration should be attempted. An unduly restrictive definition would be inappropriate for a subject that was in a constant state of evolution as a result of technical developments.

4. In regard to paragraph 2, his difficulties were not so much with the text as with the Special Rapporteur's comments in support of that provision. Since the comments consisted essentially of extracts from legal writings, his criticisms were directed at the authors of those works, not at the Special Rapporteur.

5. In the first place, with regard to the obligation of due diligence, paragraph (6) of the comments quoted the explanation by a writer that due diligence was the diligence "to be expected from a 'good government', i.e. from a government mindful of its international obligations". Paragraph (7) stated that the standard to be used in determining whether due diligence had been exercised was "the degree of care that could be expected of a 'good government' or a 'civilized State' ". Such a government or State was said to be one that possessed "on a permanent basis, a legal system and material resources sufficient to ensure the fulfilment of [its] international obligations under normal conditions".

6. It was hardly necessary to dwell on the questionable and out-of-date concept of a "civilized State". As to the introduction of the concept of a "good government" in the present context, he rejected it as morally unacceptable. A "good government", in the sense of those comments, was one that had the means of causing pollution, and did so on a large scale. Experience showed that it was the other governments—those not described as "good"—which had to suffer the consequences of pollution; their territories were becoming dumping grounds for harmful wastes originating in the territories administered by the "good governments". Those comments presented the governments that caused pollution as "good", instead of the governments that were not responsible for pollution.

7. Nor could he accept the suggestion that a State was exonerated from responsibility if it had taken appropriate preventive measures. A watercourse State had two separate and distinct obligations: first, to prevent pollution; secondly, to make reparation in the event of harm being caused by pollution. The fact that a State had discharged its obligations of prevention did not exonerate it from responsibility in the event of harm being caused by pollution.

8. The comments on article 16 suggested that the State would be responsible for appreciable harm caused by transboundary pollution only if the harm was foreseeable. That proposition was not valid. Regardless whether the harm was foreseeable or not, the State of origin incurred international responsibility in the event of harm being caused. The basis of responsibility was the harm caused; the occurrence of harm automatically generated State responsibility.

9. The expression "appreciable harm" was not the only one used in the report. Expressions such as "significant harm", "substantial harm", "serious harm" and others also appeared. Efforts should be made to bring greater harmony into the language used, not only in the articles, but also in the commentaries.

10. He agreed that not all harm could be compensated, but a more modern system of liability should be worked out which, without discouraging necessary activities, would protect the interests of third States. It was clearly necessary to depart to some extent from traditional concepts of responsibility.

11. The provisions of paragraph 3, on co-operation, should be broadened. Some mention should be made of international organs of co-operation; it was not sufficient to make provision for co-operation at the request of a watercourse State.

12. Mr. BARSEGOV said that draft article 17 covered a subject of great interest, not only to individual States, but to the whole of mankind. In the Soviet Union, the protection of the environment in general, and of watercourses in particular, was currently receiving much attention. In January 1988, the Central Committee of the Communist Party of the Soviet Union and the Council of Ministers of the USSR had adopted a decree radically restructuring the country's environmental protection activities on the basis of the growing interdependence of the state of the environment and economic development. A State committee for nature conservation had been set up to act as the central organ of State control for nature conservation and utilization of the environment. The committee's responsibilities extended to the utilization of surface and ground water, the marine environment and the natural resources of the Soviet Union's territorial sea, continental shelf and economic zone. In view of the global nature of ecological problems, steps were to be taken to increase the Soviet Union's co-operation in nature conservation with other countries and international organizations. The State committee was also responsible for ensuring the Soviet Union's fulfilment of obligations under international agreements on environmental protection and on the rational utilization of natural resources, and for formulating proposals for a unified State policy on international co-operation in those areas.

13. In the text of article 17, greater clarity was needed in determining both the object and the substance of the regulatory measures. The article spoke of protecting the environment of an international watercourse, including the ecology of the watercourse and of surrounding areas, from impairment, degradation or destruction, or serious danger thereof. He considered that the rules being elaborated should be directed principally to acts leading to pollution of the waters of the watercourse

itself. The problem of ecology as a whole outside the area of the watercourse, important as it was, lay outside the topic under consideration.

14. As to relations between States in the matter of protection of watercourses, they took the form, in agreements between the Soviet Union and its neighbour States, of co-operation on a treaty basis. The agreements provided both for regular measures aimed at reducing pollution of the waters through national, bilateral or multilateral programmes relating to each particular watercourse, and for emergency measures to be taken in the event of pollution, or danger of pollution, caused by accidents or natural disasters. Those measures were taken in accordance with the internal regulations of the parties to the agreement and with the technical and economic possibilities open to them. That proviso was to be found, with minor variations, in all agreements on the subject between the Soviet Union and its neighbours. In addition to the adoption of agreed indicators to ensure comparability of observation data on water quality, unified methods of analysis and assessment of the condition of the water, and of any alteration in its quality, were elaborated on the basis of special agreements; those agreements also contained provisions on mutual assistance, exchange of experience and information, and joint control measurements. The nature and extent of co-operation depended largely on the closeness of political relations between the States concerned and could hardly be the same throughout the world, although in his opinion a higher level of worldwide co-operation was a goal worth striving for.

15. It had been suggested that the provisions relating to co-operation in pollution control should be placed in a separate article. While agreeing that such a step would emphasize the importance of preserving the purity of watercourses, he wondered whether separating that particular area of co-operation from the general article might not weaken the concept of the interrelationship between the utilization of watercourses and their protection. If the articles on ecology were to be set apart, they should give priority to co-operation.

16. In the light of Soviet practice as he had just described it, he could only welcome the provisions of article 17, and also the adoption of any necessary measures for the protection of the marine environment, which was a matter of great interest to his country with its long coastline and extensive economic zone. He agreed with previous speakers that paragraph 2 of article 17 should form a separate article, and would have no objection if that article or the commentary thereto included specific references to the 1982 United Nations Convention on the Law of the Sea which, he hoped, would have entered into force by the time the draft articles under consideration were completed.

17. Mr. EIRIKSSON said that he shared almost all the views expressed by Mr. Yankov, Mr. Beesley and Mr. Calero Rodrigues at the previous meeting. Article 17, paragraph 2, brought into focus a dilemma inherent in the draft from the outset. Should the Special Rapporteur be encouraged to propose the establishment of norms in other areas, or should he be asked to bring article 17, paragraph 2, into line with earlier articles, confining its scope to co-operation between watercourse

States in fulfilling their obligations, established elsewhere, to preserve the marine environment? In proposing that the Special Rapporteur should follow the former course, he hoped that the draft articles as a whole could be adapted accordingly at some later date.

18. His suggestions for the restructuring of part V of the draft were the following: paragraph 2 of article 16 would be placed in the section on general principles, beside the principle of equitable use, as an important aspect of the no-harm principle, with a cross-reference to part V, regarding the implementation of that obligation; paragraph 1 of article 17, dealing with measures to prevent the pollution of the environment of the watercourse, would become the first article of part V; paragraph 2 of article 17 would become a separate article whose provisions, as suggested by Mr. Yankov and Mr. Barsegov, would be of general application to the marine environment; paragraph 3 of article 16, since it merely provided an illustration of the possible measures to be taken, should follow the general articles, together with article 18 and, possibly, other similar illustrative provisions.

19. He would prefer the definition of pollution in article 16 to be replaced by the definition appearing in article 1, paragraph 1 (4), of the 1982 United Nations Convention on the Law of the Sea. In any case, the definition should refer to "pollution of the watercourse" or "pollution of the environment" rather than simply to "pollution". In paragraph 2 of article 16, which, as already suggested, should be moved to an earlier part and be accompanied by a cross-reference to part V, the word "the" before the word "pollution" was redundant and should be deleted.

20. In article 17, paragraph 1, the reference should be to "necessary" rather than to "reasonable" measures. He was not sure of the need to indicate that the environment of an international watercourse included its ecology; and, like Mr. Al-Qaysi (2067th meeting), he doubted whether it was appropriate to refer both to protection from impairment, degradation or destruction and to protection from danger thereof. In his view, the paragraph could be streamlined to read:

"1. Watercourse States shall, individually and in co-operation, take all necessary measures to prevent pollution of the environment of an international watercourse [system] by activities within their territories."

21. Paragraph 2 of article 17 should, as already suggested, appear as a separate article setting out the general obligation to prevent pollution of the marine environment. It would then be divided in two parts, the first setting out the general obligation and the second dealing with co-operation between the watercourse States to fulfil that obligation. The reference to "an equitable basis" would be appropriate in the second part only. While agreeing that it was necessary to mention estuaries as being included in the marine environment, he saw no need to refer specifically to "marine life".

22. He shared the view of Mr. Calero Rodrigues (*ibid.*) on article 18, but if that article were maintained as a separate provision, the expression "pollution or en-

vironmental emergency", which was not a term of art, should be replaced.

23. He supported the use of the term "appreciable harm" in article 16, paragraph 2, having reached the same conclusion (2048th meeting) on that issue as in the case of the draft articles being prepared by Mr. Barboza.

24. Mr. TOMUSCHAT said that he found the text of article 17 rather difficult to understand. By speaking of "the environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas", the article brought the number of concepts dealt with in part V to four, namely international watercourses, the waters of international watercourses, the environment of international watercourses, and the ecology of international watercourses and surrounding areas. That approach was unnecessarily complicated, and the Special Rapporteur should have used simpler language and concentrated on the concept of the international watercourse and its waters. The introduction of so many elements entailed difficulties of interpretation and could lead the Commission into areas beyond the limits of the topic under consideration; in particular, there was a risk of encroaching on Mr. Barboza's topic. If the Special Rapporteur thought it necessary to keep the different terms, he should provide a clear explanation of their meanings and indicate what criteria he had used in differentiating between them.

25. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with the general orientation of the Special Rapporteur's work and with the part V which he proposed to include in the draft articles. It should be remembered that the object was to prepare a framework agreement to serve as a basis for States in drafting agreements to control the uses of individual watercourses. Accordingly, the definition of pollution in article 16, paragraph 1, should be adapted to take account, as appropriate, of already existing agreements, such as the 1982 United Nations Convention on the Law of the Sea. The definition should be in general terms, and he agreed with Mr. Thiam and other speakers that it should be moved forward into part II, on general principles.

26. Referring to the obligations set out in article 16, paragraph 2, he observed that pollution of an international watercourse generally resulted from lawful activities by watercourse States. As Mr. Reuter had pointed out (2065th meeting), responsibility in the event of transboundary harm arose from the consequences of lawful activities, rather than from those activities themselves. As to the use of the word "ecology" in the last phrase of paragraph 2, he agreed with Mr. Yankov (2063rd meeting) that the term "ecosystems" would be preferable.

27. There was no need to establish a list, as provided in paragraph 3, of substances or species whose introduction in the waters of the watercourse was to be prohibited, limited, investigated or monitored; that task could be left to States drawing up agreements on particular watercourses.

28. The point raised by Mr. Mahiou (2065th meeting) concerning cumulative responsibility in the case of international watercourses which crossed several countries was interesting and might be studied further.

29. In conclusion, he stressed the importance of complying with the General Assembly's instructions concerning the topic and of ensuring that all the articles could be properly integrated in a future framework agreement.

30. Mr. McCaffrey (Special Rapporteur), summing up the discussion, said that there had been a very rich and helpful debate on articles 16 and 17, as well as a brief discussion of article 18. A wide spectrum of views had been expressed on the complex issues raised by articles 16 to 18; all those who had spoken, however, had agreed on the importance of environmental protection and pollution control. The differences of opinion related mostly to the manner in which the subject should be approached and the desired results achieved.

31. Before dealing with the articles in detail, he wished to speak on a number of general issues. The first was whether the draft should include a separate part to deal with pollution and environmental protection. A few members had expressed a negative opinion on that question, whereas others had considered that part V should be more detailed. The majority view had been that a separate part was necessary, because of the importance of the problem in the contemporary world. It had also been pointed out that the articles under discussion could affect non-watercourse States and areas beyond national jurisdiction—considerations which justified separate treatment of the subject, since the rest of the draft concerned only watercourse States.

32. It had been suggested that the rights and duties of non-watercourse States should be specifically provided for in part V. That point deserved careful consideration and could perhaps be covered simply by replacing the expression "watercourse States" by the term "States" in appropriate places.

33. Several speakers had referred to the number of draft articles on environmental protection and pollution, and to the detailed coverage of that subject; most of them appeared to favour a minimalist approach, on the grounds that the draft was intended to become a framework instrument. Some believed that several paragraphs should be made into separate articles, while others had suggested adding a procedural component, at least to article 16.

34. If the Commission accepted the Drafting Committee's recommendation that the subject of exchange of data and information should be moved to part II (General principles), part V would become part IV. With regard to the structure of part V, he could accept the useful proposal to reverse articles 16 and 17, so that the more general provision would come first and be followed by the more specific provision on pollution.

35. He had no objection to the suggestion that the title of part V be changed to "Protection of the environment of international watercourses", but wished to point out that the right of a State to be free from pollution harm went beyond environmental protection; it was not only the environment but also the uses of an international

watercourse that had to be protected against pollution harm.

36. As to the definition of pollution in paragraph 1 of article 16, he had no objection to the suggestion that it should cover the "pollution of an international watercourse" and not "pollution" generally. The majority of speakers had favoured moving the definition to article 1, on the use of terms. He accepted that suggestion, which was in keeping with the Commission's usual practice. He had included the definition of pollution in article 16 for convenience only.

37. The terms of the definition had been found generally acceptable, although there had been some suggestions for improvement. One suggestion was that a reference be introduced to what produced pollution—a possibility which he discussed in paragraph (2) of his comments on article 16. It had also been suggested that the definition should refer to the "introduction" of dangerous substances, but some speakers had held that that approach would produce too narrow a definition: it was also necessary to cover pollution by withdrawal.

38. Several references had been made to the definition of pollution contained in article 1, paragraph 1 (4), of the 1982 United Nations Convention on the Law of the Sea. Some speakers had suggested that the definition in that Convention should be followed more closely, in the interests of uniformity of the law; others, however, had found that definition inappropriate for international watercourses.

39. It had been asked by one member whether the term "biological alteration" would cover the introduction of species such as fish, on the grounds that it was doubtful whether that problem could be dealt with in the context of pollution. In reply to that point, he would refer members to article 196 of the United Nations Convention on the Law of the Sea, concerning the use of technologies or the introduction of alien or new species. Paragraph 1 of that article referred to "the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto". The question of covering that type of harm should be considered.

40. One member had suggested that actions that produced detrimental effects indirectly should not be excluded from the purview of the articles; situations like that in the Minamata case would then be covered. Another member had thought that that kind of situation was already covered by the definition as it stood.

41. Concern had been expressed about the words "results directly or indirectly from human conduct", which did not appear to be in line with traditional causation requirements under the law of State responsibility. He would point out, however, that that would also be true of the definition in the United Nations Convention on the Law of the Sea which spoke of the "introduction by man, directly or indirectly, of substances or energy". He would not be opposed to examining alternative language with the help of the Drafting Committee.

42. It had been suggested that the term "safety" be replaced by "well-being", and that express reference be made to "amenities", as in the definition in the United

Nations Convention on the Law of the Sea. Those useful suggestions would be considered by the Drafting Committee. As to the proposed reference to radioactive elements, he recalled that in an earlier statement he had put forward the idea of introducing the term “energy”, which would cover radioactivity (2062nd meeting, para. 45).

43. Some members had found the expression “any beneficial purpose” confusing, but the concept of “beneficial use” was well known in watercourse law, both national and international, being linked with the concept of equitable utilization. There was also a reference, in article 1, paragraph 1 (4), of the United Nations Convention on the Law of the Sea, to “hindrance to marine activities, including fishing and other legitimate uses of the sea”. If the expression “beneficial purpose” raised difficulties, he had no objection to referring simply to the “use of the waters”.

44. Most speakers had found paragraph 1 of article 16 generally acceptable. He therefore proposed that it should be referred to the Drafting Committee together with the comments and suggestions made. The Drafting Committee would recommend whether the paragraph should be moved to article 1 of the draft.

45. Paragraph 2 of article 16 set out the obligation not to cause appreciable pollution harm, in which connection the Commission might wish to consider a suggestion that the first substantive provision in part V of the draft should read: “Watercourse States shall co-operate to prevent, reduce and control pollution of international watercourses.” It had also been suggested that paragraph 2 should form the subject of a separate article, or be moved to part II of the draft.

46. One of the main issues discussed in connection with paragraph 2 had been the use of the expression “appreciable harm”, for which there was ample precedent in State treaty practice. He would refer members, in particular, to Mr. Schwebel’s third report, which stated that

“Substantial”, “significant”, “sensible” (in French and Spanish) and “appreciable” (especially in French) [were] the adjectives most frequently employed to modify “harm”<sup>4</sup>

and which listed some of the agreements in which equivalent expressions were used.<sup>5</sup> The intention, as explained in paragraph (4) of the comments, was to use a term that was as factual as possible. He agreed on the need for an objective criterion but, in the absence of specific agreement on scientifically determined levels of permissible emissions, it was possible to have only a general criterion that came as near as possible to objectivity. That was particularly true of a framework agreement. Besides, if a different criterion, such as “substantial” or “considerable” harm, were used in article 16, it would be difficult to reconcile with the criterion of “appreciable” harm laid down in article 8 [9].

47. As to the relationship between the concept of “appreciable harm”, in paragraph 2 of article 16, and that of “detrimental effects”, in paragraph 1, his idea was that such effects might, or might not, rise to the level of

appreciable harm. Both terms, or similar ones, had been used in conjunction in other instruments, such as the United Nations Convention on the Law of the Sea. He agreed, however, that detrimental effects which did not rise to the level of appreciable harm should be the subject of “reasonable measures” of abatement, under paragraph 1 of article 17.

48. The question of responsibility was particularly difficult, because it touched on the topics of State responsibility and liability for acts not prohibited by international law. He urged members not to try to resolve all the problems that had arisen in regard to those two topics in a single paragraph of one article of the draft under consideration, since that would only delay the work on the topic as a whole.

49. He had been surprised by the number of members who considered that watercourse States should be held strictly liable for all appreciable pollution harm, although most members believed that causing such harm entailed the international responsibility for wrongfulness of the State of origin only. In his view, that was the right approach; for there was little, if any, evidence of State practice that recognized strict liability for pollution damage that was non-accidental or that did not result from a dangerous activity—which matters properly fell within the scope of Mr. Barboza’s topic.

50. Once that approach was accepted, the question that arose was what exactly was the nature of the obligation or primary rule involved? It seemed clear from paragraph 2 of article 16 as drafted that, as Mr. Barboza (2064th meeting) had convincingly demonstrated, it was an obligation of result. The paragraph could, however, be interpreted as establishing a rule of strict liability, or of liability without fault, for causing appreciable pollution harm. Since that was not the intention, some way should be found to make it clear that it was responsibility for wrongfulness, not strict liability, that was at issue. That could be done in a number of ways. The paragraph could, for instance, be drafted to provide that watercourse States should “exercise due diligence” or “take all measures necessary to prevent the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm”. Alternatively, the wording of article 194, paragraph 2, of the United Nations Convention on the Law of the Sea could be followed, to provide that:

“Watercourse States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause appreciable harm by pollution to other watercourse States or to the ecology or ecosystem of the international watercourse [system].”

Another alternative would be to leave paragraph 2 as it stood and add a paragraph providing that a watercourse State should not be considered to be in violation of paragraph 2 so long as it was exercising due diligence or taking all reasonable measures to prevent appreciable pollution harm.

51. Some members had rightly noted that the obligation of due diligence had been proposed with a view to introducing a measure of flexibility in an obligation not to cause appreciable pollution harm which would

<sup>4</sup> *Yearbook* . . . 1982, vol. II (Part One), p. 98, document A/CN.4/348, para. 130.

<sup>5</sup> *Ibid.*, pp. 98-99, paras. 132-133.

otherwise be quite strict; other members had welcomed the idea that the degree of diligence or care required should be proportional to the means at the disposal of the State. It had also rightly been said that an obligation of due diligence was nothing new. He was not, however, aware of any case in which the principle of due diligence had been applied to transfrontier pollution by name, although the arbitral award in the *Trail Smelter* case had come close to applying it, without actually using the term "due diligence". In any event, there was no need to use that term if it had undesirable connotations. On the other hand, a number of commentators had concluded that it was an appropriate general standard in cases of transfrontier pollution, and it had received extensive consideration by OECD.

52. The main question was, if State A had taken all reasonable measures to prevent appreciable pollution harm to State B, but such harm none the less occurred, would State A be internationally responsible? If the answer was in the affirmative, State A would, in his submission, be strictly liable for an act not prohibited by international law since, although it had used all means at its disposal, harm had still occurred. To his mind, that situation fell within Mr. Barboza's topic. If the answer was in the negative, and State A were not held internationally responsible if it had taken all the measures at its disposal to prevent pollution harm, a further question was whether State A had any duty or whether State B was to be left to bear its loss alone. On that question, the work on Mr. Barboza's topic could be very helpful. A provision might, for example, be included to the effect that State A should consult and negotiate with State B with a view to establishing a régime for compensation or to introducing additional measures to prevent, reduce or mitigate pollution harm.

53. He continued to believe, however, that a criterion of due diligence was the appropriate standard, not only because it afforded a measure of flexibility in the draft, but also because there was considerable support for it in State practice. According to that standard, which had the support of a number of members, a watercourse State would be internationally responsible for appreciable pollution harm to another watercourse State only if it had failed to exercise due diligence to prevent harm. In other words, the harm must be the result of a failure to fulfil the obligation of prevention. Mere failure to exercise due diligence, without appreciable harm to another watercourse State, would not entail responsibility, because what was involved in such a case was an obligation of result, not of conduct.

54. Some members, however, took the view that due diligence was too weak a standard, and placed too heavy a burden on the victim State, since only the State of origin would have the means of proving whether or not it had exercised due diligence. It had therefore been suggested that the burden of proving due diligence should be reversed, to lie with the State of origin. While he agreed with that suggestion, it would be difficult to provide for it in a framework instrument, especially if the instrument did not provide for machinery for the settlement of disputes. The point could perhaps be dealt with in the commentary and also considered in the Drafting Committee.

55. Another question concerned existing versus new pollution. While some members considered that a distinction must be made between the two, others believed that all pollution should be treated in the same way. His own view was that there could be no legal distinction between existing and new pollution, first, because there was no vested right to cause appreciable pollution harm and, secondly, because by the time the new pollution had been identified by the victim State, the State of origin might be able to argue that it had already become existing pollution. There had also been instances in which States had allowed each other a reasonable period of time in which to reduce existing pollution to acceptable levels, as in the case of the Rhine. That approach, which could be regarded as an application of the principle of due diligence, was the most consistent with State practice and the most suitable for a framework instrument. One proposal was that provision should be made for a transitional period within which States must comply with the requirement not to cause appreciable pollution harm. He would support that interesting proposal if a provision suitable for inclusion in a framework instrument could be drafted, but he was not sure how that could be done.

56. With regard to the relationship between article 16, paragraph 2, and article 6, which set out the rule of equitable utilization, he noted that none of the members who had addressed that question had advocated providing for an exception, on the grounds of equitable use, to the prohibition of appreciable pollution harm. Accordingly, the same standard should be applied in article 16 as in article 8 [9], which also provided for no exception to that prohibition.

57. Two ideas brought up during the discussion struck him as extremely good, and he hoped their authors would offer specific proposals to be taken up in the Drafting Committee. The first was that provision be made for an obligation to consult, at the request of a watercourse State, regarding "creeping" or "structural" pollution. The second was that the duties of exchanging data and information and of consultation be applied to all aspects dealt with in the article on pollution. The proposal to replace the term "ecology" by "ecosystems" was a definite improvement, and he endorsed it.

58. It had been suggested that a provision similar to the one in article 195 of the United Nations Convention on the Law of the Sea, relating to the duty not to transform one type of pollution into another, be included in the draft. He could accept that proposal and its consideration by the Drafting Committee, but he feared that it might introduce too many technical elements.

59. As to paragraph 3 of article 16, he endorsed the suggestion that it should be set out as a separate article. Most members had supported the inclusion of some reference to the preparation of a list or lists, which, many agreed, could be the responsibility of the watercourse States. He agreed that the paragraph should not imply that the list was fixed or unchangeable; the addition or deletion of substances, according to circumstances, should be permitted.

60. In regard to the suggestion that an international standard should be developed for drawing up the lists, he drew attention to the list of environmentally harmful chemical substances and the definition of "hazardous wastes" prepared by UNEP.<sup>6</sup> It might be possible to stipulate that the lists must be drawn up in accordance with internationally accepted standards, such as those contained in the 1973 and 1978 MARPOL Conventions<sup>7</sup> and in the 1974 Paris Convention on the Prevention of Marine Pollution from Land-based Sources.<sup>8</sup>

61. He could agree with those members who thought that the introduction of toxic substances in an international watercourse should be banned, but must point out that there was very little authority in State practice for such a provision. On that point, he drew attention to article 194, paragraph 3 (a), of the United Nations Convention on the Law of the Sea. Other members of the Commission had pointed out that a prohibition could be implemented only if the banned substances were clearly identified—but those substances might vary with each watercourse system, and thus could best be covered by specific agreements. An alternative approach might be something along the lines of principle 8 (d) of the set of principles adopted by ECE in 1987 on co-operation in the field of transboundary waters (see A/CN.4/412 and Add.1 and 2, para. 56).

62. He endorsed the suggestion that article 17 be placed before article 16. He also agreed that the title of article 17 be redrafted to read: "Protection and preservation of the environment of international watercourse[s] [systems]", and that the obligation to "protect and preserve" the environment be stated in paragraph 1. There were good reasons for making paragraph 2 a separate article, as some members had suggested, and he had no objections to that proposal.

63. It had also been suggested that paragraph 1 of article 17 be divided into two paragraphs, the first to deal generally with the protection and preservation of the environment of an international watercourse, and the second to deal specifically with protection against substances that were toxic and tended to be bio-accumulative. He saw that as a positive idea and would welcome a draft text to that effect, which could be examined by the Drafting Committee. He had no objection to the idea that the article should include an obligation to "prevent, reduce and control" pollution of the environment of an international watercourse.

64. Regarding the comment that it was not clear whether a distinction was intended between the "environment" and the "ecology" of a watercourse, he explained that the formulation "measures to protect the environment . . . including the ecology" had been intended to show that "ecology" was included in "environment", which was the broader concept. It might be worth while, however, to consider defining the term "environment of an international watercourse" in article 1, in order to make it clear that the concept embraced the ecology of the watercourse or its ecosystems.

He fully agreed that the paragraph should deal exclusively with international watercourses, and not purport to cover the entire environment.

65. In article 17, paragraph 2, he had no objection to inserting the words "and preserve" between the words "protect" and "the marine environment", to including a specific reference to the relevant provisions of the United Nations Convention on the Law of the Sea, and to providing that the mouths of rivers were covered, as in article 9 of that Convention.

66. Concerning article 18, he noted that most speakers had agreed that a comprehensive article dealing with all kinds of emergency situations, not only those related to the environment, should be included. He proposed to submit such an article at the Commission's next session, in the context of the subject of water-related hazards and dangers. The idea that the scope of paragraph 2 should be enlarged to include the duty to co-operate in providing information and in minimizing any harm caused by the emergency was a good one and would be taken into account in future drafting work on the article. Other points raised during the discussion related mainly to drafting, and would likewise be taken into account in future work.

67. He did not propose to submit additional articles for the Commission's consideration, since the debate had shown that the best approach would be to attempt to refine the existing articles by incorporating a number of points. He wished to thank members for giving so much thought to the articles that an extremely rich and constructive debate had resulted from their comments. Owing to the Commission's schedule of work, and because he feared that single-handedly he could do little to improve the draft, he requested that articles 16 and 17 be referred to the Drafting Committee.

68. The CHAIRMAN invited the Commission to decide whether the draft articles should be referred to the Drafting Committee. Some members had suggested that the referral should be postponed until the Commission's next session to allow time for further consideration, but the Special Rapporteur believed that no useful purpose could be served by such postponement.

69. Mr. THIAM called on the Special Rapporteur to justify his comment that, in the view of most members of the Commission, responsibility must be attributed solely on the basis of a wrongful act; in other words, that, if a person or an entity that caused pollution could not be shown to have committed a wrongful act, then responsibility for the harm could not be attributed. He strongly disagreed: the notion of due diligence was not acceptable to a majority of members if it enabled a State to evade its responsibility.

70. Mr. McCAFFREY (Special Rapporteur) said that the fundamental issue addressed in the draft articles was whether a State would be held responsible for appreciable pollution harm that emanated from its territory even if it had taken all the measures at its disposal to prevent such harm from occurring. He had found, through his research, that in practice States did not hold other States strictly liable without taking into consideration the efforts they had made to prevent or control pollution.

<sup>6</sup> UNEP/GC.14/9 (24 February 1987).

<sup>7</sup> 1973 International Convention for the Prevention of Pollution from Ships and 1978 Protocol; see 2063rd meeting, footnote 7.

<sup>8</sup> *Ibid.*

71. Mr. ARANGIO-RUIZ said he believed it would be reasonable to refer articles 16 and 17 to the Drafting Committee, as requested by the Special Rapporteur, with the proviso that the criterion of due diligence would apply, but that reversal of the burden of proof should be made explicit, perhaps in a new paragraph.

72. Mr. BARSEGOV said that since the Special Rapporteur had intimated that no new article would be submitted at the current session, he had no objection to referring those before the Commission to the Drafting Committee. He was afraid, however, that if the Commission adopted a decision on responsibility in the context of the topic under consideration, that might prejudice the question of responsibility for transboundary harm caused by lawful activities before the consideration of that difficult problem was completed.

73. Mr. BEESLEY said that, in view of the complexity of the issues, it was understandable that some members had reservations on whether the articles were ripe for referral to the Drafting Committee. He believed, however, that the thorough debate and the summing-up made by the Special Rapporteur had provided a sound basis for such referral. It would not be the first time the Commission had sent a draft to the Drafting Committee while some points still remained to be settled. If the Drafting Committee performed a purely formal function, as had been the case at the Third United Nations Conference on the Law of the Sea, he would not support referral. In view of the Committee's role of conciliation and negotiation, however, and because it was not the final arbiter, since its revisions came back to the Commission, he had no hesitation in fully endorsing the Special Rapporteur's recommendation that articles 16 and 17 be referred to the Drafting Committee.

74. Mr. THIAM explained that he did not oppose referral, but wished the objections he had raised regarding due diligence to be duly taken into account.

75. Mr. KOROMA said he supported Mr. Thiam's view that the Commission should move away from the dichotomy traditionally established in the context of State responsibility, between holding the perpetrator legally liable or leaving the victim to bear the cost of damage. In cases of pollution, source States were generally not prepared to accept legal liability, but would acknowledge their moral liability by compensation. Mr. Thiam seemed to be suggesting that the Commission should find a happy medium between not enforcing strict liability and ensuring that those who suffered harm because of pollution were compensated.

76. The Special Rapporteur had respected the views on the draft articles put forward during the debate, and had intimated that he would be prepared to recast them before their referral to the Drafting Committee. Hence the draft articles appeared to qualify for referral.

77. Mr. AL-KHASAWNEH said he did not think the draft articles were ready for referral: the Commission's debate had shown that fundamental questions relating to State responsibility and liability still needed to be settled. Referral to the Drafting Committee would impose on it the burden of deciding matters of substance, and would merely perpetuate debate on those difficult

points. He suggested that the Special Rapporteur submit a revised set of articles.

78. Mr. PAWLAK endorsed the recommendation that articles 16 and 17 be referred to the Drafting Committee. Experience had shown that the Drafting Committee generally revised texts heavily, which was perhaps what was needed in the present case.

79. Mr. FRANCIS said that the draft articles should be referred to the Drafting Committee; that would enable the Special Rapporteur to submit a new set of articles at the Commission's next session.

80. With regard to the remarks made by Mr. Barsegov and Mr. Koroma on liability, he understood the Special Rapporteur to have been referring to liability in situations in which upstream States had done all they could and appreciable harm still resulted. Such cases could be dealt with in the context of the topic of liability for non-prohibited acts, with specific reference to the question of compensation, and not in relation to breaches of obligation, under article 16, paragraph 2.

81. Mr. BARBOZA said he supported the Special Rapporteur's recommendation. The discussion in the Commission had provided many elements on which drafting decisions could be based, and the Commission would have plenty of time to reflect on the solutions proposed by the Drafting Committee and take decisions on them.

82. Mr. BENNOUNA said he had a number of reservations about referring the draft articles to the Drafting Committee. The Special Rapporteur himself had acknowledged that many substantive changes would have to be made and that the articles might even need to be restructured. A more logical procedure would therefore be for him to redraft the articles and submit them for a brief debate in the Commission, after which they could be referred to the Drafting Committee. No time would be gained by premature referral.

83. The CHAIRMAN, speaking as a member of the Commission, said that he did not oppose referral. Nevertheless, he would point out that it was by no means traditional in the Commission's work for every draft article to be referred to the Drafting Committee; often they were first discussed a number of times in plenary. It was not appropriate for the Commission to leave fundamental problems unresolved and to delegate responsibility for them to the Drafting Committee, which was a body of limited membership. More discussion on the draft articles was needed, and the process would be facilitated if the Special Rapporteur were to submit a new set of articles, redrafted in the light of the discussion, for consideration at the Commission's next session.

84. Mr. BEESLEY said that he had suggested that articles 16 and 17 should be referred to the Drafting Committee, but accompanied by a statement that the Commission had not succeeded in resolving all its differences, and perhaps with paragraph 2 of article 16 in square brackets. Then, if the Drafting Committee could not resolve the outstanding problems, the Commission could take them up again.

85. Mr. McCaffrey (Special Rapporteur) said he deeply appreciated the Commission's confidence in him, but doubted that he could produce a set of articles at the Commission's next session that would have effectively ironed out the remaining difficulties. Experience had shown that problems as fundamental as those the Commission was faced with could only be resolved in plenary after weeks of discussion. The Drafting Committee had often been chosen in the past as the appropriate place for working out difficult issues. Furthermore, if the articles were not referred to the Drafting Committee at the current session, the Committee might well not have a chance to consider them at the next, as the topic would probably be taken up fairly late. Work on it would then be delayed for a year.

86. The Chairman suggested that members of the Commission continue to reflect on the matter, and that a decision be taken at the next meeting.

*It was so agreed.*

#### Closure of the International Law Seminar

87. The Chairman said that the closure of the twenty-fourth session of the International Law Seminar was taking place in a plenary meeting to emphasize the importance attached to the annual Seminar by the Commission. The Seminar had been initiated in 1965, under the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. In close co-operation with the Commission, it had played a useful part in spreading knowledge of the Commission's work among students of international law and young officials of Member States of the United Nations.

88. At the current session, 20 young lawyers from all regions of the world, and in particular from developing countries, had been selected to attend the Seminar. Despite financial problems, the contributions obtained had made it possible to grant 10 fellowships. In addition, there had been four participants from the United Nations-UNITAR Fellowship Programme in International Law, a joint programme of the Office of Legal Affairs and UNITAR, which reflected the integration of the Seminar in the United Nations Programme of Assistance on international law.

89. Some difficulties had arisen regarding the availability of conference services, in particular simultaneous interpretation. He was confident that appropriate steps would be taken with the responsible officials of the United Nations Office at Geneva to ensure that, at the next session, the Seminar would be provided with the usual conference services.

90. The General Assembly had repeatedly emphasized, in its resolutions, the importance of the teaching, study, dissemination and wider appreciation of international law, which served to strengthen the function of progressive development and codification of international law entrusted to the Commission. It was not enough to formulate rules; they had to be disseminated and made known in order to promote their acceptance by States. Nothing could be more appropriate than the attendance at the Commission's sessions of a selected group of young lawyers who would

later come to influence the decisions of their respective Governments and to spread knowledge of those rules in their own communities.

91. Those objectives were of particular significance for the participants from developing countries, whose attendance at the Seminar enabled them to improve their knowledge for the benefit of their own countries, many of which lacked the necessary resources to provide such specialized training.

92. On behalf of the members of the Commission, he wished all the participants in the Seminar a safe journey home and success in their professional activities.

93. Mr. Martenson (Director-General) said that the object of the International Law Seminar was to enable young lawyers who were qualified, and who worked in the field of public international law, to familiarize themselves with the work of the International Law Commission and to meet and discuss topics of international law with its members. Those participants in the Seminar who had been attending an international conference for the first time would perhaps also have gained greater insight into the reasons why international conventions, so often the result of a compromise reached after long negotiations, took some time to elaborate and were not always perfect.

94. Five members of the Commission had addressed the Seminar, at which the emphasis had been placed on humanitarian law, including human rights, which was a subject of particular interest to him as head of the Centre for Human Rights. The Seminar had also provided participants with a valuable opportunity for meeting and exchanging experience with other lawyers from countries with totally different legal and sometimes also political systems.

95. The Chairman had raised the question of conference services. Over the years every effort had been made to supply the Seminar with the necessary resources, although no budget allocation had been made for that purpose. Given the unfortunate financial situation of the United Nations, to which the Secretary-General had recently drawn attention, it had been especially difficult to provide the twenty-fourth session of the Seminar with all the necessary services, particularly interpretation. He trusted, however, that when the financial problems of the United Nations were resolved, that difficulty would be overcome, and that the General Assembly would take steps to provide a proper budgetary foundation for effective work at future seminars.

96. He hoped that the participants would find the experience gained at the Seminar useful in their future careers.

97. Mr. Blay, speaking on behalf of the participants in the International Law Seminar, thanked members for their learned contributions to the Seminar and assured the Commission of the great admiration and respect of all participants in the Seminar for the work it was doing.

*The Chairman presented the participants with certificates attesting to their participation in the twenty-fourth session of the International Law Seminar.*

*The meeting rose at 1.25 p.m.*

## 2069th MEETING

Tuesday, 28 June 1988, at 10 a.m.

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (continued) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)**

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPporteur  
(continued)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) and

ARTICLE 18 [19] (Pollution or environmental emergencies)<sup>3</sup> (continued)

1. Mr. FRANCIS, concluding the statement he had begun at the previous meeting, said that some members had asked what would happen to a State that suffered appreciable harm, within the meaning of article 16, if it were established that the upper riparian State, which had caused the harm, had done everything that could reasonably be expected of it in the circumstances. The Special Rapporteur had replied that the question fell under Mr. Barboza's topic. It would perhaps, however, be advisable to include an express provision to that effect in the draft articles on international watercourses.

2. Article 35 of part 1 of the draft articles on State responsibility<sup>4</sup> had already set forth the following reservation as to compensation for damage: "Preclusion of the wrongfulness of an act of a State [. . .] does not prejudice any question that may arise in regard to compensation for damage caused by that act." The same idea was to be found in article 5 as proposed by Mr. Barboza (see 2044th meeting, para. 13), which read:

*Article 5. Absence of effect upon other rules of international law*

The fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.

<sup>1</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>3</sup> For the texts, see 2062nd meeting, para. 2.

<sup>4</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 61.

In his view, the draft on international watercourses should contain a similar article, although the concept of the "wrongfulness of an act of a State" and of a "wrongful act or omission of the State of origin" should be replaced by the concept of "acts not prohibited by international law". That would be a tidier way of approaching the problem.

3. The CHAIRMAN said that the Commission had to take a decision with regard to draft articles 16, 17 and 18, concerning environmental protection and pollution, submitted by the Special Rapporteur in his fourth report (A/CN.4/412 and Add.1 and 2). The Special Rapporteur had suggested that articles 16 and 17 should be referred to the Drafting Committee, and that the discussion on article 18 should be resumed at the next session.

4. If there were no objections, he would take it that the Commission agreed to refer draft articles 16 and 17 to the Drafting Committee, together with the observations made during the discussion, on the understanding that the reservations entered by some members would be reflected in the summary records.

*It was so agreed.*

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/409 and Add.1-5,<sup>5</sup> A/CN.4/417,<sup>6</sup> A/CN.4/L.420, sect. F.3)**

(Agenda item 4)

EIGHTH REPORT OF THE SPECIAL RAPporteur

CONSIDERATION OF THE DRAFT ARTICLES  
ON SECOND READING

5. The CHAIRMAN recalled that, at its thirty-eighth session, in 1986, the Commission had concluded its first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in which connection the General Assembly had sought the comments and observations of Governments. It was on the basis of the replies of Governments (A/CN.4/409 and Add.1-5) that the Special Rapporteur had prepared his eighth report (A/CN.4/417).

6. The draft articles provisionally adopted on first reading<sup>7</sup> read as follows:

PART I

GENERAL PROVISIONS

*Article 1. Scope of the present articles*

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

<sup>5</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Yearbook . . . 1986*, vol. II (Part Two), pp. 24 *et seq.*

*Article 2. Couriers and bags not within the scope of the present articles*

The fact that the present articles do not apply to couriers and bags employed for the official communications of international organizations shall not affect:

- (a) the legal status of such couriers and bags;
- (b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

*Article 3. Use of terms*

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as:

- (a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

who is entrusted with the custody, transportation and delivery of the diplomatic bag, and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

- (a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

- (a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and

(c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

*Article 4. Freedom of official communications*

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

*Article 5. Duty to respect the laws and regulations of the receiving State and the transit State*

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State, as the case may be. He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be.

*Article 6. Non-discrimination and reciprocity*

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

- (a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;
- (b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

PART II

STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG

*Article 7. Appointment of the diplomatic courier*

Subject to the provisions of articles 9 and 12, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

*Article 8. Documentation of the diplomatic courier*

The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag which is accompanied by him.

*Article 9. Nationality of the diplomatic courier*

1. The diplomatic courier should in principle be of the nationality of the sending State.

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 of this article with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

*Article 10. Functions of the diplomatic courier*

The functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him.

*Article 11. End of the functions of the diplomatic courier*

The functions of the diplomatic courier come to an end, *inter alia*, upon:

(a) notification by the sending State to the receiving State and, where necessary, to the transit State that the functions of the diplomatic courier have been terminated;

(b) notification by the receiving State to the sending State that, in accordance with article 12, it refuses to recognize the person concerned as a diplomatic courier.

*Article 12. The diplomatic courier declared persona non grata or not acceptable*

1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier is *persona non grata* or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.

*Article 13. Facilities accorded to the diplomatic courier*

1. The receiving State or, as the case may be, the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or, as the case may be, the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

*Article 14. Entry into the territory of the receiving State or the transit State*

1. The receiving State or, as the case may be, the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

*Article 15. Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or, as the case may be, the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

*Article 16. Personal protection and inviolability*

The diplomatic courier shall be protected by the receiving State or, as the case may be, by the transit State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

*Article 17. Inviolability of temporary accommodation*

1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State may not enter the temporary accommodation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.

2. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.

3. The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that there are in it articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier and on condition that the inspection or search be effected without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

*Article 18. Immunity from jurisdiction*

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his functions. He may be required to give evidence in other cases, provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

*Article 19. Exemption from personal examination, customs duties and inspection*

1. The diplomatic courier shall be exempt from personal examination.

2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or, as the case may be, of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

*Article 20. Exemption from dues and taxes*

The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal,

for which he might otherwise be liable, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

*Article 21. Duration of privileges and immunities*

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

*Article 22. Waiver of immunities*

1. The sending State may waive the immunities of the diplomatic courier.

2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.

3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

*Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag*

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

PART III

STATUS OF THE DIPLOMATIC BAG

*Article 24. Identification of the diplomatic bag*

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

*Article 25. Content of the diplomatic bag*

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

*Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport*

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

*Article 27. Facilities accorded to the diplomatic bag*

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

*Article 28. Protection of the diplomatic bag*

1. The diplomatic bag shall [be inviolable wherever it may be; it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical devices].

2. Nevertheless, if the competent authorities of the receiving [or transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or transit] State may require that the bag be returned to its place of origin.

*Article 29. Exemption from customs duties, dues and taxes*

The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and related charges other than charges for storage, cartage and similar services.

PART IV

MISCELLANEOUS PROVISIONS

*Article 30. Protective measures in case of force majeure or other circumstances*

1. In the event that, due to *force majeure* or other circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the bag has been entrusted or any other member of the crew, is no longer able to maintain custody of the diplomatic bag, the receiving State or, as the case may be, the transit State shall take appropriate measures to inform the sending State and to ensure the integrity and safety of the diplomatic bag until the authorities of the sending State take repossession of it.

2. In the event that, due to *force majeure*, the diplomatic courier or the diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, that State shall accord protection to the diplomatic courier and the diplomatic bag and shall extend to them the facilities necessary to allow them to leave the territory.

*Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations*

The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be

affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations.

*Article 32. Relationship between the present articles and existing bilateral and regional agreements*

The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them.

*Article 33. Optional declaration*

1. A State may, at the time of expressing its consent to be bound by the present articles, or at any time thereafter, make a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraph 1 (1) and (2) of article 3 to which it will not apply the present articles.

2. Any declaration made in accordance with paragraph 1 shall be communicated to the depositary, who shall circulate copies thereof to the Parties and to the States entitled to become Parties to the present articles. Any such declaration made by a Contracting State shall take effect upon the entry into force of the present articles for that State. Any such declaration made by a Party shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of that declaration.

3. A State which has made a declaration under paragraph 1 may at any time withdraw it by a notification in writing.

4. A State which has made a declaration under paragraph 1 shall not be entitled to invoke the provisions relating to any category of diplomatic courier and diplomatic bag mentioned in the declaration as against another Party which has accepted the applicability of those provisions to that category of courier and bag.

7. He recalled further that, by letter dated 29 January 1988 addressed to the Special Rapporteur, the Secretary of the Commission had drawn attention to paragraph 248 of the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control<sup>8</sup> adopted by the International Conference on Drug Abuse and Illicit Trafficking, of which the General Assembly had taken note in its resolution 42/112 of 7 December 1987. In that paragraph, the Conference had drawn the attention of the Commission to the use of the diplomatic bag for drug trafficking, so that the Commission could study the matter in the context of its agenda item relating to the status of the diplomatic bag. The Conference had also requested the Secretary-General to follow closely the activities referred to in the Multidisciplinary Outline, and the General Assembly had asked him to submit a report on the implementation of resolution 42/112.

8. In their statements on the present item, members would no doubt wish to take account of that letter and the considerations set forth in it.

9. Mr. YANKOV (Special Rapporteur), introducing his eighth report on the topic (A/CN.4/417), said that his oral presentation would perhaps be more detailed than was customary. That was because he had endeavoured to give due attention to all the comments, whether of a substantive or drafting character, made by Governments—which accounted for the length of his report. Also, as the Commission was embarking on the consideration of the draft articles on second reading, he

thought it would be advisable to have as comprehensive a view as possible of the situation. Again, the eighth report had not been distributed in sufficient time, and members had therefore perhaps been unable to study it properly.

10. Outlining the historical background to the question, he said that the draft articles were the outcome of a study by a working group appointed to consider the matter in 1978 and of the seven reports which he had submitted thereafter. In paragraph 9 of its resolution 41/81 of 3 December 1986, the General Assembly had urged Governments to respond to the Commission's request for comments and observations. At the time of the drafting of the eighth report, 29 Governments had sent written replies, most of them after the 1 January 1988 deadline (A/CN.4/409 and Add.1-5). In addition to those observations, the discussions in the Sixth Committee at the forty-first and forty-second sessions of the General Assembly<sup>9</sup> had afforded the representatives of Governments an opportunity to make known their views. The Commission therefore had a substantive body of material for the second reading of the draft articles.

11. Section I of the eighth report contained general observations, in particular on methodology. Section II contained an analysis of the draft articles in the light of the observations received, together with some proposed amendments. Lastly, he had thought it useful to consider the question of settlement of disputes arising out of the interpretation or application of the future treaty, as that question had been raised by two Governments (A/CN.4/417, paras. 280-281).

12. Three questions of methodology were examined under the heading of general observations, bearing in mind the views expressed throughout the Commission's work: the purpose of the draft articles, the concepts of a comprehensive approach and of functional necessity, and the form of the draft.

13. It might seem strange to be talking still of the purpose of the draft articles on second reading. Earlier discussions had, however, revealed certain differences as to the approach to be followed and as to the practical necessity of elaborating special rules governing the legal status of the diplomatic courier and the diplomatic bag. A common ground, if not a consensus, had none the less been established: the draft should lead to a coherent and, in so far as possible, uniform régime governing the status of all kinds of couriers and bags on the basis of the "codification conventions",<sup>10</sup> and of a combination of established methods for the progressive development and codification of international law. The need to introduce a coherent régime was widely acknowledged by Governments, although some maintained that the existing conventions were adequate for the purpose. At all events, the Commission had received a very clear mandate from the General Assembly.

<sup>8</sup> See A/CN.4/L.410, sect. C, and A/CN.4/L.420, sect. F.3.

<sup>10</sup> 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations, 1969 Convention on Special Missions and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (referred to as "1975 Vienna Convention on the Representation of States").

<sup>9</sup> Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987 (United Nations publication, Sales No. E.87.1.18), chap. I, sect. A.

14. The “comprehensive” approach, aimed at establishing a coherent set of rules, had been accepted by the Commission, on the understanding that it should be applied with caution. The point of departure here was the common denominator constituted by the provisions of the codification conventions, which called for identical treatment for the various kinds of courier. That identity of treatment, which was supported by State practice, led to the conclusion that a coherent and uniform régime governing the status of the courier and the bag represented an established norm of contemporary international law. There was, however, a difference in the treatment accorded to the consular bag, on which point article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations departed from the three other codification conventions. Although, as a general rule, the consular bag could neither be opened nor be detained, it could, under the terms of that paragraph, be opened in certain cases and in accordance with certain procedures. At the same time, that exception did not prevent many States, in their bilateral consular conventions, from applying the general rule set forth in article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. If, therefore, the intention was that the régime envisaged for the bag should be coherent and uniform, a decision would have to be taken to base it either on the system of the 1961 Convention or on that of the 1963 Convention. The other alternative would be to accept both systems, but that would lead to two distinct régimes, which would therefore be contrary to the basic objective of uniformity.

15. The concept of a comprehensive approach corresponded to the concept of functional necessity. The latter concept, which related to the need to find a balance between the confidentiality of the contents of the bag on the one hand, and the security and other interests of the receiving and transit States on the other, was a basic condition for determining the legal status of the courier and the bag. It should be seen not simply as a means of restricting the facilities, privileges and immunities granted but also as a prerequisite for the effective performance of the official functions of the courier and the bag, involving as it did a complex of rights and obligations.

16. With regard to the final form of the draft, it would be seen that Governments were on the whole in favour of the adoption of a convention, i.e. independent legal instrument, but one that had close links with the four codifications conventions. He too favoured that solution. The Commission would have to give its opinion on the matter and to put forward a proposal to the General Assembly.

17. As to the observations and proposals by Governments on the draft, he pointed out that the articles were divided into four parts. The first concerned general provisions. With regard to article 1, two Governments were of the view that the official communications covered by the article should be confined to communications between the central government of the sending State and its missions abroad, and that communications between missions, consular posts and delegations of that State should be excluded. In his view, however, communi-

cations of that type met a specific need, and the legal justification for protecting them was to be found in the four codification conventions, in particular in article 27, paragraph 1, of the 1961 Vienna Convention. In earlier reports he had had occasion to cite examples of State practice in that respect. His investigations had also revealed that in many cases the diplomatic courier left the sending State on a combined journey, one of the features of which was to provide a means of communication between that State’s missions, consular posts and delegations. He therefore proposed that the text of article 1 should be retained as it stood.

18. With regard to article 2, it would be recalled that the Commission had stated in its commentary that the fact of having decided, in principle, not to bear in mind the couriers and bags of international organizations or other entities did not preclude the possibility of an examination of their legal régime at a later stage, when a final decision would be taken.<sup>11</sup> The moment had perhaps come for a decision in the matter. A number of general observations by Governments deserved special attention in that connection. Some were in favour of confining the scope of the draft articles to diplomatic and consular couriers and bags or even, in the case of two Governments, to diplomatic couriers and bags alone. Others, on the contrary, favoured extending the scope of the draft articles to the couriers and bags of international organizations, taking into account the practice of the United Nations, the specialized agencies and other intergovernmental organizations. In the light of those considerations, and since it was understood that the point had to be reconsidered, he suggested in his report (*ibid.*, para. 60) adding a paragraph 2 to article 1, reading:

“2. The present articles apply also to the couriers and bags employed for the official communications of an international organization with States or with other international organizations.”

19. As for extending the scope of the draft articles to cover couriers and bags of national liberation movements recognized by the competent regional organizations and by the United Nations, he doubted whether the number of such movements was sufficiently great or their official communications sufficiently important to warrant legal regulation in an instrument of a general character. He was therefore of the opinion that the scope of the draft articles should be extended only to include international organizations.

20. No observations or proposals from Governments had been received on the substance of article 3. However, if the Commission accepted his proposal to add a provision on couriers and bags of international organizations to article 1, then paragraphs 1 and 2 of article 3 would have to be changed in the way indicated in the report (*ibid.*, paras. 70-71).

21. Articles 4, 5 and 6, which set forth general principles, had not given rise to general comments except for one Government’s doubts as to the usefulness of articles 4 and 5, and a few drafting suggestions had been made in connection with articles 5 and 6 only. He therefore

<sup>11</sup> *Yearbook* . . . 1983, vol. II (Part Two), p. 54.

proposed that the existing text of article 4 should be retained. With regard to article 5, it had been suggested that the second sentence of paragraph 2, reading, "He [the diplomatic courier] also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be", should be deleted. The suggestion could be accepted, it being understood that the courier's duty to respect the laws and regulations of the receiving State or the transit State also entailed the obligation not to interfere in any way in their internal affairs. One Government had proposed adding the word "sovereignty" to the words "laws and regulations" in the title and in paragraph 2; his own view was that the Government's concern was adequately met by the text as it stood. To simplify paragraph 2, he proposed the deletion of the words "as the case may be". Paragraph 2 was important: modest and temporary in nature as his functions might be, the courier was none the less an agent of another State and, as such, had to respect the laws and regulations of the receiving State and of the transit State.

22. One Government had proposed deleting from paragraph 2 (b) of article 6 the phrase "provided that such a modification [of the extent of facilities, privileges and immunities] is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States", a provision that was modelled on article 49 of the 1969 Convention on Special Missions. He would prefer the text to be simplified along the lines of article 47 of the 1961 Convention and article 72 of the 1963 Convention, and he read out the proposed revised text (*ibid.*, para. 92).

23. With reference to part II of the draft (Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplomatic bag), he said that article 7 had elicited only one general remark, to the effect that it was unnecessary. After reading out the arguments set out in his report (*ibid.*, para. 95) in favour of retaining the article, he added that the conditions of the diplomatic courier's appointment also had some importance from the point of view of the duration of the functions entrusted to the courier and the bag, as well as from that of the facilities, privileges and immunities granted to the courier.

24. On article 8, one Government had expressed the view that the official documents should indicate essential personal data on the courier as well as particulars of the packages constituting the bag. He thought that the official documents might not only indicate the courier's status but also contain some particulars about him and details concerning the packages, such as the serial number and destination. The discussion in the Commission and in the Sixth Committee appeared to preclude any limitation of the size and weight of the bag, except by mutual agreement between Governments, as was the case in a number of multilateral conventions. Article 8 might be revised as indicated in the report (*ibid.*, para. 102).

25. One Government had commented that article 9 should be deleted because the subject it dealt with raised few practical problems. Another had suggested the deletion of paragraphs 2 and 3 of article 9 on the grounds

that they were "unrealistic". The arguments that appeared to justify maintaining those provisions were set out in the report (*ibid.*, paras. 105-106). Some observations had also been made concerning the possible consequences on the performance of the diplomatic courier's mission of withdrawal of consent by a receiving State where the diplomatic courier was a national of the receiving State, a national of the sending State who was a permanent resident of the receiving State, or a national of a third State. He had taken that point into account in the revised text of paragraph 2 of article 9 which he proposed in the report (*ibid.*, para. 111).

26. Since article 10 had elicited no specific comments, he proposed that the text adopted on first reading should be retained.

27. With reference to article 11, it would be recalled that the initial text, submitted in 1982 (*ibid.*, para. 115), had indicated that the functions of a diplomatic courier came to an end, *inter alia*, upon completion of his task and also in the event of his death. Those provisions, deemed unnecessary by the Commission and by the Drafting Committee, had later been deleted. Since, however, some Governments had reverted to the issue, he proposed that article 11 should be expanded in the manner indicated in his report (*ibid.*, para. 120).

28. No substantive or drafting changes had been proposed for articles 12, 13, 14, 15 or 16. The comments and criticisms made in connection with those provisions were set out in the report (*ibid.*, paras. 121-138). One Government, in particular, had expressed the view that article 16 was unnecessary, since the problem it dealt with had already been resolved by the Vienna Conventions of 1961 and 1963. However, the Commission's commentary contained convincing arguments in favour of maintaining the article, which, he thought, held an important place in a coherent set of rules on the status of the diplomatic courier. Accordingly, he proposed that the present wording of the five articles in question should be maintained, but with a slight drafting change, namely, deletion of the words "as the case may be" in articles 13, 14, 15 and 16, because they were unnecessarily cumbersome.

29. Article 17 was one of the most controversial of the whole draft, as demonstrated by the summary of observations by Governments (*ibid.*, paras. 140-148). Two main trends had emerged: one in favour of deleting the article as unnecessary, unrealistic and excessive, the other recognizing its practical significance and favouring the strengthening of the principle of the inviolability of temporary accommodation, which paragraph 3 appeared to call into question by allowing inspection of the accommodation in certain cases. The amendments which had been proposed to strengthen that principle were indicated in the report (*ibid.*, paras. 143-144). It would now be for the Commission to make its choice. Deletion of article 17 would create a lacuna in the legal régime governing the courier and bag, and the problems which would arise in connection with the protection of temporary accommodation would then be resolved only on a case-by-case basis. On the other hand, strengthening the principle of inviolability would involve the risk of upsetting the fair balance which had to be maintained between the interests of the sending State and those of

the receiving State. Accordingly, he was in favour of keeping the present text, a compromise formula that was perhaps the most generally acceptable.

30. Article 18 had also given rise to extensive discussion and to many observations and proposals, which were set forth in detail in the report (*ibid.*, paras. 152-157). It had been argued by some, on the strength of the transitory character of the courier's functions and also of the greater importance attached to the bag than to the courier, that only very limited immunities should be granted to the courier, and perhaps none at all. Several Governments, however, supported the functional approach adopted in the present text, which granted the courier partial immunity from the criminal, civil and administrative jurisdiction of the receiving and transit States—namely immunity for acts performed in the exercise of his functions. Those Governments agreed that the present text provided a possible middle ground; others considered paragraph 1 of article 18 as superfluous, because the courier enjoyed personal inviolability by virtue of article 27, paragraph 5, of the 1961 Vienna Convention as well as of article 16 of the present draft; yet others considered that the courier should, on the contrary, be granted full immunity from the criminal jurisdiction of the receiving and transit States (*ibid.*, paras. 152-154).

31. In addition, a number of drafting changes had been proposed to make the text of the article more broadly acceptable. One Government had suggested that paragraph 2 should be amended to take into account the rule in certain national legislations whereby, in a traffic accident, it was the driver and not the owner of the vehicle who was held liable. He proposed the adoption of that amendment, which would consist in adding the following sentence at the end of the paragraph:

“Pursuant to the laws and other legal regulations of the receiving or transit State, the courier when driving a motor vehicle shall be required to have insurance coverage against third-party risks.”

He also proposed the adoption of the amendments indicated in his report, namely the deletion, in paragraphs 1 and 2, of the word “all” before “acts” and of the words “as the case may be” (*ibid.*, paras. 159-161). On the other hand, there seemed to be no need to add the word “official” before “acts”, since the provision specified that the acts were performed in the exercise of the courier's functions. Subject to those changes, the present compromise formula embodied in article 18 should be retained, bearing in mind that the courier was an official of his Government, that he was performing an official mission and that, in that capacity, he should enjoy facilities, privileges and immunities identical with those granted to the administrative and technical personnel of diplomatic missions.

32. He proposed further the merger of articles 19 and 20, in order to take account of the observations by Governments. Some Governments had proposed the deletion of the two articles, on the grounds that the courier's personal inviolability under article 16 made the exemption from personal examination unnecessary, and that article 20 was redundant because of the short duration and transitory nature of the courier's stay (*ibid.*,

para. 163). In view of the Commission's explanations in its commentary, it could be agreed that the protection afforded under article 16 rendered the exemption from personal examination unnecessary. On the other hand, the short duration of the courier's stay was not a valid argument for doing away with exemptions intended to facilitate customs formalities and hence help the courier perform his official functions. For the reasons stated in his report (*ibid.*, para. 165), he suggested that the Commission should adopt as a new single article 19 the text proposed in the report (*ibid.*, para. 168).

33. One Government had proposed the deletion of article 21 on the grounds that the content was already implicit, for example, in articles 12 and 16 of the draft, or expressly stated in the provisions of the 1961 and 1963 Vienna Conventions. His own view was that, while the wording of article 21 could be improved, it was not possible, on so important a question as the duration of the functions of the diplomatic courier, to be content with rules that might be deduced by implication from the provisions on the declaration of a courier *persona non grata* (art. 12) or on the protection and inviolability of the diplomatic courier (art. 16). As for the 1961 and 1963 Conventions, they contained no express provision on the duration of the privileges and immunities granted to the courier. True, article 21 drew on the provisions of the codification conventions, but it was especially focused on the peculiar legal features of the status of the courier and on the transitory nature of his functions. For that very reason, it was important to establish the precise moment or event which determined the entry into operation or the cessation of the privileges and immunities of the courier, as well as the duration of the privileges and immunities accorded to a courier *ad hoc*; otherwise there would be no difference between the treatment granted to the courier and that granted to a courier *ad hoc*. He had taken into account the observations by Governments on that point (*ibid.*, paras. 175-180) in the revised version of paragraph 1 which he proposed (*ibid.*, para. 184). Since paragraphs 2 and 3 had elicited no comments, he proposed that they should be kept in their present form.

34. Article 22 had attracted the reservations of one Government, which was opposed to granting any jurisdictional immunity to the diplomatic courier, although it admitted that, if provision was made for immunities, a provision on waiver of immunities was also necessary. An observation of a general nature had also been made on paragraph 5 of the article, but without any suggested text. He therefore proposed that the present wording of article 22 should be retained.

35. With regard to article 23, two Governments had proposed that the captain of a ship or aircraft to whom the diplomatic bag had been entrusted should be granted the same status as a courier *ad hoc*. He did not believe that that was warranted either by practical necessities or by the law in force. The captain of a ship or aircraft had well-defined professional responsibilities and did not have direct custody of the bag during the journey; his only duty was to deliver it on arrival to an authorized representative of the sending State. Moreover, the four codification conventions explicitly stipulated that the captain was not considered to be a

diplomatic courier. As for the possibility of entrusting the bag to a member of the crew other than the captain of the ship or aircraft, since the question had been extensively discussed both in the Commission and in the Drafting Committee, and since the Commission had indicated in its commentary to paragraph 1 of article 23 that there was nothing to preclude that practice, he proposed that it should be given explicit form. The amendments he was suggesting for that purpose appeared in his report (*ibid.*, para. 200).

36. With regard to part III of the draft (Status of the diplomatic bag), one Government considered that article 24 should include more specific rules, but no clear-cut proposal had accompanied that extremely general observation. In his own view, the revised text of article 8, together with article 25, could provide the legal basis for identification of the bag, and article 24 should therefore be retained in its present form.

37. Article 25 had elicited a number of general observations as well as several drafting proposals which deserved careful consideration, but did not appear to justify a revision of the existing text (*ibid.*, paras. 204-211).

38. With respect to article 26, a number of general observations had been made concerning the need for rapid transmission of the bag and for avoiding lengthy delays and cumbersome procedures. In that connection, it would be recalled that the UPU Congress held at Rio de Janeiro in 1979 had rejected a proposal to introduce a new category of postal items under the name of "diplomatic bags" in the international postal service by amending the Union's international regulations.<sup>12</sup> At present, favourable treatment for diplomatic bags could be secured only through bilateral, regional or multilateral agreements between national postal services; a number of bilateral agreements along those lines had already been concluded. On the basis of the observations and proposals submitted by Governments, he was offering for the Commission's consideration a revised text of article 26 (*ibid.*, para. 215).

39. On article 27, he would refer members of the Commission to his report (*ibid.*, paras. 216-220), and point out that the revised text he proposed placed the sending State under the obligation to make adequate arrangements for ensuring the rapid transmission or delivery of its diplomatic bags.

40. Article 28 was one of the most controversial; it had been discussed extensively and divergent points of view had been expressed on it throughout the Commission's work on the topic. It was indeed, as had been pointed out, a key provision which raised a wide range of political, legal and methodological problems, to which he referred in his report (*ibid.*, para. 222). The diversity and the differences of opinion of Governments on that article (*ibid.*, paras. 225-242) had led him to submit three alternatives, A, B and C, for the article, accompanied by comments on them (*ibid.*, paras. 244-253).

41. The comments by Governments revealed that most States were opposed to examination of the bag through electronic devices. Moreover, the International Conference on Drug Abuse and Illicit Trafficking, to which the Chairman had referred (para. 7 above) and which was also referred to in the report (A/CN.4/417, paras. 235, 239 and 240), had concluded that measures to combat illicit drug trafficking through misuse of the diplomatic bag should be taken in strict conformity with the provisions of the four codification conventions. But that would be tantamount to having two different régimes: one for consular bags, and another for the other three types of bag. The Nordic countries had suggested in their observations the use of specially trained dogs to detect the presence of illicit drugs in bags. In his opinion, that method would have the advantage of not violating the confidential nature of the bag's contents. Moreover, in view of the severity of the drug-trafficking problem, it was likely that no State would oppose such a measure.

42. The remaining articles had been the subject of proposals relating primarily to drafting, except in the case of article 33, which most Governments suggested should be deleted on the grounds that it might create a plurality of régimes. Two Governments had also considered that it might be desirable to incorporate provisions on the settlement of disputes: he would welcome the opinions and advice of the Commission on that matter.

43. Lastly, he said that the Commission could adopt a number of approaches in considering his report: it could do so article by article, or section by section, or it could focus the discussion on the most controversial matters. If it adopted the third approach, he would suggest that it concentrate on the following issues: (a) the scope of the draft articles, and specifically the possibility of extending it to the couriers and bags of special missions and of international organizations; (b) the inviolability of the courier and the scope and content of the facilities, privileges and immunities granted to him (particularly arts. 17 and 18); (c) the contents and inviolability of the bag (art. 28); (d) the relationship between the draft articles and other conventions (art. 32), the optional declaration (art. 33), and the settlement of disputes.

*The meeting rose at 1 p.m.*

## 2070th MEETING

*Wednesday, 29 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

<sup>12</sup> See in this connection the Special Rapporteur's fourth report, *Yearbook . . . 1983*, vol. II (Part One), p. 121, document A/CN.4/374 and Add.1-4, paras. 316-317.

1. The CHAIRMAN announced that, in the week of 20 to 24 June 1988, the Commission had used 100 per cent of the conference servicing time allotted to it.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/409 and Add.1-5,<sup>1</sup> A/CN.4/417,<sup>2</sup> A/CN.4/L.420, sect. F.3)

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPporteur  
(continued)

CONSIDERATION OF THE DRAFT ARTICLES<sup>3</sup>  
ON SECOND READING (continued)

2. The CHAIRMAN reminded the Commission that, in his introductory statement, the Special Rapporteur had suggested that members should first comment on individual articles, then on the various parts of the draft, and lastly on substantive issues.

3. Mr. REUTER expressed his admiration of the scrupulous preparation of the eighth report (A/CN.4/417).

4. Referring to the protection of the diplomatic bag, he noted that the Commission had received a request for assistance in the fight against drugs from the International Conference on Drug Abuse and Illicit Trafficking.<sup>4</sup> It went without saying that he sympathized with the Conference's objectives, but it was not clear what specific steps the Commission could take; so far, it had always declined to limit the fundamental rights of States, even for so worthy a cause as combating drug abuse. Many proposals to accord special rights for combating drug trafficking on the high seas had been submitted at the Third United Nations Conference on the Law of the Sea, but none had been adopted. The nature of the action the Commission could take would ultimately depend on the overall régime it selected for the diplomatic bag.

5. He wished to raise two points which showed how the Special Rapporteur's thinking on the draft articles had evolved. With respect to article 1, he did not oppose the granting to international organizations of certain immunities normally accorded only to States, but feared that a number of technical difficulties might arise. No two international organizations were alike, and opening the instrument to all of them through a general rule like the one proposed by the Special Rapporteur in his report (*ibid.*, para. 60), might be like overloading a boat so much that it sank.

6. He drew attention to article 1, paragraph 1 (2), of the 1975 Vienna Convention on the Representation of States, which provided that:

(2) "international organization of a universal character" means the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a world-wide scale;

<sup>1</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> For the texts, see 2069th meeting, para. 6.

<sup>4</sup> See 2069th meeting, footnote 8.

The Commission might consider following that precedent and stipulating that the instrument in preparation covered only international organizations of a universal character, many of which already benefited from certain privileges and immunities under conventions or headquarters agreements. It might also draw on article 90 of the 1975 Convention, which established a special mechanism whereby universal organizations not parties to the Convention could "adopt a decision to implement" its "relevant provisions". There was also a precedent for enabling international organizations to become parties to an international instrument, but that approach had political implications, and the reaction of States had never been entirely enthusiastic. He was therefore inclined to believe that if accession to the instrument was made possible only for organizations of a universal character, the chances of winning State support would be increased.

7. Mr. Calero Rodrigues had rightly pointed out that article 4 might need to be revised to conform with the greater need of international organizations to communicate with their own departments and offices in other countries than with other international organizations and States parties to the instrument.

8. The second innovation in the thinking of the Special Rapporteur appeared in article 33. The text provisionally adopted at the thirty-eighth session enabled States that had slight reservations regarding the future Convention to make an optional declaration limiting its application to certain categories of diplomatic courier and diplomatic bag. A great deal of care and thought had gone into the drafting of article 33, but the Special Rapporteur was now proposing that it be deleted, on the grounds that many Governments had not supported it or had objected to it outright (*ibid.*, para. 277). Yet the patterns forming over the past few years showed that Governments were stressing the need for greater flexibility in their multilateral treaties, and that their ratification of major conventions was accompanied by a growing number of reservations. The Commission had traditionally considered that reservations were a matter for the State alone to decide, but jurists must nevertheless take account of the growing need for flexibility in the terms of treaties.

9. He would therefore regret the deletion of article 33, although he would not oppose it. If the Commission accepted the Special Rapporteur's recommendation, it should include in its commentary a full explanation for the deletion of an article which had provided the flexibility so obviously desired by States.

10. Mr. McCAFFREY congratulated the Special Rapporteur on a scholarly report (A/CN.4/417) that diligently reflected the views expressed by members of the Commission.

11. It was to be hoped that the Commission could so conduct its debate as to be able to refer a substantial body of articles to the Drafting Committee at the current session. Of course, the Drafting Committee would not be able to take them up at present, but it would be in a position to begin work on them at the start of the Commission's next session. That was particularly desirable because the Commission's goal was to com-

plete consideration of the draft articles on second reading within its present members' term of office.

12. In its work on the draft articles, the Commission should focus on the four principal issues identified by the Special Rapporteur in his introductory statement (2069th meeting, para. 43). Most of the articles were not controversial and required only a little drafting work. If the Commission were to discuss each of them individually, the tendency of lawyers to find fault with even the best of formulations would militate against completion of the second reading.

13. At the risk of speaking at an inappropriate stage in the Commission's work, he wished to express his profound doubts about the wisdom of drafting an instrument on a topic which was ill-conceived and fundamentally flawed. The basis for the Commission's work had been the four codification conventions.<sup>5</sup> However, the Special Rapporteur observed in his report (A/CN.4/417, para. 54) that a great many States had not become parties to the 1969 Convention and the 1975 Vienna Convention. In view of that poor ratification record, taking all four conventions as the basis for the Commission's work was like sitting on a chair with only two legs.

14. Even if all four conventions had been generally accepted, however, problems would arise, because their provisions on critical points, and their functions, varied widely. When States had consciously and deliberately developed such different rules to cover different situations, it was hard to see how the objective of consolidating, harmonizing and unifying existing rules, referred to by the Special Rapporteur (*ibid.*, para. 11) could be attained.

15. It would also be extremely difficult to achieve a second objective envisaged by the Special Rapporteur, namely "to develop specific and more precise rules for situations not fully covered" by the codification conventions (*ibid.*). The fact that the most controversial provisions of the draft articles were precisely those that attempted to achieve greater precision showed that it was almost impossible to embrace a wide variety of circumstances and political relations in a set of specific and precise rules. Previous attempts to elaborate detailed rules had been abandoned. The 1961 United Nations Conference on Diplomatic Intercourse and Immunities had declined to address many details of the régime for the diplomatic bag, because attempts to settle various specific issues had created more problems than they had resolved. And the controversial nature of several key articles of the draft showed that the situation had not changed in the 27 years since the Vienna Convention on Diplomatic Relations had been concluded.

16. For all that, he was willing to admit that the main purpose, namely to facilitate the tasks of customs officials, on whom the four different régimes imposed very heavy burdens, was to some degree useful. It would be useful to harmonize most aspects of the law governing the diplomatic courier and the diplomatic bag, but not those that were most sensitive, namely, the areas dealt with in article 28, on protection of the bag.

17. On the first of the main issues identified by the Special Rapporteur and addressed in article 2, that of couriers and bags not within the scope of the present articles, in particular couriers and bags employed for the official communications of international organizations, he took the view that the text adopted on first reading should be maintained. As the Special Rapporteur pointed out in his report (*ibid.*, para. 54), the 1975 Vienna Convention on the Representation of States had not yet come into force; and in any event that Convention did not deal with international organizations of a regional, operational or quasi-commercial character. Régimes for those international organizations that needed them most had already been provided, as the Special Rapporteur stated (*ibid.*, para. 57), in the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies. That being so, he wondered whether the Commission would be well advised to delete article 2 and replace it by a new paragraph 2 to article 1, as suggested by the Special Rapporteur (*ibid.*, para. 60). Like Mr. Reuter, he feared that a blanket reference to international organizations would open a veritable Pandora's box and jeopardize any chances of acceptance the draft might possess.

18. In conclusion, he reiterated the hope that the debate would enable the Commission to refer a substantial body of articles to the Drafting Committee at the current session, so that the Committee could start work on them at the beginning of the next session.

19. Mr. OGISO said that, although he intended to discuss the four key issues identified by the Special Rapporteur (2069th meeting, para. 43), he wished also to comment on some other important points on which comments had been received from Governments.

20. On article 2, he differed from the previous speakers in having some sympathy with the Special Rapporteur's proposal for a new paragraph 2 to be added to article 1 (A/CN.4/417, para. 60). If it was the wish of the United Nations that the future instrument should permit United Nations Headquarters to use the diplomatic courier and bag for its communications with States, other international organizations of a universal character and branch offices of the United Nations, he saw no objection to such a proposal. Nevertheless, the points raised by Mr. Reuter and Mr. McCaffrey deserved careful consideration, and he hoped that the Special Rapporteur would provide a detailed explanation of his position on the matter when replying to the debate.

21. In regard to article 5, paragraph 2, he noted the Special Rapporteur's suggestion (*ibid.*, para. 82) that the second sentence could be deleted. While having no strong opinion on the matter, he wondered whether the deletion, on second reading, of the reference to the courier's "duty not to interfere in the internal affairs of the receiving State or the transit State" might not give the mistaken impression that the Commission did not consider that obligation very important. To convey such an impression would be highly undesirable, and he was therefore inclined to favour retaining paragraph 2 of article 5 as it stood.

<sup>5</sup> *Ibid.*, footnote 10.

22. Referring to article 7, he drew attention to the contradiction between the Special Rapporteur's view that the article codified a rule established in State practice (*ibid.*, para. 95) and the comment by a Government to the effect that the matters enunciated in the article had not previously been regulated by international agreement and did not require such regulation (*ibid.*, para. 94). It would be helpful if the Special Rapporteur could indicate how many international conventions or national legislations contained the rule set out in article 7.

23. In regard to paragraphs 1 and 2 of article 9, he remarked that among the junior members of diplomatic missions there might be some with dual nationality, who were nationals of both the sending and the receiving State. In the interests of convenience in the application of article 9, it would be useful to provide clarification, in the commentary if not in the article itself, concerning the status of a courier possessing dual nationality.

24. He had noted the general comment by the Austrian Government on article 13, referred to in the report (*ibid.*, para. 124), and wondered whether the Special Rapporteur had considered that Government's suggestion that the article might be redrafted so as "to lay down the general duty of the receiving or transit State to assist the diplomatic courier in the performance of his functions" (A/CN.4/409 and Add.1-5). His own view was that the mandatory wording of paragraph 1 of article 13 was unnecessarily strong; the provision could, for example, be interpreted to mean that, if the airport at which the courier arrived was situated at an inconvenient distance from the capital, the receiving State or transit State was under an obligation to provide him with means of transport. A text along the lines suggested by Austria might attenuate that obligation without substantially affecting the Special Rapporteur's original purpose.

25. Widely divergent views on article 17 were reported by the Special Rapporteur (A/CN.4/417, paras. 140 *et seq.*). His own opinion was that, since the Vienna Conventions of 1961 and 1963 both limited the concept of inviolability to the person of the courier and to official correspondence and documents contained in the diplomatic bag, and since neither Convention referred to temporary accommodation, the criticisms of the article deserved careful study. Indeed, he wondered whether the Commission might not reconsider whether the first sentence of paragraph 1 need be retained. If it were decided to delete that sentence, the title of the article would also have to be amended, possibly to read "Protection of temporary accommodation". As to the amendment proposed by the USSR to paragraph 3 of the article (A/CN.4/409 and Add.1-5), the stipulation appearing at the end of the proposed text, "so that its representative can be present during such inspection or search", might in practice have the effect of vetoing the inspection or search. While he agreed that temporary accommodation should not be treated as legally inviolable, and was therefore prepared to accept the Soviet proposal, he would suggest that the passage in question might be dropped, and that the proposed text should end with the words "to communicate with the mission of the sending State".

26. In introducing article 18, the Special Rapporteur had expressed willingness to accept the proposal of the German Democratic Republic for an additional sentence at the end of paragraph 2 (see 2069th meeting, para. 31). He would appreciate it if the Special Rapporteur, in his replies at the end of the debate or, better still, in the commentary to the article, would confirm that paragraph 2 should be understood to mean, first, that the courier enjoyed immunity from the civil and administrative jurisdiction of the receiving State or, as the case might be, of the transit State in respect of acts performed in the exercise of his functions; secondly, that such immunity did not apply to a civil action brought by a third party for damage arising from an accident caused by a vehicle driven by the courier; thirdly, that, to the extent that such damage was not recoverable from insurance, the courier could not invoke immunity and was subject to civil liability, in other words, that the receiving or transit State was not prevented from bringing a civil action for tort before the insurance company had paid the indemnification.

27. Lastly, he noted that the Special Rapporteur had raised five points concerning article 28 as being the "main critical issues" (A/CN.4/417, para. 222). With regard to the second point, "The admissibility of scanning of the bag", he could not agree with the provision in paragraph 1 of article 28 that the diplomatic bag "shall be inviolable wherever it may be". Neither in the 1961 Vienna Convention nor in the 1963 Vienna Convention was there any provision for inviolability of the bag. In fact, six or seven Governments had stated in their replies that scanning of the bag should be permitted in cases where the receiving State or the transit State had serious reason to believe that it contained objects not for official use. Considering the number of Governments that had made that point, he was surprised that the Special Rapporteur had not provided for the possibility of scanning the bag in any of the three alternative texts he had submitted (*ibid.*, paras. 244-253). The Commission should not exclude that possibility without a very thorough discussion.

28. He suggested that, in the three alternatives suggested for article 28, paragraph 1, the text be reworded to read: "The diplomatic bag shall not be opened or detained", removing all reference to inviolability. That text was taken from article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. There was every advantage in adhering to the language of that Convention.

29. For article 28, paragraph 2, the proposal made by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5) could be a fourth alternative serving as a good basis for discussion.

**The law of the non-navigational uses of international watercourses (continued)** (A/CN.4/406 and Add.1 and 2,<sup>6</sup> A/CN.4/412 and Add.1 and 2,<sup>7</sup> A/CN.4/L.420, sect. C, A/CN.4/L.421)

[Agenda item 6]

<sup>6</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>7</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE

30. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles adopted by the Committee (A/CN.4/L.421).

31. Mr. TOMUSCHAT (Chairman of the Drafting Committee) expressed his appreciation to the members of the Drafting Committee and to other members of the Commission who had taken an active part in its deliberations. He was very grateful to the Special Rapporteur for his untiring efforts and constructive spirit and to the secretariat for its valuable assistance.

32. At its previous session, the Commission had provisionally adopted four of the five articles of part I (Introduction) and the first two articles of part II (General principles), namely articles 6 and 7.<sup>8</sup> It had left aside article 1 (Use of terms).

33. The Drafting Committee had begun by considering article 9, referred to it by the Commission in 1984, which was now article 8. The Committee had then taken up six articles which had been referred to it at the previous session, starting with former article 10, which was now article 9. Lastly, it had dealt with article 15 [16], which the Commission had referred to it at the current session (see 2052nd meeting, para. 51). He would refer to the articles by their new numbers, followed where necessary by the former number in square brackets.

ARTICLE 8 [9] (Obligation not to cause appreciable harm)

34. The Drafting Committee proposed the following text for article 8 [9]:<sup>9</sup>

*Article 8 [9]. Obligation not to cause appreciable harm*

**Watercourse States shall not utilize an international watercourse [system] in such a way as to cause appreciable harm to other watercourse States.**

35. The Drafting Committee had considered at some length whether the article should be worded to take account of the possibility of conflict between the "no-harm" principle it enunciated and the principle of equitable and reasonable utilization stated in article 6. It had come to the conclusion that the two principles were not incompatible, since utilization of a watercourse could not be equitable if it caused appreciable harm—the emphasis being on the word "appreciable"—and since, should the achievement of equitable and reasonable utilization depend on one or more States tolerating a measure of harm, the accommodations required would be arrived at by way of specific agreements.

36. The Drafting Committee had considered that the no-harm principle would be more forceful if couched in terms of an obligation to ensure that no appreciable harm was caused, rather than in terms of a duty to refrain from causing harm. Hence the formulation proposed.

37. The Committee had substantially simplified the text referred to it by the Commission. It had deleted the words "within its jurisdiction" as being superfluous; it had eliminated the reference to "activities", because article 2, as provisionally adopted, did not mention "activities"; and it had replaced the concept of "uses" by that of "utilization", which was more comprehensive and appeared in article 6.

38. The Drafting Committee wished to make it clear that the expression "appreciable harm" referred to factual harm, in other words the physical, tangible and identifiable effects of the utilization of a watercourse, and not to legal injury, as meaning the infringement of rights that would entail international responsibility. Accordingly, the Committee had deleted the words "the rights or interests of". With reference to the term "appreciable", the Committee drew attention to paragraphs (15) and (16) of the commentary to article 4 as provisionally adopted, where it was said that the word "appreciable" was not used in the sense of "substantial" but was intended to convey the idea that the harm could be established by objective evidence.<sup>10</sup>

39. The concluding phrase of the former text, "unless otherwise provided for in a watercourse agreement or other agreement or arrangement" had been dropped as being unnecessary in view of the Commission's decision to prepare a framework agreement containing residual rules to be supplemented by other agreements.

40. The Drafting Committee had inserted the word "system" in square brackets after the words "international watercourse" wherever they appeared, in accordance with the Commission's decision—referred to in paragraph (2) of the commentary to article 2—to use that formula pending adoption of the definition of the term "international watercourse".<sup>11</sup>

41. It should be noted that, in accordance with the Commission's statement in paragraph (3) of the commentary to article 2, the reference in article 8 [9] to an international watercourse [system] should be read as including the waters.

42. It would be recalled that, in the discussion on article 11, at the previous session, it had been asked whether the term "State" included private activities within a State, and that the Special Rapporteur had answered in the affirmative.<sup>12</sup> It was a basic purpose of the draft under discussion to ensure that a State should not be able to disclaim responsibility for private activities authorized or permitted by it.

43. Lastly, for reasons of consistency, the opening words of the original draft article ("A watercourse State") had been replaced by "Watercourse States".

44. Mr. RAZAFINDRALAMBO, supported by Mr. MAHIU, suggested that the wording of article 8 [9] should be brought into closer conformity with the title of the article. Instead of stating that watercourse States "shall not utilize an international watercourse [system] in such a way as to cause appreciable harm to other

<sup>8</sup> See 2050th meeting, footnote 3.

<sup>9</sup> For the original text, see *Yearbook* . . . 1987, vol. II (Part Two), p. 23, footnote 80.

<sup>10</sup> *Ibid.*, p. 29.

<sup>11</sup> *Ibid.*, p. 26.

<sup>12</sup> *Ibid.*, p. 24, para. 107.

watercourse States”, the text should state that watercourse States “shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States”.

45. Mr. YANKOV noted that the word “system”, in square brackets, was used whenever the words “international watercourse” appeared in the draft articles. But in the article under consideration, the words “watercourse State” were used without the word “system” in square brackets. He wished to know whether any change was intended.

46. There had been much discussion about the expression “appreciable harm”, but it should be remembered that the term “appreciable” had been used in State practice, in particular in certain regional agreements.

47. Mr. PAWLAK proposed that the commentary should explain that the word “appreciable” meant factual harm based on objective evidence. Understood in that sense, he could accept the term “appreciable harm”, on which the whole structure of the draft was based.

48. Mr. BENNOUNA noted that the Special Rapporteur had said that there was no contradiction between article 8 [9] and article 6, on equitable utilization, since the obligation of equitable utilization presupposed that harm would not be caused or, conversely, that utilization which caused appreciable harm would not be equitable. He entirely agreed with the relationship thus established between the two articles; indeed, it seemed to him so important that it should not only be reflected in the commentary but should also be covered in the text of the draft. The Commission might therefore wish, when reverting to article 6, to include an appropriate reference in that article to article 8, and possibly also to article 16, which dealt with the prevention of pollution and also embodied the notion of appreciable harm.

49. He endorsed Mr. Razafindralambo’s proposal: it would be far more elegant and logical to draft the first phrase of article 8 [9], dealing with utilization, in positive terms and the second, dealing with the obligation not to cause appreciable harm, in negative terms.

50. Mr. GRAEFRATH said he appreciated that it was the Special Rapporteur’s intention that the rule in article 8 [9] should generate responsibility, not liability, and that there was therefore a link between that article and article 6. Unfortunately, that link was not apparent from the text and the resultant difference between responsibility and liability was not clear.

51. He would have preferred a word other than “appreciable”, such as “significant”. In his view, the rule laid down in the article would have been clearer had it read:

“Watercourse States shall ensure that the use of an international watercourse within their territory is in conformity with their obligations under article 6 and shall take the necessary measures to prevent significant harm from being caused to other watercourse States.”

52. Mr. ROUCOUNAS said that he had always had reservations about the term “appreciable harm” and was not sure that the explanations given by the Chair-

man of the Drafting Committee would remove the difficulties. Mr. Graefrath’s comments showed the need for further clarification concerning the threshold of responsibility for harm.

53. Like Mr. Yankov, he would welcome an explanation from the Chairman of the Drafting Committee regarding the omission of the word “system”.

54. Mr. ARANGIO-RUIZ said that, as he had already stated (2065th meeting) in connection with article 16, he disliked the word “appreciable”, not because he would prefer a stronger term, but because he thought the word “harm” should stand alone, especially when a plurality of States were concerned with an international watercourse. The fact that one State did not cause appreciable or significant harm would not preclude harm which, if cumulative, could become appreciable, or indeed disastrous. He would therefore be grateful if the Special Rapporteur could include an explanation of the term “appreciable” in his comments to article 8 [9], with particular reference to the problem of cumulative harm, whether appreciable or not, due to the fact that a plurality of States used the watercourse.

55. Mr. Sreenivasa RAO agreed that article 8 [9] should be reworded as proposed by Mr. Razafindralambo. He welcomed the clarification provided by the Chairman of the Drafting Committee regarding the use of the term “appreciable harm” and would favour explaining in the commentary that that term denoted a factual objective standard as opposed to legal injury.

56. While he had no preference for any particular qualifying word, whether “appreciable”, “substantial” or “significant”, all of which had been defined in much the same way by legal writers, he thought it would be better to retain the existing term so as not to add to the confusion in conceptual thinking.

57. With regard to the linkage between articles 8 [9] and 6, as he saw it the draft articles were interrelated and it would be better to leave certain principles as they stood, so that they could be applied and interpreted flexibly in each case. He was therefore opposed, as a matter of drafting technique and also of policy, to overburdening the articles with specific linkages.

58. With regard to the point raised by Mr. Arangio-Ruiz, the article did not preclude the possibility of treating cases of cumulative harm as appreciable harm. He would therefore prefer to leave the article as drafted, since it was in line with the thinking of the Commission and of the Sixth Committee of the General Assembly.

59. Mr. EIRIKSSON observed that, for ease of reference, some of the articles drafted at the Commission’s previous session, in particular article 6, should be included in the Commission’s report to the General Assembly. To avoid confusion, Mr. Yankov’s point, which was reflected in the commentary to article 3,<sup>13</sup> should also be included in that report.

60. The CHAIRMAN, speaking as a member of the Commission, said that he too had noted with some concern the omission throughout the draft of the word “[system]”. The Commission had adopted a working

<sup>13</sup> *Ibid.*, p. 26.

hypothesis as the basis for its consideration of the topic and should abide by that hypothesis. He therefore agreed entirely with Mr. Yankov's remarks.

61. He also agreed that it would be far more elegant if the first part of article 8 [9] were drafted in positive, and the second in negative terms.

62. A more substantive point concerned the word "appreciable". In Spanish, it would be more logical to replace the words *daños apreciables* by *perjuicio*, dropping the word *apreciables*. Despite his reservations about that expression, however, he would not oppose the adoption of the article, the substance of which he agreed with. The commentary to the article should, however, include a reference to the fact that some members had reservations regarding the adjective used to qualify the word "harm".

63. Mr. TOMUSCHAT (Chairman of the Drafting Committee), replying to the points raised, said that there would be no difficulty in accommodating the suggestion that the first part of article 8 [9] should be drafted in positive, and the second in negative terms.

64. The term "watercourse States" had been used rather than "watercourse system States", simply because the terms adopted in 1987, specifically in articles 3 *et seq.*, had been followed.

65. A more difficult question concerned the standard of appreciable harm. A number of suggestions had been made which, in a way, cancelled each other out. Consequently, although he too had reservations about the word "appreciable", the best solution would perhaps be to retain that word, especially as it seemed to command the widest support.

66. The linkage between articles 6 and 8 [9] was clear from the structure of the draft, since it was apparent from the sequence of the articles that article 8 [9] modified article 6, and that the two articles should be read in conjunction. He sympathized in particular with the remarks of Mr. Sreenivasa Rao and would therefore suggest that article 8 [9] be retained as drafted, without indicating a linkage with article 6.

67. Mr. MAHIU said he agreed with the Chairman of the Drafting Committee that the omission of the word "[system]" was a logical consequence of what had been agreed in 1987, when the first articles had been adopted. The fact that the word did not appear in articles 3 *et seq.* did not, however, prejudice the matter; that was the understanding on which the articles in question had been adopted in 1987. He trusted that his explanation would obviate the need for further discussion on that point.

68. The CHAIRMAN suggested that, in the commentary to article 8 [9], a reference should be made to the reservations expressed concerning the word "appreciable".

69. Mr. BARSEGOV said that, if the commentary was to record reservations concerning the word "appreciable", it should also mention the word "substantial", to which a number of members had referred.

70. The CHAIRMAN suggested that the first part of article 8 [9] should be reworded in positive terms and the

second part in negative terms, and that members' comments and reservations should be reflected in the commentary.

*It was so agreed.*

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 8 [9].

*Article 8 [9] was adopted.*

ARTICLE 9 [10] (General obligation to co-operate)

72. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 9 [10], which read:

*Article 9 [10]. General obligation to co-operate*

**Watercourse States shall co-operate on the basis of sovereign equality, territorial integrity and mutual benefit in order to obtain optimum utilization and adequate protection of an international watercourse [system].**

73. Article 9 corresponded to article 10 as proposed by the Special Rapporteur at the previous session.<sup>14</sup> In considering the provision, the Drafting Committee had borne in mind that, although opinions had diverged concerning the existence of a general obligation of States to co-operate, there had been no objection, either in the Commission or in the Sixth Committee, to the inclusion in the draft of an article on that duty, which was a logical premise of the procedural obligations enunciated in subsequent articles.

74. It had been agreed in the Drafting Committee that article 9 [10] should specify both the foundations and the objective of the duty to co-operate. For the foundations, the Committee had decided to add the words "on the basis of sovereign equality, territorial integrity and mutual benefit" after the words "shall co-operate", in accordance with the proposal referred to at the end of paragraph 98 of the Commission's report on its previous session.<sup>15</sup> It had also considered the possibility of describing the objective of co-operation in some detail, but had decided that a general formulation would be more appropriate in view of the diversity of international watercourses. The wording proposed by the Drafting Committee, "in order to obtain optimum utilization and adequate protection of an international watercourse [system]", was derived from the second sentence of paragraph 1 of article 6 as provisionally adopted in 1987. The Committee had deleted, as being superfluous, the latter part of the original text, from the words "in their relations concerning international watercourses".

75. Lastly, as suggested by a number of members at the previous session, including the Special Rapporteur, the Drafting Committee recommended that article 9 [10] should be placed in part II, on general principles.

*The meeting rose at 1 p.m.*

<sup>14</sup> For the text, *ibid.*, p. 21, footnote 76.

<sup>15</sup> *Ibid.*, p. 22.

## 2071st MEETING

Thursday, 30 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (continued)** (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, A/CN.4/L.421)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE (continued)

ARTICLE 9 [10]<sup>3</sup> (General obligation to co-operate)  
(concluded)

1. Mr. EIRIKSSON said that, in the interests of consistency, the word "obtain", in the second clause of article 9 [10], should be replaced by "attain", which was the word used in article 6 in the same context.
2. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that it was undoubtedly a mistake, which would be corrected.
3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 9 [10].

*Article 9 [10] was adopted.*

4. Mr. BARSEGOV said that he had already pointed out at the previous session that, in his view, the expression "international watercourse" was mistaken and that the expression "multinational watercourse" should be used. The expression "international watercourse" implied the existence of an international régime. The instrument that was being formulated could only be a framework agreement, having the force of a recommendation for the conclusion of watercourse agreements. That remark applied to the draft articles as a whole. If at the previous meeting he had not objected to the deletion, in article 8 [9], of the words "unless otherwise provided for in a watercourse agreement or other agreement or arrangement" in the original text proposed by the Special Rapporteur, that was precisely because the Chairman of the Drafting Committee had explained (2070th meeting, para. 39) that the Committee considered that phrase unnecessary in view of the Commission's decision to prepare a framework agreement.

<sup>1</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>3</sup> For the text, see 2070th meeting, para. 72.

When the Commission reverted to that question, he would have to reserve his position in the absence of agreement by the other members.

5. The CHAIRMAN said that Mr. Barsegov's position would be reflected in the summary record of the meeting.

ARTICLE 10 [15] [16] (Regular exchange of data and information)

6. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 10 [15] [16], which read:

*Article 10 [15] [16]. Regular exchange of data and information*

1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting watercourse State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

7. Article 10 corresponded to article 15 [16] proposed by the Special Rapporteur at the current session (see 2050th meeting, para. 1). As indicated by the word "regular" in the title and in paragraph 1, the article provided for an ongoing and systematic exchange of information as distinct from the *ad hoc* tendering of data envisaged in part III, concerning planned measures. It was therefore a specific application of the general obligation to co-operate laid down in article 9, and it was for that reason that the Drafting Committee recommended that it be placed immediately after that article, as the last provision in part II.

8. The Commission would note that the text consisted of three paragraphs, whereas in the article originally proposed there had been five. The Drafting Committee had noted that the Special Rapporteur intended to deal in a separate part with the matter of water-related hazards or calamities and had therefore reserved paragraph 4 of the original text for later action. The Committee had made paragraph 5 into a separate article, numbered 20 (see 2073rd meeting, para. 62).

9. The Committee had started from the premise that the rule enunciated in paragraph 1 constituted a specific application of the general obligation to co-operate laid down in article 9, so that casting it in terms of an obligation to co-operate would be repetitious. It had therefore given preference to the alternative approach suggested by the Special Rapporteur in paragraph (2) of his comments (A/CN.4/412 and Add.1 and 2, para. 27). The words "Pursuant to article 9" were intended to make it clear that the obligation in paragraph 1 gave concrete expression to the obligation set forth in article 9.

10. Attention had been drawn in the context of article 10 to the possibility that direct exchanges of infor-

mation might be precluded by such circumstances as a state of war or the absence of diplomatic relations. The Drafting Committee had given serious consideration to that question, had noted that it also arose in connection with various articles of part III, and had therefore agreed to deal with it in a separate provision, namely article 21 (Indirect procedures).

11. The Drafting Committee had also eliminated from paragraph 1 the opening phrase: "In order to ensure the equitable and reasonable utilization of an international watercourse [system] and to attain optimal utilization thereof", which it deemed superfluous, since article 6 already set out the basic rules of equitable and reasonable utilization and the fundamental goal of optimum utilization.

12. The words "reasonably available" were intended to indicate that the information which watercourse States were under an obligation to exchange was information obtainable without undue expense or effort.

13. The Drafting Committee had replaced the words "concerning the physical characteristics", which lent themselves to unduly broad interpretations, by "on the condition", which was considered more precise. It had substituted "in particular" for "including" in order to make it clear that, while the list in the text was not, and could not possibly be, exhaustive in view of the diversity of international watercourses, the types of data expressly mentioned in the text were the most important. The word "ecological" had been added to take account of the environmental concerns expressed within the Commission, particularly in regard to the living resources of watercourses. The Committee had furthermore included a reference to "related forecasts", which, like the rest of the data and information covered by the articles, were to be communicated only to the extent that they were "reasonably available".

14. Again, the Committee had eliminated the last part of the original paragraph 1 proposed by the Special Rapporteur, taking the view that the phrase "and concerning present and planned uses thereof" was superfluous. It would be noted in that connection that the question of supplying information on "planned uses" was dealt with in part III and that, as with regard to present uses, the exchange of information on uses which affected the condition of the watercourse was provided for in the first part of the paragraph. That point would be elaborated on in the commentary. The phrase "unless no watercourse State is presently using or planning to use the international watercourse [system]", had been eliminated not only because it dealt with a highly hypothetical situation but also because regular exchange of information could be useful even in the case of an unused international watercourse.

15. It had been suggested during the discussion on article 10 [15] [16] that the Drafting Committee should envisage the possibility that information on a watercourse might be in the hands of a third State, and should therefore provide for an obligation of that State to pass on such information to the watercourse States. The Committee had considered that, although the draft articles were primarily intended to regulate relations between watercourse States, that question should be kept in mind and reserved for a later stage.

16. Paragraph 2 was almost identical with that proposed by the Special Rapporteur. Minor changes included the replacement of the words "use its best efforts" by "employ its best efforts", borrowed from paragraph 3, the deletion of the words "in a spirit of co-operation", which the Committee had considered unnecessary because the concept of co-operation was implicit in the phrase "employ its best efforts", and the deletion of the words "or other entity", which had been advocated by several members of the Commission. In that connection, it would be recalled that existing administrative arrangements, such as joint commissions, would be dealt with in a subsequent part of the draft.

17. Paragraph 3 was also a close reproduction of the text proposed by the Special Rapporteur, except for the replacement of the words "where necessary" by "where appropriate", which gave the text more flexibility, and the word "disseminated" by "communicated", which brought out better the direct transmission of information from one State to another. In addition, the word "co-operative" had been deleted: the Drafting Committee had regarded it as unduly restrictive because the data and information could be used individually by the States concerned.

18. Mr. ARANGIO-RUIZ suggested that the word "condition", in paragraph 1, should be put in the plural and that the word "that" should be replaced by the more elegant "those".

19. Mr. SEPÚLVEDA GUTIÉRREZ suggested that, in paragraphs 2 and 3 of the Spanish text, the words *reunión* and *reunir* should be replaced by *recopilación* and *recopilar*.

20. Mr. YANKOV said it was surprising that the words "reasonable costs", in paragraph 2, should have been rendered in French by *coût normal*. Again, some treaties made provision for the communication of samples for the evaluation of certain situations. Did the expression "data and information" cover samples, which would appear to be particularly useful in evaluating the composition or pollution of the water?

21. Mr. EIRIKSSON said he was not satisfied with the use of the word "reasonably" to qualify the word "available" in paragraphs 1 and 2. In treaty practice, that term was generally used to avoid imposing an obligation on States to communicate data and information that was not at hand. In the present instance, the impression was that, in paragraph 2, States were being requested to do something that was not "reasonable". Perhaps the word *normalement*, used in the French text, was better suited to the purpose of the article, namely to impose an obligation on watercourse States to collect and communicate data and information which was either at hand or could be obtained easily or—as in the situation envisaged in paragraph 2—which they could use their best efforts to obtain at their cost.

22. In addition, the beginning of paragraph 2 should be reworded as follows: "If a watercourse State is requested by another watercourse State", and deleting the word "watercourse" from the words "the requesting watercourse State". Bearing in mind the comments of the Chairman of the Drafting Committee, the Commission could also delete the words "where appropriate" in

paragraph 3. Lastly, the words “to which it is communicated”, at the end of paragraph 3, were superfluous: a State which collected and processed data and information did not necessarily know to whom it would communicate it.

