

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1990

Volume I

*Summary records
of the meetings
of the forty-second session
1 May-20 July 1990*

UNITED NATIONS



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NOTE

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The *Yearbook* for each session of the International Law Commission comprises two volumes:

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 forty-second session of the Commission (A/CN.4/SR.2149-A/CN.4/SR.2204), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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Subsection 2 (Texts of draft articles 16, 18 and X, with commentaries thereto, provisionally adop- ted by the Commission at its forty-second ses- sion)		Commentary to article 18 (Recruitment, use, financing and training of mercenaries)	385
Commentary to article 16 (International terror- ism)	384	Commentary to article X (Illicit traffic in nar- cotic drugs)	387
2204th meeting		Commentary to article 18 (Recruitment, use, financing and training of mercenaries) <i>(concluded)</i>	388
<i>Friday, 20 July 1990, at 3.10 p.m.</i>		Closure of the session	389
Draft report of the Commission on the work of its forty- second session <i>(concluded)</i>			

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. Emmanuel J. ROUCOUNAS	Greece
Mr. Leonardo DÍAZ GONZÁLEZ	Venezuela	Mr. César SEPÚLVEDA GUTIÉRREZ	Mexico
Mr. Gudmundur EIRIKSSON	Iceland	Mr. Jiuyong SHI	China
Mr. Laurel B. FRANCIS	Jamaica	Mr. Luis SOLARI TUDELA	Peru
Mr. Bernhard GRAEFRATH	German Democratic Republic	Mr. Doudou THIAM	Senegal
Mr. Francis Mahon HAYES	Ireland	Mr. Christian TOMUSCHAT	Federal Republic of Germany
		Mr. Alexander YANKOV	Bulgaria

OFFICERS

Chairman: Mr. Jiuyong SHI
First Vice-Chairman: Mr. Julio BARBOZA
Second Vice-Chairman: Mr. Juri G. BARSEGOV
Chairman of the Drafting Committee: Mr. Ahmed MAHIOU
Rapporteur: Mr. Gudmundur EIRIKSSON

Mr. Vladimir S. Kotliar, 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 2150th meeting, held on 2 May 1990:

1. Organization of work of the session.
2. Filling of a casual vacancy in the Commission (article 11 of the statute).
3. State responsibility.
4. Jurisdictional immunities of States and their property.
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-third session.
12. Other business.

ABBREVIATIONS

ECE	Economic Commission for Europe
EEC	European Economic Community
ESCAP	Economic and Social Commission for Asia and the Pacific
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IFAD	International Fund for Agricultural Development
ILA	International Law Association
ILO	International Labour Organisation
IMO	International Maritime Organization
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	Office of the United Nations High Commissioner for Refugees
WIPO	World Intellectual Property Organization
World Bank	International Bank for Reconstruction and Development

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<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1-24: up to and including 1930)

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

PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS

- | | |
|---|--|
| Convention on the Privileges and Immunities of the United Nations (London, 13 February 1946) | <i>Ibid.</i> , vol. 1, p. 15. |
| Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947) | <i>Ibid.</i> , vol. 33, p. 261. |
| Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) | <i>Ibid.</i> , vol. 500, p. 95. |
| Vienna Convention on Consular Relations (Vienna, 24 April 1963) | <i>Ibid.</i> , vol. 596, p. 261. |
| Convention on Special Missions (New York, 8 December 1969) | United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125. |
| Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973) | United Nations, <i>Treaty Series</i> , 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, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87. |

LAW OF TREATIES

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| Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) | United Nations, <i>Treaty Series</i> , 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.

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988) E/CONF.82/15 and Corr.2.

MISCELLANEOUS PENAL MATTERS

- International Convention against the Taking of Hostages (New York, 17 December 1979) United Nations, *Treaty Series*, vol. 1316, p. 205.
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989) General Assembly resolution 44/34, annex.

CHECK-LIST OF DOCUMENTS OF THE FORTY-SECOND SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/426/Rev.1	Provisional agenda	Mimeographed. For the agenda as adopted, see p. x above.
A/CN.4/427 [and Corr.1] and Add.1	Sixth report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	Reproduced in <i>Yearbook . . . 1990</i> , vol. II (Part One).
A/CN.4/428 [and Corr.1, 2 and 4] and Add.1	Sixth 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.4/429 and Add.1-4	Draft Code of Crimes against the Peace and Security of Mankind: observations of Member States received pursuant to General Assembly resolutions 43/164 and 44/32	<i>Idem.</i>
A/CN.4/430 and Add.1	Eighth 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.4/431 [and Corr.1]	Third report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur	<i>Idem.</i>
A/CN.4/432	Fifth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	To be reproduced in consolidated form in <i>Yearbook . . . 1991</i> , vol. II (Part One), as document A/CN.4/438.
A/CN.4/433	Filling of a casual vacancy (article 11 of the statute): note by the Secretariat	Reproduced in <i>Yearbook . . . 1990</i> , vol. II (Part One).
A/CN.4/433/Add.1	<i>Idem</i> —Addendum to the note by the Secretariat: candidature and curriculum vitae	Mimeographed.
A/CN.4/L.443	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-fourth session of the General Assembly	Mimeographed.
A/CN.4/L.444	Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 10 and 12 to 16	See summary record of the 2191st meeting (paras. 23 <i>et seq.</i>).
A/CN.4/L.445	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts adopted by the Drafting Committee: articles 22 to 27	See summary records of the 2187th meeting and 2188th meeting (paras. 1-74).
A/CN.4/L.446	Draft report of the International Law Commission on the work of its forty-second session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10)</i> . The final text appears in <i>Yearbook . . . 1990</i> , vol. II (Part Two).
A/CN.4/L.447 and Add.1 and 2 [and Add.2/Corr.1] and Add.3	<i>Idem</i> : chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	<i>Idem.</i>
A/CN.4/L.448	<i>Idem</i> : chapter III (Jurisdictional immunities of States and their property)	<i>Idem.</i>
A/CN.4/L.449 and Add.1 and 2	<i>Idem</i> : chapter IV (The law of the non-navigational uses of international watercourses)	<i>Idem.</i>
A/CN.4/L.450	<i>Idem</i> : chapter V (State responsibility)	<i>Idem.</i>
A/CN.4/L.451	<i>Idem</i> : chapter VI (Relations between States and international organizations (second part of the topic))	<i>Idem.</i>
A/CN.4/L.452	<i>Idem</i> : chapter VII (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>
A/CN.4/L.453	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem.</i>
A/CN.4/L.454 [and Corr.1]	Draft Code of Crimes against the Peace and Security of Mankind: report of the Working Group established by the Commission pursuant to the request from the General Assembly in paragraph 1 of its resolution 44/39	<i>Idem</i> , chap. II, sect. C.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.455	Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: articles 16, 18 and X	See summary records of the 2196th meeting (paras. 43 <i>et seq.</i>), 2197th meeting and 2198th meeting (paras. 1-8 and 52-81).
A/CN.4/SR.2149- A/CN.4/SR.2204	Provisional summary records of the 2149th to 2204th meetings	Mimeographed. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FORTY-SECOND SESSION

Held at Geneva from 1 May to 20 July 1990

2149th MEETING

Tuesday, 1 May 1990, at 3.10 p.m.

Outgoing Chairman: Mr. Bernhard GRAEFRATH

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Opening of the session

1. The OUTGOING CHAIRMAN declared open the forty-second session of the International Law Commission and welcomed the members of the Commission and its secretariat.

Tribute to the memory of Mr. Paul Reuter

2. The OUTGOING CHAIRMAN said that it was his painful duty to inform members of the Commission of the death of Mr. Paul Reuter two days earlier. Members knew that Mr. Reuter's contribution to international law had been outstanding, but it was undoubtedly for the role he had played in the Commission since 1964 that he had been most admired. He understood that Mrs. Reuter would be in Geneva during the second half of June and therefore suggested that the Commission should devote one of its meetings at that time to honouring the memory of Mr. Reuter. Quite apart from his immense talents as a lawyer, members of the Commission would always remember Mr. Reuter's qualities of heart and mind, his intelligence, knowledge, wisdom, sense of humour, elegance and courtesy.

At the invitation of the Outgoing Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Paul Reuter.

Statement by the outgoing Chairman

3. The OUTGOING CHAIRMAN said that he had attended the forty-fourth session of the General

Assembly and introduced to the Sixth Committee the Commission's report on its forty-first session (A/44/10).¹ The text of his statement,² as well as the summary records of the meetings which the Sixth Committee had devoted to the report and the topical summary of the debate prepared by the Secretariat (A/CN.4/L.443), were available to members of the Commission. The report, and in particular the draft articles contained therein, had given rise to a wealth of constructive ideas and suggestions. The discussion had reflected a pluralistic approach to many important issues raised in the report, and it was therefore essential for the Commission to take those different views into account in arriving at balanced texts that would enable the various positions to be reconciled and agreement between interested States to be reached.

4. During the debate in the Sixth Committee, the importance of close interaction between the Commission and the General Assembly had consistently been stressed and new ways and means of strengthening that co-operation had been envisaged.

5. He would confine himself to drawing attention to some points of a general character that might influence the direction of the Commission's work.

6. Although the Commission's report had on the whole been favourably received, a number of delegations had criticized its length and structure. It should, in his view, be possible in future to submit a more concise report to the General Assembly, concentrating mainly on the Commission's decisions and commentaries and not including summaries of special rapporteurs' reports. That would enable the Commission to structure its report in such a way that there was more uniformity between the different chapters. That was certainly a question that should be taken up without delay by the Rapporteur and the Planning Group.

7. Many delegations had expressed regret that the Commission's report was not sufficiently explicit with regard to the main points or questions which the Commission would like the Sixth Committee to deal with. Knowing that the Sixth Committee had already raised the issue several times, he had endeavoured to underline those questions in introducing the report. Obviously, however, that could be no substitute for a decision

¹ See *Yearbook . . . 1989*, vol. II (Part Two).

² See *Official Records of the General Assembly, Forty-fourth Session, Sixth Committee*, 24th meeting, paras. 1-102.

by the Commission to list the questions that needed a response by States, because the success of its work depended to a large extent on a political decision by them to point the Commission in the direction it should follow with regard to a particular draft. Accordingly, in paragraph 4 (c) of its resolution 44/35 of 4 December 1989 on the report of the Commission, the General Assembly had requested it 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.

8. Several delegations had made proposals concerning the Commission's working methods, having regard to the central role it had to play in the increasingly rapid development of international law. The key to a productive relationship between the Sixth Committee and the Commission lay, as rightly suggested, in a proper understanding of each other's role in that process. The close interdependence between the working methods of the Sixth Committee and those of the Commission had also been stressed, despite the differences between them. Specific proposals and suggestions had been made in that regard, for example to split the Commission's session into two parts in order to facilitate drafting and the timely presentation of reports; to form two drafting committees or subgroups to deal with parallel topics; to streamline the Commission's report; and to improve co-operation with regional bodies.

9. It had also been suggested that long-term codification projects should be supplemented by short-term legal opinions on specific questions and that the possibility of involving the Commission in the United Nations Decade of International Law should be envisaged, a question that should be considered by the Planning Group.

10. Drawing attention to paragraph 4 (b) of General Assembly resolution 44/35, concerning the possible staggering of the consideration of some topics, he said that that was quite feasible, since the Commission might conclude the second reading of the draft articles on jurisdictional immunities of States and their property at the present session and concentrate on the draft Code of Crimes against the Peace and Security of Mankind and on the law of the non-navigational uses of international watercourses, thus accelerating its work. Moreover, the Commission should not hesitate to defer consideration of a report which introduced only a few draft articles until a more comprehensive set of articles had been submitted. That would enable it to take better account of the relationship between the various draft articles and of their place in the draft as a whole and would allow the Drafting Committee to bear in mind the debate in plenary. The Drafting Committee was placed in a difficult position when a long time elapsed between the debate in the Commission and the moment when the Committee took up draft articles on a particular topic. The Planning Group would no doubt give attention to all the suggestions and comments made with regard to the Commission's future work and working methods.

11. In paragraph 5 of resolution 44/35, the General Assembly gave a positive response to the Commission's

suggestion that special rapporteurs be invited to be present during the discussion of their topics in the General Assembly when circumstances so warrant.

12. The General Assembly had adopted a number of other resolutions which concerned the Commission. In its resolution 44/36 of 4 December 1989, the Assembly had expressed its appreciation to the Commission for its work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Many delegations, however, wanted more time to study the draft articles on that topic. The Assembly had therefore decided to hold informal consultations on the matter at its forty-fifth session before deciding on the question of convening a diplomatic conference.

13. In its resolution 44/32, also of 4 December 1989, the General Assembly had stressed the importance and urgency of the draft Code of Crimes against the Peace and Security of Mankind. Two other resolutions of the Assembly of the same date could also have an influence on the Commission's work on the draft code, namely resolution 44/34 on the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and resolution 44/39 entitled "International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes".

14. With regard to resolution 44/34, he drew the Commission's attention, and in particular that of the Drafting Committee, to paragraph 8 (b) of the report of the *Ad Hoc* Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries,³ which stated that nothing in the convention was intended to prejudice in any way the place which the crime of mercenarism should occupy in the draft Code of Crimes against the Peace and Security of Mankind.

15. In resolution 44/39, the General Assembly had requested the Commission to consider the question of including in the draft code an article on drug trafficking, as the Commission itself had decided at its previous session. In his eighth report on the topic (A/CN.4/430 and Add.1), the Special Rapporteur had accordingly submitted at the present session draft provisions dealing with international drug trafficking as an international crime under the code. The Commission would therefore be in a position to examine the question at the present session. He then read out paragraph 1 of resolution 44/39, whereby the Commission had also been invited to give a legal opinion on the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over crimes covered by the code. The General Assembly obviously expected the Commission to respond to both requests at the present session. The Assembly itself had scheduled consideration of the subject at its forty-fifth session. It was his understanding, however, that the Sixth Committee was not asking the Commis-

³ A/C.6/44/L.9.

sion to prepare a statute for an international criminal court, nor had it conferred such a mandate on the Commission. It had, rather, requested the Commission to draw up a paper pointing to the different questions involved and to give a legal opinion on the matter to prepare the ground for a political decision by the Sixth Committee.

16. With regard to the various types of tasks which could be entrusted to the Commission, it had been said that, if the Commission were able to express a view speedily as to an appropriate legal framework for future action in a sphere of immediate concern to the international community, its value would be more clearly apparent. As an example, one delegation in the Sixth Committee had suggested that the Commission should be invited to set out in succinct form the matters that would need to be resolved if the proposal for an international court in the matter of drug trafficking were to be adopted. It was in that spirit that General Assembly resolution 44/39 had been adopted by consensus. He was convinced that the Enlarged Bureau would not fail to take up that important question. Perhaps it would be advisable to set up a small working group to prepare a paper on the subject. That group could take as a starting-point part III of the eighth report on the draft Code of Crimes against the Peace and Security of Mankind, which was in the nature of a "questionnaire-report" aimed at ascertaining the positions of members of the Commission in order to prepare a paper which could satisfy the demands of the General Assembly in its resolution 44/39.

17. Reverting to resolution 44/35, in paragraph 12 of which the General Assembly had reaffirmed its wish that the Commission enhance its co-operation with intergovernmental legal bodies whose work was of interest for the progressive development and codification of international law, he noted that he had attended the session of the Inter-American Juridical Committee held at Rio de Janeiro in August 1989 and that of the Asian-African Legal Consultative Committee held at Beijing in March 1990. Those experiences had been very rewarding. They had made him realize what a broad range of questions was being considered by those two bodies and how effective, but at the same time different, their working methods were. He had been especially interested to learn that the Inter-American Juridical Committee had just adopted a Declaration on the Environment. That Declaration was an all-encompassing text which dealt with the question of liability in all its aspects, including procedures for notification and dispute settlement. The Asian-African Legal Consultative Committee had welcomed the report of the Commission on its forty-first session. During the Committee's discussions, special attention had been paid to the draft Code of Crimes against the Peace and Security of Mankind, to the law of the non-navigational uses of international watercourses and to jurisdictional immunities of States and their property. The hope had also been expressed that the Commission's work on State responsibility would make speedy progress.

18. Being concerned to promote co-operation between the Commission and those two bodies—co-operation which, in his view, could be improved—he had taken steps to ensure that the relevant documents of the Inter-American Juridical Committee and of the Asian-African Legal Consultative Committee would immediately be made available to the special rapporteurs of the Commission. It was his understanding that Mr. Tomuschat, who had represented the Commission at the November 1989 session of the European Committee on Legal Co-operation, had done the same with regard to the documents of that body. It should also be possible to organize a regular exchange of reports between the Commission and intergovernmental legal bodies and to ensure that the drafts and resolutions of those bodies were systematically included, as had been done for the present session, in the list of materials relevant to the various topics on the Commission's agenda. In addition, it would be useful to furnish to the secretariats of those bodies a set of the provisional summary records of the Commission in order to speed up the exchange of detailed information. Obviously, since the summary records were provisional and were often subject to substantial corrections, they should be made available for information only. It would be helpful if the Planning Group could prepare a recommendation on that point.

19. In conclusion, he repeated that the Sixth Committee of the General Assembly had shown great appreciation for the Commission's work, as could be seen from resolution 44/35, in which the Assembly had responded to many questions raised by the Commission.

Election of officers

Mr. Shi was elected Chairman by acclamation.

Mr. Shi took the Chair.

20. The CHAIRMAN thanked the Commission for choosing him to direct its discussions. He appreciated that expression of confidence and would do his best to be equal to the task entrusted to him. He was convinced that, with the assistance of his fellow officers, the Enlarged Bureau and all the members of the Commission, the work of the forty-second session would be crowned with success.

The meeting was suspended at 3.45 p.m. and resumed at 4.25 p.m.

Mr. Barboza was elected First Vice-Chairman by acclamation.

Mr. Barsegov was elected Second Vice-Chairman by acclamation.

Mr. Mahiou was elected Chairman of the Drafting Committee by acclamation.

Mr. Eiriksson was elected Rapporteur by acclamation.

The meeting rose at 4.30 p.m.

2150th MEETING

Wednesday, 2 May 1990, at 10.10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Adoption of the agenda (A/CN.4/426)

1. The CHAIRMAN drew attention to the provisional agenda for the forty-second session (A/CN.4/426) and suggested that, in view of the need to fill the vacancy created by the death of Mr. Reuter, a new item 2, reading "Filling of a casual vacancy in the Commission (article 11 of the statute)", should be included, all subsequent items being renumbered accordingly.

It was so agreed.

2. The CHAIRMAN invited the Commission to adopt the provisional agenda, as amended, without prejudice to the order of consideration of the topics, which would be decided later.

The provisional agenda, as amended (A/CN.4/426/Rev.1), was adopted.

3. The CHAIRMAN, drawing attention to General Assembly resolution 44/35 of 4 December 1989, suggested that the request in paragraph 4 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.

Organization of work of the session

[Agenda item 1]

4. The CHAIRMAN said that the Enlarged Bureau had met and discussed the order of consideration of agenda items and the number of meetings to be allocated to each. Agreement on a complete timetable was still outstanding and he wished to hold further consultations before making a formal proposal to the Commission. The Enlarged Bureau had, however, agreed to recommend that agenda item 5, "Draft Code of Crimes against the Peace and Security of Mankind", should be taken up first and that eight meetings should be allocated to it.

5. Mr. McCaffrey said that, while agreeing with that recommendation in principle, he wondered whether the decision to allocate eight meetings should not be adopted provisionally, subject to review in the light of a future decision on the allocation of work as

between the plenary Commission and a working group to consider the question of establishing an international criminal court. If the Commission eventually decided to deal with the question of such a court principally in the context of a working group, a smaller number of plenary meetings might be required for the topic of the draft code. If, however, it was decided that part III of the eighth report of the Special Rapporteur on the topic (A/CN.4/430 and Add.1), which dealt with the issue of an international criminal court, should be considered in plenary, more than eight meetings might be needed.

6. Mr. CALERO RODRIGUES said that the working group which the Commission was planning to set up would serve a very clear purpose, namely helping the Commission to respond to the request addressed to it by the General Assembly in paragraph 1 of its resolution 44/39 of 4 December 1989. The issue fell within the scope of the topic of the draft code and should be considered in plenary under the guidance of the Special Rapporteur. The working group should on no account be a substitute for the plenary Commission and should merely assist it in preparing an appropriate document in response to the General Assembly's request.

7. Mr. BARSEGOV associated himself with those comments. He was not opposed in principle to establishing a working group, but it would not be proper to do so before hearing the Special Rapporteur for the draft code and holding a debate on the topic. In his view, the Commission should allocate a certain number of meetings to discussion on the draft code, including the question of an international criminal court, on the understanding that any time left over would be used to consider the report of the working group. Any other decision at the present stage would be premature.

8. Mr. THIAM said that he, too, endorsed the remarks made by Mr. Calero Rodrigues and suggested that Mr. McCaffrey's point should be left in abeyance, pending the Special Rapporteur's introduction of the topic.

9. Mr. ARANGIO-RUIZ said that he supported the views expressed by the previous speakers and added that the Commission's consideration of the question of an international criminal court would be greatly facilitated if the Secretariat produced documentation on the subject.

10. Mr. AL-BAHARNA, agreeing that the question of setting up a working group should be considered at a later stage, wondered whether General Assembly resolution 44/39 merely requested the Commission to issue, as it were, a legal opinion on the question of establishing an international criminal court, or whether it provided for the elaboration of a statute for such a court.

11. Mr. JACOVIDES said that there seemed to be general agreement on the course to follow. First, the Special Rapporteur for the draft code should introduce the topic and the Commission should then begin to discuss it within a time frame such as that recommended by the Enlarged Bureau. The question of setting up a working group might be considered after that. In that connection, he endorsed Mr. Arangio-Ruiz's request for documentation to be prepared by the Secretariat.

12. Mr. BEESLEY said that he had no difficulty in accepting that procedure but wished to make some comments for consideration at a later stage. In the opinion of many, the issue of an international criminal jurisdiction lay at the very heart of the subject-matter of the draft code. The Commission should set up a working group with a flexible mandate not restricted to the report of the Special Rapporteur on the latter topic and the proposal by Trinidad and Tobago on the issue. While it might be inappropriate for the Special Rapporteur to chair the working group, it was important that he be an *ex officio* member.

13. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to the recommendation of the Enlarged Bureau that the draft code should be taken up first and that eight meetings should be allocated to it. The question of setting up a working group on the issue of establishing an international criminal court would be considered later, after the Special Rapporteur's introduction of his eighth report.

It was so agreed.

Draft Code of Crimes against the Peace and Security of Mankind¹ (A/CN.4/419 and Add.1,² A/CN.4/429 and Add.1-4,³ A/CN.4/430 and Add.1,⁴ A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 15, 16, 17, X AND Y and

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT

14. The CHAIRMAN invited the Special Rapporteur to introduce his eighth report on the topic (A/CN.4/430 and Add.1), as well as draft articles 15, 16, 17, X and Y contained therein, which read:

CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[...]

Article 15. *Complicity*

The following constitute crimes against the peace and security of mankind:

1. Being an accomplice to any of the crimes defined in this Code.
- [2. Within the meaning of this Code, complicity may mean both accessory acts prior to or concomitant with the principal offence and subsequent accessory acts.]

Article 16. *Conspiracy*

The following constitute crimes against the peace and security of mankind:

1. Participation in a common plan or conspiracy to commit any of the crimes defined in this Code.

2. FIRST ALTERNATIVE

Any crime committed in the execution of the common plan referred to in paragraph 1 above attaches criminal responsibility not only to the perpetrator of such crime but also to any individual who ordered, instigated or organized such plan, or who participated in its execution.

2. SECOND ALTERNATIVE

Each participant shall be punished according to his own participation, without regard to participation by others.

Article 17. *Attempt*

The following constitutes a crime against the peace and security of mankind:

Attempt to commit a crime against the peace and security of mankind.

Article X. *Illicit traffic in narcotic drugs: a crime against peace*

The following constitute crimes against peace:

1. Engaging in illicit traffic in narcotic drugs.
2. Illicit traffic in narcotic drugs means any traffic organized for the purpose of the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the conventions which have entered into force.

Article Y. *Illicit traffic in narcotic drugs: a crime against humanity*

The following constitutes a crime against humanity:

Any illicit traffic in narcotic drugs, in accordance with the requirements laid down in article X of this Code.

15. Mr. THIAM (Special Rapporteur) said that his eighth report (A/CN.4/430 and Add.1) consisted of three parts: part I (Complicity, conspiracy (*complot*) and attempt), part II (International illicit traffic in narcotic drugs) and part III (Statute of an international criminal court). The subject-matter of part I had been thoroughly debated by the Commission at its thirty-eighth session⁵ during the consideration of his fourth report.⁶ Draft articles 15, 16 and 17 were now being submitted in the light of that discussion.

16. Paragraph 1 of draft article 15 defined the concept of complicity itself, while paragraph 2 extended the definition to acts committed prior to the principal offence and to subsequent accessory acts. Complicity was a highly complex concept because of the nature of the acts constituting it and the plurality of possible perpetrators, as well as the problem of the succession of the acts in time. Acts of complicity could be divided into two categories: intellectual and physical. While physical acts were relatively easy to identify, that was by no means true of intellectual acts. The difficulty of distinguishing between principal and accomplice was discussed in his report (*ibid.*, para. 9), and he wished to draw particular attention to that difficulty in view of its unusual character and relative novelty. When a superior officer ordered the commission of a criminal act and a subordinate executed the order, who was the originator and who the accomplice?

¹ 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.

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

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

⁴ *Ibid.*

⁵ See *Yearbook ... 1986*, vol. II (Part Two), pp. 47 *et seq.*, paras. 115-132.

⁶ *Yearbook ... 1986*, vol. II (Part One), p. 53, document A/CN.4/398.

17. An attempt had been made in certain court decisions to settle that issue. The United States Supreme Court, in the *Yamashita* case, had considered that the order of a commanding officer, or his failure to give the appropriate orders to his subordinates, could constitute an act of complicity (*ibid.*, para. 11). More often than not, however, the point had been decided by legislation. Thus, in a number of national legislations, an order given by a superior, or failure to give an order, could be held to be an act of complicity. In that connection, he had cited the approach taken in legislation in Luxembourg, Greece, China and, in particular, France (*ibid.*, para. 10). French law took the view that, in the event of doubt, the superior should be considered as an accomplice, a somewhat strange approach in that the subordinate was considered as the principal perpetrator of the crime and the superior as the accomplice.

18. The question also arose whether counsel or advice which led a person to commit a crime could be regarded as an act of complicity. Much would, of course, depend on the force of the advice and on its impact on the perpetrator's decision. Apparently, instigation or encouragement to commit a crime was regarded as an act of complicity under Canadian criminal law, but that was not so in other legal systems. As to the force of the advice, an extreme example would be a lawyer's mistaken advice which led his client to commit a criminal offence. It would be going too far to regard the lawyer as an accomplice in that instance.

19. In the case of a crime committed by a group of offenders, it was often difficult to distinguish between principal perpetrators and accomplices. The position was altogether different in a simple offence such as housebreaking, in which the principal perpetrator was helped by an accomplice to climb over a wall. With mass crimes, however, it was not at all easy to draw the line and there was a school of thought which preferred to do away with the distinction between principal and accomplice and to treat all those involved in the crime as participants on the same footing. The decisions of many military tribunals had taken that approach. For example, the Supreme Court of the British Zone had considered that the act of complicity and the principal act were both crimes against humanity and that, consequently, accomplices should be sentenced for having committed a crime against humanity and not simply for being accomplices (*ibid.*, para. 24). On that issue, of course, it should always be remembered that the criminal responsibility of an accomplice was the same as that of the principal.

20. With regard to the question of the time of commission, some legal systems, such as those of common law, did not limit the definition of complicity to prior or concomitant acts but also included acts committed later. Most Continental systems took a more restrictive approach, but recent legislation in the German Democratic Republic and in the Federal Republic of Germany, as well as French Court of Cassation decisions, had admitted that aiding and abetting after the offence could in certain circumstances constitute complicity. Paragraph 2 of draft article 15 dealt with that issue, but it was placed between square brackets. His intention was not to make a definite proposal, but to leave the decision to the Commission.

21. Draft article 16 dealt with conspiracy, which was made up of two elements: first, a common plan, and secondly, the perpetration of a crime. Since it involved the delicate matter of possible collective responsibility, he was submitting alternative texts for paragraph 2. The first alternative specified that criminal responsibility attached not only to the perpetrator but also to any individual who ordered, instigated or organized a common plan or who participated in its execution. The second alternative was based on the approach of individual responsibility and stated that each participant was to be punished according to his own participation, without regard to that of others.

22. It would be recalled that the Nürnberg International Military Tribunal had limited the application of collective responsibility for conspiracy to crimes against peace. In the case of war crimes and crimes against humanity, it had preferred the concept of individual responsibility. More recent developments pointed to the fact that major crimes could no longer be regarded as acts committed by isolated individuals. Contemporary specialists in criminal law, while still attached to the principle of personal criminal responsibility, had an increasing inclination to draw more extensive consequences from the collective nature of the offence.

23. Draft article 17 dealt with attempt. Clearly, the theory of attempt could be of only limited application in the kinds of crime under consideration. It was difficult to see what form an attempt to commit an act of aggression could take and awkward to draw the line between commencement of the execution of an act of aggression and the act of aggression itself. The position with regard to an attempt to make a threat of aggression was even more bewildering. Nevertheless, the concept of attempt should not be entirely disregarded. Most crimes against humanity, such as genocide and *apartheid*, consisted of a series of specific criminal acts and attempt was altogether conceivable in such cases.

24. Further to the Commission's request at its previous session that he prepare a draft provision on international drug trafficking,⁷ he was submitting two texts: draft article X (Illicit traffic in narcotic drugs: a crime against peace) and draft article Y (Illicit traffic in narcotic drugs: a crime against humanity). In his opinion, the twofold characterization of illicit traffic in narcotic drugs as a crime against peace and as a crime against humanity was fully justified.

25. Lastly, the question of the statute of an international criminal court was discussed in part III of his report, which was essentially in the form of a questionnaire. In the interests of caution, he had avoided making any definite proposals and, on practically all issues, had submitted two, or even three, alternative versions.

26. The subject of an international criminal court was, of course, not a new one. Provision for such a court had been made in the days of the League of Nations, at the time of the signing of the 1937 Convention for the Prevention and Punishment of Terrorism, concluded in the wake of the assassination of King

⁷ *Yearbook* . . . 1989, vol. II (Part Two), p. 65, para. 210.

Alexander I of Yugoslavia in Marseilles in 1934. The court in question, however, had never materialized. At the end of the Second World War, the Nürnberg Tribunal had been set up, but it had been an *ad hoc* court for the purpose of dealing with certain specific cases.

27. The purpose of his "questionnaire-report" was to offer the Commission some choices among the various solutions possible. Those choices were on a number of points, which were listed in his report (*ibid.*, para. 79). On reflection, however, he wished to withdraw item 1 (b) of that list (Necessity or non-necessity of the agreement of other States). The first item in the list was the competence of the court, in which connection it would be recalled that the 1954 draft code had dealt with only the gravest crimes. It had not included, for example, the dissemination of false news having an adverse effect on international relations. Accordingly, was the jurisdiction of the court to be limited to crimes against the peace and security of mankind or was it to cover all international crimes? The broadest possible jurisdiction seemed preferable, otherwise it would be necessary to establish two international criminal jurisdictions, with the resulting complications. On that question, he was submitting two versions, without making any actual proposal. Version A limited the competence of the court to crimes under the code, i.e. crimes against the peace and security of mankind. Version B was broader and covered also "other offences defined as crimes by the other international instruments in force".

28. Item 2 of the "questionnaire" was on the procedure for appointing judges, and version B was based on article 11 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.⁸

29. Item 3 dealt with the submission of cases to the court, a question on which he was submitting three different versions. Version C specified that cases could be brought before the court by any State Member of the United Nations "subject to the agreement of the United Nations organ" specified in the statute of the court. The organ in question should, in the opinion of many, be the General Assembly. The Security Council was not favoured because of the difficulties arising from the use of the veto.

30. With regard to item 4 (Functions of the prosecuting attorney), there were two possibilities. Either the State which initiated the proceedings could draw up the indictment, or that could be done by an independent judicial body, namely the Department of Public Prosecution (*Ministère public*). It seemed perfectly logical that, as provided in the 1953 draft statute, the State which brought a complaint should be responsible for conducting the prosecution. Once again, however, it was for the Commission to indicate its preference.

31. For item 5 (Pre-trial examination), he was submitting only one version, which provided that the preliminary examination should be entrusted to a chamber of the court composed of several judges vested with all the powers inherent in their office.

32. Item 6 (Authority of *res judicata* by a court of a State) raised the question whether, if the municipal courts of a State delivered final judgment against which no appeal lay, the international court would be bound by such a decision, or whether it could declare itself competent to try the case. Another aspect of that problem, which was dealt with in item 7 (Authority of *res judicata* by the court), concerned the force of *res judicata* with respect to the court's own decisions. In that connection, he had preferred not to open the door to the possibility of the court's decisions being called into question.

33. Although withdrawal of a complaint to the court, the subject-matter of item 8, might appear to be a mere formality, it involved a fairly important question of principle. If a State withdrew its complaint, for instance, did such withdrawal automatically give rise to discontinuance of the case? Arguably, if an international crime was held to be a crime committed against the international community, a withdrawal of a complaint by one State could not result in discontinuance of proceedings. Furthermore, it might be going too far to allow any State in the international community to bring a complaint in respect of a crime from which it had not suffered direct harm. That point was not covered in his report and he was raising it now simply for the Commission to take the appropriate decision.

34. With regard to penalties, dealt with in item 9, he was submitting three alternatives. The first, which appeared in the Charter of the Nürnberg International Military Tribunal,⁹ provided that the court could impose any sentence it deemed just. The second version excluded the death penalty, while the third excluded not only the death penalty, but also certain other severe penalties imposed by national courts.

35. Item 10 dealt with the financial arrangements for the court. In that connection, it seemed logical that, if the members of the court were appointed by the General Assembly, the Assembly—and hence the Member States of the United Nations—should finance the court. If only those States which were parties to the statute created the court, however, then they should finance its operations. On the other hand, it would be going too far to provide that a State could bring a case before the court only if it was a party to the statute of the court. In his view, therefore, the possibility of bringing a case before the court should be left open to States not parties to the statute, something that would encourage States to resort to methods for the peaceful settlement of disputes and would also promote the punishment of international crime.

36. Lastly, with regard to the procedure for discussing his report, members might wish to comment first on parts I and II, and then on part III, dealing with the statute of an international criminal court.

37. Following a procedural discussion, the CHAIRMAN suggested that there should be no rigid division of the discussion into two parts, and that members wish-

⁸ "Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953" (*Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645)*), annex.

⁹ 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).

ing to speak on the topic as a whole should be free to do so.

It was so agreed.

38. Mr. TOMUSCHAT said that there was a sizeable lacuna in part I of the Special Rapporteur's eighth report (A/CN.4/430 and Add.1), for before tackling the concepts of complicity and conspiracy it was first necessary to determine the criteria which characterized the perpetrator of a crime against the peace and security of mankind. The Special Rapporteur had brought out very well the uncertainty of the distinction between principal and accomplice, particularly in paragraphs 22-27 and 44-47 of the report, but that uncertainty was the very reason why the concept of principal perpetrator must be clearly defined. It would then be possible to decide whether great detail on the notions of complicity and conspiracy was needed. So far, the Commission had merely established a list of essentially inter-State crimes, with no indication of how these could be transformed into offences entailing criminal sanctions against an individual. It was only in article 12 (Aggression), provisionally adopted at the fortieth session,¹⁰ that the Commission had begun to tackle the problem.

39. The list of crimes was made up of two different categories. First, there were war crimes, which fell readily into the traditional categories of criminal law. Such crimes were usually committed by an individual or a group on his or its own initiative, without the knowledge or other participation of superiors, and the traditional concepts of criminal law could be applied to them. But, secondly, crimes such as aggression, intervention and *apartheid* were a quite different matter. *Apartheid*, for example, involved a Government and an entire people, for everyone who lived in South Africa knew how *apartheid* operated and anyone who voted for a political party supporting *apartheid* was lending assistance to it. That was precisely the weakness of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*: by drawing on the concept of complicity from traditional criminal law, it made the circle of persons involved too broad. What was needed was to strike against the leaders and organizers, for it was impossible to incriminate an entire people.

40. There again it was necessary to consider what results would be achieved with the rules proposed in the case of aggression, for it must be avoided that each individual soldier who obeyed his superiors' orders would be liable to the sanctions laid down in the draft code. It was difficult to see the line of demarcation.

41. Each crime must be considered separately for the purposes of deciding whether it was wise to qualify complicity as a criminal act, and the Commission must adopt a restrictive approach: only in that way would it obtain a favourable response from Governments. The draft code was so politicized by its very nature as to lend itself too easily to abuse. There was no point in including actions which were not unanimously recognized as meriting criminal sanction. He was therefore

against general provisions on complicity and conspiracy.

42. The Special Rapporteur was right to say that the organizer could not be overlooked as being a marginal figure in many criminal activities. The organizer should not be allowed to evade his responsibility and he should be prosecuted as the perpetrator, regardless of whether he had committed the crime with his own hands.