23. Mr. RAZAFINDRALAMBO said the formula used in French to render the expression “requesting watercourse State”, namely *Etat du cours d'eau dont la demande émane* was clumsy. It should be replaced by *Etat auteur de la demande*, and the amendment proposed by Mr. Eiriksson should also be adopted. In addition, he failed to see why the word *élaboration* had replaced the word *exploitation*, which was a more accurate term, which appeared in the text proposed by the Special Rapporteur and which was also used in article XXIX of the Helsinki Rules. Obviously, the same remark also applied to the word *élaborer* in paragraph 3.

24. Mr. KOROMA after associating himself with the comments made by Mr. Eiriksson, suggested that the word “available”, in paragraph 1, should be replaced by “obtainable”. Besides, the paragraph appeared to him to be clumsily worded.

25. Mr. BARSEGOV pointed out that the word *normalement*, which qualified the adjective *disponibles* in paragraphs 1 and 2 of the French text, corresponded exactly to the word used in the Russian text. Accordingly, the word “reasonably”, in the English text, should be replaced by “normally”.

26. Mr. BENNOUNA said that the word *normalement* should be deleted because it was not clear: either the information was available, or it was not. Paragraph 2 was cumbersome and inelegant. It could perhaps be improved by adopting the suggestions made by Mr. Eiriksson and Mr. Razafindralambo. Lastly, the order of the paragraphs should be altered: paragraph 3, which stated the general obligation to collect information, should precede paragraph 2.

27. The CHAIRMAN, speaking as a member of the Commission, said that in the interests of clarity he supported the suggestion to delete the word “reasonably” (*normalement*) in paragraphs 1 and 2. In a legal text, it was always delicate to make use of a word which implied a subjective assessment. In any case, the word “reasonable” should be replaced by “normal”, and, in the Spanish text, the word *razonables* by *normales*.

28. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said he had no objection to the proposal by Mr. Sepúlveda Gutiérrez to replace *reunión* by *recoopilación* in the Spanish version.

29. The Drafting Committee had already examined the question raised by Mr. Arangio-Ruiz regarding the word “that”: according to the English-speaking members of the Committee, it was the grammatically correct term to use. Similarly, the use of the word “condition” in the singular appeared to be correct. It also had the advantage of corresponding to the word *état*, in the French text, which was also in the singular.

30. Mr. Yankov had mentioned the possibility of watercourse States exchanging samples, not only data and information. It had to be remembered, however,

that the Commission was preparing a framework agreement and that it would be for the signatory States of watercourse agreements to agree on the precise nature of their communications.

31. Mr. Yankov, Mr. Barsegov and Mr. Bennouna had questioned the use in languages other than French of the word “reasonably”, or rather its equivalent, when the word used in the French text was *normalement*. The word “reasonably” had been used in order to give the text a measure of flexibility. It was necessary to avoid two pitfalls. In the first place, States should not be required to exchange all the data available to them: for example, a State possessing advanced technology would, for the part of the watercourse on its territory, have extremely full analyses that would be of doubtful use for neighbouring States. But it was also necessary to avoid a situation in which a State would collect no data at all on the watercourse: in accordance with the text, it was “reasonably” supposed to furnish data. The Drafting Committee had considered that the English term “reasonably” and its Spanish equivalent were useful and well-balanced, despite their subjective appearance, but perhaps it would be better to consult the Special Rapporteur on that point. In the French text, the term *normalement* appeared to be required by usage. *Raisonnement* had different connotations and was little used in French law. Moreover, it was not necessarily a drawback for the various language versions to differ slightly because, when read together, they shed light on each other and brought out the nuances.

32. Mr. Razafindralambo's suggestion to replace *l'Etat du cours d'eau dont la demande émane*, in the French text of paragraph 2, by *l'Etat du cours d'eau auteur de la demande* constituted an improvement.

33. The choice between *élaborer les données* and *exploiter les données* had been discussed in the Drafting Committee and the French-speaking members had deemed the term *élaborer* to be the appropriate one.

34. With regard to Mr. Koroma's suggestion to replace the words “reasonably available” by “reasonably obtainable”, it had to be borne in mind that some data were already available to the State.

35. Mr. Eiriksson had proposed an extensive recasting of paragraph 3. The present wording was quite cumbersome, but precision should not be sacrificed in the interests of elegance. The Commission was in the process of adopting the draft articles and it could not review the concept of the articles at the present stage.

36. Mr. McCaffrey (Special Rapporteur) pointed out that the expression “reasonably available” was to be found in numerous international instruments, in particular in the 1966 Helsinki Rules on the Uses of the Waters of International Rivers. As used in article 10, it was intended to introduce some measure of flexibility. Moreover, it designated both information that a watercourse State already possessed and information that was easily accessible, whereas the expression “reasonably obtainable” would cover only the second category. Lastly, the notion expressed by “reasonably” was much used by English-speaking lawyers and the term *normalement*, used in French law, would have no meaning in

English in the context. He therefore urged that the word "reasonably" should be kept.

37. In addition, article 10 did not seek to impose any burden on the States that concluded a watercourse agreement; the aim was simply to express with precision the terms of their co-operation by emphasizing the need to exchange data and information. It was precisely the desire to avoid laying down an unduly strict obligation which explained the use of the words "where appropriate" in paragraphs 2 and 3.

38. Mr. BARSEGOV endorsed the Special Rapporteur's remarks confirming that paragraph 1 dealt with data and information which the State concerned already had in its possession or could collect without special effort. In his view, the word "available" was too vague.

39. Mr. ROUCOUNAS said that he too shared the Special Rapporteur's views on the use of the adverb "reasonably". The term had the merit of implying a principle of diligence: States were presumed to be in possession of some information, and it was that information they were to communicate to other States.

40. With regard to the French version of the words "requesting watercourse State", in paragraph 2, it could be improved along the lines suggested by Mr. Razafindralambo, but the words *l'Etat du cours d'eau qui fait la demande* would be just as clear and even simpler.

41. Mr. KOROMA proposed the deletion of the words "reasonably available" in paragraph 1, which might then be slightly altered to read: "watercourse States shall on a regular basis and when necessary exchange data and information on the condition of the watercourse [system]".

42. Mr. REUTER said that what the proponents of the word "reasonably" doubtless had in mind was to avoid imposing an obligation to provide a specific amount of information. If the text read simply "provide available data and information", it was conceivable that the requested State might reply to the requesting State that the requested data was, as statisticians were fond of saying, "not available". The point of the adverb "reasonably" was precisely that it enabled the requesting State, in such a case, to say that the requested information should exist and that the requested State had not entirely fulfilled its obligation. In that way, the dialogue could continue, which after all was the object of article 10.

43. The adverb *normalement* employed in the French text was not wholly objective; its meaning could vary, for example, depending on whether the State concerned was a highly developed or a developing one.

44. Mr. Sreenivasa RAO said that, by and large, he agreed with the explanations given by the Chairman of the Drafting Committee and the Special Rapporteur concerning the expression "reasonably available". Many other variations or synonyms were possible, but the basic point was that the obligation to exchange data and information stemmed from the obligation to cooperate. Since States did not necessarily have the same watercourse management requirements, in all likelihood

they did not all have the same information at their disposal. However, the concept of co-operation involved that of reciprocity; all States bound by an agreement were supposed to collect data concerning the watercourse in question, data that could be said to be "available". The word had the advantage of applying simultaneously to existing data already collected and to data which could easily be collected. Nevertheless, any other wording would be acceptable, provided that it properly reflected the purpose of article 10.

45. Mr. YANKOV referred to paragraph 8 of article 5 of the 1958 Geneva Convention on the Continental Shelf,<sup>4</sup> where it was stated that "the coastal State shall not *normally*\* withhold its consent". In his view, the adverb "normally" was more objective than "reasonably". The English text should be in line with the French, since the use of different words might give rise to different interpretations.

46. Mr. EIRIKSSON said that article 10 tried to say too many things in too few words. Explanations would have to be provided in the commentary; in particular, the Special Rapporteur would have to specify what meaning was to be attached to "reasonable". The requested State might still think that the request was not "reasonable" in view of its situation.

47. Agreeing with the view expressed by the Chairman of the Drafting Committee, he said that he would abandon the pursuit of elegance in the formulation of paragraph 3.

48. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the statements made by the Chairman of the Drafting Committee and the Special Rapporteur, except on one point. The Commission was in the process of drafting a text which was to serve as a basis for conventions and agreements that would be interpreted, not by linguists, but by lawyers. Clearly, therefore, the various language versions should be as close as possible to one another, it being unlikely that lawyers would seek clarification of a text in another text drafted in a different language. A compromise solution, consisting in replacing "reasonably" by "normally" in all languages except English, might be adopted in order to reconcile the various versions.

49. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that Mr. Bennouna's proposal to reverse the order of paragraphs 2 and 3 seemed reasonable, as the situation dealt with in paragraph 2 formed an exception. Mr. Eiriksson's drafting proposals concerning paragraph 2 would likewise facilitate an understanding of the text. So far as the French text was concerned, the French-speaking members of the Commission would have to choose between the alternatives *l'Etat du cours d'eau auteur de la demande* and *l'Etat du cours d'eau qui fait la demande*. Replying to Mr. Koroma, he said that he did not propose to change the wording of paragraph 1. Mr. Reuter had correctly defined the meaning which should be attached to the expression "reasonably available": it covered both data and information already available and data and information which could easily be obtained. The outcome of the discussion seemed to be that a qualifying adverb

<sup>4</sup> United Nations, *Treaty Series*, vol. 499, p. 311.

should be retained; it would be for the Special Rapporteur to comment on the use of the term “normally” in the English text.

50. Mr. CALERO RODRIGUES considered that paragraph 3, which applied both to the data and information referred to in paragraph 1 and to that envisaged in paragraph 2, should be maintained in its present position.

51. Mr. TOMUSCHAT (Chairman of the Drafting Committee) agreed with that view.

52. Mr. McCAFFREY (Special Rapporteur) recalled that he had already had occasion to explain the various connotations attached in legal English to the terms “reasonably” and “normally”. Would the word “normally” imply that, where data and information was in fact at a watercourse State’s disposal but not “normally” available to it, the State was not obliged to communicate it? He did not think that that was the idea the Commission wished to convey. In any case, the term “reasonably” was broader and covered all possible situations: information that was difficult to obtain, for example, or difficult to provide because of its great bulk. The term could thus be said to possess considerable legal elasticity, which explained its presence in many instruments. As to Mr. Yankov’s allusion to article 5, paragraph 8, of the Convention on the Continental Shelf, the word “reasonably” could not have been employed in that case because the context was quite different.

53. Mr. SOLARI TUDELA said that the word *razonablemente* (“reasonably”) added nothing to the Spanish text of article 10 because in Spanish the expression “available information” was rendered as information of which States *puedan disponer*. Thus the adverb merely introduced an element of subjectivity, especially as not all States were on an equal footing in terms of the possibility of obtaining data and information. He was therefore in favour of deleting it.

54. The CHAIRMAN, speaking as a member of the Commission, said that he would have preferred the adverb to be deleted from all the provisions, or at least to have the word *razonablemente* in the Spanish text replaced by *normalmente*, because he too thought the former word was too subjective.

55. Mr. BARSEGOV said he deplored the drawn-out debate taking place on article 10. He suggested that the present text should be maintained and that the meaning attached in English to the words “reasonably available” should be explained in the commentary.

56. Mr. REUTER said he shared Mr. Barsegov’s view. The word “reasonably” corresponded to a basic concept in common law, and it would be a pity not to take advantage of the resources offered by that law. The commentary should explain the meaning of the expressions “reasonably available” and *normalement disponibles*, namely that they referred to data and information already in existence or easily obtainable.

57. Mr. SEPÚLVEDA GUTIÉRREZ said that the French word *normalement* and the Spanish word *normalmente* did not have the same meaning. They had been discussed at length in the Drafting Committee, and

the members had agreed to use the terms now appearing in the document under consideration. Furthermore, the word *razonablemente* was employed in a number of Latin-American—or at any rate Mexican—documents pertaining to criminal law, civil law and international law. The solution proposed by Mr. Barsegov and supported by Mr. Reuter was therefore logical and timely.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 10 [15] [16] as amended in the various languages during the discussion, on the understanding that all necessary explanations of the meaning of the terms “reasonably available” and *normalement disponibles* would be supplied in the commentary.

*It was so agreed.*

*Article 10 [15] [16] was adopted.*

ARTICLE 11 (Information concerning planned measures)

59. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 11, which read:

*Article 11. Information concerning planned measures*

**Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].**

60. The Drafting Committee was proposing that article 11 should serve as an introduction to part III of the draft, because it considered that the procedural rules set out in the subsequent articles should be preceded by the enunciation of the general obligation of watercourse States to provide each other with information on measures which any of them might plan. The expression “planned measures” had a twofold advantage over the expression “planned uses” appearing in the previous text—that of being all-embracing and that of making it clear that the element triggering the obligation to inform was the launching of the planning process. The phrase “possible effects” encompassed all possible effects of the planned measures, whether adverse or beneficial, thus avoiding the problems inherent in the unilateral character of assessments that would be made by States. Lastly, the words “the condition of the watercourse [system]”, which also appeared in paragraph 1 of article 10, applied to characteristics such as water quantity and quality.

61. Mr. KOROMA drew attention to a difficulty arising from the remarks by the Chairman of the Drafting Committee. If “possible effects” meant both adverse and beneficial effects, did not article 11 impose on the watercourse State which knew that the measures it was planning would have adverse effects upon other States the duty to admit that it was about to breach an international obligation? He wished to be assured that the explanations given by the Chairman of the Drafting Committee would not constitute the Commission’s commentary to article 11.

62. The CHAIRMAN said that the Commission’s commentary would be drafted after the adoption of the draft articles and in agreement with the Special Rapporteur.

63. Mr. TOMUSCHAT (Chairman of the Drafting Committee) reiterated that it had been the Drafting Committee's intention to place an article enunciating a general obligation to exchange information at the beginning of part III of the draft, before the articles specifically dealing with possible adverse effects of planned measures.

64. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 11.

*Article 11 was adopted.*

ARTICLE 12 [11] (Notification concerning planned measures with possible adverse effects)

65. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 12 [11], which read:

*Article 12 [11]. Notification concerning planned measures with possible adverse effects*

**Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.**

66. Article 12 as proposed by the Drafting Committee was based on article 11 as submitted by the Special Rapporteur at the previous session.<sup>7</sup> All the changes made in that text by the Drafting Committee were designed to make it more precise. The words "If a State contemplates", in the first sentence, had been replaced by "Before a watercourse State implements", which described more accurately the chronological sequence of events. The word "contemplates", which at the previous session had been deemed too vague, had been replaced by "implements or permits the implementation of", so that the article covered not only State activities but also private activities.

67. In the interests of consistency, the Committee had replaced the concept of "new uses" by the broader one of "planned measures". The expression "which may cause appreciable harm" had been replaced by "which may have an appreciable adverse effect", in accordance with the suggestion made by the Special Rapporteur at the previous session in response to the argument that States could not be expected to admit to the intent to commit an internationally wrongful act. The word "notice" had been replaced by "notification", which also appeared in the title.

68. The adjective "available", qualifying "technical data and information", was intended to make it clear that the planning State was bound to communicate only such information as was in its possession or easily accessible to it, as distinct from the totality of relevant information.

69. The changes in the second sentence were largely consequential on the reformulation of the first sentence. The word "notice" had again been replaced by "notification" and in consequence the word "other"

had been replaced by "notified". The Committee had also replaced the word "determine", which implied something binding, by the word "evaluate". It had also harmonized the end of the sentence with the first sentence by replacing the word "harm" by "possible effects" and "proposed new use" by "planned measures". It had decided to delete the adjective "sufficient", which in some cases might be difficult to reconcile with the concept of availability enunciated earlier in the text. Lastly, the Committee had altered the title of the article to bring it into line with the content.

70. Mr. EIRIKSSON said that the word "timely" was too vague and might give rise to confusion if set against the six-month period laid down in articles 13 and 17.

71. Furthermore, the explanations given by the Chairman of the Drafting Committee as to the meaning of the word "available" were highly reminiscent of those he had given concerning the expression "reasonably available" in article 10 (see para. 49 above). The Commission's commentary on that point would have to be drafted with a great deal of care so as to remove all ambiguity.

72. Mr. KOROMA said that, in his view, the use of the words "appreciable adverse effect" did not eliminate the need for a watercourse State to admit in advance that it was planning something that would cause harm to another State. Moreover, since the obligation to notify existed only for a State which foresaw that the planned measures would have an adverse effect, difficulties as to the burden of proof were bound to arise because the State taking the measures could always allege that it did not expect them to have such an effect: in that case, who would have to bear the burden of proof?

73. The CHAIRMAN, speaking as a member of the Commission, said he endorsed Mr. Eiriksson's remark regarding the word "timely" and suggested that, in the Spanish text, the word *oportunamente* should be replaced by *a su debido tiempo*. With regard to the word "appreciable", he would reiterate his comments during the discussion on draft article 8 (2070th meeting, para. 62). He associated himself also with Mr. Eiriksson's observations on the word "available" and urged that the Commission's commentary, or at least the observations it would be submitting to the General Assembly, should clearly emphasize the interpretation to be given to that term.

74. Mr. McCAFFREY (Special Rapporteur) said he agreed with Mr. Koroma that the use of the expression "appreciable adverse effect" did not completely resolve the difficulty. That expression, however, had attracted a broad measure of support at the previous session and the Drafting Committee had not found a better one. The main thing was to avoid using in article 12 the same terms as in article 8 and thus avoid the problem mentioned by Mr. Koroma. Moreover, an "appreciable adverse effect" would presumably be less serious than "appreciable harm" and, by planning the measures in question, the State did not intend to go beyond its proper share in the equitable utilization of the watercourse. In any case, the adverse effect involved would be potential rather than definite.

<sup>7</sup> See *Yearbook* . . . 1987, vol. II (Part Two), p. 22, footnote 77.

75. With regard to the onus of proof, if a watercourse State thought that another State was planning measures likely to have an appreciable adverse effect, it could initiate the procedure specified in article 18. The Commission would have an opportunity to revert to that question when it came to examine article 18.

76. Mr. TOMUSCHAT (Chairman of the Drafting Committee), responding to the Chairman's remark, said he was not sure that *oportunamente* was the exact Spanish translation of the English word "timely". Nevertheless, it was important to keep the word "timely" in the English version. The notification had to be made as early as possible in order to avoid the project reaching too advanced a stage to be suspended.

77. With reference to Mr. Eiriksson's comment, the "available" information and technical data was in fact that which existed already. A careful distinction had to be made between the "available" information mentioned in article 12 and the "reasonably available" information referred to in article 10.

78. Mr. Sreenivasa RAO suggested that the word "available" might simply be replaced by "existing".

79. Mr. McCAFFREY (Special Rapporteur) pointed out that the data and information mentioned in article 10 covered a wide range of subjects and that it was therefore necessary to use a more restrictive qualification than in article 12, in which the data and information mentioned was of a more limited nature. For that reason, the Drafting Committee had deemed it sufficient to say "available". A precedent could be found in article 2 (b) of the 1986 Convention on Early Notification of a Nuclear Accident,<sup>6</sup> in which it was stated that, in the event of an accident, the State in question had to provide the other States and IAEA with "such available information relevant to". The reason for the wording was that, in that case too, the information was narrowly circumscribed. All those explanations would appear in the Commission's commentary.

80. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 12 [11].

*Article 12 [11] was adopted.*

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

[Agenda item 10]

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

81. The CHAIRMAN stressed the Commission's long-standing ties with the European Committee on Legal Co-operation and pointed out that the members of the Commission had often had occasion to take into account the solutions adopted by the Committee in the conventions and other legal texts resulting from its work. It was significant that the General Assembly, in paragraph 12 of its resolution 42/156 of 7 December 1987, had reaffirmed its wish that the Commission should continue to enhance its co-operation with in-

tergovernmental legal bodies whose work was of interest for the progressive development of international law and its codification.

82. Mr. HONDIUS (Observer for the European Committee on Legal Co-operation) said he welcomed the visit to the Council of Europe in May by Mr. Roucounas as representative of the Commission and wished first to summarize the current situation with regard to treaties. It was through treaties that regional organizations like the Council of Europe expressed their determination to translate into facts the common European values and ideals, and it was through ratification of those treaties that the member States of the Council of Europe demonstrated their determination to take seriously their obligations under the Statute of the Council of Europe. In accordance with the Statute, membership in a regional organization did not in any way prevent membership in other organizations: that was true in particular for the United Nations, to which most of the members of the Council of Europe belonged and for the European Communities, to which 12 of the Council's 21 members belonged. Accordingly, the International Law Commission, which played a decisive role in the construction of the modern law of treaties, would be interested to see how member States of the Council of Europe applied the law of treaties.

83. The practices of the Council of Europe, like those of the Commission, were anchored in reality, i.e. in the facts and in the interpretation of the facts—a situation which explained the emphasis placed on the spadework in the preparation of treaties. The Council of Europe also attached great importance to the present state of the law, in particular the constitutional law of its member States. That law governed the manner in which those States expressed their consent to be bound by treaty obligations. The procedures involved were in some cases lengthy and complicated, but they were part of the life of European nations and must be respected.

84. Reality also meant "political reality". No amount of agreement between experts could move Governments to ratify a treaty if there was no political will to do so. Acknowledgement of that fact had taught the Council of Europe two lessons. The first was to take advantage of opportunities when they occurred. The conclusion in 1985, three months after the tragedy in the Heysel stadium, of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular Football Matches<sup>7</sup> provided a good illustration. The Convention had entered into force at the beginning of the following football season and had been ratified by 13 States, including the United Kingdom. Secondly, the Council of Europe was aware of the fact that it could not skip stages in the treaty-making process. With a view to obtaining optimum participation in treaties, it did not try to impose too many obligations too soon, but endeavoured instead to include in a treaty the seed that would later make it blossom forth, as had been done with the most important of European treaties, namely the European Convention on Human Rights.<sup>8</sup>

<sup>7</sup> Council of Europe, European Treaty Series, No. 120.

<sup>8</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

\* Resumed from the 2047th meeting.

<sup>6</sup> See IAEA, Legal Series No. 14 (Vienna, 1987).

85. As from 1 January 1988, the European conventions and agreements which were computer stored were published in loose-leaf form, so that they could be kept constantly up to date with regard to signatures, ratifications, entry into force, reservations and declarations. In the course of the past year, four new treaties<sup>9</sup> had been opened for signature: the European Convention for the Protection of Pet Animals; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which provided for the establishment of an international committee empowered to visit all places holding persons deprived of their liberty by a public authority; the Convention on Mutual Administrative Assistance in Tax Matters, prepared by the Council jointly with OECD; and the Additional Protocol to the European Social Charter. Furthermore, Cyprus, following the example of the other States members of the Council of Europe, had on 21 June last announced its intention to grant the individual right of petition provided for in the European Convention on Human Rights, a right that was fundamental to the truly international protection of human rights.

86. Of the total number of 128 conventions in the European Treaty Series, 107 were in force. Nine draft conventions were at present pending before various organs of the Council of Europe, six of them in the legal field: two on civil and trade law, two on the law relating to asylum and two on criminal law.

87. With regard to the application of treaties, the European Committee on Legal Co-operation had recently drawn the attention of the Committee of Ministers to the delay being experienced in the entry into force of some of those instruments. On that point, the European Committee had arrived at the conclusion that it would be desirable to add to the Council's model final clauses for European conventions and agreements an "opting-out" clause which would help, in particular, to speed up the entry into force of technical protocols amending a convention or a treaty. The European Committee would see to it that reasonable time-limits were laid down in those clauses so as not to create difficulties for States which preferred to go through the conventional procedure of ratification.

88. The European Ministers of Justice, at their sixteenth Conference, held the previous week in Lisbon, had dealt with certain general questions relating to the European conventions. In the first place, they had given their support to the initiative to consolidate in a single instrument, and at the same time simplify and update, the provisions of a dozen different treaties in the field of criminal law dealing with extradition, recognition of judgments, transfer of prisoners and mutual co-operation. In doing so, the European Committee remained sensitive to fundamental political interests, which should not be sacrificed on the altar of efficiency. For that reason, the Council had excluded such treaties as the European Convention on the Suppression of Terrorism,<sup>10</sup> which dealt with subjects that were much too delicate.

89. In regard to private law, the European Ministers of Justice had received a report from the Austrian Minister of Justice analysing the reasons for the success or failure of certain conventions. The Ministers had accordingly proposed a series of practical steps to promote the ratification and practical application of conventions, such as improved information for those who might wish to use those treaties—for instance, judges and lawyers—and to favour requests from non-member States for accession to private law treaties. It seemed appropriate that the Council of Europe, which was endeavouring to achieve closer unity between its member States, should not neglect the benefit which other States, inside and outside Europe, could obtain from participation in certain European treaties. It was in that spirit that the Council was co-operating with countries in other parts of the world and was strengthening its ties with the States of Eastern Europe.

90. The legal work of the Council of Europe reflected the main preoccupations of its member States with the challenges to democratic society, many of which were of international concern: terrorism, drugs, AIDS, traffic in children and young women, and environmental hazards. When a new subject was approached, the first stage often consisted in a statement by the Committee of Ministers of the basic principles enunciated in recommendations or declarations, i.e. non-mandatory instruments. The States members thereupon elaborated their national legislations on the basis of those principles, and it was only after that process that the question arose whether the national laws should be harmonized and strengthened by the adoption of a European convention. A good example of that graded approach was the current work on bio-ethics. On that topic, which touched at the same time on law, ethics and science, and on which there was hardly any national legislation, the Council was as yet formulating principles. He was convinced, however, that sooner or later a convention on the subject would have to be formulated, since it was the future of the whole of mankind that was at stake.

91. The Council's legal activities also touched on issues resulting directly from the movement towards European unity. One of the priority questions in that regard was that of multiple nationality, which was to be studied by a new committee of experts that would be starting work shortly.

92. In the field of direct interest to the International Law Commission, the Council's Committee of Experts on Public International Law, which continued to be very active, served as a clearing-house for information to the member States. One of the standing items on its agenda was precisely the progress of the work of the Commission. The Committee of Experts also acted as the adviser to the Council on important matters of international law. In the past year, it had held exchanges of views on the question of the international liability which might arise from accidents such as that of Chernobyl. It had adopted an opinion on the implications in international law of the measures taken to avoid abuses of diplomatic or consular privileges and immunities in connection with terrorist activities; it had examined the problems of reciprocity in the application of the 1961 and 1963 Vienna Conventions on diplomatic relations

<sup>9</sup> Council of Europe, European Treaty Series, Nos. 125, 126, 127 and 128.

<sup>10</sup> *Ibid.*, No. 90.

and on consular relations and had undertaken a new study of the privileges and immunities to be granted to international organizations of a technical or commercial nature. That study had resulted from the fact that, among the international organizations that were constantly being developed, some had quite original and very surprising structures.

93. Lastly, he wished to place the report of the Secretary-General of the Council of Europe on the Council's legal activities from May 1986 to May 1988 at the disposal of the members of the Commission, and he invited the members and the secretariat to visit the Maison de l'Europe in Strasbourg.

94. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for his interesting statement on the activities on progressive development and codification of the law being conducted by that prestigious organization, the Council of Europe.

95. Mr. ROUCOUNAS said that he had welcomed the opportunity of representing the Commission at the forty-ninth session of the European Committee on Legal Co-operation. He had been particularly interested in the Committee's work on multiple nationality, on the international aspects of bankruptcy, on liability in the event of accidents to the environment, on medical research and the law, and on violence in the media. He had noted with interest the statement by Mr. Hondius on the "opting-out" formula to speed up the entry into force of conventions. With that formula, the Council of Europe was applying methods suited to its special needs, which were those of a regional organization with only a limited number of member States. The methods used by the International Law Commission were no less anchored in reality, but in a very different reality, because the drafts on which the Commission was working were intended for the whole of the international community.

96. It was gratifying to note the links which bound the European Committee on Legal Co-operation and the International Law Commission and he looked forward to continued co-operation between the Commission and the organs which, in different parts of the world, were engaged in the harmonizing and developing of the law.

*The meeting rose at 1 p.m.*

## 2072nd MEETING

*Friday, 1 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (continued)** (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, A/CN.4/L.421)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
(continued)

ARTICLE 13 [12] (Period for reply to notification)

1. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 13 [12], which read:

*Article 13 [12]. Period for reply to notification*

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

2. The present article was based on article 12, submitted by the Special Rapporteur at the previous session,<sup>3</sup> which had dealt with two issues: the period within which the notified State could study and evaluate the effects of planned measures and reply to the notification of the notifying State, and the obligations of the notifying State during that period. The Drafting Committee had decided, in the light of the comments made in plenary meeting, that the second of those issues involved an important obligation and should be given more prominence in a separate article, which would be introduced later as article 14.

3. The new article 13 dealt with the first issue and was closer to alternative B of paragraph 1 of the former article 12. The Drafting Committee had retained the six-month period within which notified States could examine the possible effects of planned measures and give their replies. As the rule laid down was residual and hence effective only in the absence of any agreement, States could always agree on a shorter or longer period. The purpose of the words "Unless otherwise agreed", at the beginning of the article, was to encourage States to negotiate the requisite period; the six-month period would apply only if they failed to do so. Consequently, paragraph 3 of the former article 12 was superfluous and had been deleted. To bring the text of article 13 into line with that of article 12, the word "determinations" had been replaced by "findings", which did not convey the idea of a binding determination.

4. Mr. EIRIKSSON said that, as he read article 13, the main point in regard to the period for reply to notification was that no implementation of the planned measures would be permitted until that period had expired; that being so, he would have preferred a separate article rather than a radical redrafting of the provision. He therefore proposed that articles 13 and 14 should be combined in the following manner: article 13 would become the first sentence of paragraph I of the com-

<sup>1</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>3</sup> See *Yearbook* . . . 1987, vol. II (Part Two), p. 22, footnote 77.

bined article, the second sentence of which, taken from article 14, would read:

“During this period the notifying State shall provide the notified States, on request, with any additional data and information that is available and necessary for an accurate evaluation.”

Paragraph 2 of the combined article, taken from the remainder of article 14, would read:

“2. During this period the notifying State shall not implement or permit the implementation of the planned measures without the consent of the notified States.”

5. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Drafting Committee had discussed at length the possibility of having a single article, but had decided on two provisions, as embodied in articles 13 and 14. That decision should stand, in his view, unless there was support for Mr. Eiriksson's proposal.

6. Mr. EIRIKSSON said he regarded it as essential to provide for a more definite link between article 13 and article 14. If the notified State wished to make certain comments after the period for reply, it should be allowed to do so.

7. Mr. AL-QAYSI said that a link between articles 13 and 14 was provided by the opening words of article 14: “During the period referred to in article 13”. In any event, it was a cardinal rule of interpretation that articles should be considered in relation to one another rather than in isolation.

8. The CHAIRMAN invited the Commission provisionally to adopt article 13 [12], on the understanding that Mr. Eiriksson's proposal would be recorded in the summary record.

*It was so agreed.*

*Article 13 [12] was adopted.*

ARTICLE 14 [12] (Obligations of the notifying State during the period for reply)

9. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 14 [12], which read:

*Article 14 [12]. Obligations of the notifying State during the period for reply*

During the period referred to in article 13, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement, or permit the implementation of, the planned measures without the consent of the notified States.

10. The present article reproduced the text of paragraph 2 of the former article 12, with some minor drafting changes. The core of the article was reflected in its title.

11. Mr. EIRIKSSON said that the article would be clearer if, as in the article combining articles 13 and 14 which he had proposed, it read: “the notifying State shall provide the notified States, on request, with any

additional data . . .”, the words “shall co-operate with” being deleted.

12. The commas after the words “implement” and “implementation of” were unnecessary and inconsistent with the language of the other articles.

13. The CHAIRMAN suggested that the Commission should provisionally adopt article 14 [12], on the understanding that Mr. Eiriksson's suggestion would be reflected in the summary record and that the secretariat would attend to the minor point of drafting he had raised.

*It was so agreed.*

*Article 14 [12] was adopted.*

ARTICLE 15 [13] (Reply to notification)

14. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 15 [13], which read:

*Article 15 [13]. Reply to notification*

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8, it shall provide the notifying State with a reasoned and documented explanation of such finding within the period provided for in article 13.

15. To take account of the comments made at the Commission's previous session and with a view to greater clarity, the Drafting Committee had decided to divide the article 13 submitted by the Special Rapporteur at that session<sup>4</sup> into two articles, now numbered 15 and 17. Former article 13 had regulated the three stages of the interaction between the notifying and notified States regarding planned measures. First, the notifying State made an assessment as to whether or not its planned measures would have appreciable adverse effects on the other watercourse States and communicated its findings to them. Secondly, if the notified State was not satisfied with that assessment or if there were discrepancies between the findings of the two States, they were required to negotiate with a view to reaching agreement. Thirdly, if the States concerned were unable to resolve their differences through consultation and negotiation, they would resort to the most expeditious procedure for the settlement of disputes binding on them or, in the absence of such binding procedure, to procedures provided for in the articles.

16. The Drafting Committee had decided not to deal at the present time with the third stage—the procedure for the settlement of disputes—since it was still not clear whether it would be covered in the body of the draft, in a separate optional protocol or, indeed, at all. Paragraph 4 of the former article 13, which dealt with that procedure, had therefore been deleted. The Commission might, however, wish to revert to the matter later.

17. The two other stages—reply to notification and consultation—were dealt with in articles 15 and 17 respectively. Article 15 corresponded to paragraphs 1

<sup>4</sup> *Ibid.*

and 2 of the former article 13. When a notifying State made a notification under article 12, there were two possibilities: either the notified State would be satisfied that there would be no appreciable adverse effects, or it would not. Paragraph 1 provided for both situations. Since the six-month suspension pending a reply from the notified State operated as a restriction on the sovereign right of the notifying State, the expectation of a reply "as early as possible" seemed reasonable.

18. Paragraph 2 of article 15, which corresponded to the second situation, laid down certain requirements when the notified State found that there would be adverse effects. Those requirements related to the time within which the reply had to be made, to the substance of the reply, and to the principle of good faith. Thus, if the findings of the notified State indicated possible adverse effects, that State would have to reply within the six-month period laid down in article 13. It would also have to indicate in its findings that the planned measures would be inconsistent with articles 6 or 8, which set out, respectively, the principle of equitable and reasonable utilization and the obligation not to cause appreciable harm; reference had been made to those articles to obviate the need for lengthy explanations of what constituted appreciable adverse effects and equitable utilization. Lastly, good faith required, first, that a notified State foreseeing adverse effects should determine that the effects of the planned measures "would be inconsistent with the provisions of articles 6 or 8", the verb "would" being intended to indicate a serious and considered assessment by the notified State; and secondly, that the assessment should be supported by a "reasoned and documented explanation".

19. The title of article 15 was that of the former article 13, in shortened form.

20. Mr. EIRIKSSON proposed that, for the sake of clarity, the first part of paragraph 2 of article 15 should be reworded to read: "If a notified State communicates to the notifying State that it finds that implementation of the planned measures . . .", and that in the same paragraph the words "provided for" should be replaced by the words "referred to", to bring the text into line with article 14.

21. Mr. KOROMA, referring to the expression "reasoned and documented" in paragraph 2, proposed that the conjunctive "and" should be replaced by the disjunctive "or". There was no reason why a State that lacked resources should be required to produce a documented explanation, which could involve considerable expense. States in a position to do so could produce both reasons and documentation, but those not in such a position should be allowed to produce either a reasoned or a documented explanation.

22. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he could agree to Mr. Eiriksson's second proposal. With regard to the first, however, since it was clear that paragraph 2 of article 15 was an instance of the application of paragraph 1, there could be no doubt as to its meaning. Besides, the insertion of additional wording might make the text too heavy. He was therefore in favour of retaining the text as drafted.

23. He understood Mr. Koroma's difficulty, but thought that the expression "reasoned or documented" sounded a little strange. Possibly the words "and documented" could be deleted, since the word "reasoned" would imply that documentation could be added if necessary.

24. Mr. BARSEGOV said that he was sympathetic to the interests of those countries that might have difficulties, but the situation was very complex, and any prohibition that prevented a State from building something in its own territory must be well-founded. Mere objections were not enough; proof was needed to show why a State should have its most essential sovereign rights restricted, especially in its own territory. In his view, it would be wrong to delete the words "and documented". The problem could perhaps be resolved by introducing a requirement of agreement between the States concerned. He did not, however, have any ready-made form of words to suggest.

25. Mr. KOROMA said that, inasmuch as the problem arose from the juxtaposition of the words "reasoned" and "documented", he would suggest that the former be deleted and the latter retained.

26. Mr. McCAFFREY (Special Rapporteur) explained that the idea behind the expression "reasoned and documented explanation" was that a requirement should be imposed on a State which asked another State to abstain from certain measures to show that it had good reason for making its request. The Commission had also considered, as was clear from its discussion at the previous session, that some balance should be introduced between the State that was planning measures and the potentially affected State, so as to prevent the latter from simply holding up a planned project at its whim. The requirement that it should provide a reasoned and documented explanation went at least some way towards restoring a balance between the positions of the two States. It was a delicate balance, however, and any attempt to change it might upset the equilibrium, which he for one would be reluctant to do.

27. Mr. BENNOUNA said he fully agreed that the words "reasoned and documented" should be retained in the interests of maintaining a balance between the countries concerned. A finding that was not reasoned, in the sense of the French word *motivé*, might consist simply of the finding, plus any supporting documents; the grounds for the finding would not be known, and that could place the notifying State in a weak position.

28. Mr. KOROMA said that he maintained his position since, in his view, it would not disturb the balance between watercourse States. If a State wished to buttress its case by providing diagrams and maps, and had the facilities to do so, well and good; but if it did not have such facilities, it should suffice if it provided reasons for its objections. It should not be further encumbered by having to provide documents.

29. Mr. HAYES said that both terms, "reasoned" and "documented", should be retained. Clearly, a State should not be allowed to prevent another State from proceeding with a project simply by contending that it would be adversely affected; it must be required to advance arguments, which was what was meant by

“reasoned”, and to provide evidence that it was not making a frivolous claim. A State that claimed it would be adversely affected would have made some kind of study or examination of the situation; the material on which it had based its conclusions should be provided in support; that was what was meant by a “documented explanation”. It was not too onerous a burden to place on a State, and the provision could be complied with fairly easily.

30. Mr. FRANCIS suggested that the phrase “reasoned and documented explanation” be placed in square brackets provisionally; the Commission might vote to delete it at a later stage, as had been done on other occasions. There was obviously a consensus in favour of retaining the phrase, but the concern expressed by Mr. Koroma should be taken into account. By placing the phrase in square brackets, the Commission would give Mr. Koroma time to decide whether he wished to maintain his objections, and give the Special Rapporteur an opportunity for detailing, in the commentary, the arguments advanced concerning that phrase.

31. Mr. AL-QAYSI said he did not think the phrase should be placed in square brackets; that would imply, for the Sixth Committee and other readers, that the Commission was not convinced that a State that feared it would be adversely affected should provide an explanation of its position. He strongly sympathized with the concern expressed by Mr. Koroma, but thought it should be allayed by the argument put forward by Mr. Hayes. The phrase in question signified that a State could not simply announce that it was about to be harmed; it had to make a case, and in doing so it would, as a matter of course, produce some sort of documentation. Changing the wording, as the Special Rapporteur had noted, entailed tampering with a delicate balance; in practical terms, it might discourage an upstream State from signing the future instrument.

32. The CHAIRMAN said that, in view of the explanations given by the Chairman of the Drafting Committee and the Special Rapporteur, and of the position adopted by most members of the Commission, he would recommend that the article be approved without alteration. The use of square brackets might indeed give the Sixth Committee a wrong impression, and in any case the article still had to be considered on second reading.

33. Mr. BARSEGOV said that the Commission was drafting a framework agreement on the basis of which States would conclude specific agreements reflecting their own concerns. The African countries, for example, could make the necessary adjustments in their regional, subregional and bilateral agreements.

34. Mr. FRANCIS, speaking on a point of order, said a request by even one member of the Commission for square brackets to be incorporated in a text should be given immediate and careful consideration. A decision to incorporate square brackets would not prejudice the consideration of the article on second reading because the reasons for it could be stated in the commentary, which was designed for precisely such expressions of position. Hence the incorporation of square brackets would not give the Sixth Committee a wrong impression.

35. Mr. YANKOV said that the Commission should try to restrict the use of square brackets in its texts to serious differences of opinion on substantive issues. The problem being discussed was really one of semantics and did not justify the use of square brackets. As Mr. Barsegov had pointed out, the specific agreements adopted on the basis of the Commission’s text would spell out the necessary arrangements.

36. Mr. KOROMA remarked that the problem might have arisen because “reasoned and documented explanation” was a phrase the Commission had never used before. He proposed that it be replaced either by “written explanation” or by “reasoned and as far as possible documented explanation”. He maintained his view that unnecessary burdens should not be imposed on States that were not in a position to provide documented evidence. As a trial lawyer, he well knew that a case could be lost on failure to produce documentation.

37. Mr. McCAFFREY (Special Rapporteur) pointed out that the phrase “reasoned and documented explanation”, or its equivalent, was used in a number of watercourse agreements and in several major trade agreements, including the Multifibre Arrangement concluded under the auspices of GATT. In most cases the terms were even more rigorous, requiring much more detailed explanation than in the present formulation. A State would not have to produce original maps, charts or displays; the reasons for its findings could simply be articulated and accompanied by any supporting material it possessed.

38. It should be remembered that it was not only the potentially affected State that was inconvenienced; a burden was also imposed on the State that was asked to halt a project. Any State, whether upstream or downstream, could be placed in such a position: the construction of a dam, for example, might have consequences for an upstream State. Thus the article was directed at any measures taken by a watercourse State, regardless of whether it was upstream or downstream, that affected another watercourse State.

39. The balance reflected in the text had been achieved after much hard work and discussion, and he appealed to members not to abandon it by incorporating substantive changes or square brackets. It should be sufficient to explain in the commentary that the “reasoned and documented explanation” contemplated was not one that would be onerous, but that a number of members had reservations about that requirement, believing it might impose an undue burden on the potentially affected State.

40. Mr. TOMUSCHAT (Chairman of the Drafting Committee) agreed that Mr. Koroma’s concern might be met by explaining in the commentary that the phrase “reasoned and documented explanation” established, not an absolute standard, but one that would vary according to circumstances and referred to the documents in which a good administration would give the factual basis for its assessment. The material might of course vary according to the capabilities of the administration concerned, but no watercourse State should be obliged to hire foreign experts at high cost.

41. Mr. GRAEFRATH said it should be kept in mind that the Commission was trying to draft an instrument that could be accepted by as many States as possible and would in any case be only a framework for specific watercourse agreements. Many States had difficulties even in feeding their populations and would hardly have sufficient resources to produce a well-documented argument. The Commission should do more to take account of the concern expressed by Mr. Koroma than simply place the phrase in square brackets. True, an adequate explanation must be given for preventing a State from carrying out a project, but all States, irrespective of their economic situation, should be enabled to make such a request. The Commission should explain in the commentary not that a number of members had reservations concerning the phrase “documented explanation”, but that it construed that phrase as allowing a certain flexibility, as was fitting in a framework agreement, its meaning being adaptable to the situations of the States concerned.

42. Mr. Sreenivasa RAO said that, in drafting articles for adoption by States, the Commission should take into consideration the special circumstances of developing countries—their economic capabilities and levels of expertise in complex fields. He fully sympathized with the concern expressed by Mr. Koroma and Mr. Francis. Clearly, there were cases in which a State would be unable to furnish a sophisticated analysis of a situation or to provide evidence based on elements that were beyond its grasp. In such cases, an explanation that was as reasoned and as documented as possible should be acceptable, and the Commission might wish to make that clear in the commentary by explaining that the phrase should be construed as meaning as reasoned and documented an explanation as possible in the circumstances.

43. It should also be recalled that the articles would impose strict obligations, under which developing countries trying to achieve progress might find their projects arrested. The interests of developing countries were thus engaged on both sides of the issue.

44. Mr. FRANCIS explained that he had not been making a formal proposal, but merely a suggestion, regarding the incorporation of square brackets.

45. Mr. BEESLEY said the discussion showed why the text must take the form of a framework agreement: it would have to be adapted to particular circumstances. Article 15 might be made more acceptable if the words “reasoned and documented explanation” were replaced by the words “reasoned explanation which is documented to the extent feasible”. That would cover not only the situations being discussed, but also a number of others: for example, when there were differences of opinion among engineers, scientists or technicians. He would even favour deletion of the word “reasoned”, since it was unlikely that a State would make an unreasoned explanation.

46. Mr. NJENGA said he believed the text of the article as it stood was adequate for the Commission’s purposes. He understood the concern expressed by Mr. Koroma and others, but thought that States could be relied on to produce well-founded arguments for

stopping a project. He endorsed the proposal that the concern expressed during the discussion should be reflected in the commentary.

47. Mr. PAWLAK said that the points raised required serious attention and should perhaps be dealt with in the commentary. Alternatively, the fears expressed by Mr. Koroma could perhaps be allayed by inserting the words “as far as possible” before the word “documented” in paragraph 2.

48. The CHAIRMAN, noting that that proposal was very similar to the proposals put forward by Mr. Hayes and Mr. Beesley and also corresponded to the spirit of Mr. Sreenivasa Rao’s remarks, asked whether the Commission was prepared to accept it on the understanding that an appropriate explanation would be included in the commentary. The draft article could of course be amended further on second reading.

49. Mr. ARANGIO-RUIZ suggested that it might be simpler to speak of a “reasonably documented” explanation.

50. Mr. BARSEGOV observed that the various proposals before the Commission were not identical. The text proposed by Mr. Pawlak and taken up by the Chairman would be appropriate for relations between countries that would have genuine difficulty in documenting a finding, but not under the conditions of, say, the countries of Western Europe. Would a project in that part of the world really have to be held up when a notified State claimed that it could not provide a documented explanation? While recognizing the need to proceed quickly with the discussion, he thought it would be worth spending a little more time trying to find wording applicable to all cases.

51. Mr. BEESLEY agreed that the proposals before the Commission differed, and reiterated his view that the word “feasible” was more appropriate than the word “possible”.

52. Mr. BENNOUNA, supported by Mr. YANKOV, proposed that members having suggestions for the wording of article 15, paragraph 2, should meet with the Chairman of the Drafting Committee and the Special Rapporteur during the break, with a view to producing an agreed text.

*It was so agreed.*

*The meeting was suspended at 11.30 a.m. and resumed at 12.10 p.m.*

53. The CHAIRMAN announced that attempts to redraft article 15, paragraph 2, had not yet been successful. He suggested that the Commission should suspend consideration of that article and revert to it after consideration of the other articles proposed by the Drafting Committee.

*It was so agreed.*

54. Mr. EIRIKSSON stressed the importance of using very precise language in paragraph 2 of article 15, because of the references to that paragraph in articles 16 and 17. It did not matter very much if a text read a little heavily, provided it was unambiguous. An attempt to say too many things in too few words was to be deprecated.

## ARTICLE 16 [14] (Absence of reply to notification)

55. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 16 [14], which read:

*Article 16 [14]. Absence of reply to notification*

If, within the period provided for in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 6 and 8, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

56. The article corresponded to and closely followed paragraph 2 of article 14 as submitted by the Special Rapporteur at the previous session.<sup>5</sup> As the title indicated, it dealt with the case in which a notification under article 12 failed to elicit any reply from the notified State within the period of six months provided for in article 13.

57. The idea underlying the article was that in such a case the notified State was estopped from claiming the benefit of the protective régime provided for in the draft. The notifying State might therefore proceed with the implementation of the planned measures subject, however, to two important provisos: first, the notifying State remained bound to comply with articles 6 and 8; secondly, the implementation of the planned measures had to be in accordance with the notification and the data and information communicated to the notified State. The rationale for the second proviso was that the silence of the notified State could be interpreted as passive consent only to planned measures which had been brought to its knowledge.

58. The Drafting Committee had redrafted the opening part of the original text in order to make it clear that, if there were a plurality of notified States, the notifying State might proceed with the implementation of the planned measures only if it had received no communication under paragraph 2 of article 15, in other words a communication which stated certain objections.

59. The other changes made by the Drafting Committee had been aimed at simplifying the text or ensuring its consistency with the articles previously adopted. The Committee had considered that the formulation would be tighter if the concluding phrase, "provided that the notifying State is in full compliance with articles 12 and 13", were removed and the references to articles 12 and 13 transferred to a more appropriate position in the text. For the sake of consistency, the words "the initiation of the contemplated use" had been replaced by the words "the implementation of the planned measures".

60. Mr. EIRIKSSON said that, first, he did not consider the phrase "under paragraph 2 of article 15" sufficiently precise. Secondly, the words "within the period provided for in article 13" seemed unnecessary, because the same words appeared in paragraph 2 of article 15, which was referred to in the same sentence. Thirdly, with regard to the words "proceed with the implementation of the planned measures", he pointed out that articles 12 and 14 spoke of implementing or permitting the

implementation of planned measures and that article 19 used the words "immediately proceed to implementation". In order to avoid confusion, the same wording should be used throughout the draft.

61. Mr. TOMUSCHAT (Chairman of the Drafting Committee) agreed that the words "within the period provided for in article 13" were not strictly necessary. In his opinion, however, the words "proceed with the implementation of the planned measures", should be retained, it being explained in the commentary that the term "implementation" was used in a broad sense, which included permitting implementation.

62. Mr. McCAFFREY (Special Rapporteur) said that, although the words "within the period provided for in article 13" could indeed be considered redundant, the feeling in the Drafting Committee had been that the point was an important one and should be re-emphasized. He would not press for retention of those words, but he wondered whether Mr. Eiriksson's suggestion did not run counter to the point Mr. Eiriksson had just made about article 15.

63. Mr. AL-QAYSI said that the passage in question related to the period of six months referred to in article 13, whereas the reference to a communication under paragraph 2 of article 15 related to the nature of the communication provided by the notified State. In his opinion, the reference was helpful and should be retained.

64. Mr. HAYES suggested that, if the phrase in question were omitted, the words "under paragraph 2", in the following phrase, should be replaced by "as provided for in paragraph 2". Thus worded, the reference to paragraph 2 of article 15 would embrace the period provided for in article 13. If, however, it was decided to retain the text of article 16 as it stood, the words "provided for" should be replaced by the words "referred to", so as to bring the text into line with the revised version of article 15, paragraph 2.

65. Mr. BARSEGOV remarked that what seemed clear to members of the Commission might not be clear to all future readers of the draft articles. At the present stage, the clarity of the text was a more important consideration than a highly polished style.

66. Mr. McCAFFREY (Special Rapporteur) agreed with Mr. Al-Qaysi that the deletion of the words "within the period provided for in article 13" would change the emphasis and thus create a risk of losing an important point. He appealed to the Commission to retain the text as it stood.

67. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the views expressed by the preceding speakers had convinced him of the usefulness of retaining the phrase in question.

68. Mr. CALERO RODRIGUES associated himself with the views expressed by Mr. Al-Qaysi, the Special Rapporteur and the Chairman of the Drafting Committee.

69. Mr. EIRIKSSON said that he would not press for the suggested deletion. However, the remarks made by

<sup>5</sup> *Ibid.*

Mr. Hayes had reinforced his view that paragraph 2 of article 15 should be drafted more clearly.

70. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 16 [14] as proposed by the Drafting Committee.

*Article 16 [14] was adopted.*

ARTICLE 17 [13] (Consultations and negotiations concerning planned measures)

71. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 17 [13], which read:

*Article 17 [13]. Consultations and negotiations concerning planned measures*

1. If a communication is made under paragraph 2 of article 15, the watercourse States concerned shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations provided for in paragraph 1 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time of making the communication under paragraph 2 of article 15, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

72. The present article was based on paragraphs 3 and 4 of article 13 as submitted by the Special Rapporteur at the previous session,<sup>6</sup> which had dealt with consultations and negotiations between the watercourse State that was planning measures and the other watercourse States, in case of disagreement about their findings concerning the effects of those measures. The requirements for those consultations and negotiations, and the conditions under which they should take place, constituted the core of article 17.

73. Paragraph 1 stated the general requirement of entering into consultations and negotiations in case of disagreement between the watercourse States concerned. Those States were the ones referred to in paragraph 2 of article 15. Paragraph 1 also stated the purpose of such consultations and negotiations, namely, to arrive at "an equitable resolution of the situation".

74. Paragraph 2 related to the conduct of consultations and negotiations. The language of that paragraph—which corresponded to that of paragraph 4 of the former article 13—had been taken from the award in the *Lake Lanoux* case. That explained the introduction of the word "interests", which had not previously been used in other draft articles. The Drafting Committee had thought it useful to include that word in article 17, qualifying it with the adjective "legitimate". The purpose of the article was to set in motion a process of consultations and negotiations between the States concerned with the aim of arriving at an equitable solution. Each State was asked to pay "reasonable regard" to the

other State's interests. All the obligations provided for under paragraph 2 had been given sufficient flexibility to maintain a balance between the interests of both parties. Furthermore, the fact that the word "interests" was qualified by the adjective "legitimate" provided a useful safeguard. For in the context of a general convention, the word "interests" could have a very broad meaning and it would perhaps be best to limit it to "legitimate" interests.

75. Paragraph 3 introduced two elements in the process of consultation and negotiation. One was the suspension of the implementation of planned measures during the consultations and negotiations; the other was the duration of that suspension. The Drafting Committee had found that those two elements were necessary to enhance the purpose of the article and to maintain a reasonable balance in protecting the interests of the parties concerned. The suspension of implementation of the planned measures was necessary because the consultations and negotiations would have no purpose if the State planning the measures could go ahead and implement them. At the same time, the Drafting Committee had considered that the suspension should be only for a reasonable period. It had been well aware that the determination of that period might appear somewhat arbitrary and that the States concerned were in a better position to decide the duration of the suspension in each case. Nevertheless, the Committee had decided that it would be prudent to set a maximum period, in case the States concerned were unable to agree. Six months seemed a reasonable maximum period for suspension of the implementation of planned measures and for consultations to resolve the differences.

76. The six-month suspension could come into effect only if, first, it was requested by the notified State and, secondly, the request was made when the notified State made a communication under paragraph 2 of article 15, indicating that the planned measures were inconsistent with the provisions of articles 6 and 8. The maximum six-month period of suspension would run from the date of that communication.

77. After that suspension period, the State planning the measures could go ahead with the implementation of its plans without being in violation of article 17. Of course, the article was without prejudice to the obligations of the State planning the measures under articles 6 and 8. The Drafting Committee had considered that paragraph 3 brought the objects of article 17 into much sharper focus and made it possible to comply with the article more effectively.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)\***  
(A/CN.4/409 and Add.1-5,<sup>7</sup> A/CN.4/417,<sup>8</sup> A/CN.4/L.420, sect. F.3)

[Agenda item 4]

\* Resumed from the 2070th meeting.

<sup>7</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>8</sup> *Ibid.*

<sup>6</sup> *Ibid.*

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

CONSIDERATION OF THE DRAFT ARTICLES<sup>9</sup>  
ON SECOND READING (continued)

78. The CHAIRMAN said that, as Mr. Pawlak would be absent during the coming week, when the Commission proposed to discuss agenda item 4, he would call on him to speak on that item.

79. Mr. PAWLAK thanked the Chairman for giving him an opportunity of speaking on item 4 and congratulated the Special Rapporteur on his excellent eighth report (A/CN.4/417).

80. The draft articles submitted by the Special Rapporteur, with the amendments he had introduced at the current session, reflected the views of many States and could be referred to the Drafting Committee for further refining. At the present stage he wished to make some general comments on methodological questions and the final form the draft articles should take.

81. In the first place, he believed that the Commission should continue its work with a view to completing consideration of item 4 during the current term of office of its members. The topic was of practical importance to all States and to the international community as a whole. Notwithstanding some doubts expressed by a few members, there was a need to work out a universal international legal instrument for the effective protection of the diplomatic courier and the diplomatic bag, which at the same time would help to prevent possible abuses. The existing universal agreements, in particular the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, did not fully cover all aspects of contemporary communication, especially between States, through the courier and the bag.

82. Moreover, the increasing number of violations of diplomatic law made it imperative to seek a more comprehensive and coherent regulation of the status of all types of official couriers and official bags and to guarantee them the same degree of international legal protection. He fully shared the Commission's view, expressed in paragraph (1) of the commentary to article I, that:

... This comprehensive approach rests on the common denominator provided by the relevant provisions on the treatment of the diplomatic courier and the diplomatic bag contained in the multilateral conventions in the field of diplomatic law, which constitute the legal basis for the uniform treatment of the various couriers and bags. . . .<sup>10</sup>

83. At the same time, it was necessary to take into consideration the practice of States, in most bilateral consular agreements, of treating consular couriers basically in the same way as diplomatic couriers. He accordingly supported the Special Rapporteur's proposal that the scope of the draft articles should not be confined to diplomatic couriers and diplomatic bags, but should also cover consular couriers and bags, as well as couriers and bags of the important international organizations of a universal character.

84. Article III, section 10, of the 1946 Convention on the Privileges and Immunities of the United Nations, quoted in the eighth report (*ibid.*, para. 58) provided that:

The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Similar provisions were to be found in the conventions on the privileges and immunities of some other organizations. He therefore supported the Special Rapporteur's proposal to introduce in article 1 a new paragraph 2 extending uniform legal treatment to the couriers and bags of some international organizations (*ibid.*, para. 60). It was necessary, however, to be very cautious about that extension; it should cover only the couriers and bags of the important international organizations of a universal character, namely the United Nations, the specialized agencies and a very few other organizations.

85. He believed that the draft articles should eventually become an independent convention. The status of the official courier and the bag was only partly regulated by existing conventions; a new convention could contribute to the promotion of international relations, harmonize the frequently opposing interests of the receiving and sending States and help to overcome many practical problems. The new convention should, however, be closely linked with the existing conventions on diplomatic and consular law.

86. In his view, the official courier should have not only personal protection, but also complete inviolability. He therefore strongly recommended that article 17, on the inviolability of the temporary accommodation of the courier, should be retained, as proposed by the Special Rapporteur. That text struck an adequate balance between the interests of the sending, transit and receiving States.

87. Any limitation of the inviolability of the courier to his person alone, which would allow a receiving or transit State to inspect and search his temporary quarters, would undermine the whole concept of the inviolability of the courier as an important instrument of international communication.

88. Article 18, on immunity from jurisdiction, was one of the most important provisions of the whole draft. In conformity with the functional approach, he supported the view that the courier should enjoy immunity from criminal, civil and administrative jurisdiction in respect of all acts performed in the exercise of his functions.

89. Paragraph 2 of article 18 should be carefully revised to make it cover such matters as the requirement of third-party liability insurance for a motor vehicle used by a courier. On that point, he drew attention to the proposal made by the German Democratic Republic in its comments (A/CN.4/409 and Add.1-5).

90. Article 28, on the protection of the diplomatic bag, called for further consideration. The Special Rapporteur had drawn attention to the very real difficulties involved and had presented three alternative texts (A/CN.4/417, paras. 244-253). He himself preferred

<sup>9</sup> For the texts, see 2069th meeting, para. 6.

<sup>10</sup> *Yearbook . . . 1983*, vol. II (Part Two), p. 53.

alternative A, which in practice covered both diplomatic and consular bags. It could be criticized for that reason, but in his view a pragmatic approach should be adopted. As stated in the comments by the Italian Government, “the distinction between diplomatic and consular bags has become obsolete in international practice” (A/CN.4/409 and Add.1-5).

*The meeting rose at 1.20 p.m.*

## 2073rd MEETING

*Tuesday, 5 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, A/CN.4/L.421)**

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
(*concluded*)

ARTICLE 17 [13] (Consultations and negotiations concerning planned measures)<sup>3</sup> (*concluded*)

1. Mr. EIRIKSSON said that, although he did not intend at the present stage to propose amendments to article 17, he wished to make a few comments on the text. First, the expression “the watercourse States concerned”, in paragraph 1, was much too vague and he would have preferred “the notifying State and the State making the communication”. In paragraph 2, it would have been preferable to replace the words “The consultations and negotiations provided for in paragraph 1” by “These consultations and negotiations”, and, in paragraph 3, to replace the words “if so requested by the notified State at the time of making the communication under paragraph 2 of article 15” by “if the other State so requests at the time it makes the communication”. Lastly, he wondered whether the members who had pressed for the retention in article 16 of the words “within the period provided for in article

13” might not be concerned that the same words did not appear in article 17.

2. Mr. AL-QAYSI, supported by Mr. KOROMA and Mr. MAHIOU, proposed that the words “the watercourse States concerned”, in paragraph 1, should be replaced by the form of words suggested by Mr. Eiriksson.

3. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the proposal was acceptable. On the other hand, he thought it necessary to retain the present wording of paragraph 2 and keep the words “provided for in paragraph 1”.

4. Mr. KOROMA suggested the deletion, in paragraph 2, of the adjective “legitimate” before “interests”. The adjective was pointless, since the State invoking an interest had in any case to establish that the interest was a valid one.

5. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Drafting Committee had considered that the word “interests” on its own would be much too broad, because it could also apply to interests not in conformity with the principles of international law.

6. Mr. KOROMA said that, although he was not convinced, he would not press his proposal.

7. The CHAIRMAN suggested that the Commission should provisionally adopt article 17 [13] with the amendment proposed by Mr. Al-Qaysi, and accepted by the Chairman of the Drafting Committee, to replace the words “the watercourse States concerned”, in paragraph 1, by “the notifying State and the State making the communication.”

*It was so agreed.*

*Article 17 [13] was adopted.*

ARTICLE 19 [15] (Measures of utmost urgency)

8. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 19 [15], which read:

*Article 19 [15]. Measures of utmost urgency*

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, safety or other equally important interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.

9. Article 15 submitted by the Special Rapporteur at the previous session<sup>4</sup> dealt with measures of extreme urgency which the State had to implement immediately, without waiting for the expiration of the period allowed to other States for reply and for study and evalua-

<sup>1</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>3</sup> For the text, see 2072nd meeting, para. 71.

<sup>4</sup> See *Yearbook . . . 1987*, vol. II (Part Two), pp. 22-23, footnote 77.

tion of the effects of those measures. The measures were considered urgent if there were a threat to public health, safety or other similar considerations. The debate at the previous session had indicated some differences of opinion on the usefulness of the article. Some members had considered that it would be unfair to penalize a State in such exceptional situations and had therefore wanted those situations to be dealt with in the draft. Others had been concerned that the article was too broad and feared that States might invoke it in order to avoid their obligations. The Drafting Committee had thought that it would be useful to have an article on exceptional situations but that it should be drafted carefully to eliminate or minimize abuse. The three paragraphs of article 19 took account of those considerations.

10. Paragraph 1 contained a definition of the situation of utmost urgency: since the Drafting Committee had judged that it would be impossible to list all such situations, it had preferred to lay down criteria. The Committee had found the criteria originally proposed by the Special Rapporteur viable for that purpose. Nevertheless, to avoid too broad an interpretation of the provision, it had decided to alter it slightly and replace the words "similar considerations" by "equally important interests".

11. In addition, paragraph 1 waived the waiting period provided for in article 14 and in paragraph 3 of article 17, subject of course to articles 6 and 8, the application of which was not suspended even for measures of utmost urgency.

12. Paragraph 2 corresponded to the last part of paragraph 1 and the opening of paragraph 2 of former article 15: a State having to implement measures of utmost urgency was required to make a formal declaration to the potentially affected watercourse States mentioned in article 12, and that declaration must be accompanied by relevant information and data. Under the new paragraph 2, as opposed to the original text, there was no obligation of notification under article 12. The whole point was that the State implementing measures of utmost urgency did not have the time to follow the normal procedures. Nevertheless, the other watercourse States should not be left completely helpless, and they should be given some data and information on urgent measures.

13. Paragraph 3 was concerned with situations in which the other watercourse States believed, after receiving the information and data, that the urgent measures would have appreciable adverse effects upon them. The Drafting Committee had considered that all that could reasonably be expected in such situations was to require the States concerned promptly to enter into consultations with each other "in the manner indicated in paragraphs 1 and 2 of article 17". That wording, which helped to avoid a long repetition, referred only to the purpose and conduct of consultations; it referred neither to the obligation triggered by the provisions of article 17, nor to the applicability of paragraph 2 of article 15 mentioned therein.

14. Paragraph 3 of the original article 15 had been deleted, since the Drafting Committee had taken the

view that, in an article on procedures for evaluating the effects of planned measures, it was inappropriate to refer to the liability arising from those effects.

15. With regard to the title of article 19, the Drafting Committee had thought it more logical to drop the word "planned", since the article dealt with emergency situations in which States did not have time to plan measures. Consequently, the article was entitled "Measures of utmost urgency". In the text of the article, however, the expression "planned measures" continued to be used.

16. Mr. AL-QAYSI said that, although he understood the Drafting Committee's reasons for using the expression "equally important interests" in paragraph 1, he was bound to point out that an interest could be important without necessarily being urgent. It was therefore necessary to find some other qualifier that would bring out the idea of urgency.

17. Mr. EIRIKSSON said he did not like the formula "immediately proceed to implementation", in paragraph 1, for the reasons he had already indicated in connection with article 16 (2072nd meeting, para. 60). He would have preferred the phrase: "implement or permit the implementation".

18. Paragraph 2 mentioned the "watercourse States referred to in article 12". In fact, the States referred to in article 12 were the States on which the planned measures could have an adverse effect and which had to be notified. A more precise formula should therefore have been used, such as "on which the measures may have an appreciable adverse effect".

19. In paragraph 3, the words "shall, at the request of the other States, promptly enter into consultations and negotiations with them" should be replaced by "shall, at the request of a State referred to in paragraph 2, promptly enter into consultations and negotiations with it". Again, instead of saying "in the manner indicated in paragraphs 1 and 2 of article 17", the present wording of those paragraphs should be used, namely "with a view to arriving at an equitable resolution of the situation. These consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State". That remark applied also to paragraph 2 of article 18.

20. Lastly, since paragraph 3 of article 18 also provided for a six-month waiting period, might it not be appropriate to add a reference to that paragraph at the end of paragraph 1 of draft article 19?

21. Mr. BARSEGOV urged that, in future, amendments as complex as those which had just been submitted should either be submitted to the Drafting Committee or communicated in advance to the Commission so that the Commission might have time to reflect on them.

22. Mr. SOLARI TUDELA pointed out that, in the Spanish text, the word *seguridad* was ambiguous: it could be interpreted in the sense of security, whereas in the present instance it meant the safety of the population—in the event of the risk of flood, for example.

23. Mr. McCaffrey (Special Rapporteur) explained that, in the English text, the adjective “public” qualified the two words that followed, namely “health” and “safety”. He would ensure that the commentary brought out that idea clearly.

24. Mr. Koroma said that the wording proposed by the Drafting Committee did not adequately express the basic idea of the article, namely the utmost urgency of the measures planned for the protection of public health and safety or other important interests, rather than the implementation of those measures. Without pressing the matter, he would suggest that paragraph 1 should be recast to read:

“1. When, as a matter of utmost urgency, in order to protect public health, safety or other equally important interests, it becomes necessary to implement such planned measures, subject to articles 6 and 8, the State planning the measures may . . .”.

25. Mr. Sreenivasa Rao said that he was prepared to accept article 19 as submitted by the Drafting Committee. As the title indicated, the article concerned measures of utmost urgency, whether or not those measures were planned. The only change that might perhaps be made for the sake of greater clarity would be to delete from paragraph 3 the reference to paragraphs 1 and 2 of article 17. Mr. Koroma’s suggestion could be considered on second reading.

26. The Chairman, replying to Mr. Barsegov, said that Mr. Eiriksson had not formally proposed an amendment to the text under consideration and that Mr. Koroma and Mr. Sreenivasa Rao had merely made some suggestions.

27. Mr. Tomuschat (Chairman of the Drafting Committee) said that Mr. Koroma and Mr. Sreenivasa Rao had drawn attention to what was visibly a problem. In contrast to the actual text of the article, which spoke of “planned measures”, the title of article 19 referred to “measures of utmost urgency”; hence it would not be impossible to argue that the article dealt only with measures of utmost urgency that were not planned. The Special Rapporteur might perhaps explain his thinking on that point on second reading.

28. On the subject of the wording of paragraph 1, he replied to Mr. Al-Qaysi that the measures referred to were subject to two conditions: they must, in the first place, be of the utmost urgency and, secondly, they must aim at one of the goals set out in paragraph 1. To replace the expression “other equally important interests” by “other equally urgent interests” would therefore be redundant. The problem raised by Mr. Solari Tudela in connection with the Spanish text of the same paragraph did not affect the English text, which was the original version, and in which the words “public safety” would be understood to apply to flooding; the Spanish text could perhaps be rendered more clearly.

29. He did not think that there could be any misunderstanding with regard to paragraph 2: the States referred to were clearly those States on which the planned measures might have an adverse effect.

30. As to paragraph 3, the Drafting Committee, in referring to paragraphs 1 and 2 of article 17, had simply wanted to avoid making the text too cumbersome.

31. Mr. Eiriksson, taking up Mr. Barsegov’s comments on the methods of work, said that the Commission had two possibilities before it, discounting a third, rather impracticable one, that would require all amendments to texts proposed by the Drafting Committee to be submitted in writing. Once the texts had been adopted by the Drafting Committee, either the Committee could hold a special meeting in which all members of the Commission would be invited to participate, or else the Chairman of the Drafting Committee could introduce them to the Commission for consideration and comments, as was done at present, after which the Drafting Committee would discuss the comments made and report back to the Commission on the outcome of its deliberations.

32. The Chairman suggested that the Planning Group should consider those suggestions within the framework of the consideration of the Commission’s programme, procedures and methods of work.

33. Mr. Al-Qaysi said that he was satisfied by the clarification given by the Chairman of the Drafting Committee concerning the expression “other equally important interests”.

34. As to the nature of the measures covered by the article, a problem the Chairman of the Drafting Committee had recognized, the measures were undoubtedly planned measures of the utmost urgency. After all, part III of the draft, of which the article formed part, was entitled “Planned measures”. The adjective “planned”, which already appeared in the titles of articles 11, 12 and 17, might therefore be added to the title of article 19 in the interests of greater clarity.

35. Mr. Barsegov said that, in his earlier remarks, he had raised no objection to the Commission’s discussing facts pertaining to Mr. Eiriksson’s proposals on the article under consideration. He simply thought it desirable that the Commission should in future find a simpler procedure for the consideration of proposals concerning the actual structure of the texts before it.

36. On the question of measures of utmost urgency, he shared Mr. Sreenivasa Rao’s views: the term could be applied equally to planned and to unplanned measures. It would be useful to specify, either in the commentary or in the actual text of the article if the Commission decided to amend it, that the measures in question were in fact planned measures of utmost urgency.

37. Mr. Graefrath said that the Commission’s report to the General Assembly should reflect Mr. Eiriksson’s suggestions on the subject of methods of work, with the explanation that the Commission had not had time to consider them at the current session and would do so at the next session.

38. He would like to know why paragraph 1 of article 19 did not refer also to paragraph 3 of article 18.

39. The Chairman said he did not think it would be appropriate at the present stage to open a discussion on Mr. Eiriksson’s interesting suggestions, which would

in any event be mentioned in the Commission's report under the heading "Programme, procedures and working methods of the Commission, and its documentation".

40. Mr. McCaffrey (Special Rapporteur) said he agreed that measures of utmost urgency would be planned in some cases and not planned in many others. As that part of the draft was entitled "Planned measures", he had originally included the adjective "planned" in the title as well as in the text of the article. It had to be acknowledged, however, that sometimes, because of the urgency of the situation, there would be no time to plan anything whatsoever. Normally, it was true, a measure that might have an appreciable adverse effect on another watercourse State required some planning, no matter how rapid or how minimal. In that sense, the adjective "planned" could be retained. But it could also be deleted from paragraph 1 without doing violence to the article as a whole. The dilemma was obvious: if the word "planned" was maintained, it would have to be admitted that in certain cases there was almost no time to plan measures of the type envisaged in that part of the draft; if the word was dropped, it would have to be admitted that in certain cases measures had to be planned very rapidly and that there was no time for the entire process envisaged in the other articles, not only because of the urgency of the situation but also because of the interests at stake. In conclusion, the Commission could either maintain the text submitted by the Drafting Committee or delete the word "planned" from paragraph 1.

41. As to the absence of a reference to paragraph 3 of article 18, without wishing to encroach upon the prerogatives of the Chairman of the Drafting Committee, he would point out that the reason was that article 18 dealt with procedures in the absence of notification—in other words, with procedures set in motion by watercourse States which believed that they might be affected by a planned measure. That situation presumably would not obtain in the cases of utmost urgency envisaged in article 19, where there would be no standstill period of any kind. Nevertheless, he saw no objection to including a reference to paragraph 3 of article 18.

42. His own view, as a member of the Commission, regarding Mr. Eiriksson's remarks on methods of work, was that the simplest solution would be to encourage members of the Commission to take part in the work of the Drafting Committee; it had been done in the past and it could be done in the future.

43. Mr. AL-QAYSI said that the problem referred to by the Special Rapporteur could be resolved on second reading, possibly by including an explanation in the commentary. However, the wording of the article would have to be adjusted in the light of the comments made.

44. Mr. NJENGA said that the text proposed by the Drafting Committee could be improved in two ways. First, in order to remove any contradiction, the word "planned" might be deleted from paragraph 1, as the Special Rapporteur had suggested, without waiting for the second reading. Secondly, the addition of a reference to paragraph 3 of article 18 would be more in

keeping with the intentions of the members of the Commission.

45. Mr. BENNOUNA said that the mechanism envisaged in article 19 was logical: it was the implementation of the planned measures referred to in the preceding articles that was a matter of urgency, not the measures themselves. The basic idea was that the implementation of planned measures was normally subject to a fairly lengthy procedure of consultation; but when a situation of utmost urgency supervened, such measures were implemented immediately—in other words, without applying the provisions of articles 14 and 17, but taking into account those of articles 6 and 8. Thus the provisions of article 19 were no more than an exception to the normal procedure. The only requirement was for a formal declaration of the urgency of the measures concerned. In short, consultations which should have been held *a priori* were entered into *a posteriori* because of the urgency of the situation. The word "planned" in the text should therefore be maintained. If the Special Rapporteur wished to envisage other situations, such as *force majeure* or absolute urgency, where there were no planned measures, he should deal with them in another part of the draft.

46. Mr. AL-QAYSI remarked that if the word "planned" were deleted, the reference to article 14 and to paragraph 3 of article 17, which concerned planned measures rather than urgent situations, would have to be deleted too. The question was: could the watercourse State, because an urgent situation had arisen, proceed immediately to the implementation of the measures it was planning, notwithstanding the provisions of article 14 and of paragraph 3 of article 17? In order to answer that question, it would be best to leave the text as it was, with the possible addition of the adjective "planned" in the title for greater clarity.

47. Mr. BEESLEY said he wondered whether the article dealt with planned measures whose implementation became urgent, or with measures of urgency which were not planned. If planned measures were not the point at issue, the words "planned" and "planning" should be deleted from paragraphs 1 and 3.

48. Mr. KOROMA, noting that the text could be interpreted in two different ways and having already given his own interpretation, suggested that the Commission should adopt the article as it stood, on the understanding that the matter would be reconsidered on second reading.

49. Mr. MAHIOU said that article 19 appeared to be open to two interpretations: the Special Rapporteur's, which was rather broad, and Mr. Bennouna's, which was somewhat restrictive. Since explanations in the commentary or reconsideration of the issue on second reading would not remove that ambiguity, it must be ensured that a provision of such importance should not lend itself to diverging interpretations.

50. Mr. TOMUSCHAT (Chairman of the Drafting Committee) explained that the reason why article 19 did not refer to paragraph 3 of article 18 was that the two articles dealt with two different situations. Article 18 was concerned with the State which had "serious reason to believe that another watercourse State [was] planning

measures”, and article 19 with the State which actually implemented measures.

51. The Drafting Committee had considered at length the possibility of a separate article on measures taken urgently by a State without prior planning, a question that led on to the rights which would then be open to the other watercourse States. The need for a separate article had been disputed by some of the Committee’s members. In interpreting article 19, it was essential to view it within the framework of planned measures which, even at the planning stage, could become of the utmost urgency. He was therefore opposed to deleting the words “planned” and “the State planning the measures”.

52. Mr. McCAFFREY (Special Rapporteur) said that the object of article 19 was to enable watercourse States, if circumstances so required, to proceed as a matter of urgency with the implementation of measures they had planned. The situation thus fell between a situation of normal planned measures and a situation of *force majeure*, those being the two ends of a continuum. The extent to which planning was necessary for the article to become applicable was impossible to define inasmuch as the planning might be very prolonged, or accelerated, or even non-existent.

53. He therefore thought that article 19 should be maintained in its present form in order to avoid disturbing the general economy of the text, particularly in regard to cross-references between articles. The commentary would reflect all the considerations put forward at the meeting.

54. Mr. REUTER wondered what would happen if the word “planned” was replaced by “envisaged”.

55. Mr. CALERO RODRIGUES said that the discussion showed that article 19 dealt exclusively with the urgent implementation of measures that were already planned and not with the planning of urgent measures or the implementation of unplanned measures. Furthermore, there seemed to be agreement on the need for an article dealing specifically with the measures that the watercourse State could take in the event, quite simply, of an urgent situation. That being apparently the general interpretation of the article, the title should refer to “planned” measures.

56. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Commission’s debate clearly showed that the scope of article 19 was limited.

57. The English version of paragraph 1 used the expression “public health, safety or other . . .”. The Drafting Committee had seen the adjective “public” as applying not only to health but also to safety. The phrase should therefore be modified slightly to read: “to protect public health, public safety or other equally important interests”.

58. The CHAIRMAN pointed out that, in the Spanish text of paragraph 1, the use of the plural—*la salud y la seguridad públicas*—made it unnecessary to repeat the adjective *pública*.

59. Mr. SEPÚLVEDA GUTIÉRREZ and Mr. HAYES, referring to the title of article 19 in Spanish

and English respectively, said that the exact wording should be “Urgent implementation of planned measures”.

60. Mr. NJENGA said he was prepared to accept article 19 as it stood, so long as the commentary brought out the distinction between cases of real emergency and cases of *force majeure*.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 19 [15] as proposed by the Drafting Committee and with the corrections to the title, it being understood that the considerations raised during the discussion would be taken into account on second reading and that a new article would be drafted to deal with situations not covered by article 19.

*It was so agreed.*

*Article 19 [15] was adopted.*

ARTICLE 20 [15] [16] (Data and information vital to national defence or security)

62. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 20 [15] [16], which read:

*Article 20 [15] [16]. Data and information vital to national defence or security*

Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

63. Article 20 corresponded to paragraph 5 of article 15 [16] proposed by the Special Rapporteur at the current session (see 2050th meeting, para. 1). Its present place in the text was logical, since the exception it contained applied both to the regular exchange of data and information under article 10 and to the machinery provided for under part III (Planned measures).

64. The Drafting Committee believed that the idea underlying the original text should be retained, for two reasons: first, expressly excluding sensitive material from the data and information States were under an obligation to provide was preferable to tacitly tolerating non-compliance with that obligation; secondly, in the particular situation dealt with in the article, exemption from the normal obligation to provide information should not result in complete suppression of information. The two ideas were reflected in the two sentences composing the article. In order to overcome the apparent contradiction in the original text, the Drafting Committee had cast the first sentence in the form of a saving clause.

65. Concerning the phrase “information vital to its national defence or security”, some members of the Drafting Committee had favoured deletion of the words “defence or”. Others had said that information vital to national defence did not necessarily qualify as information vital to national security, and that, since article 20 provided for an exception, it should be as limited in scope as possible. It had also been pointed out that the concept of defence was included in that of security, as

evidenced by the fact that the system of collective security established under the Charter of the United Nations was dealt with in both Article 51, on the right of self-defence, and Article 2, paragraph 4, on the prohibition of the use of force. The majority of members of the Committee had favoured retention of the term "defence".

66. It had been further suggested that the word "concerning" should be substituted for "vital to", but the Drafting Committee had thought that such a change would unduly broaden the scope of the article.

67. The second sentence closely followed the original text, except that the phrase "concerning the general subjects to which the withheld material relates", which would have had an unduly restrictive effect on the discretion of States, had been deleted.

68. Mr. KOROMA, expressing a desire to "demilitarize" the text of an article that had nothing to do with national defence, proposed that the word "defence" should be deleted, since the concept of "national security" encompassed that of "defence".

69. As to the second sentence, the word "Nevertheless", with which it began, seemed to refer to the possibility of an entirely different situation arising, and that shed doubt on the meaning of the expression "under the circumstances", at the end of the sentence. Was it not inconsistent to affirm in the same article that a State was not obliged to provide information, only to add straightaway that it must "co-operate . . . with a view to providing as much information as possible"?

70. Mr. McCAFFREY (Special Rapporteur) said that he shared Mr. Koroma's concern. Article 20 in fact attempted to say too much in too few words and to cover two very distinct situations. The intention was to deal first with circumstances in which it was permissible not to provide substantive information, and then to express the idea that a State which availed itself of that permission must nevertheless furnish, in good faith, general information on the potential consequences of the measures it adopted.

71. The "circumstances" qualifying the obligation set out in the second sentence were obviously the very ones that necessitated the withholding of information for reasons of national defence or security. The object was to leave no loophole in the proposed régime that would enable a watercourse State to use the pretext of defence secrets indiscriminately; under the second sentence, the State was still required to inform its neighbours of the possible consequences of its action.

72. Mr. AL-QAYSI said he feared that deletion of the term "defence" would unduly enlarge the scope of the provision. When taken alone, the expression "national security" could be interpreted as also referring to economic security, which would open up a multitude of possibilities, whereas the purpose of article 20 was to restrict the circumstances in which a State could maintain that it should be exonerated from the obligation of informing its neighbours.

73. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said he thought it was clear to all members

of the Commission that article 20 was intended to deal with "national defence". Mr. Koroma would prefer the Commission not to use a term that had strong military connotations. However, if that was precisely the concept the Commission had in mind, it should expressly say so.

74. Mr. REUTER said he believed article 20 should be adopted as it stood. As to matters of form, the French text of article 19 referred to *sécurité publique*, while article 20 spoke of *sécurité nationale*; it should be made clear in the commentary that the former referred to the safety of the population, while the latter related to the security of the State.

75. The CHAIRMAN remarked that the same comment applied to the Spanish text.

76. If there were no objections, he would take it that the Commission agreed provisionally to adopt article 20 [15] [16] as proposed by the Drafting Committee, it being understood that the necessary explanations would be incorporated in the commentary.

*Article 20 [15] [16] was adopted.*

#### ARTICLE 21 (Indirect procedures)

77. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 21, which read:

##### *Article 21. Indirect procedures*

*In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.*

78. As he had indicated in connection with article 10 (2071st meeting, para. 10), the Drafting Committee had thought it appropriate to provide for cases in which direct contacts could not be established between the parties, and in which indirect procedures must therefore be used to channel modifications and communications to the parties concerned and to conduct consultations and negotiations. The phrase "serious obstacles to direct contacts" applied to circumstances such as a state of war or the absence of diplomatic relations, and the various procedural moves referred to were listed in the order in which they appeared in articles 10 to 20.

79. The additional data and information provided for under article 14 was to take the form of a notification, in accordance with article 12, and the reasoned and documented explanation of findings provided for under article 15, paragraph 2, as well as the formal declaration provided for in article 19, were to take the form of a communication. The list given in article 21 was thus complete.

80. The CHAIRMAN, speaking as a member of the Commission, said he would have preferred the phrase "direct communication between" to "direct contacts between".

81. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission

agreed provisionally to adopt article 21 as proposed by the Drafting Committee.

*Article 21 was adopted.*

82. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Drafting Committee had briefly discussed the question of including a new article to deal with cases in which a watercourse State became aware of measures that might have an appreciable adverse effect on it after those measures had been initiated. The Committee had had before it an article on the subject proposed by the Special Rapporteur, but the discussion had been inconclusive due to lack of time. He suggested that the question be considered in greater detail at a later stage.

*It was so agreed.*

ARTICLE 15 [13] (Reply to notification)<sup>5</sup> (*concluded*)

83. The CHAIRMAN invited the Commission to resume its consideration of article 15 [13].

84. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that, as the solution envisaged by the working group appointed to examine article 15 had created some difficulties with regard to article 18, the Special Rapporteur had suggested a compromise solution whereby the words “a reasoned and documented explanation of such finding” would be replaced by “a documented explanation setting forth the reasons for such finding to the extent possible”. Many members were prepared to accept that solution, but others preferred the original wording because the objection raised by a State must be based on serious grounds and because article 15 should reflect that requirement.

85. Mr. KOROMA proposed that the phrase “it shall provide . . . in article 13”, in paragraph 2, should be replaced by “it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding to the extent possible”.

86. Mr. BARSEGOV said that Mr. Koroma’s amendment was acceptable, but that he did not see the point of the words “to the extent possible”.

87. Mr. KOROMA said he agreed that the final words of the proposal were perhaps superfluous and could be deleted.

88. Mr. AL-QAYSI said that the proposed wording of paragraph 2 did not seem to meet the objection raised during the original discussion on article 15, which had centred on the “documented” nature of the explanation. Yet the compromise text was based on that very term, although the second element in the phrase—the “reasoned” aspect of the explanation—had not been dropped.

89. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 15 [13] as amended by Mr. Koroma.

*It was so agreed.*

*Article 15 [13] was adopted.*

ARTICLE 18 [14] (Procedures in the absence of notification)

90. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 18 [14], which read:

*Article 18 [14]. Procedures in the absence of notification*

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a reasoned and documented explanation of the grounds for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a reasoned and documented explanation of the grounds for such finding. If this finding does not satisfy the other State, the States concerned shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

91. The present article corresponded to paragraph 1 of article 14 submitted by the Special Rapporteur at the previous session.<sup>6</sup> It provided for cases in which a watercourse State feared that the planned measures, of which it had not been notified under article 12, would have appreciable adverse effects for it. The purpose of the article was to enable a State which found itself in such a situation to seek the benefit of the protective régime provided for under article 12. The Drafting Committee had noted that the first two sentences of paragraph 1 of article 14, as originally proposed by the Special Rapporteur, referred to two successive stages, the first being that at which the potentially affected State sought the application of the provisions of article 12, and the second that at which the State which planned the measures responded. The Drafting Committee had deemed it appropriate to deal with those two stages in two separate paragraphs.

92. In formulating the article, the Committee had taken account of the view of several members of the Commission that the text proposed by the Special Rapporteur was too favourable to the potentially affected State.

93. The Committee had noted that the opening words of the original text of paragraph 1, “If a State contemplating a new use fails to provide notice thereof to other States as required by article 12 [11]”, had been based on the assumption that the obligation of notification under article 12 had been disregarded. Such an assumption was not necessarily correct, however, inasmuch as the absence of notification could be the consequence of a determination on the part of the State concerned, made in good faith, that the planned measures would have no appreciable adverse effects on the other watercourse States. The Drafting Committee had therefore deleted the words in question.

<sup>5</sup> For the text, see 2072nd meeting, para. 14.

<sup>6</sup> See *Yearbook . . . 1987*, vol. II (Part Two), p. 22, footnote 77.

94. The Committee had also noted that the original text had been criticized for giving watercourse States the right to seek the application of article 12 on the vague basis of a "belief". Accordingly, the State wishing to assert the right provided for under paragraph 1 had to comply with two conditions: first, it had to have "serious reason to believe", and no longer simply "believe"; secondly, it was required to provide a reasoned and documented explanation of the grounds for its position.

95. Further, in the text proposed by the Special Rapporteur, the potentially affected State had been entitled to "invoke the obligations of the former State under article 12 [11]". The Drafting Committee had considered that the word "invoke" did not indicate clearly what the rights and obligations of the States concerned would be in the situation contemplated. It had therefore replaced the phrase by "request the latter to apply the provisions of article 12", which did not prejudice the question whether the planning State had complied with its obligations under article 12.

96. The other changes made to the original text were designed to bring paragraph 1 into line with the other articles prepared by the Drafting Committee. Thus the concept of "contemplated use" had been replaced by "measures being planned", and the concept of "appreciable harm" by that of "appreciable adverse effect".

97. Paragraph 2, which corresponded to the second sentence of paragraph 1 of the original text, dealt in the first sentence with cases in which the State planning the measures reacted negatively to the request addressed to it and, in the second sentence, with the consequences to which that reaction might give rise.

98. The Drafting Committee had considered it necessary to link the first sentence of the paragraph more closely to the preceding provision by including a reference to the object of the request of the potentially affected State, namely the notification provided for under article 12. There again, the Committee had used a neutral formula which did not prejudge the question whether the planning State had applied article 12 correctly. The second part of the same sentence sought to maintain a fair balance between the States concerned by requiring the planning State to justify its reaction, as the potentially affected State was required to do under paragraph 1.

99. The second sentence of paragraph 2 related to cases in which the finding of the planning State did not satisfy the other State. Apart from the opening clause, which, as in the first sentence, was intended to describe clearly the chronology of events, the second sentence of paragraph 2 closely followed the original text. For the sake of consistency, however, the words "consultations and" had been added before the word "negotiations", and the words "at the request of that other State" had been added after "the State concerned shall", in order to make it clear that the process of negotiations and consultations was triggered by the initiative of the potentially affected State. The Drafting Committee had also introduced more flexibility in the last part of the original text by replacing the words "in the manner re-

quired by paragraphs 3 and 4 of article..." by "in the manner indicated in paragraphs 1 and 2 of article . . .". The text had also been simplified by eliminating the phrase "with a view to resolving their differences", which had been considered unnecessary since the purpose of the consultations and negotiations was already described in paragraph 1 of article 17.

100. Paragraph 3 of article 18 was modelled on paragraph 3 of article 17. In that connection, the Drafting Committee had considered whether the six-month standstill period could be specified simply by a cross-reference to paragraph 3 of article 17. Since, however, the starting point for that period was not the same in the cases envisaged under articles 17 and 18, the Committee had deemed it preferable to include a separate provision on the matter and make it clear that, in the context of article 18, the six months started to run from the time of the request for consultations and negotiations.

101. Finally, the title of article 18 had been formulated in neutral terms to avoid any implication that the planning State might have failed to comply with the obligations set forth in article 12.

102. Mr. EIRIKSSON proposed that the words "apply the provisions of article 12", in paragraph 1, should be replaced by "provide a notification under article 12". In addition, for the sake of clarity, the words "the States concerned", in paragraph 2, should be replaced by "the two States".

103. Mr. KOROMA said that articles 15 and 18 should be harmonized in the light of the agreement reached on article 15.

104. Mr. Sreenivasa RAO said that he had no objection to the wording proposed for article 18, although it was not particularly felicitous from the standpoint of the chronology of events, which occurred in two stages. In the first stage, a State planned measures which, in its view, would not have appreciable adverse effects for the other watercourse States, and therefore implemented them; in a second stage, the other watercourse States, fearing adverse effects, sought the application of article 12. However, that was not the sequence of events contemplated in article 18.

105. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that articles 15 and 18 would of course have to be harmonized. The formula accepted for article 15 would read as follows in paragraph 1 of article 18: "The request shall be accompanied by a documented explanation setting forth the reasons for such belief." Similarly, in paragraph 2, the end of the first sentence would read: "providing a documented explanation setting forth the reasons for such finding". The difference between paragraphs 1 and 2, which referred respectively to "belief" and "finding", reflected the fact that the State referred to in paragraph 1 had certain vague fears, whereas the State which was planning measures had concrete data and information at its disposal and so could make a finding.

106. In reply to Mr. Eiriksson, he said that the Drafting Committee had been careful, in the first sentence of paragraph 1, to avoid requiring the State planning the measures to make a notification under ar-

ticle 12. That State first had to evaluate the situation, as was also provided for under article 12: only then could notification take place. Accordingly, paragraph 1 set forth the general obligation to apply article 12 in different stages. If the State planning the measures considered that they would have no appreciable adverse effects, it would not make a notification. The language used had been chosen after due reflection, and any change could lead to errors. Mr. Eiriksson's second proposal, on the other hand, appeared acceptable. Although there might well be more than two States concerned, article 18 contemplated only a bilateral relationship. Bearing in mind the changes to the same effect made in article 17, the words "the States concerned" would be replaced by "the two States".

107. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 18 [14], as amended.

*It was so agreed.*

*Article 18 [14] was adopted.*

#### TITLES OF PARTS II and III OF THE DRAFT ARTICLES

108. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the titles proposed by the Drafting Committee for parts II and III of the draft articles, reading respectively: "General principles" and "Planned measures".

*The titles of parts II and III of the draft articles were adopted.*

*The meeting rose at 1.10 p.m.*

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## 2074th MEETING

*Wednesday, 6 July 1988, at 10 a.m.*

*Chairman: Mr. Leonardo DÍAZ GONZÁLEZ*

*Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

### **International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)\* (A/CN.4/384,<sup>1</sup> A/CN.4/405,<sup>2</sup> A/CN.4/413,<sup>3</sup> A/CN.4/L.420, sect. D)<sup>4</sup>**

[Agenda item 7]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

- ARTICLE 1 (Scope of the present articles)
- ARTICLE 2 (Use of terms)
- ARTICLE 3 (Attribution)
- ARTICLE 4 (Relationship between the present articles and other international agreements)
- ARTICLE 5 (Absence of effect upon other rules of international law)
- ARTICLE 6 (Freedom of action and the limits thereto)
- ARTICLE 7 (Co-operation)
- ARTICLE 8 (Participation)
- ARTICLE 9 (Prevention) *and*
- ARTICLE 10 (Reparation)<sup>5</sup> (*continued*)

1. Mr. HAYES thanked the Special Rapporteur for his very thorough and thoughtful fourth report (A/CN.4/413) and for the draft articles contained therein, the first five of which were revisions of those considered at the previous session.

2. As he saw it, the principle *sic utere tuo ut alienum non laedas* constituted the conceptual basis of the topic. That principle meant recognition that an act, although lawful in itself, could nevertheless be a source of potential or actual harm calling for measures of prevention and reparation. The draft articles provided a means of effective implementation of that principle.

3. He agreed with the Special Rapporteur's conclusion (*ibid.*, paras. 1-7) that it would be not only undesirable, but also impossible to draw up a list of the activities covered by the draft articles. He was concerned, however, at the excessive emphasis in the draft on the "risk" element. "Risk", "appreciable risk" and "activities involving risk" were all defined in draft article 2 and were carried into the substantive articles. The definitions were such that the application of the articles would be significantly limited. Certain passages in the report increased his concern, such as the statements that "the risk referred to is one which involves a greater than normal likelihood of causing transboundary injury" (*ibid.*, para. 30) and that "it is precisely because of the risk created—which is greater than is normal in other human activities—. . ." (*ibid.*, para. 44).

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\* Resumed from the 2049th meeting.

<sup>1</sup> Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

<sup>5</sup> For the texts, see 2044th meeting, para. 13.

4. In draft article 2 (a) (i), "risk" was defined as being confined to the "use" of certain things; that excluded both activities not involving things and activities in regard to things other than their use. The result was a narrow definition which was then carried into the definitions of "appreciable risk" and "activities involving risk". In turn, all three expressions carried that narrowness into the substantive articles. The incorporation of risk in the elements for identification of the activities to be covered would unjustifiably restrict the circumstances in which the obligations under the articles would arise. He therefore urged that the matter should be reconsidered, not least in the light of the principle, referred to in the Commission's conclusions at its previous session, that an innocent victim of transboundary injurious effects should not be left to bear his loss.<sup>6</sup>

5. As to the question whether polluting activities should be covered by the draft, the main consideration was that those activities should not fall between two stools: they should give rise either to the remedies resulting from breaches of international law or to the obligations under the draft articles. He believed, however, that article 1, as drafted, was adequate to catch pollution activities in so far as they were not prohibited by international law. There remained, however, the question of establishing causality, particularly in the case of multi-source pollution or cumulative pollution. The draft articles would contribute to resolving those questions only indirectly and in another part of the future instrument.

6. Articles 6 to 10, forming chapter II of the draft, were in line with the Commission's conclusions at its previous session. He saw the statement of principles in that chapter as a first step to be followed by other provisions containing more detailed elaboration and indications of practical measures. He agreed that chapter II should establish only a few principles, concisely stated. It could be improved by retaining only the substance of articles 6, 7, 9 and 10, and omitting article 8, on participation. That provision could more appropriately be placed in a later part of the draft, where practical measures would be elaborated in more detail.

7. With regard to the relationship between prevention and reparation (*ibid.*, paras. 103-111), he saw those two elements as separate responses to different stages of liability. Both were needed and there was no reason why one of them should either dominate or depend on the other. It was injury, potential or actual, which called for that response. The obligation of reparation arose from the occurrence of actual injury and not as a sanction for failure to prevent that injury. That was not, of course, to ignore that the existence of the obligation of reparation for actual harm would be an encouragement to prevention. In sum, he supported the Special Rapporteur's idea of giving equal weight to prevention and reparation (*ibid.*, para. 105).

8. Turning to the texts of the articles, he found the new version of draft article 1 an improvement on the previous wording (see A/CN.4/405, para. 6). Greater accuracy had been achieved by substituting the term "jurisdiction" for "territory". By omitting any

reference to territory, however, the text now referred to activities under the effective control of a State. The wording thus lent itself to the unintended interpretation that it was meant to refer to something close to State acts. It was true that the language had been drawn from Principle 21 of the Stockholm Declaration,<sup>7</sup> but it would be advisable to clarify it, in order to avoid that unintended interpretation.

9. In the light of the definition of "transboundary injury" in draft article 2 (c), he feared that article 1 was now not broad enough to cover cases of harm suffered as a result of physical consequences, for instance in outer space, on the high seas, or on the sea-bed, unless there was a follow-on harmful effect actually in a sphere of jurisdiction of another State and not merely affecting persons in that jurisdiction. He was assuming that "jurisdiction" was not the term to be used in respect of an area where only rights were enjoyed, such as outer space or the high seas. The Special Rapporteur had discussed that question in his report (A/CN.4/413, para. 51), but perhaps not fully enough.

10. On the question of terminology he agreed that the word "harm" would be an improvement on "injury". He had no preference as between "source State" and "State of origin". Lastly, he thought an attempt should be made to find a more suitable term than "spheres" or "places".

11. He understood the reason for including the words "or had means of knowing" in draft article 3, as explained by the Special Rapporteur (*ibid.*, paras. 69-70). As the provision was based on the presumption that a State had means of knowing unless there was proof to the contrary, he could accept it. There was a real possibility, however, that an innocent victim of an activity causing transboundary injurious effects would have to bear the loss; further thought should therefore be given to the danger of leaving such a lacuna.

12. Article 6 could usefully be redrafted to follow Principle 21 of the Stockholm Declaration more closely and to secure greater conformity with draft article 1.

13. He had already suggested that the substance of article 8 should be accommodated elsewhere in the draft. If that was not acceptable to the Special Rapporteur, article 8 could be amalgamated with paragraph 1 of draft article 7, paragraph 2 of which did not seem necessary.

14. Draft article 9 should be shortened, ending with the word "activity". The first sentence of draft article 10 did not seem to convey the Special Rapporteur's stated intention (*ibid.*, para. 112). Broadly, the article should state, first, that harm must be followed by reparation by the State of origin to the innocent victim, and secondly, that the nature and extent of reparation must be determined between the States concerned in accordance with criteria to be laid down elsewhere in the draft articles.

15. Finally, the articles could be referred to the Drafting Committee for consideration in the light of the discussion.

<sup>6</sup> Yearbook . . . 1987, vol. II (Part Two), p. 49, para. 194 (d) (iii).

<sup>7</sup> See 2044th meeting, footnote 8.

16. Mr. BENNOUNA, after congratulating the Special Rapporteur on his skilful treatment of an extremely difficult topic, said that in his view four concepts constituted the foundation of the draft. The first was the obligation to negotiate. As stated by the Special Rapporteur in his fourth report, the draft was intended “to encourage States to work out agreements regulating the activity, and, in the interim, to establish certain basic, general and minimally exigent duties” (A/CN.4/413, para. 5). The aim was to formulate a framework agreement of the same type as the draft articles on the law of the non-navigational uses of international watercourses, and the progress already made on that topic would have a positive influence on the present work.

17. It was not surprising that the obligation to negotiate should have taken shape in situations giving rise to obligations of a very general character—of a so-called “soft law” type—and in situations in which new rules were emerging as a result of technical progress. The States concerned had to be encouraged to adjust their respective interests by agreement, on the basis of general principles and considerations of equity. The ICJ had taken that view in regard to the development of the new law of the sea in the *North Sea Continental Shelf* cases<sup>8</sup> and the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case.<sup>9</sup>

18. The second basic concept was that the obligation to negotiate was triggered by the identification of an activity involving risk. In his report, the Special Rapporteur stated:

... The present draft relates to the point where a State, having identified within its borders an activity involving risk, realizes that the continuation of the activity places it in a new situation, together with other States which may be affected. (*Ibid.*, para. 4.)

Once the activity involving risk was identified, a number of specific questions arose on which the draft articles were silent. One was whether the identification of the activity should be left to the State of origin; another was whether a distinction should be made between existing activities and new activities.

19. The third basic concept was that the activity involving risk was defined by reference to its potential harmful consequences. With reference to activities connected with technological developments, the Special Rapporteur pointed out that “the lack of legal regulation of such activities is one of the major shortcomings of the international legal order” (*ibid.*, para. 46). The activity as such was not regulated by international law, but its possible effects in the event of appreciable harm would be governed by that law. The matter thus fell within the realm of the progressive development of international law, as was indicated by the title of the topic. There again, the Special Rapporteur appeared to be rather hesitant on certain questions. One was whether the activities should be more precisely defined, in particular those whose effects were cumulative or continuous and in respect of which some threshold might have to be set. Alternatively, provision could be made for a procedural mechanism enabling the States concerned to identify the risk.

20. The fourth basic concept, in the words of the Special Rapporteur, was that risk “may be regarded as forming a continuum with injury” (*ibid.*, para. 44). In the first stage, so long as the harm was only potential, the focus should be on preventing and minimizing the risk. When harm actually occurred, the right to reparation arose. The responsibility of the State which had created the risk was engaged, but it could be mitigated in the light of that State’s subsequent conduct.

21. In draft articles 1 and 2, risk was defined by reference to appreciable transboundary harm. He saw no reason to qualify the risk as “appreciable”, since it was, by definition, a risk capable of causing appreciable harm.

22. He suggested that, immediately after draft article 2, a new article should be inserted stipulating who would be responsible for identifying the risk. Provision should be made not only for notification by the State of origin, but also for the affected State to approach the State of origin and request an explanation from it, as in the draft articles on international watercourses.

23. In draft article 3, he approved of the reference to “areas under its jurisdiction”.

24. Draft articles 7 and 8, on co-operation and participation, should be supplemented by more precise provisions specifying in concrete terms the obligation to negotiate.

25. Draft article 9, on prevention, should be expanded. Draft article 10, on reparation, was placed too early in the draft.

26. He believed that the framework agreement under consideration could encourage States to be more directly concerned about the risks inherent in technological developments, and to conclude agreements designed to prevent harmful effects and ensure reparation when they occurred. The Special Rapporteur’s decision to make the notion of risk the centre of the topic had the great advantage of providing a criterion for the distinction between responsibility for wrongful acts and liability for activities that were not prohibited. Responsibility, in the first case, was based on fault; liability, in the second case, was based on risk. In both cases, the chain of causality had to be investigated in order to ascertain which of the two régimes was applicable.

27. He agreed that the draft articles should be referred to the Drafting Committee for consideration in the light of the discussion.

28. Mr. BEESLEY said that one apparently basic point of divergence among members of the Commission was the scope of the topic, and whether it would be too restrictive if it were confined to cases in which appreciable risk of harm was evident from the outset. He had been struck by how little might actually separate the two schools of thought on that issue, which he did not regard as mutually exclusive. Those who advocated the appreciability of risk as an all-embracing concept delimiting the scope of the articles also recognized that there might be some obligations under international law in respect of accidents that occurred even though the risk was not regarded as appreciable or even

<sup>8</sup> *I.C.J. Reports 1969*, p. 3.

<sup>9</sup> *I.C.J. Reports 1974*, p. 3.

foreseeable. At the same time, there was concern that obligations covering both appreciable and non-appreciable risk, couched in general terms, could result in a régime that was too onerous for the State of origin and too limiting of State sovereignty.

29. Conversely, those who called for liability in situations where appreciable transboundary harm was caused even though the risk was not appreciable or foreseeable had conceded that the obligations need not be the same. Relatively few members had demanded a rule of strict—still less of absolute—liability. Indeed, as had already been pointed out, the topic was bounded by the limits set by the concepts of appreciable harm and physical consequences. It was, however, feared that to impose duties to consult, to co-operate and to prevent harm before any appreciable risk of harm became evident would be tantamount to placing all activities under those procedural obligations. Yet many of the worst transboundary catastrophes could arise in situations where there had not been much advance appreciation of the risks involved, and in such cases the question of liability could not be dismissed on the grounds of non-foreseeability.

30. Human foresight left something to be desired if one considered, for instance, the *Titanic*, which had been said to be unsinkable; nuclear radiation, which had been said to be harmless except in massive doses; and mercury emissions into Minamata Bay, which had been thought to pose no threat to human health. The same applied to *post facto* assessments of pre-accident risk as a standard of liability. Whether the expression “foreseeable” risk or “appreciable” risk was used, in practice the line drawn was often arbitrary; a person who suffered injury as a result of risk deemed to be marginally less than appreciable would suffer just as much as a person injured as a result of a risk deemed to be marginally more than appreciable. Nevertheless, the Special Rapporteur had rightly underlined the importance of appreciability of risk, and the principles enunciated in the draft articles were certainly the correct ones to apply in cases where risk was appreciable.

31. It was in that context that he welcomed Mr. Eiriksson’s proposal (2048th meeting, para. 7), which involved broadening the scope of the articles by amending draft article 1 so that it would cover not only situations that created an appreciable risk of transboundary harm, but also, in a subparagraph (b), “other activities which do not create such a risk but none the less cause transboundary harm”. Under the terms of that proposal, the duty of prevention, which involved co-operation and notification, would apply only to activities involving appreciable risk, and a separate chapter would be drafted to deal with activities within the scope of subparagraph (b). The relationship between the present topic and that of State responsibility could be dealt with in a “without prejudice” clause and, if necessary, different guidelines for negotiating reparation in the two situations could be elaborated. He looked forward to the comments of other members, in particular the Special Rapporteur, on Mr. Eiriksson’s proposal.

32. It was becoming increasingly clear that the law in interrelated fields could no longer be compressed into

watertight compartments. That applied, in particular, to the law of the topic under consideration, the law of State responsibility and the law of the non-navigational uses of international watercourses. There was therefore a need to harmonize and dovetail the law in those areas: to stop the progressive development of the law in any one of them pending developments in the others would be counter-productive and unacceptable.

33. In conclusion, he drew attention to paragraphs 15, 16 and 30 of the final statement of the World Conference on the Changing Atmosphere: Implications for Global Security, held at Toronto (Canada) from 27 to 30 June 1988,<sup>10</sup> which had been circulated informally to members of the Commission. New and imaginative approaches to the development of the law concerning the commons or areas beyond national jurisdiction were needed, possibly based on incentives in addition to liability. It was incumbent on the Commission to keep its mind open to such developments, as indeed it had done at the current session.

34. Mr. BARSEGOV expressed gratitude to the Special Rapporteur for his fourth report (A/CN.4/413), which represented a major step forward in solving one of the most complex problems of contemporary life. The Special Rapporteur’s particular merit lay in his endeavour to create a concept based on an objective assessment of the existing state of affairs. That approach gave special value to his report, which could well form the basis for the Commission’s further work. He was pleased to note the readiness of members to seek the common ground without which it would be virtually impossible, given the lack of normative material and doctrinal studies, to arrive at solutions acceptable to States.

35. The Special Rapporteur recognized in the report that “there is [no] norm of general international law which states that there must be compensation for every injury” (*ibid.*, para. 39). That was a fundamental statement of fact which could pave a realistic way for the development of international law through the creation of norms. There was no disagreement about the need to fill gaps, about the need for the progressive development of international law in the present field, or about the practical significance of the problem of transboundary harm; and no one denied that the solution of that problem under international law would help to consolidate law and order, to enhance confidence and promote co-operation among States, and to prevent the negative consequences of scientific and technological progress and ecological degradation.

36. As members were aware, he had been in favour of studying the problem of strict liability on the basis of concrete normative materials in specific areas of activity—outer space, nuclear activities, etc.—taking into account the conditions peculiar to each field and proceeding from scientifically founded criteria for the assessment of risk, harm, etc. The prevailing view seemed to be that the building should start not with the foundations, but with the roof, for the Special Rapporteur stated in the report:

<sup>10</sup> Text distributed to the Second Committee of the General Assembly in document A/C.2/43/2 (3 October 1988).

... the aim of the present articles is precisely to place us at a stage prior to the drafting of detailed agreements concerning specific activities. Such agreements would in fact constitute the next stage, arising out of the general obligations laid down by the articles. (*Ibid.*, para. 4.)

The Commission was obviously free to follow such a course; but if it wished to start by laying down general obligations concerning harm resulting from a lawful activity, and thus to encourage States to conclude concrete agreements on liability for transboundary harm in specific fields, the best course would be to draw up general recommendations to which States could refer for guidance in their treaty practice. The matter was, of course, one for States to decide, and he had no doubt that they would arrive at the right solution.

37. One of the problems raised by the Special Rapporteur with regard to the present topic concerned the definition of the legal nature of strict liability and the topic's relationship to that of State responsibility for wrongful acts. The fundamental difference between the two forms of responsibility lay in their legal nature. Unlike responsibility for unlawful acts, the form of responsibility under consideration related to acts that were not prohibited. That was why he thought it would be preferable to use the expression "lawful activity" in the title of the topic.

38. It was also necessary to have a clear understanding of what the Special Rapporteur meant by the reference in draft article 1 to the "jurisdiction of a State". Acts performed by a State within the confines of its territory were carried out not on the basis of any jurisdiction vested in it by international law, but on the basis of its sovereignty. The reference to jurisdiction in international law could be construed as a delimitation of the frontiers of national jurisdiction between States, but had nothing to do with an assessment of the lawfulness of an activity, unless it was directly prohibited by an international convention.

39. In the desire to establish a general obligation to make reparation for injury, the lawful nature of the conduct had been lost from view. Where an obligation was violated under the primary rules of international law, the question of wrongfulness might arise. Hence, once the primary rules of conduct were established, the consequences of a regulated activity no longer fell within the sphere of strict liability. The question therefore arose as to the legal nature of the obligation to make reparation for injury arising out of a lawful activity.

40. According to the concept of strict liability as proposed, activities involving risk that could be connected with a source of danger greater than usual provided the first link in the chain, and transboundary harm the last; neither risk, nor an activity involving risk, nor injury *per se* could serve as the basis for strict liability. The key element, according to the Special Rapporteur, was the causal link between risk (or an activity involving risk) and injury. It was not altogether clear, however, what that link was. At a number of points in his report, the Special Rapporteur advanced the idea that, to create an obligation to compensate for transboundary harm, it was sufficient to establish a causal link. For instance, he stated:

... in order for the result to be attributed to the source activity, and with it possible liability, the sole requirement is that the chain of cause and effect should remain unbroken and that each link should be unquestionably connected to the previous link, so that the chain may be followed back to the source activity. (*Ibid.*, para. 52.)

Following the causal link to its logical conclusion, it had to be recognized that any activity which caused appreciable harm as its direct consequence would have to be regarded as wrongful. The harm in such a case might be, for instance, the consequence of criminal negligence resulting from the use of a source of danger that was greater than usual.

41. In the relationship between risk and harm as it had been outlined, the role of situations of *force majeure* had not received sufficient attention. He noted that the Special Rapporteur spoke of *force majeure* as "a supplementary cause: a cause which is not part of the normal chain of causation" (*ibid.*, para. 28). But it was precisely the presence of *force majeure*, in activities involving risk from which harm ensued, that confirmed the lawful character of those activities. Were it otherwise, and were the harm to occur as a result of the natural and normal consequences of an activity involving risk, then, logically, the activity should be included among wrongful acts. In reality, *force majeure*, which could not be foreseen or prevented, formed, as it were, a watershed between responsibility for lawful and for unlawful activities. *Force majeure* placed a risky activity beyond State control, and that ultimately resulted in transboundary harm ensuing from lawful activities. It transformed an abstract notion of risk into concrete harm, which not only had no direct causal link to the corresponding lawful activity, but actually conflicted with that link, in that it deprived the State of origin of the possibility of making positive use of the results of its lawful activity. Thus, if the risky activity did not fall outside the bounds of lawfulness, it could give rise to harm only in the event of *force majeure*.

42. Accordingly, if the Commission did not intend to go beyond the framework of the topic, it must think in terms of compensation for harm caused as a result of a lawful activity throughout which the State did not wish harmful consequences to occur and did its utmost to prevent such consequences. Such an understanding of strict liability would be in line with national practice and legal doctrine. However, what was valid within the national boundaries of a State could cause difficulty in the context of inter-State relations. The question therefore arose whether responsibility could be attributed to a State for something it had not done, or had not intended to do, and had been unable to prevent. It was clear that further work on the subject was needed. In the process, it would be correct not to substitute harm for risk, but to identify the relationship between all the elements involved in the concept more precisely in the light of its public function.

43. Referring to the initial and final links in the chain, he noted that a certain degree of risk was inherent in any lawful activity, just as a certain degree of harm was unfortunately unavoidable. If responsibility were to be attributed for any injurious consequences whatsoever, then everyone would be responsible to everyone else. That would be like holding responsible every member of

the Commission who smoked on the grounds that, in consuming oxygen, he impaired the health of others.

44. The Special Rapporteur's wish to introduce the concept of "appreciable risk" was understandable: in his words, it was intended to avoid the creation of an "unacceptable situation" in which "virtually any new activity would have to be subjected to scrutiny by States which might be affected" (*ibid.*, para. 29). That was why another "threshold" was established below which there would be no liability (*ibid.*, para. 30).

45. The Special Rapporteur acknowledged that quantification was virtually impossible in that area. He might have yielded to the temptation to give up the idea of risk altogether and might have confined himself to actual harm, but fortunately he had not, for a number of reasons. First of all, he wished to base his conception of that special kind of responsibility on notions developed in various legal systems, such as aggravated risk, and to ensure that that conception was as realistic as possible. He also wished to find a basis for co-operation. But how was it possible to co-operate in the prevention of something that did not yet exist?

46. Draft article 6 was the corner-stone of the concept devised by the Special Rapporteur; in it, the notion of co-operation in preventing injurious consequences in the form of transboundary harm was based on the presence of risk. The Special Rapporteur was right in conceiving the goal of the draft articles as being not simply to ensure equity in compensation for harm, but also to avert injurious consequences in the form of pollution, etc. And such a goal could never be achieved without co-operation.

47. The provisions of draft article 7 on co-operation reflected, in his view, a high level of civilization and a deep understanding of the vital interests of mankind. Article 7 occupied a key position in the draft articles and in the solution of the problem as a whole. It testified to the wisdom of both the Special Rapporteur and the Commission, and to the possibility of operating on the level of the highest human values, both in terms of respect of equity and concern for the interests of all affected parties, and in terms of ensuring further progress for human civilization. He would therefore categorically oppose the deletion of article 7.

48. The Special Rapporteur had not closed his eyes to the very important fact, in the context of human development, that the sort of activity covered by the draft articles was useful "not only to the State in which it was being carried on . . . but also to the State which was accidentally affected by the damage" (*ibid.*, para. 113). He had also recognized that "the measures of prevention adopted could impose a heavy financial burden on the State of origin, a factor to be cited at the time of reparation". As he explained, "activities based on modern technology and involving risk make perpetrators and victims of us all" and "are being carried on in nearly all countries", so that "today's affected State might be tomorrow's State of origin" (*ibid.*).

49. The Special Rapporteur had adopted a balanced approach to the establishment of a régime for reparation for damage in situations where there was no agreed treaty régime, either bilateral or multilateral. He

proceeded on the assumption that the country in which a disaster took place "must not be left to bear 'alone' the injury suffered as a result of an activity involving risk" (*ibid.*, para. 112). The injury must be assessed "not by the exact amount of specific damage caused by the accident in question, but by the amount of damage in relation to other factors": accordingly, the victim would "have to bear the resulting injury to some extent" (*ibid.*).

50. Thus the efforts of countries to cope with sources of aggravated risk, not only through prevention, but also through the fastest and fullest possible containment of injurious consequences, must be taken into account; such efforts were demanded not only by a concern for equity, but also by the need to reduce the number of victims and their exposure to injurious effects. It was impossible, in that context, not to mention the tragic events at Chernobyl, and the colossal physical resources and selfless energy devoted to minimizing not only the "national" consequences, but also the transboundary effects. Hence the philosophical basis proposed by the Special Rapporteur for solving the problem of reparation for injury—namely that equitable treatment of one country should not turn into punishment for another which was acting as a pioneer of scientific and technological progress—was extremely important. He congratulated the Special Rapporteur on having adopted a humanistic approach, but was surprised and disappointed to have heard the view expressed during the discussion that that aspect of the problem was not the Commission's concern and that the convention to be elaborated should focus on the victims. The interests of victims of transboundary effects should, of course, be taken into account in developing the concept of that particular kind of responsibility, but the instrument being drafted must focus on the interests of mankind as a whole, on the prevention of ecological degradation and the promotion of further scientific and technological progress.

51. The provisions of draft article 3, on attribution of liability, clearly established that the State of origin had the obligations connected with reparation if it knew or had means of knowing that an activity involving risk was being carried on in areas under its jurisdiction. He shared the view of other members of the Commission that a State could merely ensure that natural or legal persons were brought to account for harm inflicted. One member had said that the member countries of CMEA, unlike the capitalist countries, could answer for everything because they knew everything. He did not think that the Government of the United States of America knew any less about what was going on in that country than the Government of the Soviet Union did with regard to its territory; but that was not the point. What was striking was the failure to take account of the fundamental changes being made in the economy of the Soviet Union and other socialist countries. For example, the Soviet Union had adopted a law on enterprises which gave them full economic independence; that was one of the principal areas of *perestroika* and it had far-reaching consequences.

52. The problem of attribution of liability was especially acute for the developing countries. The

Special Rapporteur said that the primary basis of attribution was territorial, but that there was another necessary condition, namely that “the State should know or have means of knowing that the activity in question is being carried on within its territory or in areas within its control” (*ibid.*, para. 61). He also expressed the view that, in principle, a State was considered to have had means of knowing unless there was proof to the contrary (*ibid.*, para. 70). In other words, a State was normally considered to be capable of knowing that an activity was being carried on. The Special Rapporteur recognized that the responsibilities set forth in the draft “could easily enough be attributed directly to the State of origin by simply tracing the causal chain of events to its territory” (*ibid.*, para. 68). Those propositions, which were crucial to the draft’s whole conception, placed the developing countries in a difficult position; for very often they could not know about or control activities carried on in their territory by foreign companies, and it was by no means clear how the provision on “means of knowing” would protect developing countries, as the Special Rapporteur contended (*ibid.*, para. 69). The problem that arose when the entity which bore responsibility was not that with whose activity the injury was linked affected all States; a solution that would cover all such situations should therefore be sought in the draft articles.

53. Mr. Sreenivasa RAO said that the subject of the fourth report (A/CN.4/413) had raised extremely high expectations in the international community. The problems it dealt with were contemporary and highly complex, and their treatment afforded wide scope for innovation. The Commission, being a body entrusted with the progressive development and codification of international law, must try to devise a set of principles which were readily recognizable and which could be applied by States and other entities in concrete cases of harm. While the need for specificity should be the guiding factor in developing those principles, the basic objectives of providing a safe, viable global environment and of preventing and minimizing damage in the context of, but without deterring the pursuit of, development goals must be kept in mind.

54. When the basic objectives were conceived in such general terms, the concept of liability became merely one part of the whole framework. Some speakers, while emphasizing the broader objectives involved, had urged that a realistic attitude be adopted to what could be achieved through the draft articles, and that a pragmatic assessment be made of how much more could be accomplished through other mechanisms: the mobilization of public opinion, the elaboration of laws and regulations of a promotional nature and of international standards, and the establishment of institutional mechanisms that would provide the necessary aid, assistance and skills for managing disaster situations. He thought the Commission should orient its work towards a broader conception of the topic. The aims could and should be set high, but they could be made clear and straightforward and linked to other processes.

55. The Commission need not worry unduly at the present stage about interlinkages with concepts that were related to other topics under consideration; in fact,

such connections could be very helpful. That was why he believed that any limiting of the Commission’s perspective should be avoided. For example, the concept of appreciable harm could be understood differently in the context of the non-navigational uses of national watercourses than it was in that of the injurious consequences of lawful acts; but any difference in the development of the pertinent concepts could, if necessary, be streamlined at a later, finishing stage in the work.

56. He was not too concerned about what could be treated as a promotional objective as opposed to a strict obligation under the terms of the draft articles, which need not be solely a set of hard-core principles: they could be a combination of general provisions emphasizing the need to achieve certain goals, and strict obligations—for example, not to cause harm. The decision to develop a framework agreement, as opposed to a draft convention, should not be allowed to limit the kind of principles that it would be relevant to enunciate in the draft.

57. Many of the concepts that had already been considered in connection with the topic of the injurious consequences of lawful acts still created more problems than they solved. Of course, that was all part of the process of developing principles in a complex area, and the Special Rapporteur should not be disheartened by criticisms made.

58. The draft to be elaborated in the quest for an acceptable code of liability should not become bogged down in a search for acts “not prohibited” by international law; the negative formulation “not prohibited” in the title of the topic should not be allowed to constrict the Commission’s thinking, and was, in his view, better avoided, as suggested by other members. There was no need to fear that a gap would be left in international law: the living nature of the law, in both the internal and the international systems, was such that solutions were always found, through creative interpretation of available principles and/or through “judicial innovation”.

59. The Commission’s main concern should be with the principles covering harm caused to one State by activities in another State. Clearly, liability must be involved, because the rights of others had to be taken into account on a small planet like the Earth. And naturally, harm could not be allowed to go unredressed; the Commission was engaged in the task of determining how it was to be dealt with. That search should be broadened by enlarging the scope of the topic, as advocated by Mr. Calero Rodrigues and Mr. Tomuschat (2045th meeting), Mr. Francis (2048th and 2049th meetings) and Mr. Beesley, to focus not only on the parties immediately involved, but also on the social purpose served by the activity in question. Preventive measures required should not be so costly as to outweigh the benefits of the activity whose harmful effects had to be averted.

60. The situation was, of course, entirely different in the case of highly hazardous activities involving the risk of massive disasters, such as the Bhopal and Chernobyl accidents. What was needed in such cases was a global management approach focused not only on the issue of

liability, but also on such aspects as relief, rehabilitation and international assistance.

61. He agreed with Mr. Tomuschat's suggestion that the Commission should identify a number of subject areas of concern: the draft articles could include the conditions in which liability arose; mitigating circumstances; the type and extent of reparation required; the relationship between cause and harm; the question of the burden of proof; the duty to co-operate, to notify and to share knowledge about the existence of risk; and, as suggested by Mr. Tomuschat and Mr. McCaffrey (2045th meeting), the consequences of negligence.

62. Furthermore, the topic of liability could be built upon generally accepted principles of international law: respect for State sovereignty and territorial integrity; pursuit by States of their rights and interests within the limits of "reasonableness"; accommodation of multiple interests on the basis of common interests; and principles already developed in the fields of the law of the sea, outer space, the utilization of nuclear energy and Antarctica, including the principles laid down in the Stockholm Declaration<sup>11</sup> and in the Helsinki Rules on the Uses of the Waters of International Rivers.<sup>12</sup> In addition, the Commission should aim at a concept of and framework for liability which emphasized the concept of risk essentially in the context of a preventive approach, as suggested by Mr. Tomuschat and Mr. Beesley, linking it broadly to "harm", "injury" or "injurious consequences". In other words, the Commission should view and so limit the concept of liability not as an instrument of punishment, but as a means of promoting preventive measures and common management of activities of general community interest relevant to a new ethic of development, transfer of resources and technology.

63. The concept of appreciable harm had been questioned by several previous speakers on the grounds of its subjectivity. But no matter whether the term employed was "appreciable", "significant" or "substantial", the point at issue was whether the harm exceeded the limits of acceptability established by common consent in the relevant bilateral and multilateral agreements. The existence of such limits or thresholds could not, in his opinion, be ignored, although it did not necessarily have to be spelt out in the body of the draft articles. It would also be appropriate for the Commission to recommend that States should, wherever possible, agree upon such thresholds when drawing up agreements at the bilateral or multilateral level, bearing in mind the nature of the activities concerned. In that regard, competent international organizations and independent commissions had a valuable role to play in the clarification of policies and the identification of applicable standards.

64. As already stated, the basic principle was that no State had the right to cause harm to others in the exercise of its own rights. The concept of liability should be broadly defined to cover not only the State or State

authorities, but also other entities operating in a particular area and exercising effective control over their activities. As to the concepts of "jurisdiction" and "control", it should be noted that, in the case of multinational corporations, jurisdiction was a highly sophisticated concept requiring a most careful approach, as Mr. Graefrath (2047th meeting) had pointed out. After all, multinational corporations had, over the years, developed a variety of operating mechanisms which did not neatly fit into the jurisdiction of any one State; indeed, it might be said that a simple view of jurisdiction and control would not do proper justice to matters such as taxation, anti-monopoly questions and liability involving multinational corporations. It was extremely important, therefore, that the concept of jurisdiction should not be framed in such a way as to prevent the Commission from examining the role of multinational corporations even when they were technically within the jurisdiction of States.

65. Moreover, unlike States, multinational corporations were motivated exclusively by the need to make profits. Hence they should take the "risk" and accept liability, particularly since, unlike most States, they had the means to prevent, minimize or manage harm when it occurred in a given case. He therefore fully endorsed the views expressed by Mr. Barsegov, and earlier by Mr. Razafindralambo (2048th meeting) and Mr. Graefrath. Accordingly, draft article 3, in particular, should be reworded so as to cover not only areas, but also activities, under the effective control of the State of origin, the term "State" being understood not to cover the liability of other entities, where it could be shown that they had effective control over an activity. The liability of such entities should also be dealt with directly by the Commission in the draft articles.

66. In conclusion, he emphasized that the Commission should not be satisfied with an unchanged structure of inquiry when dealing with the changed structure of international liability. He was confident that the Commission would find the right balance in treating the concept of liability by focusing not only on the State or State authorities, but also on all other entities, such as multinational corporations; by addressing "harm" or "injury" without unduly restricting it to "risk"; by making liability proportional to effective control and, more importantly, to the means available to prevent, minimize or manage harm, injury or injurious consequences; by dealing with such factors as prevention, due diligence, insurance, and global emergency-relief and management schemes; and with a view to promoting the application of science and technology to development in a manner consistent with the basic objective of achieving a safer and sustainable environment from an inter-generational perspective.

67. Mr. KOROMA said that the Special Rapporteur was to be congratulated on his learned, lucid and interesting fourth report (A/CN.4/413) on a topic which complemented the international community's efforts to prevent the pollution of the atmosphere. In that connection, he referred to the conference held at Toronto the previous week to discuss an international law of the atmosphere parallel to that of the sea, and was pleased to note that Mr. Beesley (para. 33 above) had also men-

<sup>11</sup> See 2044th meeting, footnote 8.

<sup>12</sup> Adopted by the International Law Association in 1966; see ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

tioned that conference and had informally circulated a document relating to it.

68. In pursuing its work on the present topic, the Commission had to take account of the objections raised in various influential quarters. Such opposition could not be dismissed as ideological, and the Commission should not slacken in its efforts to dispel doubt by continually bringing its work up to date and taking cognizance of developments in the same field elsewhere in the international community. By doing so, it would demonstrate that the topic was an important and highly relevant one.

69. All members of the Commission were agreed on the primary rule that no State was entitled to cause harm to another State through its activities, whether lawful or unlawful, and that if harm did occur, the State of origin had to make reparation or pay compensation to the affected State. That principle should be formulated as early as possible in the draft, perhaps even before the article on scope. The rule was widely accepted in general international law, in the jurisprudence of the ICJ and in many international legal instruments, and there was no reason to fear that it would stand in the way of the development of science and technology. The actual wording used could, of course, be adapted to accommodate any justified objections.

70. In the introduction to his report, the Special Rapporteur said that the draft related to the point where "a State, having identified within its borders an activity involving risk, realizes that the continuation of the activity places it in a new situation, together with other States which may be affected" (A/CN.4/413, para. 4). The situation thus described was open to several interpretations. The activity might be carried on by a third party without the knowledge of the State in whose territory it took place; the risk might have come about as a result of *force majeure*; or the activity might have involved no risk at first, but have been found to do so later. In any event, the State would be unable to identify such an activity until the harm had been done and the need for reparation had arisen. Accordingly, a State having introduced into its jurisdiction an activity involving risk was liable for transboundary harm.

71. The Special Rapporteur further remarked that, in the present case, the only obligations were "those governed by the general duty to co-operate, namely to notify, inform and prevent" (*ibid.*, para. 6). Without wishing to minimize the importance of that general duty, and while agreeing, in particular, with Mr. Barsegov on the primary importance of preventing pollution, he considered that the principle of liability for compensation or reparation when harm did occur was of greater importance and should not be bracketed together with the duty to co-operate. He hoped that point would be taken up later.

72. In his oral introduction (2044th meeting), the Special Rapporteur had expressed the fear that acknowledgement of the primacy of the rule of compensation for injury might lead to a one-article draft. That need not be the case, and besides, the text being drafted need not necessarily become a convention, but could take the form of guidelines or guiding principles.

73. The meaning of draft article 1 would be clearer if it were amended to read:

"The present articles shall apply with respect to activities carried on in the territory of a State or under its jurisdiction, or in territory under its effective control, when such activities cause transboundary harm."

The reference to territory was, in his view, essential. By sacrificing it, the Special Rapporteur had intended to ensure that the article covered ships and other objects, such as aircraft, spacecraft and oil installations, while at the same time avoiding the legal fiction that such objects formed part of the territory of the State controlling them. That point could perhaps be met by drafting two separate articles, one dealing with activities within the territory of a State—which undoubtedly formed the main category of activities under consideration—and the other with activities connected with extraterritorial objects under the State's jurisdiction.

74. As to the concept of appreciable risk, the legal basis for liability was the harm caused, not the risk incurred. Risk was a matter of fact, not of law. Moreover, the list of activities involving risk was becoming longer every year; the principle of risk did not, therefore, constitute a sound basis for the draft articles.

75. He fully agreed with the three principles set out by the Special Rapporteur in paragraph 85 of the report (A/CN.4/413); unfortunately, however, the draft as it stood did not appear to be constructed on the basis of those principles. He urged the Special Rapporteur to proceed along the lines of the principles he himself had enunciated.

76. The CHAIRMAN informed members that, during the previous week, the Commission had used its full allocation of working time plus 15 minutes.

*The meeting rose at 1.05 p.m.*

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## 2075th MEETING

*Thursday, 7 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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**International liability for injurious consequences arising out of acts not prohibited by international law (concluded)** (A/CN.4/384,<sup>1</sup> A/CN.4/405,<sup>2</sup> A/CN.4/413,<sup>3</sup> A/CN.4/L.420, sect. D)<sup>4</sup>

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR  
(concluded)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Attribution)

ARTICLE 4 (Relationship between the present articles and other international agreements)

ARTICLE 5 (Absence of effect upon other rules of international law)

ARTICLE 6 (Freedom of action and the limits thereto)

ARTICLE 7 (Co-operation)

ARTICLE 8 (Participation)

ARTICLE 9 (Prevention) and

ARTICLE 10 (Reparation)<sup>5</sup> (concluded)

1. Mr. SOLARI TUDELA emphasized the importance of the Special Rapporteur's fourth report (A/CN.4/413), which had the particular merit of reflecting the discussion generated by the third report (A/CN.4/405) in the Commission and in the Sixth Committee of the General Assembly. Just as all international law institutions were interrelated, yet some enjoyed particularly close ties, so three of the topics now before the Commission—international liability, State responsibility and the law of the non-navigational uses of international watercourses—were especially closely interwoven. The Commission must keep those links in mind and strive to harmonize the instruments it was developing on the three topics.

2. The topic under discussion was concerned to a large extent with the preservation of the environment, which was deteriorating much more rapidly than could be offset by protective measures, the result being that man's natural surroundings were becoming more and more inhospitable. The Commission should seize the opportunity before it of helping to arrest that deterioration, not only through the calibre of its work, but also through its ability to act promptly.

3. In draft article 1, the Special Rapporteur defined the activities to be covered by the future convention as those which created an appreciable risk of causing transboundary injury. By espousing the concept of liability for risk, the Special Rapporteur had excluded from the scope of the draft harm caused by activities not prohibited by international law that did not involve ap-

preciable risk: hence he was also forced to exclude compensation for innocent victims and injury that was not appreciable, and to introduce a subjective criterion to determine whether the risk involved in a given activity was appreciable. In his fourth report (A/CN.4/413, para. 39), the Special Rapporteur expressed the view that there was no norm of general international law which stated that there must be compensation for every injury. But that should not prevent such a norm from being incorporated in the draft. The Commission was involved not only in the codification, but also in the progressive development of international law. He himself was aware that the international community was not entirely ready to accept such a norm, but believed that, faced with the sharp rise in environmental degradation, special circles among the public that had a strong influence over governmental decisions would not only be prepared to accept it, but would even demand that arrangements be made to ensure compensation for the victims of injury, whatever its origin.

4. Article 1 referred to two additional concepts: jurisdiction, which replaced the idea of territory used earlier; and effective control, which might be applied to Namibia, for example, perhaps to certain portions of Antarctica—although it was questionable whether effective control would really be involved there—and to the occupied Arab territories.

5. None of that meant that the concept of risk was no longer useful: in his view, the distinction between appreciable risk and risk which was not appreciable should come into play in determining the amount of compensation.

6. He had already spoken of the need to correlate the terms defined in draft article 2 with those used in the draft articles prepared on State responsibility and on international watercourses. In article 2 (a) (ii), for example, where it was stated that "appreciable risk" meant the risk which could be identified through a simple examination of the activity involved, the exact meaning of the expression "simple examination" was not entirely clear. Presumably it meant an examination carried out without technical assistance in order to determine the risk level of the activity. But unless he was mistaken, it was impossible to determine, through a simple examination, the risk involved in an activity that generated creeping pollution which would cause long-term harm, or to identify such an activity as one involving appreciable risk. Another point also needed to be clarified: how did the transboundary injury referred to in article 2 (c) relate to injury in outer space, on the high seas or in Antarctica?

7. Draft article 3 met the concerns revealed during the discussion about the means States might have of knowing about the activities in question. Those concerns arose primarily for the developing countries, whose limited resources might prevent them from fulfilling that control obligation, but the problem affected the entire international community as well: that fact could be acknowledged by incorporating in the article a reference to the technical assistance that a United Nations specialized agency could provide to developing countries, on request, in such cases.

<sup>1</sup> Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

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

<sup>5</sup> For the texts, see 2044th meeting, para. 13.

8. He had a number of reservations about draft article 6. The freedom of action of States had to be limited in conformity with the Charter of the United Nations and the principles of international law—for example, Principle 21 of the Stockholm Declaration<sup>6</sup>—otherwise an interpretation might be placed on the article that was entirely different from what the Special Rapporteur intended, particularly in the field of human rights.

9. The principles regarding co-operation and prevention in draft articles 7 to 9 should also be clarified, particularly in relation to human rights, by indicating the minimum co-operative measures to be taken by States, measures which could then be supplemented by the parties directly concerned in negotiations between themselves.

10. With regard to draft article 10, on reparation, he stood by what he had said earlier about the concept of risk: risk was not the draft's point of departure, but it should play a role in the establishment of the amount of compensation, for it was only right that that amount should vary depending on whether the harm had been caused by an activity involving appreciable risk or one that did not involve such risk. Lastly, negotiations between States to determine the amount of compensation would be the primary, but not the sole, means of reaching agreement.

11. Mr. AL-QAYSI said that the Commission's task was complex and of vital importance for the world community, particularly the developing countries. It was complex because the Commission was attempting to break new ground in terms of the progressive development of international law, and of vital importance because it was imperative to strike a proper balance between lawfulness and the avoidance of harm. The Special Rapporteur had submitted a fourth report (A/CN.4/413) which reflected a serious attempt to propose a set of basic general duties. For his own part, he would confine himself to making a number of general observations.

12. The characteristics of the present topic had gradually taken shape as the Commission's work on it had progressed. The scope of the draft, which had been established at the very outset, had been refined during the course of the discussion: the Special Rapporteur was called upon to deal with lawful activities involving danger or transboundary risk. Opinions differed on whether the time had come to take up the specific liability attributable to such activities, and whether the structure proposed by the Special Rapporteur would allow the problem to be solved. As to the form the Commission's product should take, the Special Rapporteur had chosen the approach of submitting draft articles designed to encourage States to work out specific agreements. Yet there was another school of thought which believed that the most the Commission could do was to develop a set of recommendatory rules or guidelines addressed to States.

13. Should the foundation for the draft be liability for risk or for harm? On that all-important question, he

was inclined to side with the Special Rapporteur, who favoured liability for risk. In adopting that approach, the Special Rapporteur had remained true—with good reason—to the results of the Commission's consideration of the topic with the previous Special Rapporteur. At the same time, he had set a goal that was not at variance with the Commission's mandate, although not all members shared that view. Personally, he did not believe that paragraph 7 of the report should be interpreted as meaning that the Special Rapporteur was deviating from the mandate assigned to the Commission by the General Assembly: he was simply trying to define the task that had to be accomplished at the current stage. Moreover, the Special Rapporteur pointed out that: "Here, the only obligations are those governed by the general duty to co-operate, namely to notify, inform and prevent." (*Ibid.*, para. 6.) Those were indeed the Commission's main concerns. The Special Rapporteur went on to say: "If injury occurs, there is no precisely specified compensation; instead, there is an obligation to negotiate in good faith to make reparation for the injury caused, possibly taking into account various factors . . ." (*Ibid.*) Moreover, the title of the topic as determined by the General Assembly did not in any way qualify the types of non-prohibited acts to be covered, something that had been left for the Commission to decide. He therefore did not share the view that, in basing the entire draft on liability for risk, the Special Rapporteur was pursuing an objective not in line with the Commission's mandate.

14. The part of the report dealing in detail with the subject of injury (*ibid.*, paras. 37 *et seq.*) confirmed that the Special Rapporteur had not lost sight of the Commission's mandate from the General Assembly. There again, like Mr. Mahiou (2048th meeting) he could only endorse the approach adopted by the Special Rapporteur. Paragraph 40 of the report in particular was entirely in keeping with the Commission's objectives and reflected the conclusions that could be drawn from the discussions in the Sixth Committee of the General Assembly. Nothing prevented the Commission from incorporating the concept of strict liability if it so desired. If it did not, or could not, do so, it should set a more modest objective—to which the approach taken by the Special Rapporteur would conform perfectly.

15. Some members questioned whether the Special Rapporteur had laid enough stress on the question of injury. A careful reading of paragraph 44 of the report revealed that he had not lost sight of the need to strike a balance between risk and injury. Risk did indeed play an important role, and could be regarded as forming a continuum with injury. The Special Rapporteur envisaged a potential obligation based on risk which became an actual obligation once harm had occurred, and pointed (A/CN.4/413, para. 48) to the other conditions relating to injury. Personally, he agreed with Mr. Mahiou that that was obviously a case of progressive development of international law; Mr. Mahiou had also quite rightly referred to the importance of the principle of good-neighbourliness.

16. It had been stated that risk was an abstract notion and that the Special Rapporteur's concept of it was unduly subjective. He did not share that view. He pointed

<sup>6</sup> See 2044th meeting, footnote 8.

out that the Special Rapporteur had tried (*ibid.*, para. 22) to suggest a number of factors that could be used to transform risk into an objective, albeit abstract, notion.

17. The question of the scope of the draft had to be settled once and for all if the Commission was to make progress in its work on the articles—something it must certainly do, in view of the length of time that had elapsed since it had begun considering the topic. It could do so on the basis of the progress made in the discussion so far. It could use the draft articles submitted by the Special Rapporteur as a starting-point and attempt to refine them. While he did not wish to go into specifics, he did wish to comment on a number of proposals made by other members of the Commission concerning certain articles.

18. It had been said that the terms “jurisdiction” and “control” were not as clear as they should be. Mr. Graefrath (2047th meeting) had referred to the hypothetical case of a company established under the law of the United States of America, with its head office in Madrid, controlled by Canadian shareholders and working mainly in the Sudan. It was certainly true that such a company could fall under several jurisdictions. For what purpose, however, had the Special Rapporteur used the notion of “jurisdiction” in draft article 1? Was it to determine the legal status of the company? For his part, he believed that the Special Rapporteur had used that notion because of its links with the territory on which the lawful activity was being conducted; thus, in the event of transboundary harm, the *continuum* between the risk and the harm would come fully into play. In the example given by Mr. Graefrath, the jurisdiction of the Sudan would apply.

19. With regard to the notion of “effective control”, Mr. Razafindralambo (2048th meeting), supported by Mr. Sreenivasa Rao (2074th meeting), had urged that it should be made clear that the State of origin was responsible only for activities directly under its control, since many foreign companies established in the developing countries were outside the real control of the national authorities, which did not have adequate means for controlling their activities. The example of the Bhopal disaster had been cited in support of that argument. Without wishing to pass any judgment on the negotiations by developing countries with foreign companies to attract them to their territory, he nevertheless believed it had to be acknowledged that a foreign firm did not establish itself overnight on a State’s territory without prior negotiations with the Government of the country. The draft articles would at least be instructive in making the developing countries aware of their responsibilities and thereby help to settle the question of effective control.

20. Other points which deserved attention included the relationship between the *sic utere tuo ut alienum non laedas* principle and the principle of reparation for harm, the rule of due diligence and the question of the burden of proof. In order to make progress in examining those problems, however, the Commission first had to agree on the scope of the draft. On that point, conflicting opinions were still being expressed.

21. Under the circumstances, the question arose as to how the Commission should proceed. Should it continue to discuss draft articles despite the divergence of views? Should articles be referred to the Drafting Committee? Might it not be unwise to assign the Drafting Committee the task of settling problems which it was for the Commission to solve? It was not possible, however, to refrain from referring those texts to the Drafting Committee if the Commission agreed that the Special Rapporteur’s proposals were the outcome of its earlier discussions and if it was not prepared to alter the direction of its work. An intermediate solution was perhaps possible: it could refer the draft articles to the Drafting Committee yet at the same time request the Special Rapporteur to prepare a new report containing a thorough examination of the articles, perhaps from the standpoint suggested by Mr. Koroma (2074th meeting) and with due regard for the objective indicated by Mr. Sreenivasa Rao, i.e. endeavouring to give general form to the solutions which had already been adopted in certain conventions on pollution, outer space and nuclear energy. The Commission would consider the report at its next session, article by article, in order to see to what extent it could agree on a given part of the draft, and would thus achieve two objectives: give the Drafting Committee the necessary guidance and decide on the shape to be given to the draft articles.

22. The CHAIRMAN, speaking as a member of the Commission, said that for many years there had been long and lively discussions on the present topic, without any agreement on the method of dealing with it. When the previous Special Rapporteur had submitted a schematic outline, the Commission, after an extensive debate, had decided to communicate to the Sixth Committee of the General Assembly all members’ observations with a request for guidance from the Assembly on the direction in which it was to continue its work. Unfortunately, the General Assembly had not given a clear answer to that request. The present Special Rapporteur had thereupon decided to adopt a different approach to the topic, basing the draft articles on the concept of risk. It was a wise and intelligent solution, because it dealt at the same time with the two aspects of the question—reparation and prevention—highlighted by Mr. Calero Rodrigues (2045th meeting). That approach also had the advantage of limiting the scope of the topic, for it was a question of examining not what was lawful and what was wrongful but, in more concrete terms, transboundary harm resulting from pollution.

23. Unquestionably, the principles of law recognized at present both in State practice and in legal writings included one which was asserting itself more and more, namely that anyone creating a source of abnormal risk had to answer for the resulting harm, even if no wrongful act had been committed. In any event, international liability was conceivable for exceptional risks—“exceptional” and not “appreciable” as proposed by the Special Rapporteur. As a result of technological developments, the problems connected with liability for the possible consequences of space or nuclear activities by States were among the most serious in the world today. Yet if States were to accept international liability for the consequences of that type of ac-

tivity, perhaps the only way was to separate clearly, from the legal point of view, the obligation to make reparation—basing it exclusively on risk—from the concept of lawfulness or wrongfulness. In substance, it was not the duty to make reparation which the States in question refused to accept, but rather the idea that they could have committed a wrongful act, since their activity was not forbidden by international law (mention had been made in that respect of the case of the United States of America, which had made Japan an *ex gratia* payment in compensation for the damage caused by its nuclear tests in the Marshall Islands, without admitting thereby that it did not have the right to carry out those tests). The States concerned would doubtless be more disposed to accept international liability for activities which, though lawful, constituted a source of exceptional risk.

24. As to the draft articles submitted by the Special Rapporteur, it would be preferable to say in article 1 that the articles applied with respect “to the consequences of activities . . .” rather than “to activities . . .”. In addition, the word “appreciable” should be replaced by “exceptional”, both in article 1 and in article 2 (a) (ii). The expression “highly likely” should be eliminated from article 2 (a) (i), since it was impossible to measure likelihood; moreover, the expression “throughout the process” was ambiguous, for it was difficult to see what the word “process” referred to. Lastly, it was necessary to clarify in the Spanish text of article 2 (a) (ii) the subject of the verb *maneja*.

25. Furthermore, the question arose whether the draft articles were intended to apply to all transboundary harm, regardless of its extent, inasmuch as the draft would cover only those activities which created an exceptional risk. In that connection, he did not believe it advisable to draw up a list of dangerous activities. The activities in question were permitted by international law and wrongfulness attached solely to their consequences, in other words to the harm they caused. The decisive factor was the risk. The risk, however, first had to be exceptional, and secondly it had to produce harm. Obviously, it would never be possible to eliminate all risks completely. On the other hand, it was possible to prevent the consequences of a lawful but exceptionally dangerous activity. In other words, the draft had to establish, for the State which permitted such an activity, the obligation to co-operate with the affected States in order to prevent and minimize the possible harm. Several definitions of the concept of “ultra-hazardous activities” already existed. The most interesting was found in the American Law Institute’s *Restatement of the Law of Torts*, published in 1938.<sup>7</sup> According to that definition, ultra-hazardous activities were those which were uncommon and which necessarily involved unavoidable dangers even though the utmost precautions had been taken. That definition applied perfectly to nuclear and space activities.

26. The questions raised by the Special Rapporteur’s excellent fourth report (A/CN.4/413) which remained unanswered included the following. Was the obligation of prevention an obligation to prevent the risk (which

would involve the prohibition of the dangerous activity) or an obligation to prevent the harm? If transboundary harm was defined as that which occurred in spheres under the jurisdiction of a State other than the one under whose jurisdiction the activity took place, what would happen if the harm occurred on the high seas or in outer space? Who would have the obligation to notify and to inform in that case? Many other questions remained unanswered and it was clear that the Commission was not yet ready to take a decision on the future of the draft. For his part, he was not even fully convinced that liability should be based exclusively on risk, even exceptional risk. The best thing would doubtless be to continue to examine the subject, in the hope of finding a solution for serious problems of great importance to the international community.

27. Mr. AL-BAHARNA said he was not convinced by the Special Rapporteur’s arguments for not drawing up a list of dangerous activities, as requested by some representatives in the Sixth Committee of the General Assembly. The Special Rapporteur’s principal objection was that the draft dealt with the situation in law prior to the conclusion of detailed agreements among States regulating hazardous activities and that there was therefore no point in enumerating those activities, which would in any case rapidly become obsolete with advances in science and technology. Those objections were theoretical and failed to indicate the complexity of the problems to be covered by the topic. He therefore urged the Special Rapporteur to reconsider the question.

28. The changes in draft article 1 made by the Special Rapporteur in his fourth report (A/CN.4/413), compared with the previous text (see A/CN.4/405, para. 6), did not seem calculated to make the scope of the topic clearer. For example, the Special Rapporteur had replaced the phrase “activities . . . which occur within the territory or control of a State” by “activities carried on under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State”. Apart from the fact that the formula “jurisdiction of a State as vested in it by international law” could give rise to certain difficulties of interpretation, the concept of territory was preferable to the less comprehensive concept of jurisdiction. In his view, the notion of sovereignty could also be introduced into article 1. Moreover, the previous text of the article had spoken of a “physical consequence . . . affecting . . . the use or enjoyment of areas”, a formula which the Special Rapporteur had replaced by “an appreciable risk of causing transboundary injury”. He was not at all certain that the Special Rapporteur had been right to introduce the concept of risk at that stage, since any activity involved an element of risk.

29. It was therefore not the risk that was the basis of the obligation to make reparation in the event of transboundary harm, but the harm itself—a fact which did not rule out the idea of prevention, because it was possible to take action as soon as the danger appeared in order to prevent imminent harm. Making the concept of injury or the threat of injury the basis of responsibility would avoid having to describe the risk as

<sup>7</sup> American Law Institute, *Restatement of the Law of Torts*, 12 May 1938, vol. III, p. 42, chap. 21, sect. 520.

“appreciable” and thereby avoid obstructing new activities. In any case, the Special Rapporteur acknowledged (A/CN.4/413, para. 41) that the basis of the obligation to make reparation was the injury, but added that that obligation was subject to certain implied limitations and that, as the law now stood, injury that was not appreciable should be tolerated. Nevertheless, the fact that there were limits to the obligation to make reparation did not mean that the obligation could not be based on injury and he therefore urged the Commission to consider replacing the concept of “risk” or “appreciable risk” by the concept of “injury”.

30. Draft article 3 (Attribution), which differed only slightly from former draft article 4 (Liability), was based on the requirement that the State had to know, or have means of knowing, that the activity in question involved risk. In that connection, the Special Rapporteur explained that the expression “had means of knowing” was meant to protect developing countries, something that raised a question of principle on which the Commission might well wish to express itself. He could find no fault with the idea that it was necessary for the State to have known about the risk, but the text should specify that knowledge included presumed knowledge. The previous title was preferable to the new one, for it was less ambiguous.

31. He would refrain from commenting on draft articles 4 and 5 because it seemed too early to consider the relationship between the present articles and other international agreements, on the one hand, and other rules of international law, on the other.

32. He had read with interest the Special Rapporteur’s comments (*ibid.*, sect. III) on the articles of chapter II of the draft (Principles) and found the three principles set out in paragraph 85 of the report to be unassailable. Viewed as a pointer to the progressive development of international law, as the Special Rapporteur proposed (*ibid.*, para. 90), they certainly deserved support, but the question of transforming them into practical norms of international law was another matter. The Commission should avoid formulations which States found unacceptable. The draft’s success would largely depend on the clarity with which the Commission developed certain classical concepts such as sovereignty, co-operation or reparation in their application to the topic under consideration. Draft articles 6 to 10 could be improved in that respect by including a reference to sovereignty in article 6, to mutuality in article 7, to the range of preventive measures in article 9, and to compensation, in addition to reparation, in article 10.

33. Mr. BEESLEY said that he wished to raise three specific questions concerning the principles outlined in section III of the fourth report (A/CN.4/413). First, had the Special Rapporteur had in mind the elaboration of precise articles based on those principles, or had he merely wished to seek the Commission’s advice on the subject? Secondly, did the Special Rapporteur envisage circumscribing chapter II of the draft, as he had done with chapter I, by the concept of “appreciable risk” or “exceptional risk”? Thirdly, did the Special Rapporteur intend chapter II to address transboundary activities which caused appreciable injury without involving appreciable or exceptional risk? In other words, was the

Special Rapporteur proposing in chapter II to take into consideration the rules referred to by many members of the Commission and founded in essence on the *Trail Smelter* case (*ibid.*, para. 2), Principle 21 of the Stockholm Declaration<sup>1</sup> and Part XII of the 1982 United Nations Convention on the Law of the Sea?

34. Mr. REUTER, remarking that in dealing with the topic under consideration the Commission had been grappling with shadows for many years, paid tribute to the Special Rapporteur, whose efforts and sacrifices—possibly painful ones—had helped to clear away a number of uncertainties pertaining both to terminology and to the ideas expressed. The Special Rapporteur had succeeded in transforming many shadows into living realities, so that the topic was beginning to take shape.

35. Mr. FRANCIS reiterated his intention to submit to the Drafting Committee in due course a definition of the word “risk” within the framework of draft article 2.

36. Mr. OGISO said he hoped that the Special Rapporteur, in summing up the debate if he thought it opportune at the present stage, or better still in his next report, would state his views on the final form of the draft. Views within the Commission differed as to whether the draft should take the form of a framework agreement, guidelines or a convention, and future work would be facilitated if a decision on the issue could be taken soon. The Special Rapporteur’s proposal would perhaps not resolve all differences, but in that case the Commission would be able to proceed on the basis of an international convention binding upon the parties. That was perhaps not very likely, but the possibility could not be discounted.

37. The CHAIRMAN invited the Special Rapporteur to sum up the discussion.

38. Mr. BARBOZA (Special Rapporteur) thanked those members of the Commission who had spoken in the debate. Their thoughtful statements would help him better understand the complexities of the topic and to reflect the Commission’s wishes in the draft articles.

39. The topic’s complex nature called for efforts to reconcile individual preferences; in some cases, difficult choices had to be made. It was also necessary to define the topic’s limits so that a practical answer in the form of a workable legal régime might be found to the very real problems involved.

40. On the question of including polluting activities in the draft articles, several members had maintained that a general prohibition on causing appreciable harm by pollution existed in general international law. For his part, he had adopted a pragmatic position in the matter in his fourth report because, as he said there (A/CN.4/413, para. 10), he did not think that the Commission would unanimously accept the idea. That doubt was, of course, expressed at the operative level of “express prohibition” and not at the level of principles. On the other hand, if such a prohibition existed, polluting activities would be left outside the topic. To violate a legal prohibition was a wrongful act, and activities pro-

<sup>1</sup> See 2044th meeting, footnote 8.

ducing harmful effects would not be activities “not prohibited by international law”. That, in turn, would have the consequence of leaving the victims of pollution defenceless except in cases governed by a special treaty. By not excluding polluting activities from the scope of the topic, the Commission would not be taking a position on the matter: it would merely leave open to a State that was the victim of pollution the option of applying the solutions and procedures to be set forth in the future instrument.

41. In the same spirit, he had suggested that it was not the Commission’s purpose to establish “whether the principles in question reflect general international law” (*ibid.*, para. 89). It should be understood that, by adopting certain principles as applicable to the topic, the Commission was not pronouncing as to whether or not they were already part of international law or simply a step in the progressive development of the law.

42. With regard to terminology issues, he would of course defer to the Commission’s native English-speaking members in the matter of whether “injury” or “harm” was a better translation of the Spanish term *daño*. The title of the topic did speak of “injurious consequences of acts”, but he noted that there seemed to be a preference for the term “harm”. Again, there seemed to be general agreement that the expression “State of origin” was preferable to “source State”. Lastly, the term “substances” in draft article 2 (a) would have to be changed. The word “things”, which would correspond to the Spanish *cosas* and the French *choses*, had been proposed and he had no objection to it.

43. Mr. McCaffrey (2049th meeting) had asked whether the causality referred to in the context of the present topic was factual or legal—in other words, proximate causality. Without entering into too many subtle distinctions, he wished to refer to Administrative Decision No. II of the United States-German Mixed Claims Commission mentioned in his report (A/CN.4/413, para. 52), a decision in which the idea of “proximate causality” seemed to be accepted in the conclusion that “all indirect losses are covered, provided only that in legal contemplation Germany’s act was the efficient and proximate cause and source from which they flowed”.<sup>9</sup> In his report, however, he had discussed attribution of conduct and of result (*ibid.*, paras. 71-77) only to show that, at the present stage, he saw no need to open a new chapter of causality in connection with the topic, since it did not differ essentially from causality in responsibility for wrongfulness. The dividing line between attribution in the topic under consideration and responsibility for wrongfulness was not the causal, physical attribution of a result to a certain act, but rather the attribution of the act to a State—in other words, the characterization of the act as an act of the State and, once that characterization was established, its qualification as a wrongful act (an act in breach of an international obligation). It was only then that the intention of the agent might play a certain role.

44. Having noted that the majority of members agreed with the suggestion made in his previous reports that the

topic should be limited to activities having physical consequences, he had thought at first that the introduction of the concept of a physical consequence in the definition of the expression “transboundary injury” in draft article 2 (c) would be sufficient. However, after hearing some of the statements made, he was persuaded that it would be better if the concept appeared in draft article 1 as well.

45. Some members had spoken of the draft in terms of a convention on the law of the environment. Yet it should be borne in mind that the point at issue was to regulate certain types of State activities with certain consequences attaching to them. Under the régime thus established, States would be asked to take preventive measures, to consult with potentially injured States and to make reparation in the event of injury, all of which presupposed an identifiable State of origin and injured State and identifiable injury or harm. How could such a régime be applied to the environment, outer space, the high seas, the ozone layer, or any other area where there were many States of origin and where virtually the whole of mankind was the injured party. With whom would the State of origin negotiate concerning preventive measures? To whom would it make reparation? For what harm? The topic under consideration dealt with the human environment only to the extent that the criteria mentioned in article 1 were met; environmental activities whose consequences affected the whole of mankind belonged in another framework. Of course, if an activity in State A produced some harmful effects in a zone beyond national jurisdictions, and if that situation had adverse repercussions in the territory of State B, the latter State might bring an action against the State of origin under the present articles.

46. In the earlier version of the draft (see A/CN.4/405, para. 6), the term “situation” had been used to define the state of affairs created by an activity conducted in such zones—in the same way that that term was used in referring to the creation of a certain dangerous state of affairs as a result of activities which could not be considered dangerous in themselves. For instance, the activity of building a dam could in itself hardly be considered an activity involving risk; yet the creation of an artificial lake could bring about a “situation” capable of causing some transboundary harm such as floods or a climatic change. Certain criticism voiced at the previous session had induced him to eliminate the term “situation”, which was not strictly necessary because the causal chain would still exist, and since the term would require precise definition. However, the term had some advantages, as Mr. Francis (2048th meeting) had pointed out, and its reintroduction into the draft might be considered.

47. The debate on draft article 3 had raised two different issues: the existence of a certain activity within the territory of the State of origin and the risk involved in that activity. In order to be held responsible for the obligations imposed by the draft, the State of origin was required to know or have the means of knowing that an activity involving risk was being carried on in its territory. But if the activity in question was really one involving risk, and if the risk involved was appreciable, the State of origin could not invoke its lack of means of

<sup>9</sup> United Nations, *Reports of International Arbitral Awards*, vol. VII (Sales No. 1956.V.5), p. 30.

knowing about the risk in order to be exempted from responsibility. The reason was simple: since “appreciable risk” had been defined as “the risk which may be identified through a simple examination of the activity and the things involved” (art. 2 (a) (ii)), knowledge of its existence did not require special means.

48. Another point raised was how the requirement of knowledge by the State of origin should be formulated. In other words, how was the presumption of knowledge to be formulated? Was it to be presumed that the State knew or that it did not know? The question was important because it involved the issue of the burden of proof. In order to provide an answer, it had to be recalled that article 3 was intended to take into account the interests of certain developing countries with vast territories and insufficient financial and administrative means of monitoring what was going on in all parts of their territory. The article was also intended to be fair and to reflect the generally accepted idea that a State could not reasonably be expected to know of everything that was going on in its territory or, to use the terms of the draft, under its jurisdiction or control. Those two primary purposes, however, as Mr. Ogiso (2049th meeting) had pointed out, should not mean overlooking another important principle, namely that an innocent victim of transboundary injurious effects must not be left to bear his loss (A/CN.4/413, para. 85).

49. A glance at the map of the world was sufficient to show that there were more developing countries bordering on other developing countries than on developed countries. It was therefore very likely that activities within a developing country might produce harmful effects in another developing country; consequently, developing countries could be protected only up to a certain limit, beyond which their own interests might be prejudiced. That was the conclusion he arrived at in his report (*ibid.*, para. 70). The wording of article 3 should perhaps be made more explicit by expressly stating that the burden of proof did not rest with the affected State. It had also been proposed that the words “had means of knowing” should be replaced by “should have known”; but that, conversely, seemed to make the situation of the State of origin too difficult. How was it to prove that it “could not” have known? If, for example, the reason for its ignorance was lack of sufficient naval means to supervise a vast exclusive economic zone, would it not be told that it “should have” acquired such means? He therefore thought it preferable to keep the text in its present form.

50. Despite the doubt expressed by some members, he remained convinced that the concepts of “jurisdiction” and “control” were more appropriate to the topic than the concept of “territory”. While activities pertinent to the topic were in most cases conducted in the territory of a State, in some cases they were conducted outside such territory, for example on the high seas, in the territorial sea, in the exclusive economic zone, in outer space, or even in the territory of another State. Those situations, which might well produce transboundary harm, should not be excluded from the scope of the topic simply because they did not meet the territoriality requirement.

51. Moreover, if the concepts of “territory” and “territorial rights” were considered in terms of the appli-

cation they had received in similar contexts, it became clear that they had a jurisdictional dimension and that, in those earlier cases, the term “territory” had been used in the sense of the jurisdictional capacity of the State over certain activities or events. The other aspect of “territory”, that of the right to ownership or “title”, was irrelevant to the responsibility issue. A distinction therefore had to be drawn between those two aspects of territoriality. In the topic under consideration, it was the jurisdictional component that prevailed, for the rights and obligations of States under international law were determined not only by their sovereign rights to a territory, but also by their competence to make and apply law, i.e. their jurisdictional competence.

52. In that connection, he gave three examples: the *Trail Smelter* case (*ibid.*, para. 2), the *Corfu Channel* case (*ibid.*, para. 62) and the *Island of Palmas* case (*ibid.*, para. 61), and quoted the awards at some length. He recalled that, according to the award rendered by Max Huber, the arbitrator, in the *Island of Palmas* case, “territorial sovereignty . . . involves the exclusive right to display the activities of a State”,<sup>10</sup> and he emphasized the word “exclusive”. Max Huber had added: “This right has as corollary a duty: the obligation to protect within the territory the rights of other States . . .”. Clearly, the arbitrator had been referring in that context to the State’s jurisdiction within its territory, and not to its title. In those three cases, the issue of a State’s responsibility had been raised in relation to an activity or act within its territory, and the State’s duties and obligations had been established from the point of view of its jurisdictional competence over that territory.

53. The concept of jurisdiction was useful because it was not limited to a territorial State and hence could encompass activities with harmful transboundary consequences conducted outside the State’s territory, for example the jurisdiction exercised by a flag-State over its ships navigating on the high seas, or for certain matters within the territorial sea or internal waters of another State. The 1958 Geneva Conventions on the law of the sea and the 1982 United Nations Convention on the Law of the Sea covered many jurisdictional capacities of that kind. There was also the case of the belligerent State which, for certain matters, exercised jurisdictional competence within the territory it occupied and was held liable for the consequences of activities over which it exercised jurisdiction. Again, there was the case of Mandate, Trust and Non-Self-Governing Territories, which did not come under the territorial sovereignty of the caretaker State, although the latter was held liable in the event of transboundary harm. Lastly, there was the case of mixed jurisdiction, where several States were authorized by international law to exercise their jurisdiction—navigation and passage in the territorial waters, the contiguous zone or the exclusive economic zone, incidents on the high seas or in space—and where liability for injury was attributed to the State having jurisdiction over the event or activity that caused the injury.

54. Noting, in connection with the concept of jurisdiction, the points raised by Mr. Graefrath (2047th meeting) and Mr. McCaffrey (2049th meeting)

<sup>10</sup> *Ibid.*, vol. II (Sales No. 1949.V.1), p. 839.

concerning the multiple meanings of the term “jurisdiction”, he remarked that, in order to be held liable for an activity entailing harmful consequences, the State had to have power to make and apply laws. As for the point concerning the risk of unilateral extensions of jurisdiction by States, it was in his opinion dealt with by the phrase “as vested in it by international law”, which qualified the words “jurisdiction of a State” in draft article 1 and made it clear that the article concerned only internationally recognized jurisdiction. The Commission could not, within the limits of the topic, deal with unilateral extension of jurisdiction.

55. Jurisdictional questions were highly complex and might one day form the subject of a separate convention. For the purposes of the work in hand, it seemed sufficient to state clearly what was meant by “jurisdiction”. The term was broad enough to apply to most of the situations that had been mentioned. Moreover, it appeared in a number of instruments, including the 1982 United Nations Convention on the Law of the Sea. There remained the case of a State which could demonstrate that it had been ousted by another State from the objective exercise of its jurisdiction: that was where the concept of “control” or “effective control” became applicable. He had no strong preference for either of those terms, although “effective control” corresponded more closely to the situations envisaged.

56. Unlike the concept of jurisdiction, the concept of control was a factual determination. In other words, it meant *de facto* jurisdiction, a situation which had the properties of jurisdiction except that it was not recognized as such in international law. There again, it should be recalled that the term was already in use, and that the ICJ had given it a legal content in the *Namibia* case:<sup>11</sup> the judges at The Hague had certainly not had in mind South Africa’s title to Namibia, but the control—the *de facto* jurisdiction—which South Africa exercised over that Territory. When international law did not recognize the jurisdiction of a State but acknowledged its “control”, it imposed obligations on that State without recognizing any corresponding rights. Strictly speaking, control was the ouster of jurisdiction. That interpretation of the concept of control made it possible to meet situations where the State having jurisdiction over a particular territory or particular activities explicitly or implicitly surrendered its effective control over that territory or those activities to another State. From the point of view of liability and of the obligation to make reparation, the most common cases of control were unlawful occupation, annexation or intervention. There could also be other cases, for example an oil platform of State A on the high seas that was occupied by State B, or a slot in the geostationary orbit of State C occupied by State D.

57. The expressions “jurisdiction” and “effective control” employed in draft article 1 were the most appropriate to define the scope of the topic. They were broad enough to include the activities pertinent to the topic and had sufficient legal content to avoid any am-

biguity. Replying in that connection to Mr. Barsegov (2074th meeting), who had questioned the expression “vested in it by international law” in article 1, he added that he would have no objection to using a more neutral phrase such as “accepted by international law” or “in accordance with international law”.

58. With regard to the concept of attribution (art. 3), Mr. McCaffrey (2044th and 2045th meetings), noting that the term also appeared in article 11 of part 1 of the draft articles on State responsibility,<sup>12</sup> had made the point that it should not be implied that an act of the State was necessary in order for responsibility to be attributed to that State under the terms of the present draft. He had also said that responsibility should be “direct”, as opposed to “attributed”. However, the term “attribution” was not applied to responsibility for wrongfulness alone. It should perhaps be explained in the commentary that it was not the activities referred to in draft article 1 that were attributed to a State, but, simply and directly, their harmful consequences. Article 3 clearly stated that the only conditions for the attribution of responsibility were that the activity was carried on under the State’s jurisdiction or control and that the State knew or had means of knowing that it was being carried on. As to the question of “direct” attribution, it had to be recognized that in international law all attribution of responsibility was indirect, because the State was a legal person which could act only through individuals. That was particularly true in the case of the present topic, since the State was made responsible for activities carried on by persons who could in no sense be regarded as official organs of that State. It seemed impossible to avoid the principle of indirect attribution, but that did not mean that such attribution was established through equivocal means or complicated mechanisms.

59. On the question of the scope of the articles, Mr. McCaffrey, among others, had expressed the fear that the present wording of article 1 could be interpreted to exclude activities involving a low risk of great damage. He would amend the text in such a way as to leave no doubt on that score.

60. A great deal had been said about the concept of risk. Some members had argued that “risk” should be referred to only in the context of prevention and that the concept of “duty to make reparation” should apply where effective harm was caused, whether or not the activity concerned had involved risk. That would amount to creating a dual régime, one for the duty to prevent, which would require the existence of “appreciable risk” as a pre-condition for the requirement that a State should adopt measures of prevention, and the other for the duty to make reparation, which presupposed harm which, in turn, presupposed risk. As had been said, if there was harm, there was risk—a maxim which, incidentally, took care of the hypothetical case of hidden risk.

61. Others had expressed a preference for a hard core of obligations applying to activities involving risk and extending progressively therefrom, in other hypotheses and other instruments, to responsibility for “harm

<sup>11</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16.

<sup>12</sup> See 2045th meeting, footnote 6.

caused". Members had rightly pointed out that all existing conventions dealt with specific activities involving risk—nuclear power, transport of certain substances by sea, space activities, and so on. International practice in that respect supported the present text of the articles.

62. Lastly, some members had expressed a considerably more conservative view regarding the functioning of a system of liability for activities not prohibited by international law and had said that they would find it difficult to accept a text along the lines he had proposed.

63. The trends having thus been clearly established, it seemed that the Drafting Committee would be the best forum in which to seek grounds for a consensus, with his help as Special Rapporteur. Possibly, too, as Mr. Beesley (2074th meeting) had said, the gap between the two positions was not in fact so very wide.

64. The principles proposed in chapter II of the draft appeared to be generally acceptable except for the point made that the principle of participation (art. 8) might be included together with that of co-operation in article 7, or be expressed in some other way. Various drafting changes had also been suggested and he would bear them in mind in his future work.

65. He had been reproached for abandoning Principle 21 of the Stockholm Declaration.<sup>13</sup> That had not been his intention; he had sought only to adapt the principle to the present subject-matter. As to the idea of imposing a positive obligation to protect the marine environment, by analogy with the provisions of the law of the sea, draft article 6 was in his view sufficient for the purpose inasmuch as it limited the freedom of States by the obligation to protect the rights emanating from the sovereignty of other States.

66. Some members, including Mr. Bennouna (*ibid.*), had wondered who would be empowered to qualify an activity as dangerous and what mechanisms would be employed for notification and consultation. Provisions covering those points would probably be included in his next report.

67. Mr. Barsegov had wondered whether the Commission was not trying to construct the edifice of the draft from the roof down. He did not agree with that view and pointed out that the draft was concerned with the stage preceding that of conventions on specific activities. Such conventions represented the ideal outcome of the Commission's work, but in the mean-time it was necessary to lay down certain principles to guide States towards those future instruments.

68. The title of the topic had been the subject of some comments, of which he had taken good note. It had earlier been decided that the question should be left in abeyance until the final stage. That decision was, in his view, a wise one since the topic broke new ground in international law.

69. In conclusion, he wished to take up the question of the interrelationship between three topics at present on the Commission's agenda: State responsibility, the law of the non-navigational uses of international water-

courses and the present topic. The parallel treatment of those three topics was a fruitful exercise and helped to identify correctly some of the problems common to all three. For example, views expressed in connection with the watercourses topic had helped him to clarify his own ideas, and the consideration of State responsibility would doubtless yield the same benefits. Waiting for the development of one of the topics before starting with the others might oblige the Commission to revert to the one that was most advanced in order to alter some of the conclusions reached.

70. Regarding the future method of work, opinions appeared to diverge on the way to deal with the draft articles submitted in his fourth report. In his opinion, the texts should be referred to the Drafting Committee. The only point on which there seemed to be a marked difference of views was that of the respective roles of the concepts of "risk" and "harm". A compromise solution was not impossible and the Drafting Committee was the best forum in which to find it. The general debate on the delimitation of the topic might continue indefinitely and the General Assembly would then be entitled to call the Commission to account. If the topic could not be dealt with, the Commission should say so. If there were members who did not want the project to succeed, they should shoulder their responsibilities before the General Assembly.

71. Mr. KOROMA said that he was not opposed to referring the draft articles to the Drafting Committee. However, the Special Rapporteur had said that he would redraft parts of the text in the light of comments made during the discussion, particularly those by Mr. Beesley (2045th meeting), which meant that the work could not be resumed before the next session.

72. Mr. BARSEGOV said that he, too, would agree to referring the draft articles to the Drafting Committee were it not for the fact that, since the Special Rapporteur was still to modify the texts, the Commission might find itself faced, as it were, with a *fait accompli*. Perhaps it would be best, as was generally done, to refer the texts which had been considered to the Drafting Committee together with the comments made on them.

73. Mr. BEESLEY said he had advised the Special Rapporteur to change the wording of the draft on the basis of the three principles listed in paragraph 85 of the fourth report (A/CN.4/413). He continued to feel that those three principles would provide a firm basis for chapter II of the draft. Nevertheless, he had no objection to the articles being referred to the Drafting Committee.

74. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 1 to 10 to the Drafting Committee together with the comments made during the discussion.

*It was so agreed.*

*The meeting rose at 1.15 p.m.*

<sup>13</sup> See 2044th meeting, footnote 8.

## 2076th MEETING

Friday, 8 July 1988, at 10 a.m.

**Chairman:** Mr. Leonardo DÍAZ GONZÁLEZ

**Present:** Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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

[Agenda item 10]

#### STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Njenga to address the Commission in his capacity as Observer for the Asian-African Legal Consultative Committee.
2. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) expressed the hope that his dual status as a member of the International Law Commission and Secretary-General of the Asian-African Legal Consultative Committee would serve to strengthen the very close relationship which had developed over the years between the two bodies.
3. The Asian-African Legal Consultative Committee had been established to serve its member Governments as an advisory body in the field of international law and as a forum for Afro-Asian co-operation in legal matters of common concern. The history of the Committee's activities thus far had been that of the needs and aspirations of the new States of Asia and Africa. One of the functions specifically assigned to the Committee was the examination of questions under consideration by the Commission, and the Committee had endeavoured to generate interest in those questions among the Governments of its region by preparing notes and comments on the Commission's work for the use of delegations representing member Governments to the Sixth Committee of the General Assembly.
4. In more than three decades of service, the Committee had dealt with the legal aspects of a wide range of topics, including environmental protection, international economic relations and the elements of good neighbourly relations between States. A fundamental feature of its deliberations in each of those areas had been their objectivity and their predominantly legal orientation.
5. During the first decade, 1957-1967, the Committee's activities had been confined to giving advice on problems submitted to it by member Governments

and to the consideration of issues of common concern, many of them of considerable importance to the region, where uniformity of approach was desirable. The subjects considered by the Committee during that period had included diplomatic immunities and privileges, immunity of States in respect of commercial transactions, extradition of fugitive offenders, status and treatment of aliens, dual or multiple nationality, border and frontier issues, legality of nuclear weapons tests, rights of refugees, and international rivers, to name but a few. Final reports and/or resolutions had been adopted on those items.

6. During the second decade, the Committee's work had expanded considerably, the main emphasis being placed on assisting member Governments in regard to some of the major international questions before the United Nations, especially those that became the subject of codification conferences. In addition to the 1969 Vienna Convention on the Law of Treaties and the more recent negotiations on the law of the sea, with which it had been concerned, the Committee had also prepared background and analytical studies for the United Nations Conferences on Limitation in International Sale of Goods (1974), on the Carriage of Goods by Sea (1978), on Succession of States in respect of Treaties (1978), on Contracts for International Sale of Goods (1980), on Outer Space (1982), and on the Law of Treaties between States and International Organizations or between International Organizations (1986).

7. When economic issues had come to the forefront in United Nations deliberations, the Committee had addressed the legal aspects of some of those issues. Since the establishment of a Sub-Commission on International Trade Law Matters in 1970, many of the Committee's activities had been concerned with economic relations and trade law. In addition to working closely with UNCTAD and UNCITRAL, it had engaged in the preparation of standard/model contracts for use in international trade transactions relating to commodities and model bilateral agreements on the promotion and protection of investments; the formulation of industrialization schemes; and the organization of a system for the settlement of disputes in economic matters through the development of national arbitral institutions and the establishment of regional centres for arbitration. Two such centres had already been set up under the Committee's auspices, at Kuala Lumpur and Cairo, and a third, at Lagos, was expected to become operational in June or July 1988.

8. A new phase in the evolution of the Committee's activities had begun with the adoption on 13 October 1980 of General Assembly resolution 35/2, granting the Committee permanent observer status. Pursuant to that resolution, the Committee had oriented its work programme to complement United Nations efforts in areas such as the law of the sea, international protection of refugees, and international economic co-operation for development. In addition, it had undertaken major projects aimed at rationalizing the work of the Sixth Committee, strengthening the role of the United Nations, and promoting wider use of the ICJ. Its programme for co-operation with the United Nations provided, *inter alia*, that the Committee would continue to follow

\* Resumed from the 2071st meeting.

discussions in the Sixth Committee and developments in the International Law Commission, UNCITRAL and the Special Committee on the Charter of the United Nations.

9. Developments in the work of the Commission at its current session were of special interest to the Committee because the items on the non-navigational uses of international watercourses and on jurisdictional immunities of States were also on its own agenda. The close link between the two bodies had been appropriately symbolized by the presence at the Committee's session in March 1988, in Singapore, of the outgoing Chairman of the Commission, Mr. McCaffrey, whose comprehensive and informative statement had been greatly appreciated.

10. He wished to take the opportunity of inviting the Commission's present Chairman, Mr. Díaz González, to participate in the Committee's twenty-eighth session, to be held in Nairobi early in 1989.

11. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his most interesting statement and kind invitation.

12. Mr. McCAFFREY thanked the Committee and its newly elected Secretary-General, Mr. Njenga, for the warm hospitality extended to him at the Committee's session of March 1988, where he had been greatly impressed by the wide diversity of topics studied by the Committee on behalf of its member States and by the quality of the work done, as well as by the work of the Committee's secretariat and the collegiality of the delegations to the session.

**The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/406 and Add.1 and 2,<sup>1</sup> A/CN.4/412 and Add.1 and 2,<sup>2</sup> A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)**

[Agenda item 6]

**FOURTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)\***

**PARTS IV AND V OF THE DRAFT ARTICLES:**

**ARTICLES 15 [16] TO 18 [19]<sup>3</sup> (concluded)**

13. The CHAIRMAN said that, although the debate on agenda item 6 was concluded, he proposed, as a matter of courtesy and on the understanding that no precedent was being set, to comply with requests he had received from two members of the Commission who wished to speak on that item and had not been able to do so previously.

14. Mr. AL-BAHARNA, after thanking the Chairman for allowing him to make a general statement although the debate on the item was already concluded,

said that he had read the Special Rapporteur's fourth report (A/CN.4/412 and Add.1 and 2) with great interest. In 1984, when the previous Special Rapporteur had submitted his second report,<sup>4</sup> consideration of the topic appeared to have reached an advanced stage, but in 1987 the prospects for completing the work in the near future had become much less favourable. He was therefore gratified to note that the Special Rapporteur now hoped that the first reading could be completed by 1991, and urged the Commission to support the schedule proposed in the fourth report (*ibid.*, para. 8). If possible, however, he would prefer the first reading to be completed in 1990 rather than in 1991.

15. In his report (*ibid.*, footnote 9), the Special Rapporteur suggested that a definition of "optimum utilization" might be included in article 1. It was doubtful, however, whether the article on use of terms would be the best place for such a definition—if, indeed, the term could be defined with certainty. Furthermore, the Special Rapporteur proposed dealing with the subject of "security of hydraulic installations" under "Other matters" (*ibid.*, para. 7). While recognizing that hydraulic installations constituted an important part of the hardware of international watercourses, he doubted whether it was necessary or feasible to deal with the issue in connection with non-navigational uses.

16. While he agreed with the Special Rapporteur on the need for regular exchanges of data and information on international watercourses, he wondered whether watercourse States were required under international law to supply such data and information to one another and, if so, whether that obligation was absolute. In the survey of State practice (*ibid.*, paras. 15-26), there was reference to a number of bilateral and subregional treaties dealing with the matter, some of which established institutions for the exchange of data and information. He was not convinced that an international obligation to exchange information could be deduced from those treaties or from State practice; he therefore questioned the Special Rapporteur's position, in particular, his assumption that article 6 could form the basis for a legal obligation (*ibid.*, para. 14). No obligation to exchange data and information followed necessarily from the rule of equitable utilization; such exchanges merely helped to establish whether the rule of equitable utilization was being observed.

17. The relevant passages of the ECE Principles regarding co-operation in respect of transboundary waters, quoted in the report (*ibid.*, para. 22), provided a good model, which the Commission would be well advised to follow. In the light of those principles and of the basic concepts of international law, draft article 15 [16] (see 2050th meeting, para. 1) appeared to overreach itself. If the rules in question, as the Special Rapporteur stated in his comments, were to be residual rather than mandatory, the word "shall" should be replaced by "should" throughout the article. Furthermore, he would prefer the words "reasonably available", in paragraph 1, to be replaced by "as far as practical"; and he doubted the usefulness of the proviso at the end of that paragraph, which merely introduced un-

\* Resumed from the 2069th meeting.

<sup>1</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>3</sup> For the texts, see 2050th meeting, para. 1, and 2062nd meeting, para. 2.

<sup>4</sup> *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

necessary complications. Paragraph 1 should be expressly linked to paragraph 5 so as to make it clear that the obligation formulated was not absolute, but subject to considerations of defence and security. Lastly, noting that, in paragraph (7) of his comments, the Special Rapporteur sought the Commission's views on whether the article should expressly provide for the establishment of joint commissions for collecting and processing data on international watercourses, he maintained that, in conformity with the views held by both the previous special rapporteurs, the establishment of such bodies should be explicitly provided for in that article or in another, separate, article.

18. With regard to the draft articles on pollution of international watercourses, protection of the environment of international watercourses and pollution or environmental emergencies, he believed that the "bare minimum" approach adopted by the Special Rapporteur might not do that subject full justice. In view of its much more extensive treatment by his predecessors, as well as the Special Rapporteur's own view that it was the single most important component of the draft articles (A/CN.4/412 and Add.1 and 2, para. 90), he would do well to review his formulations. In particular, he might consider reintroducing in the draft the article on control and prevention of water-related hazards (art. 26) proposed by the previous Special Rapporteur in his second report.<sup>5</sup> For the definition of the term "pollution", he preferred the text proposed by the previous Special Rapporteur (art. 22)<sup>6</sup> to the definition appearing in paragraph 1 of draft article 16 and in the Special Rapporteur's comments (*ibid.*, footnote 207).

19. The Special Rapporteur's statement, in paragraph (4) of his comments on draft article 16 [17], that it was doubtful that pollution *per se* of an international watercourse could be said to be proscribed by contemporary international law, caused him serious misgivings. To recognize that pollution was unlawful only if it caused injury was not the same as saying that contemporary international law did not proscribe pollution. The comment, in his view, should be modified or deleted. As to the substantive rule contained in paragraph 2 of article 16 [17], he would have preferred it to be closer to the wording of article X of the Helsinki Rules, which related the rule to the principle of equitable utilization of the waters and imposed on States the dual obligation to prevent pollution and to abate it. The Special Rapporteur's explanation notwithstanding, it would be preferable to replace the word "appreciable", in paragraph 2 of the article, by a more objective term such as "substantial" or "serious", the former being used in the Helsinki Rules and the latter in the arbitral award in the *Lake Lanoux* case.

20. The wording of paragraph 3 was rather weak and seemed to water down the legal obligation stated in paragraph 2; in particular, he questioned the usefulness of the opening words, "At the request of any watercourse State", and of the word "introduction". The paragraph should be suitably amended to bring it into closer conformity with the firm obligations laid down in paragraph 2.

21. Draft article 17 [18] was a useful complement to article 16 [17], but consideration should be given to reversing the order of the two articles, so that the provision setting out the more positive duties came before the one expressed in negative terms. A comparison of article 17 [18] with article 20 proposed by the previous Special Rapporteur in his second report<sup>7</sup> showed that the latter text contained a few more elements and was also more practical; paragraph 2, regarding the adoption of measures and régimes for protecting the environment, was particularly significant, and he suggested that it should be restored. Since the draft was likely to become a framework convention, it was advisable to include as many fertile ideas as possible.

22. He approved of paragraph 2 of article 17 [18], on the need to protect the marine environment. Its inclusion was necessary, because the bulk of marine pollution was due to river discharges. Lastly, he suggested that a reference should be included in paragraph 2, or in a new paragraph 3, to the 1982 United Nations Convention on the Law of the Sea, as in paragraph 3 of draft article 20 proposed by the previous Special Rapporteur.

23. In principle, he supported the idea of including an article to cover emergency situations relating to pollution, but the text of draft article 18 [19] seemed to be somewhat confusing. The article defined the words "pollution or environmental emergency" in paragraph 1, and then proceeded to lay down the legal obligations in paragraph 2. He suggested that those two elements be combined, as had been done by the previous Special Rapporteur in paragraph 1 of draft article 25.<sup>8</sup> In addition, the title should be amended to read: "Emergency situations regarding pollution", and the unsatisfactory expression "potentially affected watercourse States", in paragraph 2, should be replaced by the language used in article 198 of the United Nations Convention on the Law of the Sea, namely "other States it deems likely to be affected by such damage". That change would make the text simpler and clearer.

24. In his comments (para. 5) on article 18 [19], the Special Rapporteur asked whether a provision should be added in that article along the lines of article 199 of the 1982 Convention, dealing with contingency plans against pollution, and whether that article 18 should also prescribe obligations for third States. His own response was in the affirmative to the first question and in the negative to the second. Whereas it was possible legally to prescribe contingency plans for watercourse States, it was doubtful whether the same could be done for third States.

25. Mr. NJENGA, after congratulating the Special Rapporteur on his scholarly fourth report (A/CN.4/412 and Add.1 and 2), said that he had some general comments to make on environmental protection and the specific issue of pollution. He believed that the Commission would be losing the focus of the debate if it were to concentrate on the question of the liability—strict or otherwise—of one watercourse State to another for activity which caused "appreciable" or "substantial"

<sup>5</sup> *Ibid.*, p. 121, para. 90.

<sup>6</sup> *Ibid.*, p. 119, para. 84.

<sup>7</sup> *Ibid.*, pp. 118-119, para. 82.

<sup>8</sup> *Ibid.*, pp. 120-121, para. 89.

harm. The pollution of watercourses should be looked at in the broader context of damage to the international community as a whole, as something that caused harm to all States, including the State of origin and its population. The developing countries were acutely aware of that fact, particularly in Africa, where over 80 per cent of the rural population depended for drinking water on rivers that were completely untreated for any pollution resulting from land-based activities.

26. The realization of the grave danger represented by pollution had caused consternation concerning the clandestine and unscrupulous activities of certain companies of industrialized countries, which had been dumping toxic chemical wastes in Africa. One journalist from Lagos, writing in the *Sunday Observer* of 19 June 1988, had spoken of "some European countries" which, "after inflicting the slave trade on the continent in the last century", were "bent on decimating the African population of the next century by dumping their unwanted toxins on Africa's feeding grounds".

27. In fact, some of the most highly polluting companies which were deteriorating the environment—including international watercourses—in the third world were companies from industrialized countries which had relocated their operations in developing countries to avoid stringent environmental standards, and which were making huge profits in those countries with little concern for the effects of their activities on the environment.

28. The general obligation of co-operation in the control and abatement of pollution was now generally accepted and should therefore constitute the fundamental principle of the articles of part V of the draft. In its report entitled "Our common future", the World Commission on Environment and Development stressed that "a new focus on the sustainable use and management of transboundary ecological zones, systems and resources" was needed. It pointed out that "over one third of the 200 major international river basins in the world are not covered by an international agreement, and fewer than 30 have any co-operative institutional arrangements. These gaps are particularly acute in Africa, Asia and Latin America, which together have 144 international river basins".<sup>9</sup> And the report continued: "Governments, directly and through the United Nations Environment Programme (UNEP) and the International Union for Conservation of Nature and Natural Resources (IUCN) should support the development of regional and subregional co-operative arrangements for the protection and sustained use of transboundary ecological systems . . .".<sup>10</sup>

29. The World Commission also pointed out that "legal régimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development" and went on to stress the urgent need "to recognize and respect the reciprocal rights and responsibilities of individuals and States regarding sustainable development; to establish and apply new norms for States and inter-State behaviour to achieve sustainable development; to

strengthen and extend the application of existing laws and international agreements in support of sustainable development, and to reinforce existing methods and develop new procedures for avoiding and resolving environmental disputes".<sup>11</sup>

30. It was worth noting that article 192, which was the very first provision in part XII of the 1982 United Nations Convention on the Law of the Sea, laid down: "States have the obligation to protect and preserve the marine environment." That general obligation of States to co-operate on transboundary environmental problems was clearly reflected in the legal principles established in 1986 by the Experts Group on Environmental Law of the World Commission on Environment and Development.<sup>12</sup> Those principles laid down, in paragraph 1 of article 14, the requirement for States to "co-operate in good faith with the other States concerned in maintaining or attaining for each of them a reasonable and equitable use of a transboundary natural resource or in preventing or abating a transboundary environmental interference or significant risk thereof". Paragraph 2 of the article further stated the aim of such co-operation as: "arriving at an optimal use of the transboundary natural resource or at maximizing the effectiveness of measures to prevent or abate transboundary environmental interference".

31. He also drew attention to the recommendations of the first African Ministerial Conference on the Environment, held at Cairo from 16 to 18 December 1985, which had adopted the Cairo Programme for African Co-operation. The Conference had adopted 29 priority subregional activities, 15 of which related to the rational transboundary use of the waters and ecosystems of the region. They included support for the Lake Chad Basin Commission for the integrated development of Lake Chad Basin; support for the River Niger Basin Authority for the integrated development of the River Niger Basin; the study and implementation of plans for a number of other river basins, including that of the Zambezi; improvement of co-operation for the integrated development of the Congo-Zaire River; a hydrometrical and geological survey of the Volta River system; consideration of the water resource development of the three Maghreb countries; strengthening of co-operation among the countries of the River Nile basin in the environmental field; study and implementation of an integrated multipurpose development plan for the Lake Victoria basin, and a number of other schemes. He hoped that the Special Rapporteur would be able to follow the progress of that programme through UNEP, which was the implementing agency.

32. He had brought those regional and international developments to the Commission's attention in order to see whether the draft articles reflected the new perspectives that were emerging in the area of environmental protection and the fight against pollution.

33. Without wishing to enter into the controversy about the status of the United Nations Convention on the Law of the Sea, he wished to stress that he had no doubt about the immense normative value of part XII

<sup>9</sup> A/42/427, annex, chap. 12, para. 32.

<sup>10</sup> *Ibid.*, para. 33.

<sup>11</sup> *Ibid.*, para. 80.

<sup>12</sup> See 2065th meeting, footnote 5.

of that Convention, which dealt with protection and preservation of the marine environment. Its provisions had been negotiated by representatives of all shades of international opinion and represented the largest measure of consensus on the topic. Even if the Convention had not been signed by 159 States and ratified by more than 35 of them, that would not detract from the value or the international authority of those provisions as showing how far States wished to commit themselves on the protection and preservation of the environment.

34. Referring to draft article 16 [17], he observed that the definition in paragraph 1 was most comprehensive and backed by a wealth of authority. He agreed, however, that the proper place for that definition was in the article on the use of terms. Paradoxically, the acceptance of such a broad and comprehensive definition would make it very difficult to accept paragraph 2 of article 16 [17], because any human activity, however well intentioned, was a potential cause of pollution as defined in paragraph 1. Paragraph 2, as proposed, would expose a watercourse State to claims by indeterminate claimants for an indefinite period, especially as no definite standards had been set for the types and quantities of substances that could be safely discharged.

35. It was true that the Special Rapporteur had stressed that, by using the term "appreciable harm", he was not advocating the absolute prohibition of all pollution. In paragraph (4) of his comments to article 16, he described "appreciable harm" as "harm that is significant—i.e. not trivial or inconsequential—but less than substantial". But, in the absence of a mechanism for the settlement of disputes and of clearly established standards, the concept of "appreciable harm" could not be objectively assessed. What was "appreciable" to one party could be a mere inconvenience to the other, and what was insignificant for one purpose could be catastrophic for another. For instance, pollution which caused no inconvenience for irrigation could be disastrous for purposes of human consumption.

36. It was unnecessary to dwell on the "due diligence" test of a "good government" or "a civilized State" advocated by Pierre Dupuy, who appeared to be putting forward the dubious argument that it was enough to exonerate a State if it possessed "on a permanent basis, a legal system and material resources sufficient to ensure the fulfilment of [its] international obligations under normal conditions", even if it used such infrastructure "with a degree of vigilance adapted to the circumstances" (see paras. (7) and (8) of the comments on art. 16). In fact, the position at present was that the States that polluted international watercourses and the marine environment were precisely those that possessed those attributes. The condition of the international watercourses of Europe and North America confirmed that fact.

37. It was thus clear that paragraph 2 of article 16 [17] did not provide for a fair balance of the interests of all the States concerned and needed radical revision. He would prefer that revision to be done by the Special Rapporteur, but was not opposed to its being done by the Drafting Committee.

38. He endorsed draft article 17 [18], on protection of the environment of international watercourses, and

draft article 18 [19], on pollution or environmental emergencies. The Special Rapporteur's comments on those two articles showed that they were well founded on existing State practice and the Drafting Committee should have no difficulty in giving them their final shape.

39. Mr. BEESLEY said that there might be some misunderstanding regarding his position on the 1982 United Nations Convention on the Law of the Sea. He wished to make it clear that at no stage had he put the status of the Convention at issue; he had never suggested that the Convention as whole had any particular status. For sound legal reasons, he had avoided any statement to the effect that the whole of that Convention reflected customary international law. Moreover, although he did not share the reservations on part XI, which dealt with deep-sea mining, he had referred specifically to its controversial character in order to underline the fact that he was well aware of it.

40. He had, of course, referred to the status of part XII of the Convention, which related to both the topic now under consideration and the topic of international liability for injurious consequences arising out of acts not prohibited by international law. That part XII reflected customary international law had not been questioned, either in the Commission or elsewhere. Some counter-arguments had occasionally been put forward, but not by States. Indeed, the major non-signatory States to the Convention had made a point of acknowledging that part XII reflected customary international law.

41. He then asked whether the Special Rapporteur intended to reply to the statements made at the present meeting.

42. Mr. McCAFFREY (Special Rapporteur) said that he did not propose to reply at the present stage. He did not wish to see the debate reopened, and in any case practically all the points raised at the present meeting had been substantially covered by his summing-up at the end of the discussion (2073rd meeting).

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)\*  
(A/CN.4/409 and Add.1-5,<sup>13</sup> A/CN.4/417,<sup>14</sup> A/CN.4/L.420, sect. F.3)**

[Agenda item 4]

**EIGHTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)**

**CONSIDERATION OF THE DRAFT ARTICLES<sup>15</sup>  
ON SECOND READING (*continued*)**

43. Mr. SHI, after congratulating the Special Rapporteur on the objectivity and scholarly qualities of his eighth report (A/CN.4/417), said that he agreed with the Commission's general approach to the topic and

\* Resumed from the 2072nd meeting.

<sup>13</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>14</sup> *Ibid.*

<sup>15</sup> For the texts, see 2069th meeting, para. 6.

would therefore refrain from making any general comments. Nor was there any need for him to raise drafting points, which could be dealt with in the Drafting Committee. He would therefore confine his statement to the main issues which, in the Special Rapporteur's view, required the Commission's attention.

44. With regard to the scope of the draft articles, he suggested that the original articles 1 and 2 adopted on first reading be kept intact, without the amendments proposed by the Special Rapporteur. There was no convincing reason for extending the scope of the draft articles to the official communications of international organizations. Those organizations were essentially different from States, as was shown by the fact that the Commission had dealt separately with the law of treaties between States and the law of treaties between international organizations. There was also the problem that practically no two international organizations had the same characteristics. Moreover, if the official communications of international organizations *inter se* were to be covered by the draft articles, there would be no reason not to extend their scope to the communications of national liberation movements, thereby complicating the whole subject. He therefore suggested that the scope of the draft articles should not be extended to the official communications of international organizations *inter se*. The status of the couriers and bags of international organizations would not be affected, since it was safeguarded by article 2.

45. The rule of inviolability of temporary accommodation set out in article 17 had evoked diametrically contrary responses: some Governments had proposed its deletion as unacceptable, while others had suggested that it should be not only retained, but even strengthened. He himself believed that the rule provided an assurance of freedom, safety and confidentiality of communication by bag between the sending State and its missions abroad. It had been argued that there was no need to extend the inviolability of the diplomatic courier to his temporary accommodation, because in most cases he would stay at the premises of the mission, or if some sort of temporary accommodation was used, he would not take the diplomatic bag with him there. That argument disregarded the requirement of completeness of the rules on the diplomatic courier and diplomatic bag; incidents or accidents affecting freedom of communication by diplomatic bag were always possible. It was true that the application of article 17 could prove somewhat burdensome for a receiving State or a transit State, but it should be remembered that those States were also sending States. The rule in article 17 should therefore be kept as it stood; he agreed with the Special Rapporteur that it represented an acceptable balance between the freedom of communication of the sending State and the legitimate interests of the receiving and transit States.

46. Article 18, as adopted on first reading, represented a good compromise solution to the much disputed problem of immunity from jurisdiction. It was based on the functional approach and provided for a qualified immunity. Full or absolute immunity would have been more consonant with the functional necessity of the official duties of the diplomatic courier, but, in view of the objections made to it, qualified immunity was

perhaps the only possible choice; it provided at least the minimum assurance required for freedom of communication by diplomatic bag accompanied by diplomatic courier. Article 18 should therefore be retained in its original compromise form, with the minor amendments proposed by the Special Rapporteur (*ibid.*, paras. 158-161).

47. For article 28, on the protection of the diplomatic bag, the Special Rapporteur had submitted three alternative texts. As he himself saw it, alternative B should be ruled out, because paragraph 2 ran counter to the main purpose of the draft articles and deviated from the comprehensive and uniform approach adopted by the Commission. It was true that the paragraph was in line with paragraph 3 of article 35 of the 1963 Vienna Convention on Consular Relations, but paragraph 1 of that same article, which permitted consular posts to use diplomatic bags, made paragraph 3 virtually ineffective.

48. Alternative A reflected established law. The concept of inviolability of the diplomatic bag embodied in the article, although not explicitly provided for in the relevant Vienna Conventions, was nevertheless a logical extension of the inviolability of the archives, documents and official correspondence of the mission provided for in article 24 and in paragraph 2 of article 27 of the 1961 Vienna Convention on Diplomatic Relations. The inviolability of the diplomatic bag ensured full protection for the confidentiality of its contents. No examination of the bag—either directly or by scanning or other devices—could be permitted, since modern scanning devices had reached a stage of development that would make nonsense of the confidentiality of official communications. Alternative A was therefore correct in providing for explicit exemption of the diplomatic bag from examination, either directly or by scanning from a distance.

49. It had to be admitted that cases of abuse of diplomatic bags had occurred in the past and, at a time when the international community had to combat international terrorism and narcotic drug trafficking, it was important that the diplomatic bag should not be misused for such purposes. The observations addressed to the Commission by the 1987 International Conference on Drug Abuse and Illicit Trafficking, which the Special Rapporteur quoted in his eighth report (*ibid.*, para. 239), were very relevant to that problem.

50. There was thus clearly a need for a certain flexibility in the application of the principle of inviolability of the bag. A balance had to be struck between protecting the confidentiality of the contents of the bag and preventing possible abuses. Viewed from that angle, alternative A appeared deficient and alternative C had the merit of remedying its shortcomings. He would be inclined even to agree to the use of non-intrusive examination by sniffer dogs if the authorities of the receiving State had serious doubts about the contents of the bag. The question arose whether that solution would not constitute a retrogression from established law; if an acceptable balance was maintained between confidentiality and prevention of abuses, however, there would be no retrogression, but rather a necessary progressive development of the law.

51. He favoured the deletion of article 33. Its retention would not only create a plurality of régimes, but would also defeat the purpose of the draft articles. In reality, the distinction between different categories of couriers and bags was becoming increasingly academic and meaningless. Today, among the various categories of couriers and bags, diplomatic bags—whether accompanied by diplomatic couriers or not—were the most commonly used form of official communication.

52. Finally, he was opposed to the inclusion in the draft articles of a set of regulations on the settlement of disputes. If the draft were finally to take the form of a treaty, it would be preferable, as experience had shown, to place the rules on the settlement of disputes in a separate optional protocol.

53. He suggested that the draft articles, with the revised texts proposed by the Special Rapporteur, should be referred to the Drafting Committee.

54. Mr. GRAEFRATH congratulated the Special Rapporteur on a comprehensive report (A/CN.4/417), which clearly demonstrated that the topic was ripe for second reading.

55. In progressively developing and codifying the law on the topic, it was necessary to bear constantly in mind the standard set by the existing conventions on diplomatic and consular relations, so as to ensure that the draft articles did not depart from that standard and to strengthen, where practicable, the provisions of those conventions. The Special Rapporteur's general approach and the suggestions he put forward in his eighth report would be particularly helpful in developing the topic along the right lines.

56. The functional approach, to which he himself attached particular importance, was often interpreted as an attempt to limit the privileges and immunities of the courier. But the Special Rapporteur suggested a much broader interpretation in his report (*ibid.*, para. 30), according to which the purpose of the functional approach was to ensure that the courier was accorded all the facilities, privileges and immunities necessary for the performance of his task. That interpretation, which he fully endorsed, gave a scientific and theoretical value to the functional approach that went far beyond the confines of the topic and provided a very useful means of balancing the interests of States and defining legal rules.

57. As to the final form of the draft (*ibid.*, paras. 32-38), he agreed that it would be best if it became a convention constituting a separate legal instrument. It should nevertheless retain an appropriate legal relationship with the existing codification conventions, so as to fit more readily into the network of the instruments in force.

58. The Special Rapporteur advanced cogent reasons for extending the scope of the draft, in articles 1 and 2, to communications between missions *inter se*. While a provision on the lines of article 1 as drafted would be a satisfactory solution and should be retained, he shared the doubts expressed about the advisability of extending the scope of the draft to the official communications of all intergovernmental organizations. It might be preferable to deal with that matter in special agreements.

59. Article 12 reflected existing law on the subject and was in general acceptable; but the problem of protection of the bag when the courier was declared *persona non grata* required further consideration. The Special Rapporteur acknowledged the justification of concern on that score, but believed (*ibid.*, para. 123) that sufficient protective measures ensuring the integrity of the bag were provided for under article 30. Article 30, however, dealt with cases of “*force majeure* or other circumstances”, and although, if that article were broadly interpreted, a *persona non grata* declaration might conceivably be covered by “other circumstances”, there was no certainty that the receiving State would accept such an interpretation of an article that dealt with a different situation. On a subject as delicate as that of protection of the diplomatic bag, States would prefer to have an express provision, rather than rely on an interpretation of other, rather remote, provisions. He therefore suggested that such an express provision should be included in article 12.

60. He agreed with the Special Rapporteur's approach to article 17, which struck the right balance between the interests of the receiving State and the sending State. He thought that the substance of the article should be retained, but that certain drafting amendments should be introduced to improve the structure and meet the concern of some States, as suggested by the Special Rapporteur (*ibid.*, para. 147). For instance, paragraphs 1 and 3 of the article, each of which stated the same basic rule and then provided for an exception, could be combined in a single paragraph 1, reading:

“1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State may not enter, search or inspect it.”.

The two exceptions, incorporated in new subparagraphs (a) and (b), would then follow, starting, respectively, with the words “Except with the consent . . .” and “Unless there are serious grounds . . .”. Paragraph 2 would remain unchanged.