43. It would be most unwise to make conspiracy a crime in the abstract, if the conspiracy did not actually lead to a crime being committed. For example, many abominable plans might be adopted at ministerial meetings but not be carried out later. The draft code was not intended to be a means of strengthening international morality: it was sufficient for it to be applied when its provisions had actually been violated. For that reason, he was strongly opposed to draft article 17, on attempt. The article was unnecessary, for if a criminal undertaking was cut short before it was carried out there was certainly no need to involve an international criminal court. Moreover, the difficulties of defining the crime of attempt would be enormous. If an ordinary crime failed only because of circumstances independent of the potential perpetrator's intention, his attempt could be punished with the full force of the law. Yet if efforts to subjugate another country failed, the act of aggression had already begun when the first shot was fired. As the Special Rapporteur pointed out, attempt was perfectly conceivable in the case of genocide. It might not, however, be conceivable in the case of other crimes.

44. Article 13 (Threat of aggression), provisionally adopted by the Commission on first reading,¹¹ illustrated the difficulty of drafting a provision on attempt. The concept of threat already took the Commission very far, but by introducing the concept of attempt it would establish an attempt at threat of aggression as a crime against the peace and security of mankind. It was difficult to see what precisely that would mean, but the scope of criminal acts would certainly be considerably enlarged. All that could be done was to specify in certain cases, with respect to one crime or another, that attempt was liable to criminal sanction.

45. Furthermore, for reasons of logic it would be preferable to include draft articles 15, 16 and 17 in the general part of the draft code. In the case of article 17, for example, if attempt were made a crime on its own, attempt at attempt would also be a crime. That was certainly not the intention, and for the sake of legal clarity all doubt must be removed.

46. With regard to draft articles X and Y on international illicit traffic in narcotic drugs, he would like to ask, first, why the Special Rapporteur was proposing two articles that were apparently identical in scope. The substantive law was one thing, its classification another. Therefore, even if such illicit traffic was both a crime against peace and a crime against humanity, two articles were still unnecessary. Secondly, it was essential to distinguish between small traffickers and big organ-

¹⁰ *Yearbook* . . . 1988, vol. II (Part Two), pp. 71-72.

¹¹ *Yearbook* . . . 1989, vol. II (Part Two), p. 68.

izers. At the international level, it was impossible to be concerned with smaller-scale crime, although the point must be reflected in the text itself.

47. In part III of his report, concerning the statute of an international criminal court, the Special Rapporteur proposed three alternative texts on penalties (A/CN.4/430 and Add.1, para. 101). A provision of such a kind should form part of the substantive rules, since it was not part of procedural law. Therefore, either the provision must be placed in the general part of chapter I of the draft code or the appropriate penalties must be indicated for each individual crime. He also disagreed with the Special Rapporteur on the content of the three versions: it was a recognized principle of international law on the protection of human rights that the penalties must be set in the rule characterizing an act as a crime. The Commission would therefore have to agree on the appropriate penalty for each crime listed. However, that task might be left to the future plenipotentiary conference, since the members of the Commission were not experts in criminal law.

Drafting Committee

48. Mr. MAHIU (Chairman of the Drafting Committee) said that, following consultations, he proposed the following membership for the Drafting Committee: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi and Mr. Solari Tudela. Mr. Eiriksson would be an *ex officio* member in his capacity as Rapporteur of the Commission.

It was so agreed.

The meeting rose at 1 p.m.

2151st MEETING

Thursday, 3 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Organization of work of the session (*continued*)

[Agenda item 1]

1. The CHAIRMAN said that, as a result of discussions held in the Enlarged Bureau and informal consul-

tations, a timetable for the work of the session had been arrived at on the assumption that the Commission would hold four plenary meetings a week during the first 10 weeks and 10 meetings a week during the last two weeks. The proposed timetable was as follows:

1. Draft Code of Crimes against the Peace and Security of Mankind (item 5)	2-15 May	8 meetings
2. Jurisdictional immunities of States and their property (item 4)	16-22 May	4 meetings
3. The law of the non-navigational uses of international watercourses (item 6)	23-31 May	5 meetings
4. State responsibility (item 3)	5-12 June	5 meetings
5. Relations between States and international organizations (second part of the topic) (item 8)	13-19 June	4 meetings
6. International liability for injurious consequences arising out of acts not prohibited by international law (item 7)	20-29 June	7 meetings
7. Reports of the Drafting Committee	3-9 July	6 meetings
8. Adoption of the report of the Commission	12-20 July	14 meetings

2. The meeting on 1 June could be used by the Drafting Committee or the proposed working group on the question of establishing an international criminal court. The four meetings on 10 and 11 July would be kept in reserve. It was understood that any time saved in the consideration of a topic in the plenary Commission should be allocated to the Drafting Committee, the Planning Group or other organs. In accordance with previous practice, the representatives of the legal bodies with which the Commission maintained a working relationship would make their statements on dates to be decided in the course of the session.

3. Mr. ARANGIO-RUIZ expressed surprise that only five meetings had been allocated to agenda item 3, "State responsibility". There was a disproportion that could be remedied by allotting some of the meetings held in reserve to that topic.

4. Mr. JACOVIDES, agreeing with that suggestion, said that he was concerned at the Commission's slow progress on the topic of State responsibility. It would be advisable for it to produce some tangible results for the next session of the General Assembly.

5. Mr. BENNOUNA said he, too, considered that more time should be allowed for the consideration of State responsibility. The topic occupied a very important place in the Commission's mandate as it was the last major area of general international law still to be codified. The Commission must speed up its work on the topic, the completion of which would only enhance its prestige.

6. Mr. BARBOZA said that, while he believed State responsibility was, as just stated, a topic of great importance, agenda item 7, "International liability for injurious consequences arising out of acts not prohibited by international law", was certainly more urgent.

Many United Nations organs had been working on the matter at various technical levels and were starting to prepare draft rules. Principle 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),¹ which provided that "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage . . .", was in the throes of implementation. One only had to remember the field of dangerous goods, for instance. The Commission should therefore identify general principles and submit a body of systematic ideas to the General Assembly. The seven meetings envisaged for that purpose were the minimum to be contemplated.

7. The CHAIRMAN said that the proposed timetable was not to be seen as a strait-jacket. On the contrary, it would be applied with the utmost flexibility and the Commission would allot additional meetings to particular agenda items as necessary. On that understanding, if there were no objections, he would take it that the Commission agreed to adopt the proposed timetable.

It was so agreed.

Draft Code of Crimes against the Peace and Security of Mankind² (continued) (A/CN.4/419 and Add.1,³ A/CN.4/429 and Add.1-4,⁴ A/CN.4/430 and Add.1,⁵ A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLES 15, 16, 17, X AND Y⁶ and

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (continued)

8. Mr. JACOVIDES said that he had taken due note of the Special Rapporteur's analyses in part I of his eighth report (A/CN.4/430 and Add.1), entitled "Complicity, conspiracy (*complot*) and attempt", and of the divergent views expressed by Mr. Tomuschat at the previous meeting. He had had occasion in the past to indicate his own views on the matter and would therefore not repeat them.

9. With regard to part II of the report (International illicit traffic in narcotic drugs), he recalled that he had been among those who had suggested several years previously that the inclusion of that subject in the draft code should be envisaged. He was therefore glad that the General Assembly had specifically entrusted consideration of the matter to the Commission. There was

¹ 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.

² 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.

³ Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

⁴ Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

⁵ *Ibid.*

⁶ For the texts, see 2150th meeting, para. 14.

little doubt that trafficking in narcotic drugs was currently one of the major scourges of mankind and that it merited inclusion in the code, after it had been appropriately defined.

10. Part III of the report dealt with the statute of an international criminal court. To be a complete legal instrument, the code had to include three elements: the crime, the penalty and jurisdiction. He therefore welcomed the General Assembly's initiative and the Special Rapporteur's response. The General Assembly expected a legal opinion on the question of the statute of the court, and a working group would be an appropriate body to articulate the Commission's position, taking as its starting-point the views of the Special Rapporteur.

11. For the time being, he would confine himself to a few main points, but might revert later to other aspects of the matter. First, on the issue of jurisdiction, the international criminal court should have jurisdiction over those accused of crimes included in the code. Other offences, defined as crimes under other international instruments, could come under the jurisdiction of the court on an optional basis. Secondly, on the issue of the procedure for appointing judges, it would be preferable if they were appointed by the General Assembly, the costs being met by a fund set up by the Assembly.

12. An important consideration concerned the necessity or non-necessity of the agreement of other States for the submission of cases to, or withdrawal of complaints from, the court. In his view, the question did not arise inasmuch as the crimes covered by the code were of concern to the international community as a whole and transcended the subjective interests of the parties.

13. Mr. GRAEFRATH thanked the Special Rapporteur for his eighth report (A/CN.4/430 and Add.1), which recommended simplified solutions to extremely difficult problems and provided the Commission with a questionnaire on problems connected with the establishment of an international criminal court which might serve to streamline a preliminary discussion on the subject and at the same time facilitate the task allotted to the Commission by the General Assembly in its resolution 44/39 of 4 December 1989.

14. For the time being, he would confine himself to some remarks on parts I and II of the report, reserving his right to speak again later on the questionnaire set forth in part III.

15. The comments on draft article 15 in the report started with remarks on methodology and he would therefore follow that approach. Attempt, participation and conspiracy were not, in his opinion, separate crimes, but forms of commission of offences. He would therefore not speak of a crime of complicity, or of a crime of attempt, which, as seemed to be understood in draft article 17, was merely the commencement of the execution of a crime as defined in the list of crimes. In his view, the place for general provisions defining forms of commission of crimes was in the part of the draft code dealing with general principles. On the other hand, when defining the elements of specific crimes, the Commission had to determine which potential forms of

commission it wished to cover and how to punish the perpetrators. That was clearly connected with the difficult question of determining who was responsible for a certain crime.

16. So far as the perpetrators were concerned, it seemed difficult to agree on general provisions applicable to all the different kinds of crime committed. In the modern day and age, war crimes, which might also take the form of conspiracy, had been or could be planned and organized at a very high level and far from the area of combat. Only after having clearly defined who was the perpetrator of a crime would it be possible to decide to what extent it was necessary to refer to co-perpetrators or accomplices. While in general it could be said that a person who acted by himself or through another or who, in breach of a legal duty, did nothing to prevent the commission of a crime was a perpetrator, it was perhaps necessary to be more specific when dealing with organized State crimes such as aggression, *apartheid* or genocide. In such cases, the Commission had to ensure that those who were in a political position to plan, order and initiate the crime were made responsible—not all those individuals caught in a network of laws and constraints.

17. That brought him back to the problem of individualizing the crimes, in other words determining who could or should be held responsible for a particular crime. The attempt made in that regard in article 12 (Aggression), provisionally adopted by the Commission on first reading,⁷ was insufficient. The Commission had adopted paragraph 1 of that article only provisionally, since it had still not defined the potential “perpetrator”—an omission that had met with strong criticism in the Sixth Committee of the General Assembly. While he would not insist on the formulas proposed by Mr. Ushakov in 1985, namely “persons planning, preparing, initiating or causing an act of aggression . . .”⁸ and “persons planning, preparing, ordering or causing a State to engage in armed intervention . . .”,⁹ he wished to refer to them in order to demonstrate the need for an exact description of the perpetrator, tailored to the crime concerned.

18. The Commission could define attempt, complicity and conspiracy in the part on general principles, and it might be a good idea to use at that point the simplified wording proposed by the Special Rapporteur. The Commission should, however, specify in the different parts of the list of crimes, or even when describing the individual crimes, whether attempt—and to what extent complicity—should be punishable.

19. In his view, attempt should be punishable only if it was expressly provided for by the provisions defining a crime or a category of crimes. It should also be clear that attempt might be punished less severely than the completed crime. Even if threat of aggression or preparation of aggression were made separate crimes, there would be no point in doing the same for attempt at aggression. *Mutatis mutandis*, the same was true of participation. If the Commission thought that, in relation

to a concrete crime, incitement, assistance or subsequent accessory acts should be punishable, it should say so. At the same time, it should not forget that the law often allowed for differentiation between the punishment of the perpetrator and that of a helper. In the case of conspiracy as a particular form of committing an offence, the Commission must ensure that the punishment was without regard to the participation by others in the crime: that seemed particularly necessary in the case of aggression, *apartheid* and genocide. The point should be made clear in a separate paragraph of draft article 16.

20. The draft articles as submitted were too general and too isolated from the list of crimes. They might serve as elements for definition of different forms of commission of offences, but their practical application depended on a specific reference in connection with each crime.

21. Turning to the question of international illicit traffic in narcotic drugs, two draft articles on the subject were not needed. It might be sufficient to define large-scale transboundary drug trafficking as a crime against humanity. The fact that it might give rise to a series of conflicts endangering peace was no reason to declare it a crime against peace. It was regrettable that the points made about that crime by the Special Rapporteur in the last sentence of paragraph 69 of his report, in his comments on draft article X, were not included in the article itself. He therefore suggested that paragraph 1 of draft article X be amended accordingly and that the whole draft article be transferred to the part of the draft code on crimes against humanity.

22. Finally, the Commission should avoid becoming involved in a dispute on individual responsibility versus collective responsibility. Domestic criminal law and also international criminal law always dealt with individual responsibility. However, the time had come to tackle organized crime, and not only in the case of crimes against peace. The question was that of the distribution of responsibility in the commission of such a crime. In any event, the responsibility remained individual: it depended on the role played by the person concerned in the commission of the crime, even if it carried the burden of acts executed by others as part of the organization of the crime.

23. Mr. CALERO RODRIGUES noted that, in part I of his eighth report (A/CN.4/430 and Add.1), the Special Rapporteur reverted to issues which he had already dealt with in his fourth report,¹⁰ in 1986, and that he remained convinced of the usefulness of a part of the draft code on “related offences” or “other offences”. He (Mr. Calero Rodrigues) had not changed his opinion since 1986 either: the specific crimes covered by the code should be those already listed by the Special Rapporteur under the headings “crimes against peace”, “crimes against humanity” and “war crimes”. Complicity, conspiracy and attempt were only aspects of the commission of a crime. Mr. Tomuschat (2150th meeting) and Mr. Graefrath had recalled that the Commission had not yet addressed the fundamental ques-

⁷ *Yearbook* . . . 1988, vol. II (Part Two), pp. 71-72.

⁸ See *Yearbook* . . . 1985, vol. I, p. 61, 1886th meeting, para. 44.

⁹ *Ibid.*, p. 62, para. 48.

¹⁰ *Yearbook* . . . 1986, vol. II (Part One), p. 53, document A/CN.4/398.

tion of participation, i.e. the definition of the person who was to be considered the main participant, the perpetrator of the crime—a key definition on which would be based the definitions of complicity and attempt.

24. In his comments on draft article 15, on complicity, the Special Rapporteur himself provided arguments in support of his (Mr. Calero Rodrigues's) contention that the Commission was not dealing there with separate crimes but with the definition of responsibility for participation in the commission of a crime. For example, the Special Rapporteur concluded from the laws and judgments he cited that

there is no hard and fast distinction between the concepts of principal perpetrator, co-perpetrator and accomplice. . . . The difficulty of establishing precise criteria for distinguishing between accomplices, principal perpetrators, co-perpetrators and so on probably explains why the Charters of the International Military Tribunals referred, in the same articles and without distinction, to "leaders, organizers, instigators and accomplices"... (A/CN.4/430 and Add.1, para. 13).

The Special Rapporteur concluded by saying that "These brief references illustrate the scope of the concept of complicity and the variety of its content, which are reflected both in the acts of complicity and their characterization and in the status of those committing such acts" (*ibid.*). The Special Rapporteur gave other examples (*ibid.*, paras. 23-25). He stated:

... The classic dichotomy of principal and accomplice, which is the simplest schema, is no longer applicable because of the plurality of actors. The dualistic classification gives way to the broader concept of participants, which encompasses both principals and accomplices. It might sometimes be wondered whether all the actors should not be defined as participants, without it being necessary to determine the precise role played by each of them. (*Ibid.*, para. 23.)

The Special Rapporteur himself therefore recognized that complicity was part of the perpetration of the crime. An accomplice was an actor just as the principal perpetrator was. Accordingly, there was no reason to assume that complicity constituted a separate crime.

25. The Special Rapporteur followed the same reasoning in his comments on draft article 17, on attempt, stating: "Generally, attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention" (*ibid.*, para. 65). The Commission could certainly accept that truism, but how could it consider that if a criminal action was successfully completed one was faced with one crime, and if it was not so completed, with a different crime?

26. The question of conspiracy was a little more complicated, for it had its own specific features. In his comments on draft article 16, the Special Rapporteur developed the definition of conspiracy and distinguished two degrees in the commission of the crime planned (*ibid.*, paras. 40-41). But those arguments did not altogether accord with the Special Rapporteur's conclusion that the concepts of complicity and conspiracy "are very similar and sometimes overlap" (*ibid.*, para. 62). That was why conspiracy should also be regarded as an aspect of participation in a crime.

27. To sum up, the draft code must include provisions on attempt and complicity, but not as independent crimes. The provisions should be placed in the part on general principles. Furthermore, it was not necessary to have a provision on conspiracy; but if the Commission

did not share that view, the relevant provision should be added to the general provisions dealing with attribution of responsibility. That same part of the draft code should include everything that was needed to decide who was to be punished for a crime: at the initial stage, judges should be allowed to decide who was to be considered the author of a crime, a particularly important issue in the case of crimes that were in principle attributable to the State.

28. Since the draft articles had been prepared with a view to defining separate crimes, it was difficult for him to comment on them from his standpoint. He would therefore limit himself to saying that he had difficulty in accepting the concept of complicity based on acts subsequent to the commission of the crime, as provided for in draft article 15, paragraph 2.

29. He could accept the idea that, in some cases, international illicit traffic in narcotic drugs could rise to the level of a crime against the peace and security of mankind. However, the Special Rapporteur's proposals on the matter were not fully satisfactory. In draft articles X and Y, the definition of that crime should have been matched with qualitative or quantitative distinctions, for otherwise both drug barons and small dealers would fall within the scope of the code, which was not of course the Special Rapporteur's intention. It was therefore essential to be specific about the type of traffic covered.

30. The definition given in draft article X, paragraph 2, was not helpful. The language was taken from article 3 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, but there was a difference between qualifying the offences covered in that article as crimes under domestic law and elevating them to the highest level of international crimes. He was confident that the Special Rapporteur would be able to solve that problem.

31. Mr. KOROMA said that he would confine himself to a few preliminary comments, specifically on the question whether complicity, conspiracy and attempt should be made separate crimes or whether they should be dealt with in the part of the draft code on general principles. No doubt the position stated by the Special Rapporteur in his comments on draft article 15 (A/CN.4/430 and Add.1, para. 6) was supported by the Nürnberg Principles¹¹ formulated by the Commission in 1950, but, regardless of those Principles, if complicity or conspiracy could not be made crimes as such it would follow that, unless the crime were carried out, the accomplices or the participants in the conspiracy would go unpunished. He was therefore of the opinion that both the precedents and those theoretical considerations argued in favour of the Special Rapporteur's proposal to treat independently the three crimes which were the subject of part I of his eighth report.

The meeting rose at 11 a.m. to enable the Drafting Committee to meet.

¹¹ 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.

2152nd MEETING

Friday, 4 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

**Filling of a casual vacancy in the Commission
(article 11 of the statute)**

[Agenda item 2]

1. The CHAIRMAN said that, regrettably, the Commission would in the near future have to fill the vacancy created by the death of Mr. Reuter. It was suggested that, in line with established practice, the Commission should request the Secretariat to issue, on 25 May 1990, a document containing a list of candidates and that the election should be held on 30 May 1990.

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**

2. The CHAIRMAN said that the Enlarged Bureau proposed that the Planning Group should be composed as follows: Mr. Barboza (Chairman), Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Roucounas, Mr. Thiam, Mr. Tomuschat and Mr. Yankov. The Group was not restricted and other members of the Commission would be welcome to attend its meetings.

It was so agreed.

**Draft Code of Crimes against the Peace and Security
of Mankind¹ (continued) (A/CN.4/419 and Add.1,²**

¹ 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.

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

A/CN.4/429 and Add.1-4,³ A/CN.4/430 and Add.1,⁴
A/CN.4/L.443, sect. B)

[Agenda item 5]

**EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)**

ARTICLES 15, 16, 17, X AND Y⁵ and

**PROVISIONS ON THE STATUTE OF AN INTERNATIONAL
CRIMINAL COURT (continued)**

3. Mr. THIAM (Special Rapporteur) said that he wished to clarify two points in order to speed up the Commission's work. First, the Commission should not dwell too long on methodological problems, although they were indeed important. He did not in fact attach too much importance to the method proposed in his eighth report (A/CN.4/430 and Add.1). Most penal codes contained a general part, but that part did not necessarily deal with complicity. Some codes reserved a specific place for complicity in the part concerning offences. The French Penal Code, to take one of many examples, did so in article 59. In the Commission's 1954 draft code, complicity was dealt with as an offence, in article 2, paragraph (13), and not among the general principles. Furthermore, the Nürnberg Principles⁶ clearly characterized complicity as an international crime. There was, of course, a principle that an accomplice was to be treated as a principal perpetrator, but penal codes differed on that point too. The main thing, therefore, was that the Commission should deal with the issue of complicity; its place in the draft code was less important.

4. Secondly, his report perhaps went into too much detail about the very complex concept of complicity, which covered perpetrators playing various roles that were difficult to separate into such categories as direct or indirect perpetrator, accomplice or originator. Moreover, the greater the number of actors, the harder it became to define the concept, which had also evolved from the traditional situation involving an accomplice present during the commission of a crime to one where he took no direct part in it. A category had emerged—one not covered by the traditional concept—of leaders, planners or organizers of a crime who took no direct part in its execution.

5. The Nürnberg Tribunal had treated such persons, often senior civil or military officials and sometimes even judges, as accomplices. The question now was to decide how such accomplices should be prosecuted. Mr. Tomuschat (2150th meeting) had argued that it was impossible to prosecute a whole people, but in the case of the Third Reich the Nürnberg Tribunal had tried to bring as many accomplices as possible to justice. The Commission's definition must therefore list the various categories of accomplice, something that could best be done in the commentary rather than in the body of the text.

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

⁴ *Ibid.*

⁵ For the texts, see 2150th meeting, para. 14.

⁶ See 2151st meeting, footnote 11.

6. He agreed that the draft articles on international illicit traffic in narcotic drugs were not entirely satisfactory. He had submitted two separate articles on such illicit traffic as a crime against peace and as a crime against humanity because the Commission had long made that distinction and had, indeed, already elaborated draft provisions listing separately all crimes against peace and all crimes against humanity. Perhaps the matter could best be left to the Drafting Committee.

7. Mr. ROUCOUNAS said that the Special Rapporteur's clarification was very helpful, but the concepts of conspiracy, complicity and attempt still required further analysis. The Commission's limited goal when it had begun its work on the draft code had grown over the years to encompass a huge range of criminal acts, including terrorism and crimes against the environment. In fact, both the original aim and the substance of the topic had shifted with the evolution in the views of the international community. The Commission must keep that point in mind in its definition of concepts.

8. The Special Rapporteur had made extensive reference to national legislation in his eighth report (A/CN.4/430 and Add.1), but such legislation was decisive only if it presented a degree of uniformity and harmony. The Special Rapporteur's very detailed work showed in fact that the concepts were not very clear even in national codes.

9. The Charter of the Nürnberg Tribunal⁷ referred to complicity ("conspiracy" in the English version and *complot* in the French) in the last paragraph of article 6, the aim being to establish the responsibility of persons participating in the formulation or execution of a common plan, and commentators had characterized that as an exclusion *a contrario* of complicity from the category of crimes by the individual. He agreed, incidentally, with the Special Rapporteur that in such matters as aggression, for example, an individual must necessarily participate in the crime together with a number of other persons. By convicting persons instigating the commission of a crime without being materially involved in its execution, the Nürnberg Tribunal had seemed to be following the general principle of criminal law concerning criminal participation. It might therefore be unwise to give too much weight to the Nürnberg precedents.

10. As the Special Rapporteur had just pointed out, the Nürnberg Principles formulated by the Commission in 1950 clearly established complicity as a crime in international law. But the content of those Principles and of article 2, paragraph (13), of the 1954 draft code had prompted some criticism of the Commission for not producing a more detailed definition of what the concept meant. Unless the provision was clear and widely understood, the Commission would be leaving it to judges to proceed in accordance with their interpretation of their own domestic legislation rather than with the code.

11. There was no doubt that, irrespective of whether complicity was assimilated to a crime, neither the Commission nor indeed the Nürnberg Tribunal had vested it with collective responsibility. Responsibility for an act committed by several persons, for example an act of terrorism, genocide or drug trafficking, remained individual responsibility. The Nürnberg Tribunal, even in matters of conspiracy, had reserved the right of prior assessment for itself and had not allowed other courts in various countries to rule *ratione loci* after the Second World War.

12. It would be recalled that the term "complicity" had been introduced in part 1 of the draft articles on State responsibility in 1978,⁸ but it had quite rightly been removed in article 27 as provisionally adopted by the Commission.⁹

13. As to whether complicity or conspiracy should be dealt with separately or in the general part of the draft code, it should not be forgotten that other international instruments dealt separately with the international crimes covered by the draft code, for example genocide, drug trafficking and the taking of hostages. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide discriminated between degrees of participation and also characterized attempt as a crime. As far back as 1936, the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs had required States to make attempt and complicity separate offences under national law. More recently, attempt and complicity had been covered by the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 3, para. 1 (c) (iii) and (iv)), although he noted that the word "conspiracy" appeared in the English version, whereas the word *complicité* was used in the French, which indicated that the two concepts were not altogether clear. The same Convention contained a reservation in the introductory clause to paragraph 1 (c) of article 3, reading "Subject to its constitutional principles...", which divested subsequent clauses of their force. Reference to complicity and attempt, couched in similar language, was also to be found in the 1979 International Convention against the Taking of Hostages (art. 1, para. 2) and in the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 3, para. 2).

14. In view of all those conventions, which would continue to exist concurrently with the code, it might be appropriate to deal with complicity in the general part of the code. At the same time, in the interests of harmony with existing international law, a separate approach should be adopted to each of the crimes to be included in the code. He could not agree that there were principles of international law that provided a solution to problems relating to the coexistence of norms of international law, and the maxim *lex specialis* did not, in his opinion, provide an answer. The Commission's main concern should be the certainty of the law, and it was to that aspect of the matter that it should pay special attention.

⁸ See *Yearbook . . . 1978*, vol. II (Part One), p. 60, document A/CN.4/307 and Add.1 and 2, para. 77 (draft article 25).

⁹ *Yearbook . . . 1978*, vol. II (Part Two), p. 99.

⁷ See 2150th meeting, footnote 9.

15. As to the draft articles themselves, draft article 15, paragraph 2, was not altogether necessary. Article 3 of the 1988 United Nations Convention was extremely detailed, and the Commission could draw on its terms for the elements of the serious crimes that should be treated as crimes against humanity.

16. Mr. BENNOUNA said that the Special Rapporteur's eighth report (A/CN.4/430 and Add.1) would considerably enrich the work already done on the draft code.

17. Commenting first on part I of the report, he said that, if the questions of methodology related solely to the place in the code of the concepts of complicity, conspiracy and attempt, he could agree to the matter being dealt with by the Drafting Committee. His difficulty regarding methodology was somewhat different, however, for he reacted not as an expert in national or criminal law but as an international lawyer. Accordingly, he had asked himself whether certain traditional categories of criminal law—complicity, conspiracy and attempt—were relevant to a code of crimes against the peace and security of mankind, which was concerned not with just any crime, but with crimes that were prejudicial to universally recognized values and were so grave that international co-operation was essential in order to punish them. He wondered whether treating complicity, conspiracy and attempt as separate crimes would not have the effect of considerably enlarging the scope of the definitions of specific crimes, or, at the very least, of giving extremely wide-ranging discretion to the courts—a discretion which was incompatible with the existing state of international society. States, after all, wanted to know what they were committing themselves to. If certain concepts of national criminal law—which was not even uniform—were simply to be transposed to international law, would that not, rather than clarify the issue, increase the confusion?

18. An effort had been made, in defining each of the crimes, to cover all the constituent elements of those crimes so as to avoid the broad interpretations that could prove prejudicial to the credibility of the code. If the concepts of complicity, conspiracy and attempt were tested by reference to the existing definitions, on a crime-by-crime basis, the unsuitability of those concepts—and the absurd consequences that could sometimes ensue—became apparent.

19. In his report, the Special Rapporteur pointed out with respect to complicity and conspiracy that “the content of these concepts changes as soon as they are transposed to international law, because of the mass nature of the crimes involved and the plurality of acts and actors” (*ibid.*, para. 26). Thus those concepts would, as it were, undergo a metamorphosis upon contact with international law, at any rate so far as crimes against the peace and security of mankind were concerned. One might therefore ask what benefit internal law could introduce in that particular field. The Special Rapporteur further noted that “complicity and conspiracy . . . are very similar and sometimes overlap” (*ibid.*, para. 62) and expressed concern that “The theory of attempt can be applied only to a limited extent in the area of the crimes under consideration” (*ibid.*, para.

66), after which he posed a number of questions concerning, for instance, attempted aggression, attempted *apartheid* and attempted genocide.

20. Since those concepts proved so problematic, why should they be included in the code at all? Was it simply because they appeared in certain national laws, or in the Nürnberg Principles¹⁰ and the 1954 draft code? Municipal systems of law, however, were far from uniform, and the Commission was involved in something infinitely more advanced than the Nürnberg Principles and the 1954 draft code. It therefore seemed to him that the Commission should first take account of the specific nature of each crime and of the legal system that would apply—in the event, international law—and include or exclude the concepts of complicity, conspiracy and attempt accordingly.

21. The link between the crime and attribution to an individual had not yet been established, except in paragraph 1 of article 12 (Aggression), provisionally adopted by the Commission on first reading,¹¹ and then only on a provisional basis. In that connection, it was true to say that the time had come to adopt a general formula of the type appearing in paragraph 1 of article 12, defining the author of the crime before going on to related acts or secondary participants. It would be premature, in his view, for the Commission to take a decision on draft articles 15, 16 and 17 before it had a more definite idea of the general structure of the draft code and, above all, of the connection between crimes of the State and attribution to an individual.

22. Article 2 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, for example, did establish the necessary link between the recruitment of mercenaries and the offences under the Convention, and article 4 provided that complicity was an offence. Given the complexity of the crimes envisaged in the draft code, he favoured the establishment of such a link in each instance, and considered that the Commission should not rely on general concepts, since that would vest judges with excessive power. The Commission should proceed on a case-by-case basis, for, in the final analysis, complicity could be so broadly interpreted as to assimilate the accomplice and the principal offender in the matter of penalties. Would it be right and proper to enlarge the scope of a crime against the peace and security of mankind to that extent?

23. Turning to part II of the report, the Commission had been asked to make international drug trafficking a crime against the peace and security of mankind, something which involved a move beyond the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and hence a qualitative change that must necessarily give rise to a qualitative change in the definition of the crime. A crime against the peace and security of mankind could not be treated as an ordinary crime: indeed, were it otherwise, all work on the code might as well cease. On the contrary, the very special and grave character of the code must be retained and the conditions

¹⁰ See 2151st meeting, footnote 11.

¹¹ *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

for compliance with it must be strengthened. Consequently, the definition laid down in draft article X seemed to be too wide to achieve the objective, which was to punish not the small drug dealer but the major criminals who operated at the international level and whose budgets were sometimes larger than those of States. That was the type of crime the code should seek to cover, and the Commission should devise appropriate legal criteria to that end. In a recent television interview, Colombian judges had said that they were unable to try such criminals in their own country as the criminals were too powerful and the national courts were incapable of bringing them to justice. That was what had prompted the idea of punishing them at the international level. To bring such persons before an international court would be a major innovation in international law, and so the definition must be far more specific. The General Assembly expected something from the Commission over and above the 1988 Convention, and the Commission should endeavour to live up to that expectation.

24. Mr. BARSEGOV said that the issue of complicity, conspiracy and attempt was of fundamental importance to the effectiveness of the future code, to the cause of international justice and, by that token, to the strengthening of international legal order. The difficulty of finding a solution lay, on the one hand, in inherent differences between crimes, as pointed out by Mr. Tomuschat (2150th meeting), and, on the other hand, in the widely differing positions adopted by various national legal systems, as well as in the limited amount of international experience available.

25. As to Mr. Tomuschat's point that different crimes called for different solutions to the problem of complicity and conspiracy, the need to take account of the specific nature of the crime in deciding on the issue of responsibility in each particular case was not in doubt. One possible approach might consist in determining for each particular crime, or even for each of its constituent elements, whether complicity and conspiracy were possible and what forms they might take. Such an approach would make for the greatest clarity, but it would add to the time required to elaborate the draft code, and he wondered whether it was strictly necessary.

26. In certain cases, such as aggression, genocide and *apartheid*, the principal act could not be committed by one single individual. While some crimes could be committed individually, virtually all the crimes covered by the draft code involved some form of complicity, and some were inconceivable without it.

27. If it was found that certain specific crimes did not, in principle, allow of complicity or conspiracy, and if some members of the Commission objected on those grounds to complicity or conspiracy being recognized as punishable in the code, one approach could be to elaborate a general rule and indicate exceptions to it; or, alternatively, an enumeration might be provided of the crimes in which complicity or conspiracy were possible. Personally, however, he would not favour such a solution.

28. He agreed with the Special Rapporteur's general view that, in the case of crimes against the peace and security of mankind—or at any rate the majority of such crimes—the issue of complicity could assume decisive importance. He noted that the Special Rapporteur had expressed that view in his eighth report (A/CN.4/430 and Add.1, para. 55) and had even mentioned the conflict between two forms of responsibility—collective and individual. It was an issue whose importance went beyond the scope of the draft code. In his own view, criminal responsibility was always personal in nature, and only individuals who had committed a specific crime or had been an accomplice to that crime could be held answerable under criminal law; in other words, criminal responsibility could not be applied according to the principle of collective responsibility. As Mr. Tomuschat had rightly said, an entire nation, as such, could not be brought to court for criminal responsibility, yet he felt bound to refer to those instances in the history of mankind, as well as in contemporary times, in which entire nations, with the exception of only a few of their citizens, had participated in the commission of crimes such as genocide. Collective responsibility for crimes against the peace and security of nations, such as genocide, aggression and *apartheid*, fell under the international responsibility of States, whether legal (on the basis of international law), political, material or other. The responsibility of a State for an act of genocide might take the form of that State's being deprived of the exercise of power over the people against which the crime had been directed, as well as of the corresponding territorial rights. For example, the responsibility of one State for aggression committed during the Second World War had been reflected in the establishment of new frontiers intended to deprive that State of the opportunity of taking an aggressive course, as it had already done twice within a generation.

29. At the same time, in determining the possible criminal responsibility of individuals, it would be a mistake to ignore such characteristics of punishable international crimes as the mass and systematic nature of acts committed by the persons perpetrating those crimes. Consequently, in cases such as genocide or *apartheid*, where the crime was committed by a large number of persons and where a correct legal definition of the crime had to be based on the totality of the acts committed by all those persons and not on isolated individual crimes, responsibility had to be determined on the basis of the participation of all the perpetrators of the crime in collective acts. Each of the persons brought to account was responsible for his own acts, but those acts were regarded as part of interrelated acts committed by all the perpetrators of the crime. That, too, was the approach adopted in practice, as evidenced not only by the *Pohl* case referred to by the Special Rapporteur (*ibid.*, para. 53), but also by the *Eichmann* and *Barbie* cases and others.

30. The question naturally arose as to how to determine who was an accomplice, and whether a distinction should be drawn between leaders, organizers, instigators and other kinds of accomplices. In that connection, he referred to the last paragraph of article 6 of the

Charter of the Nürnberg Tribunal,¹² article 5 (c) of the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal)¹³ and article II, paragraph 2, of Law No. 10 of the Allied Control Council.¹⁴ He also referred to the categorization of acts of complicity proposed by the Special Rapporteur in his report (*ibid.*, para. 7).

31. In Soviet criminal law, complicity was defined as deliberate joint participation by two or more individuals in the commission of a crime, and as a form of crime involving several persons uniting their efforts in order to reach a criminal result; it was accordingly considered to be an aggravating circumstance. A distinction was drawn between two forms of complicity: simple complicity, in which all co-perpetrators took a direct part in committing a criminal act, and complex complicity, in which the various perpetrators performed different functions, some being the immediate perpetrators of the act and others acting as abettors, organizers or other accomplices. The latter form of complicity was generally described as complicity proper, since in that case one or more individuals participated in a crime directly committed by another individual. The perpetrator, organizer, instigator and abettor were all accomplices in the crime and were defined as specific kinds of accomplices, depending on the actual role they performed. The basis for the accomplices' criminal responsibility was culpable participation in the commission of a socially dangerous act falling within the definition of a particular crime. The perpetrator's acts were directly connected with the result of the crime. As for the acts of the other accomplices, they were connected with the criminal result through the perpetrator: the abettor assisted the perpetrator in achieving the criminal result, the instigator incited him to commit the crime, and the organizer guided the actions of other individuals in committing the crime.