61. The Special Rapporteur had rightly concluded that article 18 provided an acceptable middle ground for a compromise between States that favoured full immunity for the courier and those that favoured a restrictive approach. There could be no question of deleting article 18, since that would leave a gap in the legal regulation of the topic and would jeopardize the legal status of the diplomatic courier. He noted that article 78 of the 1975 Vienna Convention on the Representation of States, concerning insurance against third-party risks, had some relevance to paragraph 2 of article 18 in the context of defining the scope of the immunity of the courier from the civil and administrative jurisdiction of the receiving State.

62. Paragraph 1 of article 21 could be improved. He agreed with the suggestions made by the Special Rapporteur for improving the language of paragraph 1 and making it more precise (*ibid.*, para. 177); in particular, that it should be provided that the courier was entitled to privileges and immunities from the moment of his appointment and as soon as he had received the official document referred to in article 8.

63. Article 28 was probably the most controversial provision in the draft, and also the most essential, and the Commission would be in breach of its mandate if it adopted a provision that lagged behind the terms of article 27 of the 1961 Vienna Convention on Diplomatic Relations, the standard-setting character of which had been underlined by the majority of States. Paragraph 1 of article 28 should therefore state the principle of the inviolability of the diplomatic bag in unambiguous and unrestrictive terms, and the square brackets should be removed, as recommended by the Special Rapporteur, in the three alternatives—A, B and C—proposed for the article (*ibid.*, paras. 244, 247 and 251).

64. He very much doubted whether search or inspection of the bag by scanning or other devices was admissible under article 27 of the 1961 Vienna Convention. Moreover, any positive aspects of such controls would be outweighed by the many drawbacks for official communications and the danger to the confidentiality of the bag. Such inspection would also place many countries at a disadvantage.

65. The main argument advanced in support of article 33, which provided for the creation of separate and more restrictive régimes by means of optional declarations, was that it would make for flexibility and thus increase the probability of ratification of the future convention. In his view, however, an adequate degree of flexibility was already provided for under the rules of general international treaty law. Article 33 would only weaken the legal régime of the future convention unnecessarily and create a danger of “atomization” of the legal status of the bag, which could vary in the course of a single journey. He therefore supported the Special Rapporteur’s proposal that article 33 should be deleted.

66. Mr. OGISO said he wished to ask the Special Rapporteur a specific question on article 28. If that article were adopted, would the prohibition of any examination of the diplomatic bag “directly or through electronic or other technical devices” extend to the common airport practice of putting baggage through X-ray machines? Would an airline company which demanded that a diplomatic bag be X-rayed be committing a wrongful act and, if so, would the State where the airport was located bear responsibility for that act?

67. Mr. BENNOUNA said that it would be useful to clarify what was meant in practical terms by electronic devices as opposed to the usual methods of metal detection. He would also appreciate clarification of the Special Rapporteur’s position regarding sniffer dogs: did he have a specific proposal to make, or was he simply suggesting that the Commission should look more closely at the measures described in the report of the International Conference on Drug Abuse and Illicit Trafficking, to which Mr. Shi had referred earlier?

68. Mr. YANKOV (Special Rapporteur) said that he would reply at once to some of the points raised at the current meeting, and would respond to the others at greater length later.

69. On the question whether X-ray controls at airport check-points constituted an examination within the meaning of the draft articles, he confirmed that technical progress had now reached the point where a

sending State had absolutely no guarantee that an X-ray check for metal would not reveal the entire contents of a diplomatic bag. Countries that possessed advanced technology could well carry out a number of operations, in addition to checking for metal, without the knowledge of those present during the examination. In informal discussions with scientists and specialists on the subject, he had consistently been told that there was no guarantee that sophisticated radiological or electronic examinations would not be used to discover, not only the physical contents of diplomatic bags, but also specific items that were material and pertinent to the secrecy of communications, such as coding and decoding instructions or handbooks. He had been informed by technical specialists that, from a satellite positioned in outer space, the make and licence plate number of a car moving down a street, and even the content of a newspaper being read by someone in the car, could be identified. On the other hand, world attention had recently been drawn to the mistakes that could be made by sophisticated defence systems.

70. On the question whether the use of sniffer dogs was permissible under the draft articles, it should be borne in mind that drug abuse had become a problem of widespread concern, not only to those directly affected by the drug traffic but also in terms of general public health and safety. Hence anything that was not prejudicial to the secrecy of the diplomatic bag should be permitted in the fight against drugs. According to his own interpretation, the use of sniffer dogs was not covered by the prohibition of “examination directly or through electronic or other technical devices”, but he would welcome the views of other members on the matter. Sniffer dogs were unlikely to be so well educated that they could read the contents of a diplomatic bag, so he saw no reason why they should not be used to identify psychotropic and other substances prohibited by international conventions. He also pointed out that, under alternative C, the receiving State would have the option of requesting that a diplomatic bag be returned to its place of origin if the sending State refused to permit an examination of any kind.

71. Mr. ARANGIO-RUIZ, referring to the Special Rapporteur’s comment that airport electronic scanning devices did not offer sufficient guarantees for the inviolability of the diplomatic bag, asked what guarantees were given to a receiving or transit State that a diplomatic bag did not contain weapons or drugs? Two countries, Austria and Italy, had already made it clear that they did not favour a general prohibition of electronic scanning, and he personally was convinced that the possible presence of drugs or weapons in diplomatic bags was a very real problem.

72. Mr. OGISO again asked for clarification on the legal effect of article 28: if it were adopted, would the present practice of X-ray controls for baggage in airports be suspended for diplomatic bags?

73. Mr. TOMUSCHAT pointed out that another problem arose: airports were often run by private companies, but international obligations normally applied to State authorities. Would the State have to ensure that private companies did not scan diplomatic bags by means of electronic devices?

74. Mr. EIRIKSSON said that, in a discussion on that very question at an expert group meeting within the Council of Europe, it had been assumed that the draft articles would not affect the ability of private air carriers to ensure the security of their own aircraft, but would apply to the activities of State customs officials. In most cases, of course, airport security was ensured by a combination of measures carried out by State authorities and private companies.

75. Mr. BARSEGOV, referring to comments made by other members of the Commission, said that the scope of international air transport regulations extended to private companies, and that he had never heard of unaccompanied air cargo being subjected to scrutiny at airports.

76. Mr. MAHIU concurred with Mr. Barsegov that air transport was already regulated by a number of instruments which had to be respected by airline companies as well as by States. Even if airports were managed by private companies, they were still subject to State control through regulation. With regard to control mechanisms that operated in both the public and the private sectors, the example could be cited of motor coaches, which were subject to extremely strict regulations in terms of authorization to carry passengers, passenger identity controls, etc., and also that of privately owned data banks, whose use was monitored in many countries by government bodies set up to prevent interference in the private lives of individuals.

77. Mr. ARANGIO-RUIZ said that the Commission's problems with article 28 did not relate to whether regulations could cover both private and public entities, for of course they could. If the future convention incorporated a provision against electronic scanning, both State authorities and private companies would be obliged to ensure that diplomatic bags were not subjected to that scrutiny. The Commission should concentrate on determining how the application of article 28 would affect situations such as those mentioned by Mr. Ogiso.

78. Mr. BENNOUNA, referring to the comments made by the Special Rapporteur, said that, although sniffer dogs were unlikely to read what was in diplomatic bags, they raised a serious problem. Could the evidence provided by their sense of smell, which was not infallible and could easily be misled by tobacco or food products, be used as grounds for opening or returning a diplomatic bag?

79. He had every sympathy with the recommendations made by the International Conference on Drug Abuse and Illicit Trafficking and would welcome any steps taken to combat the drug traffic.

80. Mr. TOMUSCHAT, referring to the comments made by Mr. Barsegov, said that, in his view, the whole problem hinged on the type of obligation the Commission wished to establish. Under human rights law, the prohibition of torture meant that a State could not use torture and must ensure that none took place in its territory. But the guarantee of free speech did not place the State under an obligation to ensure freedom of speech in private relations. There was thus a basic distinction between two types of obligation, and article 28 could be understood in either sense. The commentary could

elucidate whether airline companies would be under an obligation to refrain from scanning diplomatic bags.

81. Mr. OGISO said that he had had difficulty understanding the comment made by Mr. Barsegov, because he saw article 28 as applying also to bags carried by diplomatic couriers, not to bags entrusted to the captains of aircraft.

82. Mr. YANKOV (Special Rapporteur) said that the issues raised during the discussion would fuel the Commission's consideration of the topic over the next few days. An interesting point about counterbalance had been raised by Mr. Arangio-Ruiz. The obligation of the sending State was stipulated in article 5, and any abuse by that State of the relevant regulations would be a wrongful act and would thus entail its responsibility. That was one of the legal guarantees about which Mr. Arangio-Ruiz had asked; another was the attempt to strike a balance of interests between various categories of States throughout the draft articles.

83. An additional consideration brought out in the discussion was that the draft articles should apply to all diplomatic bags, whether accompanied or not; they should not create a régime within a régime applicable to private companies or individuals. If a State assumed obligations under an international convention, all legal entities under its jurisdiction or control must respect those obligations: article 27 of the 1969 Vienna Convention on the Law of Treaties had made it clear that internal law could not be invoked as a justification for non-compliance with international obligations.

*The meeting rose at 1.05 p.m.*

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## 2077th MEETING

*Tuesday, 12 July 1988, at 10 a.m.*

*Chairman: Mr. Leonardo DÍAZ GONZÁLEZ*

*Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

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**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/409 and Add.1-5,<sup>1</sup> A/CN.4/417,<sup>2</sup> A/CN.4/L.420, sect. F.3)

[Agenda item 4]

<sup>1</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>2</sup> *Ibid.*

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

CONSIDERATION OF THE DRAFT ARTICLES<sup>3</sup>  
ON SECOND READING (continued)

1. Mr. TOMUSCHAT paid tribute to the Special Rapporteur for the skilful way in which he had dealt in his eighth report (A/CN.4/417) with the often conflicting comments by Governments and succeeded in working out balanced solutions. From the general point of view of establishing a uniform régime, he noted that there was little or no difference between the four types of couriers and bags covered by the codification conventions. In practice, Governments more often than not chose the better protection of diplomatic channels for their consular communications. It was therefore somewhat artificial to maintain that distinction, and it would not be unduly bold for the Commission to propose a single régime corresponding to all four conventions. On the other hand, many States had not yet become parties to the 1969 Convention on Special Missions or the 1975 Vienna Convention on the Representation of States, and it should be explained to the international community that the establishment of a uniform régime was not a veiled attempt to impose the provisions of those two instruments on States that were not prepared to accept them.

2. With regard to the new paragraph 2 which the Special Rapporteur proposed to add to article 1 (*ibid.*, para. 60), he shared the view of those who wished to exclude the couriers and bags of international organizations from the scope of the articles. If they were to be included, a great many drafting changes would be necessary; indeed, the entire draft would have to be revised. More importantly, since many States refused to place international organizations on the same footing as States, the extension of the proposed régime to cover those organizations would seriously hamper the chances that the draft articles would one day enter into force. In addition, all the problems that had arisen during the discussions on the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations were bound to arise again: should international organizations be able to become parties to the future convention? Should regional organizations also be able to participate? What weight would an international organization's signature have from the viewpoint of the convention's entry into force? All those problems could probably be resolved if it was really necessary to supplement the 1946 Convention on the Privileges and Immunities of the United Nations, but that did not seem to be the case. For all those reasons, the Commission should refrain from adding one more link to an already complex legal chain.

3. Referring to article 6, he said that he saw no justification for the Special Rapporteur's proposal for the addition of a new paragraph 2 (b) (*ibid.*, para. 92), since States enjoyed the sovereign power to arrange their mutual relations as they saw fit. The draft articles were not a kind of *jus cogens*, and it would be ill-advised to prohibit States from deviating from the path

traced by the Commission. If States parties to the future instrument wished to enter into arrangements different from those the Commission was proposing, that would be because they had serious reasons for doing so.

4. Article 13 also seemed unnecessary, especially in view of article 30. Under normal circumstances, a courier should be able to discharge his functions independently, and it was only in unforeseen circumstances that he might be in need of help from the authorities of a foreign State. Nevertheless, he was prepared to abide by the view of the majority on that point.

5. Article 17 had been the subject of controversy at the time of its adoption on first reading, and government opinion on it also appeared to be divided. He personally could not see any merit in the provision. The courier already enjoyed the protection of articles 15, 16 and 28. The addition of a new immunity, which was not provided for in existing agreements or customary rules, could only reduce the number of accessions to the future convention. Article 17 might be marginally useful, but it was certainly not necessary and it would be better to dispense with it.

6. Article 18 was not absolutely necessary either, although it did not seriously encroach upon the sovereign rights of the receiving State. The cases it covered were not likely to occur very often because of the short duration of the courier's stay in the territory of the receiving State. As for the possible liability of the courier for motor vehicle accidents (para. 2), the receiving State would undoubtedly make the entry of any vehicle into its territory dependent on insurance coverage for injury to third parties.

7. With regard to article 28, the Special Rapporteur rightly stressed that the aim of the Commission's work should be the establishment of a uniform régime. Alternative B proposed in the report (*ibid.*, para. 247) should therefore be excluded from the outset. However, simply to reproduce article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations ("The diplomatic bag shall not be opened or detained") would not be a viable solution either, for many abuses had occurred in the recent past. The solution proposed by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5) was particularly felicitous. First, it was only when the receiving State believed that the diplomatic bag contained articles which gravely endangered public security or the safety of individuals that the authorities of that State could request that the bag be subjected to examination by electronic or other technical devices; secondly, the sending State would have ample opportunity to dispel suspicions; thirdly, the examination could take place only in the presence of a representative of the sending State; finally, the examination could in no circumstances jeopardize the confidentiality of the diplomatic bag. The various safeguards built into that proposal should allay the fears of all interested parties, since they struck a fair balance between the requirements of confidentiality and the risk of abuse.

8. The new text proposed for article 32 (A/CN.4/417, para. 274) specified that the draft articles "shall complement" the four codification conventions. He was not

<sup>3</sup> For the texts, see 2069th meeting, para. 6.

sure whether that wording was fully adequate to cover the many different situations which could arise from the simultaneous application of the four conventions and of the proposed régime. It was true that, in general, the draft articles were designed to elaborate on the provisions of the four codification conventions, and the word "complement" would therefore seem appropriate. In many respects, however, the draft articles, and in particular article 28, could also be regarded as amendments to the rules in force. The wording of article 32 should take account of that amending effect, which would not be expressed by the word "complement".

9. As the Special Rapporteur indicated (*ibid.*, para. 277), article 33 as it now stood should be deleted: the Commission's work would be pointless if a provision were retained that fragmented the régime that had been so laboriously established. However, States which accepted the future instrument should not be compelled to accept the provisions of a convention which they had not ratified, for example the 1969 Convention on Special Missions. A formula should therefore be devised to ensure that States did not find themselves in that situation.

10. He was in favour of referring the draft articles to the Drafting Committee.

11. Mr. CALERO RODRIGUES said he regretted the fact that the full text of the articles adopted on first reading had not been reproduced either in the eighth report (A/CN.4/417) or in the document containing the comments of Governments (A/CN.4/409 and Add.1-5), for that would have facilitated the discussion. It was also unfortunate that fewer than 30 Governments had deemed it necessary to reply to the request of the General Assembly.

12. In the eighth report, the Special Rapporteur proposed many amendments of form and substance to the draft articles. He himself welcomed the new wording of articles 6 (para. 2), 9, 11, 19, 20, 21, 26 and 31, but he did not agree with the amendments to articles 5 and 27, and doubted the validity of those relating to articles 8, 23 and 32. He would nevertheless confine his statement to the four issues on which the Special Rapporteur had suggested (2069th meeting, para. 43) that the debate should focus.

13. The first issue was that of the scope of the draft articles. On first reading, the Commission had decided that the draft should deal exclusively with the diplomatic and consular courier and bag and that communications between States and international organizations should not be covered. In doing so, it had followed established practice, under which international organizations were subjected to a kind of *apartheid* régime. In point of fact, those organizations regularly communicated by diplomatic courier and bag, with the consent of the States concerned. Since the main purpose of the draft articles, as the Special Rapporteur recalled in his report (A/CN.4/417, para. 11), was "the establishment of a coherent and, in so far as possible, uniform régime", it had to be ensured that the provisions of the draft also applied to that very real situation. That result could be achieved without great difficulty, inasmuch as all the provisions on the courier and the bag serving in inter-State relations could apply *mutatis mutandis* to

communications between international organizations. Of course, as Mr. Tomuschat had pointed out, a great many amendments would have to be made to the text, but the task was not insurmountable.

14. Failing such a course, the Commission might find itself in the same situation as in the case of the law of treaties: once the 1969 Vienna Convention on the Law of Treaties had been elaborated and concluded, work had had to be resumed on a convention on the law of treaties "between States and international organizations or between international organizations" (1986), whereas it would have been just as easy to include some additional provisions in the first convention. If international organizations were not included in the present draft, it was more than likely that the Commission would soon be requested to prepare a new draft relating to them. It might just as well do so now. Incidentally, a reference to "international organizations" would not be enough; it would have to be specified which organizations would be covered, probably starting with those of a universal character, particularly those belonging to the United Nations family.

15. The paragraph 2 which the Special Rapporteur was proposing to add to article 1 (*ibid.*, para. 60) dealt only with relations between international organizations or between international organizations and States, whereas account also had to be taken of communications within the same international organization, for example between its headquarters and its external offices.

16. If the Commission did not wish to broaden the scope of the draft articles in that manner, it could at least add an optional clause concerning international organizations, but with all the advantages and disadvantages of "declarations" of the type referred to in article 33. Better yet, it might consider the possibility of an additional protocol, for, even if States might be reluctant to have international organizations sign the future convention, they might be more ready to agree that they should be able to sign an additional protocol. In any event, the Commission could not simply ignore the question.

17. Turning to the questions of inviolability and immunity dealt with in articles 17 and 18, he recalled that, from the very beginning of work on the topic, the delegations to the Sixth Committee of the General Assembly and the members of the Commission themselves had expressed concern lest the articles might grant too many immunities and privileges. The proposed texts should allay such concern: the approach adopted was purely functional, since the courier was granted only the immunities he required for the proper exercise of his functions. Doubts nevertheless continued to exist, so much so that it had been asked whether the provision on the inviolability of temporary accommodation (art. 17) should be retained and whether the courier should enjoy immunity from jurisdiction (art. 18). His own view was that those articles should be left unchanged and that, if the term "inviolability" seemed too strong, the first sentence of paragraph 1 of article 17 should be deleted and the order of paragraphs 1 and 2 reversed. The same functional approach was apparent in article 18, which gave the diplomatic courier

only the protection he needed for the performance of his functions. Like the Special Rapporteur (*ibid.*, para. 158), he thought that article 18 should be retained as it stood, since it represented a compromise solution, although some drafting changes would be necessary because the text was too long.

18. The protection of the diplomatic bag, dealt with in article 28, was a very controversial issue, and the discussions on the subject appeared to relate primarily to examination by means of electronic devices, and to what should be done when the receiving State had serious reason to believe that the bag contained something unlawful. On the first point, dealt with in paragraph 1 of the article, he was opposed to that paragraph on the grounds that some countries had such sophisticated technical devices that it could never be known whether they were really respecting the confidentiality of the bag. As to the second point, dealt with in paragraph 2, the concerns of receiving States had to be taken into consideration, since there were all too many examples of abuses of diplomatic privileges. It was for that reason that the Special Rapporteur proposed alternatives B and C (*ibid.*, paras. 247 and 251). Alternative C was preferable, since it merely confirmed a practice which was becoming increasingly widespread and which had, moreover, been dealt with in a convention. It also offered the advantage of meeting the concerns of the two States involved in a balanced way. Lastly, it would better safeguard the homogeneity and uniformity of the proposed régime.

19. Article 33 gave States the option of derogating, by means of a declaration, from the provisions of a régime which it was rightly desired to make "coherent and uniform". It had been suggested that the provisions of that article would make it easier for States to sign the future convention. He saw many objections of a legal nature to such an "optional declaration", but, if its inclusion would help to ensure the success of the draft, he would be prepared to accept it.

20. Mr. HAYES said that, in view of the detail and density of the report under consideration (A/CN.4/417), the Commission should now confine itself to considering the four main issues indicated by the Special Rapporteur (2069th meeting, para. 43) and leave a closer study of other parts of the report until the next session. That, he hoped, would make it possible to refer the draft articles relating to those four issues to the Drafting Committee and to ensure that the second reading would be completed during the Commission's current term.

21. A first general question that had to be considered, however, was whether the Commission should prepare draft articles on the topic at all. The majority of the members seemed to agree with the General Assembly that it should. He too believed that, while some of the other topics on the agenda were more important, it would be useful to consolidate the rules on the courier and the bag in a single instrument.

22. The Special Rapporteur had naturally based his proposals on the four codification conventions, identifying the twin objectives of consolidating and harmonizing existing rules and developing new rules for situations not fully covered by those conventions. At a

time when States, which were beset with serious problems, including security problems, were re-examining those conventions and tending towards divergent interpretations of their less precise provisions, those two objectives were fully justified.

23. It had been argued that the preparation of the draft articles duplicated work already done and that it faced the obstacle that, in many respects, the provisions of the four codification conventions differed, presumably because the situations covered were different and therefore required different solutions. The most obvious example was that of the 1963 Vienna Convention on Consular Relations which, unlike the other conventions, permitted the opening of the bag in certain circumstances. The Special Rapporteur had been right to tackle that difficulty by adopting a functional approach; he had also demonstrated the usefulness of examining State practice to see whether it revealed more uniformity than the provisions of the conventions. The ultimate success of the Commission's endeavours would largely depend on its good judgment in deciding whether harmonization of a particular rule was feasible or acceptable.

24. It had been pointed out that, while the 1961 and 1963 Conventions had been widely supported, the same was not true of the 1969 and 1975 Conventions, and that had raised the question of the scope of the articles. In that connection, he considered that, in the case of divergences between the provisions of the four conventions, less weight should be given to the two last. In short, he thought that it was useful to prepare draft articles on the topic and that the functional approach adopted by the Special Rapporteur was probably the only means of achieving that goal.

25. The first of the main issues identified by the Special Rapporteur was that of the scope of the future convention, dealt with in article 1. In his own view, the articles should cover all couriers and bags coming under the four codification conventions. With regard to international organizations, the draft should cover only organizations of a universal character; other organizations should continue to be covered by specific agreements or arrangements. He also thought that the draft should cover communications between international organizations and their external offices. However, he agreed with the argument put forward by the Special Rapporteur (A/CN.4/417, para. 56) that communications of national liberation movements did not have to be covered in a general legal instrument, particularly since such movements were essentially temporary in nature and it was to be hoped that they would be subsumed into State structures in the not too distant future. Still on the subject of article 1, he said that he was in favour of retaining the words "or with each other", since the 1961 Vienna Convention already acknowledged the use of the courier and the bag for communications between missions. The functional approach supported that position.

26. Turning to the second issue, concerning the inviolability of the courier (arts. 16-20), he said that article 16, which was a faithful restatement of the relevant provisions of the 1961 Vienna Convention, should be retained subject to the minor drafting amendment sug-

gested by the Special Rapporteur (*ibid.*, para. 139). However, he was not convinced of the need for article 17, concerning the inviolability of the courier's temporary accommodation. No such provision was included in any of the codification conventions. So long as the inviolability of the courier and the bag formed the subject of effective provisions, the protection of temporary accommodation, which involved serious practical difficulties, would not be necessary. The functional approach did not call for any new rules in that respect and article 17 could therefore be deleted.

27. Like all important provisions, article 18, on immunity from jurisdiction, was controversial. In general, he supported the text proposed by the Special Rapporteur, who correctly described it as "a compromise based on a functional approach leading to a qualified immunity from jurisdiction" (*ibid.*, para. 149). However, the problem dealt with in the second sentence of paragraph 2, relating to motor vehicle accidents, had to be given further thought before a final position was adopted. He also wondered whether paragraph 5 was really necessary.

28. He doubted the need for paragraph 1 of article 19, which merely elaborated on personal inviolability, as guaranteed in article 16. Paragraphs 2 and 3 of the article, however, were functionally justifiable and should be retained.

29. As to article 20, he found it difficult, in view of the shortness of the courier's stay in the receiving or transit State, to see what national, regional or municipal direct taxes he could be liable for in the performance of his functions. That exemption did not seem to be functionally necessary and could be dropped.

30. The third main issue referred to by the Special Rapporteur was the inviolability of the bag. Article 28 was, in that regard, a key provision which must ensure "an acceptable balance between the confidentiality of the contents of the bag and the prevention of possible abuses" (*ibid.*, para. 221). However, the use of square brackets in paragraph 1 showed that views differed on how that balance should be achieved and even on what the balance should be. The problem was most helpfully summarized by the Special Rapporteur in his report (*ibid.*, para. 222). He personally believed that article 28 should expressly provide for the inviolability of the bag as a logical corollary of the inviolability of the archives, documents and, particularly, the correspondence of the mission to or from which the bag was proceeding. At the time of the preparation of the future 1961 Vienna Convention, it might have been sufficient to provide merely that the bag should not be opened or detained; today, such a rule was clearly not adequate. Hence the functional approach called for an express rule on the inviolability of the bag.

31. He also considered that the scanning of the bag should not be permitted. In view of technological advances, current or future, an obligation to accept scanning, even under exceptional circumstances, could not be regarded as consistent with respect for the confidentiality of the bag's contents. During the exchange of views which had taken place at the preceding meeting on the question of the examination of bags by airport or airline personnel using metal detectors, the Special Rap-

porteur had indicated that, according to the information available to him, it could not be guaranteed that such equipment would not become even more sophisticated. Sending States might have to make special arrangements in that regard, but they should not be placed in the disadvantageous position of being obliged by law to accept scanning. Moreover, the draft articles should apply a uniform régime in respect of all bags. Although the provisions of the 1963 Vienna Convention differed from those of the other conventions, the evidence suggested that States had applied a uniform régime both prior to and since 1963. The functional approach did not furnish any substantial grounds for different régimes for different types of bag.

32. As for the type of régime to be applied, he considered that it should be based on the approach taken in the 1963 Vienna Convention, as the exception provided for therein was necessary in order to ensure a proper balance between the concern of the sending State and of the receiving State in the light of recent examples of abuses of the inviolability of the bag. However, that exception should be more narrowly defined than in article 35 of the 1963 Convention. The conditions set out in paragraph 2 of article 28 proposed by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5) illustrated the approach which the Commission might adopt, without, however, allowing scanning.

33. On the other hand, he was not convinced that that exception should be available to the transit State. Since the transit State could return the bag to its place of origin, and since the bag would, in all likelihood, leave the territory of the transit State at least as soon by proceeding normally on its way, the exception would be of very limited value to the transit State it was thus unjustifiable on functional grounds.

34. He was therefore in favour of retaining paragraph 1 of article 28 *in toto* and of deleting all the square brackets. As for paragraph 2, alternative C proposed by the Special Rapporteur (A/CN.4/417, para. 251) could serve as a starting-point, but the text would have to be amended to omit any reference to the transit State and to incorporate the conditions set out in the text proposed by the Federal Republic of Germany, with the exception of examination through electronic means.

35. Since the draft articles as a whole covered the accompanied bag as much as the unaccompanied bag, he wondered whether the title of the draft should not be amended.

36. Turning to the fourth main issue mentioned by the Special Rapporteur, he reiterated the view that the draft articles should apply to all couriers and bags, with rare exceptions. However, as many States had not become parties to at least two of the codification conventions and seemed unwilling for the present to be bound by their rules, they would probably not accept a new convention which would bind them to the same rules. In those circumstances, article 33 was necessary if there was to be any hope of early and wide acceptance of the draft articles in the form of a convention. It could of course be asked what purpose a consolidated convention would serve if many of its provisions were to remain a dead letter. His own response was that the con-

vention would be particularly useful to States that accepted it in full and also, if less so, to States that availed themselves of article 33. Moreover, the convention would contribute towards a future consensus and a uniform régime.

37. The only practical alternative seemed to be to limit the draft articles to diplomatic and consular bags. A consolidated instrument would not in any case eliminate the plurality of régimes in existence at present, but, with a provision such as article 33, it might help to do so in the not too distant future. Naturally, that reasoning was valid only if the draft articles as a whole were regarded as potentially constituting a legally binding instrument; if that were not the case, there would be no need for article 33, at least in its present form. The nature of the instrument that would be adopted was another problem that would have to be resolved at a later stage during the second reading, at the same time as the fate of article 32.

38. He was in favour of referring to the Drafting Committee the articles dealing with the four main issues on which he had spoken and of leaving the other articles for consideration in greater detail at the next session.

39. Mr. AL-BAHARNA, after briefly reviewing the background of the topic under consideration, suggested that it might be worth while to look at what Governments had had to say about the draft articles (A/CN.4/409 and Add.1-5). Only 29 Governments had transmitted their comments and observations, however, and, even if additional replies were received before the end of 1988, they would still be too few to enable general conclusions to be drawn. Those comments and observations thus represented the opinions of States that held strong views one way or the other. His intention was not to analyse those comments, but to highlight the major points which had a bearing on the codification of the law.

40. Several Governments had argued that the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, as well as customary international law, were sufficient for the purpose and that it would be unnecessary to embark upon the codification of the topic. That argument seemed to show that the Governments concerned were opposed either to the approach adopted by the Commission or to the content of the draft articles. Whatever the reason, however, it was too late to question the need for codification. Inasmuch as the draft articles consolidated existing rules in a single instrument and removed any loopholes in those rules, they must be welcomed. That was why he believed that basic opposition to the draft articles was unsustainable. Nevertheless, the Commission might wish to consider some of the points made in the replies by Governments that might improve the draft articles.

41. The Governments of the Nordic countries, Austria, Greece, the Netherlands and Spain had raised a number of objections to the upgrading of the status of the courier. In his view, the general argument against treating the diplomatic courier in the same way as the diplomatic agent should be reconsidered, as should article 17, which went beyond the criterion of "functional necessity". The reconsideration should cover other ar-

ticles as well, including article 18. He agreed with the comments made by the Greek Government concerning paragraph 1 of article 18, which could also apply to paragraph 2.

42. The Governments of the Nordic countries, the Netherlands and the United Kingdom had objected to article 19 for a number of reasons. The Commission should examine the ramifications of those arguments and remove the lacunae, if any, in the article.

43. Article 25, on the content of the diplomatic bag, was obviously a key provision. The Government of the United Kingdom was in favour of strengthening it in order to prevent the import or possession of articles prohibited by the law of the receiving State or the transit State. That argument appeared to be reasonable, and the Commission should take it into account in re-examining the text.

44. Article 28 was also a key provision and one of the most controversial, as shown by the number of bracketed portions of the text adopted on first reading. Governments had expressed diametrically opposed views on the subject, and the Commission now faced the task of reconciling them. In so doing, it had to bear in mind not only the impact of technological progress on institutions, but also the purpose of codification, which, in the present instance, was to establish an acceptable balance between the interests of sending States and those of receiving or transit States.

45. An analysis of the comments by Governments revealed sharp differences of views on three questions. The first was whether the diplomatic bag should be subjected to electronic examination: some Governments were firmly opposed, while others were favourable, but one of them under certain conditions. It seemed to him that the Governments of the Nordic States had taken the most balanced position on that delicate problem: they had indicated that further study and discussion of the question were required in order to reach a broadly acceptable solution. The second controversial question was whether the rule enunciated in paragraph 2 of article 28 should apply only to the consular bag or be extended to the diplomatic bag; he preferred the second solution, which was the most logical. Paragraph 2 was in the nature of a qualification to paragraph 1, which dealt with the diplomatic bag; it therefore stood to reason that the scope of paragraph 2 should be extended to the diplomatic bag. As to the third question, concerning the extension to the transit State of the privileges accorded to the receiving State in respect of examination of the bag, he believed that it should be given an affirmative answer.

46. Article 31, which established the rule that the immunities of the diplomatic courier and the diplomatic bag were not affected by non-recognition of a sending State or its Government, had been criticized by the few Governments that had submitted comments on it. He himself was not sure whether the article was absolutely necessary and believed in any case that it should be reformulated to limit its scope.

47. Article 32, on the relationship between the articles and existing bilateral and regional agreements, had likewise been heavily criticized. It was true that ar-

ticle 32 did not deal adequately with the question of successive treaties, for it said nothing about the relationship with the four codification conventions; nor did it seem to be in keeping with article 30 of the 1969 Vienna Convention on the Law of Treaties. In his view, it would be best to leave the matter to the operation of existing law rather than to prescribe a half-way solution.

48. Article 33, which would enable States to designate the categories of couriers and bags to which they did not intend to apply the articles, might indeed introduce an element of flexibility in the text, thereby facilitating wider acceptance; but it also resulted in a fragmentation of the legal rules governing the status of the diplomatic courier and bag, and a number of Governments had therefore criticized it. He himself saw it as being contrary to the central purpose of codification, which was to produce uniform rules. It should either be deleted altogether or amended to mitigate its undesirable effects.

49. Mr. BENNOUNA said that, in accordance with the suggestion made by the Special Rapporteur, he would refer only to four of the most controversial articles of the draft, reserving the right to express his views on the other provisions at the appropriate time, either in the Drafting Committee or in plenary.

50. With regard to article 1, the proposal made by the Special Rapporteur in his report (A/CN.4/417, para. 60), which would have the effect of equating international organizations with States in respect of the status of the courier and the bag, called for a number of comments. First, the unitary legal status of the State contrasted with the multiplicity of legal régimes of international organizations; secondly, the privileges and immunities of international organizations at present depended on the headquarters agreements concluded between those organizations and the host countries; thirdly, those headquarters agreements permitted the facilities granted to international organizations to be adapted to their objectives, functions and size. Before a decision was taken to establish a uniform régime for the couriers and bags of international organizations, a great deal of thought should therefore be given to the problem, which was more complex than it might seem. For example, a State which agreed to grant certain immunities to the bag of an international organization's office in its territory might not want that office to enjoy the same immunities in communicating directly with other countries, or even with organizations which the State regarded as being hostile to it. In drafting a headquarters agreement, moreover, a State had the option of ranking the privileges and immunities granted to the bag of an organization according to the guarantees which that organization was prepared to offer and according to the level of responsibility it had acquired. It would be difficult, especially on second reading, to do away with that system and simply to extend the application of the articles, which were intended to cover States, to all international organizations. It might, however, be possible, as Mr. Calero Rodrigues had proposed (para. 16 above), to draft an optional protocol on the status of the couriers and bags of organizations belonging to the United Nations system. He would be interested to hear the Special Rapporteur's opinion on that proposal.

51. In order to succeed in reconciling views on article 28, which was, as had been pointed out, a key provision of the draft, account had to be taken of the objective stated by the Special Rapporteur (A/CN.4/417, para. 221), namely to establish an acceptable balance between the confidentiality of the content of the bag and the prevention of possible abuses, bearing in mind that sending States could become receiving States and vice versa. He agreed with the Special Rapporteur's proposal that the adjective "inviolable" should be retained in paragraph 1 of the article (*ibid.*, para. 226). Even if that word was not used in the existing conventions, it could well be incorporated in a special convention on the diplomatic courier and bag, for the inviolability of the courier and the bag was a corollary of the inviolability of archives and other official documents of diplomatic missions. Consequently there must be exemption from all examination, whether direct or by electronic or other means. He was therefore in favour of the deletion of all the square brackets in paragraph 1, as the Special Rapporteur proposed (*ibid.*). Although security of transport, especially air transport, continued to be a problem, he had taken the Special Rapporteur's point that there was no way of ensuring that existing metal detection methods would not be used for other purposes; that problem, which was linked to technological advances, was still unresolved.

52. The Special Rapporteur had proposed three alternatives for paragraph 2 of article 28. Alternative C would be a step backwards in the development of positive law and he preferred alternative B, which reproduced the existing rules and would perhaps obviate the need for the provisions of article 33. It could also be argued that the secrecy of correspondence transmitted through the consular bag had less need of protection than that of correspondence transmitted through the diplomatic bag, and that the host country could therefore have broader powers vis-à-vis the consular bag.

53. Article 32 raised a number of thorny legal problems which should perhaps have been dealt with in greater detail. The Special Rapporteur indicated (*ibid.*, para. 271) that the main purpose of the draft articles was to establish a coherent régime governing the status of all categories of couriers and bags through the harmonization of existing provisions in the codification conventions and the further elaboration of additional concrete rules. The Special Rapporteur also proposed the deletion of the word "regional" in the title and the text of article 32, since it was ambiguous; he supported that proposal. With regard to the relationship with the four codification conventions, the Special Rapporteur believed that it was enough simply to stipulate in article 32 that the provisions of the articles would complement the conventions listed in article 3, paragraphs 1 and 2, without mentioning the possibility of conflicts between the articles and the codification conventions.

54. Should the conclusion then be drawn that the draft was intended to complement the codification conventions as and where they did not conflict with it? If so, the main objective, that of harmonizing the existing provisions, might be left by the wayside. Since article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties clearly indicated that a later treaty

took precedence over an earlier treaty in relations among States which were parties to both instruments, and since the Commission's draft articles constituted a *lex specialis* that should take precedence over the general conventions in most cases, he believed that article 32 should be amended by reversing the order of the proposal made by the Special Rapporteur (*ibid.*, para. 274) and stating, for example:

“Bilateral agreements in force, including the conventions listed in article 3, paragraphs 1 and 2, shall be applicable in so far as they do not conflict with the provisions of the present articles.”

Article 311 of the 1982 United Nations Convention on the Law of the Sea, which provided that that Convention prevailed over earlier codification conventions and stipulated that individual agreements were applicable in so far as they did not conflict with it, might also serve as a model.

55. With regard to article 33, he endorsed the Special Rapporteur's proposal for its deletion. As he had pointed out during the discussion in the Sixth Committee,<sup>4</sup> even if the article did not constitute a reservation *per se*, since it provided for an option, it had the effect of enabling States to make a general reservation—a procedure which was contrary to the purposes of the articles as stated in article 1 of the draft and which was prohibited by article 19 of the Vienna Convention on the Law of Treaties. Although the commentary to article 33<sup>5</sup> indicated that that article was based on article 298 of the United Nations Convention on the Law of the Sea, the analogy had no foundation in the present case, for the optional exceptions provided for in article 298 applied only to section 2 of part XV of the Convention, dealing with the settlement of disputes. The optional nature of dispute settlement was recognized in treaty law practice, but that was not at all the case in the present instance. Article 33 might even have the effect of weakening the existing customary rules, and should therefore be deleted.

56. The Special Rapporteur had expressly requested the Commission to indicate whether there was any need for providing for procedures for the settlement of disputes. Like Mr. Shi (2076th meeting), he personally believed that the most suitable approach would be to deal with the question in an optional protocol.

57. Mr. AL-QAYSI, after commending the Special Rapporteur on the quality of his eighth report (A/CN.4/417), said that he would merely endorse the views expressed by Mr. Calero Rodrigues and add a few comments of his own.

58. The general observations made by the Special Rapporteur at the beginning of his report (*ibid.*, para. 11) deserved support, although account must be taken of the Commission's overall objective of relative if not absolute acceptability. With regard to the argument put forward by some members that the draft articles should not be based either on the 1969 Convention on Special Missions or on the 1975 Vienna Convention on the

Representation of States, which many States had not accepted, he pointed out that the topic under consideration related to only one element of those Conventions, namely the courier and the bag, and that the aim was to consolidate the rules in force, to supplement them and to prevent abuses, as the Special Rapporteur had explained. If some of the provisions of those two Conventions would in fact make it possible to consolidate and supplement the rules in force and to prevent abuses, he could not see why they should not be reproduced.

59. Referring to the scope of the articles, he endorsed the comments made by Mr. Calero Rodrigues, noting, however, that the application of the articles to international organizations would be all the more justified in that the international community had provided, in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, for the possibility that international organizations could conclude treaties. The application of the articles to international organizations would thus be not only appropriate but also legally well founded.

60. As to the extent of the privileges, immunities and facilities, a proper balance had to be maintained in all cases between the various factors referred to by the Special Rapporteur (*ibid.*, paras. 29-31), while guarding against selectivity and, above all, taking account of functional necessity, having regard to the interests of the sending State, the receiving State and the transit State. For example, the concern for unification and harmonization could not prevail over a State's interest in protecting itself against abuses. Similarly, the formulation of more detailed and precise rules could not be required without some functional necessity, for such rules would create unnecessary obligations for States. Some articles therefore had to be trimmed, while others would have to be strengthened.

61. Turning to article 28, he said that, although the proposal by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5) was an interesting one, it would require further discussion. When the receiving State requested that the diplomatic bag should be examined by electronic means, that could be only an intermediate step, coming between the request for the opening of the bag and the return of the bag to its place of origin, and which, in the event of a refusal, would in any case lead to one of those two solutions. Such a step would probably allay concerns, but it would at the same time jeopardize the principle of the confidential nature of the bag. He was therefore of the opinion that the examination of the bag by electronic means should either be made a general rule or eliminated altogether. In any event, he agreed with Mr. Calero Rodrigues that it would be better to state the principle of inviolability in paragraph 1, that paragraph to be followed by paragraph 2 of alternative C.

62. Article 31, as amended by the Special Rapporteur, now applied only to situations that seemed to be governed by general principles. It might therefore not really be necessary. As to article 32, it raised thorny problems, and the comments made in that regard by Mr. Benouna should be given careful consideration. The best solution might be to leave that text aside for the time be-

<sup>4</sup> *Official Records of the General Assembly, Forty-first Session, Sixth Committee, 32nd meeting, para. 62.*

<sup>5</sup> *Yearbook . . . 1986, vol. II (Part Two), pp. 33-34, para. (1) of the commentary.*

ing and come back to it once the entire draft had been completed.

63. With regard to article 33, he shared Mr. Calero Rodrigues's views and recalled that the idea of an "optional declaration" had originally been put forward by a member of the Commission in connection with the question now dealt with in article 28; the problem was whether the inviolability of the bag should be absolute, whether the inspection of the bag by electronic means should be allowed and whether the diplomatic bag should be treated in the same way as the consular bag.<sup>6</sup> The Special Rapporteur had taken up that idea, which had been put forward in a very specific context, and had introduced it in the wider context of the applicable legal régime as a whole, thus making it an entirely different idea that was much broader than it had been originally. Moreover, if article 33 was retained, it would give rise to practical problems, for it would be for minor officials to decide which régime to apply according to the option chosen by States and it was not certain that they would be in a position to do so. If article 33 was designed to incite wide acceptance by States of the draft articles as a whole, it should perhaps be retained provisionally, although the possibility of deleting it should not be ruled out in the event that it raised practical problems.

64. As to referral of the articles to the Drafting Committee, he thought that the Commission should proceed without further delay to the finalization of the text. It would nevertheless be better to refer all the articles to the Drafting Committee, and not only those relating to the four main issues referred to by the Special Rapporteur, since all those texts were closely linked.

65. With regard to the question of the settlement of disputes, that might be dealt with later, perhaps in a separate protocol, as Mr. Bennouna had suggested, assuming of course that the question warranted consideration by the Commission, given the modest objectives of the draft articles.

#### Organization of work of the session (continued)\*

[Agenda item 1]

66. Mr. BARSEGOV said that he would like to know what the Commission's programme of work would be from now until the end of the session. There were still two topics to be discussed, namely State responsibility and jurisdictional immunities of States and their property, and he asked whether the special rapporteurs concerned would be able to introduce their reports at the current session, even on a preliminary basis, so that the members of the Commission would have time to study them before the following session.

67. The CHAIRMAN said that the Enlarged Bureau would meet the following day to consider the programme of work up to the end of the session and that he would present the Enlarged Bureau's recommendations at the Commission's next meeting.

*The meeting rose at 1 p.m.*

<sup>6</sup> See *Yearbook . . . 1985*, vol. I, p. 179, 1906th meeting, para. 7 (Sir Ian Sinclair).

\* Resumed from the 2044th meeting.

## 2078th MEETING

*Wednesday, 13 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

#### Organization of work of the session (concluded)

[Agenda item 1]

1. The CHAIRMAN announced that the Enlarged Bureau had drawn up a proposed programme of work based on an exchange of views at the meeting it had just concluded. According to the proposed programme, discussion on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier would continue until Friday, 15 July, when the Special Rapporteur would sum up the views expressed by members and debate on the topic would be closed.

2. On Tuesday, 19 July 1988, two Special Rapporteurs, Mr. Ogiso and Mr. Arangio-Ruiz, would introduce their respective reports on the remaining items on the Commission's agenda, namely jurisdictional immunities of States and their property, and State responsibility. There would be no debate on those topics at the current session, but if time permitted, members would be able to ask questions about the introductory statements and reports of the Special Rapporteurs. The discussion of the report of the Drafting Committee on the draft Code of Crimes against the Peace and Security of Mankind would take place from 20 July to 22 July inclusive. The final week of the session (25 to 29 July) would be devoted to discussion of the Commission's report to the General Assembly.

3. In reply to a question by Mr. SEPÚLVEDA GUTIÉRREZ, he said that two meetings a day would be held throughout the final week.

4. If there were no objections, he would take it that the Commission agreed to adopt the programme of work proposed by the Enlarged Bureau.

*It was so agreed.*

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/409 and Add.1-5,<sup>1</sup> A/CN.4/417,<sup>2</sup> A/CN.4/L.420, sect. F.3)

[Agenda item 4]

<sup>1</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>2</sup> *Ibid.*

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR  
(continued)

CONSIDERATION OF THE DRAFT ARTICLES<sup>3</sup>  
ON SECOND READING (continued)

5. Mr. BARSEGOV said that, in his eighth report (A/CN.4/417), the Special Rapporteur had summed up the substantial results achieved by the Commission in its work on the topic, namely completion of consideration of the draft articles on first reading and examination of the articles by Governments. The Special Rapporteur deserved credit for the energy and professional competence he had brought to bear on his task.

6. The creation of a uniform régime for all types of correspondence, bringing together in a single instrument all the relevant rules of international law, would facilitate the smooth flow of communications between States and their representatives and consulates and thereby contribute to the broadening and strengthening of the numerous and varied links between States. The draft articles must therefore incorporate and elaborate rules that extended full international legal protection to diplomatic couriers and thus guaranteed the freedom of diplomatic communications.

7. The text prepared by the Commission constituted, on the whole, an acceptable basis for the adoption of the future instrument; but even though the Commission's work was nearing completion, much remained to be done. A number of the provisions of the draft needed to be refined and made more balanced, in conformity with the purpose they were intended to serve, and he wished to make some remarks on that point.

8. His first remark related to article 17, which was one of the key provisions. In international law, the issue of the inviolability of temporary accommodation was closely linked to that of the inviolability of diplomats, or diplomatic couriers, and of their living accommodation. The venerable tradition of diplomatic relations had been crystallized in the principle of the inviolability of the diplomatic courier's person. Since respect for that principle was in practice contingent on acknowledgement of the inviolability of the courier's accommodation, international law applied the same rule on that matter. The principle of the absolute inviolability of consular premises, which was set out in a number of bilateral conventions, had an even broader basis in international law: article 18 of the 1928 Havana Convention regarding Diplomatic Officers<sup>4</sup> and article 339 of the Bustamante Code<sup>5</sup> came immediately to mind.

9. Article 31 of the 1963 Vienna Convention on Consular Relations, which was usually cited as restricting the scope of the inviolability of the temporary accommodation of a diplomatic courier, did not in fact address the general issue at all. Paragraph 2 of that article covered intrusions into consular premises "in case of fire or other disaster requiring prompt protective action", and indicated that, even in such situations of

*force majeure*, the consent of the ranking consular officer had to be assumed. The restrictive provisions of that article could hardly be considered to be a generally accepted rule, much less to apply to the diplomatic courier. A better correlation could be found between article 17 of the draft and article 30, paragraph 1, of the 1969 Convention on Special Missions, under which the private accommodation of members of a special mission enjoyed "the same inviolability and protection as the premises of the special mission". There would seem to be little justification for refusing to extend to the diplomatic courier rights that were accorded to the members of special missions.

10. The fact that the diplomatic courier remained in the receiving or transit State for only a short time had been cited to justify the denial of absolute inviolability to his temporary accommodation. The logic of that argument—if it existed at all—limped on both legs. Accommodation had to be inviolable, because otherwise the person of the diplomat or of the diplomatic courier could not be inviolable—and that fact was not affected by the length of stay. It was unlikely that recognition of the inviolability of temporary accommodation would plunge the receiving State into a tangle of red tape; the only difficulties that might arise were those resulting from exceptional circumstances of *force majeure*.

11. To ensure a balance between the requirements of human safety in the event of fire or other disaster and the inviolability of the diplomatic courier and the communications entrusted to him, paragraph 1 of article 17 should clearly provide that the agents of the receiving State or the transit State might not enter the diplomatic courier's temporary accommodation without his "clearly expressed" consent. The addition of those two words would clarify the text and make it more logical, thereby preventing misunderstandings.

12. In the last sentence of paragraph 1, which provided that consent might be "assumed in case of fire or other disaster requiring prompt protective action", it should be made clear that entry of the premises could take place "provided that all necessary measures are taken to ensure the protection of the diplomatic bag, as stipulated in article 28, paragraph 1". Paragraph 3 of article 17, which provided for the possibility of inspection or search of the temporary accommodation of the diplomatic courier if there were serious grounds for believing that there were in it articles the possession, import or export of which was prohibited or regulated, should set out the obligation of the receiving State or the transit State, "in the event of inspection or search of the accommodation of the diplomatic courier, to guarantee him the opportunity to communicate with the mission of the sending State so that its representative can be present during such inspection or search".

13. In his report (*ibid.*, paras. 143-144), the Special Rapporteur cited those amendments, suggested by the Soviet Government, but did not make it clear whether he supported them. He expressed the view (*ibid.*, para. 147) that the present text provided "an acceptable compromise solution, striking a reasonable balance between the legitimate interests of the sending State and those of the receiving or transit State", and that drafting amendments could be made with a view to improving the text,

<sup>3</sup> For the texts, see 2069th meeting, para. 6.

<sup>4</sup> League of Nations, *Treaty Series*, vol. CLV, p. 259.

<sup>5</sup> Convention on Private International Law (Havana, 1928), *ibid.*, vol. LXXXVI, p. 111.

but that they should not jeopardize that balance. But where was the line of demarcation between substantive and drafting amendments to be drawn? The amendments to which he had just referred were so straightforward that they could be regarded as drafting amendments. In his opinion, a balance could be struck only through clarifications that reflected absolutely incontrovertible rights and did not jeopardize other interests. If agreement was reached on that point, then article 17 would become acceptable.

14. He was somewhat concerned, however, about Mr. Ogiso's statement (2070th meeting) that he could accept the amendment to paragraph 3 of article 17 proposed by the Soviet Union provided that the last part was deleted. Surely Mr. Ogiso understood that, without the last part of the sentence, the notification procedure would become a mere formality. The purpose of the proposal was certainly not to say that notifying the mission of a sending State of an impending inspection or search implied obtaining its tacit consent.

15. As the Special Rapporteur pointed out in his report (A/CN.4/417, para. 221), article 28, on protection of the diplomatic bag, was a key provision setting out basic rules. The future instrument must endorse the principle of inviolability not only of the diplomatic courier's person and accommodation, but also of the bag. To that end, it was necessary to remove the square brackets in paragraph 1 of the article. The text would then be in line with the provisions of article 27 of the 1961 Vienna Convention on Diplomatic Relations, which was the most authoritative text on diplomatic law in the light of contemporary conditions.

16. If he had understood the position of the Special Rapporteur correctly, that approach corresponded, on the whole, to the one favoured in the report (*ibid.*, para. 226). As the Special Rapporteur pointed out (*ibid.*, para. 227), a significant number of the written comments and observations on the article had made "serious reservations and objections to the examination of the bag directly or through electronic or other technical devices". It would hardly be logical to proclaim the inviolability of archives and other official documents if that rule were not to apply while such documents were in transit. It should be clearly stated that examination of the diplomatic bag, including examination by means of electronic or other technical devices, was prohibited.

17. The proponents of scanning saw it as something distinct from opening the diplomatic bag, and advanced a number of arguments to support their case. For example, they maintained that there were no rules of customary international law prohibiting the scanning of diplomatic bags or their inspection by means of electronic or other technical devices. It was certainly true that the word "scanning" did not appear in any international convention or textbook on international law; but that should not be taken as tacit approval of such procedures. No one could have foreseen the possibility of the use of such methods, even in the future. As to the absence of a prohibition of inspection, he could not agree: that prohibition was not only established by centuries of practice, but was also written down in black and white. The argument that there was no indication of

how inspections were to be carried out was simply not relevant.

18. It had also been suggested that the practice of scanning diplomatic bags should be applied not generally, but only when there was reason to believe that the bag was being used for inappropriate purposes. A right, however, was a right, and, once the right was granted, all protestations about and calls for self-restraint would become merely pious talk. If the special services of technically advanced countries were granted the right to scan bags, it would be futile to try to limit the scope of that right. There was, after all, a principle at stake: either it was recognized that the diplomatic bag was inviolable and might not be opened, or that old-established principle was frankly repudiated.

19. Not only would scanning and similar means of inspection damage correspondence and other documents transmitted on microfilm, but such inspection could also violate the confidentiality of the bag. Governments in favour of inspection naturally claimed that the control that they would have the possibility of exercising would not permit the reading of the documents, so that the relevant provisions of the Vienna Convention on Diplomatic Relations would be respected; on that point he referred members to the comments received from the Governments of the Netherlands (A/CN.4/409 and Add.1-5) and the United Kingdom (*ibid.*). The good faith of Governments seeking to establish the principle of the scanning of the diplomatic bag must not, of course, be put in doubt. Yet the very fact of raising the issue was contrary to the principle of inviolability *vis-à-vis* the Governments whose diplomatic bags would be scanned, and introduced elements of suspicion and distrust in relations between States.

20. In his report (A/CN.4/417, para. 229), the Special Rapporteur stated that the final decision was to be taken by the authorities of the receiving State or the transit State and would depend upon their satisfaction with the explanations provided by the sending State. He also noted the difficulty of proving that the recourse to scanning would not affect the integrity and secrecy of the documents. There could be no guarantee that, should the principle of scanning be accepted, the special services of Governments having the necessary technical equipment would not take advantage of the opportunity afforded. Technology was developing at such a pace that it would be impossible to establish whether or not a document had been read during inspection by scanning. However, as was pointed out in the report (*ibid.*), that solution would satisfy only the small number of States that possessed the requisite scanning technology.

21. To authorize examination of the diplomatic bag by any means whatsoever would clearly be at variance with the established rules of international law, as reaffirmed in the Vienna Convention on Diplomatic Relations. That was the conclusion reached by a number of Governments, including those of Spain and New Zealand; the latter had expressed the wish that article 28, paragraph 1, should make it clear that the use of electronic screening devices was impermissible (A/CN.4/409 and Add.1-5), and the Special Rapporteur had come to the same conclusion.

22. Paragraph 2 of article 28 raised an entirely different problem, that of establishing a comprehensive and uniform régime governing the legal status of all categories of bag. In his report (A/CN.4/417, para. 230), the Special Rapporteur expressed himself in favour of a differentiated régime and referred to the "different treatment" provided for by the 1961 Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, on the one hand, and the 1963 Vienna Convention on Consular Relations, on the other. In paragraph 2 of article 28, the consular bag was set aside from the general legal régime governing postal communications between States and was made subject to a special régime, which permitted its examination, *inter alia*, by means of electronic or other technical devices and its return to the place of origin.

23. His reasons for opposing the use of scanning were applicable to the consular bag as much as to the diplomatic bag, and he disagreed with the Special Rapporteur's idea of providing for a differentiated régime solely on the basis of the differences between article 27, paragraph 3, of the 1961 Vienna Convention and article 35, paragraph 3, of the 1963 Vienna Convention. He pointed out that article 33 of the 1963 Convention provided that consular archives and documents should be inviolable at all times and wherever they might be; that article 35, paragraph 1, of the same instrument set out the obligation of the receiving State to permit freedom of communication on the part of the consular post for all official purposes, and, in the following sentence, clearly placed consular posts on the same level as diplomatic missions; and that article 35, paragraph 2, of the same instrument, corresponding to article 27, paragraph 2, of the 1961 Vienna Convention, proclaimed the inviolability of the official correspondence of the consular post.

24. As to article 35, paragraph 3, of the 1963 Vienna Convention, which the Special Rapporteur had singled out, and which authorized examination of the consular bag as an exceptional measure, in specified circumstances, it was contrary to the laws and practice of many States, which strictly upheld the principle of the absolute inviolability of the consular bag. That provision could not therefore be considered to be generally recognized. According to Soviet doctrine, it imposed excessive limitations on the privileges and immunities of the consular service and its officials, thereby infringing the sovereign rights of States. Soviet practice did not take a narrowly functional, predominantly commercial and economic view of consular law, and did not substantially differentiate between the legal régimes governing diplomatic and consular missions, their staff and their correspondence.

25. The consular agreements and practice of the majority of States showed that the scope of consular immunity was tending increasingly to coincide with that of diplomatic immunity. It was surely not the Commission's task to review established rules and standards governing the relations of States with their missions and consular posts; on the contrary, the principal object of the draft under consideration was to standardize ex-

isting international rules with a view to improving the communications of States with their missions abroad. To reduce the status of the diplomatic bag to that of the consular bag would justify the fears expressed by the Government of Greece (A/CN.4/409 and Add.1-5) and other Governments that the adoption of a new status might lead to the undermining of the rules in force.

26. For the reasons he had just stated, he considered that paragraph 2 of article 28 should not be retained. Of the three alternatives proposed by the Special Rapporteur, he preferred alternative A. Alternative B included a paragraph 2 based directly on article 35, paragraph 3, of the 1963 Vienna Convention; that paragraph in fact referred only to the consular bag. The Special Rapporteur stated in his report (A/CN.4/417, para. 248) that "under the four codification conventions only this type of bag could be opened and returned". However, paragraph 2 of alternative B differed from all four codification conventions in a significant respect: the right to request the opening or return of the bag was granted not only to the receiving State but also to the transit State. The transit State would thus be empowered to grant or withhold permission for the free passage of the bag through its territory, and consequently to decide whether or not the sending State should be permitted to communicate freely with its missions abroad. Such a situation would obviously be contrary to the principle of freedom of communication between the State and its delegations and missions.

27. Alternative C had been submitted by the Special Rapporteur as a "compromise provision" and an attempt to achieve a coherent and uniform régime "striking a balance between the requirements for the protection of the confidentiality of the contents of the bag and the legitimate security and other interests of the receiving or transit State" (*ibid.*, para. 252). That alternative was unacceptable inasmuch as, by aiming at a "unity" of régimes, it reduced the régime governing the diplomatic bag to the more restrictive régime imposed on the consular bag under paragraph 3 of article 35 of the 1963 Vienna Convention on Consular Relations. Whereas, under alternative B, the receiving State and the transit State were empowered to request the opening or the return of the consular bag, under alternative C that right was not confined to the consular bag but extended, by implication, to the diplomatic bag. The proposed text differed from the corresponding passage in the 1963 Vienna Convention by providing that, if the request for the opening of the bag was refused by the sending State, the competent authorities of the receiving State might request that the bag be returned to its place of origin. Moreover, according to alternative C, in the event of disagreement concerning the opening of the bag (whether consular or diplomatic), not only the receiving State but also the transit State was empowered to request the return of the bag to its place of origin. The question also arose whether the consequences of the request for the opening of the bag would differ from those envisaged in the 1963 Vienna Convention and, if so, whether the relevant provisions of that instrument should not be revised. There were as yet no answers to that question, and he therefore strongly preferred alternative A as being simpler, straightforward and based on the law in force.

28. Article 33, concerning the optional declaration, was directly contrary to the object of establishing a coherent and uniform régime for couriers and bags in all the categories listed in article 3 of the draft. To grant the receiving and transit States the right to exclude specific categories of couriers and bags from the application of the articles could lead to serious divergences in State practice and greatly complicate communications, especially where transit was concerned. It was hardly surprising that, as the Special Rapporteur stated (*ibid.*, para. 277), the article had received only "insignificant support" and that "substantial reservations and objections" had been made. He fully endorsed the Special Rapporteur's conclusion that deletion of article 33 would be advisable (*ibid.*).

29. Mr. KOROMA said that, by mandating the Commission to elaborate a set of coherent and uniform rules governing the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the General Assembly had by implication recognized that the existing rules were not coherent and uniform. Consequently, the first criterion that should be applied to the draft articles under consideration was that of their coherence and uniformity; and in his view they passed that test.

30. The second criterion, of equal importance, was that of the relevance and timeliness of the draft. It would be remembered that incidents involving the status of the diplomatic bag had taken place in Geneva and London some three or four years earlier, focusing the attention of the international community on the Commission's endeavours. The title of the topic notwithstanding, it seemed obvious that the emphasis should be on the problem of the diplomatic bag. The role of the diplomatic courier was of course an important one, but the protection of the diplomatic bag, its uninterrupted passage and its confidentiality, was essential. In dealing with those problems the draft articles, if they were eventually to become an international convention, must strike the necessary balance between the interests of the sending, transit and receiving States.

31. A point which the Special Rapporteur's eighth report (A/CN.4/417) did not seem to emphasize sufficiently was that of reciprocity; in achieving the necessary balance between competing interests, the onus should not be on only one category of States.

32. By and large, however, the draft articles before the Commission met present requirements and were ready for second reading. The Special Rapporteur deserved thanks and congratulations for the objectivity and care with which he had brought the text to its present advanced stage. The comprehensive and functional approach he had adopted was valid because it not only did justice to the inviolability of the diplomatic bag and courier, but also provided for observance of the laws and regulations of the receiving and transit States.

33. As to the scope of the draft articles, he believed that for the time being it should be confined to States; to attempt to extend it to international organizations would introduce complications. No two international organizations were alike, and organizations could not enter into reciprocity agreements with States. As ex-

plained by Mr. Reuter (2070th meeting), however, even if international organizations were not parties to the draft articles, they could be invited to implement them. Another possibility was to deal with the matter in the constituent instrument of an organization.

34. In any case, the question of extending the scope of the draft articles to international organizations could not be seriously considered without first making a survey of the volume and nature of the communications of such organizations. Only in that way would it be possible to decide whether there was any justification for giving their couriers and bags the benefit of the future instrument. An important reason for not extending the scope of the draft articles to international organizations was the considerable reluctance of States to grant them privileges and immunities. Any attempt to do so would thus create a further obstacle to acceptance of the draft by States.

35. On the other hand, the proposed régime should be extended to recognize national liberation movements. Those movements performed duties as nascent States, and extending the régime to them would facilitate their diplomatic activities. It should be remembered that many States had recognized the representatives of national liberation movements as diplomatic missions, and the international community could therefore be expected to approve the extension of the draft articles to those movements.

36. Article 11 needed to be reworded. The text should not give the impression that the courier ceased to be a courier when he had delivered the bag at its destination. It should be made clear that a courier's functions ended only on his departure from the receiving State. Sub-paragraph (b) of article 11, which dealt with the case in which the receiving State refused to recognize the person concerned as a diplomatic courier, would be more appropriately placed in article 12, since that article dealt with cases in which the diplomatic courier was declared *persona non grata* or not acceptable.

37. Article 17, on the inviolability of temporary accommodation, had given rise to some controversy. It was possible that the principle of inviolability of the temporary accommodation of the courier might impose burdens on the receiving or transit State; but those burdens would not be excessive in inter-State relations. The situations in which the inviolability was invoked would arise only occasionally, and, by virtue of the principle of reciprocity, all States would benefit from the provisions of article 17. In the light of all those considerations, he accepted the solution proposed by Mr. Calero Rodrigues (2077th meeting, para. 17), namely deletion of the first sentence of paragraph 1, reading: "The temporary accommodation of the diplomatic courier shall be inviolable." The second and third sentences were sufficient for the intended purpose.

38. Article 18, on immunity from jurisdiction, was justified by the principle of functional necessity; immunity was an indispensable condition for the efficient performance of the official functions of the diplomatic courier and bag. The provisions of article 18 followed a middle course between full immunity of the courier and bag, and protection of the interests of the receiving and

transit States. He approved of that article, which struck the right balance between the opposing interests and did not give the courier a status to which he was not entitled.

39. Article 25, on the content of the diplomatic bag, dealt with a very sensitive issue. It should be read in the context of the draft articles as a whole. Since paragraph 2 of article 5 stated the duty of the sending State and its courier "to respect the laws and regulations of the receiving State or the transit State", it was quite inappropriate to prescribe in article 25 the permissible contents of the diplomatic bag. The fact that the present international situation had caused alarm in certain States did not justify the adoption of excessive measures which might well defeat the whole purpose of the diplomatic bag.

40. With regard to article 28, on the protection of the diplomatic bag, he was strongly opposed to permitting the search or scanning of the bag, which would defeat the whole purpose of the draft articles. In view of certain abuses which had taken place, it was of course necessary to take account of the concern of receiving and transit States. But the interests of all States must be taken into consideration; they were all concerned that the confidentiality of the bag should be respected.

41. The Special Rapporteur proposed three alternative texts for article 28 (A/CN.4/417, paras. 243-253). In the light of the explanations given by the Special Rapporteur, his own preference was for alternative C, paragraph 2 of which dealt adequately with the case of genuine suspicion that the bag contained unauthorized items. That provision struck the right balance between the interests involved. Clearly, if no inspection was allowed at all, article 28 would prove unacceptable to States.

42. He agreed with Mr. Bennouna (2077th meeting) that article 23 should be dropped. Its provisions would not contribute to a uniform and coherent régime.

43. Mr. MAHIOU congratulated the Special Rapporteur on his objective and scholarly report (A/CN.4/417). Its only defect was the way in which the footnotes were presented in the French version; they had all been placed at the end of the report. He urged that, in future, all footnotes be placed at the foot of the page to which they related.

44. It was a matter for regret that only 29 Governments had sent in written comments on the draft articles. That was not a sufficient number from which to deduce the opinion of the world community. He urged the Commission not to be persuaded by that small body of opinion to alter in any way the delicate balance it had achieved on a number of important points in its draft.

45. He wished to comment on the four main issues indicated by the Special Rapporteur (2069th meeting, para. 43). The first concerned the general approach to the subject. He reiterated his support for the Special Rapporteur's approach, so well explained in his report (A/CN.4/417, paras. 10 *et seq.*). The main purpose of the draft articles, as explained by the Special Rapporteur, was the establishment of a coherent and, as far as possible, uniform régime governing the status of all

kinds of couriers and bags, based on the four codification conventions. It had been objected that the consular bag had certain peculiar features. That problem was adequately dealt with in article 28, and it had proved possible to establish a uniform régime for all types of bag.

46. There was also the problem of the small number of parties to the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. The position in regard to those two Conventions was very different from that regarding the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, which had been ratified by a large number of States. Any misunderstanding could be avoided by explaining in the commentary to the relevant article that the draft was not intended to create any obligations for States which had not accepted the 1969 or 1975 Conventions.

47. The second issue was that of the scope of application of the draft articles, and in particular whether they should apply to international organizations. In past debates on the subject, he had favoured extending the scope of the draft articles not only to international organizations but also to national liberation movements recognized by the United Nations or by the competent regional organizations. He had not changed his mind on that subject, but he would not press the point in view of the importance of arriving at a generally acceptable draft.

48. So far as international organizations were concerned, he shared the views of Mr. Calero Rodrigues (2077th meeting) and supported the idea of an article providing for optional extension of the future instrument to them. Another possibility would be a separate protocol. Perhaps the Special Rapporteur would state his views on those suggestions.

49. The third issue was the extent of the privileges and immunities to be granted to the diplomatic courier. The Special Rapporteur had invited the Commission to decide the question of the inviolability of temporary accommodation in the light of the observations made by Governments. Some of those observations disregarded the need to strike a balance between the interests of the receiving and transit States on the one hand, and the need for protection of diplomatic communications on the other, which was the underlying theme of article 17. He was opposed to the deletion of that article, although some drafting improvements, on the lines of those suggested by Mr. Ogiso (2070th meeting) and Mr. Calero Rodrigues, could be considered.

50. Article 18, which was based on the functional concept, was a well-balanced and entirely satisfactory provision. Under its terms, the diplomatic courier would enjoy jurisdictional immunity only in respect of acts performed in the exercise of his functions, and there would be no reason to question that immunity. The wording could perhaps be improved by the Drafting Committee.

51. The fourth issue was that of inviolability, more specifically as dealt with in article 28. That article had revealed a divergence of views, particularly on inspection of the diplomatic bag by electronic or other

technical devices. Of the three alternatives proposed by the Special Rapporteur to reflect the different views, he preferred alternative C (A/CN.4/417, para. 251), which endeavoured to strike a balance within the framework of the desired coherent and uniform régime. The text was a genuine compromise between a régime more favourable to the sending State, as exemplified by the relevant provisions of the 1961 Vienna Convention, and a régime more favourable to the receiving and transit States, as exemplified by the relevant provisions of the 1963 Vienna Convention. Any change made in the wording would be at the expense of that balance and would make the article more difficult to accept. It should therefore be retained as it stood.

52. He had opposed article 33, which had been introduced with a view to securing the widest possible acceptance of the future convention, because of the difficulties it would cause. He noted that most of the Governments that had submitted observations had criticized the article. The flexibility it was designed to introduce had become a source of confusion and possible danger for the future convention. He therefore agreed with the Special Rapporteur's proposal that article 33 should be deleted (*ibid.*, para. 277).

53. He had no definite views on the need for a procedure for the settlement of disputes although, as had already been suggested, it might be useful to provide for such a procedure in an annex. He was open to any solution that would be acceptable to the Commission.

54. He suggested that the draft articles as a whole should be referred to the Drafting Committee for examination at the next session, with a view to the completion of a draft convention and the convening by the General Assembly of a diplomatic conference for its adoption.

55. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on an exhaustive and erudite report (A/CN.4/417) marked by his characteristic sense of compromise, and expressed continued support for the global approach he advocated.

56. He agreed that it would have been preferable to place the footnotes to the French version of the report at the foot of each page rather than at the end of the document, and would like to know why the names of the various Governments which had sent in observations had been omitted throughout the text. It would also have been helpful, for ease of comparison, if the texts of the articles adopted on first reading had been set out alongside the revised texts.

57. The general conclusion arrived at by most of the Governments which has made observations was that, to a very great extent, the draft achieved the desired objective: establishing a coherent and uniform régime applicable to all types of diplomatic courier and bag. It was regrettable, however, that so few Governments of the third world, and particularly of Africa, had expressed their views. He did not think that that attitude reflected any lack of interest, since the diplomatic courier and, particularly, the unaccompanied diplomatic bag were the only means third world countries had of ensuring the security of their official communications with their diplomatic missions. He was

convinced that they were in favour of the early adoption of the draft by the General Assembly and the convening of a diplomatic conference as soon as possible thereafter.

58. He was not convinced by the arguments against the Special Rapporteur's proposal to extend the scope of the draft to international organizations, and did not see the advantage of rejecting outright the assimilation of international organizations to States, when international law, and the ICJ itself, unequivocally recognized that international organizations, like States, were full subjects of international law. It would have been unnecessary for the Commission to prepare the draft that was the basis for the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which had been modelled exactly on the 1969 Vienna Convention on the Law of Treaties, had international organizations been covered by the 1969 Convention in the first place. But a distinction had to be made between international organizations of a universal character and other organizations; only the former could conclude conventions on privileges and immunities with States, and benefit, without difficulty, from the application of the present articles. If necessary, the possibility of drafting a separate protocol on international organizations could be considered. The same solution could perhaps be adopted for national liberation movements, since unfortunately those movements could not benefit from the régime proposed in the draft, and since any future convention which covered them was unlikely to receive the support of a significant part of the international community.

59. The purpose of part II of the draft was to provide the diplomatic courier with freedom and security to perform his mission. The Special Rapporteur had simply codified the rules set out in the four diplomatic conventions. In aligning the status of the diplomatic courier with that of a diplomatic agent in so far as possible, he had not gone beyond his mandate, which was to draft provisions to ensure the protection of the diplomatic courier. That applied in particular to the rules on personal protection and inviolability laid down in article 16, and to the rules on inviolability of temporary accommodation in article 17. The latter form of inviolability could be no less than the guarantee provided by national penal codes, which treated any intrusion into private homes as unlawful entry. Yet that inviolability was not absolute, for paragraph 3 of article 17 laid down rules for inspection and search of temporary accommodation. He was therefore unable to support article 17.

60. The functional approach to immunity from jurisdiction, as adopted by the Special Rapporteur in article 18, was apparently designed to achieve a fair balance between the interests of the sending, transit and receiving States and to ensure the confidentiality of diplomatic communications. Codification could not be achieved without wide acceptance of the provisions by States, and the principle of absolute inviolability would not be favourably received by the international community; recent history provided too many examples of abuse of diplomatic privileges and immunities. A

general principle of functional immunity from jurisdiction, confined to acts performed in the exercise of the diplomatic courier's functions, seemed to offer an acceptable compromise.

61. Article 28, which was a key provision of part III of the draft and, indeed, of the draft as a whole, introduced a number of innovations, which had not received the unanimous support of States and consequently called for detailed consideration. Paragraph 1, for instance, provided that the bag was "inviolable wherever it may be" and added that it "shall be exempt from examination directly or through electronic or other technical devices". The objections of some States to inviolability of the bag were apparently due to their desire to limit the scope of earlier treaty provisions by omitting any provision prohibiting direct or indirect electronic or technical examination. He could not agree with their position, which was too favourable to the receiving State and contrary to the well-established principles of confidentiality and inviolability of the contents of the bag. Moreover, the fact that some States, especially industrialized States, wished all reference to exemption from electronic or technical examination to be omitted, made it quite clear that those States intended to use such methods when necessary. Third world countries, which did not have such advanced means of inspection, would then be placed at a disadvantage.

62. He believed that the prohibition of electronic devices would not generally apply to security checks at international airports, which were apparently confined to the detection of metal objects. Moreover, the interests of the receiving State were sufficiently covered by article 5, which imposed a duty on the sending State to respect the laws and regulations of the receiving State, and by article 25, which imposed an obligation on the sending State to prevent the dispatch by its diplomatic bag of anything other than official correspondence and documents or articles intended exclusively for official use. Those provisions would help to establish a fair balance between the interests of the States concerned.

63. In paragraph 2 of alternative C proposed for article 28 (A/CN.4/417, para. 251), the Special Rapporteur proposed to extend the procedure applicable to consular bags under the 1963 Vienna Convention on Consular Relations to all bags, including the diplomatic bag. Such controls were to be carried out at the request of the competent authorities of the receiving State, not of the authorities of a transit State through whose territory the diplomatic bag merely passed. A transit State should not have the right to request that the bag be opened or returned to its place of origin. If such a State had doubts about the contents of the bag, it was free to take what security measures it chose and to ask the diplomatic courier to leave its territory immediately. However, should there be a majority in favour of inspection of the bag under the conditions laid down in alternative C, he would gladly support that alternative.

64. With regard to article 32, the Special Rapporteur proposed a revised text (*ibid.*, para. 274) which rightly omitted all reference to bilateral or regional agreements, terms that had a wider connotation than they had in Article 52 of the Charter of the United Nations.

65. Article 33 could seriously disturb the balance of the draft, for optional declarations would multiply the régimes governing the diplomatic courier and the diplomatic bag, thus defeating the object of establishing a coherent and uniform régime. He therefore agreed that the article should be deleted.

66. He did not favour a mandatory procedure for the settlement of disputes, especially as the 1961 and 1963 Vienna Conventions already provided for such procedure in optional protocols.

67. The draft articles should be referred to the Drafting Committee for consideration at the Commission's next session, with a view to adoption of the draft on second reading.

68. The CHAIRMAN announced that, during the week of 4 to 8 July, the Commission had made full use of the time allotted to it by the conference services and had in fact exceeded that time by 35 minutes.

*The meeting rose at 1 p.m.*

## 2079th MEETING

*Thursday, 14 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)**  
(A/CN.4/409 and Add.1-5,<sup>1</sup> A/CN.4/417,<sup>2</sup> A/CN.4/L.420, sect. F.3)

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

CONSIDERATION OF THE DRAFT ARTICLES<sup>3</sup>  
ON SECOND READING (*continued*)

1. Mr. ROUCOUNAS, after congratulating the Special Rapporteur on his very full report to the Commission (A/CN.4/417), said that the draft articles adopted on first reading, on the basis of what had been

<sup>1</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> For the texts, see 2069th meeting, para. 6.

described as a "comprehensive" approach, called for hardly any comments, except on the few points in respect of which the Commission would have to seek compromise solutions. The Special Rapporteur had moreover prepared the ground by eliminating various contradictions and drafting problems and by proposing certain solutions in the light of the comments made by Governments.

2. He saw no objection to extending the scope of the draft to international organizations of a universal character, but recalled that the draft had originally focused on relations between States. The Special Rapporteur would have to indicate how the two approaches were to be reconciled at the present stage.

3. In making suggestions with a view to improving certain texts, including those of articles 4, 5 and 6, the Special Rapporteur had evidently taken the sensible view that, the less the draft was modelled on the provisions of the codification conventions that had been ratified by only a small number of States, the more chances it would have of being accepted by Governments. Thus the revised text of article 6, in particular paragraph 2, was now based on the text of the 1963 Vienna Convention on Consular Relations, which had been ratified by 116 States, whereas previously it had been modelled on the 1969 Convention on Special Missions, which had been ratified by only 23 States.

4. As for the incorporation in the draft of certain rules of international law which had not given rise to objections on the part of Governments, he agreed that, so long as it did not make the text too cumbersome, it was necessary for the sake of logic and consistency, for example in articles 7 and 10, and in paragraph 2 of article 9.

5. Turning to the controversial provisions, particularly articles 17, 18, 28, 32 and 33, he said that he was not convinced of the need to retain article 17. Paragraphs 1 and 3 of that article, which provided respectively for the inviolability of temporary accommodation and for the possibility of conducting an inspection or search therein, were hardly compatible with the rules enunciated in article 28. As to article 18, in so far as it established a broader régime of protection for the diplomatic courier than that provided for in article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, the Commission would have to agree on the official duties of the courier so as to try to reconcile the contradictory positions adopted on that subject by some Governments. A compromise appeared possible if emphasis were placed on the functional nature of the courier's immunities. With regard to articles 19 and 20, he agreed with the Special Rapporteur's suggestion that the provisions on exemption from customs duties and other dues and taxes should be combined in a single article.

6. With regard to article 28, the words in square brackets at the end of paragraph 1 of the text adopted on first reading probably reflected a restrictive interpretation of paragraph 3 of article 27 of the 1961 Vienna Convention on Diplomatic Relations. It should be recalled, however, that the main purpose of both those provisions was to protect the confidentiality of the con-

tent of the diplomatic bag. The lengthy discussion which had taken place in the Commission during the preparation of the draft articles on diplomatic relations, and later at the diplomatic conference, had resulted in the laconic text of paragraph 3 of article 27, and the same solution might have to be adopted as a last resort. In any case, the confidentiality of the diplomatic bag had to be preserved. The solution proposed in paragraph 2 of alternative C suggested by the Special Rapporteur for article 28 (*ibid.*, para. 251) would be satisfactory from the point of view of a uniform régime, whereas paragraph 2 of alternative B dealt only with the consular bag.

7. Turning to articles 31 and 33, concerning which he had raised objections, he took note of the amendments proposed by the Special Rapporteur to article 31; however, he still thought that, since article 33 was likely to introduce undesirable elements of complexity into what was intended to be a uniform régime, it should be deleted.

8. Article 32 should be considered very closely in relation to the four codification conventions, each of which provided for a different régime in that regard. It would be noted that, although none of those four conventions contained a general amending clause, they all included articles on non-discrimination and reciprocity, the two main problems arising in connection with article 32. In some cases, the 1961 Vienna Convention on Diplomatic Relations allowed a more restrictive (or more favourable) treatment than that for which it provided: that was the purpose of its article 47. The 1963 Vienna Convention on Consular Relations contained an article 72 entitled "Non-discrimination", but also an article 73 entitled "Relationship between the present Convention and other international agreements", which paved the way for some differentiation.

9. In the first place, article 73 reserved other agreements in force between States parties (para. 1), even if they were contrary to the Convention; secondly, it allowed States parties to conclude international agreements "confirming or supplementing or extending or amplifying" the provisions of Convention (para. 2). Read in conjunction with article 41 of the 1969 Vienna Convention on the Law of Treaties, it gave States far-reaching possibilities of modifying their treaty obligations. The 1969 Convention on Special Missions seemed to be stricter, inasmuch as article 49 (Non-discrimination) provided, in paragraph 2 (b), that the modification by States, by custom or agreement, of the extent of facilities, privileges and immunities for their special missions should not be incompatible with the object and purpose of the Convention and should not affect the enjoyment of the rights or the performance of the obligations of third States. Lastly, the 1975 Vienna Convention on the Representation of States permitted, in article 4 (Relationship between the present Convention and other international agreements), the conclusion of other international agreements.

10. It was a striking fact that, while most of the substantive provisions of the draft articles proposed by the Special Rapporteur in the course of the past 10 years or so had changed little in relation to their original content, there had been five different versions of article 32,

on the relationship between the draft articles and other agreements and conventions. The reasons for that were manifold. The first was that the Commission still did not know what form the draft articles would finally take, although, in his own opinion, it should be engaging in codification rather than in consolidation. The second was that very few States had submitted their observations, and that the Special Rapporteur had been obliged to take account of the replies that had been received. However, since it was the general view that the four codification conventions should be preserved in their entirety, he could see only two possibilities: either to delete article 1 of the draft, or to specify that the present articles "complemented" the four existing codification conventions and did not "replace" or "prevail over" them. Even the term "complement" was inappropriate, however, for, while the draft certainly contained some provisions that complemented the four codification conventions, it also contained others that differed from those of at least three of the four instruments; that was the case, for example, of paragraph 2 of article 28, whether in alternative B or in alternative C.

11. That being so, and having carefully analysed the five texts proposed by the Special Rapporteur on the question of the relationship between the present articles and other agreements and conventions, he considered that the best solution was that of article 42 (Relation of the present articles to other conventions and international agreements) proposed in the seventh report.<sup>4</sup> Paragraph 1 of that article provided that "the present articles shall complement the provisions . . .", which was logical; paragraph 2 stated that the provisions of the present articles were without prejudice to other international agreements in force, even if they were more restrictive; and paragraph 3 gave States the possibility of subsequently concluding agreements on the same subject or of modifying the provisions of existing agreements, on the condition that such modifications were in conformity with the articles of the draft—a reservation to be found in all four codification conventions, as well as in article 41 of the 1969 Vienna Convention on the Law of Treaties. Unless an "open door" solution was adopted, the draft would have to refer to the object and purpose of agreements that might be concluded subsequently, failing which the Commission would be engaging in consolidation instead of codification. The draft should, in his view, contain an article which properly settled the question of the relationship between that text and other agreements.

12. Mr. SEPÚLVEDA GUTIÉRREZ said that the Special Rapporteur was to be commended on his analysis and on his comprehensive treatment of the topic in his report (A/CN.4/417). He fully agreed with all the conclusions the Special Rapporteur has reached and with the proposals he had made. In particular, the Special Rapporteur had taken account of the comments received from Governments, of which there were unfortunately all too few, especially from developing countries.

13. He would confine his remarks to some of the details and finer points of the main issues identified by the Special Rapporteur. The draft met a definite need and therefore deserved support. First, it was intended to combine in a single instrument all the rules that would guarantee the smooth functioning of communications between Governments and their missions and, secondly, it would fill some of the gaps in the four codification conventions. The value of the topic was thus obvious, particularly since the draft submitted by the Special Rapporteur, if it ultimately took the form of a multilateral instrument, would resolve a number of problems of diplomatic law.

14. With regard to the scope of the draft, he agreed with the comments made (2077th meeting) by Mr. Calero Rodrigues and Mr. Bennouna to the effect that the draft should cover international organizations of a universal character and communications between such organizations and their external offices, as well as with their member States. The idea of adding an optional protocol for that purpose seemed reasonable.

15. Article 16 might be supplemented by a clearer definition of the scope of the inviolability enjoyed by the diplomatic courier in the performance of his functions. Some Governments took the view that such protection was already provided for in three of the codification conventions, but the States that signed the future convention would not necessarily be the same as those that were parties to those three instruments. The text of that article should perhaps be improved to take account of recent advances and of the increase in relations between States.

16. He was of the opinion that article 17 should be retained as it stood. That text gave the courier and the bag sufficient legal protection during their stay in the receiving State or in the transit State.

17. According to some members of the Commission, the jurisdictional immunities provided for in article 18 should not be the same as those enjoyed by a diplomatic agent acting in an official capacity. However, such immunities were necessary so that the courier might properly perform his very important functions and, for all practical purposes, the solution proposed by the Special Rapporteur was the only possible one.

18. Article 23 was rather obscure and could probably be improved.

19. Article 28 was obviously the key provision of the draft and the Special Rapporteur had commented on it at length, concluding with some entirely appropriate recommendations. He personally was in favour of alternative C (A/CN.4/417, para. 251), for it represented a compromise solution that would take account of all the interests involved.

20. For the reasons already given by several members of the Commission, article 33 should be deleted.

21. With regard to the question of the settlement of disputes, he agreed with the views expressed by Mr. Bennouna, and also thought that there should be an additional protocol on the subject.

<sup>4</sup> *Yearbook* . . . 1986, vol. II (Part One), p. 50, document A/CN.4/400, para. 62.

22. He had a few comments, but no specific proposal, to make on article 26. Since most diplomatic bags were transmitted by couriers or by parcel delivery services, neither the bags themselves nor their contents could be subject to supervision. The normal practice was to send the diplomatic bag once every two weeks, so that there might be as many as 10,000 diplomatic bags moving around the world at any one time. That was thus a real problem and it should be given serious consideration. There were many examples of diplomatic bags lost in the midst of passengers' luggage. As for the postal services, their shortcomings in many countries were all too well known and cases where diplomatic bags were misplaced or even lost for good were not at all uncommon. It was true that private parcel delivery companies could offer better service than official postal services, but in such cases it was not certain that diplomatic packages would not be examined by electronic or other means or that the contents of the bags would not be violated. Article 28, however, did not offer the kind of protection the Commission was so laboriously trying to provide for.
23. Of the 29 Governments which had complied with the General Assembly's request, only two, namely the Federal Republic of Germany and the United Kingdom, had referred to article 26, the former only in passing. Did that mean that States paid no attention to that problem or that they implicitly admitted that it could not be resolved?
24. He regarded the physical safety of the bag as a matter of some concern, but he was sure that the Special Rapporteur would be able to allay his fears.
25. Mr. EIRIKSSON said that he personally would never have suggested that the international community and the Commission should deal with the topic under consideration. The General Assembly's instructions nevertheless had to be complied with and work on the topic had to be completed as soon as possible. The Special Rapporteur's eighth report (A/CN.4/417) would bring the Commission closer to that goal and the changes proposed in it were generally acceptable.
26. In the light of the doubts expressed by many members of the Commission about the need for the work in progress, he did not think that the Commission had to stake its reputation on whether the end product would be acceptable or not. He therefore understood why the Special Rapporteur had not taken advantage of the opportunity provided by the comments of some Governments to eliminate various elements of the draft that were not absolutely vital to the States which were in favour of the Commission's work on the topic and objectionable to those which opposed it.
27. Certain changes, however, might make the draft more acceptable. To return to the main issues to which the Special Rapporteur had referred in his oral introduction (2069th meeting, para. 43), it would be necessary to restrict the scope of the articles as much as possible; to reduce the privileges and immunities of the courier to the minimum necessary for the performance of his functions; and to adopt a pragmatic compromise formulation for article 28.
28. His views on articles 32 and 33 were linked to his considerations on the scope of the draft. He nevertheless thought that the question of the settlement of disputes should be dealt with not as part of the draft, but in a draft optional protocol that would be submitted separately to the body to which the draft would be sent for final consideration, whether the General Assembly or a diplomatic conference.
29. As to the scope of the draft articles, it would be unrealistic not to make a distinction between the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, on the one hand, and the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, on the other. The couriers and bags referred to in the two latter Conventions should be dealt with in two separate optional protocols, not in article 33.
30. He agreed with Mr. Calero Rodrigues (2077th meeting) that, if the Commission excluded the couriers and bags of international organizations from the present draft, it might at some future time be requested to formulate a régime relating to them. He was therefore in favour of the solution of an optional protocol dealing exclusively with intergovernmental organizations of a universal character.
31. Since the body of the text would thus be confined to diplomatic and consular couriers and bags, terminology problems could be avoided by adopting provisions on diplomatic couriers and bags *stricto sensu* and then applying them to consular couriers and bags in a separate article. It would moreover be necessary to delete the reference to article 1 contained in paragraphs 1 and 2 of article 3.
32. Article 32 should be reworded to make it clear that, with regard to diplomatic and consular couriers and bags, the draft articles would replace, as between the parties, the relevant provisions of the 1961 and 1963 Conventions. Similar provisions would be found in the optional protocols relating to the 1969 and 1975 Conventions.
33. Such a limitation on the scope of the articles would ensure uniformity of the régime, at least for the most widely used couriers and bags, and would not prejudice the situation with regard to the others. The draft articles might thus be entitled "Draft articles on the courier and the bag" or, better yet, "Draft articles on the courier and the bag employed for the official communications of States and international organizations".
34. Similarly, the new wording proposed by the Special Rapporteur (A/CN.4/417, para. 92) for paragraph 2 (b) of article 6 should be amended to read:
- "(b) where States by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles."
35. Turning to the status of the diplomatic courier, he proposed the deletion of the second sentence of paragraph 2 of article 5; of articles 7, 9, 10, 13 and 17; of paragraphs 2, 3 and 4 of article 18; of paragraph 1 of article 19; and of articles 20 and 22. Those were mostly

*pro forma* provisions based on existing conventions, or provisions dealing with unlikely situations.

36. The reasons for deleting articles 13 and 17, however, were more substantive. With regard to article 13, on facilities accorded to the diplomatic courier, he noted that the corresponding articles of the 1961 Convention, such as articles 21 and 25, and of the 1963 Convention, had given rise to problems because of uncertainty about those facilities. If anything, the Commission's commentary had added to those problems. Article 27 should be deleted for the same reasons. As to article 17, the comments made by some Governments and the views expressed by members of the Commission showed that the text was impracticable. In addition, the Special Rapporteur had stated that he was prepared to delete the second sentence of paragraph 2 of article 5 (*ibid.*, para. 82) and to combine articles 19 and 20 by deleting paragraph 1 of article 19 (*ibid.*, para. 168).

37. Referring to article 28, he said that he was in favour of alternative C (*ibid.*, para. 251), although some major changes would have to be made. First, the use of the term "inviolable", in paragraph 1, would have to be linked to the specific obligations referred to in that paragraph. Secondly, those specific obligations should be expressly limited in paragraph 2. Thirdly, the possibility of non-intrusive or other external examination of the bag should be maintained. Fourthly, the possibility of causing the bag to be opened should be confined to the most serious cases, such as those referred to in the comments by the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5). Those changes would involve the following amendments: in paragraph 1, the comma at the end of the first phrase should be replaced by a colon; the words "subject to the provisions of paragraph 2" should be added after the words "opened or detained"; and the words "its contents" should be inserted before the words "shall be exempt from examination", in order to make it clear that external examination, by sniffer dogs, for example, would be allowed; in paragraph 2, the word "Nevertheless" should be deleted; and the words "and which seriously endanger the public security of the receiving State or transit State or the safety of individuals" should be added after the words "referred to in article 25".

38. In conclusion, he said he was convinced that, if his proposals were adopted, the draft articles could be accepted by the vast majority of States.

39. Mr. Sreenivasa RAO, commending the Special Rapporteur on the useful historical review of the question he had provided for the benefit of new members of the Commission, like himself, said that the eighth report (A/CN.4/417) was an attempt to improve on draft articles which had already been well received on first reading. The fact that there had been so few replies from Governments might, moreover, be an indication of approval by a majority of States, particularly since the trend in the discussions in the Sixth Committee of the General Assembly attested to the value of the work being done on the progressive development and codification of the law on the subject.

40. With regard to the doubts or even objections that had been expressed, the Commission must not lose sight of the objectives of the draft, which were: first, to limit and eventually eliminate the increasing number of violations of diplomatic and consular law; secondly, to reaffirm the international community's common interest in protecting the inviolability of the diplomatic and consular bag, whether or not it was accompanied by a courier; thirdly, to accommodate the sending State's concern for the confidentiality of communications with respect for the legitimate interests of the receiving State; and, fourthly, to harmonize and unify the existing rules and to develop more specific rules for situations not fully covered by the existing conventions, taking account of developments since 1961. One such development was the international community's growing recognition of the legal personality of international organizations, as illustrated by the 1969 Convention on Special Missions, the 1975 Vienna Convention on the Representation of States, and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Accordingly, and in the light of the mandate which the General Assembly had entrusted to the Commission, there appeared to be every reason to press ahead to complete a set of draft articles that would be as comprehensive and as universally acceptable as possible.

41. The draft under consideration had benefited from an extensive analytical survey of State practice and would serve to strike a careful balance between all the practical and policy considerations involved. The Special Rapporteur was to be commended for having focused on the harmonization and progressive development of the law and, at the same time, for having displayed caution; by proposing alternatives for various draft articles, he had refrained from expressing his own preferences and had merely indicated the merits of one approach or another.

42. Once the draft had been adopted, it would be of immense value to government officials in their day-to-day dealings with diplomatic and consular couriers and bags, and consequently to diplomatic and consular relations in general. The protection and inviolability of the courier and the bag were indeed an extension of the protection and inviolability of the premises of diplomatic and consular missions, of the various exemptions from which they benefited and of the inviolability of their archives and documents. Such protection and inviolability were thus essential to the proper exercise of the functions of those missions: to negotiate with the Government of the receiving State and with the Governments of other member States of international organizations; to protect the interests, in the receiving State, of the sending State and its nationals; to follow developments in the situation in the receiving State and to report thereon to the Government of the sending State; and to promote friendly relations between the receiving State and the sending State and among nations in general.

43. In view of the importance of those functions and of customary and conventional recognition of the principle of the protection and inviolability of the courier and the bag, as well as of their privileges and immunities, States unanimously agreed that the inviol-

ability of the bag had to be respected and even further strengthened. Recent abuses only highlighted the importance of respect for the purposes of the bag and the need for discipline on the part of all States. Cases of abuse of the courier or the bag in order to threaten the security of States were few and far between, and carried little weight compared with other considerations.

44. It was also quite clear that, in practice, States attached the same importance to diplomatic and consular couriers and bags. Diplomatic missions, moreover, could perform consular functions. He therefore fully agreed with what the Special Rapporteur stated in his report: "uniformity in the treatment of diplomatic couriers and consular couriers has acquired general support by States and thus it may be considered as a well-established rule in conventional and customary law" (*ibid.*, para. 22). In any event, abuses which might be committed by extremists could and must be curbed by the other legitimate means available to States for monitoring the activities of missions and their members, which included expelling anyone who might be considered *persona non grata*, reducing the staff of a mission and even severing diplomatic relations.

45. The answer to some of the unfortunate abuses about which States were rightly concerned, at a time when terrorism and drug trafficking had become a threat to mankind, was thus not to restrict the privileges and immunities or the protection and inviolability of the diplomatic and consular courier and bag. It was, rather, to expand mutual co-operation and to emphasize the fact that it was in the common interest of States to combat that threat by co-ordinating their intelligence services, by bringing the criminals to justice, either by prosecuting them in their own courts or by extraditing them, and, above all, by refraining from encouraging their activities for short-term political purposes or for monetary gain. The restrictions that had been proposed would in no way help to combat terrorism and drug trafficking; they would, rather, have the effect of limiting the value of the courier and the bag and of disrupting friendly relations among States by giving rise to doubts and leading to retaliatory measures.

46. The privileges and immunities and protection and inviolability of the courier and the bag were, moreover, governed by other equally well-established principles, such as that of the duty to respect the laws and regulations of the receiving State and the transit State and that of non-discrimination and reciprocity, which were reaffirmed in articles 5 and 6. In that connection, it might be useful to keep a provision in article 5, as the Special Rapporteur had proposed in his fourth report,<sup>5</sup> making it an obligation of the sending State to prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag. Such a provision would enhance the credibility of the draft articles and would be in line with the conclusion the Special Rapporteur had reached in his report:

... it is well established in law and practice that non-compliance with or violation of legal obligations constitute an illicit act which entails responsibility and liability for injury (*ibid.*, para. 87).

<sup>5</sup> See draft article 32 (Content of the diplomatic bag), *Yearbook* ... 1983, vol. II (Part One), p. 115, document A/CN.4/374 and Add.1-4, para. 289.

From that point of view, the proposal to amend paragraph 2 (b) of article 6 by deleting the reference to the rights of third States did not seem advisable; in his view, the earlier version would give better effect to the general principle of non-discrimination. That, however, was a point that would have to be decided by the Special Rapporteur, the Commission itself and the Drafting Committee.

47. With regard to the four main issues identified by the Special Rapporteur (2069th meeting, para. 43), he agreed that the scope of the draft should be extended to international organizations of a universal character. For the sake of consensus, however, he would support the idea that the scope of the draft should not be extended to communications between other international organizations, which could be dealt with in special agreements, as Mr. Reuter had suggested (2070th meeting). In the same spirit, and although he shared Mr. Mahiou's opinion (2078th meeting), he could agree that the draft should not cover communications of national liberation movements. He was also in favour of the retention of article 17, subject to drafting amendments which might improve the text and help to make it generally acceptable.

48. As had been stated, the most important provision was article 28. In that connection, he joined in the broad consensus that had developed in the Commission to the effect that the bag should not be subjected to any direct or indirect examination and, in particular, to any electronic examination, in view of the principles of reciprocity, non-discrimination, inviolability and respect for the confidentiality of the bag. In a spirit of compromise, he therefore supported alternative C proposed by the Special Rapporteur (A/CN.4/417, para. 251).

49. It would be better to discuss the question of the relationship between the draft articles and other conventions on the same subject-matter at a later stage, for it raised complex legal problems concerning the law of treaties. Moreover, if the draft articles were regarded as the outcome of efforts to consolidate the applicable rules in a single instrument, that question would no longer be of any practical significance. The main goal, therefore, must be to have the draft articles accepted by the largest possible number of States, taking account of all the interests at stake.

50. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

*The meeting rose at 11.25 a.m.*

## 2080th MEETING

*Friday, 15 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues,

Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded)**  
(A/CN.4/409 and Add.1-5,<sup>1</sup> A/CN.4/417,<sup>2</sup> A/CN.4/L.420, sect. F.3)

[Agenda item 4]

**EIGHTH REPORT OF THE SPECIAL RAPPORTEUR**  
(concluded)

**CONSIDERATION OF THE DRAFT ARTICLES<sup>3</sup>**  
ON SECOND READING (concluded)

1. Mr. McCaffrey said that he had already presented general considerations concerning the Special Rapporteur's excellent eighth report (A/CN.4/417), as well as on the first issue identified by the Special Rapporteur—that of scope. He would therefore confine his comments to the remaining issues identified by the Special Rapporteur and to certain collateral questions.
2. In article 5, he would be very reluctant to see the second sentence of paragraph 2 deleted, as the Special Rapporteur proposed (*ibid.*, paras. 80-82). Some balance was necessary in the text of the article, and the sentence in question was the only statement that provided a measure of protection for the receiving State.
3. He supported the proposed revised text of article 8 for the practical reasons stated by the Special Rapporteur (*ibid.*, paras. 96-99).
4. He agreed with at least one Government, which had found article 9 unnecessary. He took that view, first, because diplomatic couriers were not analogous to diplomatic agents or consular officers for the purposes of the draft and, secondly, because article 9 seemed to be inconsistent with the relevant provisions on consular couriers set out in article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations. If the article was to be retained, he would support the amendment proposed by the Special Rapporteur (*ibid.*, para. 111), but in his opinion the matter could best be dealt with in the commentary.
5. He supported the revised text which the Special Rapporteur proposed for article 11 (*ibid.*, para. 119).
6. Article 13 had always presented difficulties for him because of its vagueness and generality. He saw no need for an article that purported to provide extensive and in many cases unnecessary facilities for a courier, especially when it could impose uncertain and possibly burdensome obligations on the receiving State. That was particularly true of paragraph 2, which could lead

to disputes between the sending and receiving States, rather than settle any questions that might arise. He therefore agreed with the Austrian Government's proposal (A/CN.4/409 and Add.1-5) that the article should be deleted or, as a second alternative, be confined to a general duty of the receiving and transit States to assist the courier in the performance of his functions.

7. He remained convinced that article 17 was unnecessary and was bound to raise the problems which had caused so much controversy during the elaboration of the Convention on Diplomatic Relations. Such a provision was still less necessary for couriers, even on functional grounds, for there had been no problems in practice, and the article did not require the diplomatic courier to accompany the diplomatic bag in order to qualify for protection. In any event, the courier was amply protected by article 16, and did not need the penumbra that had been created in article 17. The article would also place extremely heavy burdens on the receiving and transit States, some of which would therefore probably find it unacceptable. Paragraph 2 of article 17, although designed to assist the receiving and transit States, could have the opposite effect by imposing even greater burdens upon them. Thus the article as a whole would only weaken the chances of acceptance of the draft and did not meet any practical need.

8. He also remained unconvinced of the need for article 18, some of the provisions of which, including those in paragraph 2, concerning insurance, would be unworkable in certain jurisdictions. The compromise reached in the article combined the worst of both worlds: it did not provide complete protection, yet created difficulties for the receiving and transit States. The Commission should therefore give serious consideration to the need for article 18, particularly in view of the terms of article 16.

9. Article 28, which lay at the heart of the draft, had caused the Commission the most difficulty. He feared that, if an attempt was made to introduce substantive clarifications into its terms, some of the accommodations arrived at through many years' experience with the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations, and even earlier, would be disturbed.