32. Punishment for complicity was to be determined within the limits of the penalty laid down for the crime in question, for example life imprisonment. In pronouncing sentence, the court took account of the degree and nature of participation in the crime by each accomplice.

33. Conspiracy was a secret agreement between a number of individuals concerning organized joint acts falling within the definition of crimes. It was important to note that, in internal law, conspiracy was generally taken to mean an activity directed against the State, such as seizure of power. In international criminal law, conspiracy was understood to be a form of commission of certain international crimes. According to the Charters of the International Military Tribunals, participation in a common plan or conspiracy with a view to the preparation, initiation or waging of a war of aggression were punishable. In the Special Rapporteur's eighth report, conspiracy was defined as "participation in a

common plan with a view to committing a crime against the peace and security of mankind" (*ibid.*, para. 40). Conspiracy to commit genocide was punishable under article III (b) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Hence it was appropriate that such a form of commission of crimes as conspiracy—a secret agreement to participate in a common criminal plan—should be included in the draft code.

34. The question had been raised whether a person who committed acts after the principal offence (for example, offering the principal offender refuge or concealment or otherwise assisting him to escape punishment) should be considered an accomplice in the crime, or whether such an act constituted a separate criminal offence. If such acts were committed prior to or concomitant with the crime, they were undoubtedly acts of complicity. The same was true of acts committed after the event but based on an agreement or plot entered into before or during the event. The situation was more complicated in the case of acts committed after the event and without previous agreement. In that connection, he referred to the concept used in Soviet criminal law to define an act which, although associated with a crime, did not constitute a circumstance determining the commission of the crime, for example promise of concealment. He wondered whether a similar concept was to be found in other national penal codes.

35. Another question was the point in time at which an act of aggression, genocide or *apartheid* should be considered to have ended. The beginning of the act was generally easy enough to establish, but was an act of genocide, for example, ended when the killing stopped or should it be regarded as still continuing so long as refugees or deportees were prevented from returning to their homes? The matter deserved further thought in the particular context of complicity, conspiracy and attempt.

36. As to part II of the report, on international illicit traffic in narcotic drugs, his first point concerned the definition proposed by the Special Rapporteur. The international element of the crime appeared only in the title of part II and not in the text of draft article X. In his view, the reference to the conventions in force was insufficient. His second point concerned the classification of the crime. The grounds for classifying an act as a crime against peace, a crime against humanity or a war crime were, of course, merely relative. It seemed indisputable, however, that international illicit traffic in narcotic drugs, on the basis of its many characteristics, clearly fell within the category of crimes against mankind, since it was aimed against all the peoples of the world and its physical result was the destruction of human life in all countries, i.e. of mankind.

37. Mr. McCaffrey said that, in a thorough eighth report (A/CN.4/430 and Add.1), the Special Rapporteur had provided the Commission with considerable food for thought, demonstrating once again his responsiveness to the requests of the Commission and the Sixth Committee of the General Assembly.

¹² See 2150th meeting, footnote 9.

¹³ *Documents on American Foreign Relations*, vol. VIII (July 1945–December 1946) (Princeton University Press, 1948), pp. 354 *et seq.*

¹⁴ Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

38. He wished to apologize for not following the Special Rapporteur's advice to avoid a discussion on methodology, but one point was crucial. As he had already stressed in the past, it was essential that, for each substantive crime, the link between the individual perpetrator and the act or practice that constituted the crime should be clearly indicated. For example, genocide was an internationally wrongful act of the highest order, but it could not be committed by an individual acting alone. The question therefore arose as to how, through a process of "reverse attribution", it was possible to identify an individual, or individuals, who could be tried for the crime, bearing in mind that it was one characteristically regarded as committed by a State.

39. None of the concepts of attempt, complicity and conspiracy could be dealt with in the abstract: each of them had to be examined in the context of every individual substantive crime so as to determine what constituted, for example, attempted aggression or attempted genocide. Mr. Tomuschat (2150th meeting) had suggested that the definition of the principal perpetrator of a crime could largely solve that problem. The terms of the definition could indeed eliminate the need to go into the question of conspiracy or complicity, for anyone who planned or organized a crime was a perpetrator, and hence there was no need to speak of complicity. Yet it was clear that the punishment of the individuals could vary with the degree of their involvement. All of them were perpetrators of a crime, but the severity of the punishment would differ, depending on whether they were leaders or subsidiary participants. It had also been pointed out during the discussion that, as far back as 1985, Mr. Ushakov had proposed formulas for "individualizing" various crimes under the code. He himself was in complete agreement with Mr. Ushakov on that point.

40. It was in fact necessary to look at each separate crime in order to see whether, and in what way, complicity, conspiracy and attempt formed part of the crime, instead of saying in the abstract that complicity, conspiracy and attempt constituted crimes. He for one did not believe that they were separate autonomous crimes; as noted by Mr. Calero Rodrigues (2151st meeting), they were aspects of the definition of participation by individuals in the substantive crimes. The suggestion that complicity, conspiracy and attempt should be mentioned in the general part of the draft code would have the drawback of implying that they did constitute separate crimes—a doubtful proposition in the context of a code that dealt solely with the most serious widespread acts and practices which undermined the very foundations of international peace and security.

41. In short, it would prove necessary to try to determine precisely whether and how an individual could be regarded as an accomplice in the commission of each crime or be held to have conspired or attempted to commit the crime. The task could not be tackled without concrete proposals from the Special Rapporteur on each substantive crime, proposals stating whether the crime would form the subject of complicity, conspiracy or attempt and providing some indication of what would constitute, for example, an attempt to commit genocide.

42. On the question of international drug trafficking, he strongly supported the suggestion by Mr. Calero Rodrigues that the element of extreme seriousness, or trafficking on a massive scale, should be introduced, perhaps in paragraph 2 of draft article X. Otherwise, the words "any traffic" in that paragraph would cover not only the drug baron, but also the small-scale dealer. The dealer could, of course, be regarded as an accomplice, but the draft code was concerned only with the most serious international crimes, namely crimes against the peace and security of mankind. Some forms of complicity might not rise to that level.

43. Lastly, he agreed with members who felt there was no need for two draft articles on drug trafficking, although it was difficult to find the right place for the provision. Drug trafficking exploited human beings and could be considered as a crime against humanity, yet it also destabilized Governments and undermined entire societies, something which appeared to make it a candidate for consideration as a crime against peace.

44. Mr. OGISO said that he welcomed the efforts of the Special Rapporteur, in his excellent eighth report (A/CN.4/430 and Add.1), to take due account of types of crimes and general principles embodied in the criminal codes of various countries in defining the concepts of complicity, conspiracy and attempt for the purposes of an international code. However, he did not share the view that complicity, conspiracy and attempt could constitute separate offences independent from crimes against peace, crimes against humanity and war crimes. He was concerned that such an interpretation could stem from the inclusion of complicity, conspiracy and attempt in chapter II of the draft code rather than in the general principles in chapter I. In Japan, the Criminal Code defined the concepts of complicity and attempt in the part dealing with general principles and further provided for complicity or attempt on a crime-by-crime basis in the part relating to specific crimes. He believed that such an approach was taken in most national penal legislations.

45. The concept of conspiracy was not found in all national codes, except for the offence of conspiracy against the State, and he had serious doubts whether it could be said to have become a part of the general theory of international law.

46. Having made those general comments, and proceeding to specific observations, he noted that the Special Rapporteur, in explaining why he had decided to deal with the concept of complicity in the part dealing with the crimes themselves, stated: "It is no doubt axiomatic that the accomplice incurs the same criminal responsibility as the principal." (*Ibid.*, para. 6.) That was an acceptable remark if it meant that both the principal and the accomplice should be punishable. For his own part, however, he expressed some reservations as to the possible implication that both of them should bear the same criminal responsibility in the case of every crime defined in the draft articles. The extent to which complicity should be punished varied from one crime to another. Indeed, in some instances complicity might not be punishable at all; for example, the principal perpetrator of an act of aggression was punishable, but

low-ranking members of the armed forces who had participated in the aggression should not be punishable on the basis of alleged complicity.

47. On the subject of conspiracy, the Special Rapporteur had submitted two alternatives for paragraph 2 of draft article 16, explaining that the first was based on the idea of collective criminal responsibility and the second on the idea of individual criminal responsibility. Actually, the Special Rapporteur appeared to favour collective responsibility, for he argued:

Today, [there is an] ever-greater need to deal more and more with the continuing growth of collective crime and with the new problems to which it gives rise . . . The law therefore responds to this new dimension of crime by providing a new definition of criminal responsibility, which in the cases in question takes a collective form, since it is becoming increasingly difficult to determine the role played by each participant in a collective crime. (*Ibid.*, paras. 54-55.)

In that regard, he wished to emphasize what he had said at the Commission's thirty-eighth session, in 1986, namely that individual responsibility should, as far as possible, be treated as a general principle in the case of war crimes. The concept of conspiracy, if the Commission decided to include it in the draft code, should apply only to crimes against peace, as well as to genocide, as already provided in article III (b) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

48. In general terms, he agreed with the Special Rapporteur's definition of attempt as "any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention" (*ibid.*, para. 65). As he had pointed out at the thirty-eighth session, however, mere preparation, not followed by execution, should not be interpreted as a criminal act. The Special Rapporteur's present definition of attempt, which referred to "commencement of execution", would contribute to making fairly clear the borderline between attempt and preparation.

The meeting rose at 12.45 p.m.

2153rd MEETING

Tuesday, 8 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/419 and Add.1,² A/CN.4/429 and Add.1-4,³ A/CN.4/430 and Add.1,⁴ A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 15, 16, 17, X AND Y⁵ and

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (*continued*)

1. Mr. BEESLEY said that he had certain points of principle and substance to make.

2. So far as principles were concerned in the case of the topic under consideration, it was apparent that it was very difficult for any special rapporteur, however able and hard-working, as in the present case, to reconcile the various national legal systems in one text. In his view, therefore, the Commission should explore the possibility of seeking the technical assistance of experts in international criminal law.

3. With regard to substantive questions, it was clear from the discussion that, if the Commission was to make progress, it had to avoid dogmatism. It must attempt, on the basis of national criminal systems, to find the means that would enable a court that was to be created or an existing court to apply the future code harmoniously without the fundamental principle of justice being affected by any differences as to law and procedure. In that regard, the Commission must venture into new fields and approach the problem with an open mind. It seemed ready to do so.

4. Given the evolution in thinking with regard to national criminal law and to international criminal law in so far as it existed, it would be advisable to consider the reasons for that evolution. The fact that a particular act was criminalized in some national jurisdictions and not in others, or was subsequently criminalized in a jurisdiction in which it previously had not been, suggested that its eventual characterization as an offence reflected principles of public policy. For example, some jurisdictions criminalized one or both of the acts of complicity and conspiracy. Those acts had no *actus reus, per se*, and were often attributed the *actus reus* of the underlying offence. It might be, therefore, that they were characterized as criminal where deterrence was warranted for reasons of public policy. That seemed to be the case with the offence of conspiracy in Canada. In other cases, the criminalization of complicity or conspiracy might be the only means of addressing effectively the underlying offence.

¹ 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.

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

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

⁴ *Ibid.*

⁵ For the texts, see 2150th meeting, para. 14.

5. Perhaps the evolution of international criminal law might also be said to be based on emerging concepts of international public policy. Thus the 1954 draft code and the Nürnberg Principles⁶ should be regarded as valuable precedents, but the Commission should feel free to re-examine such precedents, as well as the series of other issues under consideration under the present topic. That should be done with a view not only to the codification, but also to the progressive development of international criminal law so as to contribute to the Charter system of international peace and security, which was the Commission's fundamental objective under the topic. It would be desirable to apply that test to each crime covered in the draft code and also to the institutions and modalities needed for implementation. In the latter connection, he remained convinced that any national court would have difficulty in applying the code unless it included representatives of other legal systems, which would also make it possible gradually to develop a common standard, harmonizing differences between legal systems.

6. To illustrate the complexity of the issues under consideration, he referred to certain sections of the Canadian Criminal Code, parts of which were also quoted in the Special Rapporteur's eighth report (A/CN.4/430 and Add.1).

7. For example, paragraph (1) of section 21 of that Code, which dealt with parties to offences, included a provision to the effect that everyone who aided or abetted the commission of an offence was a party to that offence. It was arguable that something akin to a legal fiction might thus be created, since an act was attributed to the accused which he had not himself committed. Similarly, paragraph (2) of section 21 provided that, once a common criminal intention had been formed between individuals, each became a party to any related offence committed by any one of them. Section 22 provided that a person who counselled another to commit an offence became a party to that offence, while section 422 provided that, if the offence was not committed, a person who counselled the commission of an offence would be guilty of counselling. Lastly, section 23 dealt with accessories after the fact.

8. It would, of course, be presumptuous to make a detailed analysis of the Canadian Criminal Code as a possible model to be followed. It might, however, be appropriate to consider how that Code might, together with other sources, assist the Commission in reconciling the principles of differing legal systems in developing a harmonized system of substantive and procedural international criminal jurisprudence.

9. The Special Rapporteur had raised a number of questions without always proposing an answer. That was a wise course, since a means of reconciling the differing legal systems in force had yet to be found. The Commission should therefore endeavour to take not only the best of what those systems had to offer, but also those precedents which might provide common ground. If there were none, the Commission might have to be bold and introduce innovations. That was a

task not only for the Drafting Committee, but also for the plenary Commission.

10. He reserved the right to revert later to the related and equally important question of the possible establishment of an international criminal court, which had his support in principle.

11. Mr. AL-BAHARNA said that, before analysing the draft articles which had been submitted, he would first make a few general observations concerning the methodology and approach adopted by the Special Rapporteur in his eighth report (A/CN.4/430 and Add.1).

12. With regard to methodology, he agreed with the Special Rapporteur that complicity, as a crime, should be included in the part of the draft code dealing with the definition of crimes rather than in the part dealing with general principles, since an accomplice incurred the same criminal responsibility as the principal. The same applied to conspiracy and attempt, although the latter should be examined in the context of each crime or group of crimes under the code, inasmuch as it could be applied only to a limited extent given the nature of the crimes involved.

13. With regard to approach, the Special Rapporteur seemed to have been influenced by the provisions in the penal codes of some countries more than of others in arriving at an international norm with respect to complicity, conspiracy and attempt. That approach was, in his view, open to objection in that it was eclectic and, in any event, was predicated on an analogy with internal law. He would have much preferred an approach based on multilateral treaty practice. There were international conventions on genocide, narcotic drugs, hijacking and war crimes, which incorporated provisions on complicity, conspiracy and attempt and which would provide a far more useful basis for work on the draft code.

14. Turning to the draft articles submitted by the Special Rapporteur, he said that he would confine himself at the present stage to comments of a conceptual and substantive nature.

15. Draft article 15 made complicity a crime. Since international crimes were for the most part group crimes involving a variety of actors who had been assigned different roles, it was logical to hold responsible all the actors connected with the crime in question, whether the person was an originator of the crime or an executant. There might, however, be circumstances in which a person became involved in an unlawful or prohibited act without the necessary intention or knowledge. Was it proper to hold such a person responsible? It would be remembered that, after the Second World War, only the major war criminals had been arraigned before the Nürnberg and Tokyo Tribunals. He realized that distinguishing between the principal and the accessory was no easier in international crimes than in national crimes. None the less, a distinction had to be made between the various degrees of complicity in order to attribute culpability, failing which the result might be an illusory law. The very nature of the crime of complicity called for a more detailed examination of that aspect of the question. Paragraph 1 of draft arti-

⁶ See 2151st meeting, footnote 11.

cle 15 did not, in his view, address the problem and did not make it clear what was meant by the word “accomplice”. Paragraph 2 no doubt explained the scope of the concept of complicity, but referred to its application in time, since it related to accessory acts committed before and after the principal offence. That was an entirely different matter. He was, of course, in agreement with the underlying notion that complicity should encompass all accessory acts, whether prior or subsequent to the commission of the principal offence. Care should, however, be taken to establish a nexus between the principal offence and subsequent accessory acts. Accordingly, he considered that draft article 15 should include a definition of the concept of “accomplice” and that the degrees of complicity required in order to hold the accomplice responsible should be specified.

16. Draft article 16 provided that conspiracy was a crime against the peace and security of mankind. In the 1954 draft code, the Commission had extended the concept of conspiracy to cover all crimes against the peace and security of mankind. The Special Rapporteur seemed to have some reservations with regard to that approach, for, in his report, he observed that it “represented a considerable extension” (*ibid.*, para. 50). It was not clear, however, from his comments whether his reservations related to the crimes themselves or to the question of individual and collective responsibility. Whatever the answer, the subject of conspiracy had to be examined more thoroughly—if necessary, in the context of each crime or group of crimes—and its limits clearly laid down. Consideration could thus be given to including a definition of “conspiracy” in the body of the article, with an indication of the scope of the liability. It was true that the Special Rapporteur had noted (*ibid.*, para. 41) that conspiracy involved two elements, the first being agreement and the second the physical acts whereby the crime was carried out. In his opinion, however, that indication belonged in the body of the article. As to whether or not conspiracy should encompass all the crimes covered in the code, he had an open mind. However, on the question whether responsibility for the crime should be collective or merely individual, he would prefer the concept of collective responsibility, which would be far more effective in controlling the crimes covered by the code. As in the case of complicity, however, care should be taken to establish that every participant in the crime had the necessary *mens rea*. In the event, he preferred the first alternative of paragraph 2 of draft article 16.

17. The Special Rapporteur noted in his report that “In its broadest sense, the concept of criminal participation encompasses not only the traditional concept of complicity, but also that of conspiracy” (*ibid.*, para. 26) and that “although complicity and conspiracy are two separate concepts, they are very similar and sometimes overlap” (*ibid.*, para. 62). Those comments prompted the question whether it was really necessary to have two different articles on complicity and conspiracy. Treaty practice in the matter was not consistent. Some treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, dealt with complicity and conspiracy individually, whereas others, such as the 1988 United Nations Convention against

Illicit Traffic in Narcotic Drugs and Psychotropic Substances, dealt with them synonymously. While he held no strong views on either of those two approaches, he considered that it would be possible to avoid the overlapping to which the Special Rapporteur had referred if draft articles 15 and 16 were combined in a single article entitled “Participation in the crime”.

18. With regard to draft article 17, he considered that the inclusion of attempt in the draft code was fraught with difficulty. First of all, an internationally acceptable definition of “attempt” had to be found. Secondly, the question whether the concept of attempt should apply to all the crimes covered in the code or only to some of them had to be decided. Unfortunately, “attempt” was not defined in the 1954 draft code or in the conventions that had given attempt the same status as the crime in question. The concept of attempt was, however, well defined in criminal law. Generally, it contained the following elements: (a) an intent to commit the crime in question; (b) an overt act towards its commission; (c) failure to commit the crime; (d) the apparent possibility of committing it. In his view, all those elements should be included in the definition of “attempt” in draft article 17.

19. He agreed with the Special Rapporteur that the concept of attempt was applicable to most crimes against humanity, such as genocide and *apartheid*. It would therefore not be difficult to provide, in the case of those crimes, that attempt constituted a crime. The same did not, however, apply to crimes against peace, such as aggression and intervention, because, as the Special Rapporteur indicated (*ibid.*, para. 66), it was impossible to determine exactly the point at which aggression or intervention began or failed.

20. So far as the two draft articles on international drug trafficking as a crime against peace and as a crime against humanity, respectively, were concerned, he had some reservations about the Special Rapporteur’s approach. He recognized that international drug trafficking constituted a grave threat at present, but did that warrant its characterization as a crime against peace and as a crime against humanity? It might suffice to characterize it solely as a crime against humanity. He also had reservations about the Special Rapporteur’s approach with regard to the definition of the crime of international illicit traffic in narcotic drugs. Article 3 of the 1988 United Nations Convention defined “offences” and “sanctions” in such a way as to cover every conceivable act connected with drug trafficking. By contrast, draft article X submitted by the Special Rapporteur included only a part of that definition. The financial aspects covered by the Convention, for example, were not included. That lacuna should be remedied, and he suggested that, for the purposes of the draft code, the definition of international drug trafficking should be based on the 1988 United Nations Convention.

21. With those reservations, he wished to thank the Special Rapporteur for his instructive and stimulating report. He reserved the right to speak later on the question of the possible establishment of an international criminal court.

22. Mr. THIAM (Special Rapporteur) said he was surprised that almost none of the members of the Commission had yet referred to the question of the statute of an international criminal court, dealt with in part III of his eighth report. At the previous session, he had been asked to submit a draft as early as possible, as if the matter had been urgent. Since time was passing, perhaps the Commission should consider changing its programme of work.

23. The CHAIRMAN said that members could analyse any aspect of the report, including part III, at any point during consideration of the agenda item, so long as it had not been completed.

24. Mr. PAWLAK, referring to part I of the eighth report (A/CN.4/430 and Add.1), relating to complicity, conspiracy and attempt, said that he could understand the Special Rapporteur's reasoning, but failed to share some of his conclusions. For him (Mr. Pawlak), complicity, conspiracy and attempt were nothing more or less than forms of committing a crime. That approach was clearly evident in most European penal codes, including that of Poland, and it surely ought to be taken into account in the draft code.

25. Being forms of the commission of crimes, complicity, conspiracy and attempt should be regarded as a separate part of the code. In that new part, it would be advisable to incorporate a definition of the perpetrator from the point of view of international law, if the Commission could agree on one. Such a definition, which could be based on Mr. Ushakov's ideas,⁷ might, as several members of the Commission had pointed out, clear up many aspects of forms of committing crimes through so-called related offences and would thus make the Commission's task easier.

26. It was true that international crimes differed from most crimes defined in national penal codes, but the differences were often only a matter of the degree of seriousness of the punishable act. That was why it would not be appropriate, as a principle, to create separate crimes of complicity, attempt, etc. for each international crime under the code: some exceptions could, of course, be made, for example in the case of conspiracy. It would be preferable to include, at the beginning of chapter II of the draft code, a short set of articles defining all forms of the commission of crimes under the code. Those provisions could begin, for example, with preparation and go on to conspiracy, association, attempt, etc., and thereafter to a definition of all forms of participation by the co-perpetrators, whether originators, direct perpetrators or leaders who directed the commission of the crime without directly participating in its execution. After all forms of participation by co-perpetrators had been exhausted, it would be possible to refer to accomplices. Complicity, as he had already stated, was only one form of the commission of a crime. That would become clearer when a definition of the principal perpetrator of the crime had been provided.

27. In his report (*ibid.*, para. 19), the Special Rapporteur referred to "the existence of grey areas, areas of

uncertainty" in the sphere of complicity. It was true that from a study of the laws of many States it could be concluded that there was a lack of uniformity. The Commission should, however, not concern itself with extreme cases; rather, it should try to define, as broadly as possible, accountability for the commission of crimes under the code. The role of the code was not only to punish, but also to educate and to deter. Acts of complicity, instigation, preparation, aiding, inspiring, ordering, directing, etc. were only forms of crimes and should be punished in the same way as the crime itself, obviously according to the degree of participation in the execution of the crime. In that regard, he was in favour of the principle of individual responsibility, not collective responsibility.

28. Turning to part II of the report, on international illicit traffic in narcotic drugs, he said that the Commission should simply declare such traffic to be a crime against humanity and concentrate on the effects of such a definition. A single article should suffice. The objective was to punish major drug traffickers and dealers, leaving it to national courts to deal with petty trafficking and other activities that were part of illicit traffic in narcotic drugs.

29. Mr. ILLUECA recalled that the reason the Commission had originally been entrusted with the task of preparing the draft code was that, after a major world conflict, the international community had wanted certain crimes and the corresponding penalties to be defined and a set of appropriate legal rules drafted. The Commission had had to find legal solutions which would avoid the criticism levelled against the Nürnberg and Tokyo Tribunals, namely that they had not based themselves on existing international law; that charges had been brought which had not been in accordance with the principle of legality; and that the penalties imposed had been contrary to the principle *nulla poena sine lege*.

30. The methodological points made by the Special Rapporteur in his eighth report (A/CN.4/430 and Add.1, para. 6) should not be overlooked, but the content and scope of draft articles 15, 16 and 17 showed that matters of form and of substance were so closely intermingled that it was physically impossible, in terms of methodology, to situate the constituent elements of the punishable act in relation to its physical and moral perpetrator or perpetrators and the punishment to which they were liable.

31. It was obviously not the Commission's task to prepare a draft code based on common law or the Roman-law systems; nor was it to draft a code based on rules intended for the settlement of conflicts of laws or jurisdiction by national courts. Under General Assembly resolutions 177 (II) of 21 November 1947 and 36/106 of 10 December 1981, the Commission was required, in elaborating the draft code, to indicate the place to be accorded to the Nürnberg Principles, taking duly into account the results of the progressive development of international law.

32. In his report (*ibid.*, paras. 19 and 26), the Special Rapporteur spoke of the difficulties ("grey areas, areas of uncertainty") of defining the actors involved in com-

⁷ *Ibid.*, footnotes 8 and 9.

plicity. The problems to which he referred were related to two basic theories of international criminal law, namely that of the *iter criminis*—the way in which the crime came into existence—and that of criminal participation, relating to co-culpability or, in other words, to the *societas sceleris* of Italian law.

33. Complicity, conspiracy and attempt occupied a special place in terms of the ways in which a crime came into existence, since there was only one crime, but many perpetrators. The commission of a crime obviously extended over both the planning and the execution stages. The objective manifestations of a criminal plan were thus, first, attempt, which presupposed a commencement of execution; secondly, failure, which presupposed that the act had been executed but that, because of circumstances independent of the perpetrator's will, the desired results had not been achieved (in that connection, he noted that what the Special Rapporteur said (*ibid.*, para. 67) on the concept of attempt should also apply to failure: failed homicide, which was relevant to the code in, for example, the case of genocide, *apartheid* or aggression, was a criminal act, examples of which were to be found in history, particularly that of Latin America); and, thirdly, the consummation of the crime, the culmination of the process which completed execution. Proposal, conspiracy (dealt with in draft article 16) and provocation or instigation should, however, be added to attempt, failure and consummation as forms of the commission of a crime.

34. In his report, the Special Rapporteur noted two tendencies, one which detached *post factum* participation from complicity and another which associated the two. He therefore concluded that he could not "propose a single rule without denying the coexistence of these two tendencies" (*ibid.*, para. 37). The solution he proposed in draft article 15 should accordingly be incorporated in the draft code, since it provided the best means of defining the involvement of each participant in the criminal act and the responsibility and the penalty which he incurred.

35. Many national penal codes drew a distinction between perpetrator, accomplice and concealer. The latter was in dispute among experts in criminal law, but it was safe to accept the view of the Seventh International Congress of Penal Law (*ibid.*, para. 36) that acts of subsequent assistance not resulting from a prior agreement, such as concealment, should be punished as special offences.

36. The contemporary criminal-law theory of criminal participation reflected two main approaches: the traditional one, as represented by the unitary or monist theory, which maintained the oneness of the crime as against the plurality of its perpetrators; and the pluralist theory, according to which each participant was a part of the common act constituting the crime committed. In the view of some eminent criminal lawyers, if several persons agreed to commit a crime or if there was a principal act from which the participant derived his qualification, the accessory nature of participation became manifest. The participant's conduct could be qualified as criminal only

"conditionally", since it depended on the conduct of the principal perpetrator.

37. As a result of the Special Rapporteur's work, the Commission was in a position to prepare a draft code which would pave the way for the exercise of international criminal jurisdiction. The code would rank as a uniform and exhaustive body of universally accepted rules in harmony with the world's different legal systems. Its implementation would obviously require the establishment of an international criminal court which would, with the support of the necessary administrative machinery, have exclusive competence to try the crimes covered by the code. The present international climate was characterized by détente, peace, friendship and co-operation and that no doubt explained why the General Assembly had, on 4 December 1989, adopted by consensus its historic resolution 44/39 on the establishment of an international criminal court with jurisdiction over persons engaged in illicit trafficking in narcotic drugs and other transnational criminal activities.

38. In conclusion, he expressed the view that draft articles 15, 16 and 17 on complicity, conspiracy and attempt should be included in the part of the draft code devoted to general principles. He reserved the right to speak again on part III of the eighth report, dealing with the statute of an international criminal court.

39. Mr. MAHIOU said that the qualities of brevity and conciseness which were a characteristic feature of the Special Rapporteur's reports had at first made him fear that the eighth report (A/CN.4/430 and Add.1) did not contain enough elements to enable the Commission to study the so-called "related" offences. Actually, the report had to be read in the light of part III of the Special Rapporteur's fourth report⁸, in which he had made a detailed analysis of "other offences". For his own part, he would confine his comments to a few important points on which members of the Commission had been requested to state their positions clearly.

40. With regard to method, as considered from the standpoint of the substantive consequences, he noted that several members had raised the question whether it was desirable to formulate a general rule on the concepts of complicity, conspiracy and attempt, in other words to apply the deductive method in order to derive from it the consequences for each of the crimes, or whether it was preferable to deal with each of those concepts in direct connection with each crime so as to take account of the particular characteristics of each act by following the inductive method. It had also been asked whether a separate part of the draft code should be devoted to those related offences, or whether they should be included in an existing part, such as the one on general principles.

41. Those questions raised the substantive problem of the exact characterization of each of those offences. Were they autonomous offences or purely related offences? For example, if conspiracy were regarded as

⁸ *Yearbook* . . . 1986, vol. II (Part One), pp. 63 *et seq.*, document A/CN.4/398.

an autonomous offence, it would be punishable as such even in the absence of a commencement of execution. The comparisons used by the Special Rapporteur to enlighten the Commission showed clearly what the position was: the mere fact of belonging to an association of criminals was punishable, whether or not an offence had actually been committed, and commencement of execution was merely an aggravating circumstance which had the effect of making a heavier penalty applicable to the convicted person. If, on the other hand, conspiracy was regarded as a form of criminal participation and was only a related offence, the position would be different. For such participation to be punishable, it had to be connected with the principal offence. It was in the light of those consequences that the Commission had to consider the nature of the offences in question.

42. In that connection, the Special Rapporteur recalled the interpretation by the Nürnberg Tribunal of article 6 of its Charter,⁹ which drew a distinction between three categories of crimes: crimes against peace (para. (a)), war crimes (para. (b)) and crimes against humanity (para. (c)). Although conspiracy was expressly mentioned only in paragraph (a), it could be assumed that, since it was referred to at the end of article 6, the concept of conspiracy applied to all three categories of crimes. At the time, the aim had been to punish severely those who had prepared, organized or directed criminal acts without having to investigate the principal offence. In the end, however, the Tribunal had interpreted article 6 restrictively and considered that the concept of conspiracy applied only to crimes against peace. As far as those crimes were concerned, it had been regarded as an autonomous offence, the idea being to punish crimes committed by rulers, namely crimes against peace, which were mainly acts of aggression, and to try those responsible as principal perpetrators and not merely as accomplices. The concept of collective responsibility had begun to take shape on that occasion, since article 6 of the Nürnberg Charter had been based on solidarity between those who had directed and organized those different crimes, some of which had been directly committed by other persons. It was obviously essential to study the concept of collective responsibility carefully and identify on a case-by-case basis the exact conditions in which it would come into play. The concept of conspiracy could thus have its place among crimes against the peace and security of mankind as an autonomous offence, provided that the necessary precautions were taken and due account was taken of certain elements, such as intention, which had the effect of limiting it.

43. In more general terms, related offences presented a dilemma: either it was considered that the draft code covered the most serious crimes and that, on that basis, it was essential to punish not only the perpetrators, but also all those involved as a result of complicity, conspiracy or attempt, the penalty applicable to them being commensurate with the degree of their involvement; or it was considered that, in the case of serious crimes, it was essential to have strict enforcement of the law and

to seek to punish only those who were really guilty of specific, individual acts. There might, however, be an intermediate position.

44. With regard to complicity, he believed that it was possible to have a single article that would be applicable to all of the crimes covered by the draft code, whereas other members of the Commission considered that there could be a restrictive approach to complicity in respect of certain crimes, such as war crimes, and a broader approach for others, such as crimes against peace and crimes against humanity. He had, however, heard no really convincing argument in favour of that distinction. Perhaps the fact that there were conventions on war crimes containing detailed provisions and identifying the various offences might make it easier to characterize the crimes and, hence, complicity, thus militating in favour of a restrictive approach to complicity in the case of that category of crimes. Even in that case, however, the Hague and Geneva Conventions could be imprecise, no matter how detailed they might be. That might therefore not be a sound enough basis to support a restrictive approach in one case and a broad approach in another. He was, moreover, not sure whether the inclusion of the crime of conspiracy might not be making the Commission adopt a restrictive approach to complicity: since the concept of conspiracy made it possible to punish leaders and organizers, was there any justification for broadening the concept of complicity in order to cover certain persons who were responsible? In any event, draft article 15 had to be worded in greater detail in order to identify more clearly the acts of complicity which should be punishable under the code.

45. Attempt was an example of an act closely connected with the crime planned. It therefore had to be analysed in relation to the various crimes and be punished in accordance with the circumstances. If the attempted crime had not been committed because of circumstances independent of the will of the perpetrator, attempt had to be punishable.

46. With regard to illicit traffic in narcotic drugs, the first problem which arose, as in the case of war crimes, was that of determining whether any illicit act relating to narcotic drugs was covered by the draft code. His view was that the element of seriousness, however different it might be from the one to be taken into account in the case of the other categories of crimes, had to apply for the purpose of justifying the inclusion of a crime in the code. It was therefore necessary to identify the parameters which made it possible to say that a particular illegal activity was covered only by internal law and that, at some point, it was outside that context and became subject to international repression. Accordingly, some importance had to be attached to that element of extraneousness in order to include illicit traffic in narcotic drugs among the acts punishable under the code as crimes against peace. Viewed from that angle, however, paragraph 2 of draft article X was inadequate. Moreover, the comments by the Special Rapporteur in paragraph 69 of his report did not correspond exactly to that article, which was very broad in scope and therefore did not exclude isolated acts. It was thus necessary to stress the extraneous nature of the act

⁹ See 2150th meeting, footnote 9.

referred to in paragraph 1 of the article, as well as the consequences it might have for international relations. It was the link with international relations that made a particular act involving narcotic drugs a crime against peace. Paragraph 2 of article X might specify the acts which constituted crimes and were therefore punishable.

47. Some members of the Commission had questioned whether illicit traffic in narcotic drugs as a crime against humanity should be dealt with in a separate article. In his view, it was preferable to have two articles, particularly since the Commission was dealing with crimes against peace, crimes against humanity and war crimes in separate parts of chapter II of the draft code. If illicit traffic in narcotic drugs was to be characterized as a crime against peace, that had to be made clear in the relevant part of chapter II, as must also be done if it was to be characterized as a crime against humanity. As a crime against peace, illicit traffic in narcotic drugs had, from the point of view of the State, both an internal and an international aspect. It was because it affected the stability of the State or because it jeopardized international relations that it could be described as a crime against peace. Those parameters had to be included in the draft article which defined illicit traffic in narcotic drugs as a crime against peace. In the case of a crime against humanity, however, that internal or international element relating to the State was superfluous. Domestic illicit traffic which had grave consequences for the population could, as a result of those consequences and in some respects, be equated with a form of genocide. It did not directly affect international peace or the stability of a Government, but it did harm broad sectors of the population: the point was thus to preserve the concept of humanity as such. In such a case, there was a close link with internal law, so that the consequences in the matter of penalties had to be divided between domestic courts and the envisaged international criminal court—and that was a particularly delicate matter.

48. Lastly, he recalled that the Special Rapporteur had been invited on a number of occasions to define the principal perpetrator in order to make it possible subsequently to identify the various categories of participants in a crime. He personally did not favour that approach, because criminal law usually did not define the perpetrators so much as the offences. It was on the basis of the offences that the perpetrators were identified so that they could be punished according to the degree of their participation. On that point, the Commission must not be too ambitious: some concepts could not be defined with all the necessary precision. Quite often, in internal law, it was the judge who assessed the role played by each of the accused and there was no reason why it should be any different at the international level. The Commission had to prepare some guidelines, but it was for the judge in each particular case to determine the responsibility of each person involved. Once the list of principal offences had been agreed on, the Commission could add a list of related offences which it would try to make as detailed as possible, although it could never be exhaustive.

49. Mr. RAZAFINDRALAMBO said that, since previous speakers had dealt with virtually all the questions raised by the Special Rapporteur in connection with the concepts of complicity, conspiracy and attempt, he would confine himself to some brief comments on the topic. He understood the Special Rapporteur's concern not to reopen the debate which had taken place during the consideration of his fourth report at the thirty-eighth session, in 1986, but, rather, to learn what the members of the Commission thought about the definitions he had proposed for the three concepts. However, several members of the Commission had not taken part in the debate at the thirty-eighth session. Furthermore, the refinements which the Special Rapporteur had made in the definitions of the concepts in question could hardly give rise to any differences of opinion, for they merely reflected widely recognized principles of general criminal law. That was why any fruitful discussion that was to take place must focus in particular on the role to be assigned to the three concepts. The Commission must determine whether it could incorporate them unchanged in international criminal law.

50. With regard to complicity, everyone knew that, in general criminal law, the concept was based on the principles of derived criminal nature (*emprunt de criminalité*) and derived punishable nature (*emprunt de pénalité*). Under the first principle, complicity was determined by the existence of a principal criminal act. A number of consequences flowed therefrom. *Inter alia*, an accomplice could be convicted only if the perpetrator of the principal act was himself convicted: pardon of the principal act eliminated the criminal nature of the complicity. Under the second principle, namely the principle of derived punishable nature, the act of complicity and the principal act were punished in the same way and, according to the advocates of the theory of absolute derived punishable nature, the principal perpetrator and his accomplice must even suffer the same actual penalty.

51. In the traditional system, complicity was therefore usually defined in terms of the principal action, and a special provision, most often contained in the part of penal codes stating general principles, was devoted to the concept of principal perpetrator or presumed principal perpetrator. That was quite normal.

52. However, the Commission had to draft a code of crimes against the peace and security of mankind, in other words an instrument of international law. As in the past, whenever the Commission had had to consider the possibility of transferring rules and principles of internal law to international law, it must proceed very cautiously and think about the way in which the concept of complicity should be transposed to the code, even if the definition and content of the concept were roughly the same in all domestic penal codes. It was necessary to decide, *inter alia*, whether the principles of derived criminal nature and derived punishable nature applied to the concept of complicity in a crime against the peace and security of mankind. If they did, then the concept of complicity should be defined in the general part of the code, as should perhaps the concept of principal perpetrator.

53. Before reaching a decision on that issue, however, it was important to analyse international conventional and judicial practice. As the Special Rapporteur pointed out in his eighth report (A/CN.4/430 and Add.1, para. 13), the Charters of the International Military Tribunals referred, in the same articles and without distinction, to "leaders, organizers, instigators and accomplices" (art. 6 *in fine* of the Charter of the Nürnberg Tribunal and art. 5 (c) of the Charter of the Tokyo Tribunal), no distinction being made between perpetrators and accomplices. The view that there was no relationship of subordination between the accomplice and the principal perpetrator had been embodied in the Nürnberg Principles,¹⁰ as well as in the 1954 draft code, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and the 1979 International Convention against the Taking of Hostages. However, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries adopted by the General Assembly on 4 December 1989 seemed to be an exception.

54. Mr. Mahiou had clearly described the legal consequences of the solution of dealing on an equal footing with the principal act and the act of complicity and making the latter an autonomous offence.

55. As had just been seen, international practice clearly took the line of separating the act of complicity from the principal act and a similar trend had emerged in internal law, where recognition of the criminal nature of the act of complicity was not dependent on conviction of the principal perpetrator or even on his identification. It was understandable in the circumstances that the Special Rapporteur should have chosen to deal with complicity as a separate offence. He had, however, been aware of the difficulties which the Commission would inevitably encounter if it tried to define the concept of accomplice by setting it against the concept of perpetrator and had rightly proposed disregarding the traditional perpetrator/accomplice "dichotomy" and opting for the broader concept of participant, which covered both principal perpetrators and accomplices. The Commission should examine that solution closely and consider the possibility of drafting a general provision on criminal participation covering organizers, instigators, perpetrators and accomplices. Such a provision would be placed among the general principles and would apply in principle to all the crimes covered by the code, it being understood that it would be for the international criminal judge to assess in each specific case the exact role of the various participants.

56. Unlike some members of the Commission, he did not think it would be useful at the present stage to review the different crimes against the peace and security of mankind in order to determine whether the theory of complicity could be applied to them.

57. Draft article 16 contained two paragraphs on what the Special Rapporteur called the two degrees of conspiracy. In fact, only paragraph 1 actually dealt

with conspiracy characterized by participation in a common plan or by an agreement between the participants. Paragraph 2 referred not to conspiracy, but to the offence corresponding in French penal terminology to a criminal act (*attentat*), namely an executed conspiracy. A criminal act against the security of the State, for example, constituted a quite separate crime in French criminal law. It ought to be possible to incorporate the provision on conspiracy itself without difficulty in the general part of the draft code.

58. The provision contained in paragraph 2 dealt, in the first alternative, with collective responsibility and, in the second alternative, with individual responsibility. If the Commission opted for the principle of individual responsibility, paragraph 2 became superfluous, for the draft code already contained a provision on individual responsibility. If, on the other hand, it adopted the first alternative, which, in accordance with the notion of criminal participation, dealt with all the participants in the commission of a crime in the same way, then the text of paragraph 2 ought in all logic to be placed among the general principles, following the provision concerning participation.

59. Draft article 17, on attempt, prompted the same comments as the provisions on complicity. Since once again it was difficult to review all the crimes covered by the code in order to determine whether the notion of attempt could be applied to them, it would be unwise to decree out of hand that attempt was possible with respect to all crimes against the peace and security of mankind. If the Commission merely included in the general part of the code the traditional definition of attempt, it would then be for the judge to determine in each specific case whether or not the notion of attempt was applicable.

60. With regard to part II of the eighth report, he said that he approved in principle of the idea of including drug trafficking among the crimes covered by the code. It would be preferable, in his view, to characterize the offence as a crime against humanity rather than as a crime against peace. However, the Special Rapporteur should rework the text of draft article Y so as to cover only organized large-scale traffic constituting a true international conspiracy.

61. Mr. SOLARI TUDELA, commenting first on the concepts of complicity and conspiracy, said that the simplest thing would be to have one and the same provision for the two concepts under the heading of criminal participation, as the Special Rapporteur himself had indeed envisaged in his eighth report (A/CN.4/430 and Add.1, para. 26). That approach would also have the advantage of serving as a common denominator for the different legal systems, which did not always distinguish between conspiracy and complicity. In that connection, it should be remembered that, if the code incorporated a definition of the perpetrator of the crime covering not only the physical perpetrator, but also the "originator" and the indirect perpetrator, the provisions on complicity and conspiracy would become superfluous.

62. Furthermore, he doubted whether all forms of complicity and, in particular, accessory acts subsequent

¹⁰ See 2151st meeting, footnote 11.

to the principal offence constituted sufficiently serious offences for them to be regarded as crimes against humanity and therefore to be treated as criminal acts under the code. The same was true of attempt: it did not seem to be of sufficient gravity to be regarded as a crime against humanity. There was a danger in characterizing those offences as crimes against humanity: the concept of extreme gravity which must be inherent in the acts treated as crimes under the code risked becoming somewhat vague in the public mind.

63. The wording of draft article X, on illicit traffic in narcotic drugs, should be amended to make it quite clear that the article applied only to organized large-scale traffic.

64. It would also be a good idea to add to the list of crimes covered by the code a new form of crime—narco-terrorism. At its forty-sixth session, the Commission on Human Rights had adopted resolution 1990/75 entitled “Consequences of acts of violence committed by irregular armed groups and drug traffickers for the enjoyment of human rights”, in which it expressed its deep concern at the crimes and atrocities committed in many countries by irregular armed groups and drug traffickers and its alarm at the evidence of growing links between them. There were now grounds for thinking that the terrorist movements rife a few years previously in Europe had had links with drug traffickers at one time. The same was currently true in several countries of Latin America where that new form of crime constituted a real threat to society. What was involved was therefore not only a crime against humanity, but also a crime against peace which must definitely be treated as a crime in the code.

65. The CHAIRMAN, speaking as a member of the Commission, noted first of all that, in parts I and II of his eighth report (A/CN.4/430 and Add.1), the Special Rapporteur raised extremely controversial issues. Complicity, conspiracy and attempt were internal-law concepts whose content varied from one legal system to another. Before including them in an international instrument, it was necessary, if the instrument was to be universally accepted, to carry out a difficult task of unification and harmonization. Even if an international criminal court was to be established in the near future, the crimes covered by the code would no doubt be tried most often by national courts.

66. Unfortunately, draft articles 15, 16 and 17 as currently worded were not fully acceptable.

67. He had no objection if the code treated complicity and conspiracy as crimes, but he wondered whether it was a good idea to list attempt among the crimes against the peace and security of mankind. Indeed, the Special Rapporteur himself seemed to have some doubts on that point, admitting in his report (*ibid.*, para. 66) that the theory of attempt could be applied only to a limited extent in the area of the crimes under consideration. Yet a reading of draft article 17 gave the impression, in contrast to that comment, that it was dealing with a theory of general application.

68. As to methodology, he thought that the provisions on complicity, conspiracy and attempt should be placed in the part of the code dealing with general prin-

ciples, since those were not crimes specific to crimes against the peace and security of mankind. They were in fact offences committed most often in connection with criminal acts such as murder, theft, etc. Indeed, it was perhaps for that reason that, in the penal codes of various countries, including his own, the provisions on those concepts appeared in the part devoted to general principles.

69. He was glad that the Special Rapporteur had submitted provisions on illicit traffic in narcotic drugs. Coming from a people which had been the first victim of a traffic in narcotic drugs organized by the imperialists, he was intimately convinced that, by characterizing that offence as a crime against the peace and security of mankind, the international community would be taking a landmark decision in the history of the world. As for the draft articles submitted on the subject, he recognized that illicit traffic in narcotic drugs constituted both a crime against peace and a crime against humanity, but he could not see the need to have two separate articles.

70. Lastly, as the Special Rapporteur himself had indicated, in order to be treated as a crime under the code the traffic in question must be extremely serious; it thus had to be massive and carried out on a large scale by associations or private groups or by public officials. Unfortunately, that point did not emerge from a reading of draft article X.

The meeting rose at 12.50 p.m.

2154th MEETING

Wednesday, 9 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/419 and Add.1,² A/CN.4/429 and Add.1-4,³ A/CN.4/430 and Add.1,⁴ A/CN.4/L.443, sect. B)

¹ 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.

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

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

⁴ *Ibid.*

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPporteur
(continued)ARTICLES 15, 16, 17, X AND Y⁵ andPROVISIONS ON THE STATUTE OF AN INTERNATIONAL
CRIMINAL COURT (continued)

1. The CHAIRMAN pointed out that, in accordance with the timetable agreed for the present topic, the meetings of the current week were intended primarily, though not exclusively, for discussion of part III of the Special Rapporteur's eighth report (A/CN.4/430 and Add.1), on the question of establishing an international criminal court.

2. Mr. BARBOZA noted that the question had arisen during the debate whether complicity and attempt were autonomous offences, as the Special Rapporteur considered, and were therefore to be included in the list of crimes, or whether they were simply modes of commission of offences which should appear in the general part of the code. In his opinion, there could be some grounds for the latter view regarding complicity, but it must be borne in mind that the acts perpetrated by an accomplice were always of an accessory character. If considered by themselves, they were not, then, a form of commission of the crime. As for attempt, its principal feature was precisely that the conduct of the criminal was frustrated before the crime was committed. That being the case, attempt could not be conceived of as a mode of commission of the crime. Having said that, he considered that the place attempt and complicity should occupy in the code was not an important issue. It could not be among the principles, because they certainly were not principles, but they could appear in the general part as in many international conventions.

3. The question then arose as to the desirability of including some definition of those concepts. He had found that a number of important relevant international instruments invariably declared that complicity and attempt were punishable, but did not give a definition of the concepts in question. He would draw attention in that connection to Principle VI of the Nürnberg Principles,⁶ article 4 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, article 3, paragraph 1 (c) (iv), of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and article 1 of the 1979 International Convention against the Taking of Hostages.

4. Since no definition of attempt and complicity was incorporated in those instruments, the result would be that each national court would interpret those terms according to its internal law, the drawback being that interpretations might differ. To avoid that difficulty, it would perhaps be advisable to include in the draft

code, and in the commentary, some guidelines to sketch out an international doctrine in the matter. As far as complicity was concerned, the essential element was its accessory character; it should also be indicated that the notion of complicity covered acts subsequent to the main offence. In the case of attempt, the main ideas to be stressed were that it implied a commencement of execution of the crime and that performance had been thwarted by factors beyond the control of the prospective perpetrator. With such guidelines, judges would be able to distinguish between preparatory acts and the attempt to commit a crime.

5. Another question was whether to include a definition of the principal perpetrator. Actually, the draft code defined each of the various crimes listed in it and the definitions provided an indirect but complete description of the perpetrator. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries had been cited in the debate as an example of an instrument in which a description of the perpetrator of the crime was given. In fact, however, the Convention described the mercenary, but not the perpetrator of the crime, namely the person recruiting, using, financing or training the mercenary, since under the terms of article 3 the mercenary himself became an offender only when he participated directly in hostilities or in a concerted act of violence.

6. Yet another point to be clarified was the distinction between a co-perpetrator and an accomplice. The instigator of a crime, for example, was a co-perpetrator and not a mere accomplice.

7. In the matter of conspiracy, the introductory clause of draft article 16 and the definition in paragraph 1 were acceptable, even if the second alternative of paragraph 2 was adopted. Under that second alternative, responsibility for conspiracy would be personal, since each participant would be punished according to his own participation, without regard to participation by others. The first alternative, on the other hand, made provision for collective responsibility.

8. The notion of conspiracy, when applied to such crimes as aggression, referred to what were normally preparatory acts. Making conspiracy a separate punishable offence was an approach adopted by certain legislations in order to protect some vital interest. It was a well-known legal mechanism for additional protection. For instance, in some countries mere possession of plates to counterfeit banknotes was in itself a crime, even if they had not been used in any way. Similarly, in some countries mere possession of firearms constituted an offence. Again, many national legislations punished as a separate crime mere participation in a common plan to commit a crime, even if no offence was committed. The first alternative text proposed for paragraph 2, however, dealt at the same time with the autonomous crime of conspiracy, for which each participant was responsible, and with the responsibility attaching to each participant for the crimes committed by others. At the Commission's thirty-eighth session, in 1986, he had already expressed some reservations. That form of criminal liability went beyond what was customary in the civil-law systems which were familiar to him. The

⁵ For the texts, see 2150th meeting, para. 14.

⁶ See 2151st meeting, footnote 11.

concept of conspiracy was alien to those legal systems, but since it existed in the common-law system, which was particularly attentive to the protection of personal freedom, he was prepared to accept it if the Commission endorsed it as a means of defence against organized crime.

9. Lastly, he could agree to the idea of including drug trafficking in the draft code, but it should be placed under the heading of crimes against humanity rather than under crimes against peace. He shared the view that only large-scale crimes should be covered.

10. Mr. KOROMA congratulated the Special Rapporteur on his skill in handling the subject-matter of his eighth report (A/CN.4/430 and Add.1), for the complex concepts of complicity, conspiracy and attempt in domestic criminal law were difficult to transpose to international law.

11. Two main positions had emerged during the debate, some members maintaining that complicity, conspiracy and attempt should be dealt with in the part of the draft code devoted to general principles, and others arguing that they should be treated as separate offences. In that connection, it was appropriate to refer to the Nürnberg Principles formulated by the Commission in 1950⁷ and endorsed by the General Assembly. They were perhaps open to adjustment through experience or changing circumstances, but they commanded respect not only because of the way they had been adopted, but also because they had been framed by some of the finest legal minds of the times. The Principles reflected historical necessity and legal integrity, and, having been reaffirmed by the General Assembly in 1946,⁸ could not be criticized as lacking in validity.

12. He had no objection to complicity, conspiracy and attempt being included in the general part of the code, but they should be retained as specific offences as well. As was well known, the chief reason for deciding to codify the Nürnberg Principles had been to eliminate the problems generated by the absence of clearly defined offences and sanctions. In a code like the one under discussion, the crimes had to be specific: only in that way could the prosecution provide the required evidence against the accused and the accused know the specific nature of the offence with which he was charged and of the evidence adduced against him. Accordingly, to charge all accused persons merely as "participants" would not be specific enough. It would make the task of the prosecution difficult, if not impossible, since the evidence might well vary from the principal offender to the accomplice before the fact and the accessory after the fact. Moreover, a whole spectrum of defences—justification, self-defence, necessity, coercion, obedience to superior orders, error of law or fact—were open to the accused, and where the indictment was not sufficiently specific it could fail and the accused would go free.

13. Consequently, in attempting to apportion legal responsibility, various forms of responsibility of the accused persons would have to be defined, as would the

proof: the apportionment of punishment would depend on what each accused person was charged with. The maxims *nullum crimen sine lege* and *nulla poena sine lege* would thus be observed.

14. A proper approach might be, first, to define complicity, conspiracy and attempt as categories of crimes, and then examine the question whether they should be regarded as autonomous. Unfortunately, the Special Rapporteur's report did not define those offences. It merely stated that the actions listed constituted crimes against the peace and security of mankind and added that being an accomplice in any of the crimes covered by the code was punishable. There was no indication whatsoever as to what an accomplice was. For his part, he would suggest a simple definition along the lines of: "Any person who aids, abets, counsels or procures the commission of any of the crimes under this Code shall be liable to be tried or is guilty of that crime."

15. Similarly, conspiracy could be defined as an offence in which two or more persons agreed to act together with a common purpose for the commission of any of the crimes under the code; it would be stated that each of them would be guilty of conspiracy to commit that crime. Such a definition brought out more clearly the twofold responsibility—individual and collective—involved in the case of conspiracy as envisaged by the Special Rapporteur (*ibid.*, para. 45).

16. A person would be individually responsible for committing a crime under the code when, with intent, knowledge or recklessness, he engaged in an act in violation of any of the provisions of the code. Collective responsibility, as distinct from individual responsibility, would arise when an individual acted in concert with others with intent, knowledge or recklessness in an illegal act in contravention of the code and when the commission of that act could be attributed to a legal entity as well as to each individual who had participated in the decision-making process or the implementation of the decision to commit the act. The nature of the crime was obviously of great importance in ascertaining which type of criminal responsibility was involved, since certain crimes such as aggression, genocide and *apartheid* could not be committed by an individual: they required group or collective participation. The tendency to broaden the scope of collective responsibility for crimes against the peace and security of mankind was understandable, and the legal basis for that tendency was clearly set out in the Special Rapporteur's report (*ibid.*, para. 55).

17. The Special Rapporteur's suggestion not to disregard the concept of attempt met with his approval. Viewed in the abstract, it might seem an arcane, not to say nebulous, concept, yet its importance lay in preventing the commission of the crime, in other words in acting as a deterrent. The Special Rapporteur had entered the caveat that the theory of attempt could be applied only to a limited extent in the area of the crimes under consideration (*ibid.*, para. 66).

18. On the question whether an attempt could be made to commit the crime of genocide or *apartheid*, one answer was in the affirmative. Under the 1948 Convention on the Prevention and Punishment of the

⁷ *Ibid.*

⁸ General Assembly resolution 95 (I) of 11 December 1946.

Crime of Genocide, States parties agreed that genocide and conspiracy or incitement to commit genocide, as well as attempt and complicity therein, should be punishable by national courts or by an international criminal tribunal. As for the crime of *apartheid*, an attempt might conceivably be made to murder or to inflict grievous bodily or mental harm on members of a racial group for the purpose of establishing and maintaining domination by one racial group over another and of systematically oppressing it. Therefore the focus should be on the specific criminal acts constituting the main crime, rather than on the main crime itself; *apartheid*, after all, was only, as it were, a term of art. The specific acts committed within the main crime, whether genocide or *apartheid*, were what should be taken into account.

19. International drug trafficking was a prime candidate for inclusion in the draft code. It was perhaps regrettable that the Special Rapporteur had omitted to look into the historical evidence for drug trafficking being characterized as a crime against peace; such evidence, though scant, was available, as Mr. Shi had briefly mentioned at the previous meeting. His own view, however, was that the Commission would be on firmer ground if it qualified drug trafficking as a crime against humanity. A recent statement on the subject by the President of Colombia supported that view.

20. It had been suggested that drug trafficking should not be internationally criminalized unless a considerable quantity of drugs was involved. In view of the difficulty of deciding what was and what was not a considerable quantity of a particular drug, as well as the fact that the Special Rapporteur provided no guidelines in that respect, he would not be in favour of focusing on the quantity element. The legal basis for the proposed article should be the international conventions on narcotic drugs already in existence.

21. Mr. PAWLAK said that, in principle, and subject to certain conditions, he was in favour of the establishment of an international criminal court as a separate judicial organ for the trial of individuals, whether private persons or officials, charged with crimes for which jurisdiction would be conferred upon the court by the code or by other international conventions. The urgency of establishing such a tribunal had been eloquently argued, *inter alia*, in the explanatory memorandum presented by the Permanent Representative of Trinidad and Tobago⁹ prior to the forty-fourth session of the General Assembly in connection with the proposal for the establishment of an international criminal court with jurisdiction over illicit trafficking in narcotic drugs and other transnational criminal activities. The international community was increasingly aware that some forms of crime had assumed such transnational dimensions as to require action by most, if not all, States. Illicit drug production and trafficking now fell in that category.

22. The main weakness of international law today lay in enforcement and lack of effective sanction mechanisms. Besides the offences traditionally classified as international crimes, the world was witnessing

the emergence of individual offenders who possessed the power to endanger the security of all States and to wage war against entire Governments. To control such forms of crime, States strengthened extradition treaties or enforced their domestic criminal law through mutual assistance and transfer of proceedings, but such traditional means were not proving sufficient to combat drug-related offences, and new forms of international co-operation were needed. In that context, it might be worth while to explore the question whether more tangible results would not be achieved by approaching the problem of the establishment of an international criminal court from the point of view of enforcement, focusing on a well-defined category of offences and leaving aside the traditional methodological approach. Certain traditional habits of thought might have to be overcome. He strongly endorsed the principle that individuals, not States, should be the subjects of international jurisdiction, but many States might today be more prepared than before to submit their nationals to the jurisdiction of an international criminal court and to assist such a court in legal and procedural matters.

23. Turning to the questionnaire in part III of the eighth report (A/CN.4/430 and Add.1), in the matter of the jurisdiction of the court he supported, with some minor changes, version B submitted by the Special Rapporteur (*ibid.*, para. 80), and also agreed entirely with the Special Rapporteur's conclusion (*ibid.*, para. 83).

24. With regard to the procedure for appointing judges, provided there was broad adherence to the statute of the future court and other international agreements directed against international crimes he would opt for their election by the General Assembly and therefore favoured version A (*ibid.*, para. 86). If the elections took place at regular sessions, there would be no need to involve the Secretary-General in convening the General Assembly. Moreover, a qualified two-thirds majority rather than an absolute majority should be required.

25. On the submission of cases to the court, he would opt for version C (*ibid.*, para. 88), on the understanding that the case might be brought by any State Member of the United Nations subject to the agreement of the General Assembly.

26. With regard to the functions of the prosecuting attorney, he supported version A (*ibid.*, para. 90). In his view, there was no risk of confusing the prosecuting attorney with the agent of a State, since their functions were clearly distinct.

27. On the issue of pre-trial examination, the text proposed by the Special Rapporteur (*ibid.*, para. 92) was acceptable, although the formulation needed further refining, for example in order to deal with the nationality of members of the proposed committing chamber.

28. As regards the authority of *res judicata* by a court of a State, version B (*ibid.*, para. 93) was more appropriate to the nature of international crimes. The *non bis in idem* rule should be regarded as an indication rather

⁹ A/44/195, annex.

than as an excuse for the lenient verdicts of some national courts.

29. He supported the Special Rapporteur's proposal in respect of the authority of *res judicata* by the court (*ibid.*, para. 96); no other solution was, indeed, possible. With regard to withdrawal of complaints, version B (*ibid.*, para. 98) was preferable. In the matter of penalties, he supported version A (*ibid.*, para. 101), taking the view that the international criminal court should not be limited in regard to the degree of punishment it could impose.

30. Lastly, on the question of financial provisions, version A (*ibid.*, para. 106) was better, because it would give the court a feeling of independence from individual States. However, if the statute of the court was not universally accepted, a *pro rata* basis of financing by the States parties should be introduced.

31. Mr. GRAEFRATH said that he greatly appreciated the Special Rapporteur's decision to submit part III of his eighth report (A/CN.4/430 and Add.1) in the form of a questionnaire, for it coincided with the General Assembly's request in resolution 44/39 of 4 December 1989 for a legal opinion on the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over illicit trafficking in narcotic drugs and other transnational criminal activities.

32. Although the questionnaire-report was not submitted specifically for the purpose of assisting the Commission in the preparation of the paper requested by the General Assembly, it would undoubtedly be most helpful in that respect. As he had explained at the opening meeting, the General Assembly, in adopting resolution 44/39 by consensus, had neither requested the Commission to draft a statute for an international criminal court, nor decided to give an affirmative answer to the question put by the Commission in 1983 as to whether its mandate to draft the code also extended to the drafting of such a statute. The Assembly had requested the Commission to produce an options paper pointing to the different questions and aspects involved in taking a decision on the matter. The Commission had been asked to draft a legal opinion so as to prepare the ground and to facilitate a political decision by the General Assembly on that important and far-reaching issue.

33. The question of an international criminal court had come up repeatedly over the past 40 years, without ever being successfully resolved. States had obviously not been prepared to take a decision on a matter which was so closely connected, on the one hand, with the principle of State sovereignty and, on the other hand, with the step-by-step development of an international legal order. The establishment of such a court would be a historic move in the progressive development of international law, and extreme care and circumspection had to be applied in approaching the issue. The advantage of the General Assembly's request and, to a certain extent, of the Special Rapporteur's questionnaire-report was that the Commission would not be tempted to embark at once upon the drafting of a statute, but was obliged to think first about various possibilities for a

feasible structure and for the competence of an international criminal court. To think that the court could materialize in one form alone would be a serious mistake; the most appropriate form under the prevailing international conditions called for unhurried consideration.

34. Thus it would make a great difference whether the court had exclusive jurisdiction for certain crimes or only concurrent jurisdiction with national courts; whether it functioned as a court of first instance or as a court reviewing final national judgments with a view to guaranteeing objective and uniform jurisprudence; whether all States or only the States concerned had access to the court; and whether the court was or was not dependent on other United Nations bodies. Those and similar matters should be examined to facilitate a clear-cut political decision by the General Assembly, which would in turn enable the Commission to draft a statute in line with the legal intentions of the majority of States and give the court a chance of working effectively. The Commission should, from the outset, work towards proposing a court that would not be doomed to powerlessness and could contribute towards stabilizing international relations, enforcing the basic principles of international law and promoting the peaceful settlement of disputes between States. The need was for an international criminal court which had its place within the international legal order and might progressively expand its competence and importance.

35. Over the years, many States had voiced different positions and objections; in particular, it had often been contended that the time was not yet ripe for the establishment of such a court, or that it might interfere with existing national jurisdictions and the system of universal jurisdiction provided for in many multilateral treaties on the prosecution and punishment of international crimes. The Commission had to consider the question of the advantages and drawbacks of an international criminal court as compared with existing methods of bringing criminals to justice. It also had to explain why the need for an international criminal court was more urgent today than 40 years ago, and why, in present-day international relations, the establishment of such a court was more feasible than in the past. A closely related question was whether establishing a court or similar trial mechanism was advisable or even possible from the point of view of international relations at the present time.

36. The answer to both those questions would greatly depend on the structure and competence envisaged for the court. Those factors would also influence the answer to a question which was often raised but rarely elaborated upon, namely the legal implications for State sovereignty of establishing an international criminal jurisdiction. It was often forgotten that universal jurisdiction would, in practice, lead to considerable limitation of sovereignty, in particular with regard to crimes covered by the draft code. That, rather than the possibility of chaos in criminal jurisdiction, was the main reason why some States were definitely opposed to the principle of universal jurisdiction in relation to the draft code. On the other hand, it was clear that the

extent to which national sovereignty was affected by the establishment of a court would very much depend on whether the court was intended to replace, compete with or complement national jurisdiction.

37. Another important question was the kind of crimes to be dealt with by the court and whether States should be allowed to exclude the competence of the court for certain crimes. Again, the issue had often been raised, even within the Commission, as to what influence a trial before an international criminal court might have on an ongoing conflict between States or on proceedings in progress in the United Nations.

38. Such considerations of legal policy would plainly have a powerful impact on the legal issues connected with the establishment of an international criminal court, its structure and its competence. The Commission's legal opinion should draw the attention of States and the General Assembly to the different legal consequences of each possible solution. Furthermore, the Commission itself had to take that aspect into account in dealing with part III of the Special Rapporteur's report.

39. While the Special Rapporteur was right to say that the competence of the court should be limited to trying individuals, the Commission should none the less consider whether it might not also be necessary to establish competence to try legal persons or entities other than States, at least in the case of certain crimes. He also agreed with the Special Rapporteur that the court's competence should not be confined to crimes referred to in the code, or even to certain international crimes as defined in specific international instruments. If the decision was taken to establish an international criminal court, then there should be only one such court and not a whole series of courts, each limited to particular international crimes. The question also arose, however, whether the court should have competence to deal with crimes defined by customary international law or by the domestic law of the States concerned. He would not be in favour of such an extension of the applicable law.

40. The Commission could not examine the problem of competence without deciding what type of proceedings might be instituted before the court. Did it want a court of first instance or only a court to review final national court decisions? Should the court be competent to give binding legal opinions on questions of international criminal law, or should it establish *prima facie* evidence of international criminal activities for the purpose of instituting proceedings before a domestic court? It would be better if, for the time being, the court was established as a review court also competent to give binding legal opinions if so requested. Such competence would greatly facilitate the establishment of the court; it could easily be brought into line with the existing system of universal jurisdiction, would promote co-operation among States, and would operate in the interests of uniform application of international law.

41. The need for a prosecuting attorney, a committing chamber or an international commission of criminal inquiry also depended on the decision regarding the

competence of the court. If the court was established to review national decisions on international criminal law, it might be sufficient to have the reasoned complaint of a State concerned, without the need for any other prosecutor. That raised the question of submission of cases to the court and entitlement to institute proceedings or request an advisory opinion. The possibilities were numerous and it might be counter-productive to open the door too wide. It would be preferable for access to be limited to the States concerned, which might be States in which the crime had been committed, whose nationals were involved, or in whose territory the perpetrator was found. Should the court be competent to review final decisions by national courts, it would be useful to limit access to States complaining either that no proceedings had been instituted by a State in whose territory the alleged offender had been found or that a judgment rendered in another State in a case falling under the code was insufficient, if the crime had been directed against the complaining State or had been committed in its territory or if its nationals had been punished by another State. It therefore seemed that the issues relating to the submission of cases were much more far-reaching and complicated than those discussed in the report.

42. Another matter touched on by the Special Rapporteur was how jurisdiction was to be conferred upon the court. With regard to version A submitted by the Special Rapporteur in that connection (A/CN.4/430 and Add.1, para. 84), he would point out that article 27 of the 1953 draft statute (*ibid.*, para. 85) required conferment of jurisdiction not by one or other of the States concerned, but by the State of which the perpetrator was a national and by the State in which the crime was alleged to have been committed. That would of course be an unacceptably restrictive clause.

43. Furthermore, would the court have exclusive jurisdiction, or would the competence of national courts continue to exist concurrently? The 1953 draft statute had favoured concurrent jurisdiction, as did the very recent drafts of the International Law Association. Despite the serious problems that might arise, such a solution had been proposed because States were not prepared to give up their jurisdiction over criminal offences committed in their territory or against their very existence.

44. It would also be important to decide on the methods for conferring jurisdiction: by convention, unilateral declaration, *ad hoc* agreements, and so on. However, the main legal implication of the establishment of an international criminal court would not be the question of *res judicata*, but the question whether the jurisdiction of the court would replace national jurisdiction or merely open another choice for the States concerned.

45. As far as the relationship between judgments of national courts and the competence of the court was concerned, version B submitted by the Special Rapporteur (*ibid.*, para. 93) was preferable: the court could try and punish a crime on which the court of a State had handed down a judgment (or not instituted proceedings), if the State in whose territory the crime had

been committed, or the State against which the crime had been directed, or the State whose nationals were the victims (or whose national was the convicted person) had grounds for believing that the judgment handed down by that State (or the decision not to open proceedings) was not based on a proper appraisal of the law or the facts. Once again, the provision should not be a rule regulating an exception, but the main rule determining the competence of the court.

46. He could agree to the Special Rapporteur's proposal (*ibid.*, para. 96) that no national court might hear a case which had already been referred to the court, but the formulation did not solve the problem of whether a State concerned could submit to the international court a case which was under examination by a court of another State. That possibility should be ruled out, and States should wait until the national court had handed down a final judgment. All those issues were important ones because of the need to avoid not only conflicts of jurisdiction, but also political conflicts between States. The Commission should always tend to prefer alternatives which furthered co-operation between States.

47. There were a number of serious procedural questions to be resolved, such as the procedural law to be applied by the court and the possibilities of appeal. If the court was to be a court of first instance, then there had to be a possibility for appeal, in accordance with the fundamental human right set out in article 14, paragraph 5, of the International Covenant on Civil and Political Rights. Such a possibility would not be needed if the court's competence were confined to reviewing national decisions on international criminal law. The Commission must also give thought to the most advisable methods of enforcing judgments by the court, and there might be a need for provisions on mutual assistance in international criminal matters at the court's request. The Commission would also have to settle such matters as the method of establishing the court and its relationship with the United Nations.

48. One of the main objectives of the present discussion was to pinpoint the questions and problems to be tackled in the options paper for the General Assembly. The Commission had to air the issues he had discussed, and indeed others, in order to demonstrate the implications of alternative answers to the questions, and it must give its opinion on the advisability and feasibility of the options available.

49. Mr. CALERO RODRIGUES said that the Commission would not be breaking new ground in drafting a statute for an international criminal court: the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction¹⁰ had considerable technical merits and would be of much assistance. The Special Rapporteur was prudent to suggest that the Commission should initially concentrate on a general examination of a few points on which choices must be made, and his "questionnaire-report" approach was a good one.

50. On the question of competence, if the court was established within the framework of the code its juris-

diction should be exercised over persons accused of having committed the crimes defined in the code. Version B submitted by the Special Rapporteur in his eighth report (A/CN.4/430 and Add.1, para. 80) suggested that the court be given competence to try persons accused of "other offences defined as crimes by the other international instruments in force", thus setting boundaries to the enlargement of the court's competence but rightly excluding any reference to customary law. The code did not cover all international crimes, but the definition of such crimes outside the code tended to be loose, as the list given by the Special Rapporteur (*ibid.*, para. 81) showed. Limiting the crimes under the jurisdiction of the court to those defined in international instruments brought some certainty, but not enough. Was it the Commission's intention that a person accused of committing a crime defined in an international instrument should automatically come under the jurisdiction of the court? If so, how was the question of penalties to be resolved? The notion of "broadest possible jurisdiction" (*ibid.*, para. 83) was acceptable, but it must be carefully defined. The court's competence should be established primarily for the crimes defined in the code, with the possibility of extension to crimes defined in other international instruments when those instruments expressly recognized the court's competence. It would be easy for the parties to existing international instruments to supplement them with a provision recognizing the competence of the court.

51. With regard to the part played by States in the exercise of jurisdiction, the only acceptable suggestion made in the two versions submitted by the Special Rapporteur (*ibid.*, para. 84) was that States should simply have a preliminary role in the initiation of proceedings. There was no reason not to apply the principle of the independence of the judiciary to an international institution. An international criminal court established to deal with crimes against the peace and security of mankind must be able to consider allegations that a crime had been committed and to punish the perpetrators. In internal criminal law, some persons came to trial only if there was a complaint from the victim, while in the case of more serious crimes the activation of the trial machinery was a matter of public policy. The seriousness of crimes against the peace and security of mankind and the common interest to secure justice were such that no State should be able to prevent or halt the action of the court.

52. It seemed logical that pre-trial matters should be entrusted to the office of a prosecuting attorney attached to the court, and the interests of justice argued very strongly in favour of a permanent prosecuting attorney. States should be entitled to bring to his attention indications that a crime had been committed, but their action should stop there, and the main responsibility for presenting the case should rest with the prosecuting attorney. They should also be entitled to appoint agents to follow his actions, but it would be for the prosecuting attorney to decide whether there were grounds for bringing a case to the court. Hence none of the three versions proposed by the Special Rapporteur regarding the submission of cases to the court (*ibid.*,

¹⁰ See 2150th meeting, footnote 8.

para. 88), or his suggestion in version A on the functions of the prosecuting attorney (*ibid.*, para. 90) that the latter might be appointed by a complainant, was acceptable. The prosecuting attorney should be a permanent official and have the functions described in version B, and should also be associated with the pre-trial examination by a committing chamber.

53. With regard to penalties, under any of the three versions submitted (*ibid.*, para. 101) the court would have a free, or almost free, hand. Like any criminal court it should have some latitude, graduating penalties according to the offence and the degree of participation of the individual involved; but it would be running counter to basic principles of criminal law to give the court the power to impose "whatever penalty it deems fair". The penalties should be specified in the code. As he had argued for many years, and as most members of the Commission agreed, if the code was to be a useful instrument it must define the crimes, indicate the jurisdiction and set out the penalties. The Commission was at last turning its attention from the definition of crimes to the question of jurisdiction, and it must tackle the question of penalties as well.

54. The Special Rapporteur was right not to have given too much attention to matters concerning the organization and financing of the court, which did not raise fundamental legal issues. A final answer could only be given at a later stage. If the draft code and the draft statute of the court became part of the body of international law generally accepted by the international community, then the court might be linked to the United Nations. If the code and the court proved, regrettably, to be expressions of the will of a limited number of States, then those States should appoint the judges and provide the financing.