10. In paragraph 1 of the article, he would therefore prefer to adhere to the language of paragraph 3 of article 27 of the 1961 Vienna Convention on Diplomatic Relations, which would allow sniffer dogs, but made no reference to scanning. In his view, remote scanning was not prohibited by international law or State practice, so long as it did not compromise the confidentiality of the official communications contained in the bag. The same was true of the opening of the consular bag with the consent of the receiving State and in the presence of its authorized representative, as provided in paragraph 3 of article 35 of the 1963 Vienna Convention on Consular Relations. It followed from those remarks that he considered paragraph 2 of article 28 unnecessary. If it was to be retained, however, the amendments proposed by the Government of the Federal Republic of Germany (*ibid.*), to which other members had already referred, were worthy of further consideration.

<sup>1</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> For the texts, see 2069th meeting, para. 6.

11. He had always considered that article 33, or an equivalent provision, perhaps in the form of a protocol as some members had suggested, was essential for a comprehensive and uniform approach to the topic. States could not be expected to give what was in effect blanket approval to the four codification conventions on which the draft was based, when many of them found two of those conventions unacceptable. Moreover, some States might prefer to continue to make a distinction between diplomatic and consular bags.

12. He was attracted by the idea that the draft should apply only to diplomatic and consular couriers and bags, and that other couriers and bags should be dealt with in an optional protocol. The same requirements would then apply to the kinds of couriers and bags most often used, and one of the main grounds of objection to the draft would be eliminated. But that would be feasible only if an adequate formulation could be found for article 28.

13. The articles should be referred to the Drafting Committee for consideration at the next session, with a view to completion of the second reading of the draft within the Commission's current term of office.

14. Mr. BEESLEY congratulated the Special Rapporteur on his extremely lucid and scholarly report (A/CN.4/417), which showed that the topic, despite reservations on many sides, was worthy of serious consideration by the Commission. He agreed that the draft articles should be referred to the Drafting Committee with a view to the preparation and submission of clear texts to the Commission and to Governments.

15. While he was among those who could have accepted the idea that the topic was more or less adequately covered by the four existing codification conventions, he appreciated that some aspects required clarification. One of the difficulties was to devise rules that would be workable in all the countries concerned, without having to have someone with a doctorate in international law standing by at all stages to give an instant legal opinion. It was necessary to develop rules that were as simple as possible to apply. He noted that the Special Rapporteur had made a serious effort to resolve the problems that still arose in relations between States and to develop acceptable compromises to safeguard all the interests involved, while also harmonizing, and to some extent rationalizing, existing law.

16. On the four main issues raised by the Special Rapporteur (2069th meeting, para. 43), his position was akin to that of Mr. Ogiso, Mr. Hayes and Mr. McCaffrey. First of all, he saw no compelling reason why the régime of the draft should not be extended to international organizations of a universal character, or at least to their communications with their own regional offices. He recognized, however, that more than one article might be needed for that purpose. It had of course been argued that States would never agree to extend the scope of the draft in that way, but he was prepared to leave the matter to debate in the Sixth Committee of the General Assembly and to the comments of Governments, without prejudging the issue. There was considerable merit in Mr. Calero Rodrigues's comments

(2077th meeting), particularly in regard to the desirability of implementing the concept through a separate optional protocol, but with the proviso that the fate of the protocol should not be allowed to hold up progress on the rest of the articles.

17. On the question of communications between States *inter se*, he thought the functional approach tended to support the retention of the words "or with each other", in article 1.

18. Another question raised by the Special Rapporteur, and dealt with in article 17, was the inviolability of temporary accommodation. Although the Special Rapporteur had suggested that there might be a lacuna if temporary accommodation was not protected, he himself was unaware of any such problem. His position was that, since the courier and bag were independently protected, there was no need for a specific article of that kind. If the article was retained, however, Mr. Ogiso's proposal (2070th meeting) that the first sentence of paragraph 1 be deleted would be acceptable as reflecting his general approach.

19. The granting of qualified jurisdictional immunity to the courier, under article 18, seemed to be in accord with the functional approach, and he therefore supported that article as drafted.

20. As to article 28, he recognized the need to maintain a very careful balance, so as to ensure that the receiving and transit States had some protection against improper use of the bag. Had the underlying principle of reciprocity been properly observed, the Commission would not have had to deal with that particular problem.

21. Scanning raised the problem of how to make sure that the devices used did not violate confidentiality. He none the less tended to the view that scanning should not be permitted, whether it was legally permissible in theory or not. Sniffer dogs might be permitted as an acceptable compromise if the object was to preserve the inviolability of the bag, while at the same time taking account of the concern about drug trafficking.

22. Some members had suggested that the diplomatic bag did not remain in the territory of transit States long enough to warrant the provision on its protection. However, a State using the bag for improper purposes would not necessarily adhere to its transport schedule. He was not suggesting that the principle to be incorporated in the articles should be based on an assumption of bad faith, but a delicate balance had to be struck between protecting legitimate uses and guarding against abuses. He was therefore in favour of according the same rights to transit States as to receiving States. For the text of article 28, he preferred alternative C (A/CN.4/417, para. 251), as laying the best foundation for a compromise.

23. It had been argued that that approach might constitute a step back from positive international law, but he believed that, on the contrary, it could be part of progressive development towards a more equitable and functional balance. As to the idea that a receiving or a transit State might overuse the exception provided for in paragraph 2 of article 28, he was inclined to think that

reciprocity would be adequate to prevent such overuse and to ensure a viable régime.

24. Some concern had been expressed about the meaning of the revised text of article 32 (*ibid.*, para. 274) and whether the word "complement" adequately conveyed the relationship between the present articles and the codification conventions. It had further been suggested that the provision that "the present articles shall not affect other international agreements in force" might be a deviation from the terms of the 1969 Vienna Convention on the Law of Treaties and from the principle it laid down of the supremacy of later instruments. He believed the Commission should seek to harmonize the present draft articles with those it was developing on other topics, in order to ensure that the same terms were used to mean the same things. He tended to agree with Mr. Bennouna's views (2077th meeting), but was also sure that the Special Rapporteur saw the need for harmony with the approaches adopted in other draft conventions.

25. He supported the proposed deletion of article 33. Although he knew that the article had originally been included in the hope that the loss of uniformity resulting from the creation of a hybrid régime would be compensated by the greater acceptability of the draft articles, he believed it was better to face the issue head-on and try to develop a broadly based set of articles that would attract solid support. He did not object to developing the law to some extent, but too much innovation or deviation from what had already been codified would make it harder to persuade States.

26. The Special Rapporteur had performed a valuable service to the Commission and the international community. He supported the referral of the draft articles to the Drafting Committee.

27. The CHAIRMAN, speaking as a member of the Commission, thanked the Special Rapporteur for his capable and comprehensive summary of the comments made by Governments on the draft articles. The failure of a great many Governments to offer comments could be explained by the fact that they either endorsed the draft articles or were not interested in them. But even though comments had not been received from a representative number of Governments, the Commission could still use the comments it had received (A/CN.4/409 and Add.1-5) to proceed with the fulfilment of its mandate, namely to complete the second reading of the draft articles during the term of office of its present membership.

28. The objective of the draft was comprised in one basic principle: protection of the diplomatic bag and observance of its inviolability, as being essential to respect for the communications of States with their representatives abroad. The main intention was to give the diplomatic courier immunities and privileges equivalent to those of the head of a diplomatic mission. It was perhaps for that very reason that so few comments had been received from developing countries; they rarely used the services of diplomatic couriers because they were too costly, especially in times of economic crisis like the present.

29. In response to the Special Rapporteur's request, he would focus his remarks on a few fundamental issues arising from the comments by Governments.

30. On article 2, he endorsed Mr. Reuter's view (2070th meeting) that the régime provided for in the draft should be extended to international organizations on a case-by-case basis, with the necessary restrictions. The privileges and immunities granted to an international organization should be determined by its functions. Some organizations, such as those working for international peace and security, should enjoy complete confidentiality of their correspondence. But it was generally recognized that all international organizations needed to be able to communicate freely, quickly and in confidence with their member States and regional offices. The right to use diplomatic bags and couriers was recognized in article 10 of the 1946 Convention on the Privileges and Immunities of the United Nations, as well as in a number of individual headquarters agreements, including those between FAO and Italy, IAEA and Austria, UNESCO and France, and WHO and Switzerland. Multilateral relations were now a fundamental part of international life that would surely increase in importance in the future, and extension of the scope of the draft articles to international organizations would promote the progressive development of the rights they enunciated. He agreed with other speakers that the least problematic means of accomplishing that purpose might be to incorporate the relevant provisions in an optional protocol.

31. Article 17 did not seem to be important; since it would create more difficulties than it resolved, it should be deleted. His comments on article 27 could best be made in the Drafting Committee.

32. With regard to article 28, on protection of the diplomatic bag, he observed that anyone who had been a diplomat knew that the inviolability of the bag was something of a myth. Advanced technical devices could easily be used to determine its contents, and unaccompanied bags were often left unguarded for long periods, during which they could be not only scanned but also opened without anyone's knowledge. Those facts should be kept in mind as the Commission proceeded with its work on developing a theoretical foundation for the secrecy of communications between States. He supported alternative C proposed for article 28 (A/CN.4/417, para. 251), as the one which best covered all the possibilities that might arise regarding treatment of the diplomatic bag.

33. He agreed that article 33 should be deleted if the Commission's goal was to create a coherent and unified régime. States were more likely to endorse the draft articles if they expanded and consolidated the various provisions relating to the diplomatic bag than if they added to them.

34. He also endorsed the idea that the Commission should attempt to elaborate a flexible system for the settlement of disputes; in order that its inclusion in the draft articles might not affect the willingness of States to ratify them, such a provision might take the form of an optional protocol.

35. The draft articles should be referred to the Drafting Committee for review in the light of the comments made by Governments, so that the Commission could consider them on second reading at its next session.

36. Mr. YANKOV (Special Rapporteur), summing up the debate, thanked the members of the Commission for their comments, critical observations and suggestions. The debate had been rich yet streamlined, focusing on the most important issues, and would be of great assistance in future work on the topic, including work in the Drafting Committee and in the Sixth Committee of the General Assembly. All members of the Commission appeared to favour referring the whole set of draft articles to the Drafting Committee. For practical reasons, he would confine his summing-up to the main issues, but wished it to be understood that he would take account of all substantive and drafting comments made during the debate. It might perhaps be useful if he prepared a working paper listing all the suggestions made in order to assist the Drafting Committee, as well as a brief analytical outline of the debate in the Sixth Committee at the forthcoming session of the General Assembly, and, on that basis, submitted revised versions of the articles for the Drafting Committee's consideration.

37. The instructive exchange of views on the purpose and form of the draft, and on methodology, specifically the concept of a comprehensive and functional approach, had resulted in a number of constructive suggestions which he would endeavour to follow.

38. Article 1, as adopted on first reading, had given rise to no substantive comments; it seemed that the concept of the *inter se* character of official communications caused no difficulty. The main discussion had centred on the revised text of paragraph 2 as proposed in the report (A/CN.4/417, para. 60), which extended the scope of the article to intergovernmental organizations. He had considered it his duty to raise that issue again, not only because some Governments had specifically suggested it in their comments, but also, and more particularly, because the Commission, in its commentary to article 2,<sup>4</sup> had expressed the wish that the question should be re-examined before a final decision was taken.

39. The debate had shown that there were two main schools of thought on the subject: the first maintained that the draft articles should apply to the couriers and bags of States, without excluding couriers and bags employed for the official communications of international organizations; the second held that their scope should be extended to international organizations of a universal character, i.e. the United Nations and its specialized agencies, IAEA and similar organizations, as specified in article 1, paragraph 1 (2), of the 1975 Vienna Convention on the Representation of States. Several possible modalities had been suggested for extending the scope of the draft articles, e.g. an optional implementation clause along the lines of article 90 of the 1975 Vienna Convention, or an optional protocol attached to the future convention. While continuing to

believe that there were valid reasons in favour of a qualified extension of the scope of the draft articles, he thought the idea required further study; the various options should be considered with great care and the reactions of Governments scrutinized further before a final decision was taken.

40. In regard to the facilities, privileges and immunities accorded to the courier, the debate had concentrated principally on articles 17 and 18, although several members had also made interesting comments on articles 7, 9 and 11; those comments would certainly be taken into consideration in the final drafting of the articles and commentaries.

41. All speakers had commented on article 17, expressing a wide range of views. Some had argued that the text reflected a functional approach and should be retained as it stood; some had been in favour of deleting the article altogether; and others had suggested amending the text, either by strengthening the principle of inviolability and proper protection of the bag, or by deleting the first sentence of paragraph 1. His own view was that the text adopted with no formal reservations on first reading provided a basis for an appropriate provision. The question should be studied further with a view to finding a formulation that might offer better prospects of acceptance.

42. Replying to the questions raised by Mr. Ogiso (2070th meeting) concerning article 18, he observed that the courier's immunity from the jurisdiction of the receiving State and the transit State was in respect of acts performed in the exercise of his functions. That immunity did not extend to an action for damages arising from an accident caused by a vehicle the use of which might have involved the courier's liability, where those damages were not recoverable from insurance. In such a case, a civil action might be brought if the insurance company could not pay the indemnification. It had been suggested that a provision should be added to the effect that the courier was required to have insurance coverage against third-party risks. The article might also be improved by the drafting amendments indicated in the report (A/CN.4/417, paras. 159-161).

43. In reply to Mr. Hayes (2077th meeting), who had expressed some doubt about the need for paragraph 5 of article 18, he pointed out that a safeguard provision of that kind was virtually a standard rule in diplomatic and consular law. In his view, the paragraph served a useful, if modest, purpose.

44. The merger of articles 19 and 20 proposed in the report (A/CN.4/417, para. 168) had not given rise to substantive objections; the revised text might therefore be considered to provide a basis for consideration by the Drafting Committee.

45. The next major group of problems discussed had been those relating to the status of the bag, and article 28 had received particular attention, which showed once again that protection of the diplomatic bag was a key issue. While the adoption of alternative B (*ibid.*, para. 247) was probably the easiest solution, it had been thought that it would be a deviation from the Commission's objective of establishing a coherent and uniform régime for all categories of bags. Although not without

<sup>4</sup> *Yearbook* . . . 1983, vol. II (Part Two), p. 54.

foundation in existing conventional law, alternative B had not received sufficient support at the current session. All the other solutions considered by the Commission—the bracketed text of article 28 considered on first reading, alternatives A and C proposed by the Special Rapporteur, the proposal of the Government of the Federal Republic of Germany (A/CN.4/409 and Add.1-5), and the solutions advanced during the session, including an amendment to alternative C suggested by Mr. Eiriksson (2079th meeting, para. 37)—deserved further meticulous examination. Account should also be taken of any views that might be expressed in the Sixth Committee at the forty-third session of the General Assembly and of any further written comments submitted by Governments. The debate had indicated a trend in favour of alternative C, but it might be advisable to consider the matter further.

46. On the question of the option of the transit State to request the opening of the bag, he noted that the majority of speakers had taken the view that the position of the transit State should not be the same as that of the receiving State. Without overlooking the legitimate interests of the transit State, he agreed that the proposed procedure might lead to unreasonable delays and impede the rapid transit of the bag. Hence the majority view appeared to be justified.

47. With regard to article 26, some speakers had said that protection of the unaccompanied diplomatic bag sent by post or other mode of transport deserved closer attention. While recognizing that the revised text he proposed (A/CN.4/417, para. 215) did not fully meet that genuine concern, he drew attention to the passage in his report (*ibid.*, para. 214) recalling that proposals to obtain favourable treatment of the bag by national postal administrations had been rejected by the competent organs of UPU. That being so, he thought that further attempts might be made to improve the text of the article by including provision for bilateral or multilateral arrangements to ensure safe and rapid transmission of the bag.

48. The revised texts of articles 30 and 31 had elicited no specific comments, but only some drafting proposals and a general comment concerning the need for article 31.

49. As to article 32, both the text provisionally adopted on first reading and the revised text proposed in the report (*ibid.*, para. 274) had been the subject of a most useful discussion. The relationship between the draft articles under consideration and other agreements and conventions was a rather complex one, and further reflection was called for in order to arrive at a fully adequate formulation. Throughout the period of his work on the topic, he had taken into account the relevant provisions of the 1982 United Nations Convention on the Law of the Sea and the 1969 Vienna Convention on the Law of Treaties. In the draft articles under consideration, the doctrine of *lex posterior* or *lex specialis* had to be applied with great caution and prudence, because the draft, while based on the four existing codification conventions, went beyond them in certain respects. A study of some precedents might prove useful, but in conducting such a study it should be recognized that the role of the draft articles was to be very much more modest than

that of the United Nations Convention on the Law of the Sea. The latter had been conceived as an umbrella convention constituting the legal basis for special conventions, whereas the draft articles were intended to form a special convention, based on four existing codification conventions. The matter obviously required further consideration, with a view to arriving at a formulation that was as precise as possible and could be widely accepted.

50. The proposal to delete article 33 for the reasons explained in the report (*ibid.*, paras. 275-277) had been widely supported. Arguments in favour of providing grounds for a more general acceptance of the draft should not, however, be overlooked. Further efforts might be made to achieve that purpose through other provisions of the draft.

51. A useful debate had been held on the question of settlement of disputes. The idea of an optional protocol having been advanced, he would remind the Commission that the Optional Protocol concerning the Compulsory Settlement of Disputes appended to the 1961 Vienna Convention on Diplomatic Relations had been ratified by 52 of the 151 States parties; in the case of the Protocol to the 1963 Vienna Convention on Consular Relations, that ratio had been 41 to 116, and in that of the Protocol to the 1969 Convention on Special Missions, 10 to 23. For the 1975 Vienna Convention on the Representation of States, a different course had been adopted by providing for a procedure for the settlement of disputes through consultation (art. 84) and conciliation (art. 85). The question of the approach to be adopted in the present draft should be considered further.

52. Agreeing with the critical comments on the presentation of the eighth report, he said that his main concern had been to produce a document that was not too bulky. He recognized, however, that the report would have been more satisfactory had it included the texts of the draft articles provisionally adopted on first reading as well as the revised texts proposed, and had the written comments and observations of Governments referred to been identified by country. Although the number of written comments received had been rather small, those received in the past on topics that might have been considered more interesting had not been significantly more numerous.

53. He believed that the existing articles, i.e. those provisionally adopted on first reading and the revised texts submitted in his report, together with the proposals made during the current session, would provide a basis for the Commission's future work, particularly for that of the Drafting Committee.

54. Mr. BARSEGOV asked that a brief summary of Mr. Yankov's statement be circulated as early as possible.

55. The CHAIRMAN suggested that the draft articles, including the texts revised by the Special Rapporteur, should be referred to the Drafting Committee for consideration in the light of the discussion, on the understanding that the Special Rapporteur could submit new texts as appropriate.

*It was so agreed.*

56. Mr. KOROMA endorsed the Special Rapporteur's statement regarding the number of replies from Governments; the coverage of the present topic had been approximately the same as that of other topics. Hence the fact that the number of comments was small should not influence the Commission in its work.

57. With regard to the presentation of reports, he urged that all footnotes should be placed at the bottom of the page to which they related and not grouped together at the end.

58. The CHAIRMAN pointed out that it was in only one language version of the report on the topic that the footnotes had been placed together at the end.

59. Mr. YANKOV (Special Rapporteur) observed that, for technical reasons, there was now a tendency to group all the footnotes together at the end of a book. He certainly agreed with Mr. Koroma that, in the reports of special rapporteurs, it was preferable to place the footnotes at the foot of the page, so that they could be read together with the passages to which they referred. He hoped that that could be done in all future reports, provided that it did not unduly increase costs.

**Programme, procedures and working methods of the Commission, and its documentation (concluded)\***

[Agenda item 9]

60. Mr. AL-QAYSI said he wished to raise an administrative matter. The summary records of the Commission were being circulated with considerable delay, and he had not yet received the records of meetings at which he had spoken and which had been held a long time previously. The main difficulty, however, would arise when the session ended; summary records which had not been circulated by then would be posted to members, and it would be very difficult for them to observe the time-limit for sending in corrections. Clearly, some leeway was necessary in that situation.

61. Mr. BARSEGOV said he wished to draw the attention of the secretariat and of the conference services to the fact that only one summary record had so far been circulated in Russian, namely the record for the first meeting of the session, which was a very short one. He had received no other summary records in his own working language. In fact, he had not yet received the summary records in Russian for the previous session either. In the circumstances, he must disclaim all responsibility for any inaccuracies that might appear in the summaries of his statements.

62. Mr. KALINKIN (Secretary to the Commission) explained that the original texts of the summary records were produced alternately in English and in French and subsequently translated into the other language, as well as into Arabic, Chinese, Russian and Spanish. The position with regard to distribution was that the last records to appear in English were those of the 2066th and 2068th meetings, and in French those of the 2065th and 2069th meetings. The other language versions lagged behind, and Mr. Barsegov was correct in saying that the

only summary record to have appeared in Russian was that of the 2042nd meeting.

63. The secretariat would not fail to bring the remarks of Mr. Al-Qaysi and Mr. Barsegov to the attention of the competent services of the United Nations. Similar problems had arisen in the past and the answer which had been received was that the conference services were understaffed and found it difficult to keep pace with the Commission's meetings. Moreover, the financial position of the United Nations made it difficult to engage more staff.

64. Mr. BEESLEY suggested that the views expressed by Mr. Al-Qaysi and Mr. Barsegov should be recorded as the views of the whole Commission, since the concern of those two members was shared by all the others.

65. Mr. AL-QAYSI said that he had had no intention of criticizing the secretariat of the Commission, which was not responsible for the serious situation to which he had drawn attention. But he asked that some measure of flexibility be introduced in the arrangements for submitting corrections to summary records.

66. Mr. HAYES supported Mr. Al-Qaysi's request and said that much of the difficulty would be removed if the time-limit for sending in corrections were extended.

67. Mr. KALINKIN (Secretary to the Commission) said that the time-limit for corrections had been extended from three days to two weeks. If the Commission so wished, it could ask that the time-limit be extended further, and the secretariat would raise the matter with the appropriate services.

68. Mr. CALERO RODRIGUES said that the most important question was that of summary records received by members at their home addresses after the end of the session; the two-week time-limit might be difficult to observe in that case. It was necessary to ensure that in those circumstances corrections received late would still be accepted. He understood that the services concerned were adopting a flexible attitude.

69. Mr. BARSEGOV said he wished to make it clear that he was not complaining about the work of the Secretariat. He recognized the difficulties involved and believed that a flexible approach should be adopted. Perhaps his own statements could be made available to him without delay so that he could correct them?

70. He appreciated that the matter was not one for the Commission's secretariat, but for the conference services. He urged that the final text of his statements in English, French and other languages should not be issued until he had been able to correct the Russian text. He needed to have an assurance on that point; otherwise he must disclaim all responsibility for the passages appearing under his name in the summary records.

71. Mr. Sreenivasa RAO associated himself with the comments of members on the need for more time to send in corrections to summary records. He noted that, when he sent in a correction to a record, he did not receive a corrected version.

72. The CHAIRMAN pointed out that all the corrections communicated by members were incorporated in

\* Resumed from the 2046th meeting.

the summary records of the session, which appeared in final form in volume I of the Commission's *Yearbook*.

73. He suggested that the secretariat should inform the conference services of the Commission's wish to receive the summary records punctually during its sessions. In the event of some summary records not being circulated by the end of the session, the competent services would be urged to adopt a flexible approach regarding the time-limit for corrections. Those services would also be asked to take due account of corrections submitted by members in their own working languages before finalizing the records in the other languages.

74. Mr. KALINKIN (Secretary to the Commission) said that the best way for the secretariat to deal with the matter would be to insert an appropriate paragraph in the Commission's report on the current session. That paragraph would reflect the views expressed during the present discussion on the problem of the circulation of summary records and the submission of corrections to them.

75. Mr. BEESLEY said that perhaps matters should be brought to the attention of the Economic and Social Council, which was at present meeting in Geneva and was responsible for co-ordination in the United Nations.

76. Mr. KALINKIN (Secretary to the Commission) pointed out that, since the Commission was a subsidiary body of the General Assembly, the appropriate way to deal with organizational matters was to record the views of members in the Commission's report to the Assembly. The Legal Counsel would then be in a position to make representations to the Under-Secretary-General having responsibility for all the conference services of the United Nations.

77. The CHAIRMAN suggested that the Commission should adopt that course, and request its Rapporteur and the Chairman of the Planning Group to draft a paragraph for inclusion in the report. The Commission would have an opportunity of discussing the text of that paragraph when it considered its draft report. If there were no objections, he would take it that the Commission agreed to adopt that suggestion.

*It was so agreed.*

*The meeting rose at 1 p.m.*

## 2081st MEETING

*Tuesday, 19 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao,

Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Jurisdictional immunities of States and their property (A/CN.4/410 and Add.1-5,<sup>1</sup> A/CN.4/415,<sup>2</sup> A/CN.4/L.420, sect. F.2)

[Agenda item 3]

#### PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the topic (A/CN.4/415).

2. Mr. OGISO (Special Rapporteur), after giving a brief account of the history of the topic, recalled that, at its 1972nd meeting, on 20 June 1986, the Commission had provisionally adopted on first reading a complete set of draft articles on jurisdictional immunities of States and their property,<sup>3</sup> and that the draft articles had been transmitted, through the Secretary-General, to Governments, with a request for them to submit their comments and observations by 1 January 1988.

3. By 24 March 1988, comments and observations had been received from 23 Member States and Switzerland.<sup>4</sup> In his preliminary report (A/CN.4/415), he analysed those comments and recommended some amendments to the draft articles which would enable a consensus to be reached on the texts. In preparing his report, he had also taken into consideration national and international instruments on State immunity and the diverse views expressed in the Sixth Committee of the General Assembly.

4. The previous Special Rapporteur had submitted to the Commission eight reports based upon the idea that there were two kinds of acts of States, namely *acta jure imperii*, to which immunity from jurisdiction applied, and *acta jure gestionis*, to which it did not apply. On that point, the discussion in the Sixth Committee, as well as written comments by Governments, revealed certain basic differences of opinion between those who favoured the so-called "restrictive" theory of State immunity and those who supported the theory of "absolute" immunity. Thus Belgium, the Federal Republic of Germany, the United Kingdom and Switzerland believed that there was a tendency in international law to limit the immunity of a State from the jurisdiction of the courts of another State and therefore held that recent international and national practice should be reflected in the draft articles. It should be noted that the legal position in question was not confined to theoretical writings and court decisions; it was also reflected in legal instruments, such as the 1972 Euro-

<sup>1</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> See *Yearbook . . . 1986*, vol. II (Part Two), pp. 8 *et seq.*

<sup>4</sup> These comments and observations, together with those received from five other Member States during the present session, are reproduced in document A/CN.4/410 and Add.1-5.

pean Convention on State Immunity,<sup>3</sup> and in a number of national legislations, in particular those of the United States of America, the United Kingdom, Canada, South Africa, Pakistan, Singapore and Australia.

5. The opposite view was held by States such as Bulgaria, China, the German Democratic Republic, the USSR and Venezuela, which considered that the goal of the future convention was to reaffirm and strengthen the concept of the jurisdictional immunity of States, subject to certain clearly stated exceptions. In their view, replacing that principle by the concept of functional immunity would considerably weaken the effectiveness of the basic principle, and they advocated keeping the number of exceptions to a minimum.

6. As he recalled, members of the Commission had agreed during the first reading of the draft articles not to plunge too deeply into a theoretical and abstract debate on the respective merits of the two theories of immunity and to concentrate rather on concrete problems, trying to identify the activities to which immunity from jurisdiction should apply and those to which it should not. The problem in that connection was that, at the present stage in the development of international law, it was not possible to classify all State activities into one or other of those categories, so that some grey area would inevitably remain. Nevertheless, that approach was the surest, and perhaps the only, way of reconciling two opposite positions and achieving the objective of the future convention, namely, as stated by China, "to strike the necessary balance between the limitation and prevention of abuses of national judicial process against foreign sovereign States and the provision of equitable and reasonable means of resolving disputes" (A/CN.4/410 and Add.1-5).

7. The views of Governments diverged in particular with regard to article 6 (State immunity) and the title of part III of the draft, "[Limitations on] [Exceptions to] State immunity". Article 6, after enunciating the principle of State immunity, indicated that it applied subject to the provisions of the other articles, in other words of part III of the draft. However, the Commission would now have to decide whether to retain or delete the words "and the relevant rules of general international law", which had been placed in square brackets at the end of the article. Ten States supported retention of the words, while nine were in favour of deleting them. The former, including the United Kingdom, adduced "the need to maintain sufficient flexibility to accommodate further developments in State practice and the corresponding adaptation of general international law" (*ibid.*). The latter pointed to the risk of the expression "the relevant rules of general international law" being interpreted unilaterally. He himself had some sympathy for the arguments of the first group, but, in view of the fact that a grey area would remain between two categories of State activities, the fears of the second group were justified from the practical standpoint. The draft should endeavour to establish in a clear-cut and balanced way the principle of immunity, on the one hand, and the ap-

propriate limitations or exceptions, on the other. The words in question could lead to controversy not only on matters pertaining to the grey area, but also on matters relating to limitations or exceptions. He therefore proposed that those words be deleted. However, since international law in the present field was undoubtedly at the stage of development, one solution would perhaps be to follow the suggestion of Spain (*ibid.*) and deal with the question in the preamble to the future convention. Moreover, deletion of the words in question should be viewed in conjunction with article 28 (Non-discrimination) and the possible future articles on the settlement of disputes: acceptance of those articles could to some extent help to maintain a balance between the two different points of view.

8. As to the title of part III of the draft, the Commission had retained two alternatives. One, "Limitations on State immunity", was preferred by Cameroon, the Nordic countries and the United Kingdom. The latter, in particular, considered that part III was intended to deal with cases in which international law did not recognize that the State had jurisdictional immunity. The other alternative, "Exceptions to State immunity", was supported by Brazil, the Byelorussian Soviet Socialist Republic, the German Democratic Republic, Thailand and Yugoslavia, for whom it was a logical consequence of the doctrine of absolute immunity. In his opinion, during first reading the Commission had attached disproportionate importance to the choice of a title, perhaps because some members feared that that choice might influence the doctrinal orientation of the discussions on other aspects of the topic. It would be easier to make a choice after all the concrete and individual issues had been settled, without prejudice to the doctrinal position of various Governments.

9. Having made those general remarks, he wished to touch on the main problems arising from the various articles, starting with the problem of definitions.

10. In that connection, he agreed to the suggestion by Australia and the Byelorussian SSR to merge articles 2 and 3. In his report, he recommended a new combined text for article 2 (A/CN.4/415, para. 29).

11. As to the substance of the new article 2, the question remained as to the definition of the term "State" (para. 1 of former article 3) and of the expression "commercial contract" (para. 1 (b) of former article 2 and para. 2 of former article 3).

12. Governments had raised three problems regarding the definition of the term "State". First, the Federal Republic of Germany had pointed out that the draft contained no specific provisions for federal States, unlike the 1972 European Convention, for example. He had no objection to including in the future convention a provision of that kind, but would like to have the Commission's opinion on the matter. The second question raised by Governments was that of the conditions under which political subdivisions of a State, or agencies or instrumentalities of a State, should enjoy immunity from jurisdiction. In that regard, he pointed out that the Federal Republic of Germany, for example, considered that such entities could invoke immunity only when acting in the exercise of sovereign authority (*acta jure im-*

<sup>3</sup> Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

*perii*), and that the United Kingdom asserted that those entities were entitled to jurisdictional immunity only *ratione materiae*. The other position was that any such entity, if it was invested at all with sovereign authority, automatically became invested also, *ratione personae*, with all the jurisdictional immunity of the parent State. He could accept either interpretation, but the point had not been extensively discussed during first reading and he would welcome comments from members. Moreover, if his proposal to introduce a new article 11 *bis* (*ibid.*, para. 122) dealing with the third problem raised by Governments, namely that of State enterprises with segregated State property, was accepted, a new provision would have to be added at the end of paragraph 1 (b) (iii) of the new article 2. For that provision, he proposed the following wording, drawn from article 27 of the 1972 European Convention on State Immunity:

“A State enterprise which is distinct from the State, which has the right to possess and dispose of segregated State property and which is capable of suing or being sued shall not be included in the agencies or instrumentalities of that State, even if that State enterprise has been entrusted with public functions.”

That proposal would appear in his next report.

13. The Drafting Committee had chosen the expression “commercial contract” in preference to “commercial activity”, the formula used by the previous Special Rapporteur in his second report.<sup>6</sup> He did not deem it necessary to reintroduce the term “transaction”: whether one spoke of “contract”, “activity” or “transaction”, the substance was the same. Thailand and Switzerland had criticized the definition of “commercial contract” as being tautological. He accepted that criticism and proposed that the adjective “commercial” be deleted from paragraph 1 (b) (i) of former article 2.

14. Many Governments had criticized paragraph 2 of former article 3 because it made the purpose of the contract the test of its commercial character. Those Governments felt that the only test should be the nature of the contract, and he drew attention in that connection to the arguments put forward by Australia, Qatar and the United Kingdom (A/CN.4/410 and Add.1-5). A review of the position taken with respect to those tests in recent national legislation showed, for example, that, in United States law, the commercial character of an activity was determined by reference to its nature and not its purpose. The law of the United Kingdom and the 1972 European Convention contained no express provision on the question. Nevertheless, it was the practice of European courts to apply the test of the nature, and not the purpose, of the activity. The clearest example was the decision in 1963 by the Federal Constitutional Court of the Federal Republic of Germany in a case concerning a claim against Iran, in which the court had stated that the distinction between acts *jure imperii* and acts *jure gestionis* could only be based on the nature of the act of the State or of the resulting legal relationship,

not on the motive or purpose of the State activity.<sup>7</sup> Another much-quoted example was the judgment rendered in 1961 by the Austrian Supreme Court in which it had decided to adopt as a criterion not the purpose of the act, but its “inherent nature”.<sup>8</sup> In a recent lecture, Professor Schreuer of the University of Salzburg had said that recent court practice revealed that, in nearly all cases, the wider context or purpose of the transaction in question had been discarded in favour of the type of transaction or the nature of the activity.

15. Personally, he had no fundamental difficulty in setting aside the purpose test and leaving only the test of the nature of the contract. He would point out, however, that the matter had been discussed at length both in the Commission and in the Sixth Committee and that paragraph 2 of former article 3 was the result of a compromise proposed by the previous Special Rapporteur. Moreover, a number of developing countries preferred the purpose test. He therefore feared that complete elimination of the purpose test, although theoretically justifiable, might give rise to further difficult discussions. For example, in the case of a contract for the implementation of a development-aid project, or a contract implementing emergency famine relief, the purpose criterion could be helpful. Accordingly, in view of the criticism of the wording of paragraph 2 of former article 3, criticism levelled largely at the reference to the practice of the State, which was held to be ambiguous, subjective and therefore inapplicable, he had reformulated the purpose criterion in paragraph 3 *in fine* of the new article 2 (A/CN.4/415, para. 29). He would welcome comments on that matter at the next session.

16. A final point raised with regard to commercial contracts related to article 11 (Commercial contracts) and to the new article 11 *bis* (Segregated State property) (*ibid.*, para. 122). Article 11 stipulated the most important exception to State immunity by providing that a State did not enjoy immunity when it entered into a commercial contract with a foreign natural or juridical person. He believed that the article posed no fundamental difficulties, subject to some drafting changes he proposed in paragraph 1 (*ibid.*, para. 121) in order to take account of the observations of certain Governments and also to simplify to some extent the present text, which had been framed under the influence of the theory of consent.

17. Article 11 *bis* was built round a concept that was new in the draft, namely that of “segregated State property”, and drew on the observations of the Governments of socialist countries, in particular the Soviet Union and the Byelorussian SSR. Notwithstanding article 11 of the USSR constitution of 1977, which was cited in his report (*ibid.*, para. 14), he believed he could infer from those observations that, in the event of a

<sup>6</sup> See *Yearbook . . . 1980*, vol. II (Part One), p. 206, document A/CN.4/331 and Add.1, para. 33 (draft article 2, para. 1 (f)), and pp. 211-212, para. 48 (draft article 3, para. 2).

<sup>7</sup> Judgment of 30 April 1963 in *X v. Empire of . . . [Iran]* (*Entscheidungen des Bundesverfassungsgerichts* (Tubingen), vol. 16 (1964), p. 62; trans. in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 288).

<sup>8</sup> Judgment of 10 February 1961 in *X [Holubek] v. Government of the United States* (*Juristische Blätter* (Vienna), vol. 84 (1962), p. 44; trans. in United Nations, *Materials on Jurisdictional Immunities . . .*, p. 205).

dispute relating to a commercial contract, a State enterprise, like a natural person, was subject to the jurisdiction of a court of the forum State with respect to the segregated property placed in its possession. It was in the light of those considerations that he proposed article 11 *bis*, with regard to which he would welcome the views of members and which no doubt called for drafting improvements. The article, which had to be read together with the new article 2, could help to strike a proper balance between the “restrictive” and “absolute” theories of State immunity.

18. As to other important articles, he proposed to delete from article 12 (Contracts of employment) the reference to social security provisions, which did not seem essential. In view of the comments by Belgium and the Federal Republic of Germany, he also proposed to delete paragraph 2 (a), as well as paragraph 2 (b), since he agreed with the observation by the Government of the Federal Republic of Germany that paragraph 2 (b) cast doubt on the usefulness of article 12 itself. He therefore proposed an amended text for article 12 (*ibid.*, para. 133).

19. With regard to article 13 (Personal injuries and damage to property), he drew attention to the proposals on transboundary injury or damage made by Australia, the Federal Republic of Germany and Thailand. He doubted whether the presence of the author of the act or omission in the territory at the time of the deed could be legitimately considered as a necessary criterion for the exclusion of State immunity and had therefore eliminated that criterion in the amended text he proposed for article 13 (*ibid.*, para. 143).

20. In his fifth report,<sup>9</sup> the previous Special Rapporteur had made it clear that paragraph 1 (c), (d) and (e) of article 14 (Ownership, possession and use of property) mainly concerned the legal practice in common-law countries. In his own opinion, it was doubtful whether they reflected universal practice. If the Commission wished the practice of common-law countries to prevail, he would propose that the subparagraphs in question be amended so as better to reflect existing practice, and he accordingly recommended a new text for paragraph 1 (*ibid.*, para. 156). If, however, the Commission took the same view as the USSR, namely that paragraph 1 (b), (c), (d) and (e) could open the door to foreign jurisdiction even in the absence of any link between the property and the forum State (A/CN.4/410 and Add.1-5), he would propose that the four subparagraphs be deleted. In practice, it would always be possible for the common-law countries to solve the problem by applying the principle of reciprocity provided for in article 28 (Non-discrimination). That question could be examined at the next session.

21. Article 15 (Patents, trade marks and intellectual or industrial property), article 16 (Fiscal matters) and article 17 (Participation in companies or other collective bodies) had not been the subject of any comments as to substance and they appeared to be generally acceptable, subject to some possible drafting changes.

22. In connection with article 18 (State-owned or State-operated ships engaged in commercial service), the United Kingdom, the Federal Republic of Germany and the five Nordic countries (*ibid.*) were opposed to the term “non-governmental”, which had been placed in square brackets in paragraphs 1 and 4. Thailand, on the other hand, was in favour of retaining it. Personally, he found that the term “non-governmental” introduced an element of ambiguity and therefore proposed that it should be deleted. In that regard, the 1926 Brussels Convention<sup>10</sup> (art. 3) and the 1982 United Nations Convention on the Law of the Sea (especially arts. 32, 96 and 236) had drawn a distinction between State-owned commercial and non-commercial vessels, but not between government vessels and non-government vessels. The Federal Republic of Germany had made detailed suggestions for the article which he proposed to refer to the Drafting Committee for further examination.

23. Article 19 (Effect of an arbitration agreement) had been the subject of many critical comments and he wished to clarify its meaning. First, the article related to the so-called “implied waiver” whereby a State agreed in writing to submit a dispute to arbitration in the forum State. Accordingly, he proposed that the words “that State cannot invoke immunity from jurisdiction” be replaced by “that State is considered to have consented to the exercise of jurisdiction”, so as to make it clear that the effect of the arbitration agreement was considered as implied consent. Secondly, the court of the forum State had to be construed as a court of another State on the territory—or according to the law—of which the arbitration had taken or would take place. It should be noted that the same limitation was contained in article 12 of the 1972 European Convention on State Immunity. Thirdly, the proceedings referred to in article 19 had to relate to the three matters mentioned, namely (a) the validity or interpretation of the arbitration agreement; (b) the arbitration procedure; (c) the setting aside of the award. Hence the question whether a State could invoke immunity from jurisdiction before a court of the forum State in a proceeding with respect to the recognition and enforcement of the arbitral award remained open, and the answer depended on the arbitration agreement itself. As to the words placed between square brackets, he believed that the expression “civil or commercial matter” was preferable to “commercial contract”, in view of the comments made by a number of Governments.

24. For the reasons he had already stated in connection with article 18, the term “non-governmental” in square brackets in subparagraph (a) of article 21 (State immunity from measures of constraint) and in paragraph 1 of article 23 (Specific categories of property) should be deleted. He was also in favour of deleting from article 21 the phrase “or property in which it has a legally protected interest”, which appeared between square brackets, because its meaning was not clear. His proposal for a new article 11 *bis* and

<sup>9</sup> *Yearbook* . . . 1983, vol. II (Part One), pp. 48 *et seq.*, document A/CN.4/363 and Add.1, paras. 116 *et seq.*

<sup>10</sup> International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and Additional Protocol (Brussels, 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 173 *et seq.*).

the consequential amendment to article 2 (see para. 12 above) might perhaps meet the objections of the USSR and the German Democratic Republic to article 21.

25. He proposed a new formulation for paragraph 2 of article 23 (A/CN.4/415, para. 240) in view of the comments by the German Democratic Republic. As he recalled, the previous Special Rapporteur had proposed article 23 in order to protect the developing countries from giving consent to measures of constraint on their property as a result of a misunderstanding. He therefore suggested that property in any of the five categories listed in paragraph 1 should not be the object of enforcement measures, even with the consent of the defendant State. In addition, to avoid extending immunity to all property of central banks, he proposed to add the words "and serves monetary purposes" at the end of paragraph 1 (c).

26. Contrary to his original intention, lack of time meant that he would not submit specific proposals at the present session on the question of the settlement of disputes. He would do so in an addendum to his preliminary report at the next session.

27. Mr. BARSEGOV thanked the Special Rapporteur for his preliminary report (A/CN.4/415) and for his introduction.

28. He wished to point out that the USSR had to be added to the nine States listed as being in favour of deleting the words "and the relevant rules of general international law" in square brackets in article 6 (State immunity) (*ibid.*, para. 61). Accordingly, there were 10 Governments in favour of retaining them and 10 against. He would also like to know whether the Special Rapporteur intended, in his next report, to make specific proposals on reducing the number of exceptions to immunity. Lastly, with regard to segregated State property, he would pass on to the Special Rapporteur all the relevant legislative texts and asked whether the Special Rapporteur could, in his report to the next session, introduce that notion into the draft articles as a whole, not confining it to article 11 *bis*.

29. Mr. OGISO (Special Rapporteur) thanked Mr. Barsegov for his offer. He did, of course, intend to make specific proposals on reducing the exceptions to immunity and would do so in an addendum to his preliminary report to be submitted at the next session. His proposal on the question of segregated State property would be worked out in the light of the discussion at the next session.

30. Mr. BENNOUNA thanked the Special Rapporteur for his preliminary report (A/CN.4/415). With regard to the presentation, he would have liked the Special Rapporteur to annex to the report the texts of all the draft articles adopted on first reading, and to indicate in the report the references for the sources cited and the extent to which his proposals took account of the comments made in the Commission and in the Sixth Committee of the General Assembly. It would also have been helpful if the Special Rapporteur had provided a consolidated analysis of the comments made by Governments. He expressed the hope that the Special Rapporteur would supplement the preliminary report before

the next session, so as to make it a more comprehensive document and one that was easier to consult.

31. Mr. KOROMA congratulated the Special Rapporteur on his endeavours to reconcile views and to arrive at compromise solutions. His preliminary report (A/CN.4/415) moved in the right direction.

32. In view of the large number of developing countries that were interested in the topic and had had to defend cases in the courts in developed countries, it would have been useful to take account not only of the judgments—the relevance of which was not challenged—but also of the arguments advanced by the developing countries, so as to provide a general picture of their position.

33. It was gratifying that the Special Rapporteur had not given in to the temptation to engage in a doctrinal debate on the principle of the immunity of States, which was not contested. The Commission should confirm the principle, together with some exceptions.

34. As to the criterion for a commercial contract, the best test was the purpose, rather than the nature, of the contract. In that connection, he noted the exception the Special Rapporteur admitted, for example, in the case of contracts for the emergency supply of foodstuffs in the case of famine, and contracts for the implementation of development-aid projects (see para. 15 above). Such contracts could not be regarded as profit-making.

35. The CHAIRMAN thanked the Special Rapporteur for his excellent introduction of his preliminary report, which would without doubt help the Commission in its future work. He was confident that the Special Rapporteur would take due note of the comments made.

**State responsibility (A/CN.4/414,<sup>11</sup> A/CN.4/416 and Add.1,<sup>12</sup> A/CN.4/L.420, sect. F.1)**

[Agenda item 2]

*Parts 2 and 3 of the draft articles<sup>13</sup>*

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

36. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the topic (A/CN.4/416 and Add.1), as well as the new articles 6 and 7 of part 2 of the draft contained therein, which read:

<sup>11</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>12</sup> *Ibid.*

<sup>13</sup> Part I of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

*Article 6. Cessation of an internationally wrongful act of a continuing character*

A State whose action or omission constitutes an internationally wrongful act [having] [of] a continuing character remains, without prejudice to the responsibility it has already incurred, under the obligation to cease such action or omission.

*Article 7. Restitution in kind*

1. The injured State has the right to claim from the State which has committed an internationally wrongful act restitution in kind for any injuries it suffered therefrom, provided and to the extent that such restitution:

- (a) is not materially impossible;
- (b) would not involve a breach of an obligation arising from a peremptory norm of general international law;
- (c) would not be excessively onerous for the State which has committed the internationally wrongful act.

2. Restitution in kind shall not be deemed to be excessively onerous unless it would:

- (a) represent a burden out of proportion with the injury caused by the wrongful act;
- (b) seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act.

3. Without prejudice to paragraph 1 (c) of the present article, no obstacle deriving from the internal law of the State which committed the internationally wrongful act may preclude by itself the injured State's right to restitution in kind.

4. The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind, provided that such a choice would not result in an unjust advantage to the detriment of the State which committed the internationally wrongful act, or involve a breach of an obligation arising from a peremptory norm of general international law.

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would confine himself to the essential elements of his preliminary report (A/CN.4/416 and Add.1), giving priority to chapter II, which dealt with the problem of cessation of an internationally wrongful act and restitution in kind, and chapter III, which contained new draft articles 6 and 7 for part 2 of the draft. Only then would he endeavour to illustrate the points of method raised in chapter I.

38. The new draft articles 6 and 7 represented the minimum coverage for two of the elements of the progressive development and codification of the law on the present topic, namely the obligations of the wrongdoing State and the rights of the injured State in regard to cessation and reparation, as distinguished from the latter State's powers to take any measures to obtain reparation or impose a penalty on the wrongdoing State. That distinction, obviously a relative one, was explained in his report (*ibid.*, paras. 14-15 and 18), but he would have to revert to it. At the present stage, the distinction made it clear that he was dealing for the time being with what the wrongdoing State was bound "to do" or "to give" and what the injured State was entitled "to get", regardless of the means to which it was entitled to resort in order to secure cessation of the act or reparation of the injury, or to inflict any sanction. It was still too early to think of "measures", or "countermeasures" as some called them. The difficulties encountered so far in connection with the consequences of an internationally wrongful act stemmed precisely from disregard of that distinction, and from the tendency, quite widespread among publicists, to

"rush" into the realm of measures before covering such vital substantive matters as cessation, reparation and/or punishment.

39. The substantive consequences of an unlawful act, namely cessation and the various forms of reparation, were dealt with all together in draft articles 6 and 7 of part 2 as submitted by the previous Special Rapporteur. Nevertheless, since article 7 was intended merely to set forth an exception—admittedly a major exception—to the general obligation to provide restitution in kind, the whole set of substantive consequences (restitution in kind, compensation, and so on) was covered by paragraph 1 of article 6, while paragraph 2 covered the relationship between restitution in kind and pecuniary compensation. However commendable the conciseness of those provisions, they had therefore seemed inadequate in terms of codification, let alone progressive development, of the law. Moreover, at the Commission's thirty-eighth session, in 1986, the Drafting Committee had not been able to agree on wording for article 6, despite the endeavours to disentangle cessation from reparation, and particularly from restitution in kind. Better results might be achieved if separate and more articulate provisions were worked out on cessation of the unlawful conduct, and on the various forms of reparation. Within such a wider framework, the Commission could make better use of the legal materials available, whether in the literature or in practice concerning international responsibility, as well as the analyses made by the previous Special Rapporteur.

40. A critical analysis of the literature and of practice concerning cessation of an internationally wrongful act was to be found in his report (*ibid.*, paras. 29-52) and demonstrated three points: first, cessation should be expressly provided for in the draft; secondly, the scope of the corresponding obligation should be expressly formulated; thirdly, the provision in question should be separate from the articles on the various forms of reparation, and notably on restitution in kind.

41. The need to cover cessation among the consequences of an internationally wrongful act, and especially a continuing wrongful act, stemmed from the fact that any wrongful conduct, in addition to specific consequences detrimental to the injured State, constituted a threat to the very rule violated by the wrongdoing State. International law was made up of rules created by the very entities to which they applied, and any violation of a rule inevitably endangered the survival of the rule itself. That was so even if the wrongdoing State did nothing explicitly or implicitly to contest the existence of the rule or the interpretation thereof, or again, if it proposed to modify or abrogate it. The continued existence of the rule was jeopardized all the more when the wrongful act was accompanied, as was not infrequently the case, by an attack on the rule itself or its interpretation. It was also evident that the longer the unlawful conduct lasted, the more the rule was jeopardized. For that reason, it was essential for the draft to stipulate that, whenever a State was guilty of a wrongful act of a continuing character, it remained—despite, but also because of, the breach—under the obligation to desist from the unlawful conduct. Such a provision

would serve not only the interests of the injured State, but also the more general interest of preserving the rule of law, in other words the interests of all States, hypothetically.

42. It had been argued that a provision on cessation had no place in the draft because the obligation was not, strictly speaking, among the legal consequences of a wrongful act, covered as such by the so-called "secondary" rules applicable to responsibility. However, all things considered, the distinction between "primary" and "secondary" rules was relative. The rule of cessation could be conceived as situated, so to speak, in between the former and the latter. As to the former, it would in a sense "concretize" the primary rule that the wrongdoing State was infringing. With regard to the secondary rules, it would contribute to determining the quality and quantity of the reparation.

43. There were other arguments for a separate express rule on cessation. First, there was no generally applicable institutional mechanism comparable to the system of criminal law and procedure or to the civil procedures to which an injured party could resort at the domestic level to secure protection of its rights. Secondly, the express obligation to discontinue the wrongful act or omission was of practical importance in the case of delicts of particular gravity, as well as of international crimes. In that connection, he had in mind certain cases mentioned in his report (*ibid.*, paras. 50-51). Thirdly, non-compliance with a claim for cessation, or with an injunction to that effect by an international body, could justify resort to immediate individual, collective or institutional measures against the wrongdoing State.

44. As to the scope of the provision on cessation, it should be considered that internationally wrongful acts extending in time might consist of "omissive" as well as "commissive" conduct, in which connection he would refer members to his report (*ibid.*, paras. 34-38).

45. For a number of reasons, the way to formulate the duty of cessation suggested that it should form the subject of a provision separate from those on other consequences of an internationally wrongful act. The first reason was, obviously, the unique function of cessation, as distinguished from any form of reparation. As stated in the report (*ibid.*, paras. 39-41 and particularly para. 54), cessation was not a form of reparation. Unlike the various forms of reparation, and particularly restitution in kind, the obligation of cessation did not form part of international responsibility stemming from a secondary rule. A State engaging in wrongful conduct was under an obligation to desist by virtue of the very same rule imposing on it the initial obligation that was violated by the unlawful conduct.

46. The second reason, as explained in his report (*ibid.*, para. 55), had to do with the formulation of a rule on cessation either in terms of the rights of the injured State or in terms of the obligations of the author State. In so far as the various forms of reparation were concerned, a formulation in terms of the rights of the injured State was preferable in that it was the initiative of that State which set in motion a "secondary" legal machinery. That was not so in the case of cessation:

even though the initiative by the injured State was both lawful and opportune, the obligation of cessation should be considered as being in operation on the mere strength of the primary rule. There was no accessory or secondary machinery to be "started". The part of the wrongful act that was a *fait accompli* fell within the provisions governing reparation, but the article on cessation should simply emphasize that the wrongdoing State was still subject to its primary obligation, with no demand by the injured State for respect thereof being necessary.

47. The third reason, as explained in his report (*ibid.*, para. 56), lay in the relatively limited sphere of application of the remedy, which was conceivable only in the case of wrongful acts extending over a period of time. It would be confusing to deal with cessation in a general provision covering, as did the previous Special Rapporteur's formulation of article 6, reparation for the consequences of instantaneous as well as continuing wrongful acts.

48. The fourth reason for differentiating cessation from reparation was that such a distinction was needed to prevent the limitations and exceptions characteristic of the régime of restitution in kind from extending to cessation, where they would be inconceivable. The obligation to discontinue any wrongful conduct was not and should not be subject to the same considerations, since its purpose was precisely to prevent future wrongful conduct, namely conduct that would further extend the wrongful act.

49. One of the key words of the new draft article 6 he had submitted was "remains", which was used instead of "is". It was preferable to stress the lasting character, rather than the mere existence, of the State's obligation so as better to convey the article's *raison d'être*, which was preservation of the primary rule despite infringement by the wrongdoing State. The article was easy to understand, and the words "without prejudice to the responsibility it has already incurred" had been added simply to underline the fact that the article dealt only with stopping the breach. It would also have been possible to add that the wrongdoing State's obligation was not conditional upon a claim by the injured State, but it had seemed preferable not to mention that point.

50. With the problem of restitution in kind, one entered the realm of reparation, namely that of the consequences, in the strictest and most technical sense, of an internationally wrongful act. As a form of reparation, restitution differed sharply from cessation in several respects, as discussed in his report (*ibid.*, paras. 69-70). The first difference was that restitution followed upon an unlawful act in order to make good the consequences. The second difference, an obvious corollary of the first, was that restitution in kind applied to any wrongful act, whether instantaneous or lasting. The third difference was that restitution in kind was, like other forms of reparation, a "secondary" obligation deriving from a "secondary" rule.

51. A study of doctrine and practice revealed two different concepts of restitution in kind (*ibid.*, para. 64). According to one definition, *restitutio in integrum* would consist in re-establishing the *status quo ante*. Ac-

ording to the other, it would consist in establishing or re-establishing the situation that would have existed had the wrongful act not been committed. He then summarized the difference between the two concepts—discussed in his report (*ibid.*, para. 67)—in terms of the purpose, scope, functions and practical application of reparation. In any event, restitution was the form of reparation that was closest to the general principle of law whereby the wrongdoer should wipe out all the consequences of his act. To do so, it was not enough to compensate the injured party: the original situation should first be restored. Restitution in kind was the foremost of all forms of reparation *lato sensu*.

52. At the same time, the literature and practice indicated that restitution in kind was not necessarily an adequate, comprehensive and self-sufficient form of reparation for the consequences of any internationally wrongful act. Again, reparation often took the form of pecuniary compensation, either because it was difficult or impossible to wipe out the consequences of the act, or because the parties preferred such a solution. Statistically, pecuniary compensation seemed to prevail.

53. Accordingly, while maintaining the logical and chronological primacy of restitution in kind among the various forms of reparation, it would be theoretically and practically inaccurate to define *restitutio* as the form of reparation that was preferable in all cases. On the other hand, there was no contradiction between the fact that reparation by equivalent was statistically more frequent and the fact that restitution in kind was still the first remedy to be sought. As a matter of codification as well as progressive development of the law, it therefore seemed indispensable to formulate the obligation of restitution in kind not only as one of the forms of reparation, but also as the primary form, by specifying its scope, the exceptions thereto and the conditions of application. He would discuss those three points in some detail.

54. To begin with the matter of scope, the obligation to provide restitution in kind should be formulated as a general obligation. It should be obvious that it was a form of redress applicable in principle for any kind of wrongful act and that any attenuating considerations were not directly dependent on the nature of the obligation violated or on the kind of rights or interests of the injured party. The only possible obstacles to the obligation lay in the nature and circumstances of the specific injury and the means of restitution actually available. From the analysis of doctrine and practice in his report (*ibid.*, paras 105-106), it seemed that it was essential to avoid any formulation envisaging “special” régimes for certain categories of wrongful acts. That applied in particular to the primary obligations relating to the treatment of foreign nationals, a subject on which the previous Special Rapporteur had submitted a provision in draft article 7 that made a distinction between “direct” and “indirect” injury to a State (*ibid.*, paras. 107-108). That distinction did not seem acceptable. As explained in the report (*ibid.*, paras. 108 and 122), a provision entitling the wrongdoing State to choose unilaterally between restitution in kind and pecuniary compensation in the case of “indirect” injury would not be justified. To begin with, the distinction

was arbitrary. Again, it should be remembered that the values involved in the protection of foreign nationals were not just of an economic nature: they also concerned civil, social and cultural rights. Economic interests themselves, once guaranteed by law, were an essential part of human rights.

55. In addition, even if *restitutio* applied less frequently to wrongful acts committed against foreign nationals, that did not warrant the conclusion that such wrongful acts were subject, *de lege lata*, to the special treatment envisaged in draft article 7 as submitted by the previous Special Rapporteur. Setting aside the obvious but not inconsiderable fact that some decisions or agreed solutions might not conform to the general rule, it should be remembered that cases in which *restitutio* had not been applied in the past had in fact been part of situations in which restitution in kind was totally or partly excluded, not because of any “special” effect of the primary rules, but simply because of the concrete obstacles created by the wrongful act itself and recognized as such by the parties: physical impossibility, excessive onerousness, choice made by the injured State, and so on. The true exception to the obligation to make restitution was the one in which the obligation ceased to exist because restitution was physically impossible—destruction of an object, sinking of a ship, loss of human lives, and so forth (*ibid.*, paras. 85 and 123).

56. Less simple, and in some ways controvertible, were the legal obstacles to restitution, namely those deriving from rules of municipal or international law which the wrongdoing State would have to violate in order to comply with its obligation to provide restitution.

57. The difficulties regarding municipal law lay in the nature of the State and the particular relationship between municipal law and international law. To begin with, the nature of the State was such that there was hardly an action, activity or operation intended to provide restoration that could actually be carried out without a law or legal provision for that purpose being adopted in the State’s legal system. Unlike a private individual, a State wishing to give back annexed territory, to rectify a wrongly modified boundary or to restore freedom to an unlawfully arrested person had to arrange for some legal provision at the constitutional, legislative, judicial or even administrative level if the restitution was to be essentially and in all cases “legal”. Physical *restitutio* was merely the *exécution*, the translation into fact, of a legal action. In practice, therefore, restitution in kind was in international law essentially a form of “juridical” restitution accompanying or preceding physical restitution. Secondly, the relationship between municipal law and international law was very different from that between the national law of federal States and the law of each constituent State. On the one hand, the primacy of international law was not sufficient to invalidate, as a directly superior legal system would, any rule of municipal law that might be incompatible with the international obligations of the State in question. The internal legal system could be adapted to international legal obligations only by some legislative, judicial, administrative or constitutional ac-

tion by the State itself (*ibid.*, paras. 77-84, especially paras. 80 and 82). On the other hand, the primacy of international law in relations between States meant that a State could not plead its own municipal law in order not to honour its international obligations.

*The meeting rose at 1 p.m.*

## 2082nd MEETING

*Wednesday, 20 July 1988, at 10 a.m.*

**Chairman:** Mr. Leonardo DÍAZ GONZÁLEZ

**Present:** Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**State responsibility (concluded) (A/CN.4/414,<sup>1</sup> A/CN.4/416 and Add.1,<sup>2</sup> A/CN.4/L.420, sect.F.1)**

[Agenda item 2]

### *Parts 2 and 3 of the draft articles<sup>3</sup>*

PRELIMINARY REPORT OF THE SPECIAL RAPPOREUR  
(concluded)

1. Mr. ARANGIO-RUIZ (Special Rapporteur), continuing his introduction of his preliminary report (A/CN.4/416 and Add.1), reminded members that, at the end of the previous meeting, he had begun to discuss obstacles to restitution, in particular the legal obstacles arising from rules of internal or international law.

2. With regard to obstacles arising from internal law, since all States lived under a legal system, no restitutive operation could be carried out within a State without

some legal act or provision being made within that system. A State spoke to its agents and officials through the law, so that restitution could not be carried out *de facto*; it would always require some legal steps.

3. At the same time, the relationship between internal law and international law was quite different from that between the federal law of a federal State and the law of one of its component units. In the first place, the primacy of international law did not go so far as to invalidate any rule of the internal law of a State which stood in the way of that State's compliance with its international obligations. The content of a State's legal system could be adapted—for the purposes of compliance with international legal obligations—only by some legislative, judicial, administrative or constitutional action by the State itself (*ibid.*, paras. 77-84). On that point, the European Community offered an interesting example: the enactments of the Community had the force of law in the member States, but some action by each member State was necessary to introduce them into its own legal system.

4. The primacy of international law in relations between States meant that a State could not validly invoke an obstacle arising from its internal law as an excuse for non-compliance with an international obligation. That was undoubtedly true of any national legal rule or ruling—legislative, administrative, judicial or constitutional—which might be invoked as an impediment to restitution in kind. The rule to that effect was set out in paragraph 3 of the new draft article 7<sup>4</sup> he proposed. It was an obvious corollary of the principle embodied in article 4 of part 1 of the draft, which provided that "An act of a State may only be characterized as internationally wrongful by international law" and that "Such characterization cannot be affected by the characterization of the same act as lawful by internal law". That was tantamount to concluding that the obligation to make restitution could not be affected by any legal obstacle in the internal law of the author State. It was, indeed, incumbent on that State to remove any such legal obstacles, which were disregarded as such by international law. Any difficulty which the author State might have in removing internal legal obstacles should be assessed on its merits under international law, as a possible factual obstacle. His report accordingly dealt with internal legal obstacles under the rubric of excessive onerousness in a wide sense (*ibid.*, paras. 102 and 127).

5. In the case of international legal obstacles, the legal impediment was within the same legal system as that under which restitution was due, that was to say within international law itself. At first sight, that would seem to create a situation similar to that of an impediment to restitution arising under the private law of a country, from a rule of superior rank such as a constitutional rule. But the validity of the analogy was reduced very considerably by the high degree of relativity of international legal rules, situations and relationships.

6. As noted in the report (*ibid.*, para. 87) that analogy would apply in a situation in which restitution en-

<sup>1</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>2</sup> *Ibid.*

<sup>3</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook* . . . 1985, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

Articles 1 to 5 and the annex of part 3 of the draft ("Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes) were considered by the Commission at its thirty-eighth session and referred to the Drafting Committee. For the texts, see *Yearbook* . . . 1986, vol. II (Part Two), pp. 35-36, footnote 86.

<sup>4</sup> See 2081st meeting, para. 36.

countered an obstacle in the rules of the Charter of the United Nations (Article 103) or in any conceivable peremptory norm of international law. Another example would be the obstacle represented by the contemporary doctrine which denied the right to restitution in the case of nationalization, a point also considered in the report (*ibid.*, para. 106). But the analogy would disappear where an obligation to provide restitution in favour of an injured State B was in conflict with a co-existing treaty obligation of the author State A towards a third State C. That was a typical example of the relativity of treaty rules and obligations in international law; the impossibility of complying with the international obligation could not be invoked by State A—at least not as a legal obstacle—against the injured State B. It would be for State A to choose whether to wrong State B or State C; and the choice to refuse restitution to the injured State B in order to comply with the obligation towards State C would obviously be a factual rather than a legal obstacle. That point was illustrated by the *Bryan-Chamorro Treaty* case (*ibid.*, paras. 76 and 83).

7. With regard to the real or alleged legal impossibility of restitution arising from international law, the previous Special Rapporteur, Mr. Riphagen, in his preliminary and second reports,<sup>5</sup> had raised the question of the relationship between the general rule placing the author State under the obligation to make restitution and the other general rule of international law which, in his opinion, protected every State from the violation of its domestic jurisdiction by claims of other States. The result, according to Mr. Riphagen, would be to allow the author State to replace restitution by pecuniary compensation whenever restitution implied an obligation for it in a sphere in which its internal law was competent to perform a normative function.

8. For his part, he could not accept the view that any argument against the generality of the obligation to make *restitutio in integrum* could be derived from the concept of domestic jurisdiction. That concept could not call in question the international obligation to make restitution in kind, any more than any other obligation under international law. Indeed, the very existence of an international obligation meant that compliance with it by a State could not possibly constitute an assault against the domestic jurisdiction of that State. It should be borne in mind that there was hardly any international rule compliance with which did not entail some repercussion on the internal law of the State bound by the rule. A belief that domestic jurisdiction and the principle of non-intervention could in any way interfere with the obligation to make restitution in kind—or any other form of reparation, or the discontinuance of a wrongful conduct—could only derive from confusion of the right of the injured State to obtain restitution or any other form of redress as a matter of substantive law with the right of a wrongfully “unsatisfied” injured State to take measures aimed at securing cessation and/or reparation. Respect for domestic jurisdiction was a condition

of the lawfulness of an *action* by a State or an international body. It was not, *per la contradizion che nol consente*,<sup>6</sup> a condition of the lawfulness of an international *legal rule* or *obligation* (*ibid.*, para. 89).

9. The inevitable conclusion seemed to be that an article on restitution in kind should exclude the possibility of any internal legal obstacle being considered *per se* (and as such) as a valid excuse for the author State to evade—wholly or in part—its obligation to make restitution. Any indications to the contrary in practice could easily be explained as the result of agreements between the parties which, while recognizing in a given case that obstacles deriving from the legal system of the author State constituted good reasons for converting restitution in kind into pecuniary compensation, did not contradict the general principle that restitution should be made. On the contrary, failure to recognize and codify that general principle would jeopardize not only the secondary obligation and the rule from which it was derived, but also the primary obligations and rules themselves. It was, of course, possible for the injured State to renounce restitution in kind and accept reparation by equivalent or referral of the decision to a third party. Impediments in internal law could come into consideration only as factual obstacles. As such, they could be taken into account, where appropriate, only under the exception of excessive onerousness, or perhaps of physical impossibility. It was clear, on the other hand, that not all internal legal obstacles would be such that their removal by the author State would amount to excessive onerousness or physical impossibility.

10. As to obstacles in international law, the only conceivable case in which they might represent a valid excuse for failure to make restitution was that in which the required measures of restitution would involve a breach of an obligation created by a higher norm of international law.

11. While failure to make restitution was thus rarely justifiable on legal grounds under national or international law, it could be justified—apart, of course, from the case of physical impossibility—by the excessive onerousness of the measures that would be required. As shown in the report (*ibid.*, paras. 99-103 and 126-127), the exception of excessive onerousness was an obvious corollary of the principle of proportionality between injury and reparation. The right of the injured State to obtain restitution was restricted in that it would not be entitled to refuse reparation by equivalent whenever the effort required of the author State to provide restitution would be disproportionate to the gravity of the violation or injury. That principle had some support in legal literature and should be adopted, in any case, as a matter of progressive development.

12. The main instance of excessive onerousness appeared to be that in which making restitution in kind would be incompatible with the political, economic and social system of the author State or with fundamental new choices concerning that system. It had to be clearly understood, however, that the obstacle would not be so

<sup>5</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 107, document A/CN.4/330; *Yearbook* . . . 1981, vol. II (Part One), p. 79, document A/CN.4/344.

<sup>6</sup> “Nor to repent, and will, at once consist, by contradiction absolute forbid”, Dante, *Inferno*, XXVII, 119-120 (trans. H. F. Cary, 1910).

much a question of legal impossibility as of a factually excessive burden for the author State to bear, as compared with the sacrifice which the substitution of reparation by equivalent might represent for the injured State.

13. Thus *restitutio in integrum* did not seem to be subject to any limitation other than material impossibility, international legal impossibility or excessive onerousness. If other forms of redress, such as reparation by equivalent, happened to take the place of restitution in the absence of any such obstacles, that would be a consequence not of other exceptions, but rather of the attitudes actually taken by the parties in each case. Those attitudes could manifest themselves either in such modes and terms as to constitute an agreement between injured and author States, or simply as the exercise of a right or faculty of choice by the injured State. What mattered in either case appeared to be the right or faculty of choice of the injured State. Of course, the author State might well offer reparation by equivalent as a substitute for *restitutio in integrum*, even in a case in which the latter was neither impossible nor excessively onerous; and the substitution would be fully admissible, provided that it was accepted by the injured State.

14. A substantial part of legal doctrine favoured the right of the injured State to choose between restitution and pecuniary compensation. As to practice, elements supporting the doctrine seemed to be present in the *Chorzów Factory* case (*ibid.*, para. 110). Germany had started with a claim to restitution, but had later claimed pecuniary compensation, stating that the factory "in its present condition, no longer corresponded to the factory as it was before the taking over in 1922". Restitution would thus have been of no interest to the claimant. Further practice was cited in his report (*ibid.*, para. 111). It was also true (*ibid.*, para. 112) that fears had sometimes been expressed that recognition of a right of choice of the injured State might open the door to abuses. That misgiving, though not without justification, was lessened by the consideration that the right of choice should be set aside where restitution would be excessively onerous for the wrongdoing State. The opposite could also occur, with the injured State claiming pecuniary compensation even where *restitutio in integrum* was possible. In that case, however, any excessive claim by the injured State could be effectively resisted on the basis of proportionality, equity and excessive onerousness.

15. It should be stressed, however, that the right of choice of the injured State would not be unlimited. Whenever restitution was due for a breach of a peremptory rule or, more generally, of a rule stating an *erga omnes* obligation, it could not be renounced by the injured State, which could not opt for pecuniary compensation. In such a situation, the law should place upon the author State the obligation to provide full restitution in kind. That matter would be better developed in the context of the particular legal consequences of crimes.

16. It was self-evident that impossibility or excessive onerousness could prevent restitution either in whole or in part. In practice, partial exclusion of restitution was more frequent than total exclusion. The portion of in-

jury not covered by restitution would have to be remedied by one or more other forms of reparation, in particular by pecuniary compensation.

17. The new draft article 7 contained two references to "a peremptory norm of general international law". Notwithstanding the problematic nature of the concept, he was inclined to share the view that there were rules of *jus cogens* in international law; some of the rules in the Charter of the United Nations could be regarded as having that character. It was very difficult, however, to draw up a list of rules of *jus cogens*. It was quite common not only for one group of members of the international community to regard a rule of international law as *jus cogens* while another group took the contrary view, but also for the same State or States to take one view at one time and an opposite view at another. Indeed, views on the exact content of *jus cogens* varied not only in point of time, but also from case to case.

18. All things considered, he had thought it his duty to introduce in draft article 7 the provision in paragraph 1 (b), which set out an exception to restitution in kind where such restitution would "involve a breach of an obligation arising from a peremptory norm of general international law". Clearly, it would be difficult to give examples. The comments of members of the Commission during future discussions would no doubt be helpful. A second reference to *jus cogens* was made in paragraph 4, which set out the right of choice of the injured State to claim pecuniary compensation as a substitute for restitution in kind. An exception to that right was stipulated where such substitution would "involve a breach of an obligation arising from a peremptory norm of general international law." On that provision too, he looked forward to receiving guidance from the Commission. On the whole, it seemed to him that the new draft article 7 left too many loopholes for the author State. Further discussion would perhaps help him to tighten its provisions.

19. Chapter I of his report contained a few suggestions concerning the proposed programme of work on parts 2 and 3 of the draft articles and a tentative summary outline of those parts (*ibid.*, para. 20). In the treatment of the topic, he proposed to keep roughly to the order followed by the previous Special Rapporteur, guided by the general outline of 1963. That meant the order in which the subject-matter had been dealt with in draft articles 6 to 16 of part 2 and draft articles 1 to 5 of part 3, as submitted by his predecessor and referred to the Drafting Committee.<sup>7</sup> He thought it essential, however, to depart from that order on three points, none of them revolutionary.

20. The first point was his proposal that there should be a more marked separation between wrongful acts characterized in part 1 as delicts, and wrongful acts characterized as crimes. The reasons for that change were purely methodological (*ibid.*, para. 12). Considering the relative novelty of the distinction, and the difficulty of identifying the features that should characterize the consequences of the international

<sup>7</sup> See footnote 3 above.

crimes of States, it was advisable to deal separately with the two sets of consequences. The legal consequences of delicts and those of crimes would thus form the subject of separate chapters. Since a first chapter of general principles might comprise articles 1 to 5 of part 2 already provisionally adopted by the Commission,<sup>9</sup> it should then be possible to envisage tentatively a chapter II of part 2 to deal with the consequences of delicts and a chapter III of part 2 to deal with the consequences of crimes.

21. The second point was his suggestion that, within each chapter, a distinction should be made between the substantive consequences of wrongful acts and what might be called the "procedural" or "instrumental" consequences. Cessation and the various forms of reparation fell within the substantive consequences, whereas the measures aimed at securing cessation and reparation, or at inflicting punishment, constituted procedural consequences. The work on the consequences of internationally wrongful acts would be less arduous if the two sets of consequences were dealt with separately for delicts as well as for crimes. The distinction was not, of course, an absolute one. It was not as clear-cut as the distinction in a national legal system between the substance of the law of tort and of criminal law, on the one hand, and the procedures of redress and punishment, on the other. The difference was nevertheless evident even in such an inorganic system as the law of nations. Both sets of consequences were, in any case, hard enough to determine and formulate, without mixing the intricacies of the one with those of the other. There again, he believed that it would be less difficult to deal with those two areas of the law in separate stages.

22. The third point related to the subject-matter covered by draft articles 1 to 5 of part 3. Those five draft articles covered two aspects of the "implementation" or *mise en œuvre* of international responsibility which appeared to him to be quite different. One was the conditions, in the form of obligations or *onera*, under which one or more injured States were lawfully entitled to resort to measures in order to secure cessation or reparation, or to inflict a penalty of any kind upon the wrongdoing State. The other aspect was the procedures that could, or should, be contemplated for the settlement of disputes relating, in the words of Article 36 of the Statute of the ICJ, to "the existence of any fact which, if established, would constitute a breach of an international obligation" (para. 2 (c)) or to "the nature or extent of the reparation to be made for the breach of an international obligation" (para. 2 (d)). It would be desirable for each of those aspects to be dealt with where it belonged *ratione materiae* or *ratione naturae*. Since the first aspect, namely the conditions to be complied with by an injured State for lawful resort to measures, fell within the realm of measures, it should be covered not in part 3 but in part 2 of the draft. Dispute-settlement procedures should instead be dealt with in part 3. Quite apart from any logical reason, such an arrangement was justified by the fact that at least some of the provisions on the settlement of disputes would presumably not be mandatory. On the other hand, the

conditions for lawfulness of measures were, in principle, mandatory *de lege lata*, or should be *de lege ferenda*.

23. According to the plan he had outlined, the new draft articles 6 and 7 of part 2 submitted in his preliminary report would be followed by provisions dealing with the consequences of internationally wrongful acts other than cessation and restitution in kind. For those provisions, and particularly for those relating to pecuniary compensation and satisfaction, he would draw on the materials on State practice and arbitral awards assembled at the University of Rome and by the Commission's secretariat, for whose assistance he was most grateful.

24. He trusted that the Commission would take up the topic of State responsibility early enough at the next session for a substantial debate to be held, so that he could benefit from the guidance of his colleagues.

25. The CHAIRMAN, thanking the Special Rapporteur for his introduction, said that, as had been agreed, there would be no debate on the preliminary report (A/CN.4/416 and Add.1) at the present session. He invited members to raise any questions on which they required clarification.

26. Mr. BARSEGOV, expressing his appreciation of the Special Rapporteur's comprehensive presentation of the topic, said that it would be extremely useful if his statement, as well as Mr. Ogiso's introduction of his preliminary report on jurisdictional immunities of States and their property, were reproduced in full, or at least as fully as possible, and circulated to members at the present session. It would also be helpful if all the materials relating to the preliminary report on State responsibility (A/CN.4/416 and Add.1) could be combined in a single document.

27. Mr. KALINKIN (Secretary to the Commission) said that it had been agreed, after discussion with the Rapporteur, that the introductory statements made by Mr. Arangio-Ruiz and Mr. Ogiso would be included in the Commission's report, but in an abridged form. The Commission's reports were an exception to the General Assembly rule that the reports of its subsidiary bodies should not exceed 32 pages, but it was not possible to include documents *in extenso*. The Secretariat would, however, have both statements typed and circulated to members in English before the end of the session.

28. The Secretariat was not permitted, under the rules in force, to reissue documents incorporating corrections. Corrected versions of the reports of special rapporteurs were published in the Commission's *Yearbook*.

29. Mr. BARSEGOV said he had not wished to suggest that the preliminary report as a whole should be reissued, although that would have been desirable. What he had in mind was a list of corrigenda in English, which could perhaps be prepared by the Secretariat. He appreciated that the Commission was bound by certain rules, but the two introductions in question were not just ordinary statements; they were more in the nature of documents of the Commission which members required for their work. That point should perhaps be taken into account in the future.

<sup>9</sup> *Ibid.*

30. Mr. ARANGIO-RUIZ (Special Rapporteur) agreed that the best solution would be to circulate the texts of the two statements to all members. It had certainly not been his intention to suggest that his own statement should be included verbatim in the Commission's report.

31. He accepted responsibility for many of the errors in his preliminary report, which were possibly due to pressure of time. He would take the matter up with the Secretary to the Commission to determine how best to deal with it. A more serious defect was that the footnotes to his report were grouped together at the end of the document, which was why he had circulated to members a list of those notes he regarded as essential for an understanding of the report. He found it hard to understand why a machine for the placement of footnotes, of the kind in common use at universities, for instance, was beyond the means—albeit limited—of the United Nations.

32. Mr. FRANCIS said that, in the light of the explanations given by the Secretary, the Commission might wish to give some consideration, at the present session, to the question of the length of its reports.

33. The CHAIRMAN said that, while he agreed on the importance of that question, the best place to discuss it would perhaps be in the Secretariat or at the General Assembly. In any event, there was not enough time to do so at the present session.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>9</sup> (continued)\* (A/CN.4/404,<sup>10</sup> A/CN.4/411,<sup>11</sup> A/CN.4/L.422)**

[Agenda item 5]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE**

**ARTICLES 4, 7, 8, 10, 11 AND 12**

34. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 4, 7, 8, 10, 11 and 12 as adopted by the Committee (A/CN.4/L.422).

35. Mr. TOMUSCHAT (Chairman of the Drafting Committee) recalled that, at its thirty-ninth session, in 1987, the Commission had provisionally adopted articles 1 and 2 of part I (Definition and characterization) and articles 3, 5 and 6 of part II (General principles) of chapter I (Introduction) of the draft code.<sup>12</sup> At the current session, the Drafting Committee had adopted the remaining articles of part II (arts. 4 and 7-11) referred to it by the Commission in 1987, with the exception of article 9 (Exceptions to the principle of responsibility).

\* Resumed from the 2061st meeting.

<sup>9</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>10</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>11</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>12</sup> See *Yearbook . . . 1987*, vol. II (Part Two), chap. II, sect. C.

The Committee had also adopted article 12, the first provision in part I (Crimes against peace) of chapter II (Acts constituting crimes against the peace and security of mankind).

**ARTICLE 4 (Obligation to try or extradite)**

36. The text proposed by the Drafting Committee for article 4<sup>13</sup> read:

*Article 4. Obligation to try or extradite*

1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 of this article shall not prejudice the establishment and the jurisdiction of an international criminal court.

37. The purpose of article 4, which touched upon delicate questions of jurisdiction and extradition, was to eliminate any safe haven for an alleged offender. The Drafting Committee had considered at length whether to draft a detailed provision dealing with questions of jurisdiction and extradition, or a short and general article stating only the basic principle. It had come to the conclusion that it would be impossible to draft a detailed article that would satisfy all members. Moreover, as it had not been decided whether or not the code should provide for an international criminal court, questions of jurisdiction and extradition would have to be discussed on a provisional basis. The Committee had therefore decided to state the basic principle, leaving those questions aside for the time being. Article 4 had thus been drafted on the understanding that it dealt, in broad terms, with the general principles of jurisdiction and extradition, and that specific rules for the application of those principles would be drafted later, for inclusion in an appropriate part of the code. That understanding should be reflected in the commentary, which would then also serve as a reminder of the need to revert to the specific rules governing priorities in jurisdiction and extradition. Article 4 would have to be reviewed after those rules had been drafted.

38. Paragraph 1 was almost identical to that proposed by the Special Rapporteur, with some drafting changes. For example, the words "perpetrator of an offence" in the previous text had been replaced by "an individual alleged to have committed a crime": the Drafting Committee had thought that the word "perpetrator" implied that the accused had already been convicted of the crime, whereas the new wording more objectively described a person who had been charged with a crime. The Committee also considered that the new wording should be defined in an article on the use of terms, as in other instruments, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic

<sup>13</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, *ibid.*, pp. 9-10, footnote 19 and paras. 29-36.

Agents. Such a definition would indicate that the allegation should be supported by reasonable evidence and that it would not of itself suffice to bring the obligations under the article into play. The word “arrested” in the previous text had been replaced by “present”, which seemed preferable to the Drafting Committee, since arrest could not be deemed to be compulsory in all instances of a charge against a person that he had committed a crime against the peace and security of mankind.

39. Paragraph 2, which was new, provided for a plausible and not infrequent situation. The question that arose was which State in a series of States requesting extradition should have priority or, indeed, whether there should be any priority at all. One of the drawbacks of having a detailed list of categories of States setting out strict priorities for extradition was that there would have to be a measure of co-ordination between the priorities set in such a list and priorities in the matter of jurisdiction—a question that would have to be considered in the future. Pending a decision on the incorporation in the code of the principles of universal jurisdiction, of the jurisdiction of an international criminal court, or of a combination of both, such a list would be premature, since any one of those principles or a combination of them would affect the question of extradition. Besides, the question of priority in extradition would involve the Commission in an endless debate on whether the territoriality principle or the nationality principle should determine priority, or whether either of those principles should yield to the functional theory, whereby the State that could provide the best administration of justice for trial and punishment of the accused would have priority. An additional drawback to such a list was that many States would be reluctant to accept a strict rule on extradition which encroached on their discretion: for example, they would be reluctant to extradite an individual to a State where he might be subjected to torture.

40. Some members of the Drafting Committee had maintained that article 4 should express some preference for granting extradition to the State where the crime had been committed, in keeping with the Nürnberg Principles.<sup>14</sup> Others had been disinclined to accept any unqualified preference, but believed that the State where the crime had been committed should have some discretion. Under the resultant compromise reflected in paragraph 2, a State receiving several extradition requests would be obliged to give “special consideration” to the request of the State where crime had been committed. That did not indicate any rule of strict priority, but meant that a State faced with multiple extradition requests should consider the request of the State where the crime had been committed very seriously and should incline to the view that that State might, in the circumstances, be the most appropriate place for trial and punishment of the alleged offender.

41. Paragraph 3, which corresponded to paragraph 2 of the previous text, dealt with the unresolved question of jurisdiction under the code and served to stress that the jurisdictional basis of article 4, as drafted, would

not prevent the Commission from deciding in the future to establish an international criminal court.

42. Lastly, the title of the article, “Obligation to try or extradite”, was a translation of the previous Latin title, *Aut dedere aut judicare*.

43. Mr. ARANGIO-RUIZ said that paragraph 3 was not entirely satisfactory. It stated that the provisions of paragraphs 1 and 2 “shall not prejudice the establishment and the jurisdiction of an international criminal court”, but that very statement did so: by addressing the issue in negative terms, it precluded a positive approach. The Chairman of the Drafting Committee had said the provision meant that paragraphs 1 and 2 would not prevent the Commission from taking up the question of an international criminal court; but the words “shall not prejudice” really signified that the problem would be excluded from the Commission’s immediate concern and programme of work. The establishment of an international criminal court would, of course, be difficult, but work had already been done, in 1951 and 1953, on elaborating its statute, and the Commission should pursue that effort.

44. For those reasons, he thought that paragraph 3 should be deleted. If that was not acceptable it should be rephrased, or an explanation should be included in the commentary to the effect that the drafting of the statute of an international criminal court was entirely within the Commission’s competence and that, as a technical body, it was entitled to recommend the establishment of such a court.

45. Mr. BARBOZA pointed out that there was a discrepancy in the wording of articles 4 and 7 that should be corrected. Article 4, paragraph 2, spoke of “the State in whose territory the *crime* was committed”; article 7, paragraph 4 (a), referred to “the *acts* which were the subject of the judgment”; and article 7, paragraph 5, referred to a “previous conviction for the same *act*”.

46. Mr. McCAFFREY explained that he had participated in the Drafting Committee’s work on the draft code only in regard to article 4, and had a number of reservations that he wished to place on record.

47. No one could disagree with the article’s purpose, which was to ensure that there was no safe haven for an individual alleged to have committed a crime against the peace and security of mankind. His reservations related rather to the manner in which such an individual was to be sought out and brought to justice. He did not believe that universal jurisdiction would be any more acceptable to States than an international criminal court—in fact, it might be less so. Consequently, he was not sure that the Commission would be well advised to proceed with the drafting of an article on universal jurisdiction before having at least attempted to draft the statute of an international criminal court or a tribunal like the one suggested by Mr. Beesley at the previous session.<sup>15</sup>

48. Referring to the text of article 4, he confessed to being worried by the word “alleged” in paragraph 1,

<sup>14</sup> See 2053rd meeting, footnote 8.

<sup>15</sup> See 2059th meeting, footnote 13.

because it was not clear by whom the allegation would be made. If State A made an allegation, for example, did State B have to try the individual in question? The Chairman of the Drafting Committee had indicated that the term "alleged" would be defined, perhaps along the lines of the definitions in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. He hoped that that would indeed be done, and that the commentary would record the Commission's intention of producing such a definition.

49. With regard to paragraph 2, he thought that a list of priorities on a crime-by-crime basis was needed; in other words, the matter of jurisdiction should be individualized. It was very difficult to generalize in that area: for example, how would paragraph 2 apply to cases of alleged genocide or *apartheid*, where it would be undesirable to remand an individual to the State in which the crime had been committed, since it was the authorities of that State that had committed the crime?

50. Paragraph 3 gave no indication whether the competence of an international court—should one be established—would overlap with the competence of national courts exercising universal jurisdiction. He believed it should not, in the interests of preventing the chaos that might follow the establishment of universal jurisdiction. He therefore had reservations on paragraph 3.

51. As to drafting points, paragraph 3 should read "paragraphs 1 and 2 of this article do not prejudice," rather than "shall not prejudice". He agreed with Mr. Barboza's comment on paragraph 2, and suggested that any reference to a "crime" should be phrased "the State in whose territory the crime is alleged to have been committed", in symmetry with paragraph 1, which contained the phrase "an individual alleged to have committed a crime".

52. He would reserve his position on article 4 until the extent to which individual crimes were to be detailed in the code had been decided.

53. Mr. BARSEGOV said that, as a member of the Drafting Committee, he would naturally not express opposition to the compromise texts that had been worked out, and he did not intend to dispute anything said by the Chairman of the Drafting Committee. It was important, however, to bring into the open the nuances of the process by which the texts had been developed, so that the Commission's report to the General Assembly could present as full and balanced a picture as possible of the considerations underlying the adoption of those texts.

54. He therefore wished to make a number of comments on paragraph 2 of article 4. That paragraph was derived from an earlier text that had clearly established a hierarchy, in which the principle of territoriality had occupied the first place. The Chairman of the Drafting Committee had informed the Commission that the Committee believed there were many obstacles to drawing up a detailed list of categories of States setting out strict priorities for extradition. That was not entirely true, however. The fact that the members of the Drafting Committee had all agreed to a compromise

solution did not mean they all believed that a detailed list of priorities could not be drawn up. Certainly, there were difficulties arising from differing approaches and points of view, but he did not agree that there was any fundamental, intrinsic obstacle.

55. The Chairman of the Drafting Committee had rightly noted that there had been a number of serious differences of opinion on a whole range of important issues: whether the territoriality principle or the nationality principle should determine priorities for extradition; whether a State in whose territory a criminal was located should have the right to select the country to which he would be remanded; and whether priority should be given to a State which could provide a better administration of justice. The opinions expressed on those issues should be accurately and faithfully reflected in the Commission's report to the General Assembly: compromise solutions could be understood properly only when all the views to be reconciled were clearly evident.

56. He had raised the question of the definition of a "better administration of justice" in the Drafting Committee. In his view, the best administration of justice was one which made punishment inescapable; but other members had expressed concern about ensuring that an alleged offender would not be handed over to a country that might subject him to torture, for example. Torture was covered by existing international instruments, which provided for machinery to prevent it. Moreover, no State was competent to decide in what country an alleged perpetrator of a crime against the peace and security of mankind would have his legal rights guaranteed; in the aftermath of the Second World War, that policy had resulted in many war criminals going unpunished. He was in favour of ensuring the best possible administration of justice for crimes against peace and security, and believed that the future code must reduce possibilities of arbitrary action to a minimum and establish the most comprehensive régime possible, to be adopted by all States; in other words, it must clearly state priorities for extradition.

57. He did not entirely agree with the interpretation by the Chairman of the Drafting Committee that the expression "special consideration" meant that a State faced with multiple extradition requests should "very seriously" consider the request of the State where the crime had been committed, or with his conclusion that the text of paragraph 2 "did not indicate any rule of strict priority" (see para. 40 above). If that was the sort of limited interpretation to be given to paragraph 2, it might well prove unacceptable to many States when the code was proposed for adoption. He understood the provision to mean merely that, if there were no other, weightier basis for determining where a better and fuller administration of justice could be ensured, preference should be given to the State in whose territory the crime had been committed. Mr. McCaffrey had cited the examples of genocide and *apartheid* committed by Governments on their own territory; but such crimes were exceptions, and in any case were covered by the relevant international instruments. As exceptions, they should not be allowed to detract from the primacy of

the principle of territoriality, which was reflected in the Nürnberg Principles.<sup>16</sup>

58. The views he had expressed were not merely his own; they were shared by many members of the Drafting Committee and should be fully reflected in the Commission's report to the General Assembly.

59. Mr. Sreenivasa RAO said that, as a member of the Drafting Committee, he supported the text of article 4 introduced by its Chairman, whose balanced statement had highlighted the various considerations underlying the Committee's decisions.

60. One basic principle that should be kept in mind concerning the concept of territoriality was that, if a crime had been committed within the territory of a State, that State should have jurisdiction. But the concept of territoriality of jurisdiction was evolving in the direction of a more flexible interpretation. According to several different courts, the principle of territorial jurisdiction did not exclude all reference to the effect of the crimes committed. While it was important that no criminal should have a safe haven, and that all criminals should be tried on the basis of the best possible evidence, justice must be rendered in the most effective way possible. Accordingly, when the territory of one State had been used only notionally to escape the jurisdiction of another, in whose territory the criminal acts had had a detrimental effect on security and public order, the principle of priority, as posited in paragraph 2, was deemed to refer to the territory of the State that had actually been affected.

61. Most members of the Drafting Committee had acknowledged that point, but in order to promote consensus and to streamline the final formulation, it had been decided not to reflect it in the draft article. He urged the Special Rapporteur to mention it in the commentary.

62. Mr. EIRIKSSON said that the revised text of draft article 4 submitted by the Special Rapporteur to the Drafting Committee had contained a list of priorities to be followed in the event of multiple requests for extradition. He was sorry that no such list was provided in the text adopted by the Drafting Committee, and shared the concern expressed on that point by Mr. Barsegov. While he had no strong feelings about what the order of priority should be, he remained convinced that the priorities should be clearly specified. Paragraph 2 as drafted did not, in his view, represent a compromise, and he would prefer it if no paragraph of that nature were included.

63. As to paragraph 3, he agreed with Mr. Arangio-Ruiz that the text would be appropriate only if, at the end of its work, the Commission had not succeeded in drafting provisions on the establishment of an international criminal court. He shared the views of those members of the Commission who thought that the attempt should be made. Pending its outcome, it would be appropriate to place paragraph 3 in square brackets and to explain the position in the commentary. If the at-

tempt proved successful, the square brackets around paragraph 1 of article 7 would, of course, be removed.

64. Prince AJIBOLA said that the Drafting Committee was to be commended for the excellent work it had done on the draft articles, which were a considerable improvement on the previous texts.

65. The question of an international criminal court was a very serious difficulty, basic to the whole project of the code, and it was against that background that paragraph 1 of article 4 had to be considered. That paragraph required any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind was present to "try or extradite him". But how was any State to try an individual for a crime of such a nature and magnitude with its own judicial machinery? If the problem of an international criminal court were settled, there would be no need to deal with the trial of the alleged criminal in article 4 and extradition would be the only remaining issue.

66. There again, the difficulties were very great. In many cases, the crimes concerned were committed with some element of State participation: genocide and *apartheid* were cases in point. If a crime of that nature had been committed, say, in State X, some of those who had committed it going later to State Y, and if State X then asked for those persons to be extradited to it, the situation would surely be at odds with the fundamental principle of law that no one should be the judge in his own cause. The whole problem of extradition was an extremely thorny one, and he believed that the Drafting Committee had done the best that could be hoped for at the present stage. The insertion of the word "either" between "shall" and "try" in paragraph 1 would tighten the text by making it clear that no other course of action was permissible.

67. He agreed with previous speakers that the term "crime" should be used throughout the draft. The provision in paragraph 2 was acceptable in itself, but in view of what he had just said about paragraph 1, it might be advisable to amplify the wording so as to ensure that extradition would not benefit criminals seeking a safe haven.

68. Lastly, he would prefer the words "shall not prejudice", in paragraph 3, to be replaced by "shall be without prejudice to", in order to achieve a slight—but in his view desirable—shift of emphasis.

69. Mr. BEESLEY said that, in drafting article 4, the Drafting Committee had clearly intended not to prejudice any future development or decision relating to the establishment of an international criminal court or of universal jurisdiction. Paragraph 1, as drafted, was clear and easy to understand, but he feared that it might also prove easy to apply in a manner not intended by the Drafting Committee or the Commission.

70. He agreed with much of what Prince Ajibola had said about the obligation to try or extradite. In his view, the obligation to try should be replaced by an obligation to detain or initiate criminal proceedings against the individual concerned, or to ensure that criminal proceedings were initiated against him. As paragraph 1 now

<sup>16</sup> See 2053rd meeting, footnote 8.

read, it seemed to be based on the presumption of the establishment of universal jurisdiction, which was not apparent from articles 1, 2 and 3; an intermediate step would seem to be necessary in order to close the hiatus. By giving further thought to the formulation of paragraph 1, the Commission would safeguard the whole process of drafting the code, which would be hopelessly compromised in the eyes of some Governments by the presumption that universal jurisdiction was to be established. The problem of extradition, too, though not insoluble in itself, would remain impossible to resolve so long as it was not known whether there was to be an international criminal court, universal jurisdiction, or a mixed tribunal.

71. The issue of territoriality did not appear to cause any major difficulty. It might, however, be preferable to use the term "jurisdiction" rather than "territory", so as to cover cases in which there was duality of jurisdiction, such as crimes committed on board ship in the territory of another State. He agreed with previous speakers that it was desirable to harmonize the terminology employed in the draft: the word "crime" should be used throughout the text or not at all. The question of priorities in the case of requests for extradition received from several States could be dealt with in the commentary.

72. He suggested that paragraph 3 be amended slightly to make it clear that the provisions of the preceding paragraphs were without prejudice not only to the establishment and jurisdiction of an international criminal court, but also to the whole question of jurisdiction or competence, including the question of venue.

73. He emphasized that the doubts he had expressed, which also applied to article 7, were not meant to imply any criticism of the Drafting Committee or its Chairman, who had done their best to reconcile deeply divided views.

74. Mr. OGISO said that the points he was about to make were intended mainly for the record; he had no intention of pressing them at the present stage.

75. First, while accepting the formulation of paragraph 2 of article 4 as adopted by the Drafting Committee, he would have preferred the word "due" to be used instead of "special" to qualify "consideration". That wording would, he thought, avoid a situation in which, for instance, a person alleged to have committed the crime of *apartheid* would be extradited to the State where *apartheid* was practised.

76. Secondly, he could accept the proposal made by several speakers that the words "was committed", in paragraph 2, should be replaced by "is alleged to have been committed".

77. Thirdly, he was prepared to accept article 4 in its present form if the Commission's report to the General Assembly included a recommendation that the Commission should be requested to study questions of jurisdiction in general, and the question of an international criminal jurisdiction in particular, at its next session.

78. Mr. PAWLAK said that, although he was a member of the Drafting Committee, he had unfortunately been unable to be present when article 4 had been adopted. He must therefore apologise to the Chairman of the Drafting Committee for the critical remarks he was about to make.

79. The general principles being drafted were intended to provide a basis on which the ideas set out could be developed in the future. Like Mr. Barsegov, Mr. Sreenivasa Rao and some other speakers, he thought the compromise formula adopted in paragraph 2 was very weak and failed to provide an adequate basis for preventing the criminal from finding a safe haven.

80. In considering that issue, it was essential to look back in history and recall that, as a result of inadequate provisions and practices, many war criminals had escaped to safe havens after the Second World War. Fortunately, at the beginning of the process of prosecution of war criminals, a number of them—including the infamous commandant of Auschwitz, Hans Frank—had been sent to the country where they had committed their crimes and had been adequately punished. For the sake of the peace and security of mankind, as well as of the progressive development of international law, the Commission should, at the very least, not depart from the principles accepted at Nürnberg and Tokyo. He therefore suggested that the word "special" in paragraph 2 be replaced by "priority".

*The meeting rose at 1.05 p.m.*

## 2083rd MEETING

*Thursday, 21 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*later:* Mr. Bernhard GRAEFRATH

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

**Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.422)**

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

## [Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
(continued)ARTICLE 4 (Obligation to try or extradite)<sup>4</sup> (concluded)

1. Mr. ARANGIO-RUIZ said that the present wording of paragraph 3 of article 4 launched into space, so to speak, the idea of establishing an international criminal court. The idea could be brought back down to earth by the following wording:

“3. The provisions of paragraphs 1 and 2 of this article shall not prejudice the determination of the competence of an international criminal court once it is established.”

That would in no way alter the meaning of the article, particularly in regard to the hypothesis of universal jurisdiction, which was implicit in paragraphs 1 and 2.

2. Mr. CALERO RODRIGUES said that he had some reservations regarding the form of paragraph 1, but generally speaking the substance met with his approval. The point had been made that no individual alleged to have committed a crime against the peace and security of mankind should have safe haven from prosecution under the pretext that a country had no jurisdiction in the matter. That principle was correct and deserved to be stated in a provision of the draft. Application of the principle, however, posed various problems, first in terms of jurisdiction, and then in terms of extradition.

3. As far as jurisdiction was concerned, the difficult choice was between an international criminal court and universal jurisdiction. If established, an international criminal court would in a sense operate by delegation of the international community. The question of jurisdiction therefore opened up a very broad range of problems. Presumably, the question would be settled elsewhere in the code and it was perhaps pointless to mention it in article 4.

4. With regard to extradition, an individual alleged to have committed a crime would naturally have to be brought before an international court, in which case the term “extradition” was not suitable, or before the competent national courts. There again, it should be specified which State could exercise jurisdiction, and under which conditions, and what the effects of such jurisdiction would be on that of other States—not forgetting the case of joint jurisdiction—and a system of communication between States should be set up. An extradition régime would also need to be established, by specifying, for example, that in the absence of an express treaty between the States concerned, the code itself would serve as the basis for the procedure. Clearly, the problems of extradition were all too numerous. Other less wide-ranging instruments consisted of 10 to 12 articles on the matter and the code could not be expected to settle all the problems in one single provision.

5. The complexity of the situation was such that it would be wise to follow the direction indicated by Mr. Beesley at the previous meeting. Article 4 should simply

lay down the principle of the obligation to try or extradite, on which everyone was agreed and which was aimed essentially at preventing a criminal from escaping from justice. The best course would be to delete paragraph 2, which simply raised problems it did not resolve, and to avoid questions of jurisdiction. The Commission should not, however, believe that it had resolved the problems in passing and therefore feel that it was not bound to elaborate a number of much more precise articles on the matter.

6. Paragraph 3 merely stated a truism: in fact, no provision of the draft code prejudged the establishment of an international criminal court. That did not mean that the other solution, namely universal jurisdiction, was resolved. Even in that case, a State might well be unable to exercise jurisdiction because, quite simply, the person in question was outside its territory.

7. The present discussion also caused some concern in regard to methodology. The Drafting Committee did indeed have to find compromise solutions, but it should not impede the work of the Commission itself. Yet the Committee was spending practically all its time on questions of substance, and the drafting work was being done in plenary, as had been the case at the previous meeting. That explained why the Drafting Committee had arrived at such disappointing results on the present topic.

8. Mr. FRANCIS said that paragraph 2 of article 4 was not sufficiently precise. The crimes in question could, although they had been committed by one and the same person, consist of various acts, perpetrated in various countries. In that case, the system of universal jurisdiction, the essential object of the main article and the instrument of enforcement of the code, would be difficult to put into practice, quite apart from the fact that it would be very costly. It should therefore be kept for exceptional cases.

9. Mr. Beesley (2082nd meeting) had raised an important point with regard to paragraph 1, which said that an individual “alleged to have committed” a crime had to be tried. That was going rather far and overlooked the earlier stages, such as police information and, more particularly, a preliminary enquiry. The authors of a number of conventions had not been mistaken in that regard. For example, the International Convention on the Suppression and Punishment of the Crime of *Apartheid* spoke only of persons “charged” with a crime (art. V), and not individuals “alleged to have committed” a crime. Nor did the words “individual alleged” appear in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, or in the 1977 European Convention on the Suppression of Terrorism.<sup>5</sup> Accordingly, if the phrase “individual alleged to have committed a crime” were maintained, paragraph 1 would have to be amended by replacing the words “shall try” by “shall prosecute”.

10. Mr. GRAEFRATH said that some countries did not want the establishment of an international court with jurisdiction for crimes against the peace and secur-

<sup>4</sup> For the text, see 2082nd meeting, para. 36.

<sup>5</sup> See 2057th meeting, footnote 11.

ity of mankind. Moreover, at its thirty-fifth session, in 1983, the Commission had asked the General Assembly to indicate whether it should prepare the statute of a competent international criminal jurisdiction for individuals and had reiterated its request at its thirty-ninth session.<sup>6</sup> Since it had received no reply, the Commission should consider that the question of the jurisdiction of a possible international court and its relations with national criminal jurisdictions remained open.

11. The principle laid down in article 4 was by no means new. It was enunciated not only in the instruments cited by Mr. Francis, but also in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft,<sup>7</sup> the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation<sup>8</sup> and the 1937 Convention for the Prevention and Punishment of Terrorism.<sup>9</sup> In other words, its validity did not depend on establishing a hypothetical international court. Unfortunately, however, article 4 was not clear-cut about the ways and means of applying the principle. Various intermediate steps had been proposed in the Drafting Committee, more particularly to ensure custody of the criminal, and the Committee had even discussed the order of priority for those steps. Several members of the Committee had been ready in that regard to expand the provisions of article 4 in the light of existing conventions. However, some difficulties had emerged, for instance with regard to the principle of territoriality in paragraph 2, a principle which, it had been said, could not apply to the crime of *apartheid*.

12. He was none the less ready to endorse article 4 in its present form, on the understanding that it would be amplified by subsequent articles. The text had the twofold merit of providing a basis, however narrow, for pursuing the Commission's work, and of not closing the door on an international criminal court, for those who appeared to want such a court.

13. Mr. BENNOUNA said that paragraph 3 would quite obviously disappear, for it merely indicated that the Commission would later consider the possibility of establishing an international criminal court. The best course would be to place the paragraph in square brackets, as suggested by Mr. Eiriksson (2082nd meeting), with an explanation in the commentary that that did not mean that there had been any difference of opinion among members of the Commission.

14. The Chairman of the Drafting Committee had given a perfect picture of the lively discussion in the Committee. Article 4 was indeed difficult in that it assumed problems were resolved when they were not, for example the problem of jurisdiction. The Drafting Committee had preferred not to settle everything immediately, on the understanding that it would revert to matters that were still pending. That was a wise decision, because on further reflection the new proposals the Special Rapporteur would be making at the next ses-

sion, and above all a thorough analysis of the various crimes covered, would definitely make it possible to obtain a better grasp of the ins and outs of the principle the article endeavoured to enunciate.

15. It had already been said that the provision on extradition should be less ambiguous, but it would be premature to try to move further at the present time. Article 4 posed basic problems involving the very concept of crimes against mankind, from the standpoint of universality, of the collective interests of States, of international action to punish such crimes, and so on. For those reasons, he shared Mr. Graefrath's view that article 4 should be provisionally adopted as it stood, that all reservations should be recorded, and that the matter should be taken up again at the next session in the light of the replies by the Special Rapporteur.

16. Mr. ARANGIO-RUIZ said that, after hearing the statement by Mr. Calero Rodrigues, he was convinced that it would be better to delete paragraph 2 and to retain paragraph 1, which enunciated the principle of universal jurisdiction, as well as paragraph 3, possibly in an amended form, for it reserved the question of establishing an international criminal court. The problems of jurisdiction and extradition would be settled in detail in another part of the code.

17. As Mr. Graefrath had pointed out, the question whether the preparation of the statute of an international criminal court formed part of the Commission's mandate had twice been put to the General Assembly, which had not answered. Accordingly, the Assembly intended to leave the matter in the Commission's hands. In his opinion, the preparation of such a statute was an essential element in the drafting of the code. For that very reason he had proposed his amendment to paragraph 3 (para. 1 above), which would reserve the question of establishing an international court without prejudice to the code entering into force. The Commission could at least indicate to the General Assembly that it deemed it advisable to take up the question.

18. Mr. Eiriksson's idea (2082nd meeting) of placing paragraph 3 in square brackets would simply give the impression that some members of the Commission were in any event opposed to the establishment of an international court.

19. Mr. KOROMA said he agreed with the arguments adduced in favour of article 4. It was of little import whether, individually, members approved or did not approve of the idea of a draft code, since the Commission had been instructed by the General Assembly to prepare one: everyone must now do his best to produce the best possible text. Plainly, article 4 could not satisfy everyone, since it was the outcome of a compromise. Its inadequacies could at least not be ascribed to any negligence by the Drafting Committee, which had spent nearly two weeks on the article. The Commission, now that all members had been able to state their views and express their reservations, which the Special Rapporteur would take into account in reviewing the text for second reading, should adopt the text proposed by the Drafting Committee, possibly with the drafting change suggested by Mr. McCaffrey (2082nd meeting, para. 51), namely

<sup>6</sup> See *Yearbook* . . . 1987, vol. II (Part Two), p. 17, para. 67 (c).

<sup>7</sup> United Nations, *Treaty Series*, vol. 860, p. 105.

<sup>8</sup> *Ibid.*, vol. 974, p. 177.

<sup>9</sup> See 2054th meeting, footnote 7.

to replace the words “shall not” by “do not” in paragraph 3. Other amendments—and he himself intended to make some proposals—could be considered on second reading.

20. Paragraph 3 should not be placed in square brackets, because in the practice of the Commission they were a sign of disagreement among members. It would be better to mark the paragraph with an asterisk and add a footnote by the Special Rapporteur explaining that, for the time being, the Commission was setting aside the question of an international criminal court. Since, as already pointed out, the General Assembly had said nothing in that regard and the Commission was better placed than the Assembly to envisage all the consequences of choosing between an international court and universal jurisdiction, the Commission should, at its next session perhaps, take a decision on the matter and make a recommendation, instead of putting the ball back in the General Assembly’s court.

21. Mr. McCaffrey noted that Mr. Francis’s objections to the obligation “to try” were similar to the ideas expressed by Mr. Beesley (2082nd meeting). In that regard, under the terms of a number of conventions, including the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (arts. 6 and 7) and the International Convention against the Taking of Hostages<sup>10</sup> (arts. 6 and 8), the States parties took the necessary steps to ensure the presence of the alleged offender “for the purpose of prosecution or extradition”, and if the person was not extradited, they submitted the case to their “competent authorities for the purpose of prosecution, through proceedings in accordance with [internal] laws”.

22. He had reserved his position on the whole of draft article 4 and, since it seemed to be agreed that more detailed provisions on jurisdiction and extradition would be prepared later, he would suggest that the words “in accordance with the provisions of the present Code” be added at the end of paragraph 1, with an explanation in the commentary that detailed provisions would figure in another part of the code.

23. Mr. BEESLEY said he supported that proposal. Moreover, the Commission should, in his opinion, fall back on that method whenever necessary, for it would avoid extensive debate.

24. On the other hand, the amendment to paragraph 2 proposed by Mr. McCaffrey (2082nd meeting, para. 51), namely to replace the end of the paragraph by the words “in whose territory the crime is alleged to have been committed” was perhaps not adequate, for such a presumption would relate only to the territory and not to the crime. Even if it involved repetition, it would be better to say “the alleged crime”.

25. He was not opposed to the amendment to paragraph 3 proposed by Mr. Arangio-Ruiz, but simply thought that it did not go far enough. The solution he himself advocated was to leave all options open. If that solution was not acceptable, the Commission could in-

form the General Assembly that, failing instructions to the contrary, the Commission took universal jurisdiction as its working premise.

26. Mr. Sreenivasa RAO said that the Commission was reopening the debate on questions already discussed at length in the Drafting Committee. As Mr. Koroma had said, the Commission should adopt the wording proposed, for at the present stage any amendments would raise insoluble difficulties. The arguments on all sides would be found in the summary records of the Commission’s meetings, along with the proposed amendments. The Special Rapporteur would be able to take them into account and, in the commentary, draw the General Assembly’s attention to the major problems that arose, particularly the problem of the establishment of an international criminal court.

27. The ultimate criterion for the draft code was still its acceptability to States. Hence the General Assembly should give the Commission the requisite guidelines to continue its work. The greater the number of controversial elements introduced into the draft, the more difficult it would be for the draft to command acceptance by States: some had always been opposed to it. It was from that standpoint that the members of the Drafting Committee had striven, regardless of personal convictions, to reach agreement on a text. The proposed text of article 4, which represented the lowest common denominator of the various opinions, was necessarily imperfect. It was, nevertheless, the best the Commission could produce and it should now be adopted if the Commission wished to discharge the task assigned to it. He was therefore opposed to any change in the text, whether it was to place some provisions in square brackets or to amend paragraph 3, which in no sense prejudged the position of members of the Commission.

28. It had been suggested that the obligation to try or to extradite should be replaced by an obligation to prosecute or to extradite, in view of certain treaties and provisions of municipal law. In that regard, Prince Ajibola’s comments (2082nd meeting) should be enough to convince the Commission to keep to the present wording, since States might well choose not to try an individual. He also supported Prince Ajibola’s suggestion (*ibid.*, para. 66) to insert the word “either” between the words “shall” and “try” in paragraph 1. The realities of inter-State relations should not be ignored. All too often, nowadays, a State requested to extradite an individual suspected of committing a crime refused to do so. It then took refuge in the fact that it was not obliged to try but simply to prosecute the person in question and the suspect was released on the grounds that it had not been possible to bring sufficient charges against him. The State demanding extradition could then do nothing at all, except pay back in kind when the time came.

29. Clearly, there was no question of compelling States to try an individual without following the usual procedures, but nothing in article 4 prevented those procedures from being observed. If the punishment of persons committing crimes against humanity was not to be an entirely political matter, a text laying down the obligation to try was indispensable. For that reason, article 4, with the amendment proposed by Prince Ajibola, should be adopted.

<sup>10</sup> See 2061st meeting, footnote 6.

30. Cases of more than one request for extradition posed quite thorny problems and, there again, the text proposed by the Drafting Committee for paragraph 2 should be adopted.

31. Mr. AL-BAHARNA said that, in view of the explanations given by the Chairman of the Drafting Committee, he was in favour of article 4 in its present form, as was Mr. Sreenivasa Rao, whose comments he endorsed. The basic principle was obviously that of territorial jurisdiction, but it was essential to make an exception in the case of such odious crimes as those covered by the draft code, and to adopt the system of universal jurisdiction. Paragraph 2 was perhaps not perfect, but it did follow on logically from paragraph 1. In his opinion, it should be adopted on first reading in its present form.

32. He approved of the amendment proposed by Prince Ajibola (2082nd meeting, para. 66), but was against the idea of placing paragraph 3 in square brackets. Indeed, it was to be hoped that the Commission would decide to recommend to the General Assembly the establishment of an international criminal court. He had no objection to Mr. Arangio-Ruiz's proposal for paragraph 3 (para. 1 above), but the time was not right to consider it and the best thing would be for the paragraph to be adopted without change.

33. Having attended the meetings of the Drafting Committee as an observer, he found that members of the Commission took up in detail some arguments they had already advanced at length in the Committee. In such circumstances, would it not be better for the drafting work to be done directly in plenary? The suggestion was not as preposterous as it might seem, if one bore in mind the example of the Third United Nations Conference on the Law of the Sea, at which all the Members of the United Nations had taken part in the drafting of the Convention, which was on a particularly delicate matter.

34. Mr. EIRIKSSON said that he, too, supported Mr. McCaffrey's proposal (para. 22 above) to add the words "in accordance with the provisions of the present Code" at the end of paragraph 1. They seemed essential if the article was to be acceptable.

35. Paragraph 2 would be better placed in another part of the draft.

36. He was anxious to clear up any misunderstanding about his proposal (2082nd meeting, para. 63) to place paragraph 3 in square brackets. He had thought that the commentary could explain that the provision would be maintained only if the Commission failed to agree on the establishment of an international criminal court. If his proposal was not acceptable, there was another possibility, one that Mr. Koroma had brought to mind. Paragraph 3 could be transferred to the commentary, with an indication that the Commission had not yet received clear guidelines on whether to draft provisions on the establishment of an international criminal court, and that, if it had still not elaborated such provisions by the end of its work on the topic, it would incorporate paragraph 3 in article 4 in its present form, but supplemented, in accordance with the proposal made by

Mr. Beesley at the previous session,<sup>11</sup> by the words "or other combined court".

37. Mr. FRANCIS withdrew his proposal concerning the word "try" in paragraph 1 (para. 9 above) and said that he supported Mr. McCaffrey's suggestion (para. 22 above). Since article 4 was in the part of the draft entitled "General principles", it would have sufficed to lay down the obligation to prosecute. The obligation to try had no place in that part of the draft, for it was a matter of jurisdiction. The same was true of paragraph 2. The principle of extradition was already enunciated in paragraph 1.

38. Prince AJIBOLA said that, in the absence of clear instructions from the General Assembly, the Commission had three options: it could confine itself solely to territorial jurisdiction and submit an incomplete set of draft articles to the General Assembly; it could recommend the establishment of an international criminal court; or it could propose either territorial jurisdiction or the establishment of an international criminal court, as preferred. The problems posed by the issues of trial and extradition lay in the vagueness of the Commission's mandate. For example, it would be extremely difficult to ask a national court to try crimes against the peace and security of mankind, since they did not have the legal means to do so. Above all else, the Commission should find out which direction its work was to take. Its task would then be made much easier.

39. The CHAIRMAN, speaking as a member of the Commission, said that the discussion made him even more convinced that the Commission should not refer articles to the Drafting Committee without making a clear-cut decision on the substance.

40. Mr. REUTER, emphasizing that the present discussion called in question not the article under consideration or even the validity of the draft as a whole, but the Commission's reputation and its working methods, paid tribute to the Chairman of the Drafting Committee and the Special Rapporteur for the work they had done. Moreover, an inadequate text was better than no text at all. He urged that article 4 be adopted in its present form.

41. The CHAIRMAN, speaking as a member of the Commission, said that, in principle, he accepted article 4 in the form proposed by the Drafting Committee, not because the text as such was satisfactory but because it represented a compromise solution. Admittedly, the article did raise a number of issues. For example, as Mr. Francis had pointed out, would it not be better to replace the word "try", in paragraph 1, by "prosecute", so as to preserve the principle of the presumption of innocence?

42. With regard to the amendment to paragraph 3 proposed by Mr. Arangio-Ruiz (para. 1 above), he would suggest, but not insist, that it might be better to replace the words "once it is established" by "if one is established". The establishment of an international criminal court was still a hypothetical matter, since the General Assembly had not yet answered the Commis-

<sup>11</sup> See 2059th meeting, footnote 13.

sion's request for clarification and the Commission itself had not taken any decision.

*Mr. Graefrath (First Vice-Chairman) took the Chair.*

43. Mr. THIAM (Special Rapporteur) said that, in his opinion, the Commission should remain true to its tradition and refrain from reopening the debate on texts which were proposed by the Drafting Committee after painstaking work and which the Commission itself had discussed at length beforehand. At the present stage, proposals should be made only on matters of form.

44. The underlying reason for paragraph 1 of article 4 was that the 1954 draft code had simply been a catalogue, an enumeration, of crimes, with no machinery for implementation. Clearly, the Commission's work on the present draft must not be futile: it was essential to be able to implement the code, even in the absence of an international criminal court, although the possibility of such a court was not to be ruled out. Furthermore, a similar provision was found in many instruments, more particularly the 1977 European Convention on the Suppression of Terrorism,<sup>12</sup> the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance,<sup>13</sup> the International Convention against the Taking of Hostages<sup>14</sup> and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. Hence paragraph 1 contained nothing new and should be kept as it was. As for adding the phrase "in accordance with the provisions of the present Code", he intended to explain in the commentary that the basic principle laid down in paragraph 1 existed independently of the code, and he would also set out the modalities of implementation in another part of the draft.

45. Mr. Francis's suggestion to replace the word "try", in paragraph 1, by "prosecute" was simply a question of differences between legal systems. In many legal systems it was possible to prosecute (*poursuivre*) without trying (*juger*), but impossible to try without prosecuting. The two concepts were separate. Hence, in the French text at least, the word *juger* would have to be used.

46. As far as paragraph 2 was concerned, originally he had not submitted any such text, but at the request of some members he had later proposed an article containing a list of jurisdictions classed in order of preference. In the absence of agreement on the list or the order, the Drafting Committee had simply indicated that priority should be given to the principle of territoriality, at least in some cases. It was for that reason that paragraph 1 enunciated the *aut dedere aut judicare* principle, and paragraph 2 the principle of territorial jurisdiction. All would be explained in other provisions of the draft. Accordingly, paragraph 2 could be adopted as it stood. The establishment of a list of jurisdictions or an order of preference was a question that could be examined later, if necessary.

47. As to paragraph 3, he too would like an international criminal court to be established, but account must be taken of realities. It was even his intention to submit a draft statute for an international criminal court. Paragraph 3 should not be placed in square brackets, nor should it be altered. The commentary would, if necessary, explain the reasons that warranted the establishment of an international court.

48. Naturally, the commentary would reflect the various proposals made, concerning both form and substance.

49. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said the discussion clearly showed that article 4 was truly a consensus text and that it reconciled various schools of thought. The debate also revealed the need to incorporate in the draft at a later stage a part on implementation of the general principles of the code, particularly with regard to jurisdiction and extradition.

50. The proposal to insert the word "either" before the words "try or extradite" in paragraph 1 was acceptable, since the basic idea was that an individual charged with a crime against the peace and security of mankind should not be in a position to escape justice. Mr. McCaffrey's proposal (para. 22 above), supported by Mr. Beesley and Mr. Eiriksson, to add the words "in accordance with the provisions of the present Code" at the end of the paragraph was also in keeping with the spirit of the provision, but it did not really seem necessary to alter the text. The commentary could say that it was a general principle which would be spelled out in greater detail and thereby made effective elsewhere. Another proposal had been to place the word "try" in square brackets. The meaning of that word should be taken as *sui generis* and not as referring to any legal system in particular. It would therefore be better to retain the word, on the understanding that its meaning was broad and covered the notion of "prosecution" in the case of countries that drew a distinction between "trying" and "prosecuting".

51. With regard to the two proposals concerning paragraph 2, the best course would be to state in the commentary that some members supported the proposal to delete the paragraph, whereas the majority wished to retain the provision at the present stage. The drawback of the other proposal, made by Mr. McCaffrey (2082nd meeting, para. 51), namely to replace the end of the paragraph by the words "in whose territory the crime is alleged to have been committed", was that it emphasized the territorial side of the matter, as Mr. Beesley had pointed out. It would be noted that article 8, paragraph 1, of the International Convention against the Taking of Hostages spoke of the "alleged offender", but went on to say that the "State Party . . . shall . . . be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution". It therefore seemed superfluous to specify in paragraph 2 of draft article 4 that sentence had not been handed down and that the matter was still at the stage where charges were brought.

52. The word "do", instead of "shall", was acceptable in paragraph 3, since the provision was a factual

<sup>12</sup> See 2057th meeting, footnote 11.

<sup>13</sup> OAS, *Treaty Series*, No. 37 (1971), p. 6.

<sup>14</sup> See 2061st meeting, footnote 6.

proposition and not a legal command. On the other hand, the paragraph would be weaker if placed in square brackets, as Mr. Arangio-Ruiz, Mr. Koroma and Mr. Sreenivasa Rao had already said. The proposal to replace the words "shall not prejudice" by "are without prejudice to" could be mentioned in the commentary, without reopening the debate at the present stage. The advantage of the text in its present form was that the question was left pending. Lastly, a proposal had been made to add an asterisk to indicate that the paragraph would be deleted once the question of the establishment of an international criminal court was settled. It would be better to give that explanation in the commentary, since it could be a source of confusion to fall back on unusual methods. In short, paragraph 3 should be retained in its present form, the only change being to replace the word "shall" by "do".

53. Mr. McCaffrey said that he reserved his position, but was not opposed to the Commission adopting article 4.

54. Mr. Eiriksson said that he looked forward with interest to the explanations to be given in the commentary to paragraphs 1 and 3. The Commission had already used footnotes in its report in 1987: paragraph 3 should be accompanied by a footnote stating that the paragraph would not appear in the draft if the Commission prepared the statute of an international criminal court.

55. Mr. Tomuschat (Chairman of the Drafting Committee) said that he would prefer it if only the commentary was used.

56. The Chairman suggested that a footnote should be used only if the commentary proved inadequate.

57. Mr. Eiriksson said that he would like the reservation he had just expressed recorded in a footnote, which could be deleted if the commentary was adequate.

58. Mr. Francis explained that his objections were not to the substance, but only to the form, of article 4. With regard to the words "try" and "prosecute", the Special Rapporteur had been right to cite article 8 of the International Convention against the Taking of Hostages: at the drafting stage, the Commission should keep closely to the texts of conventions that had been adopted in the United Nations system and were in force. He proposed that draft article 4 should be adopted after making more stringent changes in form to take account of the fundamental reservations expressed.

59. Mr. Arangio-Ruiz suggested that the Commission should state in its report to the General Assembly and in the commentary to article 4 that, without prejudice to the principle of universal jurisdiction enunciated in paragraph 1, it would not consider that it was exceeding its mandate by preparing the statute of an international criminal court and that it would not be wrong in placing such an interpretation on the General Assembly's silence regarding the Commission's questions on that point.

60. The Chairman said that those explanations would be given in the report to the General Assembly and in the summary record of the meeting.

61. Mr. Beesley said that, although he did have some reservations regarding article 4, he would not object to it being adopted, in view of the quite broad interpretation placed on the term "try". Moreover, he interpreted the statements by the Special Rapporteur and the Chairman of the Drafting Committee as a guarantee that the principles in question would be applied in the rest of the code, in accordance with the provisions already adopted.

62. The Chairman proposed that the Commission should provisionally adopt article 4, on the understanding, first, that the words "try or extradite", in paragraph 1, would be replaced by "either try or extradite"; secondly, that the word "shall", in paragraph 3, would be replaced by "do"; thirdly, that the commentary and the summary record of the meeting would record the reservations regarding both substance and form made in the course of the discussion; and fourthly, that paragraph 3 would be accompanied by a footnote along the lines indicated, but that the footnote would be deleted if the commentary were deemed adequate.

*It was so agreed.*

*Article 4 was adopted.*

#### ARTICLE 7 (*Non bis in idem*)

63. Mr. Tomuschat (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 7,<sup>15</sup> which read:

##### *Article 7. Non bis in idem*

[1. No one shall be liable to be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.]

2. Subject to paragraphs 3, 4 and 5 of this article, no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished [by an international criminal court or] by a national court for a crime under this Code if the acts which were the subject of a trial and judgment as an ordinary crime correspond to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, a State may try and punish an individual:

(a) if the acts which were the subject of the judgment of the foreign court took place in its own territory;

(b) if that State has been the main victim of the crime.

5. Where an individual is convicted of a crime under this Code, the court, in passing sentence, shall deduct any penalty imposed and implemented as a result of a previous conviction for the same act.

<sup>15</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1987*, vol. II (Part Two), p. 10, footnote 25 and paras. 37-39.

64. Since the *non bis in idem* principle was recognized in practically all legislations for all categories of offences, the Drafting Committee had seen no need in the present context to deal with the implementation of the principle at the national level, particularly as article 14, paragraph 7, of the International Covenant on Civil and Political Rights established a widely accepted international standard in that respect. Accordingly, that aspect was not covered in the text of draft article 7.

65. Paragraph 1 dealt with the effects of the *non bis in idem* principle in relation to judgments rendered at the international level. Under the paragraph, the principle would apply without exception: in other words, a person having been convicted or acquitted by an international court for a crime under the code would not be liable to be tried again by any court for the same crime. The paragraph was, of course, predicated on the existence of international judicial machinery. It had therefore been placed in square brackets to indicate that the Commission would have to revert to it once a decision was reached on that question. It should be noted in that connection that the expression "international criminal court" left open the possibility of a number of such courts, functioning at the regional level or dealing with specific categories of crimes under the code. The word "acquitted" applied only to decisions on the substance of a case: dismissal of a charge on procedural grounds would not qualify as an acquittal under paragraph 1.

66. In drafting paragraphs 2, 3 and 4, the Drafting Committee had been guided chiefly by two considerations. The first was that the reasons underlying the recognition of the *non bis in idem* principle in most internal legal systems militated in favour of introducing it into the international legal system. The second was that, according to the prevailing view both in the Commission and in the General Assembly, general international law did not impose an obligation on States to recognize the validity of a judgment delivered by a foreign State on criminal matters. As a result, the Committee, while making in paragraph 2 an attempt at progressive development of the law, had in subsequent paragraphs identified exceptions to the *non bis in idem* principle that were necessary if article 7, and the code as a whole, were to have any chance of being accepted by States.

67. Paragraph 2 dealt with the operation of the *non bis in idem* principle as between several legal systems. Like the text originally proposed by the Special Rapporteur for paragraph 1, paragraph 2 drew on article 14, paragraph 7, of the International Covenant on Civil and Political Rights, subject to a number of adjustments required by the present context. The opening words indicated the limits within which the principle applied in the framework of the code; the concept of an "offence" had been reformulated for the purposes of the code; and the reference to "the law and penal procedure of a State" had been replaced—again to meet the requirements of the context—by the words "a national court". The concluding proviso explained that the operation of the *non bis in idem* principle as between several legal systems was conditional upon actual enforcement of any punishment imposed.

68. Paragraph 3 dealt with the first kind of exception to the *non bis in idem* principle, namely situations in which an act qualified as an ordinary crime in a given State corresponded to one of the crimes characterized in the code. A classic example was that of acts initially characterized as murder, but later corresponding to the definition of genocide. In such a situation, the individual concerned would be liable to be tried again by a national court or, as the case might be, by an international criminal court. The expression "may be tried" meant that the provision did not involve an obligation. The square brackets around the words "by an international criminal court or" did not reflect any disagreement in the Drafting Committee, but merely indicated the tentative character of that aspect of the text. As the opening words showed, paragraph 3 was intended to apply only within the general limits fixed in paragraph 2. Lastly, paragraph 3 was without prejudice to the principle of non-retroactivity enunciated in draft article 8.

69. Paragraph 4 covered a second type of exception, the idea being that a State in whose territory a crime against the peace and security of mankind was committed or which was the main victim of such a crime had a special interest in the punishment of the perpetrator. The paragraph therefore provided that the *non bis in idem* principle did not prevent the State in which the crime was committed or the victim State from bringing criminal proceedings on the basis of acts which had already been the subject of a judgment by a foreign court.

70. Some members of the Drafting Committee had been of the view that, at the present stage, paragraph 4 should have been placed in square brackets, for the possibility of adding a draft article on priority of jurisdiction among States had not been ruled out. In their opinion, the question might conceivably be settled as part of the treatment of the *non bis in idem* principle, which would necessitate a second look at paragraph 4. However, the majority view in the Committee was that, whatever system the code might establish in the matter of priority of jurisdiction, the principle of territoriality, which was universally recognized, would undoubtedly be one of the essential features.

71. Paragraph 5 embodied a principle which was contained in a number of recent regional conventions and was applied in many legislations in the form of a rule whereby periods spent in confinement awaiting trial were deducted from the sentence ultimately imposed. The rule formulated in the paragraph was intended to apply to judgments by both national and international courts.

72. Further to comments made by Mr. Barboza (2082nd meeting) regarding inconsistencies in terminology, such as the use of the word "crime" in article 4, paragraph 2, and of "act" in various paragraphs of article 7, he explained that the term "act" was an objective concept, namely something a person had done, whereas the term "crime" implied a legal characterization. Until the person concerned was convicted, it was preferable to speak of an "act" so as to leave room for the presumption of innocence. The only inconsistency was that the word "act" was used sometimes in the singular and sometimes in the plural.

73. Mr. THIAM (Special Rapporteur) suggested that, in the French text of paragraph 5, the word *acte* should be replaced by *fait*, which could designate either an act or an omission.

74. Prince AJIBOLA proposed that the expression "liable to be", in paragraph 1, should be deleted, and the word "act", in paragraphs 2 and 3, replaced by "alleged crime". In addition, in paragraph 2, the words "and sentenced" should be inserted after "convicted" and the words "has been enforced or" should be deleted. In paragraph 4, the words "and punish" should be deleted and the word "valid" should be inserted before "judgment". Lastly, the second part of paragraph 5 should be amended to read: "shall deduct any period of detention pending trial . . .". He would explain the reasons for those proposals later.

*The meeting rose at 1 p.m.*

## 2084th MEETING

*Thursday, 21 July 1988, at 3.05 p.m.*

*Chairman: Mr. Bernhard GRAEFRATH*

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (*continued*) (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.422)

[Agenda item 5]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

##### ARTICLE 7 (*Non bis in idem*)<sup>4</sup> (*continued*)

1. Mr. McCaffrey said that he endorsed the principle of article 7, but wished to comment on specific

points. The title, *Non bis in idem*, conveyed a legal concept that was widely recognized but would not be readily understood in many countries, including his own, where the term "double jeopardy" was normally used.

2. Paragraph 1 was extremely important, as it provided for an exception to the remainder of the article: if someone had been convicted or acquitted by an international criminal court, he could not be tried again, even under the conditions specified in paragraphs 3 and 4. But paragraph 1 did not specify what constituted an international criminal court. Presumably, therefore, a small group of States could decide to call itself an international criminal court for the purpose of exonerating a particular individual. As the Commission certainly did not intend to allow fake trials, it might wish to specify in the commentary that the international criminal court it had in mind was one that was accepted by the international community or by the parties to the code.

3. He agreed that it was too early to deal with the subject addressed by paragraph 4, namely jurisdiction and priorities. The sort of exception to the *non bis in idem* principle for which it provided might open the door to abuse, especially in the highly volatile circumstances surrounding an alleged crime against the peace and security of mankind. He would therefore reserve his position on paragraph 4, pending further refinement of the draft.

4. Mr. BARBOZA said that he accepted the explanation given by the Chairman of the Drafting Committee (2083rd meeting) for the use of the word "acts" in article 7, paragraph 4 (*a*), and had noted the Special Rapporteur's statement (*ibid.*) that, in the French text of paragraph 5, the word *acte* would be replaced by *fait*. He was still uncomfortable, however, with the wording of paragraph 2. To say that "no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted" made no sense. An individual was convicted or acquitted not in respect of an act, but of an act characterized as a crime under the relevant legislation. Of course, a given act could be characterized differently in different national laws and in the draft code. But the wording of paragraph 2 should be amended in the interests of clarity: he would suggest that, in French, the word *fait* be replaced by *fait réputé un crime*, and that, in English, the word "act" be replaced by "act considered a crime".

5. He could not understand why paragraph 1 of article 7 had been placed in square brackets but paragraph 3 of article 4 had not: he would appreciate an explanation.

6. Mr. TOMUSCHAT (Chairman of the Drafting Committee) explained that the title of article 7 had been chosen on the advice of the English-speaking members of the Drafting Committee, but he saw no reason why it should not be changed if that would make it more easily understandable: he would welcome suggestions. The Spanish title, *Cosa juzgada*, had been chosen precisely because the use of the Latin phrase had been deemed inappropriate.

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook* . . . 1954, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

<sup>4</sup> For the text, see 2083rd meeting, para. 63.

7. In response to the numerous questions raised by Prince Ajibola (2083rd meeting), he would simply point out that the Drafting Committee had chosen to follow the wording of article 14, paragraph 7, of the International Covenant on Civil and Political Rights in order to keep the number of new formulations to a minimum, and that the rule set out in paragraph 5 of draft article 7 was based on the provisions of several recent treaties.
8. As to Mr. McCaffrey's concern that a number of States might claim to form an international criminal court in order to exonerate a particular individual, it should be explained in the commentary that an international criminal court within the meaning of article 7 was not one that had been constituted in an arbitrary manner.
9. The reason why square brackets had been placed around paragraph 1 was that it *presupposed* the establishment of an international criminal court: paragraph 3 of article 4 merely indicated that other provisions were *without prejudice* to the establishment of such a court.
10. With regard to Mr. Barboza's drafting suggestion for paragraph 2, he really did not see any flaw in the present English text. It was perfectly reasonable for an individual to be tried for an act: the act actually constituted the material object of the prosecution. There might be a problem with the French text, however.
11. A number of drafting inconsistencies could be attributed to the fact that the Commission was working on the basis of a dual hypothesis: the establishment of universal jurisdiction and of an international criminal court. As neither of those issues had yet been resolved, the Commission was bound to have difficulties in merging two working assumptions in a single, readable text.
12. As to the amendment to paragraph 4 submitted informally by Mr. Eiriksson, he did not see that it presented any advantage over the text proposed by the Drafting Committee. He believed that the only drafting change that should be made to article 7 was the replacement of the words "acts which were" by "act which was" in paragraphs 3 and 4 (a).
13. The CHAIRMAN, speaking as a member of the Commission, said that he had understood Mr. Eiriksson's amendment to be aimed at concordance between paragraph 4, which said that "a State may try and punish an individual", and paragraph 3, which said that "an individual may be tried and punished".
14. Mr. THIAM (Special Rapporteur) said that that had also been his interpretation of the purpose of Mr. Eiriksson's amendment.
15. As to Mr. Barboza's objection to the use of the term *fait* in paragraph 2, he agreed in principle; but there would be cases—in article 12 on aggression for example—where the term *crime* could not be used and *fait* would be preferable, since it would be for the judge to decide whether the act was a criminal act or not.
16. Mr. AL-BAHARNA suggested that an attempt should be made to provide an alternative title in English, even if only in parentheses.
17. Paragraph 2 could be greatly improved, and made symmetrical with paragraph 1, by deleting the confusing and superfluous phrase "provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced": the preceding phrase, "finally convicted or acquitted", already implied that punishment had been imposed and had been enforced or was in the process of being enforced.
18. Mr. BARBOZA said that he still could not accept the present wording of paragraph 2. To say that a person had been convicted or acquitted "in respect of an act" did not make legal sense: people were convicted of crimes, not acts, and that applied equally to the word *fait* in the French text and the word *hecho* in the Spanish text.
19. Mr. McCAFFREY said that he agreed. As to the title of the article, he had not proposed any amendment, but had only made the point that the expression *non bis in idem* would not be understood in his country. If the title was acceptable to the Drafting Committee, however, he was prepared to accept it.
20. He inquired why the word "again" had been omitted after the words "tried or punished" in paragraph 1, although it appeared in article 14, paragraph 7, of the International Covenant on Civil and Political Rights. He did not think the word was indispensable in the context, but only wondered whether the omission was intentional.
21. The CHAIRMAN explained that the word "again" had indeed appeared in the original text of draft article 7, but had been deleted at the suggestion of the English-speaking members of the Drafting Committee, who had considered it unnecessary.
22. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that Mr. Eiriksson's amendment to paragraph 4, which was intended to bring the language into line with that of paragraph 3, was acceptable subject to the insertion of the words "for a crime under this Code" after the word "punished".
23. Replying to Mr. Al-Baharna's comment concerning the proviso at the end of paragraph 2, he said that the proviso had been included because a formal conviction and sentence without the firm intention to punish were not considered to be enough: a test of seriousness was required, and enforcement provided such a test. The wording of the proviso, as he had explained in his introductory remarks (2083rd meeting), was modelled on a recent convention adopted by the 12 States members of EEC. On the point made by Mr. Barboza and endorsed by Mr. McCaffrey, he personally could see no flaw in the wording of paragraph 2, although he admittedly was not a criminal lawyer.
24. Prince AJIBOLA said that he was opposed to the use of any term other than "crime" in the draft code. The expression "alleged crime" could be employed if necessary, but any other term would weaken the text and cause confusion. He also questioned the references to trial: it would be more logical to speak of prosecution.
25. The CHAIRMAN said that the language used was modelled on that of the International Covenant on Civil

and Political Rights, an instrument which had been ratified by 87 States. An appropriate explanation would be provided in the commentary. The point raised by Mr. Barboza with regard to paragraph 2 would be duly included in the summary record of the meeting and could be taken up again on second reading.

26. Mr. MAHIOU, replying to a point raised by Prince AJIBOLA, suggested that the text of paragraph 5 might be made more explicit by including a reference to the exceptions to the *non bis in idem* principle provided for in paragraphs 3 and 4.

27. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he had some misgivings about that proposal, since the rule laid down in paragraph 5 should apply to an international criminal court as well. Perhaps, therefore, the paragraph should be retained as it stood.

28. Mr. McCAFFREY, referring to paragraph 2, suggested that, to take account of Mr. Barboza's point that a person was convicted or acquitted not of an act, but of a crime, the word "for", in the phrase "for a crime under this Code", should be replaced by "on the basis of", and the words "of a crime" should be added before "by a national court". He would not press for that amendment if it was not acceptable, but would like it to be recorded in the summary record.

29. Mr. THIAM (Special Rapporteur) said that he could not accept that amendment if it was intended to apply to the French text of paragraph 2 as well.

30. Mr. AL-BAHARNA said that he, too, would prefer paragraph 2 to stay as it was. The addition of the words "of a crime", as suggested by Mr. McCaffrey, would be repetitive, since the paragraph already contained the phrase "tried or punished for a crime", and it was implicit in the word "acquitted" that the person acquitted had been acquitted of a crime. Besides, if the amendment were adopted, a similar change would have to be made to paragraph 1, where the same words were used.

31. Prince AJIBOLA said that he would like the Special Rapporteur to re-examine the wording of paragraph 5 and to consider adding the words "paragraphs 3 and 4 of" before "this Code", to establish the necessary link between paragraph 5 and the matters to which it was directed. Paragraph 1 made the unequivocal statement that no one could be tried or punished for a crime under the code for which he had already been finally convicted or acquitted by an international criminal court, and indeed the very essence of the *non bis in idem* principle was that no one could be punished twice for the same crime. Hence paragraph 5, as drafted, did not seem very logical.

32. Mr. THIAM (Special Rapporteur) said the idea behind the text was that the *non bis in idem* rule could not be invoked before an international criminal court, but only before a national court. The former could retry a person if it deemed it necessary or if the case was referred to it. The word "deduct" in paragraph 5 presupposed that there had been another trial. To meet Prince Ajibola's point, therefore, the words "passing judgment for a second time" could perhaps be added after "the court".

ment for a second time" could perhaps be added after "the court".

33. Mr. MAHIOU said that, although he had said he would not press for his amendment, in the light of the discussion he thought it would meet the objections raised by Prince Ajibola, and would not prevent the international criminal court from passing judgment, since the jurisdiction of such a court was recognized in paragraph 3 of article 7.

34. The CHAIRMAN suggested that the Commission should adjourn briefly to allow informal consultations to take place.

*The meeting was adjourned at 4.30 p.m. and resumed at 5 p.m.*

35. Mr. THIAM (Special Rapporteur) said that, in the light of the consultations he had held with the Chairman and the Chairman of the Drafting Committee, he suggested that paragraph 5 of draft article 7 should be reworded to read:

"Where an individual is convicted of a crime against the peace and security of mankind, any court trying such an individual a second time under this Code shall, in passing sentence, deduct any penalty imposed and implemented as a result of a previous conviction for the same act."

36. Mr. RAZAFINDRALAMBO suggested that the words *saisi une deuxième fois*, in the French text, should be replaced by *saisi en deuxième lieu*.

37. Prince AJIBOLA suggested that the words "any court trying such an individual a second time under this Code" in the new text should be replaced by "any court subsequently trying such an individual under this Code".

38. Mr. THIAM (Special Rapporteur) said that, to bring the French text into line with that amendment, and also to take account of Mr. Razafindralambo's proposed amendment, the words *saisi une deuxième fois* could be replaced by *statuant en deuxième lieu*.

39. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he found none of the proposals entirely satisfactory. The best solution, therefore, would be for a new text of paragraph 5 to be drafted for consideration by the Commission at its next meeting.

40. Mr. BARSEGOV appealed to members to agree to article 7 in principle and not to get bogged down in the trivia of drafting.

41. Mr. AL-BAHARNA suggested that, to avoid any further discussion on article 7, the Commission should adopt the article, subject to consideration of a revised text of paragraph 5 at the next meeting.

42. Mr. EIRIKSSON said that he would prefer not to adopt article 7 at the present stage, since his understanding of the effect of paragraph 2 differed from that of the Chairman, the Chairman of the Drafting Committee and the Special Rapporteur, and he would like to revert to the paragraph at the next meeting.

43. The CHAIRMAN suggested that the Commission should adjourn its discussion on article 7, on the understanding that it would have a revised text before it at the next meeting.

*It was so agreed.*

#### ARTICLE 8 (Non-retroactivity)

44. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 8,<sup>5</sup> which read:

##### *Article 8. Non-retroactivity*

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

45. Article 8 as proposed by the Special Rapporteur had consisted of two paragraphs. Paragraph 1 had met with general approval, but paragraph 2 had given rise to divergent views in plenary. The Drafting Committee had tried to overcome the difficulty by redrafting paragraph 1 in such a way as to render paragraph 2 unnecessary. It had come to the conclusion, however, that it was preferable to retain the present structure of the article.

46. Paragraph 1 laid down the fundamental principle of criminal law, *nullum crimen sine lege*. The Drafting Committee had decided that, in defining the scope of the paragraph *ratione materiae* as well as *ratione temporis*, the point of reference should be the code itself, rather than crimes against the peace and security of mankind. It had therefore deleted the phrase “which . . . did not constitute an offence against the peace and security of mankind”, in the previous text, and inserted instead the words “under this Code”. It had also replaced the reference to the time of commission of the crime by a reference to the time of entry into force of the code. The phrase “No person may” had been replaced by “No one shall”, which was the expression used in the corresponding provisions of various international instruments, including article 11, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1, of the International Covenant on Civil and Political Rights. The Drafting Committee had replaced, in both paragraph 1 and paragraph 2, the words “act or omission” by the word “act”, on the understanding that, at a later stage, a provision would be included to indicate that the word “act” covered both acts and omissions. Should that approach be approved by the Commission, a corresponding change would have to be made in articles 2 and 3, provisionally adopted at the previous session.<sup>6</sup>

47. With regard to paragraph 2, the Drafting Committee had been guided by two essential considerations. On the one hand, it had wished to ensure that article 8 would not operate as a bar to the prosecution of crimes committed prior to the entry into force of the code but punishable at the time of their commission on a basis other than that of the code. On the other hand, the Committee had been concerned that paragraph 2 should not give a free licence for the prosecution of acts whose criminal nature did not rest on a solid legal basis. The Drafting Committee had considered that the phrase “criminal according to the general principles of law recognized by the community of nations”, in the previous text, lacked the precision necessary in a penal instrument. It had therefore replaced that phrase by the words “criminal in accordance with international law or domestic law applicable in conformity with international law”. The first part of that phrase was self-explanatory; the second part was intended to cover the many instances in which States, prior to the entry into force of the code, had already made one of the acts dealt with therein punishable as a crime against the peace and security of mankind under their national legislation. That possibility was safeguarded under the proposed new text, subject, however, to the national legislation in question being in conformity with international law.

48. Finally, in the English text of paragraph 2, the words “shall prejudice” had been replaced by “shall preclude”, which more accurately translated the French *s'oppose*.

49. Mr. AL-BAHARNA said that he would like to have an explanation of the reference in paragraph 1 to acts committed before the “entry into force” of the code. In national legal systems, legislative enactments entered into force as from their publication in the official gazette, or as from a time specified in the legislation itself. The code, however, would become an international convention whose entry into force would depend on a certain number of ratifications being filed with the depositary. Problems could thus arise with regard to crimes committed on the date on which the last required ratification was received, or just before. He would welcome an explanation from the Chairman of the Drafting Committee.

50. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the problem was a complex one and it was easier to ask questions about it than to answer them. It was true that the entry into force of international instruments depended on the depositary receiving the requisite number of ratifications. It had to be remembered, however, that for each State party, the treaty would be binding only as from the date of its acceptance by that State. The fact that the date of entry into force of the instrument would not be the same for all the parties raised very difficult problems. Members of the Commission might have different views on the legal force of the future code with respect to the various States parties. Some would hold that the rule *res inter alios acta* applied. His own view was that, under the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, there would be different dates of entry into force for different States parties. The Commission could not possibly solve those difficult problems at the present juncture.

<sup>5</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 10-11, footnote 16 and paras. 40-43.

<sup>6</sup> *Ibid.*, p. 14.

51. It should be remembered, however, that many of the provisions of the code would be translated into national criminal codes, in which case no problem would arise regarding entry into force. States would be free to prosecute for any of the acts covered by the code under their national legal systems.

52. The CHAIRMAN said that the Commission was not dealing at the present stage with the question of the entry into force of the code.

53. Mr. McCAFFREY drew attention to a point regarding article 8, paragraph 1, which was similar to that raised by Mr. Barboza with regard to article 7, paragraph 2. He thought the formula "convicted under this Code for acts committed . . ." should read "convicted under this Code of a crime based on acts committed . . .". He would not propose any change of wording at the present stage, but wished the point to be taken up later.

54. Prince AJIBOLA suggested that the concluding phrase of paragraph 2 of article 8, "or domestic law applicable in conformity with international law", could be conveniently deleted. There was no need for the code to validate the domestic law of a country. The State concerned could prosecute the crime whether that passage was included or not.

55. Mr. THIAM (Special Rapporteur) said that the provisions of article 8 drew attention to the need for a State, in prosecuting an offender, to observe certain principles of international law.

56. Mr. TOMUSCHAT (Chairman of the Drafting Committee) stressed that most of the crimes included in the draft code were already punishable under national criminal codes. For example, most national codes made provision for the punishment of war crimes. The rule in paragraph 1 of article 8 should not be interpreted as a bar to prosecution in national courts before the code entered into force.

57. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 8.

*Article 8 was adopted.*

#### ARTICLE 10 (Responsibility of the superior)

58. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 10,<sup>7</sup> which read:

##### *Article 10. Responsibility of the superior*

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

59. Article 10 was modelled on article 86, paragraph 2, of Additional Protocol I<sup>8</sup> to the 1949 Geneva Conventions. Its purpose was to hold a superior responsible for acts by his subordinate. Since it was clear that there was no intention to depart from article 86 of Additional Protocol I, certain linguistic changes had been made to the previous text of article 10 to bring it closer to that article. For example, the word "possessed" before "information" had been changed to "had" and the word "practically" before "feasible" had been deleted.

60. Two points of substance had, however, been discussed in the Drafting Committee. It would be observed that there were two distinct requirements in article 10 for holding a superior responsible. The first was knowledge of a crime being committed, or going to be committed, by a subordinate. That requirement had two elements: the information itself and the fact that it would lead to such a conclusion. The words "if they knew or had information enabling them to conclude" were intended to convey those two aspects of the knowledge requirement. The words "enabling them to conclude" did not exactly correspond to the wording of article 86, paragraph 2, of Additional Protocol I. The reason was that the French and English texts of that paragraph differed slightly: the French text read *leur permettant de conclure*, while the English text read "should have enabled them to conclude". Thus the English text appeared to extend the scope of that indirect kind of responsibility much further than the French. The Drafting Committee had decided to follow the French text, on the understanding that the commentary to article 10 would explain that there had been no intention to depart from the connotation attributed to article 86, paragraph 2, of Additional Protocol I. The commentary would also indicate that the requirement of knowledge meant that the information received by the superior must be sufficient to support the conclusion that the subordinate was committing or was going to commit a crime; there was no need for the superior actually to have drawn such a conclusion. If he had not taken the trouble to read the reports containing the information, or if he had read them but had not drawn the appropriate conclusion although the information contained all the elements necessary to indicate the punishable nature of the act, the superior would not be relieved of criminal responsibility.

61. The second requirement for holding a superior responsible was his power to stop the subordinate committing the crime. The Drafting Committee had again encountered ambiguities relating to that requirement. It was not clear whether the notion of power was limited to physical power, such as practical means or feasible measures to stop the commission of the crime, or also included the legal power or competence of the superior to restrain his subordinate. The Drafting Committee had considered that the article should set out both criteria: the superior must have legal competence to stop the subordinate committing the crime and, in addition, the practical means of doing so. The words "feasible measures within their power" were intended

<sup>7</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, *ibid.*, p. 12, footnote 36 and paras. 56-57.

<sup>8</sup> See 2054th meeting, footnote 9.

to emphasize that both criteria must be met; those words were also used in article 86, paragraph 2, of Additional Protocol I. The Drafting Committee had considered that it should be explained in the commentary that power had two facets: a factual one and a legal one.

62. The title of article 10 had not been changed.

63. Mr. McCaffrey congratulated the Special Rapporteur and the Drafting Committee on an excellent article, which dealt felicitously with many difficult points.

64. He noted that the expression "criminal responsibility" was used, although article 10 did not identify the nature of that responsibility. Was it responsibility under the code or under national law? Perhaps it would be better to replace the words "criminal responsibility" by "responsibility under this Code", which would be consistent with article 3, provisionally adopted by the Commission at its thirty-ninth session.<sup>9</sup>

65. Mr. Eiriksson supported that suggestion.

66. Mr. Tomuschat (Chairman of the Drafting Committee) said that the point had not been discussed in the Drafting Committee. There would be no change of substance if the words "criminal responsibility" were replaced by "responsibility under this Code".

67. The Chairman pointed out that article 10 did not deal with any other kind of responsibility, so that the expression "criminal responsibility" was clear. He suggested that the text should remain as it stood.

*It was so agreed.*

*Article 10 was adopted.*

ARTICLE 11 (Official position and criminal responsibility)

68. Mr. Tomuschat (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 11,<sup>10</sup> which read:

*Article 11. Official position and criminal responsibility*

**The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.**

69. Article 11 was designed to draw attention to the fact that the official position of an individual who committed a crime under the code could not relieve him of criminal responsibility. Even in cases where the individual had the highest official position, such as head of State or Government, he would remain criminally responsible.

<sup>9</sup> See footnote 6 above.

<sup>10</sup> For the text submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1987*, vol. II (Part Two), p. 12, footnote 38 and paras. 58-61.

70. Article 11 was based on Principle III of the Nürnberg Principles.<sup>11</sup> It would be noted that the word "perpetrator", in the previous text, had been replaced by "individual", in line with the wording of article 3, as provisionally adopted by the Commission.<sup>12</sup> In the French text, the word *auteur* had been maintained, since it corresponded with the French text of article 3 and with the new English wording of article 11. To remove any ambiguity, it would be explained in the commentary that *auteur* was a broad term which included the individual who committed a crime, co-conspirators and accomplices, etc., and was not limited only to the original author of the crime.

71. It would be noted that article 11 was drafted in the present tense, whereas Principle III of the Nürnberg Principles was drafted in the past tense. The Drafting Committee had taken the view that, since article 11 addressed many situations likely to arise in the future—unlike the Nürnberg Principles, which looked essentially to the past—it should be drafted in the present tense.

72. Two principles were expressed in article 11. The first was that the official position of a person accused of a crime under the code did not remove him from the scope of application of the code, even if his position was head of State or Government. Hence there would be no immunity from the application of the code due to the position of the accused. The second principle was that a plea by the accused that he had acted in the performance of his official functions would not exonerate him from criminal responsibility. That was really the very essence of the code: to pierce the veil of the State and prosecute those who were materially responsible for crimes committed on behalf of the State as an abstract entity. The words "the fact that he is a head of State or Government", in the previous text, had been amended to read: "the fact that he acts as head of State or Government", so as to underline that the code focused on the time of commission of a crime.

73. The Drafting Committee had agreed that the commentary should elaborate on the two principles expressed in article 11 and on its purpose, so as to leave no ambiguities that might lead to misinterpretation.

74. The title of the article had been amended so as to correspond more closely to its content.

75. The Chairman said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 11.

*Article 11 was adopted.*

76. The Chairman said that it would not be advisable for article 12 to be introduced at that point, since the Commission would not have time to discuss it, and members should have the introduction fresh in their minds when they did so. He suggested that the little time remaining at the present meeting should be used by an

<sup>11</sup> See 2053rd meeting, footnote 8.

<sup>12</sup> See footnote 6 above.

informal group to prepare a redraft of paragraph 5 of article 7 for submission to the Commission at the next meeting.

*It was so agreed.*

*The meeting rose at 5.55 p.m.*

## 2085th MEETING

*Friday, 22 July 1988, at 10 a.m.*

*Chairman:* Mr. Bernhard GRAEFRATH

*later:* Mr. Ahmed MAHIU

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (concluded) (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/L.422)

[Agenda item 5]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

##### ARTICLE 7 (*Non bis in idem*)<sup>4</sup> (concluded)

1. Mr. TOMUSCHAT (Chairman of the Drafting Committee) recalled that a decision on paragraph 5 of article 7 had been left over from the previous meeting. An informal working group had redrafted that paragraph in French and, subject to possible stylistic changes, the English text would read:

“5. In the case of a new conviction under this Code, any court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act.”

The main elements of the previous text had been retained, but the emphasis was now placed on the fact that the rule would apply in cases of new convictions.

2. Prince AJIBOLA suggested the alternative wording:

“5. In the case of a new conviction under paragraphs 3 and 4 of this article, any court, in

passing sentence, shall take into consideration any term of imprisonment already served as a result of a previous conviction for the same crime.”

He had deliberately used the term “crime” instead of “act” because, once there was a conviction, the word “act” was no longer appropriate. He had also changed the unnecessarily lengthy formula “penalty already imposed and implemented” to “term of imprisonment already served” and introduced a reference to paragraphs 3 and 4 of article 7. Paragraph 5 applied to those paragraphs alone and not to the whole of article 7.

3. Mr. BEESLEY, referring to the amendment proposed earlier for paragraph 4 (a), asked whether the new formula “a national court of another State” was intended to be analogous to the expression “foreign court”.

4. He would also like to know whether it was clear that the last part of the new text of paragraph 5 (para. 1 above) referred to a previous conviction by a national court and not by a court acting in the capacity of a court applying the code.

5. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that he was opposed to Prince Ajibola’s suggestion to introduce in paragraph 5 a reference to paragraphs 3 and 4, because it would make the provision much too narrow. Paragraphs 3 and 4 described the jurisdiction of national courts as an exception to the *non bis in idem* principle and not the possible jurisdiction of an international criminal court—a matter which had been left entirely open.

6. The suggestion to replace the words “shall deduct” by “shall take into consideration” had been discussed at length, but the Drafting Committee had considered that the former were necessary in order to have a strict and rigid rule. The alternative wording proposed by Prince Ajibola (para. 2 above) left too much room for flexibility.

7. The proposal to incorporate a reference to a “term of imprisonment” would involve an important change of substance. The form of language adopted by the Drafting Committee encompassed any kind of penalty, including fines and such sanctions as expulsion from a country, although the main thrust of paragraph 5 did, of course, relate to terms of imprisonment. He himself had an open mind on the matter, but it was for the Commission to decide.

8. With regard to the possible replacement of the word “act” by “crime”, it was important to cover situations in which an individual was convicted of some offence which later proved to be an act characterized as a crime against the peace and security of mankind and was prosecuted and convicted a second time. The rule set out in paragraph 5 should apply in all instances in which an individual was being tried a second time. In the draft code, any reference to “crime” would normally mean a crime against the peace and security of mankind. If the word “crime” were used, paragraph 5 would no longer encompass the situation mentioned in paragraph 3.

9. As for the questions raised by Mr. Beesley, the issue as to whether or not a court trying an individual for a crime against the peace and security of mankind was

<sup>1</sup> The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

<sup>4</sup> For the text, see 2083rd meeting, para. 63.

acting as an agent of the international community was rather academic. Functionally, the court could be regarded as acting as an agent of the international community, and he sympathized with that interpretation; but the point was doctrinal and did not affect the wording of paragraph 5. The reference to a “foreign court” in paragraph 4 (a) meant the court which had handed down the first judgment; thereafter there was a second trial by a national court of another State. He had no doubts regarding the adequacy and clarity of the language used in paragraph 4 (a).

10. Mr. THIAM (Special Rapporteur) said that, on the subject of the “foreign court”, precise explanations would be given in the commentary in order to avoid any misunderstanding.

11. The CHAIRMAN said that it would perhaps be clearer if paragraph 4 simply stated:

“Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court for a crime under this Code:

“(a) if the act which was the subject of the judgment by a court of another State took place on the territory of that State.

“ . . . ”

12. Mr. BEESLEY said that that formulation was very close to what he himself had had in mind.

13. Mr. FRANCIS suggested that the words “passing sentence”, in paragraph 5, should be replaced by “any penalty imposed”. It would indeed be better not to use the expression “shall deduct”, and paragraph 5 should be reworded to read:

“In the case of a new conviction under this Code, any penalty imposed by the court shall be abated to the extent of any penalty already imposed and implemented as a result of a previous conviction for the same act.”

14. Mr. CALERO RODRIGUES said that none of the suggestions he had heard appeared to improve the text. As it stood, paragraph 5 provided clear guidance to any court that would have to pass judgment a second time for the same act.

15. Mr. McCAFFREY pointed out that the expression “new conviction” was unsuitable, since it was not a legal term. It was necessary to find a better expression and “subsequent conviction”, although less inadequate, was still imperfect.

16. Prince AJIBOLA said that the expression “subsequent conviction” was the most adequate.

17. Mr. BARBOZA said that, in the Spanish text, the expression *cualquier tribunal* was not appropriate and he suggested replacing it by *el tribunal*.

18. Mr. TOMUSCHAT (Chairman of the Drafting Committee) suggested that the Commission should adopt the following revised text for paragraph 5 of article 7:

“In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act.”

*It was so agreed.*

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 7 proposed by the Drafting Committee, as amended.

*Article 7 was adopted.*

20. Mr. FRANCIS said he wished to place on record his view that paragraph 5 of article 7 should have read as he had proposed earlier.

21. Mr. EIRIKSSON said that, following the adoption of article 7, he wished to revert to the question he had asked at the previous meeting about the impact of paragraph 2 on possible subsequent action by an international criminal court. He had been assured that it was the Drafting Committee’s intention that, if an international criminal court were established with some national jurisdictions under a combined system, the international court would not be barred from taking up a case again when a national court had finally convicted or acquitted an individual of a crime, even in cases other than those envisaged in paragraphs 3 and 4 of article 7. That point was not clear from the wording. If that was indeed the intention and an international criminal court were established, the restrictions set by paragraph 2 on a second trial would apply only to a second trial in a national court. Hence there would be no need for the reference in paragraph 3 to an international criminal court, for that court could always take up a case even in the event of a final acquittal by a national court.

22. The CHAIRMAN said that that was the understanding of the Special Rapporteur and the Drafting Committee, even if the actual wording was not absolutely clear.

#### ARTICLE 12 (Aggression)

23. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 12,<sup>5</sup> which read:

#### CHAPTER II ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

##### PART I. CRIMES AGAINST PEACE

##### *Article 12. Aggression*

1. Any individual to whom acts constituting aggression are attributed under this Code shall be liable to be tried and punished for a crime against peace.

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

<sup>5</sup> Article 12 corresponds to paragraph 1 of the revised draft article 11 submitted by the Special Rapporteur and considered at the present session (2053rd to 2061st meetings).

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3 of this article:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

24. Article 12 was the first article in chapter II of the draft code, which contained the catalogue of crimes against the peace and security of mankind, and part I of which dealt with crimes against peace. The Drafting Committee had borne in mind the wish expressed by many members of the Commission that each crime should form the subject of a separate article, and thus article 12 related solely to aggression. The Committee had also been mindful of the view of several members that a linkage should be established between the act of a State and action by an individual entailing the criminal responsibility of physical persons under the code. It had therefore included at the beginning of article 12 a paragraph 1 which, although it did not provide a definitive solution to the problem, signalled the need to deal with it at some future stage in relation not only to aggression, but probably also to other crimes under the code. The paragraph was tentative and would be reviewed when sufficient progress had been made on the definition of crimes.

25. The text of article 12, although it drew extensively on the 1974 Definition of Aggression,<sup>6</sup> omitted any

<sup>6</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

direct reference to it, thereby taking into account the opinion of some members that mention of a non-binding instrument intended to serve as guidance for a political organ, namely the Security Council, would be out of place in a criminal code to be implemented by the courts. Using the Definition of Aggression as a basis for its work, the Drafting Committee had taken into account that the Definition, in accordance with article 8 thereof, was an indivisible whole. Most of its elements had therefore been retained in the text now submitted to the Commission.

26. Paragraph 2 was identical to article 1 of the Definition of Aggression, except for the words "as set out in this Definition" and the explanatory note, which the Drafting Committee had deleted as being unnecessary in the context of the code. Paragraph 3 reproduced article 2 of the Definition.

27. The introductory clause of paragraph 4 began with the words "In particular", which had been placed in square brackets to indicate a basic divergence of views. Some members objected to the words because they considered it unacceptable to confer on national courts the power to expand the list of acts constituting aggression. Other members wished to preserve the freedom of the judge to qualify as aggression acts not included in the list, such as an air blockade.

28. The list of acts in subparagraphs (a) to (g) was identical to that contained in article 3 of the Definition of Aggression. The Drafting Committee had, however, inserted an additional subparagraph, subparagraph (h), which took into account the power of the Security Council under Article 39 of the Charter of the United Nations—a power which was referred to in article 4 of the Definition of Aggression—to determine that other acts constituted aggression under the provisions of the Charter. That power of the Security Council had not been questioned by any member of the Drafting Committee.

29. Paragraph 5 had been placed in square brackets to indicate a second divergence of views within the Drafting Committee. It should be stressed that the scope of the paragraph was limited to national courts and that the question of the relationship between the Security Council and an international criminal court was reserved. Furthermore, the phrase "Any determination . . . as to the existence of an act of aggression" was intended to encompass both positive and negative determinations, a point that would be elaborated on in the commentary. In support of paragraph 5, some members had argued that determinations by the Security Council under Chapter VII of the Charter were binding on States Members of the United Nations and therefore on their courts. Advocating the deletion of the paragraph, other members had maintained that to tie the implementation of the code to the functioning of the Security Council would make the code meaningless.

30. Paragraphs 6 and 7 reproduced articles 6 and 7 of the Definition of Aggression with no substantive change.

31. On the whole, disagreement had persisted with regard to only one important issue, namely the distribution of powers as between the Security Council and

national courts called upon to implement the code, disagreement that was reflected by two passages being placed in square brackets. Otherwise, the Drafting Committee had been unanimous in the view that the Definition of Aggression should be followed as closely as possible, and had reproduced it faithfully, except for the explanatory note and those elements which were relevant to inter-State relations alone.

32. Lastly, paragraph 1, constituting the introductory part of article 12, had been adopted provisionally by the Drafting Committee, on the understanding that it would be revised later when a general article was drafted to indicate clearly under what conditions an individual could be held responsible for a crime which, in the first instance, was an internationally wrongful act committed by a State. Any individual responsible for an act of aggression committed by a State was liable to be tried and punished for a crime against peace. There was a linkage between aggression, which was a wrongful act in relations between States, and the role of those individuals within an aggressor State to whom responsibility was to be attributed.

*Mr. Mahiou, Second Vice-Chairman, took the Chair.*

33. The CHAIRMAN suggested that, in view of the length of article 12, it should be considered paragraph by paragraph.

#### Paragraph 1

34. Mr. EIRIKSSON said that paragraph 1 was unnecessary and perhaps even dangerous. It contained nothing that was not already in article 1 of the Definition of Aggression, and stated simply that a crime defined in part I of chapter II had been committed. Besides, paragraph 1 of article 3 (Responsibility and punishment), provisionally adopted at the previous session,<sup>1</sup> clearly stated: "Any individual who commits a crime against the peace and security of mankind is responsible for such crime . . ." He accordingly proposed that paragraph 1 of draft article 12 be deleted as redundant, although the general thought could, of course, be included in the commentary.

35. Prince AJIBOLA said that the words "for a crime against peace" were not sufficient. They should be expanded to read: "for a crime against the peace and security of mankind". In some cases, a group of people was stronger than a State and the actions of such groups should be covered.

36. Mr. BEESLEY said it had been explained that paragraph 1 was a kind of holding paragraph, pending agreement on the crimes to be covered by the code. For his part, he supported the inclusion of the paragraph, which was important because of the message it contained.

37. Mr. BENNOUNA said that he agreed with Mr. Beesley. Paragraph 1 was necessary, despite the provision in article 3 quoted by Mr. Eiriksson. A link had to be established between the individuals responsible and the crimes against peace covered by the code. The problem arose also in respect of crimes other than aggression, for example intervention, which was a crime of the State.

38. The provision in paragraph 1 lay at the heart of the topic. The code was intended to deal with crimes of considerable importance committed in inter-State relations and individuals were to be held responsible for those crimes. Hence the concept of attribution contained in paragraph 1, which spoke of an individual to whom acts constituting aggression were "attributed under this Code". True, article 12 was provisional because it would have to be reviewed and also because another place might have to be found for it as the introductory provision to chapter II. Again, it would have to be supplemented. The concept of attribution must be clarified so as to indicate how the crime was attributed and which individuals would be involved. In the Drafting Committee, several notions had been suggested—the individuals who ordered a crime, those who organized it, and so on—but it was still too early to codify those notions. Attention would also have to be paid later to certain related concepts, such as those of complicity and attempted crime, which indirectly concerned paragraph 1. For the time being, however, the paragraph made it possible to establish a link between the code and the State crimes covered by the Definition of Aggression.

39. Paragraph 1 rightly spoke of "a crime against peace" and not a crime against the peace and security of mankind. Article 12 was concerned solely with crimes against peace, an approach that was the only way to make it clear that the article fully reproduced the provisions of the 1974 Definition of Aggression without at the same time mentioning that Definition. It had to be made plain to the General Assembly that the objective of the code was different from that of the 1974 Definition, in other words to attribute responsibility to individuals and not to States.

40. Mr. FRANCIS said that he agreed with Mr. Eiriksson. In its present form, paragraph 1 had no place in article 12. In the general debate (2059th meeting), he had stressed that the Commission should bring up to date the basic principles derived from the judgment of the Nürnberg Tribunal, namely that crimes under international law were committed not by abstract entities but by individuals, and that only by punishing those individuals could the rules of international law be enforced. He had gone on to suggest that article 19 of part 1 of the draft articles on State responsibility<sup>2</sup> made it quite clear that criminality could be attributed to States, a point that was rightly made in paragraph 2 of draft article 12.

41. He had further suggested that two things were needed in the code. The first was a principle reversing the Nürnberg principle that States could not commit crimes. One aspect, however, of the Nürnberg principles had not changed: States could not be tried for crimes attributed to them. Accordingly, he had suggested that the code should amend the first principle derived from the Nürnberg judgment. The second step would then be, in the substantive body of the code, for example in article 11, to attribute to individuals crimes that were committed by States but initiated by individuals. In article 12, what was required was not an outright attribution to individuals of the crime of aggression: that point was already covered by article 3. A paragraph

<sup>1</sup> *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

<sup>2</sup> See 2053rd meeting, footnote 17.

should be inserted immediately after paragraph 2 of article 12 attributing to individuals not crimes as such, but acts constituting crimes by States. Hence paragraph 1 would have to take another form. For those reasons, he fully supported Mr. Eiriksson's comments and intended to make a formal proposal on the subject at the next session.

42. Mr. McCaffrey said that he had great doubts regarding paragraph 1 and agreed with Mr. Eiriksson, Mr. Francis and Mr. Bennouna in many respects.

43. Mr. Beesley had been right to say that some provision was necessary as a link with the Definition of Aggression, namely a provision to demonstrate how that Definition could be applicable to individuals. Paragraph 1 of draft article 12 was, however, too vague to be properly placed in a criminal code. The language used was also rather confusing. The phrase "Any individual to whom . . . are attributed" gave the impression that the acts were being performed by someone else. The language was reminiscent of article 10 (Responsibility of the superior) of the draft code and suggested some kind of agency relationship under which one person's acts were attributed to another because of some legal relationship. That was not the position at all in article 12.

44. A much more precise formulation was to be found in Principle VI of the Nürnberg Principles,<sup>9</sup> subparagraph (a) of which stated:

The crimes hereinafter set out are punishable as crimes under international law:

(a) Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression . . . ;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

That provision constituted a much more specific way of describing how an individual could commit an act of aggression. It was troubling that the acts of an abstract entity could be attributed to an individual without any conduct on his part. Even more troubling was the vagueness of draft article 12, paragraph 1, which should be placed between square brackets so as to indicate that the Commission was trying to tie in the Definition of Aggression with an act by an individual. As now drafted, paragraph 1 was unacceptable. He was not at all certain of its intent and could not understand why the term "attributed" had been used at all. It was a confusing collection of words and was a step backwards by comparison with the Commission's formulation of the Nürnberg Principles in 1950.

45. Mr. EIRIKSSON said that he agreed with Mr. Bennouna's remarks on the idea behind paragraph 1, but considered that the form of language employed did not achieve the intended purpose. He strongly supported the suggestion to place the paragraph in square brackets so as to indicate that the Special Rapporteur would deal with the matter in detail later, and he hoped that the commentary would reflect the discussion fully.

46. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that it had been the general understanding of all members of the Drafting Committee that

the formulation in paragraph 1 was provisional and that an article was needed to specify in detail the types of acts which rendered an individual responsible for aggression. After all, aggression was committed by States and the question arose as to how to attribute it to individuals. It had been agreed that a specific article, covering all crimes against peace, was necessary. Of course, for that purpose the Commission would draw on the Nürnberg Principles, which referred to the "planning, preparation, initiation or waging of a war of aggression". It had none the less been agreed that the matter had to be examined very carefully; the Drafting Committee had not had time to prepare an article on the subject at the present session. For the time being, however, it had to be stated that a link existed between the act committed by a State and the individual responsible for aggression.

47. The CHAIRMAN thanked the Chairman of the Drafting Committee for his explanation, which showed that the disagreement related not to the idea embodied in paragraph 1 but to the way of formulating it.

48. Mr. CALERO RODRIGUES said that he agreed with the explanations given by the Chairman of the Drafting Committee and could accept paragraph 1 on an interim basis. Generally speaking, part I of chapter II of the draft code could only define the crimes. It was not necessary in every article to include an introduction affirming that the act in question constituted a crime. The Drafting Committee had agreed to have a general introduction to part I, but it had not been possible to formulate such an introduction and the Committee had fallen back on the provisional formula embodied in paragraph 1 of article 12. Article 3, referred to earlier (para. 34 above), began with the words: "Any individual who commits a crime against the peace and security of mankind". The part of the draft now under consideration, however, dealt with crimes like aggression, which could be committed only by States but were attributed to individuals as leaders or organizers. The problem was one of participation.

49. Admittedly, the terms of paragraph 1 were vague, and greater precision would be needed. Indeed, in the future a general article along the following lines would have to be inserted:

"The articles in the present part define the crimes against peace for which an individual may be held responsible and liable to punishment when he has instigated, ordered, authorized or taken a leading part in the planning or commission of the act which characterizes the crime."

For the time being, something was required as an introduction and paragraph 1 was the best that could be done. For his part, he found nothing unacceptable in it. The commentary to article 12 should explain that the paragraph was very provisional in character.

50. Mr. BARSEGOV said that he fully shared the views of the Drafting Committee and the arguments put forward by its Chairman as well as by Mr. Bennouna and Mr. Calero Rodrigues. Paragraph 1 had been the subject of lengthy and careful consideration by the Committee, which had decided that, at the present stage, it was not possible to do without it. It was fully realized that its provisions would later have to be sup-

<sup>9</sup> *Ibid.*, footnote 8.

plemented and, in addition, made applicable to other crimes as well. Without paragraph 1, it would be difficult for the General Assembly to understand the remainder of article 12. In any case, there was nothing controversial in the terms of the paragraph. The Committee had considered placing it in square brackets, but the idea had been abandoned because the Sixth Committee would no doubt have found it very strange to see a self-evident statement placed in square brackets. In any event, the provisional nature of the introductory statement in paragraph 1 would be stressed in the commentary.

51. Mr. GRAEFRATH said that he agreed with the Chairman of the Drafting Committee and Mr. Calero-Rodriguez and urged that paragraph 1 should be left as it stood.

52. Mr. FRANCIS pointed out that the greater part of article 12 was not in dispute at all, since it was drawn from the 1974 Definition of Aggression.

53. Mr. THIAM (Special Rapporteur) said that, except for the fact that two passages had been placed in square brackets, article 12 simply reproduced the Definition of Aggression.

54. Mr. McCAFFREY said that article 3 of the draft code covered the case of an individual who had committed a crime against the peace and security of mankind. Article 12, however, envisaged not the crime of an individual but the crime of the State committing aggression. The individual carried out the planning or preparation—not the actual crime—of aggression, which was committed by the State itself. Accordingly, paragraph 1 of article 12 would be much clearer if it were couched in the following terms: “Any individual to whom responsibility for acts constituting aggression is attributed under this Code shall be liable . . .”, because it was the responsibility, not the act itself, that was attributed to the individual. In its present form, paragraph 1 made no sense at all.

55. Mr. THIAM (Special Rapporteur) said that the Drafting Committee had rejected that proposal by Mr. McCaffrey because all the English-speaking members had been opposed to using the term “responsibility”. If the debate were reopened on that point, there would be no end to it. He recalled that, in the Drafting Committee, Mr. Bennouna had proposed another formula to avoid using the term “responsibility”.

56. Mr. BENNOUNA said that the point of concern not only to himself, but also to some other members of the Drafting Committee, was that responsibility could be attributed solely by a court. So long as a court had not ruled on the question, it was not possible to speak of attribution of responsibility. The planning or conduct of certain acts, on the other hand, could be attributed to an individual. It would then be for the court to decide on the question of responsibility. That idea was not very far removed from the one expressed by Mr. McCaffrey. The phrase “liable to be tried and punished” was even more striking in French (*passible de poursuite et de jugement*), for the judicial decision came after the attribution of responsibility.

57. Mr. Sreenivasa RAO said that he was in favour of paragraph 1 as it stood, in view of the explanations

given by the Chairman of the Drafting Committee and by other speakers. At the same time, he found Mr. McCaffrey’s proposal acceptable.

58. “Responsibility” was used as a general term in the present context and the phrase “tried and punished” covered the question of determining guilt. Accordingly, he had no objection to the term “responsibility”. Paragraph 1 could be adopted as a compromise, subject to an adequate explanation in the commentary and to the understanding that the provision would be reviewed on second reading.

59. The CHAIRMAN said that if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 1 as amended by Mr. McCaffrey (para. 54 above).

*It was so agreed.*

*Paragraph 1 was adopted.*

60. Mr. EIRIKSSON said that the change of wording had not made him any more satisfied with paragraph 1.

Paragraphs 2 and 3

*Paragraphs 2 and 3 were adopted.*

Paragraph 4

61. Mr. BARSEGOV said that he had no objection to paragraph 4. However, the fact that the opening words, “In particular”, had been placed in square brackets reflected the differences of view in the Drafting Committee. Some members had deemed it necessary to uphold the right of the court freely to characterize as acts of aggression acts that were not covered by the list contained in the definition of aggression. He felt strongly that a criminal court was not empowered to determine that whole categories of acts could be considered as aggression. It was called upon to decide on the issue of the criminal responsibility of an individual in accordance with the law: it had no power to create legal rules for application in inter-State relations. It was true that the list of acts of aggression set forth in subparagraphs (a) to (g) was not absolutely exhaustive, but only the Security Council could supplement the list, as indicated in subparagraph (h). As far as a criminal court was concerned, however, the list in subparagraphs (a) to (g) had to be considered exhaustive.

62. He failed to see how a criminal court—even an international criminal court—could expand the 1974 Definition of Aggression<sup>10</sup> adopted after so many years of effort in the General Assembly. The court had the duty to apply legal rules but must not attempt to create them, particularly in such a sensitive area of inter-State relations as the issue of the definition of aggression. That point had to be taken into account at an early stage so as not to undermine the very idea of an international criminal court.

63. No court, whether international or national, could perform the functions of the Security Council. In that connection, the differences in the Drafting Committee regarding the inclusion of paragraph 5, reading: “Any determination by the Security Council as to the ex-

<sup>10</sup> See footnote 6 above.

istence of an act of aggression is binding on national courts", were logically connected with those relating to the words "In particular" in paragraph 4.

64. Mr. McCaffrey said he agreed with Mr. Barsegov and believed that the list should be an exhaustive one as far as the court was concerned. Therefore, he was not at all certain that the language used in article 3 of the Definition of Aggression<sup>11</sup> was sufficiently precise. All it said was: "Any of the following acts . . .", wording which did not make the list exclusive. He had no proposal to make, but would have preferred paragraph 4 of draft article 12 to begin simply with the words: "The following acts . . .", eliminating the words "any of" and, *a fortiori*, the words "In particular" in square brackets.

65. The remainder of the introductory clause of paragraph 4 differed from the corresponding provision of the Definition of Aggression, namely article 3, which contained the words "subject to and in accordance with the provisions of article 2". That article 2 corresponded to paragraph 3 of draft article 12. He was somewhat mystified by the words "due regard being paid to paragraphs 2 and 3 of this article", which had been introduced in paragraph 4 to replace the words "subject to and in accordance with the provisions of article 2" contained in the Definition of Aggression. The proposed language did not provide firm enough guidance for a court seized of proceedings under the code. The proposed wording would seem to mean that paragraphs 2 and 3 of article 12 would control subsequent provisions, such as those contained in paragraph 4; but that point was not clear and should be made more precise.

66. Mr. RAZAFINDRALAMBO said that he endorsed the remarks made by Mr. Barsegov and Mr. McCaffrey. He was strongly opposed to any suggestion to give any court, whether international or national, the right to establish that acts not already included in the list set forth in paragraph 4 constituted acts of aggression. Such an idea was an application of the unacceptable method of creating crimes by analogy, on the basis of similarity with those specifically sanctioned by criminal law.

67. Mr. FRANCIS said that his views were substantially the same as those expressed by the three previous speakers. The definition of aggression in article 12 should be identical to that adopted by the General Assembly in 1974. He was in favour of article 12 to the extent that it reflected completely the 1974 Definition and he was opposed to any departure from that established text.

68. Mr. REUTER said that he shared the views of Mr. Barsegov and Mr. McCaffrey regarding the words "In particular". Naturally there was a connection with subparagraph (h) of paragraph 4 and also with paragraph 5. The commentary to article 12 should state that nothing in the article affected the powers of the ICJ concerning questions of aggression. The matter was of practical importance because there were cases pending before the ICJ on the question of aggression. The Commission could not deal with that question now, but it was essential for the commentary to include a reference

to the problem, since it would not be dealt with in the article itself.

69. Mr. EIRIKSSON said that his opinion on the relationship between the code and possible action by the Security Council depended on the Commission's approach in adopting article 12, more particularly in connection with the role of an international tribunal. His initial reaction, however, was that paragraph 2 sufficed as a definition of aggression. Accordingly, both paragraph 3 and paragraph 4 were unnecessary, unless any of the acts mentioned in paragraph 4 (a) to (g) could conceivably be considered as anything other than acts of aggression, which he did not believe to be the case. The inclusion of the words "In particular" in square brackets made his sentiment even stronger on that question. The same applied to the presence of subparagraph (h), on the possibility of the Security Council expanding the categories of acts in a list which was merely illustrative.

70. Mr. BEESLEY said that he associated himself with those members who had expressed strong reservations regarding the inclusion of the words "In particular".

71. Mr. BENNOUNA said that the reason for introducing the words "In particular" was that the question of the possible jurisdiction of the courts had not yet been clarified. There was still some discussion as to the impact of Security Council action under the Charter of the United Nations, particularly where the Council did not arrive at a decision. It was an important matter, because an act mentioned in paragraph 4 of article 12 might not be sufficiently serious to warrant a court—or indeed the Security Council itself—deciding that an act of aggression had been committed. However, paragraph 4 would be appropriate in affording the court some leeway to interpret the list without actually adding anything to it. A margin of interpretation had to be allowed for the general definition set forth in paragraph 2. With that approach, article 12 could be retained as it stood, on the understanding that the commentary would clarify its content, especially the question of the relationship with the Security Council.

72. Mr. ROUCOUNAS said that the Chairman of the Drafting Committee had been right to point to the provisional character of the Commission's work on article 12, in view of the fact that the questions of jurisdiction and of the establishment of an international criminal court had not yet been settled. The Commission should not give the impression that it wished to open the door to the possibility for national courts to expand the list of acts of aggression on the basis of the words "In particular". For that reason, those words should be deleted, bearing in mind that the question of aggression might ultimately fall within the jurisdiction of an international criminal court.

73. Mr. CALERO RODRIGUES said that the words "In particular" should be retained in order to give some leeway to the courts in the interpretation of what constituted aggression. The list of acts contained in paragraph 4 was not really exhaustive, for according to subparagraph (h) the Security Council could add to it. Actually, if the list was to be exhaustive, the definition of aggression would not be necessary. Since paragraph 1

<sup>11</sup> *Ibid.*

stated that any individual responsible for acts constituting aggression was liable to be tried and punished, the court should be given an opportunity to see if aggression existed on the basis of acts other than those included in the list. After all, the list had been prepared for the purpose of giving concrete shape to the concept of aggression defined in paragraph 2. Hence the possibility of the court finding that some other acts also constituted aggression should not be ruled out.

74. Much had been said about national courts, but no decision had yet been taken on a possible international criminal court, which should not be bound exclusively by the list in paragraph 4. In a given case, such a court might well find that other acts constituted aggression. That was the position he, together with some other members, had expressed in the Drafting Committee, and it was his reason for favouring retention of the words "In particular". Opinions were divided, however, and he could agree to placing the words in square brackets, on the understanding that his views would be placed on record.

75. Mr. AL-BAHARNA said that paragraph 4 should be retained as it stood, with the opening words "In particular".

76. Mr. SEPÚLVEDA GUTIÉRREZ said that he wholeheartedly endorsed the views expressed by Mr. Calero Rodrigues.

77. Mr. SHI said that the list of crimes in paragraph 4 should be exclusive. No court, whether national or international, should have the power to extend it. However, opinions diverged and he could agree to placing the words "In particular" in square brackets, leaving the matter to be decided at a later stage.

78. Mr. KOROMA said that the presentation of article 12 by the Chairman of the Drafting Committee met with his approval, except in so far as paragraph 4 (*h*) was concerned. The primacy of the Security Council for the maintenance of international peace and security was unquestioned. However, some members of the Commission held that the Security Council dealt with aggression as it affected States, whereas article 12 dealt with crimes committed by individuals. To introduce the role of the Security Council as was done in paragraph 4 (*h*) would tend to negate the Commission's efforts to prevent individual acts of aggression. For that reason, paragraph 4 (*h*) should be deleted.

79. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 4, on the understanding that the differing opinions on the words "In particular", as well as Mr. Koroma's views on subparagraph (*h*), would be placed on record.

*It was so agreed.*

*Paragraph 4 was adopted.*

Paragraph 5

80. Mr. BARSEGOV said that he could not object to placing paragraph 5 in square brackets as a temporary compromise solution, due to the substantial differences of opinion, although he personally would have preferred to delete the brackets now. However, he could

not agree to any suggestion to delete the paragraph, since, if that were done, it would appear as though Security Council decisions were binding on States but not on their criminal courts.

81. The Chairman of the Drafting Committee had advanced the view that to tie the implementation of the relevant provisions of the code to the functioning of the Security Council would make the code meaningless. The idea put forward was that the Security Council was not always effective and that national courts might not be able to try cases of aggression because of the Security Council's inability to reach a decision. That view was tantamount to denying the binding force on national courts of any resolution of the Security Council. In connection with paragraph 4, it had been suggested that an international or national court could be empowered to create legal rules as to the determination of acts constituting aggression. In connection with paragraph 5, it was now being suggested that national or international courts should be given the right not to take into consideration the decisions of the Security Council. Such an approach would not only constitute a fundamental departure from the 1974 Definition of Aggression, it could even amount to a revision of the Charter of the United Nations.

82. Mr. BENNOUNA said he believed that there would be no substantial opposition to paragraph 5 without the square brackets. Mr. Barsegov's remarks reflected the present state of the law. When the Security Council took action on the basis of Chapter VII of the Charter and made a determination as to the existence of an act of aggression under Article 39, its decision was binding on all States and therefore on the organs of those States, including the courts. It was simply a question of restating a principle of law stemming from the Charter, and it was difficult to see how that restatement could be disputed.

83. In his opinion, the opposition to paragraph 5 could be ascribed to a different cause: it was based on the idea that, if the Security Council did not arrive at a determination as to the existence or non-existence of an act of aggression, something that was fairly common, the court should then have some leeway in reaching a decision. The point was to avoid a situation in which no decision was made because the Security Council failed to reach a determination. Actually, in the absence of a determination on aggression, the court could freely exercise its full jurisdiction. It might be of interest if the Chairman ascertained informally how many members were opposed to paragraph 5 and how many wished to place it in square brackets.

84. Mr. McCAFFREY said that, without paragraph 5, the whole of article 12 would be unacceptable. The Commission was not merely duplicating a definition of aggression made within the United Nations: it was elaborating a code that would be applied by the courts. Although it was not yet certain which courts would apply the code, there was a distinct possibility that it would be the national courts. In view of that possibility, a provision along the lines of paragraph 5 was essential, and obviously he could not agree to the idea of placing it in square brackets.

85. The main point had been made by Mr. Bennouna. There was nothing in paragraph 5 that would in any way inhibit national courts in the absence of a determination by the Security Council. The paragraph was artfully drafted so as to give the courts freedom except in cases where the Security Council had taken action. In view of Article 25 of the Charter, it was unthinkable that a national court could act inconsistently with a Security Council determination, in other words that it could find aggression where the Security Council had found none, or vice versa.

86. Mr. CALERO RODRIGUES said he, too, thought that paragraph 5 should be retained. He could accept the square brackets around it because there were differences of opinion, but he believed that a Security Council determination must be binding on any court that applied the code.

87. Prince AJIBOLA said that paragraph 4 (*h*) dealt adequately with the question of what should be left to the decision of the Security Council.

88. Nobody doubted the binding character of Security Council decisions. However, any court worthy of the name had two tasks, the first being to conduct a fair trial, and the second to decide on the facts placed before it. If the court had to abide by any Security Council determination and could not look into the facts of the case, it was in danger of becoming a mere rubber stamp. Hence he was apprehensive about the consequences of paragraph 5, which was unnecessary and should be deleted. If not, it should at least be placed between square brackets.

89. Paragraph 4 itself stood in need of a number of drafting improvements, for the present wording was quite inelegant. The introductory clause should be reworded along the following lines: "With regard to paragraphs 2 and 3, any of the following acts, regardless of a declaration of war, constitutes an act of aggression:"

90. Mr. FRANCIS said that he had no objection to paragraph 5 without the square brackets. There could be no doubt that the courts applying the code would be bound by a determination by the Security Council. Nevertheless, since paragraph 5 was connected with the competence of the courts, it should be placed after paragraph 7. Alternatively, it could form a separate article, as could paragraph 1.

91. Mr. BEESLEY said that paragraph 5 could be considered redundant simply because it stated a rule of law pursuant to the Charter of the United Nations. Nevertheless, in order to avoid any doubts, he shared the view that the paragraph should be retained and that the square brackets should be removed in due course. It would be noted that paragraph 5 referred only to national courts: he did not wish to raise at the present stage the question of what the situation would be with respect to an international criminal court.

92. The reference in paragraph 5 to "Any determination . . . as to the existence . . ." and the explanations given by the Chairman of the Drafting Committee showed that the provision covered both positive and negative findings. Later, the Commission would have to tackle the matter of whether a national court, or an

international court, would be free to hear a case concerning an allegation of aggression where no finding whatsoever had been made by the Security Council. It was an issue of sufficient importance to be placed squarely before States in the Sixth Committee of the General Assembly and perhaps eventually in questions put to Governments.

93. Mr. Sreenivasa RAO said that paragraph 5 was an important element of article 12. It did not solve many problems, but it stated an obvious point of law of the Charter, namely that Security Council decisions were binding on all Member States. Indeed, in the case of the Definition of Aggression, even non-member States were supposed to co-operate in connection with such decisions. Paragraph 5 dealt with the power and competence, as between the Security Council and the national courts, to judge the matters and the evidence relating to certain crimes. The supremacy of Security Council decisions was unquestionable, but so too, in national systems, was the supremacy, impartiality and objectivity of the courts. Those two positions were easily reconciled. The Security Council determined an act of aggression only with respect to a State and did not go into the question of who committed it or the guilt of individuals. In other words, there could be a Security Council determination that a particular country had committed aggression and it would then be for the courts, in accordance with paragraph 5, to find the individuals who could be held responsible. The impartiality of the courts was safeguarded, for they could look at the evidence and even find the individual not guilty.

94. Other issues were not covered by paragraph 5, and hence it should remain in square brackets, pending further reflection on those issues. One of them was what a national court should do in the absence of a determination on the question of aggression. Another was that of ascertaining the impact court actions would have on any later determination by the Security Council. For example, a court might rule that there was no aggression and discharge the individual brought before it; subsequently, the Security Council might find that aggression had in fact been committed.

95. Mr. AL-BAHARNA pointed out that the text of paragraph 5 was not to be found in the 1974 Definition of Aggression. In the Sixth Committee of the General Assembly, he had observed differences of view on whether to include such a provision, as well as on whether to place it between square brackets. The problem differed to some extent from that concerning paragraph 4 (*h*). In his opinion, paragraph 5 should remain in square brackets.

96. Mr. PAWLAK said that he strongly supported the inclusion of paragraph 5, bearing in mind the fundamental importance of the international legal order established by the Charter, the provisions of which must be binding on States and on their courts, as well as on any international courts that were established. He was opposed to the use of square brackets; but since there was no other way of obviating the differences of opinion, he was prepared to accept the brackets as a device whereby the paragraph could be adopted by the Commission.

97. Mr. YANKOV said that paragraph 5 dealt with an important issue having political and legal implications, for it stated that a Security Council determination as to the existence of an act of aggression was binding on national courts. Article 25 of the Charter of the United Nations was relevant in that connection, as was Article 39, on the competence of the Security Council. Paragraph 5 commanded his full support, since it constituted in a sense the development of United Nations law. The square brackets were unnecessary, for adequate explanations would be given in the commentary and members' views would be set out in the summary records. If, however, the majority wished to retain the square brackets, he would be prepared to accept such a course for the purpose of indicating that there had been differences of opinion.

98. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 5 with the square brackets.

*It was so agreed.*

*Paragraph 5 was adopted.*

Paragraphs 6 and 7

*Paragraphs 6 and 7 were adopted.*

*Article 12 was adopted.*

99. Mr. BARSEGOV said that the text of article 12 did not contain any reference to the binding force of relevant General Assembly resolutions. The reason was that some members of the Commission were opposed to such a reference. In the course of the debate, the view had been expressed that General Assembly resolutions must be regarded as political texts from a political body, so that it was inappropriate to speak of them in a criminal code, which constituted a legal text.

100. He did not share the view that the 1974 Definition of Aggression was a purely political text devoid of legal content. Such a view would mean that any determination by the Security Council, and any steps it took on the basis of that Definition, would be without legal meaning. It would also open the door to justifying the refusal to observe Security Council decisions on the grounds that they were based on a purely political text and not on a legal instrument.

101. Prince AJIBOLA noted that paragraph 2 of article 12 used the expression "Charter of the United Nations" in full, and said that the same form should be used in all the other paragraphs that referred to the Charter.

*The meeting rose at 1.10 p.m.*

## 2086th MEETING

*Monday, 25 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna,

Mr. Calero Rodrigues, Mr. Eriksson, Mr. Francis, Mr. Graefrath, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft report of the Commission on the work of its fortieth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter III.

**CHAPTER III. *The law of the non-navigational uses of international watercourses*** (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

#### A. Introduction (A/CN.4/L.425)

Paragraphs 1 to 15

2. Mr. YANKOV said that, rather than repeat the background to the topic every year, it might be more rational simply to give a brief summary. A detailed history of the work could be provided when consideration of the topic was completed. That was true for all the Commission's reports and he would therefore revert to the matter during consideration of the part of the draft report on the Commission's working methods and documentation.

*Paragraphs 1 to 15 were adopted.*

*Section A was adopted.*

#### B. Consideration of the topic at the present session (A/CN.4/L.425)

Paragraphs 16 to 25

*Paragraphs 16 to 25 were adopted.*

Paragraph 26

3. Mr. RAZAFINDRALAMBO asked why the Commission's discussion on article 15 was summarized in only one paragraph, whereas much greater space was given to the consideration of the other articles, on pollution.

4. Mr. McCAFFREY (Special Rapporteur) said that it was the Commission's practice not to include a summary of the discussion on draft articles adopted in the course of the session, probably because the commentaries to the articles performed the same function. It was true, however, that paragraph 26 could be expanded a little, for example by adding a sentence indicating that the text of article 15 had been provisionally adopted at the present session on the recommendation of the Drafting Committee and that it now constituted articles 10 and 20.

*It was so agreed.*

*Paragraph 26, as amended, was adopted.*

Paragraphs 27 to 31

*Paragraphs 27 to 31 were adopted.*

## Paragraphs 32 and 33

5. Mr. BARSEGOV said that he would like some clarification regarding the content of paragraph 33. Although the Commission had so far considered articles only on relations between watercourse States, the impression gained from paragraph 33 was that the Commission was also envisaging the adoption of articles governing relations between watercourse States and non-watercourse States. What meaning was to be attached in that regard to the expression "watercourse State"? If paragraph 33 were taken to its logical conclusion, the draft could well include not only States with multinational watercourses, but also States whose territory contained the whole of a watercourse that might cause marine pollution.

6. Mr. McCAFFREY (Special Rapporteur) pointed out that, in the discussion on articles 16 and 17, which was summarized in paragraph 33, some members had noted that, since the draft dealt with pollution of the sea by international watercourses, it should envisage the possible relationship between watercourse States and other States, for example in the case of harm to a non-watercourse State or in the case of pollution of the sea beyond the limits of national jurisdiction. For his own part, he had found the idea interesting. Nevertheless, Mr. Barsegov's comment was entirely relevant. The only, and perhaps rather simplistic, reply was that the title of the topic spoke not of national watercourses but only of international—or, to use Mr. Barsegov's expression, multinational—watercourses.

7. Mr. MAHIU pointed out that paragraph 33 simply said that the problem of the relationship that might arise between watercourse States and other States merited careful consideration. When the Commission reverted to the matter, it would obviously take account of Mr. Barsegov's comments.

8. Mr. BARSEGOV said it would be better for the report to say that the Commission, in considering the problem of the relationship between watercourse States and non-watercourse States, would be facing the risk of going beyond the scope of the topic it had been instructed to consider.

9. Mr. BENNOUNA said that, whereas paragraph 32 summarized the arguments against the idea of having a separate part in the draft on questions of pollution and paragraph 33 set out the opposite view, the draft report said nothing about the middle-ground position. The advocates of that position, one he himself shared, held that the general provisions of the draft already dealt with the protection of a watercourse against pollution, for which reason a link should be established between those general provisions and the separate part on the question. A sentence along those lines could be added at the end of paragraph 32.

10. Mr. BEESLEY said that he attached the greatest importance to making the provisions on environmental protection a separate part of the draft. He was concerned, however, to respect other views and saw no drawback in endeavouring to harmonize as best as possible, both in form and in substance, the provisions in other parts of the draft and those dealing especially with environmental protection. He was aware of the dif-

ficulties connected with the other question raised—pollution of the marine environment by national rivers—but felt that they should not prevent the Commission from seeking, within the context of its mandate, to establish the broadest possible régime of protection.

11. Mr. McCAFFREY (Special Rapporteur) proposed that, to take account of Mr. Barsegov's comments, the following text should be inserted before the last sentence of paragraph 33: "It was pointed out, however, that care should be taken not to exceed the scope of the Commission's mandate with regard to the present topic." With regard to Mr. Bennouna's comments, the following sentence could be added at the end of paragraph 32: "According to another view, it was essential that a link be provided between the provisions on pollution and environmental protection and the other parts of the draft."

12. The CHAIRMAN said that, in the first sentence of the Spanish text of paragraph 33, the word *refutarlo* should be replaced by *incluirlo* or *incorporarlo*.

13. Mr. BARBOZA said that he would like to know whether the Special Rapporteur's proposal concerning Mr. Barsegov's comments actually reflected the debate in question or whether it reflected the present discussion—in which case it would be enough for that point of view to be set out in the summary record of the meeting. It was, in his opinion, a very important matter of procedure and one that applied generally.

14. Mr. OGISO said that the Special Rapporteur's proposal regarding paragraph 33 was satisfactory. For his own part, he had one minor suggestion, namely to start a new paragraph from the words "In this connection" in the fifth sentence, so as to deal separately with that exceptional case.

15. Mr. YANKOV said that he endorsed Mr. Ogiso's suggestion. Similarly, the sentence the Special Rapporteur had proposed adding at the end of paragraph 32 could also form a separate paragraph, for it, too, contained a different idea.

16. With regard to protection of the marine environment against land-based pollution, it was difficult to draw a clear-cut distinction between pollution from international watercourses and pollution from national watercourses. In the latter case, however, it was the 1982 United Nations Convention on the Law of the Sea that applied and, like Mr. Barsegov, he therefore considered that the Commission should confine its work to international watercourses. In his opinion, the solution was to be found in paragraph 34, to which he would in due course propose an amendment to meet all the views expressed.

17. Mr. BENNOUNA, referring to the sentence starting with the words "According to another view" proposed by the Special Rapporteur for insertion at the end of paragraph 32, said that it was doubtful whether those words were necessary, for it was not a point of view different from the one expressed earlier in the paragraph. Those who deemed it pointless to have a separate part of the draft on environmental protection and pollution of international watercourses also thought that, if the opposite view prevailed, a link had to be provided between that separate part and the other parts of the draft. In

any event, the sentence proposed by the Special Rapporteur should be amended by adding, after the words "the other parts of the draft", the phrase "which already referred more specifically to that question, in particular the articles just mentioned".

18. Mr. McCAFFREY (Special Rapporteur) said that Mr. Bennouna's suggestion was acceptable. He had no strong feelings as to whether the sentence in question should be added at the end of paragraph 32 or whether it should form a separate paragraph and pointed out that Mr. Bennouna himself had proposed that a sentence along the same lines should be added at the end of paragraph 32.

19. With reference to Mr. Barboza's comments, he seemed to recall that the points mentioned by Mr. Barsegov and Mr. Bennouna had indeed been raised in the course of the debate. It was for the members concerned to confirm whether or not that was true.

20. Lastly, he welcomed the suggestion by Mr. Ogiso, supported by Mr. Yankov, to turn part of paragraph 33, as amended by him, into a separate paragraph; it could be provisionally numbered paragraph 33 *bis*.

21. Mr. BARSEGOV said that he was not the only one to have cautioned against the danger of going beyond the scope of the topic by dealing with watercourses other than international watercourses. Yet the phrase "the relationship between watercourse States and non-watercourse States", in paragraph 33, could be interpreted as meaning regulation of the relationship between a national watercourse State and other States, which was out of the question.

22. Mr. MAHIU said he entirely agreed with Mr. Barsegov that the Commission should keep to its mandate, but would none the less point out that a "watercourse State" was defined in article 3, provisionally adopted by the Commission at its thirty-ninth session, as a State "in whose territory part of an international watercourse [system] is situated". Hence no ambiguity was possible.

23. Mr. BARSEGOV said that he would be happy to see his position reflected in the summary record. Despite Mr. Mahiou's point, however, it seemed useful to explain in the report that the Commission intended to keep to its mandate, especially since, although it was called upon to regulate the relations between States of a multinational watercourse in regard to marine pollution, it had to take account of the fact that marine pollution was attributable much more to national watercourses than to multinational watercourses.

24. Mr. BEESLEY said that he had no recollection of the position expressed in the course of the debate being stated in the terms proposed by the Special Rapporteur: it had been implicit. Nevertheless, he had no objection to the sentence proposed by the Special Rapporteur being added to paragraph 33 of the draft report, instead of simply mentioning that position in the summary record.

25. Mr. CALERO RODRIGUES said that he endorsed Mr. Beesley's remarks.

26. Mr. REUTER suggested that the sentences at the end of paragraph 33 should be placed in a different order. The fifth and seventh sentences should run in sequence, for they reflected two suggestions that had actually been made, and the sixth sentence should be placed at the end of the paragraph and be amended to read: "The Special Rapporteur reacted favourably to these suggestions, stating that they merited further careful consideration, more particularly because they questioned, as was pointed out, the scope of the mandate assigned to the Commission"

27. Mr. McCAFFREY (Special Rapporteur) said he thought that the last sentence of paragraph 33 should remain where it was, for it simply stated a fact. As to the order of the other sentences, a new paragraph 33 *bis* could start as from the present fifth sentence ("In this connection, . . ."), which would be followed by the sixth sentence ("The Special Rapporteur reacted . . ."), then the sentence he had proposed in order to take account of Mr. Barsegov's position ("It was pointed out, however, . . ."), and lastly the final sentence of the present paragraph 33 ("Attention was also drawn . . .").

28. Mr. YANKOV said that he agreed with Mr. Reuter. He proposed that the new paragraph 33 *bis*, after the first sentence ("In this connection, a suggestion was made . . ."), should read:

"The Special Rapporteur reacted favourably to this suggestion. It was pointed out, however, that care should be taken not to exceed the scope of the Commission's mandate with regard to the present topic. Attention was also drawn to the fact that the 1982 United Nations Convention on the Law of the Sea, considered by many to be one of the most important multilateral conventions in recent history, contained a separate part (Part XII) devoted entirely to the question of the protection and preservation of the marine environment. The Special Rapporteur believed that all these suggestions merited careful consideration."