55. As to the question of the application by the court of the principle *non bis in idem* in relation to judgments by national courts, the proposed version A (*ibid.*, para. 93) reasserted the principle laid down in paragraph 2 of article 7 of the draft code as provisionally adopted by the Commission on first reading,¹¹ while version B allowed a trial by the court to take place if certain States had grounds for believing that the earlier judgment was "not based on a proper appraisal of the law or the facts". That exception corresponded to some extent to the exception set out in paragraph 4 of article 7. It could not correspond more exactly, because article 7 had been drafted without first resolving the question of jurisdiction. The spirit, however, was the same.

56. With regard to the application by national courts of the principle *non bis in idem* in relation to judgments by the international court, the wording of the Special Rapporteur's proposal (*ibid.*, para. 96) was not perfect, but the sense was entirely clear: full application of the principle, corresponding to paragraph 1 of article 7 of the draft code. However, article 7 was not yet in its final form and, while the *non bis in idem* principle was likely to be retained in the draft code, it might not be wise to have provisions on the same matter in the draft statute: any differences could make for legal uncer-

tainty. On the other hand, if the provisions coincided there would be undesirable duplication. The Commission should therefore think twice before introducing in the draft statute provisions such as those suggested in paragraphs 93 to 97 of the report.

57. Mr. MAHIU said that the question of an international criminal court had arisen at almost every session since the start of the Commission's work on the draft code, something that was only natural, for it underlay a number of solutions envisaged in the code and, without provision for a court, the code would be incomplete. The General Assembly's request that the Commission consider the question in connection with the need to combat illicit trafficking in narcotic drugs afforded an opportunity to discuss the matter directly and to decide on the need for such a court. The Special Rapporteur's eighth report (A/CN.4/430 and Add.1) provided the basis for the Commission's work, and a number of drafts that would supply the Commission with valuable material were also available. Rather than make firm proposals for a draft statute for the court, the Special Rapporteur had rightly preferred to renew the debate on certain substantive points and, accordingly, 10 points were submitted for consideration by the Commission.

58. His own remarks would be confined to five of those points on which the Commission should concentrate, and which should form the basis on which the edifice of an international criminal court could be constructed: the competence of the court; submission of cases; the functions of the prosecuting attorney; pre-trial examination; and the authority of *res judicata*. Other points of a more technical nature, such as the method of financing the court, the appointment of judges, such procedural aspects as the withdrawal of complaints, and even the way of establishing the court, could be dealt with later.

59. The first point—competence—was of particular importance, for once it had been clearly established it would help to resolve a number of other questions at the outset. To his mind, it prompted three questions in particular: Which crimes should be dealt with by the court? Which perpetrators should be tried and punished by the court? And what should be the relationship between the jurisdiction of the court and that of domestic courts? Those three questions must be resolved in order to avoid, on the one hand, a conflict of jurisdiction that could give rise to contradiction and hence difficulty at both the legal and the political level, and on the other hand, the risk of a denial of justice should certain crimes not be tried either by the international court or by a domestic court.

60. His answers to the three questions were, first, that only the crimes covered by the code should be tried by the international criminal court. Accordingly, he approved of version A submitted in that connection (*ibid.*, para. 80) and disagreed with the Special Rapporteur's statement (*ibid.*, para. 83) that it would seem preferable to confer the broadest possible jurisdiction upon the court. The court was simply the logical outcome of the code, and matters should go no further than that.

¹¹ *Yearbook* . . . 1988, vol. II (Part Two), p. 68.

61. The perpetrators to be tried and punished by the court should be the natural or legal persons who committed the kind of crime concerned. In that way, the Commission would simply be complying with General Assembly resolution 44/39 of 4 December 1989, which referred to individuals and entities engaged in illicit trafficking in narcotic drugs and other transnational criminal activities. He would not refer at the present stage to the delicate question of the involvement of States.

62. The third and last question, namely the relationship between the jurisdiction of the court and that of domestic courts, was one of the most delicate to be resolved and had already been encountered in connection with articles 4 and 7 of the draft code as provisionally adopted by the Commission on first reading.¹² Clearly it would remain an issue in the Commission's debates for some time to come.

63. None of the three versions proposed regarding the submission of cases to the court (*ibid.*, para. 88) was entirely satisfactory, since it was necessary to confine the initiation of proceedings to the States concerned and to avoid universal proceedings, as it were, open to all States, something which might create more problems than it resolved. To that end he favoured the adoption of some appropriate criterion. In criminal law, of course, the two classic criteria were territoriality and personality. The former enabled the State in which the crime took place to initiate proceedings, while the latter—whether active or passive personality—relied either on the nationality of the victim of the crime or on the nationality of the perpetrator of the crime to enable a State to institute proceedings.

64. As to the functions of the prosecuting attorney, his preference was for version B (*ibid.*, para. 90), since it would make for an independent service and for a court that operated on a more detached basis. The same applied to pre-trial examination, for which the Special Rapporteur had, in his view, suggested an appropriate text (*ibid.*, para. 92).

65. The authority of *res judicata* had already been discussed by the Commission in connection with the *non bis in idem* rule, and the solution which the Commission proposed with regard to the statute of the court should follow logically upon the solution adopted for article 7. For his own part, he believed it would be difficult to make an international criminal court a kind of court of appeal to review decisions of domestic courts, which had their own remedies, including appeals on points of fact and of law. To introduce into the international criminal court a further degree of control over domestic courts would pose not only a legal problem, but also a political one, for States were unlikely to accept such control.

66. The question whether domestic courts should be bound by the decisions of the international criminal court was somewhat delicate and he would favour a solution that avoided any conflict of jurisdiction. In the interests of consistency in the prosecution and punishment of crimes, therefore, he supported the Special

Rapporteur's solution, along with a division of jurisdiction between the domestic courts and the international criminal court.

67. Mr. BENNOUNA said that the Commission was arriving at a convergence of views which he trusted would enable it, with the Special Rapporteur's assistance, to reach agreement on a constructive proposal in response to the General Assembly's request. The question of an international criminal court was not new, and the time had come to consider all the implications in the further work on the draft code with a view to pinpointing the substantive issues raised and, if need be, supplementing its provisions.

68. He welcomed the method adopted by the Special Rapporteur and would comment on the questions raised largely in the order in which they were submitted. The first question, competence, was the most important in that it determined all the rest. He was entirely in favour of version A submitted by the Special Rapporteur in that regard (A/CN.4/430 and Add.1, para. 80), whereby jurisdiction would be limited to the crimes covered by the code. It should not be forgotten that the definition of crimes laid down in the draft code still posed a problem, as reflected by the inclusion of square brackets around the words "under international law" in article 1 (Definition) as provisionally adopted by the Commission on first reading.¹³ He personally did not think it possible in the international community at the present time to have a criminal court with jurisdiction for all kinds of crimes. The Commission was working within the context of a code which dealt with crimes of a certain degree, and that was why provision was included for a court. To enlarge on its jurisdiction, however, might unduly encumber the court's task and cause it to replace some of the functions of domestic courts, which was not its role. The code, however, once adopted, would not remain static forever. Indeed, a possible review or adjustment of the code in the light of developments in international law or of new crimes against the peace and security of mankind had already been envisaged. Such crimes could be likened to a virus: once an antidote had been found, other crimes would emerge, human imagination being very fertile in such matters. The code could therefore very well be enlarged, in accordance with an agreed procedure, to cover other crimes against the peace and security of mankind.

69. The second question was to determine the basis for the jurisdiction of the court. The two versions proposed (*ibid.*, para. 84) were not in fact alternatives: they involved very different concepts of international law, namely jurisdiction and *saisine* (submission of cases to the court). Moreover, the second sentence of version B merely restated a general and universally recognized rule of procedure before international courts; in other words, when the jurisdiction of the court was challenged, it was for the court itself to decide the issue.

70. There was a link between the attribution of jurisdiction to the court and the right to refer a case to it—a point on which the jurisprudence of the ICJ was

¹² *Ibid.*, pp. 67 and 68-69.

¹³ *Yearbook* . . . 1987, vol. II (Part Two), p. 13.

fairly instructive. That link, moreover, had been clearly established by article 26 of the revised draft statute for an international criminal court—which he regretted was not before the Commission—prepared by the 1953 Committee on International Criminal Jurisdiction,¹⁴ which read:

Article 26. Attribution of jurisdiction

1. Jurisdiction of the Court is not to be presumed.
2. A State may confer jurisdiction upon the Court by convention, by special agreement or by unilateral declaration.
3. Conferment of jurisdiction signifies the right to seize the Court, and the duty to accept its jurisdiction subject to such provisions as the State or States have specified.
4. Unless otherwise provided for in the instrument conferring jurisdiction upon the Court, the laws of a State determining national criminal jurisdiction shall not be affected by that conferment.

71. Paragraph 1 of that article was an application of the rule of international law, restated by the ICJ on many occasions, whereby limitations on the sovereignty of a State were not to be presumed. Paragraph 2 related to prior consent to jurisdiction, apart from any accession to the statute, and was the technique currently adopted by the ICJ. Paragraph 3 provided the link between recognition of jurisdiction, the right to refer a case to the court, and the duty to accept its jurisdiction “subject to such provisions as the State or States have specified”. That raised a number of questions with which the Commission should deal, in particular the question whether the acceptance of jurisdiction could be made subject to a reservation. It was an important matter as it would enable a State to list restrictively the crimes for which it recognized the jurisdiction of the court and hence would perhaps enlarge the number of countries prepared to accept the court’s jurisdiction. Paragraph 4 of the article was also fundamental in that it demonstrated the problem of the relationship between the jurisdiction of national courts and that of the international court, while recognizing the possibility that the two could coexist. The problem was that the attribution of jurisdiction to an international court could, if a State so wished, divest a domestic court of all jurisdiction.

72. So far as the force of *res judicata* by a national court was concerned, he favoured version B (*ibid.*, para. 93), which would enable a case to be submitted to the international court even if the national court had delivered judgment. It would be necessary to establish the basis on which a case would be referred to that court as a court of appeal on a point of fact or of law? If the former, the court would have to review the entire proceedings; in the latter instance, however, the court would have to pronounce only on a breach of the law by a State. Personally, he would endorse the latter, as in the case of European Community law. For an international court to have total control over national courts would be a major infringement of national sovereignty and therefore unacceptable.

73. The three versions proposed with respect to submission of cases to the court (*ibid.*, para. 88) were all

very wide-ranging and unsatisfactory. He continued to favour a link between jurisdiction and *saisine* as provided in article 26 of the 1953 draft statute (see para. 70 above).

74. Turning to matters of secondary importance, version B on the functions of the prosecuting attorney (A/CN.4/430 and Add.1, para. 90) commanded his full support in view of the need for an independent service. He also agreed that a chamber of the court should be responsible for pre-trial examination. As to withdrawal of complaints, he favoured version B (*ibid.*, para. 98).

75. So far as penalties were concerned, it would be inconceivable to allow the court to establish any penalty it saw fit. That would be contrary not only to human rights, but also to the basic legal principle *nulla poena sine lege*. A code of law must lay down the penalties for any infringement of that law, failing which there should be no code.

76. From his own experience with the United Nations he knew that, whenever financial provision was made for some committee to be financed by States parties, there were difficulties because of delays in payments. The best course, therefore, would be to provide for financing from the United Nations regular budget.

The meeting rose at 1.05 p.m.

2155th MEETING

Thursday, 10 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindrampolo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/419 and Add.1,² A/CN.4/429 and Add.1-4,³ A/CN.4/430 and Add.1,⁴ A/CN.4/L.443, sect. B)

¹ 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.

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

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

⁴ *Ibid.*

¹⁴ See 2150th meeting, footnote 8.

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)ARTICLES 15, 16, 17, X AND Y⁵ andPROVISIONS ON THE STATUTE OF AN INTERNATIONAL
CRIMINAL COURT (continued)

1. Mr. THIAM (Special Rapporteur) recalled that, in introducing his eighth report, he had clearly indicated (2150th meeting, para. 27) that he wished to withdraw item 1 (b) (Necessity or non-necessity of the agreement of other States) of the list of points submitted for consideration in part III, on the statute of an international criminal court (A/CN.4/430 and Add.1, para. 79). Members of the Commission should therefore not comment on that point.

2. He also wished to clarify his position on the question of the attribution of jurisdiction, because he totally disagreed with what Mr. Bennouna had said in that regard at the previous meeting. The proposed court would have to deal with crimes committed in breach of international public order. The issue was one of international criminal law and there could thus be no question of slavishly copying the Statute of the International Court of Justice, whose sphere of competence was entirely different. A State which violated international public order had to be brought to justice. It should not be able to refuse to recognize the jurisdiction of the international criminal court in order to avoid being tried. If it had that option, in other words if, in order to try a State, it would first be necessary to obtain its consent, the court would not have any reason to exist. In addition, how could a State party to the statute of the court say that it did not confer jurisdiction upon the court? His own view was that, in becoming parties to the statute of the court, States implicitly recognized its jurisdiction. There was, of course, no intention of disregarding the principle of the sovereignty of States, but that principle had to have its limits; otherwise, what was the use of formulating principles relating to the rights and duties of States, as the Commission had done?

3. Members of the Commission should therefore state their positions on the question of the attribution of jurisdiction. That was a fundamental point that should be considered in the context of the progressive development of international law. The Commission was formulating a new law, namely international criminal law, and, since nothing was certain in that regard, it could not be too sure of itself.

4. Mr. OGISO said that the establishment of an international criminal court was necessary in order to ensure fairness in the punishment of the crimes against peace and security covered by the code and so that those guilty of such crimes—during a conflict, for example—should be tried, whether they were the victors or the vanquished. The establishment of such a court would, moreover, be the logical consequence of article 2 of the draft code as provisionally adopted by

the Commission on first reading,⁶ which provided that “the characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law”.

5. On the other hand, it would not be appropriate to place under the jurisdiction of the court all the crimes mentioned in the code. The crimes to be tried by the court had to be limited to those of an extremely serious nature which had grave consequences for the international community, and the criminals to be tried by it should be only the principal perpetrators. Other offences and other participants should be dealt with by national courts in accordance with paragraphs 1 and 2 of article 4 as provisionally adopted on first reading.⁷ The criterion of gravity should thus be used to determine whether or not a certain crime under the code should be subject to the jurisdiction of an international criminal court.

6. Moreover, the jurisdiction of the court should extend to both the factual and the legal issues of cases referred to it, in conformity with the precedents of the Nürnberg International Military Tribunal and the International Military Tribunal for the Far East.

7. Following those general observations, he wished to make some more specific comments on parts II and III of the eighth report (A/CN.4/430 and Add.1).

8. With regard to illicit traffic in narcotic drugs, dealt with in part II, he shared the Special Rapporteur's view that the code should deal only with large-scale trafficking by associations or private groups, or by public officials, which constituted a threat to international peace and security. The international criminal court should deal only with that type of traffic. To combat the problem of illicit traffic in narcotic drugs in general, a task which was incumbent upon national courts, it would suffice to apply the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was an effective instrument. The same approach should be adopted in cases of unlawful seizure of aircraft.

9. Turning to part III of the report, he reviewed the points raised by the Special Rapporteur in the “questionnaire-report” on the statute of an international criminal court. With regard to item 1 (Competence of the court), he again noted that there should be a single permanent court to deal only with the most serious offences that threatened the peace and security of mankind. For example, even some war crimes did not fulfil that condition and it would be preferable to leave it to national courts to try them. Whether the Commission adopted version A or version B (*ibid.*, para. 80), it was important to ensure that only the most serious crimes covered by the code were tried before the international criminal court. Some members of the Commission might find version A much too restrictive. In order to meet that concern, the code should be formulated in such a way that crimes which might be characterized in future as serious crimes against the peace and security of mankind

⁵ For the texts, see 2150th meeting, para. 14.

⁶ *Yearbook* . . . 1987, vol. II (Part Two), p. 14.

⁷ *Yearbook* . . . 1988, vol. II (Part Two), p. 67.

would be covered by it. In that connection, the possibility had been suggested of adopting additional protocols listing the new categories of offences constituting crimes against the peace and security of mankind. That was one possible solution.

10. The Special Rapporteur also appeared to consider that an international criminal court could try only natural persons. He himself was of the view, like some other members of the Commission, that legal entities other than States could also be brought before such a court.

11. Item 1 (*b*) (Necessity or non-necessity of the agreement of other States) should be discussed in conjunction with item 3 (Submission of cases to the court), since they dealt with two aspects of the same question, namely that of determining who could bring cases before the international criminal court and under what conditions.

12. On the question of the submission of cases to the court he was in favour of version B (*ibid.*, para. 88), because it would be contrary to the generally accepted rules for a State which was not a party to the statute of an international court to be able to submit cases to it. Version C appeared to provide for a sort of political "screening" by a United Nations organ. However, there was no reason why a State party to the statute of the international criminal court wishing to bring a case before it should have to obtain the agreement of such an organ.

13. As to the question whether or not the jurisdiction of the court depended on the consent of the State concerned, he took the view that, if the State in question was a party to the code and to the statute of the international criminal court and, in addition, the person to be tried before the court was one of its nationals, it should be considered to have conferred jurisdiction upon the court for the crimes covered by the code, provided that the code contained a provision to that effect. The position would, however, be different if the State concerned was not a party either to the code or to the statute. Since tacit consent could not be assumed in such a case, it would be necessary to seek its consent to the jurisdiction of the court on a case-by-case basis. One way out of that difficulty might be for the statute of the court to be incorporated in or to form an annex to the code so that every State which became a party to the code would automatically accept the statute of the court and, hence, its jurisdiction.

14. Referring to the texts proposed on that question (*ibid.*, para. 84), he could not accept version B because it was not appropriate to leave the settlement of possible disputes on jurisdiction solely to the court without giving it any guidance in the statute. As the Special Rapporteur indicated (*ibid.*, para. 85), version A was based on—not identical with—article 27 of the 1953 draft statute. That article, which stated that "No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed", nevertheless provided the Commission with valid guidance in the matter.

15. With regard to item 2 of the questionnaire-report (Procedure for appointing judges), he, like the Special Rapporteur, preferred version A, which would stress the universal character of the international criminal court, rather than version B, which provided for a small court. At the same time, he was not altogether satisfied with the wording of version A, which specified that "The judges shall be elected by the General Assembly of the United Nations . . .". In his opinion, the judges should be appointed in accordance with the procedure applicable to the judges of the International Court of Justice: those who obtained an absolute majority of votes in the General Assembly and in the Security Council would be elected.

16. As to item 4 (Functions of the prosecuting attorney), he did not believe that the system provided for in version B was either workable or practicable. He therefore supported version A and shared the Special Rapporteur's view that the functions of the prosecuting attorney called for a degree of specialization and technical expertise and that he was called upon to uphold the interests not only of States, but also of the international community. That did not mean, however, that a prosecuting attorney-general should be assigned to the international criminal court. In his view, it would be perfectly realistic and feasible to provide that the functions of the prosecuting attorney would be performed by a jurist appointed by the complainant from among the staff of the national organ with the necessary specialization and technical expertise. Such a person would be in a good position to collect evidence or to investigate the crime committed in the territory of the complainant State or against that State.

17. There might, however, be cases where grave crimes against the peace and security of mankind were of a transnational nature and concerned more than one State. In such cases, the States concerned would have to co-operate, in particular in the collection of evidence, the summoning of witnesses, investigations, etc. It would therefore be useful to set up a small organ to ensure co-ordination and co-operation among States in that regard. The question whether such an organ should belong to the international criminal court or report to the Secretary-General of the United Nations could be considered at a later stage.

18. With regard to item 5 of the questionnaire-report (Pre-trial examination), he recalled that the question of the need for a pre-trial examination by an organ other than the international criminal court had given rise to intense discussions in the 1953 Committee on International Criminal Jurisdiction. That system did not exist in Japanese criminal procedure, but he believed that some sort of preliminary examination of the evidence could be useful. He nevertheless stressed that the most crucial problem in an international criminal proceeding would be to determine whether or not the evidence showed that the alleged offence was serious enough to be tried before an international criminal court. In his opinion, that was a problem to be decided by the court itself and not by a pre-trial chamber, because it sometimes related to the merits of the case.

19. As to item 6 (Authority of *res judicata* by a court of a State), he endorsed in principle version A, the golden rule in the matter being *non bis in idem*.

20. With regard to item 7 (Authority of *res judicata* by the court), he endorsed in principle the formulation submitted by the Special Rapporteur, which seemed to be similar in substance to article 50 (Double jeopardy) of the 1953 draft statute.⁸

21. For item 9 (Penalties), he was in favour of version B or version C, taking into account recent trends in various States and in international human rights instruments towards the abolition of the death penalty or the restriction of its application.

22. He drew the Commission's attention to the question of the execution of sentences. Article 51 of the 1953 draft statute provided that "Sentences shall be executed in accordance with conventions relating to the matter", but it was to be feared that a provision of that kind would remain a dead letter. In addition, he could not agree that the execution of sentences should be entrusted solely to the complainant State. Accordingly, he believed that the code should specify that the execution of sentences would in principle be decided by the international criminal court in its judgment and that only in the absence of such a decision would the execution be entrusted to the complainant State.

23. Lastly, with regard to item 10 of the questionnaire-report (Financial provisions), he did not believe that the idea of establishing a special fund was either realistic or workable. He therefore proposed the adoption, *mutatis mutandis*, of the same provisions as those which applied to the ICJ.

24. Mr. TOMUSCHAT said that Trinidad and Tobago should be thanked for having taken the initiative of proposing that the question of the establishment of an international criminal court, which the Commission invariably raised when discussing the draft code, but which the General Assembly had preferred to shelve, should once more be placed on the General Assembly's agenda.⁹ The Commission had now definitely been mandated to deal with the question of the establishment of such a body. True, it had not been requested to draw up the court's statute, but the responsibility entrusted to it was none the less great. The Commission was expected to inform the General Assembly about the matters of principle of both a legal and a practical nature which would have to be settled with that purpose in mind and the task was an urgent one. Within the General Assembly, there was at least one group of States which was firmly resolved to press forward and it would be unfortunate if the Commission failed to meet those States' wishes. The opportunity was all the more favourable in that, as far as drug trafficking was concerned, it was unanimously agreed, even though tactical considerations were also involved, that the activity was a scourge which had to be combated energetically.

25. The Commission was thus called upon to give the General Assembly a precise answer even though it might not be able to prepare a very detailed document.

He therefore agreed with the Special Rapporteur that the Commission should concentrate on the guiding principles of its fascinating undertaking and, in doing so, follow the outline provided in part III of the eighth report (A/CN.4/430 and Add.1). It was important that the Commission's response be placed before the General Assembly at its next session. To that end, he suggested that the Commission's conclusions be included in a study which could be issued as a separate document, but which might, as an exceptional measure, be annexed to the Commission's annual report to the General Assembly.

26. For the time being, he would refer to the most crucial problems connected with the establishment of an international criminal court. The first question which arose was whether the court should be an organ of the United Nations or an institution falling wholly within the responsibility of the States parties to the treaty establishing it. In his view, it would be preferable, despite all the technical difficulties involved, to associate the court as closely as possible with the United Nations system. Assuming that the court would have competence only in respect of States which had accepted its jurisdiction, it could be envisaged that its judges would be elected by the General Assembly and the Security Council and that its costs would be paid out of the regular budget of the United Nations, as, for example, in the case of the Human Rights Committee; failing that, the court could easily become an institution which might be held dear by a small group of States, but which other States would tend to ignore. Such an arrangement would obviously require the unreserved support of the international community as a whole and, in particular, of all regional groups.

27. An international criminal court would be quite unrelated to the International Court of Justice, and to establish it as a chamber of the Court would be a mistake. It seemed essential that it should be established by a treaty; action under Articles 7 or 22 of the Charter of the United Nations would hardly be practical. The fact that the ICJ had approved the establishment of the Administrative Tribunal of the United Nations on the basis of those two provisions was not a relevant precedent. The purpose of the Administrative Tribunal was to provide legal protection for United Nations officials and it was therefore necessary for the smooth operation of the Organization itself. The establishment of an international criminal court, on the other hand, would be a tremendous step forward, a genuine legal revolution. But at a time when so many revolutions were taking place, why not have a small one in the United Nations?

28. Recalling that, at the previous meeting, Mr. Graefrath had demonstrated that an international criminal court could take several different forms—that of a court of first instance which established the facts and applied the law or that of a court of appeal, a court of cassation or a court which merely stated the applicable law at the request of a national court which decided not to pronounce judgment and referred a preliminary issue to the international court—he expressed the view that, all things considered, only one solution was accept-

⁸ See 2150th meeting, footnote 8.

⁹ See A/44/195.

able. There were two kinds of situations in which justice could not be left to national courts. The typical situation was that in which serious crimes were committed by the State itself or, rather, by a ruling group. In such circumstances, the courts of the State in question would not be qualified to try those responsible unless there was a change of government and a return to the rule of law. The future international criminal court would therefore also have to establish the facts. The other situation was more recent, but had the same results. It was that in which a State wanted to bring to justice certain individuals who had committed serious crimes, but was not strong enough to do so: judges were intimidated; witnesses refused to speak for fear of reprisals. In that case, too, it was of course not possible to dispense with investigating the facts of the case and merely confer powers of appeal or cassation upon the international criminal court. A procedure for preliminary issues might conceivably be established, but it would first have to be seen whether it would serve any purpose.

29. With regard to the competence of the court, he said that, in his view, the court should try only crimes against the peace and security of mankind. He therefore preferred version A submitted by the Special Rapporteur in that regard (*ibid.*, para. 80), with, however, some amendments, the first being that reference should be made to crimes already covered by earlier instruments, particularly genocide. Another point was that, if the court was to receive the support of a massive majority of States, it had at first to be given a limited mandate. A court which was made competent from the outset to try cases of aggression or intervention would encounter almost insurmountable political obstacles, but that would not be so if it was to try cases of drug trafficking or genocide. With more restricted jurisdiction, the court could begin to exist and to prove itself. A victory of principle would have been won.

30. The next problem was that of the recognition of the court's jurisdiction. Article 26 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction¹⁰ provided that States could confer jurisdiction upon the court "by convention, by special agreement or by unilateral declaration". Being sovereign, States had to be free to submit to the judgment of the court either generally or for a specific category of cases or even for one particular case. Contrary to what the Special Rapporteur seemed to think, it would not be easy to divest States of their right to accept, to recognize partially or to refuse the competence of an international judicial authority. In fact, there was no international legislative body or international jurisdictional system to which States were mandatorily subject. All that could be done was to propose solutions to them and seek their consent. The Special Rapporteur seemed to fear that States which were guilty of crimes would refuse to accede to the statute of the court, which would be recognized only by irreproachable States. There were nevertheless good periods and bad periods in the lives of States and it

might well be possible to get them to recognize the competence of the court at a good time when the sense of justice and legality prevailed.

31. The question of the jurisdiction of the court gave rise to the even thornier problem of the persons who could be prosecuted as a result of recognition of that jurisdiction. A State always had authority over its own nationals and could refer them to an international court instead of trying them itself. That was also true of the State in whose territory a crime had been committed. In that connection, he noted that the territorial criterion would not be easy to apply in the case, for instance, of threat of aggression¹¹ or in a case where the organizer of an aggression did not leave his national territory. All things considered, version A proposed in that connection (*ibid.*, para. 84) would be preferable.

32. The criteria established in version A did not, however, solve every problem. Genocide, in particular, raised the question of the link which had to exist between a State and the individuals on behalf of whom it acted. When a Government murdered members of a national minority, who could confer competence on the court to judge the persons responsible? The 1948 Convention on the Prevention and Punishment of the Crime of Genocide was of little assistance. It referred only to the jurisdiction of an international penal tribunal with respect to States, whereas in the present context it was a question of individuals. Another problem might be the time-honoured principle that treaties were not binding on third States. Could that principle be waived in the case of unanimously condemned crimes? Genocide would seem to be a case in point, yet the 1948 Convention had received only 90 ratifications after 40 years of existence, which meant that a surprisingly large number of States did not recognize it.

33. The meaning of "submission of cases to the court" (*ibid.*, para. 88) in a criminal context was not altogether clear. Rules were necessary, of course, in order to avoid abuses and a system of checks by an appropriate body had to be instituted. A right of initiative could well be conferred upon States. But the indictment had to be drawn up by a prosecuting attorney assigned to the international criminal court. He therefore preferred version B on that point (*ibid.*, para. 90). In no case, however, would one prosecuting attorney-general be sufficient. A college in which all legal systems were represented would have to be envisaged.

34. Other members of the Commission had already drawn attention to the complexity of relations between the proposed court and national courts. There would, of course, be some simple cases, for example a crime falling within the jurisdiction of a single State which decided to refer it to the court. As a general rule, however, several States would have competence, one on the basis of nationality, another on the basis of the territorial link, etc. Priorities would then have to be estab-

¹⁰ See 2150th meeting, footnote 8.

¹¹ See article 13 (Threat of aggression) of the draft code as provisionally adopted by the Commission on first reading (*Yearbook . . . 1989*, vol. II (Part Two), p. 68).

lished. Without wishing to sketch out a system, he emphasized that it must be recognized that the establishment of an international criminal court would, of necessity, have repercussions on the jurisdiction of national courts.

35. Mr. McCaffrey said that he had always supported the idea of an international criminal court, since it would ensure that the code did not become overly politicized by States and would guarantee the uniformity of its interpretation and application. It was precisely because such a court was important that the Commission must be realistic and, at the present stage, propose practical solutions to the General Assembly that might be acceptable to States: it was better to have a modest court that was generally accepted than some ideal one that existed only on paper. Moreover, the current international climate seemed particularly favourable to the idea of such a court. By way of illustration, he referred to a recent initiative by the United States Senate, which had investigated the establishment of a criminal court to try the crimes of international terrorism and international drug trafficking; to a meeting of experts due to be held in Syracuse (Italy) in the summer of 1990 on the same subject; and to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which was to be convened in August 1990. Progress in the discussion of the matter was thus being made elsewhere as well, and the subject was now ripe.

36. The actual nature of the international criminal court nevertheless raised many questions. In the first place, should it be an *ad hoc* or a standing tribunal? Mr. Beesley (2153rd meeting) had suggested an *ad hoc* mechanism composed in such a way as to take account of the States involved in each individual case: that idea deserved consideration. In his eighth report (A/CN.4/430 and Add.1, para. 86), the Special Rapporteur proposed two solutions for the appointment of judges. In that connection, he noted that the International Court of Justice had been resorted to much more frequently and by a wider variety of States since the chamber procedure had come to be used. The same consideration would apply in connection with an international criminal court and the possibility should perhaps be envisaged of having a standing list of judges from which the States involved in a case could select those who would be asked to constitute the tribunal, as was now done for the ICJ chamber procedure. In short, the acceptability of an international criminal court was, for some States, closely connected with its composition: if States felt that they had some degree of control over its membership, the court would be more acceptable to them and, as pointed out by Mr. Graefrath (2154th meeting), less of a threat to their sovereignty than a national court exercising universal jurisdiction.

37. The questions which arose in connection with the competence of the court were even more numerous. Mr. Bennouna (*ibid.*) had suggested that the report of the 1953 Committee on International Criminal Jurisdiction, and the revised draft statute annexed

thereto,¹² should serve as the starting-point and, indeed, that draft statute covered questions not addressed in the Special Rapporteur's report. For instance, whereas, under article 3 of the draft code as provisionally adopted by the Commission on first reading,¹³ individuals were the subjects of the code, it would be better to specify, as did article 25 of the 1953 draft statute, that the court had jurisdiction over individuals irrespective of their status. Secondly, while the subjects of the code were individuals, jurisdiction was conferred on the court by States, a point covered by articles 26 to 28 of the 1953 draft. It therefore seemed essential to add some provision along the lines of article 26 of the 1953 draft to what the Special Rapporteur proposed on the issue (A/CN.4/430 and Add.1, para. 84), since both of the texts he had submitted seemed to be flawed: the jurisdiction of the court must have been conferred upon it by the State in which the crime was alleged to have been committed. Since that was difficult in the case of genocide, a special provision should be envisaged in its case. Lastly, a provision concerning withdrawal from the court's jurisdiction, along the lines of article 28 of the 1953 draft, should also be envisaged.

38. Still on the question of competence, the Special Rapporteur proposed two versions to deal with the crimes to be tried by the court (*ibid.*, para. 80). In his own view, the Commission should be very modest with respect to the competence of the court *ratione materiae*. Very few States would accept the jurisdiction of a court empowered to decide whether the crimes of aggression, intervention or colonialism had been committed. On the other hand, control over the membership of the tribunal might make that question less important. For the time being, it was clear that an international court to try the crime of international drug trafficking would have broad support. For those reasons, he would opt for version A because of the indeterminate nature of the definition laid down in version B.

39. Another point concerning competence was raised by the Special Rapporteur under the heading "Submission of cases to the court" (*ibid.*, paras. 88-89). That point was dealt with in article 29 of the 1953 draft statute, entitled "Access to the court", and squarely raised the question of the relationship of the court to the Security Council. For reasons he had already explained, he doubted whether it would enhance the court's acceptability if it was seen as a means of circumventing the Security Council. Consequently, and somewhat reluctantly, he would prefer a provision along the lines of alternative B of article 29 of the 1953 draft. Once again, however, the problem would probably be mitigated if the States involved consented to the proceeding and had some say in the composition of the tribunal.

40. Mr. Graefrath had raised one extremely important aspect of the problem of competence, namely whether the court's jurisdiction should be exclusive or concurrent with that of national courts. For his own part, he believed that its jurisdiction should be exclu-

¹² See 2150th meeting, footnote 8.

¹³ *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

sive; otherwise, the objectives of uniformity of interpretation and application would be frustrated. To facilitate acceptance of the court, however, it might be wise, as Mr. Graefrath had suggested, to start by providing for it to give legally binding opinions on questions of law alone, at the request of a State party.

41. Apart from those general problems, there were various other technical questions which the Commission would have to consider at some stage. With regard to extradition, provision should be made for procedural machinery, since the general obligation laid down in article 4 of the draft code as provisionally adopted¹⁴ was not enough. In any event, that article would have to be revised if the court had exclusive jurisdiction. With regard to incarceration of the accused pending trial, it was necessary to determine the conditions in which it would take place. Should bail be provided for? What should be the duration of incarceration?

42. Trial *in absentia* should probably be prohibited to minimize the risk of politicization of the code. United States law, for instance, generally prohibited criminal trials *in absentia*. As to the question of the prosecuting attorney, he agreed with Mr. Calero Rodrigues (2154th meeting) that there should be a standing institution or position, but considered that the prosecutor should not necessarily be the same individual for each case. There might conceivably be a panel from which the judges in a case could choose the prosecuting attorney. With regard to the taking of evidence, the Special Rapporteur's proposal (A/CN.4/430 and Add.1, para. 92) was a good starting-point, but needed refinement. For example, what would be the extent of the authority to gather evidence, for which provision should be made, in order for States to agree to allow the taking of evidence in their territory and to assist in that process?

43. There were two further problems, the first being enforcement of judgments of the court and execution of sentences. Would they be carried out by some international correctional system or through existing State institutions, and, if the latter, which ones? It seemed doubtful that States would agree to a sentence being executed by the complainant State. The second problem was that of penalties. It was an extremely difficult matter, but, as Mr. Calero Rodrigues and Mr. Bennouna had stated, penalties must none the less be indicated for each crime in the code. Given the major differences among the various municipal laws in that regard, he was not sure that it would be possible to arrive at a less general solution than that proposed by the Special Rapporteur (*ibid.*, para. 101).

The meeting rose at 11.30 a.m. to enable the Drafting Committee to meet.

¹⁴ See footnote 7 above.

2156th MEETING

Friday, 11 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/419 and Add.1,² A/CN.4/429 and Add.1-4,³ A/CN.4/430 and Add.1,⁴ A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLES 15, 16, 17, X AND Y⁵ and

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL
CRIMINAL COURT (continued)

1. Mr. ROUCOUNAS, referring to part III of the Special Rapporteur's eighth report (A/CN.4/430 and Add.1), said that he did not think it sufficed merely to say that the Commission opted for a particular alternative text, since many other far more wide-ranging problems might arise in the course of its work. As he saw it, the Commission was engaged in work of a preliminary nature and its technical effort should be matched by scholarly excellence.

2. A number of earlier drafts for the statute of an international criminal court had been mentioned during the discussion. The ideology behind those drafts, however, had differed from that of the statute for the international criminal court with which the Commission was now concerned. The Commission's task was to reflect a collective conscience that had not existed at the time when the earlier drafts had been elaborated. He would therefore urge the Commission to treat them with some caution, despite their undoubted technical excellence, bearing in mind that there was now a wider acceptance of the need for the United Nations to ensure the effective protection of fundamental human rights.

¹ 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.

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

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

⁴ *Ibid.*

⁵ For the texts, see 2150th meeting, para. 14.

3. An international criminal court—far more than the International Court of Justice, which was concerned with disputes between States—would give rise to constitutional difficulties for States which struck at the very heart of domestic law and the concept of separation of powers within a State. Accordingly, the Commission should inform the General Assembly that it was fully aware of the problem and should produce effective arguments and guarantees with a view to ensuring the improved application of the law at the national and international levels.