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 32 as amended by the Special Rapporteur and Mr. Bennouna, and paragraphs 33 and 33 *bis* as amended by the Special Rapporteur and Mr. Yankov.

*It was so agreed.*

*Paragraphs 32, 33 and 33 bis, as amended, were adopted.*

30. Mr. BEESLEY said that he would have liked it to be indicated at the end of the new paragraph 33 *bis* that he had said that Part XII of the 1982 United Nations Convention on the Law of the Sea was considered by many States, even non-signatory States, as expressing customary law.

Paragraph 34

31. Mr. YANKOV proposed that the words "reflecting general rules relating to the subject-matter" should be added at the end of the first sentence. The text would thus be more in keeping with the debate that had taken place and the next sentence would follow on logically.

32. Mr. BEESLEY said he supported that proposal. The instrument being elaborated was a framework agreement that would be used for the conclusion of special agreements containing more binding rules.

33. Mr. McCAFFREY (Special Rapporteur) said that he agreed to Mr. Yankov's proposal.

*Mr. Yankov's amendment was adopted.*

*Paragraph 34, as amended, was adopted.*

Paragraphs 35 and 36

34. Mr. EIRIKSSON said that, in the course of the debate, he had proposed that articles 16, 17 and 18 should be redrafted, more particularly by transferring paragraph 2 of article 16 to the part of the draft on general principles, alongside the principle of equitable use. The suggestions he had made on that point might to some extent have been taken into account in paragraphs 32, 33 and 34 of the draft report, to which he had not wished to propose any amendment. However, he reserved the right to make a specific proposal in connection with paragraph 46.

35. Mr. PAWLAK proposed that paragraphs 35 and 36 should be combined, since they both related to explanations given by the Special Rapporteur in connection with article 16.

36. Mr. RAZAFINDRALAMBO, noting that paragraphs 35 *et seq.* related to articles 16, 17 and 18, suggested that paragraph 35 should be preceded by the heading "*Article 16. Pollution of international water-course[s] [systems]*", as was the case with paragraphs 67 and 77 for articles 17 and 18.

37. Mr. McCAFFREY (Special Rapporteur) thanked Mr. Razafindralambo for drawing attention to that omission.

38. He had no objection to Mr. Pawlak's proposal to combine paragraphs 35 and 36. The decision lay with the Commission's Rapporteur.

39. Mr. REUTER proposed that, in the French text of paragraph 35, the word *préjudice* should be followed by the word "injury" in brackets, so as to make the text more intelligible. The problem of terminology arose only in English, for the French terms *dommage* and *préjudice* were roughly the same in meaning.

*It was so agreed.*

40. Mr. SEPÚLVEDA GUTIÉRREZ said that the words *la realidad*, in the first sentence of the Spanish text of paragraph 35, should be replaced by *en realidad*.

*It was so agreed.*

41. Mr. SHI (Rapporteur) said that he had no difficulty in agreeing to the amendments proposed by Mr. Pawlak and Mr. Razafindralambo.

*The amendments by Mr. Pawlak and Mr. Razafindralambo were adopted.*

*Paragraphs 35 and 36, as amended and combined, were adopted.*

Paragraphs 37 and 38

*Paragraphs 37 and 38 were adopted.*

Paragraph 39

42. Mr. BENNOUNA questioned whether the first sentence really reflected the main point of the Commission's discussion of the matter. It implied that a distinction was drawn between "physical, chemical or biological alteration of the composition or quality of the waters" and "alteration of such waters through the introduction or withdrawal of substances". Yet it was precisely such introduction or withdrawal that brought about physical, chemical or biological alteration.

43. Mr. REUTER said that the sentence should be construed as recording the view that the definition should refer to "physical, chemical or biological alteration of the composition or quality of the waters" as well as "alteration of such waters through the introduction or withdrawal of substances".

44. The CHAIRMAN said that that was clear from the Spanish text.

45. Mr. McCAFFREY (Special Rapporteur) proposed that the first sentence should be amended to read: "Some members expressed the view that the definition should refer to the fact that the physical, chemical or biological alteration of the composition or quality of the waters was effected through the introduction or withdrawal of substances from the waters."

46. Mr. MAHIU said that he would be ready to agree to that formula if it were not so restrictive. Account should be taken of cases in which, for example, the alteration was in the temperature of the water, without any introduction or withdrawal of substances.

47. Mr. BEESLEY recalled that he had raised the question of pollution through the introduction of energy, a factor he would like the report to mention.

48. Mr. CALERO RODRIGUES said that he shared Mr. Beesley's view. The new wording proposed by the Special Rapporteur was scarcely any different from the existing text, which was quite acceptable.

49. Mr. Sreenivasa RAO said that the question raised by Mr. Bennouna could be settled by speaking first of "the physical, chemical or biological change . . ." and then of "the alteration . . . through the introduction or withdrawal of substances".

50. Mr. BENNOUNA proposed that the first sentence should be amended to read: "Some members expressed the view that the definition should refer in particular to the physical, chemical or biological alteration of the composition or quality of the waters through the introduction or withdrawal of substances."

51. Mr. McCAFFREY (Special Rapporteur) said that that formula was very similar to the text he had just suggested. It would be enough to add the words "or energy" at the end of the sentence to meet the concern expressed by Mr. Mahiou and Mr. Beesley.

52. Mr. YANKOV said that Mr. Bennouna's proposal was still too restrictive. Pollution was encountered in very diverse forms. For example, it might take the form of radioactivity, and scientists would discuss endlessly whether, in such a case, the pollution was through the introduction of a substance or the introduction of energy.

53. Article 196, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea spoke of "the use of technologies . . . or . . . the . . . introduction of species, alien or new . . . which may cause significant and harmful changes". That article embodied a widely accepted norm in environmental circles. The Commission should reproduce formulae which had already been used and should not try to improvise a definition hastily. In his opinion, therefore, the first sentence of paragraph 39 should remain as it stood.

54. Mr. BENNOUNA said that, for the moment, the point was to record the opinion expressed by "some members", not to try to find a new definition of pollution.

55. Mr. McCAFFREY (Special Rapporteur) proposed that the first sentence should read:

"Some members expressed the view that the definition, apart from making reference to the physical, chemical or biological alteration of the composition or quality of the waters, should also refer to the introduction or withdrawal of substances or energy from the waters."

56. Mr. PAWLAK said that that formula was acceptable.

*The Special Rapporteur's amendment was adopted.*

*Paragraph 39, as amended, was adopted.*

Paragraph 40

57. Mr. OGISO said that the first sentence presumably reflected an opinion he had expressed during the debate. If that was so, the formula was too terse and should be replaced by the following sentence: "One member considered that the definition should be broad enough to cover situations in which continuous accumulation of small quantities of chemical substances in fish and shellfish would in the long run produce effects detrimental to human health, since paragraph 1 of article 16 referred only to the composition and quality of the waters, not to living resources."

58. Mr. McCAFFREY (Special Rapporteur) said that the first sentence did indeed seek to reflect Mr. Ogiso's position. The formula proposed by Mr. Ogiso was a much better summary.

*Mr. Ogiso's amendment was adopted.*

*Paragraph 40, as amended, was adopted.*

Paragraphs 41 to 45

*Paragraphs 41 to 45 were adopted.*

Paragraph 46

59. Mr. PAWLAK said that the presentation of paragraphs 46 to 48, concerning paragraph 2 of article 16, was not logical and the reader might well find the reasoning confusing. He therefore proposed that the first sentence of paragraph 46 should be followed by the whole of paragraph 48, the beginning of which would be amended to read: "The discussion of paragraph 2 focused on several main issues, including pollution of international watercourses, the concept of appreciable harm . . ."

60. Mr. McCAFFREY (Special Rapporteur) pointed out that paragraphs 46 to 48 acted as an introduction to the summary of the discussion on paragraph 2 of article 16 and therefore dealt with pollution only in general terms. Various legal aspects of that provision were taken up in the subsequent paragraphs. Furthermore, "pollution of watercourses" was the actual subject of the article and could thus not be included in the list of particular issues.

61. Mr. TOMUSCHAT said that the order adopted was the appropriate one. Paragraph 48 enumerated, in succession, the various issues dealt with in the subsequent paragraphs. Matters might perhaps be clearer if paragraph 48 began with the words: "The discussion of paragraph 2 focused on several specific issues . . ."

62. Mr. PAWLAK said it would be even better to say that the discussion had focused on "several specific legal issues".

63. Mr. McCAFFREY (Special Rapporteur) said that both those proposals would improve the paragraph.

64. The CHAIRMAN said that those proposals related to a paragraph which was not yet under consideration. It was his understanding that paragraph 46 would remain unchanged.

*It was so agreed.*

*Paragraph 46 was adopted.*

Paragraph 47

65. Mr. PAWLAK suggested that the word "international" should be inserted before "co-operation", in the third sentence.

*It was so agreed.*

66. Mr. EIRIKSSON, recalling the amendment he had intended to propose in connection with paragraphs 32, 33 and 34, which was also warranted in the case of paragraphs 46 and 47, suggested that a sentence should be inserted at the end of paragraph 47 reading: "Indeed, another view was that paragraph 2 should be transferred to the part of the draft dealing with general principles, to be placed alongside the principle of equitable use as an important part of the no-harm principle, with a cross-reference to part V as regards implementation."

67. Mr. McCAFFREY (Special Rapporteur) said that that proposal was acceptable, although he would have preferred a shorter text.

*Mr. Eiriksson's amendment was adopted.*

*Paragraph 47, as amended, was adopted.*

Paragraph 48

*Mr. Tomuschat's amendment to the beginning of the first sentence, as modified by Mr. Pawlak (paras. 61-62 above), was adopted.*

*Paragraph 48, as amended, was adopted.*

Paragraphs 49 to 51

*Paragraphs 49 to 51 were adopted.*

## Paragraph 52

68. Mr. ARANGIO-RUIZ said that he was perhaps the only member not to approve of the term "appreciable". In his opinion, it sufficed to speak of harm. Perhaps the Special Rapporteur would add a sentence reflecting that position at the end of the paragraph.

69. Mr. ROUCOUNAS, supported by the CHAIRMAN, speaking as a member of the Commission, and by Mr. AL-BAHARNA and Mr. THIAM, said that Mr. Arangio-Ruiz was not the only member to take that view.

70. Mr. BARBOZA said that there was perhaps some confusion, inasmuch as some members objected to the use of the term "appreciable", whereas Mr. Arangio-Ruiz deemed it pointless to qualify the term "harm". Those were two different matters.

71. Mr. McCAFFREY (Special Rapporteur) said he recognized that paragraph 52 did not reflect the position of Mr. Arangio-Ruiz and proposed that the paragraph should be supplemented by adding the sentence: "The view was also expressed that the term 'harm' was sufficient by itself and should not be qualified at all."

*It was so agreed.*

*Paragraph 52, as amended, was adopted.*

## Paragraphs 53 to 56

*Paragraphs 53 to 56 were adopted.*

## Paragraph 57

72. Mr. EIRIKSSON proposed that the phrase "article 1, paragraph 1 . . . in its definition of", in the second sentence, should be replaced by "article 1, paragraph 1 (4), of the 1982 United Nations Convention on the Law of the Sea, in defining".

*It was so agreed.*

*Paragraph 57, as amended, was adopted.*

## Paragraphs 58 to 60

*Paragraphs 58 to 60 were adopted.*

## Paragraph 61

73. Mr. THIAM said that paragraph 61 did not fully reflect the view of members who found that the concept of an obligation of due diligence was dangerous. The following text should therefore be added at the end of the paragraph:

"Some members pointed out that the concept of due diligence was dangerous, inasmuch as it made responsibility rest on wrongfulness rather than on risk, and that States would be tempted to evade responsibility simply by trying to prove that they had complied with their obligation of due diligence. They also pointed out that the problem of responsibility should not be dealt with in the framework of the present topic, but rather in the framework of liability for acts not prohibited by international law."

74. Mr. RAZAFINDRALAMBO said that he supported Mr. Thiam's comments, but would point out that paragraph 66 reflected the idea expressed in the

second sentence of the proposed amendment. For his own part, he would therefore suggest that only the first of the two proposed sentences should be added at the end of paragraph 61 and that the beginning of paragraph 66 should state that "The Special Rapporteur noted, further to comments by some members . . .", in order to meet Mr. Thiam's concern.

75. Mr. THIAM said he had no objection to that proposal, but paragraph 66 did not fully reflect his view. It said that the question under consideration was related to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, whereas it should, in his opinion, be dealt with solely in the framework of that topic. He would not like the problems of liability for pollution, for example, to be considered under the present topic. If the Special Rapporteur agreed to indicate that in paragraph 66, he would have no objection. Otherwise, he would press for his amendment to be adopted.

76. Mr. CALERO RODRIGUES said that he supported Mr. Thiam's amendment, as he would support an amendment by any member who wished to see his views properly reflected in the report.

77. The CHAIRMAN, speaking as a member of the Commission, said that he supported Mr. Thiam's amendment.

*Mr. Thiam's amendment was adopted.*

*Paragraph 61, as amended, was adopted.*

## Paragraph 62

78. Mr. BENNOUNA said that paragraph 62 clearly indicated that the members who had spoken about the obligation of due diligence had called for it to be based on precise rules. But many had emphasized the danger involved in the concepts of "civilized State" or "good government" adduced in support of the concept of due diligence. Their view was not reflected in the first sentence. The following sentence should therefore be inserted after the first sentence: "In this connection, according to those members the presumed conduct of 'good government' or government by a 'civilized State' could not serve as the basis for the obligation of due diligence."

79. Mr. McCAFFREY (Special Rapporteur) said that he had no objection to the text proposed by Mr. Bennouna, but thought that it did not cover the same issue as did the first sentence, which reflected the view of the members who had pressed for more emphasis on cooperation. Mr. Bennouna's proposal covered the problems posed by the concepts of "good government" and "civilized State" viewed as criteria: it should therefore follow on from the second sentence. Moreover, it should begin with the word "however".

80. Mr. Sreenivasa RAO said that he doubted whether it was necessary to refer to the concepts of "good government" and "civilized State", which the Commission could only reject. Why speak about something that was better forgotten?

81. Mr. BENNOUNA said that he appreciated Mr. Sreenivasa Rao's position, but the concepts in question had already been mentioned in the Special Rapporteur's

fourth report (A/CN.4/412 and Add.1 and 2). They should be referred to in the Commission's report simply to give a balanced account of the debate.

82. Mr. BARBOZA pointed out that all the comments made on the matter were already contained in the summary records.

83. Mr. THIAM said that he supported Mr. Bennouna's proposal, more particularly since the Sixth Committee of the General Assembly might be surprised at the absence of any reference to the matter in the Commission's report when it had been discussed at length in the Special Rapporteur's report.

84. Mr. McCAFFREY (Special Rapporteur) said that he had reached a conclusion similar to Mr. Sreenivasa Rao's, namely that it would be better to remain silent on the point. He had spoken about the matter in his report because the works on the obligation of due diligence did so; as Special Rapporteur, it had been incumbent on him to present the topic from every angle. It certainly would not be surprising for the Commission's report to say nothing about the concepts in question, since he had not spoken about them in introducing his own report. Mr. Bennouna's amendment, if adopted, might in fact lead to superfluous discussion in the Sixth Committee.

85. Mr. THIAM pointed out that several members of the Commission had been opposed to the concepts. Their position ought to be reflected in the report.

86. Mr. McCAFFREY (Special Rapporteur) said that no member, including himself, had defended resort to the criteria of "good government" and "civilized State".

87. Mr. Sreenivasa RAO said that some members had mentioned those concepts and rejected them. The very silence of members who had not spoken about them had indicated that they shared that view. Hence members were unanimously agreed that the Commission's report could not and should not mention such anachronistic criteria, which would not fail to give rise to futile discussion. The Commission should beware of giving them the least respectability, or at the very least indicate its unanimity on the matter.

88. Mr. BEESLEY said that a question of principle was involved. It could not be assumed that the Special Rapporteur had adopted a particular stance simply because he had referred to the question in his report. Personally, he shared the opinion expressed by Mr. Sreenivasa Rao, but thought that the best course, if Mr. Bennouna's amendment were adopted, would be to add a sentence stating: "No member of the Commission, including the Special Rapporteur, had associated himself with that position."

*The meeting rose at 1.05 p.m.*

## 2087th MEETING

*Monday, 25 July 1988, at 3 p.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft report of the Commission on the work of its fortieth session (*continued*)

CHAPTER III. *The law of the non-navigational uses of international watercourses* (*continued*) (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

B. *Consideration of the topic at the present session* (*continued*) (A/CN.4/L.425)

Paragraph 62 (*continued*)

1. Mr. SHI said that he would prefer paragraph 62 not to include any reference to "good government" or a "civilized State". Those concepts had received no support during the debate and had been severely criticized by some members of the Commission. Mentioning them in the report would only divert the attention of the Sixth Committee of the General Assembly from the topic dealt with in chapter III and might possibly bring the Commission into disrepute.

2. Mr. GRAEFRATH referring to the additional sentence proposed by Mr. Beesley at the 2086th meeting (para. 88), said that a reference to the concepts in question, if included at all, might more appropriately be worded in positive, rather than negative terms. He suggested a sentence along the following lines: "All members agreed that any reference to 'good government' or a 'civilized State' in the definition of due diligence would be anachronistic and out of place."

3. Mr. BENNOUNA, Mr. THIAM and Mr. RAZAFINDRALAMBO accepted that suggestion.

4. Mr. SHI said that he, too, could accept Mr. Graefrath's suggestion.

5. Mr. CALERO RODRIGUES remarked that the sentence proposed by Mr. Graefrath would read rather oddly in paragraph 62. In his view, if such a sentence were included, it should be preceded by another sentence, perhaps along the lines suggested by Mr. Bennouna at the 2086th meeting (para. 78).

6. Mr. McCAFFREY (Special Rapporteur), Mr. KOROMA, Mr. MAHIOU and the CHAIRMAN, speaking as a member of the Commission, recommended leaving paragraph 62 as it stood. There was no point in giving prominence to concepts that were not endorsed by anyone.

7. Mr. BEESLEY, explaining the additional sentence he had proposed at the 2086th meeting, said that a statement in positive terms might look like a political declaration of a kind the Commission ought not to make.

8. Mr. TOMUSCHAT, supported by Mr. ARANGIO-RUIZ, said that he had nothing against the proposed addition, but thought a distinction should be made between the expressions "good government" and "civilized State", the former being widely used and, in other contexts, quite unexceptionable.

9. Mr. REUTER said that he was prepared, with some reservations, to accept the sentence proposed by Mr. Bennouna, but could not endorse the text proposed by Mr. Graefrath (para. 2 above). The concepts in question were certainly out of date, but they had been current at an earlier period in history and to attack them seemed gratuitously aggressive.

10. Mr. BEESLEY agreed, pointing out that the concept of "good government" was fundamental to his country's constitution.

11. After further discussion, in which Mr. BENNOUNA, Mr. REUTER and Mr. McCAFFREY (Special Rapporteur) took part, Mr. PAWLAK suggested that paragraph 62 should be held over until the end of consideration of chapter III of the draft report, on the understanding that the Special Rapporteur, assisted by other members of the Commission, would endeavour to draft a text acceptable to all.

*It was so agreed.*

12. Mr. McCAFFREY (Special Rapporteur), emphasizing his disapproval of the concepts in question, said that the discussion had revealed the dangers of referring to controversial opinions in a report. That, he thought, was regrettable as far as the completeness of the information placed before the Commission was concerned.

Paragraph 63

13. Mr. AL-BAHARNA suggested that, in the last sentence, the word "members" should be inserted between the words "Some" and "however".

*It was so agreed.*

*Paragraph 63, as amended, was adopted.*

Paragraph 64

*Paragraph 64 was adopted.*

Paragraph 65

14. Mr. ARANGIO-RUIZ said that paragraph 65 established a closer correlation between the burden of proof and dispute-settlement machinery than he thought really existed. He did not agree with the Special Rapporteur's view that it would be difficult to incorporate provisions on the burden of proof in the draft articles without knowing whether the future instrument would contain dispute-settlement machinery.

*Paragraph 65 was adopted.*

Paragraph 66

15. Mr. PAWLAK suggested that the last sentence should be amended to show that the opinion it expressed was held not only by the Special Rapporteur, but also by other members of the Commission.

16. Mr. McCAFFREY (Special Rapporteur) proposed that, to that end, the words "In his view" should be replaced by "He agreed with other members that".

*It was so agreed.*

17. Mr. REUTER said that the last sentence should be further amended to make it more comprehensible and less awkward. He proposed the following text: "He agreed with other members that those issues were best left to be dealt with in the framework of other topics under consideration where they mainly belonged."

*It was so agreed.*

*Paragraph 66, as amended, was adopted.*

Paragraphs 67 to 75

*Paragraphs 67 to 75 were adopted.*

Paragraph 76

18. Mr. EIRIKSSON suggested that a paragraph 76 *bis* should be added to reflect a comment he had made about article 17, paragraph 2. If that paragraph was to be made a separate article—a possibility mentioned in paragraph 72 of the draft report—the new article should be divided into two parts, one setting out the general obligation and the other dealing with co-operation between watercourse States to fulfil that obligation. Only in the latter part would the reference in article 17, paragraph 2, to action being taken "on an equitable basis" be appropriate.

19. Mr. McCAFFREY (Special Rapporteur) said that he would not oppose such an addition, provided it was drafted with economy.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 76, on the understanding that a paragraph 76 *bis* would be added to record the view expressed by Mr. Eiriksson.

*It was so agreed.*

*Paragraph 76 was adopted.*

Paragraphs 77 to 85

*Paragraphs 77 to 85 were adopted.*

**C. Draft articles on the law of the non-navigational uses of international watercourses (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)**

**1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION (A/CN.4/L.425)**

Paragraph 86

21. Mr. McCAFFREY (Special Rapporteur) said that paragraph 86 reproduced all the draft articles provisionally adopted so far by the Commission. In footnote 35 to article 1, the words "The Drafting Committee agreed" should be replaced by "The Commission agreed at its thirty-ninth session". Footnotes 36 to 41 to

articles 2 to 7, which had already been included in the Commission's report on its thirty-ninth session, were now superfluous and should be deleted.

22. Mr. EIRIKSSON said that he supported both those changes. In order to reflect the Commission's discussion on the term "watercourse States" at the present session, however, a footnote to article 3 should be included in the report, reproducing paragraph (1) of the commentary to the article approved at the thirty-ninth session,<sup>1</sup> which stated that the fact that the term "system" was not included in the expression "watercourse States" was without prejudice to its eventual use in the draft articles.

23. Mr. McCAFFREY (Special Rapporteur), supported by Mr. SHI (Rapporteur), said he understood the reasons for that proposal, but did not think it was necessary to dwell on an issue that had been settled at the thirty-ninth session.

24. Mr. TOMUSCHAT said that such a course might establish a dangerous precedent: if it repeated a reservation made at an earlier stage of its work, the Commission might be obliged to do the same with all reservations in future.

25. Mr. EIRIKSSON said that his proposal had been designed only to indicate, through a technical device found useful at the thirty-ninth session, that the term "system" would not be reproduced throughout the draft. If there was no longer any need for such a device, he would withdraw his proposal.

26. The CHAIRMAN, replying to a question by Mr. CALERO RODRIGUES, said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 86 with the changes made by the Special Rapporteur.

*It was so agreed.*

*Paragraph 86, as amended, was adopted.*

*Section C.1, as amended, was adopted.*

**D. Points on which comments are invited (A/CN.4/L.425)**

**Paragraph 87**

27. Mr. ROUCOUNAS said that, in his view, the single sentence in paragraph 87 was not sufficient to show that a number of articles on international watercourses had been prepared at the present session. He therefore suggested that the paragraph be amplified to state that the Commission sought the views of Governments particularly on the questions of pollution, environmental protection and co-operation in various fields, all of which were the subjects of draft articles.

28. Mr. BENNOUNA said that he fully supported that suggestion, particularly in view of the long discussions that had taken place in the Commission on the importance to be attached to environmental protection and pollution. The Special Rapporteur could perhaps draft an additional paragraph along the lines indicated by Mr. Roucounas.

29. Mr. CALERO RODRIGUES, endorsing Mr. Roucounas's remarks, said that paragraph 87, as drafted, could be ambiguous, since it referred to strict liability and due diligence "as they relate to draft article 16", and there was another article 16 (Absence of reply to notification), provisionally adopted by the Commission at the present session, which had nothing to do with those matters. It should therefore be made clear that the reference was to the new draft article and not to the earlier one.

30. Mr. McCAFFREY (Special Rapporteur) said that, in drafting paragraph 87, he had endeavoured to be as specific as possible in order to focus the comments of representatives in the Sixth Committee of the General Assembly on the narrow issues. He did not have any particular alternative text to suggest but would welcome any concrete proposals.

31. Mr. RAZAFINDRALAMBO, referring to the French text, said that the words *et qui sont* should be inserted before the word *examinées*.

32. Mr. TOMUSCHAT said that he found the reference to strict liability and due diligence somewhat contradictory in view of the last sentence of paragraph 66.

33. Mr. ROUCOUNAS proposed that paragraph 87 should be amended to read:

"The Commission would welcome the views of Governments, in particular on the following points:

"(a) the degree of elaboration with which the draft articles on international watercourses should deal with the problem of pollution;

"(b) the definition of pollution;

"(c) the concept of 'appreciable harm', as a standard for establishing liability;

"(d) the place of the protection of the environment within the framework of the draft articles;

"(e) the régime of protection and international co-operation in cases of emergency."

34. Mr. BARBOZA proposed that the words "the views of Governments" should be replaced by "the views of the General Assembly": the Commission did not work directly with Governments, but through the General Assembly, in which Governments were represented.

35. Mr. ARANGIO-RUIZ said that the reference to "appreciable" harm, in point (c) of the text proposed by Mr. Roucounas, might invite acceptance of that standard.

36. Mr. KOROMA said that the proposed text was quite elaborate and might require a commentary.

37. Mr. BARSEGOV said that it would be better to proceed from the general to the particular, dealing first with any issues regarding liability in the context of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and then with the question of liability as it applied to international watercourses.

38. Mr. YANKOV said that he agreed with the general approach adopted in the text proposed by Mr. Roucounas. It would perhaps be better, however, to em-

<sup>1</sup> *Yearbook* . . . 1987, vol. II (Part Two), p. 26.

phasize that the list of points was not exhaustive, and to indicate, in the introductory clause, that it presented some of the matters on which the Commission wished to have the General Assembly's advice.

39. If, as he assumed, point (b) referred to the definition of pollution as it related to international watercourses, it would be advisable to say so explicitly.

40. Mr. BENNOUNA said that, in the light of Mr. Tomuschat's reference to paragraph 66 of the report and Mr. Barsegov's comments, the Commission might wish to clarify the issue of liability before taking a position on its application in the specific case of international watercourses. A reference to paragraph 66 should perhaps be included in point (c) of the proposed text.

41. Mr. REUTER said that Mr. Bennouna's remarks raised the question of the topics under which the problems at issue should be dealt with. It was a highly technical question, and one that should be decided by the Commission alone. For if the General Assembly were consulted, he thought it would simply return the ball to the Commission's court.

42. He himself would prefer to approach the question from a different standpoint—that of the priorities allocated by the General Assembly, in its resolutions, for the Commission's work. While the Commission could not question those priorities, it could draw the General Assembly's attention to the fact that, in consequence of them, it found itself in a rather difficult position and would like to know the general feeling of the Assembly on the matter. The Commission should not, however, ask the General Assembly for a technical reply.

43. Mr. CALERO RODRIGUES, referring to Mr. Barboza's proposal, said that, for the sake of consistency, it would be best to use the language of paragraph 5 (c) of General Assembly resolution 42/156 of 7 December 1987, in which the Commission was asked to indicate, for each topic, the specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

44. With regard to point (c) of the text proposed by Mr. Roucounas, if the intention was to obtain opinions on the concept of appreciable harm only as it related to pollution, that point should not be formulated in general terms, but should be reworded to read: "The concept of 'appreciable harm' in the context of paragraph 2 of draft article 16."

45. Mr. BARBOZA suggested that the relevant paragraphs of the report should be indicated against each point in the text proposed by Mr. Roucounas, so as to facilitate the General Assembly's reply. Perhaps it would be excessive to submit as many as five points to the General Assembly. Point (a) did not seem really necessary: any representative in the Sixth Committee reading the Commission's report would appreciate its concern about the degree of elaboration with which the draft articles should deal with the problem of pollution. As to point (b), the definition of pollution was a technical question which the Commission should try to

resolve itself: it did not seem appropriate to put that question to the General Assembly.

46. On the other hand, he fully approved of the inclusion of point (c), since it was quite appropriate for the Commission to ask for guidance from the General Assembly on the concept of appreciable harm. On that point, he supported the rewording proposed by Mr. Calero Rodrigues. He also approved of the inclusion of point (d), on the place of protection of the environment in the draft articles. He had doubts about point (e): the régime of protection and co-operation in cases of emergency seemed more a subject for a conference. If that point was to be kept, some clarification was essential.

47. Mr. KOROMA and Mr. CALERO RODRIGUES supported the proposal by Mr. Barboza to insert references to the relevant paragraphs of the Commission's report against each of the five points.

48. Mr. ARANGIO-RUIZ stressed the technical character of some questions. He urged the adoption of an empirical approach. The Commission should not refrain from discussing an issue relating to international watercourses simply because it would be dealt with under other items on its agenda.

49. Mr. ROUCOUNAS said that, if the five points he had proposed were adopted, references to both the appropriate paragraphs of the report and the relevant draft articles should be included, in order to facilitate discussion in the Sixth Committee. As to point (c), he accepted the language proposed by Mr. Calero Rodrigues, subject to the views of the Special Rapporteur.

50. Mr. EIRIKSSON said that paragraph 87 was a very important part of the report and should be given most careful attention. Of the five points proposed by Mr. Roucounas, he thought that points (a) and (d) could be conveniently combined. On point (b), he agreed with those who considered that the definition of pollution was a technical question with which the Commission itself should deal. On point (c), he supported the rewording proposed by Mr. Calero Rodrigues. On point (e), he did not believe that the Commission had enough information to enable the Sixth Committee to comment usefully.

51. The CHAIRMAN, speaking as a member of the Commission, urged that the points to be put to the General Assembly, or to Governments, should be framed in precise, but at the same time general, terms. They should also be neutral: for example, if a reference to the concept of "appreciable harm" were included, it should be specified that some members of the Commission were not in favour of adopting that standard.

52. The points to be included should also be limited to two or three: the General Assembly would consider the pertinent issues when examining the articles submitted to it.

53. Mr. BARSEGOV said that some of the points proposed for inclusion in paragraph 87 had not really arisen during the Commission's work on the topic of international watercourses. He urged that only basic questions should be included.

54. Mr. BENNOUNA supported Mr. Calero Rodrigues's suggested rewording for point (c). Points (a) and (d) could perhaps be combined.

55. Mr. ARANGIO-RUIZ said that the Commission was not obliged to put questions to the General Assembly. It might be better to leave the Assembly to examine the articles submitted to it and state its views on them. Pressing the General Assembly to answer questions could lead to unsatisfactory results.

56. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the five points proposed for submission to the General Assembly were academic in character. There was no point on which the Commission needed political guidance from the General Assembly. Asking questions unnecessarily could have the effect of eliciting answers that would restrict the Commission's freedom of choice.

57. Mr. CALERO RODRIGUES again drew attention to paragraph 5 (c) of General Assembly resolution 42/156 of 7 December 1987, in which the Assembly requested the Commission:

To indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

Clearly, the Commission could not disregard those specific instructions. It should indicate the issues on which it wished to have the views of representatives in the Sixth Committee. The Commission would certainly be criticized if it failed to do so.

58. It was worth noting that that subparagraph of resolution 42/156 of 1987 had had its origin in a subparagraph introduced into the corresponding resolution of 1986 (resolution 41/81) at the request of a group of representatives who had believed that it would be helpful to have some general guidance on the issues the Commission wished to be discussed in the Sixth Committee.

59. Clearly, the object was not to obtain answers from the General Assembly by asking questions, but to single out specific issues of major interest to the Commission so that the Sixth Committee could discuss them in depth.

*The meeting rose at 6.05 p.m.*

## 2088th MEETING

*Tuesday, 26 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindra-

lambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft report of the Commission on the work of its fortieth session (continued)

CHAPTER III. *The law of the non-navigational uses of International watercourses* (continued) (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

D. *Points on which comments are invited (concluded)* (A/CN.4/L.425)

Paragraph 87 (concluded)

1. The CHAIRMAN drew attention to the revised texts for paragraph 87 proposed by Mr. Roucounas and by the Special Rapporteur.

2. The text proposed by Mr. Roucounas (2087th meeting, para. 33) read:

“The Commission would welcome the views of Governments, in particular on the following points:

“(a) the degree of elaboration with which the draft articles on international watercourses should deal with the problem of pollution;

“(b) the definition of pollution;

“(c) the concept of ‘appreciable harm’ as a standard for establishing liability;

“(d) the place of the protection of the environment within the framework of the draft articles;

“(e) the régime of protection and international co-operation in cases of emergency.”

3. The text proposed by the Special Rapporteur read:

“The Commission would welcome the views of Governments, either in the Sixth Committee or in written form, in particular on the following points:

“(a) the degree of elaboration with which the draft articles should deal with problems of pollution and environmental protection, discussed in paragraphs 32-34, 67-68 and 73-74 above;

“(b) the concept of ‘appreciable harm’ in the context of paragraph 2 of draft article 16, discussed in paragraphs 49-57 above.”

4. Mr. ROUCOUNAS said that his proposal had been circulated simply as a matter of interest. The Commission had before it only the text proposed by the Special Rapporteur.

5. Mr. McCAFFREY (Special Rapporteur) said that he had sought to reconcile the various points of view expressed at the previous meeting. Some members had thought that too many questions were to be put to States; others had felt that cross-references to particular paragraphs of the report were needed. The text he was now submitting consolidated points (a) and (d) of the text proposed by Mr. Roucounas, which had been endorsed by a number of members.

6. Mr. KOROMA said that it might be better, in the introductory clause of paragraph 87 to speak of the General Assembly, rather than the Sixth Committee. Again, perhaps point (a) was not sufficiently precise.

The General Assembly should be provided with some options to choose from, and a reference could perhaps be made to the 1982 United Nations Convention on the Law of the Sea, for it was difficult to expect the Sixth Committee or the General Assembly to make spontaneous suggestions. It might also be possible for the Chairman, in introducing the Commission's report to the General Assembly, to explain the meaning of the paragraph.

7. Mr. PAWLAK recalled that, at the previous meeting, he had proposed a shorter text for paragraph 87, one that he still preferred, but he could agree to the Special Rapporteur's proposed text. However, point (a) should make it clear that the issue raised related to draft article 16, rather than to the draft as a whole.

8. Mr. YANKOV said that the text proposed by the Special Rapporteur was acceptable, subject to a few changes of form. To meet Mr. Koroma's concern, at least in part, the introductory clause could refer to "the Sixth Committee of the General Assembly", unless it followed the wording of paragraph 5 (c) of General Assembly resolution 42/156. As to point (a), for the purposes of greater accuracy the words "relating to international watercourses" could be added after "environmental protection", even though the paragraphs cited obviously concerned international watercourses.

9. Mr. McCAFFREY (Special Rapporteur) confirmed that the introductory clause was drawn from General Assembly resolution 42/156. In response to Mr. Pawlak, he would point out that, while point (b) related to draft article 16, point (a) covered a wider issue, namely whether the Commission should deal—not only in draft article 16 but also in draft article 17—with pollution and environmental protection in detail.

10. While it was quite evident that only international watercourses were involved, he had no objection to Mr. Yankov's proposal for point (a).

11. Mr. BENNOUNA said that the introductory clause of paragraph 87 should retain the terms used in General Assembly resolution 42/156. The questions posed in points (a) and (b) properly reflected the trends that had emerged during the discussion at the previous meeting. He none the less supported the proposal by Mr. Yankov concerning point (a), but would supplement it by speaking of "the uses of international watercourses".

12. Mr. BEESLEY, referring to the amendments to point (a) proposed by Mr. Yankov and Mr. Bennouna, proposed instead that the words "relating to the law of the non-navigational uses of international watercourses" should be added after "environmental protection". Furthermore, he wondered whether the expression *degré de précision*, in the French text, fully reflected the English expression "degree of elaboration". Was it really a matter of specificity, of detail?

13. It was not the first time that the Commission was inviting the General Assembly to give its views on specific issues; but since it had displayed great selec-

tiveness, the possible consequences of such an approach should not be lost from sight. He had no objection to proceeding in that fashion, and indeed thought that the Commission should act in the same way when it came to other chapters of its report. For example, he had already said in connection with the draft Code of Crimes against the Peace and Security of Mankind that States should be asked whether the Commission was to continue its work on the basis of an international criminal court. Similarly, in connection with the topic of international liability for injurious consequences arising out of acts not prohibited by international law, did States want an instrument elaborated on the basis of the concept of risk? Such a constructive method would make it possible to guide the discussion in the Sixth Committee and make sure that the Committee did not engage in a debate such as the one to which the concept of a "civilized State" had given rise at the present session.

14. Mr. KOROMA said that the formula used in paragraph 79 of chapter II of the draft report (A/CN.4/L.424 and Corr.1) was preferable to the wording of the introductory clause of paragraph 87 as proposed by the Special Rapporteur, which seemed to depart from the usual model. The Commission often took the "Sixth Committee" to be synonymous with the "General Assembly". However, it was to the General Assembly that the Commission submitted its report, and also to the General Assembly that the Sixth Committee submitted its report. Moreover, some Member States might decide to speak on questions of international law in the General Assembly itself. For that reason, it would be better, as was customary, to ask the General Assembly for its views.

15. Mr. CALERO RODRIGUES said that he could agree to the amendment to point (a) proposed by Mr. Yankov or to the formula suggested by Mr. Beesley. As for the introductory clause, the Commission could request "the views of the General Assembly", but it would be better to keep to the wording of General Assembly resolution 42/156.

16. Mr. REUTER said that Mr. Beesley's concern regarding the French text of point (a) was justified. The expression *degré de précision* was not the equivalent of the words "degree of elaboration". Perhaps it would be better, in the French text, to speak of *l'ampleur des développements que le projet d'articles devrait consacrer aux problèmes* . . .

17. Mr. BARBOZA said that the introductory clause should be kept as it was, for Governments could state their views on the Commission's report in the Sixth Committee.

18. The CHAIRMAN said that it was pointless to expatiate on the roles of the Sixth Committee and the General Assembly. The best course, in his opinion, would be to speak of the "General Assembly".

19. If there were no objections, he would take it that the Commission agreed to adopt the text of paragraph 87 proposed by the Special Rapporteur (para. 3 above) with the amendment to point (a) proposed by Mr.

Beesley, and on the understanding that the French text of point (a) would be brought into line with the English.

*It was so agreed.*

*Paragraph 87, as amended, was adopted.*

*Section D, as amended, was adopted.*

**B. Consideration of the topic at the present session (concluded)**  
(A/CN.4/L.425)

Paragraph 62 (concluded)

20. The CHAIRMAN drew attention to the following text proposed by the Special Rapporteur for insertion after the second sentence: "In that connection, certain members pointed out that the presumed behaviour of a 'civilized State' could not serve as the basis for the obligation of due diligence. That was also the view of the Special Rapporteur and the other members of the Commission."

21. Mr. BENNOUNA suggested that the expression "so-called" should be inserted before the word "civilized".

22. Mr. KOROMA said that he would have preferred to pass over the non-issue of a "civilized State" in silence. If the Commission's report was to speak of it, however, it should say quite clearly that the Commission rejected the concept.

23. Mr. OGISO pointed out that it was the Commission's custom to reflect in its report the views expressed in the course of the actual debate, not the views expressed at the time of the adoption of the draft report. For that reason, he would prefer the second sentence of the proposed text to be deleted. If that suggestion posed any difficulty, the second sentence could be amended to read: "In the opinion of the Special Rapporteur, that was also the view of other members." Actually, the question had not been the subject of debate when the Commission had discussed the topic, apart from the comments made by some members. However, the Sixth Committee might gain the opposite impression from the second sentence in its present form.

24. Prince AJIBOLA said that it would be creating difficulties to add such a provocative formula to the perfectly reasonable text of paragraph 62.

25. Mr. McCAFFREY (Special Rapporteur), supported by Mr. BEESLEY and Mr. CALERO RODRIGUES, suggested that the second sentence of the proposed new text should be replaced by: "Neither the Special Rapporteur nor any member of the Commission disagreed with that view."

26. After an exchange of views in which Mr. BARSEGOV, Mr. ARANGIO-RUIZ, Mr. McCAFFREY (Special Rapporteur) and Mr. TOMUSCHAT took part, Mr. Sreenivasa RAO, supported by Mr. MAHIU, proposed that the following sentence should be added after the second sentence of paragraph 62: "In that connection, it was pointed out that the presumed behaviour of a so-called 'civilized State' could not serve as the basis for the obligation of due diligence."

*It was so agreed.*

*Paragraph 62, as amended, was adopted.*

*Section B, as amended, was adopted.*

**CHAPTER II. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.424 and Corr.1)**

**A. Introduction**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

27. Mr. BEESLEY said that, in addition to the three principles enumerated in subparagraph (d), which were taken from paragraph 85 of the Special Rapporteur's fourth report (A/CN.4/413), mention should be made of the three principles set out in paragraph 86 of that report. It had been decided further to the debate that the Special Rapporteur would, for the purpose of his future work, base himself on the principles listed in both those paragraphs.

28. Mr. BARBOZA (Special Rapporteur) pointed out that paragraph 5 under consideration summarized not the discussion at the present session but the discussion at the thirty-ninth session. Nevertheless, account could be taken of Mr. Beesley's comments in connection with paragraphs 58 and 59 of chapter II of the draft report.

*It was so agreed.*

29. Mr. ROUCOUNAS said that, to avoid any confusion, "in 1987" should be inserted after the words "At the thirty-ninth session", in the first sentence.

*It was so agreed.*

*Paragraph 5, as amended, was adopted.*

*Section A, as amended, was adopted.*

**B. Consideration of the topic at the present session**

Paragraph 6

*Paragraph 6 was adopted.*

Paragraph 7

30. Mr. SHI (Rapporteur) said that, in the text of draft article 7 reproduced in paragraph 7, the expression "source States" should be replaced by "States of origin".

*Paragraph 7, as amended, was adopted.*

Paragraph 8

31. Mr. CALERO RODRIGUES said that the word "spacial", in the fifth sentence, should read "space".

*It was so agreed.*

*Paragraph 8, as amended, was adopted.*

Paragraph 9

32. Mr. BARSEGOV proposed that a sentence should be inserted either in paragraph 9 (where it would have been preferable to reflect more faithfully the Special Rapporteur's comment that there were at the present time no real rules of international law on international relations in regard to prevention and reparation) or in paragraph 13 (which reflected the position of members in that regard) along the following lines: "Some members considered that this appraisal of the existing

legal situation was of fundamental importance and that it paved the way for realistic development of international law in the formulation of new rules and new concepts.”

33. Mr. MAHIU proposed that, in the second sentence of the French text, either the word *indemnisation* or the word *compensation* should be used, in order to bring the text into line with the English, and that the full stop after *compensation* should be replaced by a semi-colon.

*It was so agreed.*

34. Mr. BEESLEY said that, in his opinion, the sentence proposed by Mr. Barsegov would be more suitably placed in paragraph 13 than in paragraph 9.

35. Mr. BARBOZA (Special Rapporteur) said that he had no objection to Mr. Barsegov's proposal, but shared Mr. Beesley's point of view. Actually, the entire topic involved the progressive development of international law and, at the present time, there was no rule of international law that imposed reparation.

36. The CHAIRMAN asked Mr. Barsegov, the Rapporteur and the Special Rapporteur to consult and decide on the place for insertion of the sentence in question, and pointed out that paragraph 9 reflected the views of the Special Rapporteur and paragraph 13 the position of members of the Commission.

*Paragraph 9, as amended in the French text, was adopted.*

#### Paragraph 10

37. Mr. BENNOUNA said that paragraph 10 was scarcely intelligible in French, more particularly because of the tenses used, and proposed that the end of the fourth sentence, starting with the words “since the breach”, should be deleted.

38. The CHAIRMAN pointed out that paragraph 10 reflected the position of the Special Rapporteur. Hence its form did not commit either the Commission or any of its members.

39. Mr. McCaffrey said that he, too, had some comments regarding the form of paragraph 10, but would submit them to the Secretariat in order to gain time. As to the tense, the preterite was entirely appropriate in the English text.

40. Mr. BARSEGOV, referring to the penultimate sentence, asked what was meant by the “operative level” of an obligation.

41. Mr. BARBOZA (Special Rapporteur) explained that, in speaking of the “operative level” of a rule prohibiting the causing of harm by pollution, he meant the existence of a rule along those lines that was sufficiently general for it to be applied in the matter. He, together with several other members, had considered that the *sic utere tuo* principle was preferable.

42. With reference to Mr. Bennouna's comments, the use of the past tense in the Spanish text was correct. Secondly, he did not consider it advisable to delete the last part of the fourth sentence, for it explained what

went before. On the latter point, however, the decision lay with the Rapporteur and the Commission.

43. The CHAIRMAN, speaking as a member of the Commission, said he was not certain that the actual prohibition on causing pollution existed “at an operative level”. What did exist at that level was the recognition, or more or less general acceptance, of the *sic utere tuo* principle.

*Paragraph 10 was adopted.*

#### Paragraph 11

44. The CHAIRMAN said that the words *que no que no existiera*, in the second sentence of the Spanish text, should be replaced by *a que no existiera*.

*It was so agreed.*

*Paragraph 11, as amended in the Spanish text, was adopted.*

#### Paragraph 12

*Paragraph 12 was adopted.*

#### Paragraph 13

45. Mr. BARBOZA (Special Rapporteur) said that, in his view, the sentence proposed earlier by Mr. Barsegov (see para. 32 above) should be incorporated in paragraph 13.

46. Mr. CALERO RODRIGUES said that he had no objection, but would like to know where the sentence came from. Moreover, the last sentence of the present text should be recast so as to avoid the repetition of the words “paved the way”. In addition, the words “For a few members”, in the first sentence, should be replaced by “For some members”, so as to bring the English text into line with the other languages.

47. Mr. BEESLEY said that he, too, had no objection to the sentence proposed by Mr. Barsegov, but wondered whether it was suitable in the part of chapter II on “General considerations”, which also stated the position adopted by the Special Rapporteur in his fourth report (A/CN.4/413). It was a question of method more than principle: it would be wise, for the sake of balance, to separate general considerations from the examination of more concrete issues.

48. In addition, what was the subject of the “consensus” mentioned in the last sentence of paragraph 13? He reserved the right to propose some changes to the paragraph once the full wording was known.

49. Mr. ARANGIO-RUIZ said that, if there was a consensus on the concept of “appreciable harm”, he was not part of it, for the term “appreciable” was not in his vocabulary.

50. Mr. KOROMA said that he could agree to the text proposed by Mr. Barsegov, subject to the deletion of the words “realistic” and “and new concepts” and subject to the place at which it would be inserted in paragraph 13.

51. Mr. TOMUSCHAT said he did not think that a text proposed by one member and reflecting his views could be altered by another member.

52. The CHAIRMAN asked Mr. Barsegov, the Rapporteur and the Special Rapporteur to consult and decide on the exact text and the place at which it would be inserted in paragraph 13.

53. Mr. BARSEGOV said he agreed to that method. He would add that he was ready to agree to an alternative and, if necessary, to place the sentence he was proposing at the end of paragraph 13, so as not to upset the present structure.

54. Mr. SHI (Rapporteur) said he thought that the matter should be settled by Mr. Barsegov and the Special Rapporteur; he would accept any formula they agreed on.

55. Mr. GRAEFRATH proposed that paragraph 13 should be retained in its present form, with the amendment to the English text proposed by Mr. Calero Rodrigues and the additional sentence proposed by Mr. Barsegov, in which the words "Some members" should be replaced by "Other members".

56. Mr. BEESLEY said that he would like the last sentence of paragraph 13 to be amended so as to make it clear that it was the members in question who took the view that many States would be unable to accept that the rules and principles drafted by the Commission on the topic already formed part of the existing law.

57. The CHAIRMAN suggested that paragraph 13 should be provisionally adopted, with the amendments by Mr. Calero Rodrigues to the first sentence (para. 46 above) and by Mr. Beesley to the last sentence (para. 56 above), on the understanding that the Commission could revert to the paragraph later, if necessary.

*It was so agreed.*

*Paragraph 13, as amended, was adopted.*

Paragraph 14

58. Mr. REUTER said that, in its present form, paragraph 14 seemed to rule out the fact that the origin of transboundary harm could lie in a wrongful act, for example in a violation of territorial integrity. Such a possibility should be pointed out from time to time in the report, though not necessarily in paragraph 14.

59. Prince AJIBOLA said that some corrections should be made to the English text, purely in matters of form. The words "allow any flexibility", in the first sentence, should be replaced by "allow for any flexibility", and the nouns and adjectives in the two expressions at the end of the last sentence should be transposed so as to read "compensable harm" and "negligible harm".

60. Mr. BEESLEY said that the expression "under the new approach", in the second sentence, implied that there had been a change of view and that an earlier approach which would not have been fruitful had been abandoned. The adjective "new" did not seem felicitous.

61. The CHAIRMAN, speaking as a member of the Commission, said that the phrase *Aunque esta premisa era correcta*, at the beginning of the last sentence of the Spanish text, was too abrupt. The statement should be given more nuance, for instance by using the equivalent

of the phrase "Although they considered this approach to be correct".

62. Mr. KOROMA said that the second sentence, stating that "there would not be liability for every transboundary harm", was too peremptory, since it could be contended that, when harm occurred, somebody was always liable. The idea to be expressed was, rather, that the victim did not always demand reparation.

63. Mr. BARBOZA (Special Rapporteur) said that he agreed to Prince Ajibola's corrections to the English text. Mr. Beesley's point could be met simply by saying: "Thus, under such an approach".

64. As to Mr. Koroma's observations, the report simply recorded the opinions expressed by members of the Commission, and some had indeed considered that "there would not be liability for every transboundary harm".

65. Lastly, regarding the point raised by the Chairman, the subjunctive could be used in the Spanish text by saying *Aunque esta premisa fuera correcta*.

*The amendments by Prince Ajibola and the Special Rapporteur were adopted.*

*Paragraph 14, as amended, was adopted.*

Paragraph 15

66. Mr. YANKOV said that the word "Many", at the beginning of the paragraph, should be replaced by "Many members", which was more precise.

*It was so agreed.*

67. Prince AJIBOLA proposed that, at the end of the fifth sentence, the word "completely" should be deleted and the word "correct" should be replaced by "exhaustive".

*It was so agreed.*

68. Mr. BENNOUNA said that paragraph 15 was not logical. It confused two ideas, namely a "list of dangerous activities" and a "list of toxic and dangerous materials". The two things should be separated, for example by placing the third sentence, beginning "It was stated that many instruments . . .", in a later part of the paragraph.

69. Mr. KOROMA said that he shared that view.

70. Mr. BARBOZA (Special Rapporteur) said that Mr. Graefrath had suggested two other changes to him: to replace the phrase "did not, however, justify not drawing up a list", in the second sentence, by "did not, however, exclude drawing up a list"; and to insert, after the third sentence, a new sentence reading: "Such lists, it was remarked, could also be useful to determine necessary preventive measures."

*It was so agreed.*

71. At the beginning of the eighth sentence, the word "however" should be inserted after the words "In this connection", so as to bring out more clearly the difference between the two ideas expressed in that passage.

72. Mr. Bennouna had proposed that the paragraph should be recast by displacing the third sentence, begin-

ning "It was stated that many instruments . . .". That passage was, in fact, the conclusion of the argument advanced by one member, Mr. Graefrath, who had held that it was possible to establish a list of dangerous activities and had, in the course of the debate, cited numerous international instruments as examples. The paragraph then went on to set out the opposite view, that of the Special Rapporteur, to which many members had subscribed. Changing the order of the sentences would thus affect the logic of the ideas.

73. Mr. GRAEFRATH confirmed what the Special Rapporteur had just said and added that the paragraph might be clearer if it avoided specifying, as did the third sentence, that the instruments were "instruments on the protection of the environment". Indeed, during the debate he had cited a number of instruments on fields other than the environment, such as transport.

74. Mr. BEESLEY said he was concerned to see that, although a great deal of the part of chapter II on "General considerations" had already been dealt with, there had still been no mention of a basic issue on which the debate had focused from the outset, namely whether risk or harm was to be the basis for the draft. That question, which was so important as a guide for further thought on the topic, was mentioned only in paragraph 25, in other words very late on. He therefore formally proposed that paragraph 25 should be placed after paragraph 15.

75. Mr. BARBOZA (Special Rapporteur) explained that the chapter did not necessarily follow the same order as the discussion. In the part on "General considerations", he had sought to include matters which shed light on the topic but still remained pending: creeping pollution, a list of dangerous activities, and so on. It had also seemed preferable to discuss some basic aspects of the debate in connection with the articles which had given rise to them. For that reason, the question whether risk or harm should be the basis for liability was set out in connection with article 1, in other words in paragraph 25 of chapter II.

76. Mr. EIRIKSSON pointed out that the problem raised by Mr. Beesley concerned not only paragraph 25, but paragraphs 21 to 28 as a whole.

77. Mr. BARSEGOV said that, if chapter II of the draft report were changed to such an extent, great attention would have to be paid in order to maintain the balance between the opinion of those who advocated liability based on risk and the opinion of those who advocated liability based on harm.

78. Mr. McCaffrey, supported by Mr. BEESLEY, proposed that the Commission should give further thought to the matter before resolving such an important problem of presentation.

79. Mr. BARBOZA (Special Rapporteur) said that, in view of the extent of the changes envisaged, he would prefer to have proposals set out in writing.

*The meeting rose at 1.05 p.m.*

## 2089th MEETING

*Tuesday, 26 July 1988, at 3 p.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft report of the Commission on the work of its fortieth session (*continued*)

#### CHAPTER II. *International liability for injurious consequences arising out of acts not prohibited by international law* (*continued*) (A/CN.4/L.424 and Corr.1)

##### B. *Consideration of the topic at the present session* (*continued*)

*New paragraph 12 bis*

1. The CHAIRMAN said that there was a proposal to incorporate in section B a new paragraph to explain that some members of the Commission believed that the concept of harm should continue to be the basis of the draft articles, while other members held the opposite view.

2. Mr. BEESLEY suggested that the new paragraph, which would become paragraph 12 *bis*, might read:

"In this connection, the Special Rapporteur had proposed that the scope of the topic be limited to activities involving risk, excluding those situations where appreciable harm occurred despite the fact that the risk of harm had not been considered appreciable or foreseeable. Some members, however, were of the view that, while the concept of risk might play an important role with regard to prevention, it would limit the topic unduly to base the entire régime of liability on appreciability of risk, since there could be activities for which the risk appeared slight, yet from which catastrophic consequences could ensue. These members pointed out that the law was never indifferent to the occurrence of harm when it threatened the rights of other States, citing the *Trail Smelter*, *Corfu Channel* and *Lake Lanoux* cases, Principle 21 of the 1972 Stockholm Declaration, and part XII of the 1982 United Nations Convention on the Law of the Sea."

3. Mr. BARSEGOV said that he had no objection to the Commission recording the views of some of its members in its report, but believed that those of other members should also be included. He therefore suggested the following addition to the text proposed by Mr. Beesley:

"Other members considered that refusal to acknowledge the causal link between appreciable harm and risk demolished the conceptual framework proposed by the Special Rapporteur, was not justified by existing rules of international law and, in many

instances, directly contradicted the legal concepts formulated in national laws.”

4. Mr. GRAEFRATH suggested that, in the first sentence of the text proposed by Mr. Beesley, the word “appreciable” should be inserted between the words “involving” and “risk”, and that the remainder of the sentence, from the words “excluding those situations” to the end, should be deleted, in the interests of accurately reflecting the Special Rapporteur’s intentions regarding the scope of the topic. Similarly, the accuracy of the second sentence could be improved by replacing the words “appeared slight” by “was not recognizable”.

5. Mr. BEESLEY said that he endorsed Mr. Graefrath’s proposal to insert the word “appreciable”. He wished to give further thought, however, to the proposals to delete the last part of the first sentence and to amend the wording of the second sentence. Although he could understand the reasoning behind those proposals, he believed that the wording he himself had proposed reflected the positions actually expressed on the issues.

6. He wished, however, to suggest two minor revisions to his proposed text, with the intention of promoting equity and accuracy. In the first sentence, the words “In this connection” should be replaced by “Some members considered that”; and, at the end of the last sentence, the following phrase should be added: “as well as the third principle referred to by the Special Rapporteur in his conclusions at the end of the debate on the topic at the thirty-ninth session”.

7. Mr. EIRIKSSON said that he endorsed Mr. Graefrath’s proposal to delete the last part of the first sentence of the text proposed by Mr. Beesley. As to the reference in the second sentence to the catastrophic consequences of risk, he had not been among those members of the Commission who believed that the topic was limited because of that possibility. He therefore suggested that the second sentence should end after the words “appreciability of risk”, and that a new sentence, beginning “There could, furthermore, be activities . . .”, should be formed out of the remainder of the second sentence. The last sentence would be better placed in a later part of chapter II.

8. Mr. BARBOZA (Special Rapporteur) said that he fully understood the reasoning behind the proposal to insert a new paragraph 12 *bis* and the suggested amendments. He had no intention of criticizing those proposals, but feared that the technique of rewriting the report, if taken to its logical conclusion, would result in the creation of an illogical line of reasoning.

9. Mr. Graefrath’s proposals to insert the word “appreciable” and delete the last part of the first sentence of the text proposed by Mr. Beesley were acceptable. He would further suggest that the part of the second sentence which Mr. Eiriksson had suggested should be made into a separate sentence (“since there could be activities for which the risk appeared slight, yet from which catastrophic consequences could ensue”) should be deleted altogether, since it referred to a complex matter that was dealt with in detail later in chapter II.

10. The CHAIRMAN, speaking as a member of the Commission, said that he endorsed Mr. Beesley’s proposal for the insertion of a new paragraph 12 *bis*, since it accurately reflected the Commission’s debate. It was perfectly true that some members—including himself—had rejected the notion of “appreciable” harm, and that view should be communicated to the General Assembly in the Commission’s report.

11. Mr. BEESLEY explained that the phrases whose deletion from his proposed text had been suggested were intended to enlighten the reader about what was really at stake: there was a tendency to view the issue in purely theoretical terms. In fact, he himself did not see the two approaches as being mutually exclusive. He would urge that the new paragraph 12 *bis* be adopted as originally proposed, but with the insertion of the word “appreciable” in the first sentence as suggested by Mr. Graefrath. Mr. Eiriksson had suggested that the last sentence be moved to a later part of chapter II; he himself would have no objection if it were deleted altogether.

12. Prince AJIBOLA said that he supported the text proposed by Mr. Beesley and would not oppose the insertion of the word “appreciable” in the first sentence, even though he did not subscribe to the notion of “appreciable risk”. The application of qualifying adjectives such as “appreciable” or “foreseeable” to the term “risk” merely made that term less precise and might do more harm than good by restricting the scope of the draft articles.

13. Mr. AL-BAHARNA said that he supported the text of paragraph 12 *bis* as proposed and revised by Mr. Beesley, but would like to suggest a small amendment. Because he was among the members of the Commission who believed that harm or injury was the basis of liability, he would prefer the first part of the last sentence, ending with the words “rights of other States”, to be retained; the remainder could be deleted.

14. Mr. MAHIU said that, at the present stage of the proceedings, amendments should be confined to views expressed during the debate that had been entirely omitted from the report, and should be clear and concise. He shared many of the opinions expressed during the discussion on paragraph 12 *bis*, but thought it unwise for the Commission to start discussing which opinions should be more fully reflected in the report.

15. The CHAIRMAN said that the main object of the Commission’s report to the General Assembly was to bring the Assembly up to date on the Commission’s discussions. All the opinions that had been expressed during a discussion should therefore be reflected in the report. Hence he believed that Mr. Beesley’s amendment was entirely appropriate, as was any amendment designed to inform the General Assembly of the range of views held by members of the Commission.

16. Mr. SEPÚLVEDA GUTIÉRREZ said that he endorsed the text proposed by Mr. Beesley, as amended by Mr. Graefrath and Mr. Eiriksson, because it reflected his own position on risk, and particularly on the concept of “appreciable risk”, which he believed should be clarified.

17. Mr. Sreenivasa RAO said he subscribed to the view that the Commission should develop the concept of liability in the broadest possible sense, without unduly restricting it to risk.

18. Mr. KOROMA said that he had objected to basing liability on risk and therefore supported the proposed paragraph 12 *bis*.

19. Mr. BEESLEY offered to consult with the Special Rapporteur and the members of the Commission who had suggested amendments to his proposed text, with a view to streamlining it.

20. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to defer consideration of the proposed paragraph 12 *bis* pending the outcome of those consultations.

*It was so agreed.*

New paragraph 13 *bis*

21. Mr. BARSEGOV, referring to a proposal he had made at the previous meeting (2088th meeting, para. 32), proposed the insertion of a new paragraph 13 *bis* reading:

“Some members considered that the statement by the Special Rapporteur to the effect that there was no norm in general international law under which there must be compensation for every injury was of fundamental importance and opened prospects for the development of international law in the present field through the formation of new rules.”

22. In reply to a suggestion by Mr. Calero Rodrigues, he agreed that the word “injury” in that text should be replaced by “harm”. Replying to a further point raised by Mr. Pawlak, he said that the expression “general international law” was taken from the Special Rapporteur’s fourth report (A/CN.4/413) and should therefore be retained.

*It was so agreed.*

*New paragraph 13 bis, as amended, was adopted.*

Paragraph 15 (*concluded*)

*Paragraph 15, as amended at the 2088th meeting, was adopted.*

Paragraphs 16 and 17

23. Mr. BARBOZA (Special Rapporteur) said that the last three sentences of paragraph 17 should be transferred to the end of paragraph 16. Replying to a point made by the Chairman, speaking as a member of the Commission, he agreed that the last of those three sentences, reading: “Such an approach was unnecessary”, should be reworded so as to indicate that the opinion expressed was that of some members of the Commission and not of the Commission as a whole.

24. In response to a suggestion made by Mr. Tomuschat and supported by Mr. Sreenivasa Rao, he agreed to the deletion of the word “expressly” in the second sentence of paragraph 16.

25. Replying to a point raised by Prince Ajibola, he said that he saw no inconsistency between the last

sentence of paragraph 16 and the text of paragraph 9. On a further point raised by Prince Ajibola, he confirmed that the expression “general principles of law”, in the last sentence of paragraph 16, was taken from Article 38, paragraph 1 (c), of the Statute of the ICJ and said that it should not be replaced by a reference to the principles of international law.

26. In reply to points raised by Mr. Sreenivasa Rao and Mr. Koroma, he agreed that the word “prudent”, in the seventh sentence of paragraph 17, should be replaced by “judicious” and that the word “unnecessary”, at the end of that paragraph, should be replaced by the words “to be avoided”.

*It was so agreed.*

*Paragraphs 16 and 17, as amended, were adopted.*

Paragraph 18 and new paragraph 18 *bis*

27. Mr. Sreenivasa RAO proposed that the following passage should be added to paragraph 18 or be inserted as a new paragraph 18 *bis*:

“The view was also expressed that, in dealing with the subject of liability, the Commission should not develop it only as an instrument for punishment. It should be promoted as a framework for prevention and international management of activities relevant to a new ethic of development and transfer of resources and technology. Concepts such as insurance, international emergency relief, rehabilitation, aid and assistance also appeared to be very pertinent for development under the present topic.”

28. In reply to a suggestion by Mr. Beesley, he agreed that the word “concepts”, at the beginning of the last sentence of the proposed text, should be replaced by “incentives”.

*It was so agreed.*

*Paragraph 18 and new paragraph 18 bis, as amended and subject to further minor drafting changes, were adopted.*

Paragraph 19

29. Mr. OGISO criticized the use of the expression “polluting activities” in the last two sentences. He asked the Special Rapporteur whether the intention was to state that all such activities were wrongful or that only some of them were wrongful, that was to say, above a certain level of pollution.

30. Mr. McCAFFREY suggested that the words “the scope of the article”, at the end of paragraph 19, should be amended to read “the scope of the topic”.

31. Mr. TOMUSCHAT said that the question whether certain matters fell within the present topic or outside it was academic. The Commission should be concerned with matters of legal policy, not with academic choices. He therefore suggested that the last sentence should be cast in terms of legal policy.

32. Mr. GRAEFRATH said he did not share that view. The topic under consideration was not pollution; it was international liability for injurious consequences arising out of acts not prohibited by international law. It therefore covered not only pollution, but other mat-

ters as well, such as accidents. Even if pollution were outside the topic, the topic itself would not fall apart.

33. Mr. YANKOV said that it was the first time he had met the expression "polluting activities" in environmental law. The expression was used in paragraph 19 for the sake of brevity, but it was not felicitous. The reference should be to "activities that may cause pollution".

34. Mr. BARBOZA (Special Rapporteur) said that the point raised by Mr. Ogiso was well taken. It could be met by referring to "polluting activities producing appreciable harm".

35. He did not agree with Mr. Tomuschat and thought that the last sentence of paragraph 19 was undoubtedly a statement of legal policy. His concern was not with the content of the topic, but with the important point of not leaving an innocent victim defenceless. That would be the result if the activities in question were not considered wrongful. He accordingly proposed the insertion at the end of the paragraph of the words "and leave the innocent victim defenceless".

36. Lastly, he suggested that the point made by Mr. McCaffrey should be met by replacing the singular "article" by the plural "articles".

37. The CHAIRMAN, speaking as a member of the Commission, said that, if a polluting activity was prohibited as such, it would fall outside the present topic: the act would be wrongful and hence would not come under the heading of acts not prohibited by international law.

38. Mr. ARANGIO-RUIZ agreed with Mr. Yankov that the expression "polluting activities" was not correct. Actually, the whole of the last sentence of paragraph 19 was unfortunate. The important question was not whether a matter fell within one topic or another. The Commission should be concerned with substance. It had to consider whether it intended to say that pollution as such was not prohibited. For his part, he thought it would be better to say nothing at all, since otherwise the result might be to encourage pollution.

39. The CHAIRMAN pointed out that paragraph 19 recorded the views of the Special Rapporteur; it was therefore his sole responsibility and did not commit the Commission.

40. Mr. CALERO RODRIGUES said he fully agreed with that remark.

41. Prince AJIBOLA suggested that the expression "polluting activities" in the last two sentences could be replaced by "pollution".

42. Mr. BARBOZA (Special Rapporteur) said he did not wish to make that change in a paragraph which expressed exclusively his own opinion. His intention had been to refer to activities. The only amendments he was prepared to make were to add the words "producing appreciable harm" after "polluting activities", to take account of the point made by Mr. Ogiso, and to insert the words "and leave the innocent victim defenceless" at the end of paragraph 19.

43. Mr. GRAEFRATH pointed out that the victim would not be defenceless, since he could invoke State responsibility; and defence under State responsibility was stronger than defence under international liability for injurious consequences arising out of acts not prohibited by international law.

44. Mr. BARBOZA (Special Rapporteur) pointed out that the last sentence of paragraph 19 expressed concern that a "definitive presumption" by the Commission that polluting activities were wrongful could remove those activities from the scope of the topic. If general international law did not accept that presumption, the victim would be left defenceless.

45. Mr. BEESLEY suggested that the expression "definitive presumption" could be replaced by "working hypothesis".

46. The CHAIRMAN, speaking as a member of the Commission, suggested that the words "by the Commission", in the last sentence, should be deleted; that sentence would then express concern that "a presumption that polluting activities were wrongful would remove those activities from the scope of the topic".

47. Mr. BARSEGOV said that he agreed with Mr. Graefrath. He had not been totally convinced by the Special Rapporteur's reply. Perhaps the last sentence of paragraph 19 could be worded so as to express concern at the possible absence of a rule on liability for injurious consequences arising out of acts not prohibited by international law. The Commission should be optimistic and expect to achieve equal success with the present topic and the topic of State responsibility.

48. Mr. BARBOZA (Special Rapporteur) suggested that the Commission should suspend consideration of paragraph 19 so as to give him an opportunity to submit a redraft at the next meeting.

*It was so agreed.*

*New paragraph 12 bis (concluded)*

49. The CHAIRMAN announced that the informal working group on the new paragraph 12 *bis* proposed the following agreed text:

"Some members of the Commission observed that the Special Rapporteur had proposed that the scope of the topic be limited to activities involving appreciable risk, excluding those situations where appreciable harm occurred although the risk of harm had not been considered appreciable or foreseeable. They, however, were of the view that, while the concept of risk might play an important role with regard to prevention, it would limit the topic unduly to base the entire régime of liability on appreciability of risk. Other members considered that the disruption in the causal link between appreciable risk and harm totally undermined the concept of the topic."

50. Mr. TOMUSCHAT said that he was at a loss to understand the meaning of the concluding words, "the concept of the topic".

51. Mr. BARSEGOV said that the meaning of the paragraph was that there must be a link between the

harm and the risk. On that point, he drew attention to paragraph 23 of the Special Rapporteur's fourth report (A/CN.4/413). The link between harm and risk was the basic concept under consideration by the Commission with regard to the present topic.

52. Mr. TOMUSCHAT suggested that the word "concept", in the last sentence of the proposed text, should be replaced by "essence".

53. Mr. CALERO RODRIGUES, also referring to the last sentence, said that it would not be adequate to speak of the "disruption in the causal link". Perhaps the reference should be to "disregard of the causal link".

54. Mr. Sreenivasa RAO suggested replacing the words "the disruption in the causal link" by "ignoring the causal link", and the words "the concept of the topic" by "régime of liability".

55. Mr. ARANGIO-RUIZ pointed out that logically there was no causal link between appreciable risk and harm, since harm did not depend on risk. The problem at issue was that of the causal link between risk and liability. Perhaps the Special Rapporteur could provide an explanation on that point.

56. The CHAIRMAN pointed out that the proposed paragraph 12 *bis* expressed the views of certain members and not the views of the Commission itself or those of the Special Rapporteur.

57. Mr. KOROMA pointed out that the last sentence described the views of members of the Commission who did not agree with the views expressed in the first two sentences. The proposed paragraph 12 *bis* thus reflected both positions. He suggested that, in the last sentence, the words "the disruption in the causal link" be replaced by "breaking the causal link". As to the concluding words, he supported the proposal by Mr. Tomuschat to refer to "the essence of the topic".

58. Mr. MAHIOU suggested that the last sentence be reworded to read: "Other members considered that the absence of links between appreciable risk and harm totally undermined the foundations of the topic." He thought that that formulation adequately reflected the ideas of Mr. Barsegov, who was one of the members referred to in the first two sentences of the proposed text.

59. Mr. ARANGIO-RUIZ stressed that the causal link was certainly not between risk and harm; it was between some event or act, on the one hand, and a danger or harm, on the other.

60. Mr. RAZAFINDRALAMBO said that the text of paragraph 12 *bis* was intended to reflect the views of certain members, and he saw no real need to change its wording. In any event, the words "absence of links" (*absence de liens*), proposed by Mr. Mahiou were not strong enough and should be replaced by "a break in the link". He agreed, however, that it would be preferable to refer to the "foundations of the topic" rather than to the "concept of the topic".

61. Mr. MAHIOU said that he had omitted the word "causal" from the text he had proposed because of the

controversy provoked by the different concepts of a causal link in his country, and no doubt *a fortiori* between countries having different legal systems. A reference simply to a link would allow each legal system the necessary margin to determine how it interpreted that link.

62. Mr. GRAEFRATH said he did not think that the problem could be solved by simply omitting certain controversial terms. He therefore suggested that the last sentence of paragraph 12 *bis* should read: "Other members considered that the break in the causal link between activities involving an appreciable risk and harm totally undermined the foundations of the topic."

63. Mr. BEESLEY said that he would prefer the original text to stand, unless Mr. Barsegov accepted the amendments proposed by Mr. Graefrath and other members. He did not think that the Commission could tell Mr. Barsegov what he had meant to say.

64. Mr. BARSEGOV said that, in any event, his views were already expressed in paragraph 23. All he wanted to do was to add a short sentence to introduce some balance into the new paragraph 12 *bis* by underlining what was stated in paragraph 23. With that in mind, he proposed that the last sentence of paragraph 12 *bis* should be amended to read: "In the opinion of some other members, the elimination of risk from the chain leading to liability undermined the concept of the topic."

*It was so agreed.*

*New paragraph 12 bis, as amended, was adopted.*

Paragraphs 20 to 23

*Paragraphs 20 to 23 were adopted.*

Paragraph 24

65. Mr. MAHIOU proposed that the second part of the third sentence should be amended to read: ". . . a concept incorporated in the Preamble and in Article 74 of the Charter of the United Nations and also in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States".

66. Mr. TOMUSCHAT said that, in his view, it would be incorrect to say that the principle of good-neighbourliness was incorporated in the Declaration referred to. It was not one of the seven principles laid down in the Declaration, although the second preambular paragraph made a passing reference to it.

67. Mr. MAHIOU, agreeing with Mr. Tomuschat, proposed that the relevant part of the sentence should be amended to read: ". . . a concept incorporated in the Preamble and in Article 74 of the Charter of the United Nations and which underlay the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States".

*It was so agreed.*

*Paragraph 24, as amended, was adopted.*

Paragraph 25

68. Mr. CALERO RODRIGUES said that the twelfth sentence, beginning "It precluded, for example, the ac-

tivities . . .”, was expressed in very poor English. That point could perhaps be taken care of by the Rapporteur in consultation with the Secretariat.

*It was so agreed.*

69. Mr. OGISO proposed that the following sentence should be added at the end of paragraph 25:

“However, one member expressed the view that legal principles governing activities such as the operation of nuclear installations, which might cause extensive damage in the case of an accident, although risk was low, should be left to specific agreements providing for a special régime covering such activities, separately from the general principles under the present topic.”

*It was so agreed.*

70. Mr. EIRIKSSON proposed that paragraph 25 should be divided into two paragraphs. The first would deal with the general topic; the second, starting with the tenth sentence, “It was also pointed out that the concept of risk was ambiguous”, would deal with the catastrophic consequences of low-risk activities and end with the text proposed by Mr. Ogisso.

*It was so agreed.*

*The meeting rose at 6.05 p.m.*

## 2090th MEETING

*Wednesday, 27 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogisso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### **Draft report of the Commission on the work of its fortieth session (continued)**

**CHAPTER II. International liability for injurious consequences arising out of acts not prohibited by international law (continued)**  
(A/CN.4/L.424 and Corr.1)

**B. Consideration of the topic at the present session (continued)**

Paragraph 19 (concluded)

1. The CHAIRMAN said that the Special Rapporteur proposed that the last sentence of paragraph 19 should be replaced by the following text:

“With regard to activities which produced appreciable harm through pollution, he stated that, in the light of the debate on the matter, such activities

would, in his opinion, fall within the scope of the topic.”

*It was so agreed.*

*Paragraph 19, as amended, was adopted.*

Paragraph 25 (concluded)

2. The CHAIRMAN said that Mr. Beesley proposed that the following sentence should be added at the end of paragraph 25:

“These members pointed out that the law was never indifferent to the occurrence of harm when it threatened the rights of other States, citing the *Trail Smelter*, *Corfu Channel* and *Lake Lanoux* cases, Principle 21 of the 1972 Stockholm Declaration, and part XII of the 1982 United Nations Convention on the Law of the Sea.”

3. Mr. BEESLEY said that he had drafted that sentence in order to minimize the contrast between the opinion expressed in it and the position stated in the preceding paragraph.

4. Mr. TOMUSCHAT said that it was not clear to whom the words “These members”, in the text proposed by Mr. Beesley, referred.

5. Mr. McCAFFREY said that the last sentence of paragraph 25 in its original form, beginning “In their view . . .”, should be reworded so that the text proposed by Mr. Beesley would link up with it better. In addition, the words “threatened the rights of other States”, in the proposed text, did not seem appropriate, since the harm had already occurred. It would be better to say “infringed the rights of other States”.

6. Mr. KOROMA said that the example of the manufacture of chemical weapons referred to in the penultimate sentence was inappropriate and should be replaced or deleted.

7. Mr. Sreenivasa RAO, Mr. McCAFFREY and Mr. MAHIOU said that they shared that view.

*It was so agreed.*

8. Mr. EIRIKSSON, recalling that at the previous meeting, at his suggestion, paragraph 25 had been divided into two paragraphs (see 2089th meeting, para. 70), suggested that the text proposed by Mr. Beesley, as amended by Mr. McCaffrey, should be inserted at the end of the second paragraph before the new final sentence proposed by Mr. Ogisso (*ibid.*, para. 69).

*It was so agreed.*

*Paragraph 25, as amended, was adopted.*

Paragraph 26

9. Mr. BEESLEY asked whether the Special Rapporteur could add the following phrase at the end of the paragraph: “and a further chapter would be drafted to deal with the second category of activities”.

10. The CHAIRMAN, speaking as a member of the Commission and noting that paragraph 26 did not refer to the opinion he had expressed in plenary, proposed the addition of the following text, which might become paragraph 26 *bis*:

“One member pointed out that it was the consequences of a dangerous activity that could give rise to injury or harm. In other words, a reference to an activity involving risk meant not any type of risk, but, rather, an exceptional risk that could also cause injury or harm. Risk always existed, at one level or another. What had to be and could be prevented were the consequences of a lawful activity which was not prohibited by international law and involved exceptional risk. That member also stated that the obligation to be provided for in the draft was the obligation of the States concerned to co-operate in setting up the necessary machinery.”

11. Mr. BARBOZA (Special Rapporteur) said that he could accept those two amendments.

12. Mr. EIRIKSSON said that, in his view, the right place for Mr. Beesley's amendment would be in paragraph 28, which was drafted from the Special Rapporteur's point of view. That amendment was none the less a clever way of reconciling views that might seem to be diametrically opposed.

13. Mr. TOMUSCHAT said that the overall balance of the Commission's report might suffer if all the individual opinions expressed in plenary had to be reflected in it. The text proposed by Mr. Díaz González should also be shortened.

14. Prince AJIBOLA said that he shared Mr. Tomuschat's concern, particularly since the text proposed by Mr. Díaz González would make the logic of paragraph 26 more difficult to grasp.

15. The CHAIRMAN, speaking as a member of the Commission, pointed out that the Commission had already agreed to add entire paragraphs to its draft report in order to reflect the views of some of its members. His amendment was designed to give a fuller picture of the discussion by having the report reflect an opinion which was different from that of the majority. Either every member had to have the right to have his point of view reflected in the report or that right had to be denied to all.

16. Mr. PAWLAK and Mr. BEESLEY said that no one was being denied that right. The balance and concision of the report did, however, have to be borne in mind.

17. Prince AJIBOLA said his only fear was that, if the report contained too detailed an account of individual opinions, the reader might lose sight of the majority position in the Commission.

18. Mr. CALERO RODRIGUES suggested that, although the amendment by Mr. Díaz González was justified, he should agree with the Rapporteur on a way of shortening it.

*It was so agreed.*

*Paragraph 26 was adopted.*

Paragraph 27

19. Mr. BENNOUNA said that he would like the following text to be added at the end of paragraph 27: “One member observed that the risk to be taken into consideration was related to the potential appreciable

harm corresponding to it. There was therefore no need to qualify the risk.”

20. Mr. FRANCIS, noting that he had endorsed the same position as Mr. Bennouna, said he agreed with that amendment.

*Mr. Bennouna's amendment was adopted.*

*Paragraph 27, as amended, was adopted.*

Paragraph 28

21. Mr. EIRIKSSON said he thought that paragraph 28 should be divided into two paragraphs, the second of which would logically start with the fifth sentence, beginning “He admitted that the concept of risk . . .”. The word “While”, at the beginning of the third sentence, should be deleted and the following phrase should be added at the end of that sentence: “and that the articles should deal with all activities causing trans-boundary harm”.

22. Mr. BARBOZA (Special Rapporteur) said that he could accept the latter amendment, which related to a very important point that had divided the Commission.

23. Prince AJIBOLA said that paragraph 28 reflected two views that had been expressed during the discussion of the question whether or not the activities to be taken into account should be limited to those involving appreciable risk. It thus failed to mention the position of those members who considered that the concept of risk should not be taken into account at all and that the term itself should not be included in the draft.

24. Mr. BARBOZA (Special Rapporteur) said that paragraph 28 summed up only what he had said in reply to comments made by members of the Commission during the discussion. If Prince Ajibola wished to propose an amendment along the lines he had just indicated, the text of that amendment would have to be included in another paragraph.

25. Mr. BARSEGOV said that, since the Commission's report was supposed to reflect the views of all its members, it should also reflect the opinion of members who agreed with the Special Rapporteur that “The risk element constituted one of the most essential features of liability” (para. 40). Whenever the Commission discussed the question of risk, the opinion of those for whom risk was an inherent element of the concept that was being developed would, for the sake of impartiality, have to be recorded. It might, however, not be necessary to keep coming back to that question.

*Mr. Eiriksson's amendments were adopted.*

*Paragraph 28, as amended, was adopted.*

Paragraphs 29 to 31

*Paragraphs 29 to 31 were adopted.*

Paragraphs 32 and 33

26. Mr. TOMUSCHAT said that, in paragraph 33, as well as in other paragraphs of the report, it would be helpful to underline the catchword, as had been done, for example, in paragraph 32.

*It was so agreed.*

27. Mr. EIRIKSSON said that, although the consequences of an activity had to be physical in order to come within the scope of the draft articles, that was not essential in the case of harm, which could, for example, be of an economic nature. He would, however, not propose any amendment to paragraphs 32 and 33.

*Paragraphs 32 and 33 were adopted.*

Paragraph 34

28. Mr. McCaffrey proposed that the fifth sentence should be amended to read: "This approach would allow the topic to deal effectively with activities having the potential to cause injuries outside the territory of a State." Moreover, since the concepts of "jurisdiction and control" were always mentioned together, it would be preferable to refer to them in the last sentence as an "expression" rather than as "terms".

29. Mr. CALERO RODRIGUES, referring to Mr. McCaffrey's proposed amendment to the fifth sentence, pointed out that paragraph 34 dealt not with "injuries outside the territory of a State", but with activities which were conducted outside that territory and were likely to cause injuries.

30. Mr. BARBOZA (Special Rapporteur) agreed with Mr. Calero Rodrigues and proposed that, in order to meet Mr. McCaffrey's concern, the fifth sentence should be amended to read: "This approach . . . with activities which are conducted outside the territory of a State and have the potential to cause injuries" or "This approach . . . with activities involving risk conducted outside the territory of a State".

*The latter amendment was adopted.*

*Mr. McCaffrey's amendment to the last sentence was adopted.*

31. Mr. AL-BAHARNA proposed that, in the last sentence, the words "and other instruments" should be deleted if those instruments were not to be specified and that the word "usage" should be replaced by "use".

32. Mr. BEESLEY, supported by Mr. YANKOV, suggested that, instead of deleting the words "and other instruments", the words "such as the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter" should be inserted after them.

*It was so agreed.*

*Mr. Al-Baharna's second amendment was adopted.*

*Paragraph 34, as amended, was adopted.*

Paragraph 35

33. Mr. TOMUSCHAT said he did not recall that the controversial matter dealt with in the third sentence had been raised during the discussion. Since it was, moreover, quite unusual for States to claim and enforce extraterritorial jurisdiction *vis-à-vis* a foreign company, he proposed that that sentence should be deleted.

34. Mr. GRAEFRATH proposed that, in the first sentence, the words "while agreeing that 'territory' alone was too narrow" should be added after the word

"however". He confirmed that, during the discussion, he had referred to the matter dealt with in the third sentence, which Mr. Tomuschat had proposed deleting, and that he knew of several cases of that kind. He therefore proposed that the words "very often" in that sentence should be replaced by the word "sometimes".

35. Mr. MAHIU supported the amendment to the third sentence proposed by Mr. Graefrath.

*Mr. Graefrath's amendments to the first and third sentences were adopted.*

*Paragraph 35, as amended, was adopted.*

Paragraphs 36 and 37

*Paragraphs 36 and 37 were adopted.*

Paragraphs 38 and 39

36. Mr. McCaffrey noted that, while the summary of the discussion on the concepts of jurisdiction and control took up one page of the draft report, the summary of the Special Rapporteur's reply (paras. 38-39) occupied two and a half pages. Perhaps the Special Rapporteur and the Rapporteur could agree on a way of making that part of the text more balanced. He also suggested that the eleventh sentence of paragraph 38, beginning "The Special Rapporteur stated that the concept . . .", should be deleted, since it duplicated what was stated at the beginning of the paragraph.

37. Mr. BARBOZA (Special Rapporteur) said that, in summing up the discussion, he had dwelt at length on the concepts of jurisdiction and control. He would, however, have no objection if the sentence referred to by Mr. McCaffrey were deleted and if paragraphs 38 and 39 were shortened.

*It was so agreed.*

38. Mr. McCaffrey, supported by Mr. BEN-NOUNA, suggested that the Special Rapporteur should reconsider the wording of the twelfth sentence of paragraph 39, beginning "Accordingly, the control was the ouster of jurisdiction . . .".

39. Mr. BARBOZA (Special Rapporteur) said that he would do his best to meet the concerns of Mr. McCaffrey and Mr. Bennouna.

40. Mr. SHI (Rapporteur) said that the text of paragraphs 38 and 39 to be redrafted with the Special Rapporteur's co-operation would be distributed to the members of the Commission before the end of the session.

*Paragraph 38, as amended, and paragraph 39 were adopted on the understanding that they would be recast by the Special Rapporteur and the Rapporteur.*

Paragraph 40

41. Mr. OGISO said that, in his opinion, paragraph 40 was very important because it reflected what the Special Rapporteur meant by the concept of risk. Although he himself had some doubts about the idea of making risk the basis for liability, he understood that that was one of the main concepts on which the Special Rapporteur had relied. The seventh sentence, reading "Sub-paragraph (a) limited the risk to 'appreciable risk',

meaning that it had to be greater than a normal risk", was thus quite significant. The Special Rapporteur had also used the expression "appreciable harm", as Mr. McCaffrey had done in the chapter of the draft report on the law of the non-navigational uses of international watercourses. Mr. McCaffrey, however, had given a detailed definition of that term: for him, it meant harm that was significant, but less than substantial. If the Special Rapporteur shared that view, should he not say so?

42. He did not recall that that question had been raised during the discussion on the present topic and he could therefore understand that the Special Rapporteur had not referred to it. He nevertheless noted that, in his definition of "appreciable risk" (draft article 2 (a) (ii)), the Special Rapporteur had given the idea of appreciability a different connotation from that implied in the expression "appreciable harm". That point should be clarified.

43. Mr. GRAEFRATH, supported by Mr. BARSEGOV, said that it would be useful to add a footnote at the end of paragraph 40 referring back to paragraphs 21 to 28, which already dealt in detail with the question of "risk" and "appreciable risk".

*It was so agreed.*

44. Moreover, it was rather strange that, after dealing at length with that question in the above-mentioned paragraphs, in which he had explained that he had adopted a different position, the Special Rapporteur should later revert to his original position.

45. Prince AJIBOLA suggested that the words "Occult risk", in the ninth sentence of paragraph 40, should be replaced by "Hidden risk".

*It was so agreed.*

46. Mr. BARBOZA (Special Rapporteur) said that he had not dealt at any greater length with the term "appreciable" because it was a term of art that was well known in environmental law. He had discussed it in detail in his fourth report (A/CN.4/413), in which he had, moreover, used it in the same sense as in the context of the law of the non-navigational uses of international watercourses. Mr. Ogiso's concern was, however, commendable and it might be met by adding a short paragraph to the part of chapter II of the report dealing with transboundary harm, to indicate that the concept of appreciable harm was similar to that used in the context of the law of the non-navigational uses of international watercourses.

*Paragraph 40, as amended, was adopted.*

Paragraph 41

47. Mr. PAWLAK and Mr. Sreenivasa RAO said that, in the second sentence, it would be better to refer to "jurisdictional limits" than to "jurisdictional boundaries".

*It was so agreed.*

48. Mr. TOMUSCHAT said that the words "a best translation", in the fourth sentence, did not mean

anything. They should be replaced by "the best translation" or "an adequate translation".

*It was so agreed.*

*Paragraph 41, as amended, was adopted.*

Paragraph 42

*Paragraph 42 was adopted.*

Paragraph 43

49. Mr. McCAFFREY proposed that the following sentence should be inserted between the second and third sentences: "It was also said that the term 'risk' should encompass activities whose operation entailed a low probability of causing harm, but in relation to which, if harm ensued, it could be catastrophic."

50. Mr. BARBOZA (Special Rapporteur) said that that point of view had already been expressed in paragraph 25 and that it had even been indicated in paragraph 28 that he intended to take it into account in amending draft article 2.

51. Mr. McCAFFREY said that the discussion summed up in paragraph 25 related to draft article 1 and that the present context was different. He was, however, prepared to withdraw his amendment, provided that paragraph 25 was amended slightly to reflect his point of view more clearly.

*It was so agreed.*

*Paragraph 43 was adopted.*

Paragraphs 44 to 46

*Paragraphs 44 to 46 were adopted.*

Paragraph 47

52. Mr. Sreenivasa RAO proposed that the following text should be added at the end of paragraph 47:

"In this connection, a view was also expressed that the Commission should focus on the liability of a multinational corporation without attempting to view it through the prism of State jurisdiction. It was further suggested that such a concept of liability should be proportional to the effective control of the State or other entities operating within each jurisdiction and, more importantly, to the means at their disposal to prevent, minimize or redress harm."

*It was so agreed.*

*Paragraph 47, as amended, was adopted.*

Paragraphs 48 to 52

*Paragraphs 48 to 52 were adopted.*

Paragraph 53

53. Mr. TOMUSCHAT and Mr. RAZAFINDRALAMBO pointed out that, in the first sentence, the word "interest" should be in the plural.

*It was so agreed.*

*Paragraph 53, as amended, was adopted.*

Paragraphs 54 to 57

*Paragraphs 54 to 57 were adopted with some drafting changes.*

Paragraph 58

*Paragraph 58 was adopted.*

Paragraph 59

54. Mr. KOROMA said that paragraph 59 dealt with an important issue which would determine the entire structure of the draft articles. He proposed that the paragraph should reproduce the principles stated by the Special Rapporteur in paragraphs 85 and 86 of his fourth report (A/CN.4/413).

55. Mr. BEESLEY supported that proposal, since paragraph 59 was in fact too vague. At least the second set of principles stated in paragraph 86 of the Special Rapporteur's fourth report should be reproduced, since the first set (para. 85 of the fourth report) had been reproduced in the Commission's report on its thirty-ninth session. He therefore suggested that the word "namely" should be added at the end of the first sentence of paragraph 59 and that the principles contained in paragraph 86 of the fourth report should then be listed.

56. Mr. TOMUSCHAT proposed that, in the second sentence, the words "specific rules for their application" should be replaced by "specific rules of implementation".

57. The CHAIRMAN, speaking as a member of the Commission, said that it would be helpful to make it clear in the first sentence that the principles identified by the Special Rapporteur had been considered relevant to the topic.

58. Mr. BARBOZA (Special Rapporteur) said that, as agreed at the 2088th meeting (para. 28), he would reproduce the principles stated in paragraph 86 of his fourth report (A/CN.4/413) in the part of the Commission's report now under consideration.

59. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 59 with the amendment agreed to by the Special Rapporteur and the amendment proposed by Mr. Tomuschat.

*It was so agreed.*

*Paragraph 59, as amended, was adopted.*

Paragraphs 60 to 63

*Paragraphs 60 to 63 were adopted.*

Paragraph 64

60. Mr. CALERO RODRIGUES proposed that, in order to bring all language versions into line with one another, the word "free" in the last sentence should be replaced by the words "free of charge".

61. Mr. BENNOUNA said that the word *gratuite* in the French text was not any clearer than the word "free". If the reference was to a financial contribution, that should be clearly stated.

62. Mr. TOMUSCHAT said that he also did not see what the last sentence meant.

63. Mr. BARBOZA (Special Rapporteur) said he had meant that, although co-operation was compulsory, assistance to a State might not always be provided free of charge.

64. Mr. TOMUSCHAT proposed that the last sentence should be amended to read: "Nor did the Special Rapporteur wish to imply that assistance provided under the rules on co-operation should be free of charge in all cases."

*It was so agreed.*

*Paragraph 64, as amended, was adopted.*

Paragraph 65

65. Mr. BARSEGOV proposed that, in order to reflect the discussion more completely, a passage along the following lines should be added:

"According to a view expressed during the debate, it was essential, as the Special Rapporteur had indicated in his fourth report, to take account of the rights and interests of the State of origin, for that was of crucial importance from the point of view of prevention. According to that view, taking account of the rights and interests of the State of origin was an integral part of the whole concept of liability in the event of transboundary harm caused by a lawful activity."

*It was so agreed.*

*Paragraph 65, as amended, was adopted with a further drafting change.*

Paragraph 66

66. Mr. BENNOUNA proposed that the following sentence should be added after the first sentence: "Through these procedures, it would be possible to identify activities involving risk and to adopt by agreement the necessary preventive measures."

*It was so agreed.*

*Paragraph 66, as amended, was adopted.*

Paragraph 67

*Paragraph 67 was adopted.*

Paragraph 68

*Paragraph 68 was adopted with a drafting change.*

Paragraphs 69 to 72

*Paragraphs 69 to 72 were adopted.*

Paragraph 73

67. After a brief discussion in which Mr. THIAM, Mr. BENNOUNA and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN said that the first sentence of the French text should read: *Le Rapporteur spécial a expliqué que le principe de la réparation prévaudrait en cas d'absence d'un régime établi d'un commun accord entre l'Etat d'origine et l'Etat affecté.*

*Paragraph 73, as amended in the French text, was adopted.*

## Paragraph 74

68. Mr. BARSEGOV, referring to the penultimate sentence, said that it was States, not the Commission, that would be called upon to transform the obligation in question into a legal obligation.

69. Mr. CALERO RODRIGUES proposed that the sentence should be amended to read: "It was that obligation that had to be transformed into a legal obligation."

*It was so agreed.*

70. In reply to a request by Mr. BENNOUNA for clarifications concerning the last sentence, Mr. BARBOZA (Special Rapporteur) said that, during the discussion, some members had stated that it had to be specified in what cases and in which circumstances the obligation to make reparation existed when it was not linked to risk.

71. Mr. BARSEGOV proposed that the words "In the opinion of these members" should therefore be added at the beginning of the last sentence.

*It was so agreed.*

*Paragraph 74, as amended, was adopted.*

## Paragraphs 75 and 76

*Paragraphs 75 and 76 were adopted with some drafting changes.*

## Paragraph 77

*Paragraph 77 was adopted.*

## Paragraph 78

72. Mr. AL-BAHARNA proposed that the words "of the Commission" should be added after "the members".

*It was so agreed.*

*Paragraph 78, as amended, was adopted.*

## Paragraph 79

73. Mr. McCAFFREY said that, as was customary, paragraph 79 should form the subject of a separate section, which would be entitled: "C. Points on which comments are invited".

74. For the sake of uniformity, the paragraph should also be brought into line with the corresponding text (para. 87) of chapter III of the report (see 2088th meeting, para. 19), and it should be specified that the Commission would welcome the views of Governments in particular on the question raised. The question itself should be stated more straightforwardly, since the Commission wished to know whether the basis of liability should be risk or harm. Paragraph 79 as it now stood was too abstract.

*The meeting rose at 1.05 p.m.*

## 2091st MEETING

*Wednesday, 27 July 1988, at 3 p.m.*

*Chairman: Mr. Bernhard GRAEFRATH*

*Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.*

**Draft report of the Commission on the work of its fortieth session (continued)**

**CHAPTER II. International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/L.424 and Corr.1)**

*Paragraph 79 (concluded)*

1. The CHAIRMAN said that, following consultations with the Special Rapporteur and to obviate the need for further discussion, he would suggest that paragraph 79 should be amended to read: "The Commission would welcome the views of Governments in particular on the role risk should play in the topic (see paragraphs 21 to 28 above)."

2. Mr. BEESLEY said that that formulation was one possibility, but was so condensed that the Commission was unlikely to receive useful answers. He proposed instead that the last part of the paragraph should read: "... on the question whether the concept of appreciable risk or the concept of appreciable harm should be the basis of liability". He was, however, prepared to accept any clear form of wording that would have the necessary effect.

3. Mr. RAZAFINDRALAMBO pointed out that, in order to bring the French text of paragraph 79 into line with the English, the words *à la fois* should be added before *à la prévention*. Also, the word *applicabilité* should be replaced by *application*.

4. Mr. BARSEGOV said that the Commission now seemed to want to change the basis on which it had been working. If the neutral wording suggested by the Chairman was not acceptable, the question the Commission should put to the General Assembly was whether the concept of liability for lawful acts should be based, as before, on risk, or whether the basis should be changed to harm, or again, if it was deemed preferable, to appreciable harm, the word "appreciable" being placed between square brackets so as to indicate that there were two schools of thought on the matter.

5. Prince AJIBOLA said that the text proposed by the Chairman would be acceptable provided the reference to paragraphs 21 to 28 was deleted.

6. Mr. FRANCIS said that the Commission should ask the General Assembly whether the scope of the draft articles should be limited to activities involving risk, as

provided in draft article 1, and if so, whether risk should be qualified by the term “appreciable”.

7. Mr. KOROMA said that, unfortunately, the text proposed by the Chairman did not present the issue in a way that would lead to an appropriate response from the General Assembly. To give both sides of the coin, as it were, it would be preferable to have a form of words which invited the General Assembly’s comments on whether risk or harm should form the basis of liability.

8. Mr. ARANGIO-RUIZ said that he still thought it would be better to defer putting any question on the topic to the General Assembly until the Commission’s next session. If a question was to be put, however, he could accept the Chairman’s formulation, since it was the most neutral.

9. Mr. CALERO RODRIGUES said that it was not so much a matter of putting a question to the General Assembly as of indicating issues on which the Commission wished to have the Assembly’s opinion. Also, he did not think it was correct to speak of a change of approach to the topic: the fact was that some members favoured the concept of risk as the basis of liability and others favoured harm. The main thing was to invite the comments of Governments in the General Assembly on the important role which both risk and harm should play in the topic. Accordingly, he could accept the text proposed by the Chairman but would suggest that it refer to the role which both risk and harm should play in the topic.

10. Mr. KOROMA said that Mr. Calero Rodrigues’s proposal should be slightly amended by adding the words “in particular” before “on the role risk and harm should play in the topic”.

11. The CHAIRMAN suggested, in the light of the comments made, that paragraph 79 should be amended to read: “The Commission would welcome the views of Governments, either in the Sixth Committee or in written form, in particular on the role risk and harm should play in the present topic (see paragraphs 21 to 28 above).” As suggested by Mr. McCaffrey (2090th meeting, para. 73), paragraph 79 would constitute section C of chapter II.

*It was so agreed.*

*Paragraph 79, as amended, was adopted.*

#### B. Consideration of the topic at the present session (concluded)

##### New paragraph 26 bis

12. The CHAIRMAN said that, following consultations with the Special Rapporteur, he would suggest that the text he had proposed at the previous meeting (2090th meeting, para. 10) for a new paragraph 26 bis should be shortened to read:

“One member pointed out that activities involving risk meant not any kind of risk but an exceptional risk capable of producing harm or injury. Risk would exist whatever its degree. The obligation under the draft articles would therefore be to co-operate with the States concerned in order to set up appropriate

machinery to regulate matters pertaining to harm caused by the consequences of an exceptionally dangerous activity.”

*It was so agreed.*

*New paragraph 26 bis was adopted.*

##### New paragraph 24 bis

13. Mr. BARBOZA (Special Rapporteur) said that Prince Ajibola proposed inserting a new paragraph 24 bis, reading:

“While some members were of the opinion that the concept of ‘risk’ should not be introduced into the present topic in any form and preferred the use of the terms ‘injury’ or ‘harm’, other members agreed with the Special Rapporteur and expressed the opinion that ‘risk’ was an important element of liability in this topic.”

14. It seemed to him, as Special Rapporteur, that it would be more accurate to speak of “one member” rather than “some members”. Prince Ajibola’s proposal, as thus amended, could perhaps then be inserted at the beginning of paragraph 25, the first sentence of which would be replaced by two sentences reading: “One member was of the opinion that the concept of ‘risk’ should not be introduced into the present topic in any form. Some other members of the Commission, while not rejecting the introduction of the concept of risk, disagreed with its place as the predominant concept in the topic.”

15. Prince AJIBOLA said that he was prepared to accept the Special Rapporteur’s amendment to his proposal, although, to the best of his recollection, other members had from the outset opposed including the concept of risk in the topic, since it merely clouded the whole issue. Naturally, he was open to correction on that score. He fully appreciated the views of those members who regarded risk as an important element in liability and, indeed, had taken account of those views in his proposal. By the same token, he would like his own view to be reflected, even if it was presented as being the view of one member.

16. Mr. BARSEGOV said that there seemed to be three schools of thought on the issue: first, that risk had no place whatsoever in the topic, which was the view held by Prince Ajibola; secondly, that liability should be based on harm, the role of risk being to oblige States to take certain measures; and, thirdly, that risk formed an integral part of the whole concept of liability. He would like to know whether that third school of thought was also reflected in the report.

17. Mr. ARANGIO-RUIZ said that, in his view, harm was an essential basis of liability, but he did not exclude the relevance of risk within the topic.