4. Turning to the Special Rapporteur's questionnaire-report, he said that the code, on the one hand, and the statute of the international criminal court, on the other, were two different matters and should not be confused. The code dealt with substantive law—the law that governed the conduct of persons—and would be universally applicable. An international criminal court would not have jurisdiction in that area alone, although that would certainly form the basis of its jurisdiction. It was therefore necessary to distinguish between participation in the code and participation in the statute of the court. So far as the former was concerned, he agreed that the aim should be a compact code to which there would be no reservations. To that end, the Commission should endeavour to distil within the code the universal conscience reflected in international criminal law as generally recognized or in what might be termed customary international law. Provisions unacceptable to the international community should not be introduced into the code, for that would only cause problems for States and inevitably result in restricted participation in the code. So far as the statute of the court was concerned, the Commission could not just tell States to "take it or leave it". Rather, it was necessary to ascertain in what circumstances the court would have jurisdiction, and that involved the question of submission of cases to the court, to which the Special Rapporteur had referred several times.

5. Another question was who would elect the judges, and it had been suggested that the General Assembly could perhaps do so. In that connection, he noted that the members of the organ that monitored the implementation of one of the international human rights conventions were elected by a United Nations body and not by the parties to that convention. In the case of the proposed international criminal court, however, it might be possible, at an initial stage, to envisage the election of judges from among States parties to the statute, because, unless the Charter of the United Nations was amended, that court, unlike the ICJ, would not be an organ of the United Nations. He would, however, be happy to leave it to the Special Rapporteur to consider the participation of States parties to the statute in the election of judges and to find some link with the General Assembly.

6. One crucial question to which it was not possible to give a definite answer was whether the international criminal court should have exclusive jurisdiction or concurrent jurisdiction with domestic courts. In its further work, the Commission should examine a number of points in that connection. What, for instance, would be the position during the period between the commis-

sion of an act and submission of the case to the court? Who would determine whether an act was covered by the code or whether it fell outside the code and therefore came within the jurisdiction of the domestic courts? What would be the relationship between the lower domestic criminal courts, the higher domestic criminal courts and the international criminal court? Should some kind of exhaustion of domestic remedies be envisaged in the event that the international criminal court did not have exclusive jurisdiction? Should the question of cases being brought before the courts of different countries, on the basis either of *ratione materiae* or of *ratione personae*, be considered? Who was to initiate proceedings before the court? Could any State do so, including the State in whose territory the act had been committed and the State whose nationals were implicated in the act either as victims or as perpetrators?

7. Yet another question concerned the injured State and it should be discussed in the context both of State responsibility and of the criminal responsibility of a person who acted on behalf of the State. That question had been the subject of a recent symposium on crime held in Florence, at which it had been pointed out that the expression "international community as a whole", which was so often misinterpreted, referred to an entity the elements of which were still not clear. That point should also be referred to the General Assembly.

8. Mr. ARANGIO-RUIZ, noting that the Commission had received a green light from its parent body on a vital issue, said that a code of international crimes without an equivalent international body to implement it would either be a dead letter or be arbitrarily applied by national courts. Much had been said of the conflicts, especially of jurisdiction and interpretation, to which the application of the code could give rise. It was, however, his firm belief that, no matter how many cases of friction arose out of the establishment of an international criminal court within the framework of a code, they would still be fewer and less serious than those that would arise within the framework of a code whose implementation was based on the so-called principle of universal criminal jurisdiction. Such jurisdiction was, moreover, likely to be less productive in terms of the effectiveness of both prosecution and trial and, above all, of justice. As rightly noted, the human rights both of the victim and of the accused had to be protected and an international criminal court was the only means whereby both the victim and the perpetrator of an international crime, along with their respective States, could expect and receive correct and impartial treatment in all circumstances.

9. The General Assembly was to be congratulated on the removal of an artificial obstacle to the Commission's treatment of the question of the establishment of an international criminal court, and the fact that it had seized the occasion of the heightened threat to mankind from the scourge of drug trafficking to request the Commission to tackle the problem of an international criminal court was further evidence that that question had been within the Commission's mandate ever since it had started work on the draft code.

10. The question was, of course, a very difficult one and he himself had had occasion to refer to some of the problems involved. The establishment of an international criminal court would entail the creation of a supranational body with jurisdiction over individuals that would go far beyond that of the International Court of Justice, for, even though the latter had compulsory jurisdiction and unilateral applications could be made to it, its decisions were addressed to States as sovereign entities and not to individuals. By contrast, the decisions of the international criminal court would be addressed to individuals.

11. On reflection, it was apparent that the acceptance of such a court by States would be no more difficult to achieve than the assent of States to the entry into force of criminal-law provisions designed to constitute, through the proper legislative channels, a uniform branch of the domestic criminal law of all participating States. States were notoriously more jealous of their sovereignty *vis-à-vis* each other than *vis-à-vis* an international body. The Commission must, however, make it clear, especially to the General Assembly, that difficulties would arise at every step in the elaboration and operation of the code. It was difficult, for instance, to define the general principles and the crimes; to determine the relationship between the crimes of individuals and those of the States on behalf of which those individuals acted; to determine the penalties; to investigate, try and punish the crimes; and to draft a statute of an international criminal court and secure its acceptance by States.

12. He agreed that it was not possible to have a list of crimes without penalties. Consequently, if the Commission, the General Assembly and States in general were unable to establish an international criminal court or some other institution to apply the code, there could be no code. Just as there could be *nulla poena sine lege*, so could there be no *codex sine iudice*; and the *iudex* must be an international one, for otherwise the exercise would be doomed to failure. He believed that that had always been the view of the Special Rapporteur, to whom appreciation was due for having promptly produced a helpful report in the form of a questionnaire that would at least allow a start to be made on a difficult task. He was convinced that those who favoured implementation on the basis of so-called universal jurisdiction were simply sweeping the difficulties of that approach, which were equally great, under the carpet.

13. Referring to the questionnaire-report, he agreed that the competence of the court should be confined, at least for the time being, to crimes covered by the code, including drug trafficking. The possibility of entrusting the court with an interpretative role or of enabling it to hear appeals on points of law and of fact also required further study. The court's competence *ratione personae* should, moreover, be confined to physical persons and to given legal entities, although it would be difficult to identify the kind of legal entity that should be subject to the code. He had no doubt that the court should be endowed with competence to rule on competence.

14. The fact that reference had been made to article 26 of the revised draft statute prepared by the 1953

Committee on International Criminal Jurisdiction⁶—a provision that had some analogies with Article 36, paragraphs 1 and 2, of the Statute of the ICJ—might indicate that some members of the Commission favoured the adoption of a system of competence not directly attributed by the statute of the international criminal court. In his view, no such analogy should be accepted. There should be no question of the jurisdiction of the international criminal court being created on a piecemeal basis, as it were, by States parties to its statute as and when they pleased. The competence of the court should not be subject to any kind of optional clauses or to reservations and should derive directly from the statute.

15. He was inclined to agree with Mr. Calero Rodrigues (2154th meeting) concerning the submission of cases to the court. Neither of the texts proposed by the Special Rapporteur in paragraph 84 of his eighth report (A/CN.4/430 and Add.1) was satisfactory, being solutions based on a universal-jurisdiction approach. Under an institutionalized system of international jurisdiction, no distinction should be made between the State where the offence had been committed and the State of which the accused or the victim was a national. Any State might be a State injured by the crime and should be entitled to bring an accusation before the competent organ. That would not actually be a question of submission, but of putting the matter into the hands of the appropriate permanent body attached to the court. Once the court had been established, an initiative presented by any State to the prosecuting attorney would not involve the difficulties and dangers feared by Mr. Mahiou and Mr. Bennouna (2154th meeting). He was referring, of course, to the situation in which a clear demarcation line had been drawn, mainly *ratione materiae*, between international jurisdiction and the criminal jurisdiction of individual States, and the decision as to whether any specific case fell on one side of the line or the other would rest with the court by virtue of its competence to rule on competence.

16. On the questions of the prosecuting attorney and pre-trial examination, he agreed that both offices should be permanent parts of the international machinery and Mr. McCaffrey (2155th meeting) had been right to urge that neither office should be entrusted to a single person.

17. With regard to *res judicata*, the decisions of the court would have to be final and the *non bis in idem* principle embodied in article 7 of the draft code as provisionally adopted by the Commission on first reading⁷ must stand. As to whether national judgments should have the same value *vis-à-vis* the court, he would reserve his opinion until the entire matter had been explored in greater depth. Further analysis seemed essential on the issues of appeal and possible *cassation*.

18. He fully agreed with Mr. Calero Rodrigues and Mr. Bennouna that penalties must be provided for in the code. The court could decide between a maximum and a minimum, but it would be absurd to leave it to

⁶ See 2150th meeting, footnote 8.

⁷ *Yearbook . . . 1988*, vol. II (Part Two), pp. 68-69.

the court to choose between different kinds or qualities of penalty.

19. In his view, no member of the Commission could give a final opinion on any of the problems involved in the establishment of an international criminal court. Most of the problems were of course not new, but no member had had sufficient time to go deeply enough into the wealth of relevant documents to be properly informed in the matter. That consideration led him to the question of what the Commission should do in response to General Assembly resolution 44/39, which clearly set the Commission an immediate task and a medium-term or long-term one. The few members of the Commission who had addressed the question seemed to be concerned exclusively with the immediate task, namely whether the Commission was complying with the mandate set forth in resolution 44/39 to the best of its ability at the present session. That mandate clearly required the Commission to devote "particular attention" to the question of establishing an international criminal court. But it was equally clear that it could not deal thoroughly with such a complex subject within the limits of a single session without setting aside the other topics on its agenda.

20. His conclusion was that the Commission's immediate task was to report to the General Assembly on the following points: (a) the Special Rapporteur's questionnaire on the establishment of the court; (b) the Commission's discussion of the issue in the light of the questionnaire and its cursory reading of the immediately available documents; (c) the provisional results of that discussion and the comparative merits of the possible solutions represented by (i) an international criminal jurisdiction, (ii) a system of universal jurisdiction, or (iii) any conceivable combination of the two approaches; (d) the consequent necessity, both in response to the specific request contained in resolution 44/39 and in fulfilment of its general mandate concerning the draft code, including the problem of the establishment of an international criminal jurisdiction, for the Commission to consider the establishment of such a jurisdiction at its next sessions within the framework of its work on the draft code. It was precisely with a view to drafting such a response to the General Assembly that a working group could be established, although the matter could probably be dealt with by the Rapporteur in co-operation with the Special Rapporteur.

21. As to the medium-term task, and subject to the more competent opinion of the Special Rapporteur, the Commission must simply proceed to a thorough analysis of the whole problem in the light of all the contributions made so far, without exception. The materials to be studied went far beyond the documents available to the Commission and it would be for the Special Rapporteur to decide whether to include a broader study of the problems in his report for the next session. In that case, a working group would have nothing to do and the matter could be left entirely to the Commission as a whole and to the Special Rapporteur, who for the future could perhaps include in his report a section on each of the questions dealt with in the questionnaire and on the further issues raised by members of the Commission.

22. Mr. EIRIKSSON said that the Special Rapporteur had been too modest in terming part III of his eighth report (A/CN.4/430 and Add.1) a "questionnaire-report", since he had set out the fundamental issues in a form enabling the Commission to carry its work forward and respond to the request of the General Assembly.

23. He generally supported the establishment of an international criminal court, but, as he had stated in his earlier remarks on the draft code, he would keep an open mind on the project as a whole until agreement had been reached on the crimes to be included and would then assess the results in relation to the extent to which the list was confined to the most serious crimes, on which there would be general agreement in the community of States. A linkage to the court would make the Commission more likely to move in the acceptable direction.

24. The acceptability of the court was another question. Although he shared the concerns of those members who had called for caution and realism as opposed to idealism, he thought that the Commission should frame the results of its work in a structure that could be readily adapted to political realities at the time a decision was taken. In other words, the Commission should not lock itself into a "take it or leave it" situation, as had been done in the past. Striking changes had taken place in the international negotiating climate since the 1953 Committee on International Criminal Jurisdiction had prepared its revised draft statute.⁸ Mr. Roucounas had just made some pertinent remarks on that point. The Commission must be wary both of trivializing the draft code and of providing an opportunity for abuse of the court for political ends. The requirement of a large number of ratifications for the entry into force of the court's statute would ensure general acceptability and justify the linkage to the United Nations.

25. With regard to subject-matter jurisdiction, the Commission should confine itself to the crimes set out in the code; the relevant section of the statute might be organized so as to allow a selection even among the agreed crimes, perhaps with the possibility of extension to other crimes after a certain period. As to crimes other than those contained in the code, provision could be made for additional protocols subject to the conditions that applied to the statute. The court should have original jurisdiction, not merely appellate jurisdiction or other variations referred to by Mr. Graefrath (2154th meeting).

26. On the appointment of judges, he could not support either of the texts proposed by the Special Rapporteur (A/CN.4/430 and Add.1, para. 86). Judges should be appointed in the same way as Judges of the International Court of Justice.

27. The right to submit cases to the court was linked to the question of the court's personal jurisdiction. Cases might be brought only by a State party to the statute which had a link to the alleged crime for one of the following reasons: the crime was alleged to have

⁸ See 2150th meeting, footnote 8.

been committed in its territory or had been directed against it; the victim was its national; or the accused was its national or had been found in its territory. For crimes such as genocide and *apartheid*, the last-mentioned ground would probably be the only one available. There should not be a requirement that, with regard to any single submission, any other State in one of those categories would also have to agree to submission, which was not a State-versus-State exercise. His conclusion took account of the reasoning of the 1953 Committee on International Criminal Jurisdiction in explaining article 27 of its draft statute.

28. As to prosecution of the case, he preferred version B submitted by the Special Rapporteur (*ibid.*, para. 90). With regard to the procedural matter raised at the previous meeting by Mr. McCaffrey, it should be specified that a case should be heard by a chamber of the court. To take account of Mr. Graefrath's point about article 14 of the International Covenant on Civil and Political Rights, the right of appeal should be made available to the court in plenary in circumstances to be set out at a later time. He agreed with the general guidelines on pre-trial examination set out in the report (*ibid.*, para. 92).

29. The question of *res judicata* by a national court should be dealt with as in paragraphs 2 to 4 of article 7 of the draft code as provisionally adopted by the Commission on first reading,⁹ with retrial by the international court being allowed only in the circumstances referred to in paragraph 3. If the Commission had wished to provide for the possibilities set out in version B submitted by the Special Rapporteur (*ibid.*, para. 93), it would have included a reference to an international criminal court in square brackets in paragraph 4 of article 7, or in a similarly drafted article. Such a solution would require the revision of article 7, with which many members of the Commission were still not satisfied.

30. As to the effect of a decision of the international court on proceedings in a national court, article 7, paragraph 1, clearly excluded trial in a national court. The text submitted by the Special Rapporteur (*ibid.*, para. 96) seemed to have the same effect, but it must be carefully redrafted in the same terms in order to avoid misinterpretation.

31. With regard to the withdrawal of a complaint by a submitting State, his impression was that one of the essential bases of competence would be removed in such a case and that proceedings could not continue, but the court might be given discretion to allow proceedings to continue if the interests of justice so dictated.

32. The question of penalties was very important, but he was not convinced that a specific schedule was needed. The possibility of a death sentence should be ruled out, but, if the list of crimes was limited to the most serious ones, then the possibility of life imprisonment should be available in all cases. The statute needed to be more specific only if the Commission envisaged a lesser maximum sentence in some cases. Version C submitted by the Special Rapporteur (*ibid.*, para. 101) would therefore appear adequate and he hoped that he

was not departing too much from Mr. Calero Rodriguez's position (2154th meeting), with which he basically agreed.

33. Although the Special Rapporteur had not dealt directly with enforcement, the place of detention could be covered in the rules of the court, States having assumed the obligation to provide facilities in accordance with a decision of the court. The rules would also provide for the possible review of sentences. The Commission did not have to take a position on financial questions, but he would favour the system used for the ICJ.

34. Turning to parts I and II of the eighth report, he said that complicity, conspiracy and attempt should not be included as separate crimes, but should be placed in the general part of the draft code together with the identification of the perpetrator. A separate reference to complicity was not needed, for the appropriate court could determine whether the level of participation in a crime was sufficient to make a person a perpetrator. In order to avoid the misuse which had been the case in some common-law systems, a general definition of conspiracy should be provided, combining the elements of intent, agreement with another person and attempt to complete the crime. He agreed with Mr. Al-Baharna (2153rd meeting) that a definition of attempt should be provided, including the elements of intent, steps towards the completion of the crime and frustration of that intent by some factor extraneous to the actor. If the completed draft code had structural differences in the definitions of some of the crimes, it might be necessary to evaluate those questions with respect to each individual crime.

35. On the question of international illicit traffic in narcotic drugs, he again pointed out that there was no practical reason to have separate sections in the draft code identifying crimes as being against peace or against humanity, for no difference in treatment seemed to be envisaged for the two categories. There was thus no need to determine whether drug offences should be in one category or the other; they could simply be identified as crimes against the peace and security of mankind. He agreed with other members of the Commission that draft article X should be reworded to include the elements of seriousness and large scale.

36. Mr. DÍAZ GONZÁLEZ, referring to part I of the eighth report (A/CN.4/430 and Add.1), stressed that complicity, conspiracy and attempt could not be regarded as autonomous offences. Those criminal acts were accessory to the principal act and totally dependent on it.

37. With regard to part II of the report, on international illicit traffic in narcotic drugs, he noted that the Commission had often been accused of working in an ivory tower, but had now been invited by the General Assembly to study and give an opinion on an issue that had been a matter of concern to the international community for a long time.

38. The Special Rapporteur had submitted two texts: one characterized illicit traffic in narcotic drugs as a crime against peace and the other treated it as a crime against humanity. In his own view, it was both a crime against peace and a crime against humanity. Many his-

⁹ See footnote 7 above.

torical examples could be given to illustrate that point. Mr. Shi (2153rd meeting) had thus noted that, in the nineteenth century, two imperialist Powers had introduced opium consumption in China not only for profit-making purposes, but also as a means of weakening the Chinese people. The situation had now changed, however, and the great Powers were suffering as much from the drug problem as small countries were. In recent years, there had been increasing references in United Nations circles to the shared responsibility of producer and consumer countries in stamping out the drug traffic.

39. He took the view that illicit drug trafficking was a crime against peace because organizations and State bodies had been known to engage in it and to use the proceeds to finance mercenaries and provide weapons for military activities to destabilize the Governments of small countries. Illicit traffic in narcotic drugs had, for example, been used as a pretext for the invasion and occupation of a small Latin-American country in which thousands of people had died and entire neighbourhoods had been destroyed.

40. In the light of the foregoing, it was appropriate for the Commission to give careful consideration to the inclusion of illicit drug trafficking in the draft code. It should also consider the establishment of an international criminal court to punish those responsible for drug trafficking.

41. At a conference recently held in Quito, illicit drug trafficking had been characterized for the first time as a crime against humanity. In 1988, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances had been adopted in Vienna. Moreover, at the Ninth Conference of Heads of State or Government of the Movement of Non-Aligned Countries held in Belgrade in September 1989, illicit traffic in drugs had been characterized as a threat not only to the health of peoples, but also to the political, economic, social and cultural structures of producer and consumer States.

42. He supported the Special Rapporteur's suggestion that the draft code contain two articles to deal with illicit drug trafficking as a crime against peace and as a crime against humanity. The code should also include a specific provision on the question of narco-terrorism.

43. Turning to part III of the report, he thought that the Commission should indeed study the question of the establishment of an international criminal court and give an opinion on the subject to the General Assembly. That question had been under discussion ever since the time of the League of Nations. The Nürnberg Principles¹⁰ could not provide much guidance, since a court set up by the victors to try the vanquished was not a valid precedent, but there seemed to be good prospects for setting up an international criminal court in which the more powerful States would not be able to impose their own ideas of justice. In that connection, he noted that paragraph 3 of article 4 of the draft code as provisionally adopted by the Commis-

sion on first reading¹¹ stated that the provisions of paragraphs 1 and 2 of that article relating to the obligation to try or extradite "do not prejudice the establishment and the jurisdiction of an international criminal court".

44. With regard to the competence of the proposed court, he was in favour of version A submitted by the Special Rapporteur (A/CN.4/430 and Add.1, para. 80), which would limit jurisdiction to "natural persons accused of crimes referred to in the Code". It would be too ambitious to try to extend that jurisdiction to any other crimes.

45. As to the procedure for appointing judges, he considered that the best solution would be to have judges appointed in exactly the same way as Judges of the International Court of Justice, in other words by the General Assembly and the Security Council. Since the right of veto did not apply for the purpose of the election of judges, there should be no fear of obstruction on that score.

46. On the question of submission of cases to the court, he favoured version A (*ibid.*, para. 88), which provided that cases could be brought before the court by any State Member of the United Nations. As for the functions of the prosecuting attorney, he found version B more acceptable than version A (*ibid.*, para. 90).

47. With regard to the authority of *res judicata* by a court of a State, he preferred version B (*ibid.*, para. 93). A national court could not examine a case which had been tried by the international criminal court, whereas the international court would be able to deal with a case which had been tried by a national court in the circumstances set forth in version B. As to the authority of *res judicata* by the international criminal court, the text submitted by the Special Rapporteur (*ibid.*, para. 96) was acceptable.

48. On the subject of penalties, he was opposed to the idea of giving the court complete freedom to sentence defendants "to whatever penalty it deems fair", as stated in version A (*ibid.*, para. 101). It would be totally unfair to allow the judges to create the law while trying an offender. His own view was that the code itself should set forth the penalty applicable to each crime.

49. Lastly, the problem of financial provisions could be dealt with at a later stage when work on the substantive matters was more advanced.

50. Mr. NJENGA said it was particularly important that each of the crimes listed in the draft code be carefully and explicitly defined, leaving no room for ambiguity and no loopholes for those who might be tempted to indulge in a course of action or conduct amounting to a crime against the peace and security of mankind. Judged by that standard, the efforts of the Special Rapporteur in his eighth report (A/CN.4/430 and Add.1) could be regarded only as a first step. Further endeavours would be required before the proposed draft articles could be considered complete. In that connection, he was glad to see that new texts for some of the articles had already been drafted by the Special Rap-

¹⁰ See 2151st meeting, footnote 11.

¹¹ *Yearbook* . . . 1988, vol. II (Part Two), p. 67.

porteur and were being circulated, albeit only in unofficial translation. As Mr. Koroma (2154th meeting) had said, the basic elements of possible definitions were already contained in the Special Rapporteur's comments on the draft articles, which should not be too difficult to revise.

51. Referring to draft article 15, he said that he fully endorsed the Special Rapporteur's arguments concerning methodology (A/CN.4/430 and Add.1, para. 6), but considered that the definition provided in the article should include both physical acts of complicity, such as aiding, abetting, provision of means, etc., and what the Special Rapporteur called "intellectual or moral" acts and what he personally would prefer to call "conceptual acts", which included the inspiration, instigation or ordering of the commission of the criminal act.

52. In his view, the Commission should not be unduly concerned with the distinction between principal perpetrators, co-perpetrators and accomplices, since all were guilty of the crime and the extent of their responsibility and, consequently, the sentence pronounced would depend on the precise role played by each of the actors. That would seem to be the approach adopted both in the Charter of the Nürnberg Tribunal¹² (art. 6 *in fine*) and in the Charter of the Tokyo Tribunal¹³ (art. 5 (c)). As the Special Rapporteur pointed out in his report (*ibid.*, para. 22), the hierarchical relationship which sometimes existed between the actual perpetrator of the act and his superior made it difficult to conceive of the latter as the accomplice of the former, in so far as the role of the accomplice was acknowledged to be a secondary one. In that context, the correct approach was that of the Supreme Court of the British Zone (*ibid.*, para. 24), which had considered that the act of complicity and the principal act were both crimes against humanity.

53. As to the concept of complicity in respect of acts committed prior to, concomitant with or subsequent to the principal offence, a qualitative distinction would be justified by the practice adopted in many municipal jurisdictions. If the antecedent act was part of a plan agreed to in advance, the actor was also held responsible for the principal crime. However, complicity in a subsequent unplanned act should be treated as an autonomous criminal act. That distinction should be clearly brought out, since the degrees of culpability in the two situations were quite different.

54. Turning to draft article 16, he associated himself with the conclusions reached by the Special Rapporteur (*ibid.*, para. 62), but took the view that the proposed alternatives for paragraph 2 were not really alternatives, but rather complementary elements, the first defining the crime of conspiracy and the second determining the degree of culpability and hence the penalties incurred by individual participants in the conspiracy. If the article were recast in that way, he believed it would command general support. Each participant in the conspiracy was responsible not only for acts he had committed personally, but also for all acts committed

collectively by his co-conspirators in the plan, even if he himself had not been present when the acts had been committed. However, the degree of culpability and the sentence would depend on the individual's involvement in the execution of the common plan.

55. He could not agree with the solution adopted in the Charter of the Nürnberg Tribunal, which had restricted the application of conspiracy to crimes against peace, and noted that, in the 1954 draft code, the Commission had extended the concept to cover all crimes against the peace and security of mankind. Genocide and *apartheid*, which were directed not against the State, but against ethnic, religious, racial, tribal or cultural groups, were precisely the types of crimes which could not be committed by single individuals, but only by organized groups, usually with the involvement of a State, working collectively in a conspiracy to achieve a common criminal objective.

56. In draft article 17, it would have been preferable to define "attempt" along the lines of the first sentence of paragraph 65 of the report. Despite the doubts raised by previous speakers, he was inclined to agree with the Special Rapporteur's conclusion (*ibid.*, para. 67) that, in the case of crimes such as genocide and *apartheid*, attempt should not be ruled out as a crime against humanity.

57. The Special Rapporteur was to be commended for dealing in part II of his report with a problem—illicit traffic in narcotic drugs—that was now generally recognized as a major threat to mankind. The report (*ibid.*, para. 74) drew attention to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In addition, article 108 of the 1982 United Nations Convention on the Law of the Sea required all States to co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas.

58. He considered that illicit traffic in narcotic drugs was a crime against humanity rather than a crime against peace and that attention should therefore focus on international co-operation in fighting the threat which such trafficking represented for the international community. International co-operation, not the unilateral self-help all too often resorted to by individual States, should be the watchword. As to the wording of the proposed provision, he was pleased to note that the Special Rapporteur's new draft, circulated in unofficial translation, provided a revised definition of the crime and that paragraph 1 of draft article X had been dropped.

59. The Special Rapporteur should be further commended for the efforts he had made to comply with the requests by the Commission and the General Assembly for a preliminary study on the statute of an international criminal court, which most members considered to be an indispensable part of any meaningful code of crimes against international peace and security. The presentation of a questionnaire-report in part III of the eighth report offered the Commission an opportunity to address some of the crucial issues involved in the establishment of an international criminal court. Like those of previous speakers, his views at present were

¹² See 2150th meeting, footnote 9.

¹³ See 2152nd meeting, footnote 13.

preliminary and might be revised or abandoned in the light of subsequent debate.

60. Proposals on the question of the competence of the court had to be realistic in order to be broadly acceptable. In the present circumstances, even allowing for the favourable climate currently prevailing on the international scene, States were unlikely to go further in derogation of their sovereignty than to accept an international criminal court whose competence was confined to the gravest crimes affecting the peace and security of mankind. For that reason, he preferred version A submitted by the Special Rapporteur (*ibid.*, para. 80). While the provision excluded jurisdiction over States, it should not preclude the possibility of jurisdiction over legal persons such as corporations, which might be involved in the furtherance or facilitation of crimes under the code.

61. With regard to the question of the necessity or non-necessity of the agreement of other States, he noted that version A (*ibid.*, para. 84) was based on article 27 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.¹⁴ Version A was a practical and all-encompassing provision, provided that it was not construed to mean that the State in question could confer jurisdiction upon the court only by becoming a party to its statute or to the code. It should be possible for the State in question to confer such jurisdiction on a case-by-case basis even without becoming a party to the statute.

62. Referring to the procedure for appointing judges, he said that, while it might be possible to envisage *ad hoc* tribunals along the lines suggested by Mr. McCaffrey at the previous meeting, his own preference would be for the establishment of a permanent international court, whose impartiality would thus be guaranteed. Moreover, in view of the grave nature of the crimes in question, the appointment of judges should not be limited to the States parties to the statute of the court. He was therefore in favour of version A submitted by the Special Rapporteur (*ibid.*, para. 86). Despite the differences between the proposed court and the International Court of Justice, which was an organ of the United Nations established under the Charter, he would not rule out the possibility that the Security Council should have a role similar to the one it played in electing Judges of the ICJ as a further guarantee of the broadest international acceptance.

63. Since the cases to be tried would involve the most heinous crimes against the peace and security of mankind, the broadest possible provision should be made for their submission to the court. Any possibility of genuine cases being suppressed by a political organ such as the Security Council had to be precluded. The court must not become a place for trying criminals from small States while the major Powers shielded their own through their power of veto. He therefore preferred version A submitted by the Special Rapporteur in that connection (*ibid.*, para. 88).

64. With regard to the functions of the prosecuting attorney, version A (*ibid.*, para. 90) was the more prac-

tical alternative. The pre-trial examination procedure, which was intended to exclude frivolous prosecution, but which was not common to all national systems, had no place in the statute of an international criminal court. If, in the court's view, the evidence was insufficient to sustain a case, the court itself should have the competence to dismiss the case after hearing the case for the prosecution, but without putting the accused to his defence.

65. On the question of the authority of *res judicata* by a court of a State, he considered that the *non bis in idem* rule should be upheld and therefore supported version A (*ibid.*, para. 93). Allowing a case to be reopened if another State was of the view that the judgment of the first State was not based on a proper appraisal of the law or of the facts or was inadequate would seriously challenge State sovereignty and lead to unnecessary friction among States and the court.

66. The text proposed by the Special Rapporteur on the authority of *res judicata* by the court (*ibid.*, para. 96) was generally acceptable, but he wondered what would happen in a situation where a case had been referred to the court and then withdrawn, for whatever reason. Such withdrawal of a complaint should not prevent another concerned State from instituting proceedings on the same complaint before its own court or before the international criminal court. Failing such action by another concerned State, however, it would be unrealistic and impractical, even in the presence of general concern on the part of the international community, to expect the court to proceed with the trial of a case which had been withdrawn. He therefore favoured version A on the withdrawal of complaints (*ibid.*, para. 98).

67. With regard to penalties, there was a growing aversion to the death penalty and other cruel and degrading punishment, including corporal punishment. While he was aware that such sentences continued to be applicable in many countries, including his own, there was a growing body of public opinion in favour of their abolition. That trend was reflected in the proceedings of the Commission on Human Rights and other human rights bodies, as well as in the increasingly common practice in extradition treaties of excluding extradition if the individual was liable to receive a sentence of death. As a progressive body, the International Law Commission should therefore opt for version C (*ibid.*, para. 101).

68. A related issue, which Mr. McCaffrey had raised at the previous meeting, was that of the country in which the sentence should be executed. While understanding the apprehensions expressed in connection with the solution whereby the sentence was carried out in the complainant State, he was equally doubtful, in the light of recent developments in the "Rainbow Warrior" case, whether it was appropriate that the sentence should be carried out in the State of the criminal's nationality. Since the possibility of the establishment of an international penal institution seemed remote, despite the quadripartite prison for Nazi war criminals operated until recently in Berlin, it appeared logical that the sentence should be carried out—with, of

¹⁴ See 2150th meeting, footnote 8.

course, all the necessary guarantees—in the complainant State.

69. Turning to the question of financial provisions, he said that he found neither of the texts submitted (*ibid.*, para. 106) to be satisfactory. In view of the gravity of the crimes in question, the General Assembly, as the only representative of the international community, could surely be expected to bear the costs of an international criminal court, particularly if its role in electing the judges were maintained. Such a solution would guarantee not only the court's impartiality, but also its general acceptability.

The meeting rose at 1 p.m.

2157th MEETING

Tuesday, 15 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/419 and Add.1,² A/CN.4/429 and Add.1-4,³ A/CN.4/430 and Add.1,⁴ A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

ARTICLES 15, 16, 17, X AND Y⁵ and

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (continued)

1. Mr. SOLARI TUDELA, referring to part III of the eighth report (A/CN.4/430 and Add.1) on the statute of an international criminal court, said that he wished first to make a general comment on the

¹ 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.

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

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

⁴ *Ibid.*

⁵ For the texts, see 2150th meeting, para. 14.

questionnaire submitted by the Special Rapporteur. In the inter-American system, defendants enjoyed among other guarantees the right to appeal to a higher court. That guarantee was embodied in the 1969 American Convention on Human Rights and other human rights instruments currently in force. The Special Rapporteur might perhaps take that into account in his next report.

2. With regard to the first point dealt with in the questionnaire, namely the competence of the court, he said that, of the two versions submitted (*ibid.*, para. 80), one limiting the court's jurisdiction exclusively to the crimes referred to in the code and the other empowering the court to try not only those crimes, but also other offences defined as crimes by the other international instruments in force, the second seemed to be preferable for the practical reasons set out in the report (*ibid.*, para. 83).

3. The Special Rapporteur had also submitted two versions on the procedure for appointing judges (*ibid.*, para. 86), providing for their election either by the General Assembly or by representatives of the States parties to the statute of the court. Like Mr. Eiriksson and Mr. Díaz González (2156th meeting), he thought that the precedent of the International Court of Justice should be followed, in view, on the one hand, of the positive experience acquired in the matter and, on the other, of the opportunity thus offered to involve the permanent members of the Security Council in the election.

4. With regard to the submission of cases to the court, he favoured the first of the three texts proposed by the Special Rapporteur (A/CN.4/430 and Add.1, para. 88), which would allow any State Member of the United Nations to bring cases before the court. Under all three texts, only States would have the right of submission, as the Statute of the ICJ also provided, but with the difference that the proposed criminal court would have to try individuals. Accordingly, it might also be useful to explore the possibility of not granting the right of submission exclusively to States, but to extend it to international organizations, non-governmental organizations, national organizations and even private individuals. Of course, the right should not be available to individuals directly, but indirectly through an organ that would examine the substance of their complaints. There was after all nothing new in such a procedure. For example, the Inter-American Court of Human Rights heard not only petitions of States, but also indirectly those of private persons or groups of persons, in which case the petitions were sent to the Inter-American Commission on Human Rights, which, if it found them admissible, brought them before the court. It would be a good idea, in the case of war crimes, to give, for example, ICRC the right of submission to the court and, in the case of environmental damage, to grant it to environmentalist movements, which would be in a much better position to exercise the right than States themselves, whose room for manoeuvre might be hampered by the exigencies of international relations.

5. On the question of the prosecuting attorney, he preferred version B (*ibid.*, para. 90), for the reasons

given by the Special Rapporteur (*ibid.*, para. 91). He also approved of the text submitted on pre-trial examination (*ibid.*, para. 92). He supported version B on the authority of *res judicata* by a court of a State (*ibid.*, para. 93), and endorsed the text submitted on the authority of *res judicata* by the international court (*ibid.*, para. 96).

6. The consequences of the withdrawal of a complaint would depend on the competence of the court. If it was limited exclusively to crimes against the peace and security of mankind, the withdrawal of a complaint could not, *ipso facto*, entail the discontinuation of the proceedings. But if it was extended to other offences defined as crimes by the international instruments in force, then in some cases the withdrawal of a complaint might, *ipso facto*, entail the discontinuation of the proceedings.

7. He had a general comment to make on penalties (*ibid.*, para. 101). The American Convention on Human rights leaned towards the elimination of the death penalty in prohibiting States parties which had abolished it from re-establishing it (art. 4, para. 3). That was why he rejected the version allowing the possibility of imposing the death penalty. Furthermore, under the American Convention, the prison term imposed must have as an essential aim the reform and social readaptation of the prisoner (art. 5, para. 6). In view of the inter-American system, he could therefore not approve of the version providing for life imprisonment, for that amounted to denying the possibility of social readaptation. Nor could he approve of the idea of a sentence of imprisonment for such a long period as to be comparable to life imprisonment. Accordingly, none of the three texts proposed by the Special Rapporteur satisfied his wishes.

8. Lastly, for practical reasons, he was in favour of version B on financial provisions (A/CN.4/430 and Add.1, para. 106).

9. Mr. ILLUECA recalled what Mr. Díaz González had said at the previous meeting when he had drawn attention to the participation of the countries of Latin America in the fight against illicit traffic in narcotic drugs and had stated his belief that such traffic should be made a crime against the peace and security of mankind, while pointing out that, in the fight against illicit trafficking, an act of aggression against a small country and the violation of its sovereignty also constituted crimes against peace. He had also paid a tribute to Simon Bolívar, "El Libertador", who, at the Congress of Panama in 1826, had sought means of institutionalizing concerted action by the countries of Latin America to defend their peoples against domestic despotism and foreign domination. Referring to the traffic in narcotic drugs, Mr. Díaz González had cited cases in which the great Powers had intervened brazenly in third countries, scorning the rules which militated in favour of the peace and mankind in international relations. He had mentioned the historical example of China, on which the Western Powers had once imposed the use of narcotic drugs, and the example of Panama.

10. In that connection, he wished to make a statement—a personal one, of course, since he did not hold and had not held for six years any public post in his country's Government. Illicit traffic in narcotic drugs had become for several Latin-American countries a destabilizing factor which undermined the institutions of States and the economic, social and cultural situation of peoples. As a centre of communications and sea, air and land transport, Panama had had to pay a higher price than other countries from the humanitarian, political, economic and social standpoints, owing to transnational criminal activities and action to combat them. In that exorbitant price should be included in particular the military invasion and occupation of the country by the United States of America in December 1989. He had no wish to take sides for or against General Noriega, who was accused by the United States of drug trafficking and whom that country had wished to take into custody and bring to trial, but he thought that, when it was a matter of defending his country's honour, questions of personalities paled before the imperative need to put an end to the military and foreign occupation and to restore the sovereignty, independence and territorial integrity of Panama.

11. The results of the inquiry carried out by the organization Americas Watch, reported by the newspaper *El País* on 11 May 1990, gave some idea of the extent of the hardship suffered by Panama's civilian population. The United States troops, the country's now disbanded defence forces and their paramilitary groups—the so-called dignity battalions—had clearly violated the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War during the largest military operation carried out by the United States since the war in Viet Nam, totally destroying a densely populated district of Panama City located near the headquarters of the defence forces: many civilians had been killed on that occasion. According to the Americas Watch report, the invasion forces had not discharged their responsibilities when drawing up the list of victims among the civilian population and the enemy forces and had not fulfilled their obligations with regard to the thousands of Panamanians who had been left homeless and who were entitled to full compensation.

12. In the fifth preambular paragraph of the Political Declaration on international co-operation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances,⁶ adopted two months after the invasion of Panama, the States Members of the United Nations reaffirmed their determination to combat the scourge of drug abuse and illicit trafficking in narcotic drugs and psychotropic substances in strict conformity with the principles of the Charter of the United Nations, the principles of international law, in particular respect for the sovereignty and territorial integrity of States, the principle of non-interference in the internal affairs of States and non-use of force . . .

All those principles had been violated in Panama, as the General Assembly had recognized in its resolution 44/240 of 29 December 1989 on the effects of the military intervention by the United States of America in Panama on the situation in Central America, in

⁶ General Assembly resolution S-17/2 of 23 February 1990, annex.

which the Assembly demanded full respect for and strict observance of the letter and spirit of the Torrijos-Carter Treaties on the Panama Canal and also demanded immediate cessation of the intervention and the withdrawal from Panama of the armed invasion forces of the United States.

13. The case of Panama posed a serious problem to Latin America, not only because of the colonialism of which the military invasion and occupation by the United States was typical, but also because of the consequences for the future of Latin America. Panama gave the impression of a destabilized region, quite unaffected by the upheavals in Eastern Europe and the consequent changes on the world social and political scene.

14. He welcomed with satisfaction the new draft article on illicit traffic in narcotic drugs submitted by the Special Rapporteur, which had just been circulated (see para. 26 below), but he thought that the word "illicit" should be inserted after the opening word "Any".

15. Turning to the questionnaire-report on the statute of an international criminal court in part III of the Special Rapporteur's eighth report (A/CN.4/430 and Add.1), he said that version A on the competence of the court (*ibid.*, para. 80) was more satisfactory than version B as matters stood at present.

16. With regard to the necessity or non-necessity of the agreement of other States, four principles were at play in version A (*ibid.*, para. 84): the principles of territoriality, nationality, protection of interests and passive personality. Given those principles, it was also necessary to invoke in some cases the principle of universality, applicable to acts which aroused universal condemnation and whose perpetrators were regarded as enemies of mankind liable to trial by the State which held them. He had in mind cases of piracy *jure gentium* and, following the Nürnberg Trial, war crimes. The alarming escalation in the illicit production of and traffic in narcotic drugs and their unanimous condemnation by the international community justified placing that crime in the same category. Apart from that, version A was acceptable.

17. Concerning the procedure for appointing judges, several members of the Commission had adduced weighty arguments in favour of the same method of election as the one used for Judges of the International Court of Justice. He therefore supported the proposed version A (*ibid.*, para. 86).

18. Version A on the submission of cases to the court (*ibid.*, para. 88) was also satisfactory. On the functions of the prosecuting attorney, version B seemed wiser than version A (*ibid.*, para. 90). As for the proposed text providing for a committing chamber (*ibid.*, para. 92), just as article 26 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction⁷ no longer seemed suited to the circumstances in the case of submission, so article 33 of that draft, on the committing chamber, would be a source of complications.

19. Version B on the authority of *res judicata* by a court of a State (*ibid.*, para. 93) was acceptable, as was the proposed text on the authority of *res judicata* by the international court (*ibid.*, para. 96). He had no objection to the arguments given by the Special Rapporteur (*ibid.*, para. 100) in support of version B on the withdrawal of complaints.

20. He understood the considerations of caution which had prompted the Special Rapporteur to draft three alternative texts on penalties (*ibid.*, para. 101). Those three texts contrasted with the principle *nullum crimen, nulla poena sine lege*, which had a direct impact on the punishable nature of an act and was expressed as the rule *nullum crimen sine poena*.

21. Lastly, experience counselled him to approve version A on financial provisions (*ibid.*, para. 106).

22. Mr. THIAM (Special Rapporteur) said that he had revised the draft articles proposed in parts I and II of his eighth report (A/CN.4/430 and Add.1) to take account of the criticisms formulated with respect to them.

23. Referring to the revised draft article 15 on complicity, he pointed out that he had deleted the word "order" in paragraph 2 (b) of the text just circulated because an unlawful order was an autonomous crime and the person giving the order had to be treated on an equal footing with the perpetrator. The Drafting Committee would have to deal with that aspect of the question and would also have to give further thought to the wording of paragraph 2 (c), relating to complicity *a posteriori*. The revised text read:

Article 15. Complicity

1. Participation in the commission of a crime against the peace and security of mankind constitutes the crime of complicity.

2. The following are acts of complicity:

(a) aiding, abetting or provision of means to the direct perpetrator, or making him a promise;

(b) inspiring the commission of a crime against the peace and security of mankind by, *inter alia*, incitement, urging, instigation, threat or abstention, when in a position to prevent it;

[(c) aiding the direct perpetrator, after the commission of a crime, to evade criminal prosecution, either by giving him refuge or by helping him to eliminate the evidence of the criminal act.]

24. The revised draft article 16 read:

Article 16. Conspiracy

1. Participation in a common plan to commit any of the crimes defined in this Code constitutes conspiracy.

2. Conspiracy means any agreement between the participants to commit jointly a crime against the peace and security of mankind.

25. The revised draft article 17 read:

Article 17. Attempt

1. Attempt to commit a crime against the peace and security of mankind constitutes a crime against the peace and security of mankind.

2. Attempt means any commencement of execution of a crime against the peace and security of mankind that failed or was halted only because of circumstances independent of the perpetrator's intention.

26. Lastly, he proposed the following revised text combining draft articles X and Y on illicit traffic in narcotic drugs:

Any mass traffic in narcotic drugs organized on a large scale in a transboundary context by individuals, whether or not acting in associ-

⁷ See 2150th meeting, footnote 8.

ation or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against peace and a crime against humanity.

In that connection, he took note of the suggestion by Mr. Illueca that the word "illicit" should be inserted after the opening word "Any".

27. The CHAIRMAN, speaking as a member of the Commission and referring to part III of the Special Rapporteur's eighth report (A/CN.4/430 and Add.1), said that the Commission's task was not to draft the statute of an international criminal court, since the General Assembly had not taken a decision to establish such a court. It had merely encouraged the Commission to explore further all possible alternatives on the question (para. 2 of General Assembly resolution 44/32) and had requested it to address the question of establishing an international criminal court or other international criminal trial mechanism (para. 1 of resolution 44/39). The Commission's first task was therefore to explore seriously the issues of principle relating to the establishment of an international criminal court and the feasibility of such a court. Accordingly, the Special Rapporteur had been wise to submit part III of his report in the form of a questionnaire dealing with specific issues relating to the statute of an international criminal court.

28. In order to combat international crimes of ever-increasing seriousness, including illicit drug trafficking, and to give teeth to the code, the ideal solution would, of course, be to establish an international criminal court as an expression of international co-operation and solidarity. In practice, however, the very principle of the establishment of an international criminal court gave rise to a number of problems that were difficult to resolve.

29. One of those problems, and perhaps the most important one, was the result of the current state of international relations. Very few States would be prepared to surrender even a small part of their sovereignty in respect of jurisdiction. The Nürnberg and Tokyo Tribunals, which advocates of an international criminal jurisdiction often cited as examples, could not serve as models because they had been set up under extraordinary circumstances. It was difficult to see how major war criminals who were the rulers of an aggressor State could be brought before an international court unless the State concerned had suffered a complete military defeat and had surrendered unconditionally. Proponents of the establishment of an international court also often cited the relevant provisions of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, but the wording used in those instruments was very guarded. Moreover, although those two instruments did provide for the possibility of establishing an international criminal court, it had to be recognized that the States parties had taken no positive steps in that direction.

30. Under the circumstances, the rule of universal jurisdiction expressed in the formula "obligation to try

or extradite" might make it possible to reconcile State sovereignty and international co-operation to combat international crimes. In view of the seriousness of certain international crimes, however, that formula, which had been used with some success in certain conventions, might, in the present case, not fully meet the needs of the international community. In the resolutions to which he had referred, the General Assembly had envisaged solutions other than the establishment of an international criminal court. In exploring that question, the Commission should therefore be more imaginative, bearing in mind the reality of international relations. Idealism rarely helped to solve problems of a practical nature.

31. Turning to the specific questions raised by the Special Rapporteur in the questionnaire-report, he noted that, if an international criminal court were to be established, it would have to be based on a multilateral convention adopted within the framework of the United Nations.

32. He considered that it would be unwise and too ambitious to extend the competence of the court to all international crimes, which were legion. He therefore preferred version A on that point (A/CN.4/430 and Add.1, para. 80), which specified that the court would deal only with the crimes referred to in the code, including international illicit drug trafficking. When international relations had genuinely improved and the international criminal court had proved its effectiveness, then its competence could be broadened.

33. With regard to the attribution of jurisdiction, the basic idea embodied in article 26 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction⁸ deserved serious consideration. The mere fact that a State was a party to the statute of the court did not warrant the assumption that it agreed to confer jurisdiction upon it. Once it was established, the court could have jurisdiction only with the consent or express agreement of the States parties to its statute. Jurisdiction could be attributed to the court by convention, by special agreement or by unilateral declaration. The Special Rapporteur had submitted two alternative texts on the matter (*ibid.*, para. 84). He himself had no objection to version A, which emphasized the fact that jurisdiction had to be attributed to the court by the State whose courts had possible jurisdiction over the alleged perpetrator of a crime under the code, either by reason of the nationality of the alleged perpetrator or of the victims of the crime or by reason of the place of commission of the offence.

34. On the submission of cases to the court, he preferred version B (*ibid.*, para. 88), which provided that cases could be brought before the court only by States parties to the statute.

35. As some members of the Commission had already pointed out, it was not wise to leave it to the complainant to appoint the prosecuting attorney. The task of prosecution should be the responsibility of a collegiate body whose members would be elected by the States

⁸ *Ibid.*

parties to the statute. That formula would perhaps offer a better guarantee of impartiality.

36. The imposition of penalties was an indispensable element of criminal law. Any statute for an international criminal court would have to provide for the power of the court to pronounce penalties. That question was, however, a very complicated one. As the Special Rapporteur admitted (*ibid.*, para. 105), criminal penalties not only varied according to the times and according to country, but also involved moral, philosophical and religious concepts. Apart from the problem of penalties themselves, there was the still more complex problem of the mechanism for their enforcement. To entrust that task to a single State was perhaps not a good solution.

37. Lastly, concerning financial provisions for the establishment of a court, he did not think that a fund should be established, because undesirable pressures might thus be exerted on the court.

38. Mr. RAZAFINDRALAMBO welcomed the fact that, on the initiative of the Government of Trinidad and Tobago,⁹ the General Assembly had finally included the question of an international criminal court in its agenda and requested the Commission to consider the possibility of establishing an international criminal court or other international criminal trial mechanism.

39. It must be remembered, however, that the Special Rapporteur himself had already suggested that, in due course, consideration should be given to the steps to be taken for the implementation of the code and, in particular, to the formulation of a statute for a supranational criminal court. General Assembly resolution 44/39 of 4 December 1989 therefore simply echoed the concerns of the Special Rapporteur and the Commission. The adoption of that resolution had, moreover, taken place at a particularly favourable time. The international situation and the new climate of inter-State relations held out hope for a less antagonistic attitude on the part of States which had so far been opposed to the formulation of a code of crimes against the peace and the security of mankind.

40. In order to have a clearer understanding of the Special Rapporteur's approach in preparing the questionnaire contained in part III of his eighth report (A/CN.4/430 and Add.1), it was appropriate to refer back to the Commission's mandate. The Commission was not being requested merely to patch up the 1954 draft code. The General Assembly had entrusted it with the more ambitious task of drawing up a list of crimes against the peace and the security of mankind, together with provisions relating to implementation and, in particular, the setting up of a mechanism for sanctioning any violation of the code. It was, moreover, in that spirit that the Special Rapporteur had always worked, since the draft articles which he had undertaken to formulate would include a part relating to general principles, a catalogue of crimes and a part dealing with the implementation of the code, in other words with criminal procedure and jurisdiction, both national and international.

41. In paragraph 1 of its resolution 44/39, the General Assembly had requested the Commission to address the question of establishing an international criminal court or other international criminal trial mechanism during its work on the elaboration of the draft code, thereby endorsing the approach the Commission had followed thus far. According to the General Assembly, the statute of the criminal court should form an integral part of the code. The court would have jurisdiction to try the crimes covered by the code, but not all international crimes *lato sensu*. That was the main difference between the mandate of the 1953 Committee on International Criminal Jurisdiction and that of the Commission. The international criminal court envisaged by the 1953 Committee had been intended to deal with international crimes in general. It was therefore not at all surprising that the revised draft statute prepared by that Committee¹⁰ had contained provisions on jurisdiction (arts. 26 and 27) similar, *mutatis mutandis*, to those of Article 36 of the Statute of the International Court of Justice.

42. The international criminal court envisaged by the General Assembly would be intended to try various crimes which threatened the peace and security of mankind and were characterized by their extreme gravity. It was therefore inconceivable that States would agree to remove one or another of those crimes from the jurisdiction of the court.

43. During the discussion, reference had been made to the more or less close relationship that should exist between the United Nations and the court. As he saw it, the court would be viable only if it were established in the framework of the United Nations and were placed under the authority of the General Assembly. It was only on that condition that its activities, which were bound to encroach upon State sovereignty, could be accepted by States.

44. The question of the modalities for the establishment of the international criminal court did not really arise because its statute would have to be adopted at the same time as the other parts of the code.

45. Some members of the Commission had raised the question whether the court was to be a permanent or an *ad hoc* body. In his view, an *ad hoc* court would not be in keeping with the requirements of independent and universal justice and would not enjoy the credibility and respect that were essential to its operation. There was, of course, the precedent of the *ad hoc* chambers of the ICJ, but it must be remembered that those chambers were part of a permanent institution and benefited from all the resulting advantages. An *ad hoc* criminal court would be similar to an *ad hoc* arbitral tribunal constituted to deal with a specific case. That type of jurisdiction, which was not based on any pre-existing structure, had so many drawbacks that, as far as arbitration was concerned, there was more and more of a tendency to turn to permanent institutions, whether of an international or of a regional nature.

46. The question of the level of jurisdiction of the court had also been raised. Would it adjudicate in first

⁹ See A/44/195.

¹⁰ See 2150th meeting, footnote 8.

instance, on appeal or even on review? One thing was certain: since the court would be born of a partial surrender of judicial sovereignty by States, it could only be sovereign itself and its decisions had to be final. It could therefore not try cases in first instance. Provision might, however, be made, as proposed by Mr. Eiriksson (2156th meeting), for a mode of operation based on a system of small chambers to consider cases in first instance, subject to the right for the parties to appeal to the full court or make an application to it for review. That was, for example, the way in which the Supreme Court of Madagascar operated.

47. He did not believe that an international criminal court could have jurisdiction to consider on appeal or review cases decided by national courts. The 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide did provide for the concurrent jurisdiction of national courts and an international criminal court, but, in practice, it was unlikely that a State which had elected to bring a case before a national court rather than the international court would later agree to have the decision of the former reviewed by the latter.

48. Of course, the international criminal court would have the power to review its own decisions, particularly in the event of the discovery of decisive new facts or documents, since review was based on the general principles of law which, as the ILO Administrative Tribunal had recognized on several occasions, applied even in the absence of texts. At a later stage, the Commission would also have to address the crucial question of the enforcement of the court's decisions.

49. In the light of those general considerations, he would comment on some essential points raised in part III of the report.

50. With regard to the jurisdiction of the court, the Special Rapporteur proposed a remarkably concise and precise text in version A (A/CN.4/430 and Add.1, para. 80) which dealt with both jurisdiction *ratione personae* and jurisdiction *ratione materiae*. According to that text, only natural persons would be subject to the jurisdiction of the court. Having started from the assumption that the code could deal only with the criminal responsibility of individuals, the Commission could hardly extend the jurisdiction of the court to crimes committed by public or private entities—as some members of the Commission had suggested during the debate—before knowing the position of Governments on the question of the criminal responsibility of the State. It should be noted in that connection that the word “entities”, which was used in the explanatory memorandum presented by Trinidad and Tobago,¹¹ did not appear in paragraph 1 of General Assembly resolution 44/39.

51. As to jurisdiction *ratione materiae*, the international criminal court would, as stated in the above-mentioned version A, deal only with crimes referred to in the code, namely crimes against the peace and

security of mankind. The Commission could not suggest a different solution, which would dissociate the statute of the court from the rest of the code. That would be contrary to the letter and spirit of the mandate it had received from the General Assembly, which was to elaborate the statute of an international court having jurisdiction to try persons alleged to have committed the crimes referred to in the code.

52. That allegation was enough to justify the initiation of what was known in traditional criminal procedure as a “public action”—the lodging of a complaint against an individual accused of having committed a crime under the code. He was inclined to think that the lodging of a complaint should not be subject to the agreement of a State, regardless of the link between the crime committed or its alleged perpetrator and that State. The principle which should apply was that of universality. The Special Rapporteur had therefore been perfectly right to withdraw item 1 (b) (Necessity or non-necessity of the agreement of other States) of the list of points submitted for consideration in the questionnaire-report (*ibid.*, para. 79).

53. With regard to the submission of cases to the court, he wished to adopt a maximalist position. In view of the specific nature of crimes against the peace and security of mankind, all States having an interest in the maintenance of peace and security, in other words all States Members of the United Nations, should be able to submit cases to the court. Mr. Solari Tudela had even proposed that that right be extended to non-governmental organizations. In that connection, it should be recalled that, in considering State responsibility, the Commission had agreed that, in the event of an international crime, all States other than the author State were deemed to be injured. Would it be going too far also to agree that, in the event of a crime against the peace and security of mankind, all States could legitimately consider that they were entitled to defend the interests of the international community and thus to institute a kind of *actio popularis*?

54. He therefore supported the proposed version A (*ibid.*, para. 88). Versions B and C were based on the assumption that the statute of the international criminal court would be dissociated from the code and that States could become parties to one without being parties to the other. That assumption was, however, totally incompatible with the Commission's mandate.

55. It was essential to establish strict and precise rules for the submission of cases to the court, for failure to comply with those rules would invalidate the procedure. It was important in that regard to impose a system of rigorous formalism in order to guarantee respect for the rights of the defence.

56. The application of procedural rules meant that there would have to be a permanent prosecution body composed of experienced jurists selected according to the same criteria as judges and enjoying the same status. The main task of that body would be to receive complaints, carry out all procedural actions preparatory to the criminal proceedings and draw up

¹¹ A/44/195, annex.

the indictment to be expanded on during the trial hearing. Pre-trial examination should take place exclusively in public in accordance with the adversary system. He could not therefore agree with the idea of appointing examining magistrates, as was the practice in the inquisitorial system.

57. The Special Rapporteur had thought it necessary to prepare special provisions on the authority of *res judicata*, but article 7 of the draft code as provisionally adopted by the Commission on first reading,¹² which was included in the general principles and dealt with the *non bis in idem* rule, would be amply sufficient to deal with that question, unless of course it was assumed that the statute would be independent of the code, something which was unacceptable.

58. Lastly, on the question of penalties, he, like other members of the Commission, considered that it was necessary to abide strictly by the *nulla poena sine lege* rule. It was inconceivable that, *de lege ferenda*, the Commission should draw up a list of crimes not accompanied by penalties, leaving it to the judge to apply the penalty he deemed appropriate in each case. The problem was to decide whether to formulate a general provision valid for all crimes against the peace and security of mankind without distinction or to determine what the applicable penalty was in each particular case. Since the crimes under the code were all equally serious, the simplest thing would obviously be to draw up a list of penalties and establish a minimum and a maximum for penalties other than life imprisonment and, possibly, the death penalty.

59. Mr. AL-BAHARNA said that he welcomed the questionnaire-report on the statute of an international criminal court in part III of the eighth report (A/CN.4/430 and Add.1), for, without an international criminal trial mechanism, a code of crimes against the peace and security of mankind would be meaningless. That preliminary report was, moreover, wholly in keeping with article 4 of the draft code, on the obligation to try or extradite, provisionally adopted by the Commission on first reading,¹³ and responded to the request made by the General Assembly in paragraph 1 of its resolution 44/39 of 4 December 1989.

60. The question of an international criminal jurisdiction was not new to the Commission. Indeed, it had been considered as far back as 1950. The 1953 Committee on International Criminal Jurisdiction had prepared a revised draft statute for an international criminal court¹⁴ and various schemes in that connection had also been considered by the Commission. But a number of factors, in particular the delay in adopting a definition of aggression and the preparation of the draft code, had resulted in the postponement of consideration of the issue. The recent upsurge in international drug trafficking, leading to the adoption in 1988 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, had brought the issue to the fore.

61. He would first make a few general observations before commenting on the proposals put forward by the Special Rapporteur.

62. In the first place, he had no doubt as to the desirability of establishing an international criminal court. Such a court would be an improvement on the current system, which involved the obligation to prosecute or extradite. In addition, an international criminal court would perhaps prove to be more objective and impartial than a national court and might also help to promote a uniform and consistent interpretation of the law. But was it feasible at the present stage of international law? Some States had expressed reservations in that connection on the ground that the establishment of an international criminal court would give rise to serious difficulties. It was said that a consensus would be required on many complex issues such as the means of obtaining evidence, the rules of procedure to be applied, the question as to who would conduct the investigation and prosecution and the rules governing sentences and the execution of sentences. Those were undoubtedly practical problems, but they were not insurmountable. The Commission would have to undertake a critical examination of all the issues involved and formulate rules and procedures that were viable and realistic.

63. Secondly, on the question whether the jurisdiction of the court should be limited to the crimes covered by the code or to certain categories only, he had an open mind. While it might be more expedient, in the existing circumstances, to restrict the jurisdiction of the court to well-recognized international crimes, he doubted the wisdom of such a measure. He preferred a flexible procedure, enabling the court to try an increasing number of international crimes, to a "minimalist" or "maximalist" approach. In that connection, he noted that the consent of States had formed the basis of the jurisdiction of the International Court of Justice and, in his view, the Commission should adopt that principle in the present case. Otherwise, it might construct an unduly idealistic system.

64. Thirdly, with regard to the important issue of the structure and organization of the proposed court, once again he had an open mind and would urge the Commission also to have an open mind. On an earlier occasion, the Commission had voiced opposition to the idea of using the ICJ to try international crimes even though it was possible to do so by amending Article 34 of the Court's Statute, but that decision need not stand in the Commission's way. The matter must be examined afresh. As the Commission had been requested by the General Assembly, in paragraph 1 of resolution 44/39, to address the question of establishing an international criminal court or "other international criminal trial mechanism", the Commission should also study the Charters of the Nürnberg and Tokyo Tribunals to see whether they offered any guidance in that regard. Similarly, it should study the constitution and procedural law of the International Tribunal for the Law of the Sea.

65. Fourthly, the question of the relationship between an international criminal court, or other international machinery, and national courts involved both policy

¹² *Yearbook . . . 1988*, vol. II (Part Two), pp. 68-69.

¹³ *Ibid.*, p. 67.

¹⁴ See 2150th meeting, footnote 8.

and technical considerations. At the present time, the crimes of genocide, hijacking and international drug trafficking fell within the purview of national courts. It might be that for policy reasons some States would prefer that system. Assuming, however, that they were willing to accept an international mechanism, in addition to national courts, under what conditions would each jurisdiction be exercised and what would be the relationship between them? Would it be practicable to constitute national courts as courts of first instance, with the international court or machinery sitting as an appeal body? All those and other issues required close examination.

66. Lastly, the question of the proposed court having competence to try States, in addition to individuals, posed special difficulties. The mere fact that a State was a legal person raised theoretical problems. For instance, would the defence pleas available to individuals apply to States? Would the investigatory procedures applicable to individuals apply to States? And could a State be punished in the same way as an individual?

67. In conclusion, he supported in principle the idea of establishing an international criminal court, or an appropriate international mechanism, for the purpose of trying international crimes. If that idea was to take form, however, the Commission must proceed in an extremely statesmanlike manner and produce a plan that would be acceptable to the largest number of States.

68. Turning to the various points raised in the questionnaire-report, he said that he had a flexible attitude with regard to the competence of the court. The questions to be determined were whether the jurisdiction of the court should be limited to the most serious crimes covered in the code, whether it should apply to all the crimes defined in the code and whether it should apply not only to the crimes defined in the code, but also to other international crimes covered by other international instruments. In his view, it would be more logical to adopt the second of those options. Accordingly, he favoured version A submitted by the Special Rapporteur (*ibid.*, para. 80), although he had some reservations about the expression "natural persons", since there was some cogency in the argument that the jurisdiction of the court could properly be extended to "legal entities", some of which should not be exempt from culpability in the case of certain crimes. With regard to the necessity or non-necessity of the agreement of other States, his preference was for version B (*ibid.*, para. 84) and he fully agreed with the Special Rapporteur that version A, which was based on article 27 of the 1953 draft statute, was quite inappropriate.

69. As to the procedure for appointing judges, he preferred version A (*ibid.*, para. 86), for crimes against the peace and security of mankind were of concern to the international community as a whole and not only to States parties to the statute of the proposed court. He had an open mind with regard to the suggestion that the judges be elected not only by the General Assembly, but also by the Security Council, as in the case of Judges of the ICJ.

70. With regard to the submission of cases to the court, like other members he did not agree with versions A and C (*ibid.*, para. 88), as it would be contrary to the rules of general international law to bring a case against a State that was not a party to the statute of the court. Version B was more acceptable, but, as some members had suggested, it should also provide that parties to the code should automatically become parties to the statute of the court.

71. He had no hesitation in accepting version B on the functions of the prosecuting attorney (*ibid.*, para. 90). The functions of the prosecuting attorney, which called for a degree of specialization and technical expertise, were too important for appointment to that office to be left in the hands of the plaintiff State on a case-by-case basis.

72. The text proposed by the Special Rapporteur on pre-trial examination (*ibid.*, para. 92) was, in his own view, an improvement on article 33 of the 1953 draft statute. It therefore did not seem to give rise to any problem at the present stage, although it provided that the number of judges sitting in the committing chamber would be determined by the statute of the court.

73. The Special Rapporteur seemed to favour version B on the authority of *res judicata* by a court of a State (*ibid.*, para. 93), although it would apparently amount to review by, or appeal to, the international criminal court. That text would be acceptable only if the statute of the court included an express provision to that effect. Otherwise, version A, which lay down the *non bis in idem* rule as set forth in article 7 of the draft code,¹⁵ should be retained.

74. He supported the text proposed by the Special Rapporteur on the authority of *res judicata* by the court (*ibid.*, para. 96), but, to enhance the authority of the court, he would prefer the word "may" to be replaced by "shall". He shared the view of other members that a national court should refrain from hearing a case within its jurisdiction if it had been informed that the case had already been brought before the international criminal court. That would avoid a conflict of jurisdiction between the international court and national courts.

75. He preferred version B on the withdrawal of complaints (*ibid.*, para. 98), for, as the Special Rapporteur rightly noted (*ibid.*, para. 100), the crimes in question were of concern to the international community as a whole.

76. In his view, none of the three texts submitted on penalties (*ibid.*, para. 101) was satisfactory. As he had already stated, provision should be made for penalties for each of the crimes covered, failing which the international criminal court could not function or, indeed, exist. Like article 32 of the 1953 draft statute, the proposed texts conferred a general discretion on the court to determine such penalty as it "deems fair". That was not acceptable in a code of crimes against the peace and security of mankind, which called for a definition of penalties. Fines and confiscation of

¹⁵ See footnote 12 above.

property would be the most appropriate penalties for legal entities, should the code be applied to them.

77. With regard to financial provisions, the international criminal court could not, in his view, function properly, independently and continuously as a judicial body if it had to be financed through a fund established by States parties to the statute, as provided for in version B (*ibid.*, para. 106). He therefore supported version A and also considered that the international criminal court, like the ICJ, should be a judicial organ of the United Nations.

78. Many details remained to be settled as to, for instance, the rules of evidence, examination of witnesses, execution of judgments and pre-trial matters. There were also questions concerning police and prisons. Would there be an international police force and international prisons? To whose custody would the accused be committed pending trial? All those questions called for detailed consideration in due course.

79. For the time being, the Commission was required, under paragraph 1 of General Assembly resolution 44/39, to submit a legal opinion to the General Assembly at its next session, not to present a draft statute for an international criminal tribunal, although it might be asked to do so at some time in the future.

80. Mr. KOROMA said that consideration of the question of the establishment of an international criminal court was consistent with the provisional adoption by the Commission of article 4 of the draft code,¹⁶ on the obligation to try or extradite, which was now a general principle of international law, and in keeping with the wishes of the General Assembly, as expressed, in particular, in paragraph 1 of its resolution 44/39 of 4 December 1989. The question had given rise to lengthy discussions which had been both interesting and learned. The Commission and the General Assembly had contributed to it on various occasions. There was every reason to believe that the problems considered, such as State sovereignty and possible conflicts of jurisdiction between the international criminal court and national courts, were not insurmountable.

81. The international criminal court would assist the United Nations in maintaining international peace and security and in encouraging respect for human rights and fundamental freedoms for all, without distinction as to race, colour or creed. It would ensure the implementation of the future code of crimes against the peace and security of mankind and its establishment, together with the adoption of the code, would obviate the criticism of lack of legal force in criminal law which had been levelled in the past against tribunals set up to try crimes on an *ex post facto* basis. The code would thus strengthen the rule of law in international relations, and the international criminal court, if it ever came to be established, would act both as a deterrent and as a safeguard for States whose institutions were currently being threatened.

82. Referring to the question of the competence of the court, he said that, since the Commission had decided that the code should cover only the most serious crimes

against the peace and security of mankind and since States would be unwilling to yield their full sovereignty in respect of all offences, the court's jurisdiction should be limited to those crimes on which there was international consensus. Other offences defined in international instruments already in existence or yet to be adopted could be added at a later stage.

83. As to the necessity or non-necessity of the agreement of other States, he did not consider either of the texts submitted in part III of the eighth report (A/CN.4/430 and Add.1, para. 84) comprehensive enough, since both proposals would imply the consent of Governments guilty of having organized or tolerated criminal acts. The international criminal court should have universal jurisdiction; in other words, it should be empowered to try crimes wherever they had been committed. In that connection, he asked whether the words "competence" and "jurisdiction" were being used interchangeably.

84. Concerning the appointment of judges, he was in favour of election by the General Assembly by an absolute majority. The Commission should borrow from the Statute of the International Court of Justice by stipulating that candidates should be persons of recognized competence in international law and that the main legal systems should be represented. The number of judges would also have to be determined.

85. With regard to the submission of cases to the court, it would be advisable, in view of the gravity of the crimes under consideration, to provide that cases might be brought before the court by any State Member of the United Nations subject to the agreement of the United Nations organ specified in the statute of the court. However, as Mr. Solari Tudela had suggested, international organizations, non-governmental organizations or even private individuals should be allowed to bring cases where States were not prepared to prosecute their own nationals. Some non-governmental organizations had proved their worth in the field of international humanitarian law and could be regarded as impartial institutions. The proposal should certainly be borne in mind.

86. Concerning the functions of the prosecuting attorney, he would be in favour of setting up a college and a permanent secretariat which would assist the prosecuting attorney in charge of a case and deal with its institutional aspects. Such a system would preserve what was known as "institutional memory".

87. With regard to pre-trial examination, he said that the committing chamber proposed by the Special Rapporteur offered an acceptable solution. However, the types of verdict which such a chamber could return should be specified; could it, for example, decide to dismiss the charge? The nature of the action that could be taken following the verdict should also be specified; for example, would there be a right of appeal? In that connection, he said that a hierarchy of appeal procedures within the court could be visualized thanks to the committing-chamber process.

88. Penalties should be stipulated for every crime. No one was in favour of cruel or inhumane forms of punishment, but the Commission had to try to find a

¹⁶ See footnote 13 above.

rational basis for agreement on that point. The impression should be avoided that the court had the interests of the accused more at heart than those of the victim. Furthermore, penalties varied very considerably between different courts and even between the States of a federation. Penalties would therefore have to be rationalized, it being borne in mind that the crimes covered by the code were extremely serious ones and that, therefore, excessive indulgence should not be shown. As a matter of principle, however, he was against the death penalty.

89. From another point of view, he wished to propose that, in its report to the General Assembly, the Commission should highlight the general standards of fairness embodied in the Universal Declaration of Human Rights, such as the rights of the defence, the authority of *res judicata*, etc.

90. In response to the General Assembly's request in resolution 44/39 concerning the possible establishment of an international criminal court with jurisdiction over persons engaged in illicit trafficking in narcotic drugs, the Commission should, as Mr. Arangio-Ruiz (2156th meeting) had suggested, forward to the General Assembly the questionnaire in part III of the Special Rapporteur's eighth report, together with the comments made during the discussion. Such an approach would offer a prompt response to the urgent need expressed by the international community.

91. Referring to the new draft articles submitted by the Special Rapporteur (see paras. 23-26 above), he said that the revised text on complicity seemed to be greatly improved in that it drew a clearer distinction between the main perpetrator of the crime and his accomplices, both before and after the event. The revised texts on conspiracy and attempt were also to be welcomed. The revised text on drug trafficking, however, referred only to acts. In his opinion, mention should also be made of criminal intent.

92. Mr. BARSEGOV said that the establishment of an international criminal court, which had been considered necessary for many years, had now become possible. That was the first point the Commission should make in its report to the General Assembly. There were still many obstacles to be overcome, but a change was taking place and it was in keeping with the spirit prevailing in the Soviet Union. As the representative of his country's legal system, he was prepared to go as far as justice and international law would require.

93. The questionnaire form chosen by the Special Rapporteur for part III of his eighth report (A/CN.4/430 and Add.1) was a happy solution and enabled the Commission to comply with the General Assembly's request pending a reply concerning the best possible solutions. The first problem raised was that of the limits of jurisdiction of the proposed international court and it held the key to all the others. It was closely related to the question of the basis for the court's jurisdiction. The possible solutions lay somewhere between two extremes. The first was to consider that a State retained the sovereign right to try its nationals accused of crimes committed in its territory, but that it

might, at its discretion, recognize the competence of the international court. The other was that the jurisdiction of the court would be recognized outside existing political structures and it would try all cases concerning all crimes under the code without such jurisdiction having to be attributed by States.

94. At the present stage in the development of international law, he considered it inappropriate to contrast the idea of an international court with the concept of the sovereign State which had taken shape in the nineteenth century and had been reinforced during the cold war. To make the court a supranational body with jurisdiction independent of the will of the international community would not be very realistic. After all, the rules of international criminal law emanated from States, the establishment of the court was decided upon by States and its jurisdiction was recognized by States, which thereby considerably limited their sovereignty. There were as yet no supranational rules and no supranational legislative organ. The legal basis for the establishment of the court had to be its statute. A State which became party to that statute recognized *ipso facto* the jurisdiction of the international court and, by so doing, agreed to limit its sovereignty.

95. Since what were being discussed were extremely serious international crimes, of which entire peoples could be the victims, the temptation was great to make the court competent to try all international crimes, even including future crimes. However, at the present stage in the development of international law, it was essential to provide a clear definition of the scope and basis of the court's jurisdiction. Only thus would it be possible to overcome the problems that had been encountered during the consideration of that question at a time when State sovereignty had been the main concern. At the present time, when States were still cautious in their approach to the question, the decisive factor was the degree of precision with which the jurisdiction of the court could be defined. If the court was to be able to function properly, it would also be essential to formulate the substantive law. Version A proposed by the Special Rapporteur (*ibid.*, para. 80) would best meet those two concerns: the States parties to the statute would give their consent to the court's having jurisdiction in all cases involving the crimes covered by the code.

96. That did not mean, however, that other States not parties to the statute of the court would not be able to bring before it cases involving other categories of crimes covered by international conventions. General Assembly resolution 260 B (III) of 9 December 1948 provided for such a possibility, which the adoption of the code did not rule out. It might be possible to go even further and provide that the jurisdiction of the court as laid down in its statute, as well as the list of crimes included in the code, could be expanded by adding crimes referred to in international conventions. A question which would arise in both cases was what States would be considered to have recognized the court's jurisdiction with regard to each category of crimes.