18. Mr. KOROMA said that he could accept Mr. Barsegov’s proposition that risk formed an integral part of the topic, in the interests of arriving at a solution to the problem. He would, however, suggest that the first part of the text proposed by Prince Ajibola should be amended to read: “While some members were of the opinion that the concept of ‘risk’ was not the basis of

the present topic and would prefer the concept of 'injury' or 'harm', other members agreed . . .".

19. Mr. OGISO said that, during the general debate, he had expressed doubts about the appropriateness of using risk as the basis of liability, but his position had not been as categorical as that of Prince Ajibola. It was for the Commission to decide whether he should be counted as another member who was opposed to the concept of risk.

20. Prince AJIBOLA said he agreed with Mr. Barsegov that there were three schools of thought on the issue: those who, like himself, wanted risk to be entirely excluded and believed that the core of the topic was liability and harm; those who, like Mr. Koroma, agreed that risk should not be the basis of the topic but thought that it should be brought into play; and those who, like Mr. Barsegov, felt that risk was a pivotal aspect of the problem. All three schools of thought must be reflected in the report.

21. The CHAIRMAN suggested that, to that end, the new paragraph 24 *bis* should read as follows: "Some members were of the opinion that the concept of 'risk' should not be introduced into the present topic in any form and preferred the concepts of 'injury' or 'harm'."

22. Mr. KOROMA said that he was prepared to accept the text proposed by the Chairman. Regrettably, however, it was an over-simplified and artificial reflection of the Commission's discussion, because it had been drafted under sharp time constraints.

23. Mr. OGISO said that he, too, could accept the text proposed by the Chairman, even though he was not sure whether his position corresponded in every particular to that of Prince Ajibola.

24. Mr. BARBOZA (Special Rapporteur) proposed that, in view of the doubts just expressed by Mr. Ogiso, the Commission should adopt the text proposed by the Chairman for the new paragraph 24 *bis* but amend the words "Some members were" to read "One member was".

*It was so agreed.*

*New paragraph 24 bis, as amended, was adopted.*

*Section B, as amended, was adopted.*

*Chapter II of the draft report, as amended, was adopted.*

**CHAPTER IV. Draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/L.426 and Add.1)**

**A. Introduction (A/CN.4/L.426)**

Paragraphs 1 to 19

25. Mr. AL-BAHARNA said that he had no objection to the proposed introduction but believed that, for future reports, the Commission should consider omitting such historical surveys altogether or abridging them radically.

26. The CHAIRMAN said that that suggestion would be given due consideration.

*Paragraphs 1 to 19 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.426)**

Paragraphs 20 to 29

*Paragraphs 20 to 29 were adopted.*

Paragraph 30

27. Mr. MAHIYOU said that, in the last sentence, the words "the Hague Court" should be replaced by "the International Court of Justice".

*It was so agreed.*

*Paragraph 30, as amended, was adopted.*

Paragraphs 31 to 33

*Paragraphs 31 to 33 were adopted.*

Paragraph 34

28. The CHAIRMAN, responding to a comment by Mr. Sreenivasa RAO, suggested that, in the first sentence, the words "The majority of the" should be replaced by "Many".

*It was so agreed.*

29. Mr. BENNOUNA proposed that the phrase "the material preparation and creation of conditions for the implementation of criminal intent", in the ninth sentence, should be replaced by "the material element of preparation". In addition, the words "foreign policies of expansionism, intervention and domination", in the last sentence, should be replaced by "foreign policies of expansion and domination".

*It was so agreed.*

*Paragraph 34, as amended, was adopted.*

New paragraph 34 *bis*

30. Mr. Sreenivasa RAO said that the members of the Commission, including himself, who had expressed strong doubts about the advisability of including preparation of aggression in the draft code had not had their views reflected in the report. They had argued, *inter alia*, that it was difficult to distinguish between preparation of aggression and preparation of defensive action, and that preparation of aggression on a large scale amounted in any case to threat of aggression and was therefore covered by the relevant provisions.

31. Mr. THIAM (Special Rapporteur) confirmed that that view had been expressed during the discussion: he would welcome a specific drafting proposal.

32. Mr. McCAFFREY proposed the following text for a new paragraph 34 *bis*:

"Some members, however, were of the view that preparation of aggression should not be included in the code as a separate offence. They believed that it would be very difficult to distinguish acts amounting to preparation of aggression from other legitimate acts of defence, and that in any case it could be covered by the crime of the threat of aggression."

*It was so agreed.*

*New paragraph 34 bis was adopted.*

Paragraph 35

*Paragraph 35 was adopted.*

## Paragraph 36

*Paragraph 36 was adopted with minor drafting changes.*

## Paragraphs 37 to 41

*Paragraphs 37 to 41 were adopted.*

## Paragraph 42

33. Mr. BENNOUNA pointed out that the second sentence of the French text should be brought into line with the English, perhaps by adding the word *internationaux* or *pertinents* after *instruments*.

*It was so agreed.*

*Paragraph 42, as amended in the French text, was adopted.*

## Paragraphs 43 to 45

*Paragraphs 43 to 45 were adopted.*

## Paragraph 46

34. Mr. MAHIU suggested that the last sentence of the French text should be amended to make it clear that the *seconde variante* mentioned therein related to a draft paragraph on intervention submitted by the Special Rapporteur, and not to a decision of the ICJ in the *Nicaragua* case.

*It was so agreed.*

*Paragraph 46, as amended in the French text, was adopted.*

## Paragraph 47

35. Mr. BEESLEY suggested that the words "intervention was wrongful by definition", in the second sentence, should be replaced by "the term 'intervention' should be used as a term of art for wrongful conduct".

*It was so agreed.*

*Paragraph 47, as amended, was adopted.*

## Paragraph 48

36. Mr. KOROMA suggested that the words "which defined intervention" should be replaced by "which dealt with intervention".

*It was so agreed.*

*Paragraph 48, as amended, was adopted.*

## Paragraph 49

37. Mr. BENNOUNA proposed that the following sentence should be inserted between the first and second sentences: "Some other members felt that the case of minor armed incidents which were not serious enough to constitute aggression under the 1974 Definition of Aggression should be left aside."

*It was so agreed.*

38. Mr. TOMUSCHAT suggested that the words "as such", at the end of the first sentence, should be replaced by "in the proper sense", so as to bring the English text into line with the French.

*It was so agreed.*

*Paragraph 49, as amended, was adopted.*

## Paragraphs 50 and 51

*Paragraphs 50 and 51 were adopted.*

## Paragraph 52

39. Mr. TOMUSCHAT proposed that the following passage should be added at the end of the paragraph:

"Other members also criticized the second alternative as being too vague in referring to such notions as 'unrest' and 'activities against another State'. According to them, the wording should follow the definition of intervention contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States."

*It was so agreed.*

*Paragraph 52, as amended, was adopted.*

## Paragraph 53

40. Mr. CALERO RODRIGUES proposed that the paragraph should be amended to read:

"One member said that he was in favour of combining the alternatives proposed by the Special Rapporteur. Another was of the opinion that it was not necessary to include intervention in the code as a separate crime. The more serious acts included in the notion of intervention should be precisely described and each of them inserted in the code as a separate crime."

*It was so agreed.*

*Paragraph 53, as amended, was adopted.*

## Paragraph 54

41. Mr. Sreenivasa RAO suggested that the heading of subsection 6, "Intervention and terrorism", should be replaced by two separate headings, namely "Intervention" before paragraph 39 and "Terrorism" before paragraph 54.

42. The CHAIRMAN explained that it would be difficult at the present stage to alter the system of headings as it corresponded to that used by the Special Rapporteur in his sixth report (A/CN.4/411). He suggested that the word "terrorism" at the beginning of paragraph 54 should be underlined to indicate the change of subject.

*It was so agreed.*

*Paragraph 54, as amended, was adopted.*

## Paragraph 55

43. Mr. THIAM (Special Rapporteur) said that the word "operating" should be inserted between "organizations" and "at the international level" at the end of the paragraph.

*Paragraph 55, as amended, was adopted.*

## Paragraph 56

44. Mr. THIAM (Special Rapporteur) said that, in the second sentence, the words "State terrorism" should be replaced by "terrorism committed by a State against another State" and the words "and not peace inside a State" should be deleted.

45. Mr. BENNOUNA wondered whether it might not be appropriate to replace the words "international

peace", which would be the last words of the paragraph as amended by the Special Rapporteur, by "the peace and security of mankind".

46. Mr. CALERO RODRIGUES proposed that the whole phrase beginning with the words "since the draft code", in the second sentence, up to the end of the paragraph, should be deleted.

47. Mr. Sreenivasa RAO said he disagreed that there had been a consensus that internal terrorism did not fall within the scope of the draft code. Either the word "consensus" should be changed or the nature of the consensus that had actually emerged should be defined in greater detail.

48. After further discussion in which Mr. MAHIU, Mr. THIAM (Special Rapporteur) and Mr. Sreenivasa RAO took part, Mr. TOMUSCHAT proposed that paragraph 56 should read as follows:

"A consensus emerged in the Commission that acts of terrorism confined to a State without any foreign support did not fall within the part of the draft code dealing with crimes against peace. With regard to international terrorism, many members were of the opinion that the code should cover terrorism committed by a State against another State."

*It was so agreed.*

*Paragraph 56, as amended, was adopted.*

Paragraph 57

49. Mr. AL-BAHARNA proposed that the words "baneful forms", in the third sentence, should be replaced by "heinous forms".

*It was so agreed.*

50. Mr. BENNOUNA proposed that the phrase "terrorism might well extend to chemical . . .", in the fourth sentence, should be amended to read: "terrorism might well extend to the use of chemical . . .".

*It was so agreed.*

51. Mr. TOMUSCHAT proposed that the penultimate sentence should be deleted. The statement that "In future, even entire countries or regions might fall into the hands of terrorists" was undoubtedly an exaggeration.

52. Mr. THIAM (Special Rapporteur) pointed out that paragraph 57 reflected the views expressed by some members of the Commission. At least one member had made the statement contained in the penultimate sentence.

53. Mr. KOROMA noted that the penultimate sentence began with the words "In future". Unfortunately, at the present time areas in some countries were already under the control of terrorists.

54. Mr. RAZAFINDRALAMBO supported Mr. Koroma's comment and recalled that, during the discussion, Mr. Reuter had cited the example of whole areas in certain countries which were under the control of bandits or drug traffickers.

55. After a brief discussion, the CHAIRMAN suggested that a decision on paragraph 57 should be de-

ferred until the next meeting, when Mr. Koroma would submit a rewording of the penultimate sentence.

*It was so agreed.*

56. Mr. PAWLAK proposed that the following sentence should be added at the end of paragraph 57 in order to reflect the views he had expressed: "It was also pointed out that the Commission, in the further elaboration of the definition and scope of international terrorism, should attach greater importance to treaties in force, as well as to the work of experts dealing with the subject."

*It was so agreed.*

New paragraph 57 bis

57. Mr. Sreenivasa RAO proposed a new paragraph 57 bis, reading:

"While the efforts of the Special Rapporteur in defining international terrorism were commended, it was suggested that such a definition could usefully draw upon the example of several recent international conventions and treaties which adopted an enumerative technique, such as the Extradition Treaty between Canada and India of 6 February 1987."

*New paragraph 57 bis was adopted.*

Paragraph 58

*Paragraph 58 was adopted.*

Paragraph 59

58. Mr. AL-BAHARNA proposed that the expression "1937 Convention", in the first sentence, should be replaced by the full title: "1937 Convention for the Prevention and Punishment of Terrorism".

*It was so agreed.*

*Paragraph 59, as amended, was adopted.*

Paragraph 60

59. Mr. Sreenivasa RAO pointed out that the statement in the second sentence to the effect that some terrorists were driven "by idealism", followed by the reference to "some noble purpose" in the third sentence, gave a somewhat unbalanced picture and amounted almost to a glorification of terrorism.

60. Mr. THIAM (Special Rapporteur) said that paragraph 60 merely reflected statements made in the course of the debate and that some members had in fact used the form of language criticized by Mr. Sreenivasa Rao.

61. Mr. ARANGIO-RUIZ said that he shared the opinion expressed by Mr. Sreenivasa Rao. Paragraph 60 dwelt too much on terrorists. The best course would be to reduce the length of the paragraph considerably.

62. Mr. TOMUSCHAT said it was indeed going too far to say that some terrorists were driven by idealism. One could perhaps speak of "misguided idealism". The best solution would be to delete the second sentence of paragraph 60, which contained that expression, and to be content with the statement in the third sentence that the Commission could not disregard the causes of ter-

rorism, which were not always without some noble purpose.

63. Prince AJIBOLA said the basic philosophy should be that terrorism constituted a crime. Glorification of terrorism should, of course, be avoided. He urged that paragraph 60 be reduced to one compact sentence.

64. Mr. EIRIKSSON proposed that the discussion on paragraph 60 should be suspended and the Special Rapporteur invited to submit a redraft at the next meeting.

*It was so agreed.*

*The meeting rose at 6.10 p.m.*

## 2092nd MEETING

*Thursday, 28 July 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft report of the Commission on the work of its fortieth session (*continued*)

#### CHAPTER IV. *Draft Code of Crimes against the Peace and Security of Mankind* (*continued*) (A/CN.4/L.426 and Add.1)

##### B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.426)

Paragraph 57 (*concluded*)

1. Mr. KOROMA said that he no longer wished to propose any amendment in connection with the penultimate sentence (see 2091st meeting, para. 55).

2. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 57 as amended at the 2091st meeting, on the understanding that the penultimate sentence ("In future, even entire countries or regions might fall into the hands of terrorists") would be deleted.

*It was so agreed.*

*Paragraph 57, as amended, was adopted on that understanding.*

Paragraph 60 (*concluded*)

3. Mr. THIAM (Special Rapporteur) proposed, in the light of the discussion at the previous meeting, that paragraph 60 should be amended to read:

"Some members were of the opinion that a degree of caution was required on the part of the Commis-

sion in the matter of international terrorism. They pointed out that terrorism could be inspired by the most diverse motives, particularly idealism."

Paragraph 61 would follow on logically.

4. Prince AJIBOLA said that he was somewhat troubled by the word "idealism".

5. Mr. MAHIOU said that he appreciated Prince Ajibola's view, but would point out that the paragraph reflected the opinions expressed by some members of the Commission and not the position of the Commission as a whole.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the new text of paragraph 60 proposed by the Special Rapporteur.

*It was so agreed.*

*Paragraph 60, as amended, was adopted.*

Paragraph 61

7. Mr. PAWLAK proposed, with the agreement of the Special Rapporteur, that the end of the second sentence should be amended to read: ". . . and it was therefore suggested that international terrorism as an independent crime should form the subject of a separate draft article."

8. Mr. BENNOUNA pointed out that there might well prove to be more than one draft article on the subject.

9. Mr. THIAM (Special Rapporteur) proposed that the words "a separate draft article" should be replaced by "separate provisions".

10. Prince AJIBOLA said that he would like the text to make it clear whether the "suggestion" had been made by one or more members of the Commission.

11. Mr. THIAM (Special Rapporteur), pointing out that many members had made the suggestion, said that he would so specify in the paragraph. In addition, since paragraph 61 reflected first his view, and then the views of certain members of the Commission, it should be divided into two, the second paragraph starting with the second sentence ("Not all acts of international terrorism . . .").

12. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 61, as amended by Mr. Pawlak and the Special Rapporteur.

*It was so agreed.*

*Paragraph 61, as amended, was adopted.*

Paragraph 62

*Paragraph 62 was adopted.*

Paragraph 63

*Paragraph 63 was adopted with a minor drafting change.*

Paragraph 64

13. Mr. THIAM (Special Rapporteur) said that the words "more precise", in the first sentence, should be replaced by "better drafted".

14. Mr. TOMUSCHAT asked the Secretariat to verify the titles of the treaties mentioned in the paragraph.

15. Mr. KOROMA said that the dates of all three treaties mentioned in the paragraph should be indicated.

16. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 64, as amended by the Special Rapporteur and in the light of the comments made by Mr. Tomuschat and Mr. Koroma.

*It was so agreed.*

*Paragraph 64, as amended, was adopted.*

Paragraph 65

17. Mr. ROUCOUNAS proposed that the following sentence should be added at the end of the paragraph: "According to another opinion, paragraph 4 should not provide encouragement to a potential aggressor or give the impression that the inherent right of self-defence under the Charter of the United Nations was being impaired."

18. Mr. THIAM (Special Rapporteur) said that he agreed to the proposal by Mr. Roucounas. In addition, at the end of the second sentence, the words "any breach" should be replaced by "a breach".

*Mr. Roucounas's amendment was adopted.*

*Paragraph 65, as amended, was adopted.*

Paragraph 66

19. Mr. THIAM (Special Rapporteur) said that, in the last sentence of the French text, the word "autres" should be replaced by "d'autres".

*Paragraph 66, as amended in the French text, was adopted.*

Paragraph 67

*Paragraph 67 was adopted.*

Paragraph 68

20. Mr. THIAM (Special Rapporteur) said that it should be made clear that the "article 19" referred to in the paragraph was article 19 of part 1 of the draft articles on State responsibility.

*Paragraph 68, as amended, was adopted.*

Paragraph 69

21. Mr. KOROMA proposed that the first part of the second sentence should be amended to read: "It was pointed out that 'colonialism' was a familiar term and that, despite the advances in decolonization . . .".

*It was so agreed.*

*Paragraph 69, as amended, was adopted.*

Paragraph 70

22. Mr. THIAM (Special Rapporteur) said that the word "colonization", at the end of the first sentence, should be replaced by "domination".

23. Mr. RAZAFINDRALAMBO said that the dates of the two General Assembly resolutions should be given.

*It was so agreed.*

*Paragraph 70, as amended, was adopted with a further minor drafting change.*

Paragraph 71

*Paragraph 71 was adopted.*

Paragraph 72

24. Mr. TOMUSCHAT proposed that the following text should be inserted after the second sentence: "The right to self-determination was a right of all peoples, as expressly proclaimed in article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights, as well as in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. It was therefore necessary to confirm its general application."

25. Mr. ARANGIO-RUIZ said that he supported Mr. Tomuschat's proposal. For his own part, he proposed that the end of the second sentence of paragraph 72 should be amended to read: ". . . but there were other cases in which it had been and could and should be used."

*It was so agreed.*

26. Mr. THIAM (Special Rapporteur), referring to the second sentence of Mr. Tomuschat's proposal, said that to speak of "general application" of the right to self-determination might well be going too far and imply a right to secession. The principle of self-determination was to be handled with care.

27. Mr. ARANGIO-RUIZ pointed out that self-determination was a general principle and, like any principle in international law, it applied—obviously with its own particular limitations—to all persons and all peoples.

28. Mr. CALERO RODRIGUES noted that paragraph 72 reflected the views of members and did not commit the Commission as a whole.

29. Mr. TOMUSCHAT suggested changing his amendment so that it spoke of "more general" application.

30. Mr. BARSEGOV said that the principle of self-determination was a universal rule of *jus cogens*. The way it had been applied in Africa, in the context of decolonization, was only one of the possible ways of implementing it and in no sense altered its universal character. Accordingly, it was difficult to agree to Mr. Tomuschat's sub-amendment: how could something be more or less universal?

31. Mr. THIAM (Special Rapporteur) and Mr. MAHIU said that the point at issue was the application of the principle, not the principle itself.

32. Mr. ARANGIO-RUIZ said that he had spoken a number of times in the course of the debate in order to affirm that the right to self-determination was a universal principle, proclaimed as such by the United Nations, and he wished to emphasize that he was against the idea

of qualifying it by an expression such as “more general”. Consequently, the following sentence should be added immediately after Mr. Tomuschat’s sub-amendment: “One member wished to emphasize that the principle of self-determination was of universal application.”

33. Mr. TOMUSCHAT withdrew his sub-amendment. The effects of the new sentence proposed by Mr. Arangio-Ruiz would be disastrous. The principle of self-determination was universal in character for the Commission as a whole and not simply for one of its members.

34. Mr. BARSEGOV, Mr. KOROMA, Mr. GRAEF-RATH, Prince AJIBOLA, Mr. BENNOUNA and Mr. Sreenivasa RAO said that they shared the concern expressed by Mr. Tomuschat, and suggested various formulas for the opening words of the new sentence proposed by Mr. Arangio-Ruiz (“Some members” or “Many members wished to emphasize . . .”, “All members considered . . .”), finally proposing: “It was pointed out . . .”.

35. Mr. ARANGIO-RUIZ said that paragraph 72 consisted of three parts. The first stated the universality of the principle of self-determination, the second pointed out that it had been applied mainly in eradicating colonialism, and the third indicated that it could be used outside the colonial context. He was ready to withdraw the new sentence he had proposed adding if it was made clear in the report that the principle of self-determination was universal in character.

36. Mr. AL-BAHARNA proposed that the following sentence should be added at the end of paragraph 72: “However, all members of the Commission believed that the principle of self-determination was of universal application.”

37. Mr. Sreenivasa RAO said he endorsed that formula, but would prefer to say “In this connection” rather than “However”.

*It was so agreed.*

*Mr. Al-Baharna’s amendment, as modified by Mr. Sreenivasa Rao, was adopted.*

38. Prince AJIBOLA suggested that the word “strong”, in the first sentence of paragraph 72, should be replaced by “strengthened”.

*Paragraph 72, as amended, was adopted.*

#### Paragraph 73

39. Mr. ARANGIO-RUIZ proposed that the third sentence should be replaced by the following text:

“Other members said that self-determination was a perpetual, imprescriptible right which was contemplated by international law in both its internal and its external dimensions. It protected not only the acquisition and preservation of independence from alien domination, but also the right of any people, in any State, freely to choose and change at any time its political, economic and social status.”

40. Mr. TOMUSCHAT proposed that the first part of the fourth sentence should be amended to read: “Still others cautioned against any misunderstanding of the

right to self-determination as sanctioning a right of secession in composite, multiracial . . .”.

41. Mr. BENNOUNA said that he supported both of the proposed amendments, but the expression “without external interference”, which was drawn from United Nations terminology, should be added at the end of the text proposed by Mr. Arangio-Ruiz.

42. Mr. ARANGIO-RUIZ said that he could not agree to that addition. Chapter IV of the report dealt elsewhere with the question of interference.

43. Mr. BARSEGOV proposed, with the agreement of Mr. Arangio-Ruiz, that the following phrase should be added at the end of the latter’s proposed text: “according to its freely expressed will, without foreign interference”.

44. Mr. CALERO RODRIGUES said that the fourth sentence, which Mr. Tomuschat sought to change, reflected the opinion expressed by some members of the Commission during the debate. Hence it seemed difficult to make any changes.

45. Mr. BARSEGOV said he did not recall that the words “ambiguity” and “danger”, which Mr. Tomuschat was striving to avoid in the fourth sentence, had been used in the debate.

46. Mr. THIAM (Special Rapporteur) proposed that the words “ambiguity” and “danger”, which seemed to pose some difficulty, should be deleted and that the first part of the fourth sentence should be amended to read: “Still others drew attention to the fact that the expression ‘self-determination of peoples’ might potentially contain the idea of secession . . .”.

47. Mr. Sreenivasa RAO said he feared that, if the contentious words were deleted, the opinion reflected in that passage might be devoid of substance. Another formula should be found.

48. Mr. KOROMA suggested that the words “in composite, multiracial or multiracial societies”, in the same sentence, should be replaced by “in heterogeneous societies”.

49. Mr. AL-BAHARNA, after consulting various members of the Commission, proposed that the words “ambiguity” and “danger”, in the fourth sentence, should be deleted and that, in the light of the proposals made by the Special Rapporteur and Mr. Koroma, the first part of that sentence should be amended to read: “Still other members drew attention to the fact that the expression ‘self-determination of peoples’ might potentially contain the idea of secession in heterogeneous communities and stated that, in the framework of . . .”.

50. The CHAIRMAN, noting that Mr. Bennouna and Mr. Barsegov were not pressing their proposals, said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 73 with the amendments proposed by Mr. Arangio-Ruiz and Mr. Al-Baharna, on the understanding that it would be made clear that Mr. Arangio-Ruiz’s amendment expressed the opinion of one member

*It was so agreed.*

*Paragraph 73, as amended, was adopted.*

Paragraphs 74 to 77

*Paragraphs 74 to 77 were adopted.*

Paragraph 78

51. Mr. Sreenivasa RAO said that the following sentence should be added at the end of the paragraph: "One member expressed the view that, in defining a mercenary, 'private gain' as a motivation should be regarded as an important element and that the exact amount of remuneration paid and the nationality of the person in question should not be over-emphasized."

*It was so agreed.*

*Paragraph 78, as amended, was adopted.*

Paragraphs 79 to 84

*Paragraphs 79 to 84 were adopted.*

*Section B, as amended, was adopted.*

**CHAPTER III. The law of the non-navigational uses of international watercourses** (continued) (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

**C. Draft articles on the law of the non-navigational uses of international watercourses (continued)\*** (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

2. TEXTS OF DRAFT ARTICLES 8 TO 21, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTIETH SESSION (A/CN.4/L.425/Add.1 and Corr.1)

*Commentary to article 8* (Obligation not to cause appreciable harm)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

52. Mr. CALERO RODRIGUES proposed that the words "A watercourse State's right . . . is limited by its duty", in the second sentence, should be replaced by "A watercourse State's right . . . has its limit in the duty".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraphs (3) to (5)

*Paragraphs (3) to (5) were approved.*

Paragraph (6)

53. Mr. McCAFFREY (Special Rapporteur) said that the treaties that should be mentioned in footnote 5 were the 1971 Convention between Ecuador and Peru and the 1909 Treaty between Great Britain and the United States of America. The footnote would be reworded accordingly.

*Paragraph (6) was approved on that understanding.*

Paragraph (7)

54. Mr. MAHIU said it was paradoxical that the paragraph dealt with the qualifier "appreciable" (*appréciable, apreciable*), yet most of the examples cited argued in favour of the word *sensible* in French and Spanish.

\* Resumed from the 2087th meeting.

55. Mr. McCAFFREY (Special Rapporteur) said that the problem lay in the French and Spanish translations of the term "appreciable". He proposed that the following sentence should be added at the end of paragraph (7): "The word *sensible* in French and Spanish is ordinarily translated by 'appreciable' in English."

*It was so agreed.*

56. Mr. GRAEFRATH said that, even at the thirtieth session, during the debate in the Drafting Committee on draft article 8, and then during the consideration of the Committee's report at the present session, he had criticized article 8 for not bringing out the distinction between the rule of responsibility and the rule of liability. "Appreciable harm" was not a sufficiently clear criterion, something which had been amply demonstrated by the debate on paragraph 2 of draft article 16, as was apparent from paragraphs 49 to 57 of chapter III of the draft report and the question addressed to the General Assembly in paragraph 87 (b) (see 2088th meeting, para. 3). It could also be seen from the debate on the expression "appreciable harm" in connection with the topic of international liability. As he had already stated (2070th meeting, para. 51), he would have preferred article 8 to be worded as follows: "Watercourse States shall ensure that the use of an international watercourse within their territory is in conformity with their obligations under article 6 and shall take the necessary measures to prevent significant harm from being caused to other watercourse States."

57. The Special Rapporteur presented article 8 as a "well-established rule" (para. (1) of the commentary) confined to an obligation "not to cause appreciable harm", and sought to show that numerous treaties contained a rule of that kind. Yet a perusal of the treaties mentioned in footnote 5 and paragraph (7) of the commentary did not prove that the term "appreciable" was generally used to qualify "harm" or significant damage, nor did the treaties establish a general obligation of liability in the event of harm. Like the discussion in the Commission, they showed that, in its present form, article 8 did not set out a "well-established rule" and that it represented progressive development of the law.

58. It was regrettable that the Commission had not had time to recast the commentary so as to make it clear that the Commission was proposing progressive development of the law. Accordingly, he was obliged to reserve his position on article 8 and on the whole of the commentary thereto, and asked for his position to be reflected in a footnote.

59. Mr. BARSEGOV said that he, too, thought that the Commission was creating new rules of law, whereas it should simply work out a framework agreement constituting recommendations to States. Since the commentary to article 8 implied that the rules adopted by the Commission rested on rules of law already in force, he was compelled, since he did not share that view, to reserve his position from the outset, so as not to have to revert to the question during the consideration of each paragraph of the commentary.

60. After a procedural discussion in which Mr. BEESLEY, Mr. YANKOV, Mr. McCAFFREY (Special Rapporteur) and the CHAIRMAN took part, on the question whether Mr. Graefrath's and Mr. Barsegov's reservations should be mentioned in a footnote or in the main body of the commentary to article 8, it was decided that Mr. Graefrath and the Special Rapporteur should settle the matter together.

*Paragraph (7), as amended, was approved on that understanding.*

Paragraph (8)

61. Mr. CALERO RODRIGUES said that the first sentence, reading: "A breach of article 8 would engage the international responsibility of the watercourse State in question", was too categorical in affirming what was, for the moment, simply one of a number of possible interpretations. The Commission had not yet considered the matter in sufficient depth to decide whether such international responsibility was for fault or liability for harm arising out of lawful activities. It would be premature to set out such a clear position in the commentary, a position that would have major consequences for future work on the international liability topic. He therefore proposed that paragraph (8) should be deleted.

62. Mr. AL-BAHARNA said that he thought an attempt should be made to find suitable wording so that the paragraph could be retained.

63. Mr. McCAFFREY (Special Rapporteur) said that he agreed to delete paragraph (8), if that was the Commission's wish.

64. Mr. ARANGIO-RUIZ and Mr. TOMUSCHAT said that they, too, were in favour of deleting the paragraph.

*Paragraph (8) was deleted.*

Paragraph (9)

*Paragraph (9) was approved.*

Paragraphs (10) and (11)

65. Mr. EIRIKSSON said that it was ill-advised to state, as did the first sentence of each paragraph, that the principle expressed in article 8 was "implicit" in a number of agreements. Since it was sometimes difficult to determine the substance of express provisions in agreements, it seemed questionable to base a rule of law on implicit provisions.

66. Mr. McCAFFREY (Special Rapporteur) suggested that it be stated instead that the principle expressed in article 8 "is applied" in a variety of agreements.

*It was so agreed.*

67. Mr. CALERO RODRIGUES proposed that the words "in modern watercourse agreements", in the first sentence of paragraph (11), should be replaced by "in many modern watercourse agreements" and that, in the second sentence, the words "several examples" should be replaced by "some examples".

*It was so agreed.*

*Paragraphs (10) and (11), as amended, were approved.*

Paragraph (12)

*Paragraph (12) was approved.*

Paragraph (13)

68. Mr. GRAEFRATH said that the examples and precedents cited in paragraphs (13) *et seq.* were far too long, if not pointless. They did not, in any case, persuade him that the rule laid down in article 8 existed in international law. In his opinion, paragraphs (13) to (28) could well be deleted.

69. Mr. BENNOUNA said he, too, found that part of the commentary too long. As he had said at the previous session,<sup>1</sup> a special rapporteur's report, in which he explained why he was proposing a particular article—and in which an explanation of diplomatic and treaty practice was therefore of some use—should be distinguished from a commentary, which clarified the article for the purposes of interpretation and application.

70. Mr. MAHIU said that he was of the same opinion.

71. Mr. BARSEGOV said that he agreed with what had just been said, especially since the sources cited by the Special Rapporteur in support of his argument could well be used to justify the opposite case, namely that the rule in question did not exist. In order to save time, he would simply refer members to the comments he had made in that regard at the previous session.<sup>2</sup>

72. In response to a question by Mr. BEESLEY, Mr. McCAFFREY (Special Rapporteur) said that the sources cited in paragraphs (13) to (28) had been gathered specially for the commentary. They did not appear in any of his reports, since it was not he who had presented article 8.

73. Mr. ARANGIO-RUIZ said that precedents did have their place in a commentary, but only in so far as they were needed in order to understand and apply the article. It lay with the Special Rapporteur to distinguish between what was essential and what was not.

74. Prince AJIBOLA said that the Commission's commentaries always gave ample room to examples drawn from treaty law or international judicial precedents and they were very useful for jurists. The Commission should remain faithful to that tradition. If the examples cited in the present instance were regarded as too long for inclusion in the commentary, they could at least appear in footnotes.

75. Mr. CALERO RODRIGUES said he, too, considered that the part of the commentary on sources was too long, but Mr. Graefrath's proposal was too radical. Moreover, the Commission's statute provided (art. 20 (a)) that, when the Commission was engaged in codification work, it was to accompany its draft articles with commentaries containing precedents and other relevant data, including treaties, judicial decisions and doctrine. The topic of the law of the non-navigational uses of international watercourses was, at least in part, one of codification.

<sup>1</sup> *Yearbook* . . . 1987, vol. I, pp. 261-262, 2039th meeting, para. 62.

<sup>2</sup> *Ibid.*, p. 263, para. 90.

76. Mr. TOMUSCHAT cited as an example the commentaries to the final draft articles on the law of treaties, adopted by the Commission at its eighteenth session, in 1966,<sup>3</sup> which contained a great quantity of quotations and examples drawn from treaties and judicial precedents. The Special Rapporteur had not departed from the Commission's tradition or indeed from its statute, as Mr. Calero Rodrigues had pointed out. The commentary under consideration was perhaps a little too long, but it was difficult at the present stage to do away with a whole section of it.

77. Mr. EIRIKSSON said he, too, thought that sources did have their place in a commentary, the purpose of which was not only to provide an understanding of the actual text of the article, as already pointed out, but also to explain why the Commission had adopted it. The difficulty in the present instance was one of striking a balance between the text of the commentary and the quotations, some of which could in fact be relegated to footnotes. However, the paragraphs in question should certainly not be deleted altogether.

78. The difficulty might also lie in the fact that the Commission had to adopt the commentary on the penultimate day of its session, without having time to verify all the sources mentioned. It would be a good idea to revert to the matter, for example when a whole set of draft articles had been adopted on first reading.

79. Mr. BEESLEY said that he endorsed the comments made by Mr. Tomuschat, Mr. Eiriksson and Prince Ajibola, as well as the observations made regarding the Commission's statute. For his part, he saw nothing to be deleted in the commentary to article 8, and would propose that the matter be left to the Special Rapporteur.

80. Mr. AL-BAHARNA said that he would like to hear the Special Rapporteur's opinion. Perhaps the quotations could be deleted and the sources mentioned in footnotes.

81. Mr. GRAEFRATH said that the Commission had just approved 11 paragraphs of the commentary, and therefore there was no question of doing away with it entirely. However, since paragraph (8)—the only paragraph containing a legal interpretation of article 8—had been deleted, the reader might well ask what the subsequent explanations related to. In any event, he had already entered a reservation with regard to the whole of the commentary and had no intention of pressing his proposal.

82. Mr. BENNOUNA said that it might be as well to reconsider the commentary paragraph by paragraph, in order to see what could be cut out.

83. Mr. SHI (Rapporteur) said that, in view of the little time available to the Commission, the best course would be to leave the commentary as it was for the time being and assign the Planning Group the task of considering the question in detail at the next session.

84. The CHAIRMAN, speaking as a member of the Commission, said that, generally speaking, sources were

useful and important and should figure in the commentaries to the articles adopted by the Commission. However, in the present instance the sources would be more suitable in a report by the Special Rapporteur than in a commentary, which was supposed to convey a kind of consensus in the Commission. In future, it would be necessary to ensure that a commentary contained only sources known to the Commission beforehand, which, in theory at least, was not true in the case in point.

85. Mr. McCAFFREY (Special Rapporteur) pointed out that article 6, which had been adopted by the Commission at its thirty-ninth session and which, in the view of some members, enunciated the most important of the general principles, was accompanied by a very lengthy commentary.<sup>4</sup> According to other members, article 8 was the one which contained the most important principle, and therefore it should be given identical treatment, for reasons of balance. He had merely sought to show, without in any way adopting a position, that the principle was based on a number of precedents in diplomatic practice and international instruments. In doing so, he had departed neither from the Commission's practice, nor from the provisions of its statute, which stipulated (art. 16 (g)) that, in the context of the progressive development of international law, the Commission was to attach to its drafts such explanations and supporting material as it deemed appropriate.

86. He proposed that the Commission should reconsider the whole of the commentary to article 8 once it had adopted the draft articles on first reading. For the time being, if the Commission so wished, he could agree to delete paragraphs (27) and (28) and simply give a reference to the texts quoted therein, without reproducing them, in a footnote to paragraph (24).

87. The CHAIRMAN said that the Commission would consider the Special Rapporteur's proposal at the next meeting.

*The meeting rose at 1.10 p.m.*

<sup>4</sup> *Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*

## 2093rd MEETING

*Thursday, 28 July 1988, at 3 p.m.*

*Chairman:* Mr. Bernhard GRAEFRATH

*later:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

<sup>3</sup> *Yearbook . . . 1966*, vol. II, pp. 187 *et seq.*, document A/6309/Rev.1, part II.

**Draft report of the Commission on the work of its fortieth session (continued)**

**CHAPTER III. The law of the non-navigational uses of international watercourses (concluded)** (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

**C. Draft articles on the law of the non-navigational uses of international watercourses (concluded)** (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

**2. TEXTS OF DRAFT ARTICLES 8 TO 21, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTIETH SESSION (concluded)** (A/CN.4/L.425/Add.1 and Corr.1)

*Commentary to article 8 (Obligation not to cause appreciable harm) (concluded)*

Paragraph (13) (concluded) and paragraphs (14) to (18)

1. Mr. YANKOV pointed out that paragraphs (13) to (17) contained references to diplomatic communications between a very limited number of States and of only relative significance. He urged the Special Rapporteur to replace them by a general reference and to indicate the sources in a footnote. The same remark applied to source material emanating from non-governmental organizations.

2. The CHAIRMAN recalled that, at the previous meeting, the Special Rapporteur had agreed to prepare a shortened version of paragraphs (13) to (18). He therefore suggested that those paragraphs should be approved on that understanding.

*It was so agreed.*

*Paragraphs (13) to (18) were approved.*

Paragraphs (19) to (24)

*Paragraphs (19) to (24) were approved.*

Paragraphs (25) and (26)

3. Mr. CALERO RODRIGUES proposed that paragraph (25) should be deleted. It reproduced article 3 of the 1974 Charter of Economic Rights and Duties of States and the Commission had not adopted that Charter as a basis for the articles on international watercourses.

4. Mr. McCAFFREY (Special Rapporteur) said that he would be reluctant to agree to such a deletion. The provision in question was a good illustration of the importance of the principle of co-operation.

5. Mr. MAHIU said that it was essential to retain paragraph (25) and its reference to the 1974 Charter of Economic Rights and Duties of States.

6. Mr. SEPÚLVEDA GUTIÉRREZ said that he strongly supported that remark. The 1974 Charter was of great importance to many Latin-American countries.

7. Mr. CALERO RODRIGUES pointed out that article 3 of the 1974 Charter spoke of the "exploitation of natural resources shared by two or more countries". The concept of shared natural resources did not constitute the basis of the Commission's work on international watercourses.

8. Mr. EIRIKSSON said that he agreed with Mr. Calero Rodrigues. The article cited in paragraph

(25) was not a source for article 8 of the draft under consideration.

9. Mr. RAZAFINDRALAMBO said that he could not agree with Mr. Eiriksson. Article 3 of the 1974 Charter was indeed relevant to article 8 of the draft. It referred clearly to the obligation not to cause damage to other States in the exploitation of natural resources.

10. Mr. ARANGIO-RUIZ said it was quite appropriate to cite that article, which set forth the obligation not to cause damage to other States. Particularly interesting was the fact that the adjective "appreciable" was not used in the article in question to qualify "damage".

11. Mr. MAHIU suggested that the quotation from article 3 of the 1974 Charter should start with the words "each State must co-operate . . .". In that way, the reference to "natural resources shared by two or more countries" would be omitted, thereby meeting the point raised by Mr. Calero Rodrigues.

12. Mr. BENNOUNA said that it would be logical for paragraph (26), which dealt with the general duty to avoid causing transboundary harm, to be placed before paragraph (25), on the specific case of common resources.

13. Mr. ARANGIO-RUIZ pointed out that, if a State was bound not to cause damage in the case of shared resources, it would be all the more bound not to do so in the case of resources that were not shared; hence the relevance of the quotation.

14. Mr. McCAFFREY (Special Rapporteur) said that he could agree to placing paragraph (26) before paragraph (25). He further proposed that the beginning of paragraph (25) should be amended to read: "Similarly, the Charter of Economic Rights and Duties of States provides in article 3 that 'each State must co-operate on the basis of a system of information and . . .'".

*It was so agreed.*

*Paragraph (25), as amended, and paragraph (26) were approved.*

Paragraphs (27) and (28)

15. The CHAIRMAN recalled that, at the previous meeting, the Special Rapporteur had proposed that paragraphs (27) and (28) should be shortened and incorporated in a footnote to paragraph (24).

*It was so agreed.*

*Paragraphs (27) and (28) were approved.*

Paragraph (29)

*Paragraph (29) was approved.*

*The commentary to article 8, as amended, was approved.*

*Mr. Díaz González took the Chair.*

*Commentary to article 9 (General obligation to co-operate)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

## Paragraph (3)

16. Mr. BARSEGOV proposed that the phrase "calls for co-operation between watercourse States", in the first sentence, should be replaced by "calls for co-operation between the parties". In addition, the words "the relevant" should be inserted before "international watercourses". The international instruments referred to in paragraph (3) were specific agreements relating to specific watercourses.

17. Mr. McCAFFREY (Special Rapporteur) said that specific international agreements were not the only instruments referred to in paragraph (3). As indicated in footnote 72, there were also declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, which did not apply to specific States or specific watercourses. Nevertheless, he could agree to the amendments proposed by Mr. Barsegov.

*Mr. Barsegov's amendments were adopted.*

*Paragraph (3), as amended, was approved.*

## Paragraph (4)

18. Mr. CALERO RODRIGUES said that the quotations from General Assembly resolutions 2995 (XXVII) and 3129 (XXVIII) could be deleted, for the same reason that he had earlier proposed deleting the reference to article 3 of the Charter of Economic Rights and Duties of States from the commentary to article 8. Similarly, the quotation from Recommendation 90 of the Mar del Plata Action Plan, adopted by the United Nations Water Conference in 1977, could be deleted.

19. Mr. McCAFFREY (Special Rapporteur) said that he could not agree to such extensive deletions of material which he regarded as useful and relevant. As a compromise, he suggested retaining the third sentence, beginning "By way of illustration . . ." and containing a quotation from General Assembly resolution 2995 (XXVII). The reference to bilateral and multilateral co-operation would thus be retained. On the other hand, the quotation from paragraph 2 of General Assembly resolution 3129 (XXVIII) in the fourth sentence, with its reference to shared natural resources, could be deleted.

20. The first sentence of the passage referring to the 1977 United Nations Water Conference should be left as it stood. The second sentence, containing the quotation from Recommendation 90 of the Mar del Plata Action Plan, could be reworded along the following lines: "For example, Recommendation 90 provides for co-operation between States in the case of international watercourses . . . in accordance with the Charter of the United Nations and principles of international law . . .". The Conference's recommendations closely paralleled the provisions of the articles under consideration and were thus specially relevant. He would submit a revised text of the passage in question to the Secretariat.

21. Mr. CALERO RODRIGUES said he accepted that solution and thanked the Special Rapporteur.

22. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (4) as amended by the Special Rapporteur, on the understanding that the Special Rap-

porteur would provide the Secretariat with a revised text.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

23. Mr. TOMUSCHAT said that it would have been helpful to have a footnote indicating the voting pattern with regard to the General Assembly resolutions in question.

24. Mr. EIRIKSSON said that he agreed with the Commission's decision. The discussion that had just taken place showed the need to review commentaries, especially in view of the commentary to article 6, approved at the thirty-ninth session.<sup>1</sup> With regard to Mr. Tomuschat's remark, he was not certain that the numbers of a vote in the General Assembly were an indication of the authoritative nature of the resolution adopted.

25. Mr. ROUCOUNAS pointed out that the excisions being made in quotations from United Nations instruments changed the entire context of the paragraphs being approved. Although he would not oppose them, he wished to record his opposition to that way of proceeding.

## Paragraph (5)

*Paragraph (5) was approved.*

## Paragraph (6)

26. Mr. GRAEFRATH proposed that the phrase "smooth functioning of the procedural rules contained in part III of the draft articles", in the second sentence, should be replaced by "other parts of the draft".

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

*The commentary to article 9, as amended, was approved.*

## Commentary to article 10 (Regular exchange of data and information)

## Paragraph (1)

*Paragraph (1) was approved.*

## Paragraph (2)

27. Mr. CALERO RODRIGUES proposed that the last word of the paragraph, "entity", should be replaced by "method".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

## Paragraph (3)

28. Mr. GRAEFRATH proposed that the expression "a state of war", in the first sentence, should be replaced by "an armed conflict".

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

<sup>1</sup> For the Commission's discussion on the commentary to article 6, see *Yearbook . . . 1987*, vol. I, pp. 265-269, 2040th meeting, paras. 14-70; for the text of the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*

Paragraph (4)

*Paragraph (4) was approved.*

Paragraphs (5) and (6)

29. Mr. EIRIKSSON said that the commentary re-affirmed his original view that the expression “reasonably available”, in paragraphs 1 and 2 of article 10, should never have been used. Some two pages of commentary were required to explain the meaning of that expression, which could easily have been conveyed by using the words “that which it has already collected for its own use or is easily accessible”, contained in paragraph (5). It was an important point in view of the fact that the term “available” was also used in a number of other places in the draft.

*Paragraphs (5) and (6) were approved.*

Paragraph (7)

30. Mr. EIRIKSSON said that a distinction should be made between the use of the term “available” in the 1960 Indus Waters Treaty and the 1986 Convention on Early Notification of a Nuclear Accident, on the one hand, and in the “Helsinki Rules”, on the other. Alternatively, the reference to the Helsinki Rules might be deleted.

31. Mr. GRAEFRATH supported Mr. Eiriksson’s proposal to delete the reference to the Helsinki Rules.

32. Mr. McCAFFREY (Special Rapporteur) said that the problem might be resolved by deleting the reference to the Helsinki Rules and adding the following text to the end of footnote 85: “Cf. art. XXIX of the Helsinki Rules and the commentary thereto, cited in footnote 84 above.”

*It was so agreed.*

*Paragraph (7), as amended, was approved.*

Paragraphs (8) to (11)

*Paragraphs (8) to (11) were approved.*

Paragraph (12)

33. Mr. EIRIKSSON suggested that the word “available”, in the second sentence, should be replaced by the words “reasonably available” in quotation marks, as in paragraph (11).

*It was so agreed.*

34. Mr. TOMUSCHAT proposed that the phrase “the Commission saw no reason why it should not be exchanged”, in the same sentence, should be replaced by “the Commission believed that requiring the exchange of such data and information would not be excessively burdensome”.

*It was so agreed.*

*Paragraph (12), as amended, was approved.*

Paragraph (13)

*Paragraph (13) was approved.*

Paragraph (14)

35. Mr. CALERO RODRIGUES proposed that the expression “For example”, at the beginning of the fifth

sentence, should be replaced by “In some cases”, that the word “Alternatively”, at the beginning of the sixth sentence, should be replaced by “In other cases”, and that the last phrase of the paragraph should be amended to read: “but this may entail undue burdens for the State providing the material”.

*It was so agreed.*

*Paragraph (14), as amended, was approved.*

Paragraphs (15) to (17)

*Paragraphs (15) to (17) were approved.*

*The commentary to article 10, as amended, was approved.*

*Commentary to part III (Planned measures)*

36. Mr. McCAFFREY (Special Rapporteur) said that the commentary to part III of the draft could be deleted as a result of the discussion on article 19, which everyone had agreed dealt with planned measures.

*The commentary to part III was deleted.*

*Commentary to article 11 (Information concerning planned measures)*

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were approved.*

*The commentary to article 11 was approved.*

*Commentary to article 12 (Notification concerning planned measures with possible adverse effects)*

Paragraphs (1) to (10)

*Paragraphs (1) to (10) were approved.*

Paragraph (11)

37. Mr. TOMUSCHAT proposed that the words “It is hoped that this listing will”, in the last sentence, should be replaced by “This listing is intended to”.

*It was so agreed.*

*Paragraph (11), as amended, was approved.*

Paragraphs (12) and (13)

*Paragraphs (12) and (13) were approved.*

*The commentary to article 12, as amended, was approved.*

*Commentary to article 13 (Period for reply to notification)*

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

38. After a discussion in which Mr. EIRIKSSON, Mr. TOMUSCHAT and Mr. McCAFFREY (Special Rapporteur) took part, the CHAIRMAN suggested that those members should draft a text to replace the second part of the last sentence, as from the words “failure to reply . . .”.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

*Paragraph (3) was approved.*

*The commentary to article 13, as amended, was approved.*

*Commentary to article 14 (Obligations of the notifying State during the period for reply)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

*The commentary to article 14 was approved.*

*Commentary to article 15 (Reply to notification)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

*The commentary to article 15 was approved.*

*Commentary to article 16 (Absence of reply to notification)*

Paragraph (1)

39. Mr. EIRIKSSON said that, during the discussion of article 16, he had protested that the type of notification under article 15, paragraph 2, that was referred to in article 16 had not been properly defined; the commentary only reinforced that view. He would therefore urge that the last part of the first sentence, beginning "—i.e. one which states . . .", be deleted.

40. The CHAIRMAN said that the Commission had already engaged in a lengthy debate over whether to include the phrase in question, and it represented a hard-won compromise solution.

41. Mr. McCAFFREY (Special Rapporteur) added that the phrase in question was essential to the commentary and accurately reflected the Commission's thinking when it had adopted article 16. The whole point of article 15, paragraph 2, was that, if a State believed a project would adversely affect it or violate articles 6 or 8, it had to communicate that finding to the notifying State and provide, in that communication, a reasoned and documented explanation. Both elements—communication of the finding and supplying an explanation for the finding—were essential to article 15, paragraph 2. He therefore strongly believed that the last part of the first sentence of paragraph (1) must be retained.

42. Mr. GRAEFRATH said he agreed that there was a certain amount of confusion about article 15, paragraph 2, as a result of its combined treatment of two cases: when no communication at all had been received, and when one that had been received did not provide the necessary explanation for the findings. It might be useful to make that distinction clear. Accordingly, he proposed that the last part of the first sentence of paragraph (1) should be replaced by "or one that does not provide the necessary explanation for its findings".

43. Mr. TOMUSCHAT said that he agreed with the idea behind Mr. Graefrath's proposal but believed it could be better rendered by saying: "or receives a communication that does not meet the requirements of paragraph 2 of article 15".

44. Mr. CALERO RODRIGUES said that he agreed entirely with Mr. Eiriksson on the substance of the mat-

ter but, like the Special Rapporteur, he also thought that the explanation of what constituted a communication under article 15, paragraph 2, was useful. Such a communication must state that the planned measures would be inconsistent with the provisions of articles 6 or 8, and must be accompanied by evidence of such findings.

45. Mr. McCAFFREY (Special Rapporteur) said that he would urge the Commission to retain the text unrevised. If a change had to be made, he would prefer the text proposed by Mr. Tomuschat.

46. Mr. EIRIKSSON said that he would not insist on a revision of the text.

*Paragraph (1) was approved.*

Paragraph (2)

*Paragraph (2) was approved.*

*The commentary to article 16 was approved.*

*Commentary to article 17 (Consultations and negotiations concerning planned measures)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

47. Mr. BENNOUNA said that paragraph (3) was extremely important, since it commented on the obligation to negotiate in good faith and referred to a landmark judgment of the ICJ. He would have preferred the judgment to be quoted in the paragraph itself and also believed that a reference to the *North Sea Continental Shelf* cases should be incorporated.

48. Mr. McCAFFREY (Special Rapporteur) suggested that the following sentence should be inserted after the second sentence: "The manner in which consultations and negotiations are to be conducted was also addressed by the ICJ in the *North Sea Continental Shelf* cases."

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

*Paragraph (4) was approved.*

*The commentary to article 17, as amended, was approved.*

*Commentary to article 18 (Procedures in the absence of notification)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were approved.*

*The commentary to article 18 was approved.*

*Commentary to article 19 (Urgent implementation of planned measures)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were approved.*

Paragraph (4)

49. Mr. EIRIKSSON said that the last sentence was difficult to understand and was superfluous. It should be deleted.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

*The commentary to article 19, as amended, was approved.*

*Commentary to article 20 (Data and information vital to national defence or security)*

*The commentary to article 20 was approved.*

*Commentary to article 21 (Indirect procedures)*

*The commentary to article 21 was approved.*

*Section C.2, as amended, was adopted.*

*Chapter III of the draft report, as amended, was adopted.*

#### **CHAPTER I. Organization of the session (A/CN.4/L.423)**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

*Paragraph 4 was adopted subject to an editorial correction.*

Paragraphs 5 to 8

*Paragraphs 5 to 8 were adopted.*

Paragraphs 9 to 15

50. Mr. SHI (Rapporteur) drew attention to the fact that section F of chapter I, "General description of the work of the Commission at its fortieth session", was an innovation. The Enlarged Bureau had decided to include it further to a recommendation by the Planning Group. He expressed thanks to the Secretariat for its assistance in preparing the draft report.

51. Mr. EIRIKSSON thanked the Rapporteur for his endeavours and particularly for the inclusion of the new section, which greatly enhanced the report.

*Paragraphs 9 to 15 were adopted.*

*Chapter I of the draft report was adopted.*

#### **CHAPTER VI. Jurisdictional immunities of States and their property (A/CN.4/L.428 and Corr.1)**

##### **A. Introduction**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

*Section A was adopted.*

##### **B. Consideration of the topic at the present session**

Paragraphs 5 to 26

*Paragraphs 5 to 26 were adopted.*

Paragraph 27

*Paragraph 27 was adopted subject to an editorial correction.*

*Section B was adopted.*

*Chapter VI of the draft report was adopted.*

#### **CHAPTER VIII. Other decisions and conclusions of the Commission (A/CN.4/L.430)**

##### **A. Programme, procedures and working methods of the Commission, and its documentation**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

52. Mr. EIRIKSSON remarked that it seemed unnecessary to indicate the composition of the Planning Group, as it was already shown in paragraph 4 of chapter I. He would not, however, press for the paragraph to be amended or deleted.

*Paragraph 4 was adopted.*

Paragraphs 5 to 7

*Paragraphs 5 to 7 were adopted.*

Paragraph 8

53. Mr. CALERO RODRIGUES proposed that, in the fourth sentence, the words "the second reading of" should be inserted between the words "on" and "the draft articles on the status of the diplomatic courier".

*It was so agreed.*

54. Mr. GRAEFRATH, replying to a point raised by Mr. AL-BAHARNA, explained that the fourth sentence meant not that the Commission proposed to exclude the other topics on its agenda from its programme of work in 1989 and 1990, but that it intended to try to complete work on the two topics mentioned.

55. Mr. BARSEGOV suggested that the sentence should be amended to incorporate that explanation.

*It was so agreed.*

*Paragraph 8, as amended, was adopted.*

Paragraphs 9 to 14

*Paragraphs 9 to 14 were adopted.*

Paragraph 15

56. Mr. KOROMA, supported by Mr. SEPÚLVEDA GUTIÉRREZ, proposed that the words "reconciling of differences", at the end of the paragraph, should be replaced by "reconciliation of different points of view".

*It was so agreed.*

*Paragraph 15, as amended, was adopted.*

Paragraph 16

*Paragraph 16 was adopted.*

Paragraph 17

57. Prince AJIBOLA, supported by Mr. AL-BAHARNA, proposed that the words "in a timely fashion", at the end of the first sentence, should be replaced by "in due time".

*It was so agreed.*

*Paragraph 17, as amended, was adopted.*

Paragraphs 18 to 21

*Paragraphs 18 to 21 were adopted.*

Paragraph 22

58. Mr. CALERO RODRIGUES proposed that the following sentence should be added at the end of the paragraph: "It should be noted that the Commission made full use of the time and services made available to it during the 12 weeks of its current session."

59. The CHAIRMAN said he endorsed that proposal and pointed out that the Commission had actually exceeded the time allocated to it.

*Mr. Calero Rodrigues's amendment was adopted.*

*Paragraph 22, as amended, was adopted.*

Paragraphs 23 to 29

*Paragraphs 23 to 29 were adopted.*

Paragraph 30

60. Mr. GRAEFRATH, replying to a point raised by Mr. BARSEGOV, proposed that the penultimate sentence should be amended to read: "It wishes to emphasize that all the language versions of the summary records should be issued in a timely and orderly manner, avoiding skips in the normal sequence." The last sentence of the paragraph should be maintained without change.

*It was so agreed.*

*Paragraph 30, as amended, was adopted.*

Paragraph 31

61. Mr. BARSEGOV proposed that a sentence should be added to the effect that summary records in any language should not be published in final form until corrections had been received in all of the languages in which statements had been made.

*It was so agreed.*

*Paragraph 31, as amended, was adopted.*

Paragraphs 32 to 37

*Paragraphs 32 to 37 were adopted.*

*Section A, as amended, was adopted.*

#### **B. Co-operation with other bodies**

Paragraph 38

*Paragraph 38 was adopted.*

Paragraph 39

62. Mr. CALERO RODRIGUES said that Mr. Vanossi's first name should be inserted before his surname at the end of the second sentence.

*It was so agreed.*

*Paragraph 39, as amended, was adopted.*

Paragraph 40

63. Prince AJIBOLA suggested that the paragraph should make it clear that Mr. Frank Njenga, the Secretary-General of the Asian-African Legal Con-

sultative Committee, was also a member of the Commission.

64. After a discussion in which Mr. MAHIOU, Mr. AL-BAHARNA and Mr. YANKOV also took part, Prince AJIBOLA withdrew his suggestion.

*Paragraph 40 was adopted.*

*Section B, as amended, was adopted.*

#### **C. Date and place of the forty-first session**

Paragraph 41

65. The CHAIRMAN said that, as far as the dates of the forty-first session were concerned, the choice was between 1 May to 21 July 1989 and 8 May to 28 July 1989.

66. After a brief discussion in which Prince AJIBOLA, Mr. EIRIKSSON, Mr. BEESLEY and Mr. RAZAFINDRALAMBO took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to hold its forty-first session from 8 May to 28 July 1989.

*It was so agreed.*

*Paragraph 41 was adopted.*

*Section C was adopted.*

67. Mr. AL-BAHARNA expressed the hope that the adoption of those dates would not entail any delay in the publication of the final text of the Commission's report on its forty-first session.

#### **D. Representation at the forty-third session of the General Assembly**

Paragraph 42

*Paragraph 42 was adopted.*

*Section D was adopted.*

#### **E. International Law Seminar**

Paragraph 43

*Paragraph 43 was adopted.*

Paragraph 44

68. Ms. NOLL-WAGENFELD (Secretariat, United Nations Office at Geneva), replying to a point raised by Mr. KOROMA, said that Professor Philippe Cahier had been invited to chair the selection committee for the International Law Seminar because no member of the Commission had been present in Geneva at the time.

69. Mr. ROUCOUNAS, without proposing any change in the text of paragraph 44, suggested that in future the Secretariat should try to ensure that the tradition of having the selection committee chaired by a member of the Commission was maintained as far as possible.

*Paragraph 44 was adopted.*

Paragraph 45

70. Mr. YANKOV, supported by Mr. TOMUSCHAT and the CHAIRMAN, speaking as a member of the Commission, suggested that a list of the names and

countries of origin of the participants in the Seminar should be given in a footnote.

*It was so agreed.*

71. Mr. OGISO said that his name and the topic of the lecture he had given to the Seminar, namely "Jurisdictional immunities of States and their property", should be added to the last sentence.

*It was so agreed.*

*Paragraph 45, as amended, was adopted.*

Paragraphs 46 to 50

*Paragraphs 46 to 50 were adopted.*

Paragraph 51

72. Mr. ROUCOUNAS proposed that the word "earnestly" should be inserted between the words "appeal" and "to States" in the last sentence.

*It was so agreed.*

*Paragraph 51, as amended, was adopted.*

Paragraph 52

73. Mr. SHI (Rapporteur) said that he had received a request from Ms. Noll-Wagenfeld (Secretariat) to amend the paragraph to read:

"The Commission also noted with concern that, because of the constraints resulting from the financial crisis, no interpretation services could be made available to the Seminar this year. The Commission, being aware that the Seminar has never been provided for in the Organization's Regular Budget, draws the attention of all Governments to this situation and expresses the hope that every effort will be made to provide the Seminar at future sessions with adequate services and facilities."

74. The CHAIRMAN, speaking as a member of the Commission, said that he would prefer to retain the original text of paragraph 52.

75. Mr. CALERO RODRIGUES said that the proposed amendment appeared to shift the burden of providing services for the Seminar from the Secretary-General to Governments.

76. Mr. BENNOUNA said that he, too, would prefer to retain the original text, but would suggest the addition of a passage in which the Commission noted that, because of the lack of interpretation services, the Seminar had been conducted exclusively in English and requested that every effort be made to implement General Assembly resolution 42/207 C with a view to ensuring equality between the official languages and giving all participants an equal chance to benefit from the Seminar.

77. Mr. RAMA-MONTALDO (Secretariat) said that paragraph 52 in its present form simply sought to secure a continuation of the conditions in which the Seminar had been held for the past 24 years. Those conditions had not changed fundamentally, even over the past three or four years, in which the Organization's financial crisis had been at its worst, and there had never been any difficulty in holding the Seminar with interpretation services provided in all working languages.

78. It could be seen from a comparative table, copies of which could be circulated to members of the Commission if necessary, that the Seminar had been held largely in June of each year since 1965 and had enjoyed services provided in all working languages, despite the crisis in the finances of the United Nations.

79. Mr. BARSEGOV, speaking on a point of order, proposed that the consideration of paragraph 52 should be deferred until the following meeting.

*It was so agreed.*

**CHAPTER V. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.427 and Add.1)**

**A. Introduction (A/CN.4/L.427)**

Paragraphs 1 to 9

*Paragraphs 1 to 9 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.427 and Add.1)**

Paragraphs 10 to 126 (A/CN.4/L.427)

Paragraphs 10 to 20

*Paragraphs 10 to 20 were adopted.*

New paragraph 20 bis

80. Mr. EIRIKSSON proposed the following new paragraph 20 bis:

"During the Commission's discussion, the view was expressed that the draft articles should be confined to diplomatic and consular couriers and bags. As an alternative to article 33, flexibility could be attained by providing in separate optional protocols for application to the couriers and bags referred to in the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States."

81. Mr. YANKOV (Special Rapporteur) said that that idea had in fact been suggested during the discussion.

*Mr. Eiriksson's amendment was adopted.*

*New paragraph 20 bis was adopted.*

Paragraphs 21 to 42

*Paragraphs 21 to 42 were adopted.*

Paragraph 43

82. Mr. EIRIKSSON proposed that the following text should be inserted after the second sentence:

"Another member also supported the deletion of the phrase in question and suggested that subparagraph (b) should be reworded as follows:

" '(b) where States by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles.' "

83. Mr. BARSEGOV asked whether the proposed new text of subparagraph (b) had to be given in full or whether it would not be enough simply to state the purpose of the proposal.

84. Mr. YANKOV (Special Rapporteur) said that he thought it would be better to give the text so that the proposal would be clear. Otherwise, the text would have to be reproduced in a footnote.

*Mr. Eiriksson's amendment was adopted.*

*Paragraph 43, as amended, was adopted.*

Paragraphs 44 to 126

*Paragraphs 44 to 126 were adopted.*

Paragraphs 127 to 209 (A/CN.4/L.427/Add.1)

Paragraphs 127 to 158

*Paragraphs 127 to 158 were adopted.*

Paragraph 159

85. Mr. OGISO said that the Drafting Committee might wish to note that the words "serious reason" were used in alternative B of draft article 28, paragraph 2, while the words "serious reasons" were used in alternative C.

*Paragraph 159 was adopted.*

Paragraphs 160 to 165

*Paragraphs 160 to 165 were adopted.*

Paragraph 166

86. Mr. EIRIKSSON proposed that the words "it may be. It shall", in the first sentence, should be replaced by "it may be: it shall" and that the following text should be added after the first sentence: "The introduction of the words 'its contents' would make it clear that external examination of the bag would be permitted. With the link provided by the words 'subject to paragraph 2', the word 'Nevertheless' could be deleted from paragraph 2."

87. Mr. YANKOV (Special Rapporteur) suggested that the text proposed by Mr. Eiriksson should begin with the words "The view was expressed that". As it now stood, that text might give the impression that the opinion of the Commission as a whole was being reflected.

88. Mr. EIRIKSSON said that the beginning of the text he had proposed might be amended to read: "The intention in introducing the words 'its contents' was to make it clear that external examination of the bag would be permitted . . .".

*It was so agreed.*

*Mr. Eiriksson's amendments were adopted.*

*Paragraph 166, as amended, was adopted.*

Paragraphs 167 to 169

*Paragraphs 167 to 169 were adopted.*

Paragraph 170

89. Prince AJIBOLA said he was surprised that the words "the bag" were used interchangeably with the words "the diplomatic bag". In his view, only the latter expression should be used throughout the draft in order to avoid any confusion.

90. Mr. YANKOV (Special Rapporteur) said that what mattered was the definition of the expression "diplomatic bag" given in article 3, paragraph 1 (2). It was only for the sake of concision that he had used the shorter term, to which he did not attach any particular meaning. Whenever the consular bag was being referred to, the word "bag" was duly qualified.

91. Mr. AL-BAHARNA said that, in the light of the explanations given by the Special Rapporteur and since article 28 was entitled "Protection of the diplomatic bag", it was obvious that the bag in question was the diplomatic bag.

92. Mr. BARSEGOV said that he shared Prince Ajibola's concern and that the use of two different terms gave the impression that the words "the bag" had a specific meaning. Since alternative B of article 28, paragraph 2, referred to "the consular bag" and alternative C of article 28, paragraph 2, referred to "the bag", it was not clear whether the latter text referred to the diplomatic bag. If it did, the Commission would be making a mistake.

93. Mr. YANKOV (Special Rapporteur), noting that the problem had not been raised during the discussion, said that, in some cases, in order to avoid any misunderstandings, he had used the words "the diplomatic bag", specifying that they were used in the sense of the 1961 Vienna Convention on Diplomatic Relations; in all other cases, he had used those words in the sense of the definition given in article 3. Whenever the consular bag was referred to, it was in the sense of the 1963 Vienna Convention on Consular Relations. When only the words "the bag" were used, they meant the diplomatic bag within the meaning of the 1961 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, even though those instruments did not use the adjective "diplomatic".

94. Prince AJIBOLA said that, when the adjective was not used, there could be some doubt about the type of bag in question, since the term "bag" was not systematically followed by the words "within the meaning of article 3". If it was stated at the beginning of chapter V of the Commission's report that the term "bag" meant the "diplomatic bag" throughout the chapter, the reader would not have any doubts. Otherwise, confusion was inevitable.

95. Mr. AL-BAHARNA said that it might be helpful to define the word "bag" in article 3 by indicating that it meant the "diplomatic bag", since, whenever the consular bag was referred to, the Special Rapporteur specifically said so.

*Paragraph 170 was adopted.*

Paragraphs 171 to 203

*Paragraphs 171 to 203 were adopted.*

New paragraph 203 bis

96. Mr. EIRIKSSON proposed the following new paragraph 203 bis:

"The view was also expressed that the objective of article 33 could be achieved by providing for optional

protocols dealing with couriers and bags under the 1969 Convention on Special Missions or the 1975 Vienna Convention on the Representation of States.”

*It was so agreed.*

*New paragraph 203 bis was adopted.*

Paragraphs 204 to 209

*Paragraphs 204 to 209 were adopted.*

*Section B, as amended, was adopted.*

*Chapter V of the draft report, as amended, was adopted.*

**CHAPTER VII. State responsibility (A/CN.4/L.429 and Add.1 and 2)**

**A. Introduction (A/CN.4/L.429)**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

97. Mr. CALERO RODRIGUES said that, in his view, paragraph 5 was much too concise. It should refer to section C of chapter IV of the Commission's report on its thirty-eighth session,<sup>2</sup> which reproduced articles 1 to 5 of part 2 of the draft; indicate that the Drafting Committee had before it draft articles 6 to 16 of part 2 and refer in that connection to footnote 66 of the Commission's report on its thirty-seventh session;<sup>3</sup> and explain that draft articles 1 to 5 and the annex of part 3 of the draft, also referred to the Drafting Committee, were reproduced in footnote 86 of the report on the thirty-eighth session.<sup>4</sup> A footnote along the following lines should also be added to paragraph 5: "For a full historical review of the Commission's work on the topic, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 19 *et seq.*, paras. 102-163." That would give the reader an idea of the work done thus far.

*It was so agreed.*

*Paragraph 5, as amended, was adopted.*

Paragraph 6

*Paragraph 6 was adopted.*

*Section A, as amended, was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.429/Add.1)**

Paragraphs 1 to 15

*Paragraphs 1 to 15 were adopted.*

Paragraph 16

98. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the eighth sentence, the words "the substantive right" should be translated into French as *le droit substantiel* and that, in the tenth sentence, the words "without setting into motion some mechanism" should be translated into French as *sans mettre en mouvement les mécanismes*. In the eleventh sentence of the French

text, the words *de façon illicite* should be replaced by the word *illicitement*. With regard to the phrase in brackets in the penultimate sentence, he said that the aim was the total or partial replacement of restitution in kind by pecuniary compensation and not the replacement of restitution in kind by "total or partial pecuniary compensation". The words *un caractère excessif*, used in the last sentence of the French text, as well as in paragraphs 17 and 18, should be replaced by *un caractère excessivement onéreux*.

*Paragraph 16, as amended, was adopted.*

Paragraphs 17 and 18

*Paragraphs 17 and 18 were adopted.*

Paragraph 19

99. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, together with the Secretariat, he would revise the first sentence of the French text, since the words *indemnisation pécuniaire totale ou partielle* and *le Rapporteur spécial a approuvé cette position* did not accurately reflect what he had said.

*Paragraph 19 was adopted on that understanding.*

Paragraph 20

*Paragraph 20 was adopted.*

*Section B, as amended, was adopted.*

**C. Draft articles on State responsibility (part 2 of the draft articles) (A/CN.4/L.429/Add.2)**

*Section C was adopted.*

*Chapter VII of the draft report, as amended, was adopted.*

100. Mr. EIRIKSSON inquired whether the General Assembly was to be asked specific questions concerning the topics of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and State responsibility. In his view, it was unnecessary to indicate to the General Assembly the points on which its discussions of those two topics should focus.

101. Mr. ARANGIO-RUIZ said that he would find it presumptuous to ask the General Assembly any questions at the current stage in the consideration of the topic for which he was Special Rapporteur, namely State responsibility.

102. Mr. AL-BAHARNA said that, in the case of the topics of jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission had received very few comments from Governments and that might hamper the work of the two special rapporteurs. Should the General Assembly therefore not be requested to remind Governments that the Commission would welcome their comments?

103. The CHAIRMAN said that the General Assembly would not fail to do so in the relevant resolution.

<sup>2</sup> *Yearbook . . . 1986*, vol. II (Part Two), p. 38.

<sup>3</sup> *Yearbook . . . 1985*, vol. II (Part Two), pp. 20-21.

<sup>4</sup> *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36.

*The meeting rose at 8.05 p.m.*

## 2094th MEETING

Friday, 29 July 1988, at 10 a.m.

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft report of the Commission on the work of its fortieth session (concluded)

#### CHAPTER VIII. *Other decisions and conclusions of the Commission* (concluded) (A/CN.4/L.430)

##### E. *International Law Seminar* (concluded)

###### Paragraph 52 (concluded)

1. The CHAIRMAN recalled that an amended text for paragraph 52 had been proposed at the previous meeting (see 2093rd meeting, para. 73).

2. Mr. TOMUSCHAT said that, in his view, the problems that had arisen in 1988 were the result of the fact that, in the past, the International Law Seminar had been able to use the conference services intended for the Commission and the fact that, at the current session, the Commission had used those services 100 per cent. If the Seminar was to have its own interpretation services, an allocation for that purpose would have to be included in the United Nations programme budget. That was the purpose of the proposed amendment, which did not, moreover, contradict the original text of paragraph 52. If he was not mistaken, General Assembly resolution 42/207 C applied only to meetings included in the calendar of conferences and that was not the case of the International Law Seminar.

3. Mr. KALINKIN (Secretary to the Commission) said that, as far as the Commission's secretariat was concerned, the original text of paragraph 52 was sufficiently clear. No interpretation services had been made available to the Seminar at the current session because the administration of the Seminar had not made the necessary arrangements for that purpose. If it had applied in time to the Office of Legal Affairs, that Office would certainly have ensured that the Seminar was included in the calendar of conferences.

4. With regard to the proposed amendment, he pointed out that, when a proposal was made to the Fifth Committee of the General Assembly to include an allocation in the ordinary budget for an activity normally financed by voluntary contributions, as was the case of the International Law Seminar, agreement by Governments of Member States was far from unanimous.

5. Mr. CALERO RODRIGUES said that the administration of the Seminar was not to be reproached in

any way and that the Commission should be trying not to identify those responsible for the problem, but only to find a solution to it. The original text of paragraph 52 would therefore suffice, since the second sentence contained an appeal to all persons of goodwill in the Secretariat to provide the Seminar with adequate services at future sessions. It was for the Secretariat to decide how that was to be done.

6. The CHAIRMAN, speaking as a member of the Commission, said that he found the original text of paragraph 52 satisfactory, since it highlighted the concerns of some members of the Commission about discrimination in favour of English during the International Law Seminar. There was no need to go any further.

7. Mr. KOROMA said that he shared Mr. Calero Rodrigues's view. What the Commission wanted was for the Seminar to be able to continue to benefit, as in the past, from interpretation services in all languages. That was what should be stated in paragraph 52 and, if the text was amended along those lines, he would be prepared to accept the paragraph as originally proposed.

8. After an exchange of views in which Mr. ARANGIO-RUIZ, Prince AJIBOLA and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that the Commission should adopt the original text of paragraph 52, on the understanding that it would be amended along the lines proposed by Mr. Koroma.

*It was so agreed.*

*Paragraph 52 was adopted.*

9. Mr. EIRIKSSON, welcoming the fact that the Commission had solved the problem in a positive spirit, said that members were all grateful to the Secretariat for the assistance it regularly provided to the International Law Seminar.

*Section E, as amended, was adopted.*

*Chapter VIII of the draft report, as amended, was adopted.*

#### CHAPTER IV. *Draft Code of Crimes against the Peace and Security of Mankind* (concluded)\* (A/CN.4/L.426 and Add.1)

##### C. *Draft articles on the draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.426/Add.1)

10. Mr. McCAFFREY said that the texts of the draft articles provisionally adopted so far by the Commission should be reproduced at the beginning of section C. The various chapters of the Commission's report should, moreover, all be presented in the same way.

11. The CHAIRMAN said that the Rapporteur and the Commission's secretariat would take those comments into account.

###### Paragraph 85

*Paragraph 85 was adopted.*

\* Resumed from the 2092nd meeting.

*Commentary to article 4 (Obligation to try or extradite)*

## Paragraph (1)

12. Mr. CALERO RODRIGUES requested the Secretariat to revise the entire English text of the commentary in order to bring it into line with the original French text. In the first sentence of paragraph (1), for example, the English translation of the words *assurer une répression efficace* and *confier la répression aux juridictions nationales* left something to be desired and would have to be revised.

13. Mr. Sreenivasa RAO said that he agreed with Mr. Calero Rodrigues. The word “repression”, in particular, had a very negative meaning in English and was not an adequate translation of the French word *répression*.

14. He also noted that the purpose of the commentaries in general was to indicate the overall trend in the Commission and the reasons why it had chosen a particular concept or term rather than another. Far too much coverage therefore seemed to have been given to the summary of individual opinions and that might not only lead to unnecessary repetition of other parts of the same chapter, but could also reopen the discussion.

15. Mr. BARSEGOV, supporting Mr. Calero Rodrigues’s comments concerning translation, said that the Secretariat should take a close look at all the language versions of the commentary in order to remove some particularly awkward mistakes. He noted, for example, that in the first sentence of paragraph (1), where the French text stated that one possibility would be to *confier la répression* to national courts, the English text stated that national courts could be made “responsible for repression”. The Russian text went even further, since it referred to the possibility of “trusting” those courts.

16. Mr. THIAM (Special Rapporteur) assured members that the Secretariat would revise the various language versions in order to bring them into line with the French text. In reply to Mr. Sreenivasa Rao’s comment, he suggested that, wherever the words “One member stated that” were used, they should be replaced by “According to one opinion” or “According to one school of thought”.

17. In the last sentence of the French text of paragraph (1), the words *à ce stade* should be replaced by *pour le moment* in order to avoid unnecessary repetition.

18. Mr. TOMUSCHAT proposed that, in the last sentence of paragraph (1), the words “needed for the actual implementation of the code” should be inserted after the words “the formulation of more specific rules”, since it had been decided that article 4 would enunciate only general principles which would have to be given concrete shape and that it could not, as such, serve as a basis for trial or extradition.

19. Mr. ARANGIO-RUIZ said that he agreed with the idea behind Mr. Tomuschat’s proposed amendment, but not with its wording, which would somewhat restrict the rules which were to be formulated and were intended to expand on and explain the general principles.

20. Mr. EIRIKSSON said he had intended to propose that the last sentence should become a separate paragraph, but that would not be necessary if Mr. Tomuschat’s amendment were adopted. The sentence could simply be divided into two, placing a full stop after the words “jurisdiction and extradition”.

21. Mr. BEESLEY said that paragraph (1) referred to three possibilities for the repression of crimes, although he himself had referred to a fourth possibility, namely a mixed solution consisting in adding to national courts judges from other States. Perhaps the Special Rapporteur could reproduce the text from the Commission’s report on its thirty-ninth session in which that idea had been mentioned.<sup>1</sup>

22. Mr. THIAM (Special Rapporteur) proposed that the following text should be inserted at the end of the first sentence: “and a fourth possibility was to enforce the code through national courts to which would be added a judge from the jurisdiction of the accused and/or one or more judges from jurisdictions whose jurisprudence differed from that of both the accused and the national court in question”. He also accepted the amendments proposed by Mr. Tomuschat and Mr. Eiriksson.

*The amendments by Mr. Tomuschat, Mr. Eiriksson and the Special Rapporteur were adopted.*

*Paragraph (1), as amended, was approved.*

## Paragraph (2)

23. Mr. THIAM (Special Rapporteur) said that the dashes in the first sentence of the French text should be replaced by commas.

24. Mr. EIRIKSSON said that the first sentence of the English text should be brought into line with the original French text.

25. Mr. RAZAFINDRALAMBO suggested that the dates of the Conventions referred to in paragraph (2) should be given.

26. Mr. TOMUSCHAT supported the proposal by Mr. Razafindralambo and further suggested that references for those instruments should be provided in footnotes.

*The amendments by Mr. Razafindralambo and Mr. Tomuschat were adopted.*

27. Mr. TOMUSCHAT proposed that the words “place where the crime was committed”, in the fifth sentence, should be replaced by “country where the crime was committed”.

28. Mr. CALERO RODRIGUES, referring to the jurisdiction of courts under the Convention on Genocide and the Convention on *Apartheid*, said that those two instruments did in fact provide for the jurisdiction of an international criminal court, which coexisted with that of the court of the place where the crime was committed. The second instrument went even further, since it recognized the jurisdiction of the courts of any State party. He therefore proposed that, in the fifth sentence of paragraph (2), the words “the court of

<sup>1</sup> *Yearbook* . . . 1987, vol. II (Part Two), p. 10, para. 35, *in fine*.

the place where the crime was committed" should be replaced by "national courts".

*It was so agreed.*

29. Mr. BARSEGOV said he did not think that the statement made in the first sentence was really true.

30. Mr. McCAFFREY proposed that the word "repression", in the sixth sentence, should be replaced.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

31. Mr. SEPÚLVEDA GUTIÉRREZ proposed that, in the third sentence of the Spanish text, the words *indicios excesivamente frágiles* should be replaced by *meros indicios*.

32. Mr. TOMUSCHAT, referring to the same sentence, said that the words "flimsy evidence" were not an accurate translation of the wording used in the original French text.

33. Mr. Sreenivasa RAO, also referring to the third sentence, said that the words "an individual alleged to have committed a crime" should be defined on the basis of the principle that a person was presumed innocent until proved guilty.

34. Mr. THIAM (Special Rapporteur) said that it was not the principle of the presumption of innocence that was in question: the point was simply to prevent a person from being regarded as having committed a crime on the basis of an unfounded allegation.

35. Mr. CALERO RODRIGUES agreed with the Special Rapporteur. The third sentence was clear and reflected what had been stated in the Commission, namely that the procedure for extradition or trial should be set in motion only on the basis of reliable facts.

36. Mr. McCAFFREY said he had pointed out that the words "an individual alleged to have committed a crime" should be defined because, as soon as it became an obligation for a State to try or extradite, the basis for that obligation had to be specified. It thus had to be indicated where the allegation came from and of what it must consist. The words "flimsy evidence" might be replaced by "unfounded allegations".

37. Mr. Sreenivasa RAO said that, although he was satisfied with the explanations provided, he wondered whether it might not be possible to state more directly that, in order for extradition or trial to take place, there had to be a *prima facie* case.

38. Mr. RAZAFINDRALAMBO, supported by the CHAIRMAN, proposed that the words "relevant facts", in the third sentence, should be replaced by "sufficiently serious and reliable facts".

39. Mr. THIAM (Special Rapporteur) proposed that the end of the third sentence should be amended to read: ". . . on the basis of relevant facts, not on the basis of unfounded allegations or fragile evidence".

*It was so agreed.*

40. After an exchange of views in which Mr. BEESLEY, Prince AJIBOLA and Mr. MAHIU took part, Mr. TOMUSCHAT proposed that the last sentence of paragraph (3) should be amended to read: "The Commission also agreed that the word 'try' was intended to cover all the stages of prosecution proceedings."

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

41. Mr. THIAM (Special Rapporteur) said that, for stylistic reasons, the word *établirait*, in the second sentence of the French text, should be replaced by *indiquerait*.

42. Mr. CALERO RODRIGUES said that he did not understand the purpose of the word "and" in the last part of the penultimate sentence. It seemed to mean that some members would have liked to see "a more clear-cut enunciation of the principle of territoriality" at the same time as the "establishment of a more definite order of priorities in respect of extradition". Those were, however, two different positions that had been defended by two separate groups. He therefore suggested that the word "and" should be replaced by "or".

43. Mr. BARSEGOV said that, although he had belonged to the group in favour of the establishment of a definite order of priorities in respect of extradition, he did not think there was any real difference between the two opinions.

44. Mr. OGISO said that, in his opinion, one view expressed during the discussion had not been reflected in the draft report and proposed that the following sentence should be added to paragraph (4): "It was also pointed out that the principle of giving preference to the State in whose territory the crime was committed would give rise to practical difficulties, in particular in the case of the crime of *apartheid*."

*It was so agreed.*

45. Mr. Sreenivasa RAO proposed that the following sentence should be inserted after the fifth sentence: "The view was also expressed that the principle of territoriality of jurisdiction was without prejudice to the principle of jurisdiction being given to the country where the crime actually produced, or was intended to produce, its effects."

46. Mr. BARSEGOV, referring to the fifth sentence, said he did not think that the words "some members . . . were of the opinion that paragraph 2 should give preference to extradition" accurately reflected the discussion. In fact, the majority had been in favour of the criterion of territoriality. In order to avoid accentuating the contrast between the two positions reflected in the fifth and sixth sentences, particularly since one had been the majority position, he suggested that wording other than "some members" and "other members" should be used. In any event, the words *une certaine préférence* in French were rather doubtful; the word *préférence* would be enough.

47. Mr. THIAM (Special Rapporteur) said that it would be possible to use more impersonal wording, such as “it was maintained that” and “it was nevertheless stated that”.

48. Mr. MAHIOU, speaking on a point of order, said that he objected to the trend towards the inclusion in the report of the opinion of every member of the Commission. The report was a collective text and the positions of all members, however respectable, did not have to be reflected in it. He was alarmed that a trend which certainly did not meet the General Assembly’s expectations was taking increasingly firmer shape every year. He invited the Commission to give serious thought to its methods of work at its next session.

49. Mr. YANKOV endorsed Mr. Mahiou’s remarks. What was of interest to the reader of the report was what the Commission thought collectively. Only the general opinion carried any weight and authority. If there was no general opinion, it would be enough simply to say so.

50. Mr. GRAEFRATH said that he supported the view expressed by Mr. Mahiou and Mr. Yankov.

51. Mr. BARSEGOV said that he also shared that point of view. In his opinion, a choice had to be made between two solutions: that of reflecting the Special Rapporteur’s interpretation of the discussions held in plenary meetings and that of reflecting the Commission’s view, in other words the view shared by several members. He, too, invited the Commission to give some thought to its methods of work.

52. Prince AJIBOLA said that he had recently made a comment along the same lines as that made by Mr. Mahiou and had been told that all members were entitled to have their views reflected in the report. Members’ positions were, however, already reflected in the summary records. The Commission should decide on a rule and abide by it.

53. Mr. TOMUSCHAT said that he, too, agreed with Mr. Mahiou, but pointed out that, at present, the Commission was considering the commentaries to articles which were still in the draft stage. That task was an ongoing one and the important thing now was to highlight the points of view on the basis of which the provisions under consideration had been discussed.

54. Mr. Sreenivasa RAO said that, since he shared the concerns expressed by the previous speakers, he would withdraw the amendment he had just proposed.

55. Mr. PAWLAK said he agreed with Mr. Barsegov that the words *une certaine préférence* should be avoided. He therefore proposed that the last part of the fifth sentence should be amended to read: “. . . many members of the Commission were of the opinion that paragraph 2 should embody the principle of extradition to the State where the crime was committed”.

56. Mr. MAHIOU said that that new wording was too peremptory. He would prefer to retain the shade of meaning introduced by the words *une certaine préférence*.

57. Mr. PAWLAK said that he would withdraw his proposal, provided the words “some members” were replaced by “many members”.

*It was so agreed.*

58. Mr. McCaffrey said it was regrettable that the commentary did not reflect the position of the members of the Commission who had stated that they were opposed to the principle of universal jurisdiction. The last sentence of paragraph (4) did, of course, state that some of them “reserved their position with regard to the future formulation by the Commission of rules on extradition”. That was not enough, however, and he proposed that the following new sentence should be added: “Some members could not accept the general applicability of the principle of universal jurisdiction to the draft code”.

59. Mr. THIAM (Special Rapporteur) said that that sentence should be included at the end of paragraph (6) of the commentary.

*Paragraph (4), as amended, was approved.*

Paragraph (5)

60. Mr. MAHIOU noted that the words *cour*, *tribunal* and *juridiction* were used indifferently in the French text of the commentary. He suggested that it would be better to use only one term, preferably *tribunal*, which was used in the text of article 4.

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

Paragraph (6)

61. The CHAIRMAN recalled that the Special Rapporteur had suggested adding the new sentence proposed by Mr. McCaffrey during the consideration of paragraph (4) (see paras. 58-59 above) at the end of paragraph (6).

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

*The commentary to article 4, as amended, was approved.*

Commentary to article 7 (Non bis in idem)

Paragraph (1)

62. Mr. CALERO RODRIGUES said that the words “in internal law”, in the second sentence, did not have the same meaning as the words *dans le cadre du droit interne* in the French text. He also did not think that the words “as a result of the establishment of relations between several national courts”, at the end of the last sentence, were an accurate translation of the words *la mise en jeu des relations entre plusieurs juridictions internes* in the French text.

63. Mr. MAHIOU said that, in his view, the second sentence contradicted the third.

64. Mr. THIAM (Special Rapporteur) said it could happen that two or even more States might claim to have jurisdiction to try a particular individual. In such a case, referred to in the last sentence, the problem would

be one of the relations between the courts of those States.

65. Mr. GRAEFRATH said that the first problem to which Mr. Calero Rodrigues had referred might be solved by using the words "within a national legal system" to translate the words *dans le cadre du droit interne*.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

66. Mr. McCAFFREY and Mr. CALERO RODRIGUES said that the words "dismissal of proceedings", at the end of the paragraph, were not a good translation of the term *non-lieu* in the French text.

67. Prince AJIBOLA suggested that the words "discharge of proceedings" should be used instead.

*It was so agreed.*

68. Mr. TOMUSCHAT said that he had been surprised by the words "a group of individuals of different nationalities who set themselves up as a court", at the end of the sixth sentence. In his view, such a case would be unlikely to occur and, on the basis of the seventh sentence, he thought that what had been meant was "a court set up by a small group of States". If the words in question were not amended along those lines, they should be deleted.

69. Mr. THIAM (Special Rapporteur) suggested that the whole of the sixth sentence, as well as the word "therefore" at the beginning of the seventh sentence, should be deleted.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

70. Mr. TOMUSCHAT, referring to the fourth sentence, said that, in his view, the *non bis in idem* principle was a rule of international law that applied to proceedings before national courts. Moreover, the problem was not one of recognizing the validity of a judgment pronounced in a foreign State, but rather one of recognizing the judgment itself. He therefore proposed that the fourth sentence should be amended to read: "In theoretical terms, it was noted that this principle governed criminal proceedings before domestic courts and that its external application give rise to the problem of respect by one State of final judgments pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgment handed down in a foreign State." He also pointed out that the *non bis in idem* rule was embodied in the International Covenant on Civil and Political Rights (art. 14, para. 7).

71. Mr. THIAM (Special Rapporteur) said that he would insist on the retention of the term "rule of internal law", which was, as the law now stood, fully justified. If the Commission made the *non bis in idem* rule a rule of international law, it would be engaging in the progressive development of the law.

72. Mr. MAHIU said that, in his view, the *non bis in idem* rule could be regarded as one of the general principles of law. The concept of a general principle of law was, however, difficult to define and related both to internal law and to international law. The meaning of the fourth sentence might thus be made clearer by indicating that that principle was a rule of internal law, although, as a general principle of international law, it was also part of international law. The best course would nevertheless be to avoid taking a stand on the question.

73. Mr. CALERO RODRIGUES suggested that the words "a rule of internal law" should be retained, with the addition of the words "governing criminal proceedings before national courts", and that the words "not a rule of international law" should be deleted.

74. Mr. ARANGIO-RUIZ said it must be borne in mind that there were not only general principles, but also rules which were universally applicable to human rights. He supported Mr. Tomuschat's amendment, particularly since, in addition to the International Covenant on Civil and Political Rights, which embodied the *non bis in idem* rule, most legal writers considered that human rights formed part of general international law.

75. Mr. Sreenivasa RAO said that, in the fifth sentence, the word "protect" was inappropriate. He would suggest wording along the following lines: "provide a shield for an individual".

*It was so agreed.*

76. Mr. McCAFFREY said that he shared Mr. Tomuschat's view and supported his amendment, but, if it was not acceptable to the other members of the Commission, he would endorse Mr. Calero Rodrigues's proposal.

77. Mr. BENNOUNA proposed that the fourth sentence should be replaced by the following text:

"In theoretical terms, it was noted that this principle was a rule of internal law and that its application in relations between States gave rise to the problem of respect by one State of final judgments pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgment handed down in a foreign State."

78. Mr. THIAM (Special Rapporteur) said that he could accept Mr. Bennouna's amendment, although he thought it would be useful to reopen the discussion of the question at a later stage, since legal writers did not unanimously agree on it. He also recalled that the Commission had objected to his suggestion that the general principles of law should be referred to in the draft code. Accordingly, the *non bis in idem* principle could relate only to internal law.

79. Mr. TOMUSCHAT said that, in the text proposed by Mr. Bennouna, it would be better to refer to "a rule applicable in internal law".

80. Mr. BENNOUNA said that he agreed with that change and further suggested that the words "its application" in the text he had proposed should be replaced by "its implementation".

81. Mr. GRAEFRATH said he thought that the *non bis in idem* principle was a rule of internal law and that it did not apply in the context under consideration. It was only because of treaties concluded by certain States that it was respected in the case of foreign judgments. The International Covenant on Civil and Political Rights recognized it only in so far as it related to the internal legal order and did not require recognition of judgments handed down in a foreign State.

82. Mr. BARSEGOV said that, in comparing the English, French and Russian texts of paragraphs (3) (a) and (4) of the commentary, he had noted that, although the expression “an act . . . tried . . . as an ordinary crime” was very clear in English, the Russian text referred to acts tried on the basis of customary law. How should the words *droit commun* in the French text be interpreted? Did they refer to rules based on custom?

83. Mr. THIAM (Special Rapporteur) said that the words *droit commun* had nothing to do with custom. The Russian text should be amended.

*It was so agreed.*

84. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the amendment to the fourth sentence proposed by Mr. Bennouna, as further amended by Mr. Tomuschat and Mr. Bennouna

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

85. Mr. BENNOUNA said that national courts should be referred to first, since the words “international criminal court” appeared only in square brackets in the text of article 7. He therefore proposed that the first sentence of paragraph (4) should begin: “It should also be noted that, according to paragraph 3, a national court may again try and punish acts already tried by a court of another State, if the acts . . .”. The last sentence was unnecessary and should be deleted.

86. Mr. THIAM (Special Rapporteur) said that he agreed with the idea of deleting the last sentence, but pointed out, with regard to Mr. Bennouna’s first proposal, that paragraph (4) was merely based on the structure of article 7.

87. Mr. MAHIOU noted that paragraph (4) explained the words in square brackets, while the question of national courts was dealt with in paragraph (3). He, too, thought that the last sentence should be deleted.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

Paragraph (5)

*Paragraph (5) was approved.*

*The commentary to article 7, as amended, was approved.*

*Commentary to article 8 (Non-retroactivity)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

88. Mr. GRAEFRATH suggested that the last sentence should be deleted, since it was not entirely correct. The Nürnberg Tribunal had never really based its judgments on the general principles of law.

*It was so agreed.*

89. Mr. TOMUSCHAT proposed that the word *lege*, in the second sentence, should be replaced by *lex*.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

90. Mr. BENNOUNA suggested that, at the end of the second sentence, it should be specified that what was meant was “customary international law”, as opposed to treaty law.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

*The commentary to article 8, as amended, was approved.*

*Commentary to article 10 (Responsibility of the superior)*

Paragraph (1)

91. Mr. THIAM (Special Rapporteur) said that the following phrase should be added at the end of the paragraph: “for example article 86 (para. 2) of Additional Protocol I to the 1949 Geneva Conventions”.

*Paragraph (1), as amended, was approved.*

Paragraph (2)

*Paragraph (2) was approved.*

Paragraph (3)

92. Mr. THIAM (Special Rapporteur) said that paragraph (3) could be deleted.

*Paragraph (3) was deleted.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were approved.*

Paragraph (6)

93. Mr. CALERO RODRIGUES said that the translation of the French words *possibilités* and *possibilité* as “opportunities” and “opportunity” should be revised.

*Paragraph (6) was approved on that understanding.*

*The commentary to article 10, as amended, was approved.*

*Commentary to article 11 (Official position and criminal responsibility)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were approved.*

*The commentary to article 11 was approved.*

*Commentary to article 12 (Aggression)*

Paragraph (1)

94. Mr. CALERO RODRIGUES proposed that the fourth sentence should be deleted, since it was not clear.

95. Mr. THIAM (Special Rapporteur), drawing attention to a mistake in the fourth sentence, said that the word "Governments" should be replaced by the words "government officials". He also noted that the question raised in that sentence had been discussed at length in the Commission.

96. Mr. BENNOUNA said that, if the words "under article 3" were added at the end of the first sentence, the last three sentences of the paragraph could be deleted. He also proposed that the second sentence should be amended to read: "Paragraph 1 has been adopted provisionally and will have to be reviewed at a later stage in the elaboration of the code."

97. Mr. BEESLEY proposed that the end of the first sentence should be amended to read: ". . . and the individuals who are subject to criminal prosecution and punishment for acts of aggression".

98. Mr. THIAM (Special Rapporteur) said that, although he agreed with the amendments to the first sentence proposed by Mr. Bennouna and Mr. Beesley, he could not accept Mr. Bennouna's proposal to delete the last three sentences of the paragraph, since many members of the Commission, including himself, were not convinced of the need for article 12, paragraph 1.

99. Mr. PAWLAK suggested that the words "of some members", in the first sentence, should be deleted because the idea expressed in that sentence reflected the concern of the Commission as a whole.

100. Mr. GRAEFRATH said that he supported the proposals by Mr. Beesley and Mr. Pawlak.

*The amendments to the first and second sentences by Mr. Bennouna, Mr. Beesley and Mr. Pawlak were adopted.*

101. Mr. RAZAFINDRALAMBO said that the fourth sentence, whose deletion had been proposed by Mr. Calero Rodrigues, was clearer in English than in French, and that the latter should be amended to read: *Il faudra décider s'il s'agit, non seulement des gouvernants, mais aussi d'autres personnes ayant une responsabilité politique ou militaire et ayant participé . . .*

102. Mr. CALERO RODRIGUES said that he supported Mr. Razafindralambo's proposal.

*Mr. Razafindralambo's amendment was adopted.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

103. Mr. BENNOUNA proposed that the last part of the second sentence should be amended to read: ". . . certain members of the Commission who felt that an instrument intended to serve as a guide for a political organ such as the Security Council could not be used as a basis for criminal prosecution before a judicial body".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

104. Mr. THIAM (Special Rapporteur) said that, in the last sentence, the words "in that it does not

reproduce the whole of resolution 3314 (XXIX)" should be deleted.

105. Mr. GRAEFRATH proposed that the following sentence should be inserted after the penultimate sentence: "The advocates of that school of thought therefore wished to retain the words 'In particular' in paragraph 4 and to delete paragraph 5." The last sentence would then read: "The text of article 12 provisionally adopted reflects these two trends . . ."

106. Mr. BEESLEY, noting that paragraph (3) dealt with cases in which the Security Council determined the existence of aggression, proposed that the following text should be inserted before the last sentence: "A number of members addressed the question whether a tribunal would be free to consider allegations of the crime of aggression in the absence of any consideration or finding by the Security Council. One member suggested that this point should be put squarely to Governments." If the second part of his proposed text gave rise to any objections, however, he would not press for it, since it merely expressed his personal opinion.

107. Mr. BARSEGOV said that he supported Mr. Graefrath's proposal, which made the meaning of the penultimate sentence clearer. Paragraph (3) was, however, not well balanced and, in order to take account of the opinion of another group of members, it should include the following text: "In the opinion of some members of the Commission, releasing national criminal courts from the requirement that they should be guided by decisions of the Security Council determining the existence or non-existence of aggression could lead to a juxtaposition of the decisions of the court and those of the Security Council and to the replacement of the Security Council by the court; and that, in the final analysis, could lead to a revision of the Charter of the United Nations."

108. Mr. KOROMA said that Mr. Barsegov's proposed amendment had convinced him that article 12, paragraph 5, did not belong in the draft code. He therefore proposed that the eighth sentence of paragraph (3), beginning with the words "In particular, the judge should not be bound . . .", should be deleted. Although he was not opposed to Mr. Barsegov's amendment, which implied that the Commission was divided on the role of the Security Council in the matter, he would invite Mr. Barsegov to tone down the wording in order better to reflect the problems that had been discussed. In fact, it was not the role of the Security Council that was at issue: the problem was only the result of the fact that the court dealt with criminal matters, while the Security Council dealt with political matters.

109. Mr. BARSEGOV said that he would not like to give the impression that the Commission was divided, but the fact was that there had been statements and amendments which had been submitted unilaterally and which showed that members of the Commission would like the court not to be bound by the decisions of the Security Council, on the grounds that the Council might not take any decision at all. However, if the summary of the point of view that was contrary to his own were deleted and if it were not stated that the court was free and could act independently of the Security Council, his

point of view would not have to be reflected. To that end, he suggested the deletion of the seventh sentence, beginning with the words “According to that same school of thought . . .”, as well as the eighth sentence, which Mr. Koroma had also proposed deleting. If the Commission accepted that suggestion, he would not press for his own amendment.

110. Mr. KOROMA said that he supported Mr. Barsegov’s proposal.

111. Mr. THIAM (Special Rapporteur) said that he accepted the proposals by Mr. Beesley, Mr. Koroma and Mr. Barsegov.

112. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (3) with the amendments by Mr. Graefrath, the first sentence of Mr. Beesley’s amendment, and the amendments by Mr. Barsegov and Mr. Koroma deleting the seventh and eighth sentences.

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were approved.*

Paragraph (6)

113. Mr. THIAM (Special Rapporteur) said that, in the first sentence, “paragraph (2)” should read “paragraph (3)”.

114. Mr. GRAEFRATH proposed that the beginning of the third sentence should be amended to read: “Other members thought that a determination made by the Security Council on the basis of Chapter VII of the Charter of the United Nations was binding . . .”.

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

Paragraph (7)

115. Mr. THIAM (Special Rapporteur) said that the second sentence should be deleted.

*Paragraph (7), as amended, was approved.*

*The commentary to article 12, as amended, was approved.*

*Section C, as amended, was adopted.*

116. Mr. CALERO RODRIGUES said that chapter IV of the report should include a paragraph suggesting questions on which the General Assembly’s discussion of the draft code might focus.

117. Mr. THIAM (Special Rapporteur) said that, although he did not think that the General Assembly had to be asked any questions, he would have no objection if the Commission drew the Assembly’s attention to particular points, such as the question of an international criminal court.

118. Mr. CALERO RODRIGUES said he still believed that what the Commission’s report should include was not questions to the General Assembly, but an indication of problems on which the views of Governments and the General Assembly would be useful for the Commission’s future work. He deplored the fact that the Commission was giving the impression of paying no attention to a General Assembly resolution, namely resolution 42/156.

*Chapter IV of the draft report, as amended, was adopted.*

*The draft report of the Commission on the work of its fortieth session as a whole, as amended, was adopted.*

#### **Closure of the session**

119. After an exchange of congratulations and thanks, the CHAIRMAN declared the fortieth session of the International Law Commission closed.

*The meeting rose at 1.40 p.m.*









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