97. Of course, if the court became an organ of the United Nations and if the Charter was amended accord-

ingly, its jurisdiction could be recognized by all Member States. But if the court was set up as an autonomous body, it would have jurisdiction in respect of the States parties to its statute, for the crimes referred to in the code, and it might also have jurisdiction in respect of other crimes on the basis of international conventions. It could also be envisaged that cases might be brought before the court on an *ad hoc* basis, even if the State concerned was not a party either to its statute or to the relevant international conventions.

98. In each of those cases, the procedures for the attribution of jurisdiction would be different. But the basis for the court would continue to be its statute, in which definitive recognition of its jurisdiction in respect of the crimes referred to in the code would be enshrined. Consideration might be given to the possibility that the States parties to the statute could choose which crimes under the code were to be subject to the jurisdiction of the court, but that might call in question the very concept of the establishment of an international court or even invalidate it altogether.

99. With regard to competence, the Commission had considered the relationship between the code and the statute of the court. From that viewpoint, the list of punishable criminal acts was of the utmost importance. The code had to cover all crimes which were recognized as such by the international community and whose constituent elements were established. However, the question involved another aspect. As Mr. Roucouas (2156th meeting) had said, the code and the statute were two different things and it would not be possible to speak of the universality of international criminal law unless the code had been widely accepted. In his own view, a further aspect was that of the legal basis for the rules embodied in the code. Those rules could be contained in non-universal conventions but still be universal on account of their customary nature. Thus the 1948 Convention on the Prevention and Punishment of the Crime of Genocide had been ratified by only 90 States, but genocide had been recognized as an international crime even before the Convention's adoption and genocide trials had been held at Nürnberg and before national courts. The charge of genocide therefore had a broader basis than that offered by the Convention. States which were not parties to conventions of that kind could not claim that the provisions of the code relating to the crimes covered by those conventions were not binding on them. It was thus open to discussion whether the words "under international law" in article 1 of the draft code as provisionally adopted by the Commission on first reading¹⁷ should have been placed in square brackets.

100. With regard to the question raised by Mr. Graefrath (2154th meeting) concerning the delimitation of jurisdiction as between national courts and the future international criminal court, national courts and an international criminal court were not necessarily mutually exclusive. The international court would not be able to try all the crimes committed everywhere in the world. However, the coexistence of the two systems

presupposed that the line of demarcation between them had to be clearly marked out and was in keeping with the interests of justice. The international court might thus act as a court of second instance if there were grounds to believe that a judgment of a national court violated international rules or was founded on an erroneous basis (for example, if participation in an act of genocide had been tried as an ordinary crime) or if new facts had come to light. That was not mere speculation, for experience showed that national courts were reluctant to convict nationals of their State who were accused of having committed the crime of genocide in the territory and with the apparatus of that State. If the national courts refused to hear a case even though there were grounds for instituting proceedings, the international court could even try the case as a court of first instance. No human right would be violated as a result. On the contrary, the international nature of the court offered the best guarantee of objectivity and of protection of the rights of both the accused and the victim. He was thinking of a system which would combine the two jurisdictions without, however, ruling out the possibility that, in some cases, the international court would be the only court; that possibility was provided for by some national systems where certain types of cases were tried directly by higher courts and no one suggested that human rights were being violated.

101. The question of the authority of *res judicata* by a national court was closely linked to the principle *non bis in idem*. The Commission's decision on that question should be consistent with the interests of justice. In listening to the discussion, he had had the impression that the Commission had forgotten the decision taken in that regard with the assistance of the late Paul Reuter, who had been instrumental in formulating article 7 of the draft code¹⁸ in the section on general principles. He was thinking of the case where an individual had committed an international crime, such as the crime of genocide, and had been tried by a national court as for an ordinary crime (murder or hooliganism). In such a case, the judgment of the national court would be contrary to international law. It was clear that such judgments should be regarded as violating the rules of the code, which would be compulsory for national courts and for the international court.

102. That was the hypothesis which the Commission had had in mind when drafting paragraph 3 of article 7. The international criminal court, if it came into being, would be able to try the individual for the crime he had actually committed without breaching the *non bis in idem* rule; the reverse, however, would not apply, for a national court could not review the decisions of the international court, which was more competent to characterize crimes under international law. For those reasons, he would prefer version B submitted by the Special Rapporteur on the matter (A/CN.4/430 and Add.1, para. 93), provided its wording was brought into line with that of article 7, paragraph 3.

103. The solution to other types of problems was linked to political rather than legal considerations: the

¹⁷ Yearbook . . . 1987, vol. II (Part Two), p. 13.

¹⁸ See footnote 12 above.

procedure for the appointment of judges and the identification of the entity responsible for conducting the prosecution would depend on the answer to the question whether the court would be an organ of the United Nations and that question was linked to that of the revision of the Charter of the United Nations, an issue which had so far been regarded as very problematical. If the court was a United Nations organ, all Member States of the United Nations would be parties to the statute and the judges would be appointed in the same way as those of the International Court of Justice. Since there could be no certainty that such a solution would be adopted, it would be advisable to consider an alternative whereby the judges would be elected only by the States parties to the statute of the court.

104. The problem of submission of cases to the court was not insurmountable. There again, the solution depended on the court's position *vis-à-vis* the United Nations. If it was an organ of the United Nations, versions A and C (*ibid.*, para. 88) would be the most appropriate. If not, several alternatives, all precluding United Nations participation, would be possible. One would be, for example, to set up a prosecuting attorney's office in the form of a college of judges representing all legal systems, which might be attached permanently to the court and which would also conduct investigations. The solution that would be most in keeping with the nature of crimes under international law was obviously to provide that any State party to the statute of the court could institute proceedings. Account also had to be taken of the danger of political abuse, but such abuse would be neutralized by the court itself as an international body which would be responsible in the final analysis for deciding whether or not to try a particular case.

105. The question of penalties was much more complex than it seemed at first sight. The code should, of course, specify the penalties attaching to each crime, as did national codes. But which scale was to be chosen? How could the various approaches taken in 160-odd penal codes be brought into line with one another? And who would choose between them—the Commission, the Sixth Committee of the General Assembly or some other body? Moreover, most of the international crimes referred to in the code were not covered by national legislations. Establishing a scale of penalties was desirable, of course, but it was hard to see how it could be done: should it range from the minimum provided for in one penal code to the maximum provided for in another? All those questions were still outstanding.

106. There were also many other problems still to be solved, but a solution would be possible only when agreement had been reached on the fundamental issues relating to the establishment of an international criminal court.

The meeting rose at 1.10 p.m.

2158th MEETING

Wednesday, 16 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jaconides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (A/CN.4/415,¹ A/CN.4/422 and Add.1,² A/CN.4/431,³ A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic (A/CN.4/431), in which he again reviewed the whole set of draft articles on jurisdictional immunities of States and their property provisionally adopted by the Commission on first reading at its thirty-eighth session, in 1986,⁴ which read as follows:

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Article 2. Use of terms

1. For the purposes of the present articles:
 - (a) "court" means any organ of a State, however named, entitled to exercise judicial functions;
 - (b) "commercial contract" means:
 - (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
 - (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
 - (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.
2. The provisions of paragraph 1 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 in the internal law of any State.

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

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

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

⁴ *Yearbook* . . . 1986, vol. II (Part Two), pp. 8 *et seq.*

Article 3. Interpretative provisions

1. The expression "State" as used in the present articles is to be understood as comprehending:

- (a) the State and its various organs of government;
- (b) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
- (c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;
- (d) representatives of the State acting in that capacity.

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

Article 4. Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:

- (a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and
- (b) persons connected with them.

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*.

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the said articles for the States concerned.

PART II

GENERAL PRINCIPLES

Article 6. State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law].

Article 7. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its political subdivisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Article 8. Express consent to the exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

Article 9. Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

- (a) itself instituted that proceeding; or
- (b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

- (a) invoking immunity; or
- (b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Article 10. Counter-claims

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

PART III

[LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

Article 11. Commercial contracts

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

- (a) in the case of a commercial contract concluded between States or on a Government-to-Government basis;

- (b) if the parties to the commercial contract have otherwise expressly agreed.

Article 12. Contracts of employment

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

- (a) the employee has been recruited to perform services associated with the exercise of governmental authority;

- (b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

- (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

- (d) the employee is a national of the employer State at the time the proceeding is instituted;

- (e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 13. Personal injuries and damage to property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for

death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 14. Ownership, possession and use of property

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

Article 15. Patents, trade marks and intellectual or industrial property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

Article 16. Fiscal matters

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Article 17. Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or

by the constitution or other instrument establishing or regulating the body in question.

Article 18. State-owned or State-operated ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

(a) a claim in respect of collision or other accidents of navigation;

(b) a claim in respect of assistance, salvage and general average;

(c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in any proceeding there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 19. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity or interpretation of the arbitration agreement;

(b) the arbitration procedure;

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Article 20. Cases of nationalization

The provisions of the present articles shall not prejudice any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual.

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Article 21. State immunity from measures of constraint

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(a) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

(b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Article 22. Consent to measures of constraint

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest.] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

- (a) by international agreement;
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary.

Article 23. Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (a) of article 21:

(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use for military purposes;

(c) property of the central bank or other monetary authority of the State which is in the territory of another State;

(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

PART V

MISCELLANEOUS PROVISIONS

Article 24. Service of process

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any special arrangement for service between the claimant and the State concerned; or

(b) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(c) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(d) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

- (i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or
- (ii) by any other means.

2. Service of process by the means referred to in paragraph 1 (c) and (d) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 25. Default judgment

1. No default judgment shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or is deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgment set aside, which shall be not less than three months from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned, shall begin to run from that date.

Article 26. Immunity from measures of coercion

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

Article 27. Procedural immunities

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Article 28. Non-discrimination

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

2. However, discrimination shall not be regarded as taking place:

(a) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(b) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles.

2. Mr. OGISO (Special Rapporteur) recalled that, at its previous session, the Commission had decided to refer articles 1 to 11 to the Drafting Committee for their second reading, together with the new articles 6 *bis* and 11 *bis* which he had proposed, and to continue consideration of the remaining articles 12 to 28 in the plenary Commission at the present session.⁵ Although he had already reviewed the whole set of draft articles provisionally adopted on first reading in his preliminary report (A/CN.4/415) and second report (A/CN.4/422 and Add.1), in the light of the comments and observations on those articles received from Governments,⁶ he was submitting his third report (A/CN.4/431) with a view to assisting the work of the Drafting Committee as well as the Commission's further deliberations.

3. The part of the third report concerning articles 1 to 11 *bis* was intended mainly for the use of the Drafting Committee and the part relating to the remaining

⁵ *Yearbook* ... 1989, vol. II (Part Two), p. 98, para. 405.

⁶ *Yearbook* ... 1988, vol. II (Part One), p. 45, document A/CN.4/410 and Add.1-5.

articles 12 to 28 for consideration in the plenary Commission. However, since some of the changes he recommended for articles 1 to 11 *bis* could relate to matters of substance, he proposed to touch on those articles first, although they were currently being considered in the Drafting Committee.

4. With regard to the proposed new text of article 2, which combined articles 2 and 3 as adopted on first reading, he wished to draw attention to four points. First, as to the definition of the term "State" in paragraph 1 (*b*), some members of the Commission had expressed the view that a constituent unit of a federal State should be regarded as a State. Although the provision concerning political subdivisions of the State (para. 1 (*b*) (ii)) was intended to include federal constituents entitled to perform acts in the exercise of sovereign authority, he was submitting an additional text (para. 1 (*b*) (i *bis*)), for consideration by the Drafting Committee.

5. Secondly, with regard to the "agencies or instrumentalities of the State" referred to in paragraph 1 (*b*) (iii), the view had been expressed in the Sixth Committee of the General Assembly, as well as in the Commission, that State enterprises should be excluded from that category of entities. Although opposing views had also been expressed, he was proposing an addition at the end of paragraph 1 (*b*) (iii) to the effect that any entity established by the State for the purpose of performing commercial transactions (State enterprise), which had an independent legal personality and was capable of suing or being sued, should be excluded from that category of entities. The new paragraph 1 (*b*) (iii) was related to the substance of draft article 11 *bis* and should therefore be read in conjunction with that article.

6. Thirdly, with regard to paragraph 1 (*c*), he was proposing, in the light of the views expressed in the Sixth Committee and in the Commission, that the expression "commercial contract" be replaced by "commercial transaction", with consequential changes in articles 11, 11 *bis* and 19. The proposed change did not entail any modification of the content of the definition itself.

7. Fourthly, with regard to paragraph 2, a number of Governments favoured the primacy of the criterion of the nature of the transaction, while others considered that the same weight should be given to both the "nature" and "purpose" tests. The text adopted on first reading (art. 3, para. 2) had not fully satisfied all members of the Commission and he was therefore suggesting another compromise proposal, to the effect that, while the primary criterion for determining immunity should be the nature of the transaction, a court of the forum State should be free to take into account the governmental purpose of the transaction.

8. Turning to part II of the draft (General principles), he was proposing the deletion of the bracketed phrase "and the relevant rules of general international law" from article 6 in view of the opposition expressed on various grounds by many members. However, provision should be made for the further development of State practice and international law and, in paragraph

(2) of his comments on article 6, he repeated the suggestion made in his preliminary report that, should the present articles become a convention, the following paragraph should be included in the preamble:

"Affirming that the rules of general international law continue to govern questions not expressly regulated in this Convention".

9. His proposals regarding articles 8 to 10 were technical in nature, and he would refrain from entering into detail about them at the present juncture, but would be pleased to answer any questions.

10. With regard to the title of part III of the draft, he would be interested to hear any reactions to a neutral formulation such as "Activities of States to which immunity does not apply" or "Cases in which State immunity may not be invoked before a court of another State". The latter formulation had been suggested by a member of the Commission, and it would be helpful to the Drafting Committee to learn the views of other members.

11. No further changes were proposed for article 11,⁷ except for the consequential ones resulting from the suggested replacement of the expression "commercial contract" by "commercial transaction" (see para. 6 above).

12. Draft article 11 *bis* had been reformulated to take account of the views expressed at the previous session. The new text made it clear that a State enterprise engaging in a commercial transaction with a foreign natural or juridical person was subject to the same rules and liabilities as were applicable to a natural or juridical person in a forum State, provided that the enterprise satisfied the conditions set out in paragraph 1 (*b*) (iii) of the proposed new article 2. In that case, the State was to be regarded as an entirely separate entity in respect of the commercial transaction of such an enterprise and, if it was sued by the foreign natural or juridical person, the State could invoke immunity from the jurisdiction of the court of the forum State. However, if a State enterprise engaged in a commercial transaction on behalf of the State, or executed a particular commercial transaction as the *alter ego* of the State, such a transaction could be regarded as one between the State and a foreign natural or juridical person, and the provisions of article 11 would then apply.

13. To conclude his comments on the articles which were before the Drafting Committee, he wished to point out that, pursuant to the suggestion made by one Government in its written comments, the expressions "State", "another State" and "other State" had been replaced by "forum State" or "foreign State", as appropriate, in articles 7, 8 and 9. He trusted that the Drafting Committee would consider whether similar changes were desirable in other articles and make appropriate recommendations to the Commission, perhaps on a case-by-case basis.

14. Article 12 presupposed a situation in which an employer State concluded a contract of employment for services or work to be performed in the forum State.

⁷ An amended text for paragraph 1 was proposed by the Special Rapporteur in his preliminary report (A/CN.4/415, para. 121).

The text adopted on first reading appeared to apply the principle of non-immunity to the employer State in paragraph 1, while providing for five exceptions to that principle in paragraph 2 (a) to (e). Since those exceptions were of a most substantial nature, the principle of non-immunity of the employer State was not as extensive as it appeared to be at first glance. The question arose whether the exceptions were so far-reaching as practically to negate the non-immunity principle applicable to the employer State, a principle which he assumed to be generally acceptable. Accordingly, in his preliminary report, he had made two proposals which would have the effect of narrowing the scope of the exceptions, namely deletion of the reference to social security provisions in paragraph 1, and deletion of subparagraphs (a) and (b) of paragraph 2.

15. The first of those proposals had been made in the light of the point made by some members that not all forum States would have social security provisions. As for the second proposal, the problem with paragraph 2 (a) was that it had the effect of excluding administrative or technical staff of a diplomatic mission or consular post from the application of paragraph 1. He was not sure whether the provisions of article 4, paragraph 1, secured immunity for a State employing administrative or technical staff, and he would therefore be interested in hearing members' views on the two alternatives for paragraph 2 (a) submitted in his third report. The main problem with paragraph 2 (b) was the reference to recruitment. In cases where local labour laws included requirements concerning non-discrimination in recruitment, the forum State might have an overriding interest in alleged violations of such regulations being tried before a local court. It had been suggested both in the Commission and in the Sixth Committee that the word "recruitment" might be replaced by "appointment".

16. With regard to article 13, he had made three proposals in his preliminary and second reports, as reflected in paragraph (2) of his comments on the article in his third report. In view of the discussion on those proposals at the previous session, he now wished to return to the text adopted on first reading, and also to ascertain whether the concept of non-commercial tort itself was acceptable to the Commission. Before completing the second reading, the Commission would have to consider carefully whether or not it wished to retain article 13 and the underlying concept. Members' views on that point would be appreciated.

17. Taking into account the views expressed in the Commission and in the written comments of some Governments, he was suggesting that the Commission consider the advisability of deleting subparagraphs (c), (d) and (e) of paragraph 1 of article 14, which represented mainly the practice of common-law countries. Most members who had spoken on the issue at the previous session had been in favour of such deletion.

18. In response to a request by one Government in its written comments, he was proposing the insertion in subparagraph (a) of article 15 of a reference to "a plant breeder's right". He was also proposing the addition of a reference to "a right in computer-generated works".

19. No questions of substance had been raised regarding articles 16 and 17 and he proposed that the texts adopted on first reading be retained, with some minor drafting changes. The proposal by one Government to reformulate article 16 along the lines of article 29 (c) of the 1972 European Convention on State Immunity should be referred to the Drafting Committee.

20. He had given detailed explanations concerning article 18 in his second report (A/CN.4/422 and Add.1, paras. 24-31) and was now recommending only the deletion of the bracketed term "non-governmental" in paragraphs 1 and 4, since it rendered the meaning ambiguous and might represent a departure from the practice followed in a number of maritime conventions and in treaties on the law of the sea. He had cited the relevant treaty provisions in his third report (A/CN.4/431, footnotes 22 to 25). As to the suggestion to introduce the concept of segregated State property, it was necessary to avoid duplication, in particular with draft article 11 *bis*. If the ships concerned belonged to a State enterprise, they would be subject under that article to the same rules and liabilities as were applicable to natural or juridical persons.

21. He would welcome the views of members on three points concerning article 19. The first concerned the choice between the expressions "commercial contract"—or rather "commercial transaction" (see para. 6 above)—and "civil or commercial matter" in the introductory clause. He preferred the second formula, since there was no reason to limit the supervisory jurisdiction of a court of the forum State to commercial transactions; the scope of an arbitration depended primarily on the terms of the arbitration agreement and in fact there had been a number of arbitration cases arising out of civil or commercial matters. The second point related to the suggestion made by one Government to add a reference in subparagraph (c) to proceedings relating to the "recognition and enforcement" of the arbitral award. He himself was simply suggesting adding a new subparagraph to read: "(d) the recognition of the award", since the question of measures of constraint, which included enforcement, was dealt with in part IV of the draft. Thirdly, in the last part of the introductory clause, the choice was between the phrases "before a court of another State which is otherwise competent" and "a court of another State on the territory or according to the law of which the arbitration has taken or will take place". The Commission had adopted the first of those formulas, but the second might have some merit and further consideration should be given to the matter.

22. Article 20 had emerged from the first reading as a general reservation clause. He agreed with many members of the Commission that the article should be deleted.

23. Turning to part IV of the draft, dealing with State immunity in respect of property from measures of constraint, his comments on articles 21 to 23 mentioned that, owing to the independent development of the subjects of immunity from measures of constraint and immunity from jurisdiction, there was still a division of opinion regarding immunity from measures of con-

straint, even among the industrialized countries inclined towards restricted immunity from jurisdiction. According to one view, the power to proceed to measures of constraint was a consequence of the power to exercise jurisdiction; but the opposing view held that international law prohibited forced execution on the property of a foreign State situated in a forum State, even where a court of the forum State had jurisdiction to adjudicate over the dispute. The former view had been upheld by the courts of Switzerland, the Netherlands and the Federal Republic of Germany, and the recent tendency among industrialized countries was to restrict State immunity in respect of property from measures of constraint. Examples of that trend could be cited in recent legislation in the United Kingdom, South Africa, Singapore, Pakistan and Australia. Under that system, provision was made for the enforcement of a judgment or an arbitral award in respect of State property which was for the time being in use, or intended to be used, for commercial purposes. Recent legislation in the United States of America, while setting forth the general rule of immunity from execution, provided for a number of exceptions to the effect that property used for a commercial activity in the United States was subject to execution.

24. In the circumstances, he was proposing alternative texts for articles 21 to 23. The first alternative consisted of the texts adopted on first reading and the second was a reformulation of those texts. It would seem that carefully limited measures of constraint, rather than total prohibition, stood a better chance of obtaining general approval.

25. With regard to the first alternative, the bracketed phrase in the introductory clause of article 21 and in paragraph 1 of article 22, "or property in which it has a legally protected interest", would be deleted. The phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in article 21 (a), would also be deleted. Thirdly, he suggested deleting the bracketed term "non-governmental" in article 21 (a) and in paragraph 1 of article 23. In addition, it would be useful to add the words "and used for monetary purposes" at the end of paragraph 1 (c) of article 23.

26. The second alternative for articles 21 to 23 took into account the suggestion that articles 21 and 22 as adopted on first reading should be combined. Paragraph 1 of the reformulated article 21 stated the principle of non-execution against the property of a foreign State in the territory of a forum State, a statement that was followed by a number of exceptions set out in subparagraphs (a) to (c), which were largely the same as those contained in the adopted texts of article 21 and article 22, paragraph 1.

27. He was, however, suggesting three major changes to the texts of those exceptions as adopted on first reading. First, a reference to arbitration agreements had been introduced in paragraph 1 (a) (i) of the reformulated article 21. Secondly, the exception in paragraph 1 (a) (iii) had been reworded in line with the similar change in paragraph 1 (c) of the new article 8.

Thirdly, the words "the property is in the territory of the forum State and" had been added at the beginning of paragraph 1 (c). Also in paragraph 1 (c), he recommended that the word "State" should be replaced by the words "foreign State".

28. Article 22 basically reproduced the text of article 23 as adopted on first reading. Article 23 in the second alternative was a new provision. Draft article 11 *bis* already provided that a State enterprise was subject to the same rules and liabilities as were applicable to a natural or juridical person. Accordingly, a State enterprise was also subject to the same rules and liabilities as a natural or juridical person in respect of measures of constraint. Logically, therefore, a State could not invoke immunity from measures of constraint before a court of the forum State in respect of such State property as it had entrusted to a State enterprise.

29. Part V of the draft contained miscellaneous provisions, and the first article was article 24, which was generally acceptable to members of the Commission. Some had none the less suggested deleting the words "if necessary" in paragraph 3. In view of the practical problems that would result for the authority serving process, it might be useful to add at the end of that paragraph the phrase "or at least by a translation into one of the official languages of the United Nations", which he had placed between square brackets in the new text proposed as a basis for consideration.

30. In article 25, he was suggesting the addition at the end of paragraph 1 of the words "and if the court has jurisdiction in accordance with the present articles". As to the words "if necessary" in paragraph 2, the same solution could be adopted as for paragraph 3 of article 24.

31. Despite the doubts expressed by some Governments, he recommended retaining at the present stage the text of article 26 adopted on first reading.

32. As to article 27, he had already proposed in his preliminary report the insertion of the words "which is a defendant in a proceeding before a court of another State" after the word "State" at the beginning of paragraph 2, a proposal that had met with support both in the Commission and in the Sixth Committee. He would none the less welcome more comments from members of the Commission.

33. Lastly, as to whether or not article 28 should be retained, the matter required careful consideration after general agreement had been reached on the preceding articles. He would therefore prefer to retain the article in its present form, at least for the time being.

34. The CHAIRMAN, speaking as a member of the Commission, said that he had already made article-by-article comments on the Special Rapporteur's preliminary and second reports at the previous session. His position remained substantially unchanged, and he would simply state his basic position on the revised articles of parts III, IV and V of the draft proposed in the third report (A/CN.4/431).

35. The Special Rapporteur suggested a compromise formula, namely "Activities of States to which immunity does not apply", for the title of part III. He

himself would propose another compromise formula: "Activities of States in respect of which States agree not to invoke immunity". For the purpose of keeping exceptions to immunity at a minimum, article 12 (Contracts of employment), article 13 (Personal injuries and damage to property), article 16 (Fiscal matters) and article 20 (Cases of nationalization) should be deleted.

36. As to article 14, he could accept the Special Rapporteur's proposal to delete paragraph 1 (c) to (e), but felt that paragraph 1 (b) should also be eliminated. The Special Rapporteur's suggestion to include a reference to "a plant breeder's right and a right in computer-generated works" in subparagraph (a) of article 15 posed no problem.

37. In part IV of the draft, on immunity from measures of constraint, the new article 21 should be explicit and leave no doubt about the principle of such immunity. He had suggested a formulation at the previous session, but would study further the Special Rapporteur's recommendations for the article. He would none the less stress the importance of retaining the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", in subparagraph (a). Deleting it could prove to be irritating for inter-State relations, especially in the event of execution of a default judgment.

38. While he had no objection to inserting the words "and used for monetary purposes" in paragraph 1 (c) of the proposed new article 22, his previous position in favour of deleting paragraph 2 (para. 2 of article 23 as adopted on first reading) remained unchanged.

39. Lastly, the text of article 27, paragraph 2, as adopted on first reading was appropriate and should stay the same. Comity among nations meant that the non-requirement of security should not be limited to defendant States.

40. Mr. TOMUSCHAT, thanking the Special Rapporteur for his clear and concise third report (A/CN.4/431), said that the drafting proposals made therein were a considerable improvement on the texts adopted on first reading.

41. Commenting specifically on articles 22 to 28, he said that he approved of the proposed merger of articles 21 and 22 into a new article 21, and in particular of the opening clause in paragraph 1, which was a streamlined version of article 21 as adopted. The Special Rapporteur had rightly focused on property of a foreign State as the sole object deserving protection. It would be absurd to grant to third parties complete protection from measures of constraint simply because a foreign State had an interest in the property concerned. However, a provision could perhaps be added to the effect that any rights enjoyed by a foreign State in relation to property owned by a third party would not be affected by measures of constraint against that third party.

42. He endorsed in particular paragraph 1 (c) of the proposed new article 21. To require a connection with the object of the claim was a condition which could never be met in the most common categories of cases—

financial claims. In that regard, he disagreed with Mr. Shi. For instance, if a bank sought repayment of a loan it had made to a foreign State, what would be the property that had a "connection" with the object of the claim? An attempt could, of course, be made to trace the monies concerned, but money had, as it were, an abstract value and it was not always easy to determine on what it had been expended. Such a requirement was therefore basically unfair, as it would obstruct any attempt to recover loans a debtor failed to refund to his creditor.

43. He had some doubts about the need for the proposed new article 23. In his view, a State enterprise established for commercial purposes was not covered by the general definition of the State. It might well be an instrument of the State, but it was not entitled to perform acts pursuant to the governmental powers of the State and it thus fell outside the scope of the topic of jurisdictional immunities of States. The new article 23 should therefore be deleted.

44. With regard to article 24, close examination was required of the rule whereby service of process would be validly effected only if the document instituting proceedings was accompanied by a translation into the official language of the foreign State concerned. Assuming, for instance, that a French firm had concluded a contract under French civil law with a State-run body in the Lao People's Democratic Republic or Cambodia, should it be a requirement that a translation into the Lao or Cambodian language must be provided? Where the proper law of the contract had been expressly agreed between the parties, the language of that law should be deemed to suffice. While he welcomed the Special Rapporteur's suggestion that at least a translation into one of the official languages of the United Nations might be required, he nevertheless considered that there should be a reasonable link between the system of law in question and the official language used. The use of Chinese in western Europe, for instance, would not be reasonable. He trusted that a balanced solution could be found and, in that connection, the solutions arrived at in other international conventions might provide a useful model.

45. He held strong views on article 25 and would go even further than the Special Rapporteur's suggested amendment to paragraph 1. In a number of instances, foreign States had been the victims of default judgments because they had not entered an appearance, placing their trust in the rule of sovereign immunity. That rule had not, however, shielded them from such a judgment because, under the procedural laws of the countries concerned, a defendant had to appear in court and expressly plead lack of jurisdiction. In that connection, he would remind members of the dispute between the United States of America and China concerning bonds issued by the Imperial Government of China in 1911.⁸ Such a procedural requirement was totally unsatisfactory. Sovereign immunity, whether applied as a rule of customary law or under the present

⁸ *Jackson v. People's Republic of China*, United States Court of Appeals for the Eleventh Circuit, judgment of 25 July 1986 (*Federal Reporter, 2d Series*, vol. 794 (1986), p. 1490).

articles, was an objective limitation on a State's jurisdictional powers. A State could not be compelled to enter an appearance if it was clear from the outset that the claim affected the exercise of governmental powers. That, of course, could prove extremely expensive—and even disastrous for a small country—in terms of the legal fees incurred in the foreign State by a State wishing to defend its interests. An unambiguous provision should therefore be incorporated in a separate paragraph to make it incumbent upon the judge to inquire *ex officio* into the issue of immunity under the present articles.

46. The drafting of article 26 was not at all satisfactory, for it was open to two possible interpretations. According to the first, the article would exclude the possibility of issuing any order or injunction against a State carrying the proviso that non-compliance would entail a monetary penalty. Did that mean that an order or injunction *per se* was prohibited? If so, he did not think that such a strict limitation of judicial powers would be advisable. According to the second interpretation, only the imposition of a monetary penalty on a State would be prohibited. In either case, there was room for improvement and the existing text should not be adopted without modification.

47. He agreed with the Special Rapporteur's proposed amendment to article 27 and with his suggestion to retain article 28 in its present form for the time being.

48. Lastly, he trusted that the Commission would complete the second reading of the draft articles during the term of office of its current members. To that end, it should bear in mind how little time remained to attain that objective.

Draft Code of Crimes against the Peace and Security of Mankind⁹ (continued) (A/CN.4/419 and Add.1,¹⁰ A/CN.4/429 and Add.1-4,¹¹ A/CN.4/430 and Add.1,¹² A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLES 15, 16, 17, X AND Y¹³ and

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL
CRIMINAL COURT (continued)

49. Mr. THIAM (Special Rapporteur), replying to points raised during the debate, thanked members of the Commission for their valuable contributions on a difficult topic—difficult because it stood at the crossroads of law and politics and, being concerned with the progressive development of international law,

⁹ 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.

¹⁰ Reproduced in *Yearbook* ... 1989, vol. II (Part One).

¹¹ Reproduced in *Yearbook* ... 1990, vol. II (Part One).

¹² *Ibid.*

¹³ For the texts, see 2150th meeting, para. 14, and 2157th meeting, paras. 23-36.

necessarily involved a meeting of several trends of thought.

50. He wished at the outset to point out that international criminal law (*droit international pénal*) was now very much a branch of international law, a fact that the Commission must recognize. In French law at least, *droit international pénal*, which was taught at university as a separate discipline and was concerned with the study of international crimes, had to be distinguished from *droit pénal international*, which was concerned with conflicts of jurisdiction in criminal matters. It had become increasingly evident, ever since the Nürnberg Trial, that more and more crimes, including *apartheid*, genocide and aggression, were crimes not of internal law but of international law. For that reason he had found it difficult as Special Rapporteur to group according to any one school of thought the various statements made during the discussion.

51. It had never been his intention to define the term "perpetrator", for the Commission had gone beyond that stage. In any event, it was a matter that could be dealt with in the Drafting Committee. The fact that a number of criminal codes, including the French, German and Finnish, did not define the term "perpetrator" had not prevented the courts of the countries in question from functioning properly. In his view, it was for case-law to settle the meaning of that term. As he had explained in his eighth report (A/CN.4/430 and Add.1), its original meaning had been a person who committed a crime, directly and physically. Although an attempt had been made to enlarge the concept to cover, for instance, indirect perpetrators, such persons were not perpetrators in the strict sense of the term, but rather accomplices.

52. The question of determining the link between the act and the perpetrator, and also the categories of perpetrator to be covered, should likewise be settled by case-law. Aggression, for instance, like all crimes against the peace and security of mankind, was a crime committed by those who held power, and its perpetrators were therefore to be found only among those who were vested with a power of command and who used that power to commit such a crime. That provided a possible link. It could also be said that the person responsible was the individual who used the power—or governmental instrument—which vested him with the authority he exercised in order to commit his crime. The Commission's concern, however, was to provide for the criminal responsibility of natural persons—as opposed to that of the State—who acted as executants. War crimes could, of course, be committed by executants, for example by a soldier on the battlefield who used prohibited means of warfare to commit a crime against the peace and security of mankind or by an officer who ill-treated prisoners of war. For each category of crime it was none the less necessary to ascertain those persons who, by virtue of their functions or activities, were likely to commit the crime in question, and that was essentially a matter of case-law. The Drafting Committee could always discuss the matter further, but he feared that the Commission might then become involved in pointless research.

53. As to the crimes of complicity, conspiracy and attempt, one general criticism voiced during the discussion was that they should have been dealt with in the general provisions of the draft code, rather than in the specific provisions. Some national criminal codes did deal with complicity, conspiracy and attempt under the general provisions, but many others did not. The French Penal Code, for its part, dealt with complicity in the specific provisions but with attempt in the general provisions. In his view, therefore, it was a matter of methodology and the Commission could adopt either course. He would have no objection to the Drafting Committee handling the matter in the way it saw fit.

54. He had been asked to deal with each crime on a case-by-case basis, determining whether the concepts of complicity, conspiracy and attempt were applicable to all crimes against the peace and security of mankind. It was an impossible task which, despite much good will, he felt quite unable to perform. The Commission must have faith in the judges, who followed case-law in deciding whether or not to apply a particular concept. After all, as had rightly been noted, the courts in question reflected all systems of law and the judges had both theoretical and practical knowledge: they therefore merited the Commission's confidence. In his opinion, the Commission should elaborate general provisions, leaving it to the courts to settle the details. It would be extremely unwise to proceed on a case-by-case basis, particularly where crimes of such a massive nature were concerned. Indeed, he might well have been asked not which concept should apply, but rather what the exceptions were. There were, in fact, none: all the crimes covered were crimes committed by groups of individuals.

55. He had not always been able to define the crimes in question very narrowly, since international law was a science based on sources such as customary law and therefore one could not always be specific. He had, however, done his best in the context of the onus of work placed on him. For instance, with regard to complicity, he had incorporated the ideas of physical and intellectual acts of complicity, although on reflection he should perhaps have used the word "abstract" rather than "intellectual". Thus assistance or aid rendered to the principal perpetrator would be an identifiable physical act, whereas advice, instigation, promises, threats or provocation would be abstract acts—though ascertainable in certain cases. Complicity was, of course, a very complex concept and had been the subject of much discussion by learned writers. None the less, the Commission must still endeavour to present matters as clearly as possible. The concept could, in his view, be incorporated equally well in the general or specific provisions or, alternatively, in both, as was the case with certain national criminal codes, some of which also provided, for instance, that the penalty imposed on an accomplice should be as severe as that imposed on the principal. A discussion of such ideas would, however, be never-ending and his aim therefore had simply been to attempt a clarification.

56. Conspiracy differed from complicity in that, in the case of conspiracy, there was no distinction between

direct and indirect perpetrators, between perpetrators and co-perpetrators, and between perpetrators and accomplices, all the participants joining in an agreed plan and deciding jointly on the commission of the crime. Although the Nürnberg Tribunal had decided not to apply conspiracy to all crimes against the peace and security of mankind, the 1954 draft code had extended the concept to all the offences it covered, a trend that had become more marked in the conventions on genocide, *apartheid*, narcotic drugs and slavery. The concept of conspiracy could thus be said to have acquired recognition in international law and therefore had a place in the code along with the concept of complicity, which was also covered by those conventions.

57. The notion of attempt could be handled in several ways. Most criminal codes sought an element of intent in order to distinguish between punishable and non-punishable attempt and left it to the courts to apply that general principle to specific cases. He had formulated one draft article on that basis, having taken into account the criticisms offered by members of the Commission.

58. Drug trafficking was a typical example of a domestic offence which, as it grew in scope, was becoming increasingly international. Mr. Díaz González (2156th meeting) had been very instructive in tracing the development of the common desire to suppress an offence which had become a common danger. Early in its work on the draft code the Commission had tried to define what offences should be included in it. Many members of the Commission and other experts had been against including drug trafficking. However, the situation had now changed and drug trafficking was viewed almost unanimously as a crime under international law. He had himself changed his own position in the same way and, in 1989, had agreed to draft provisions on international drug trafficking.

59. Drug trafficking was a crime both against peace and against humanity—in the first case because many international conflicts originated in drug trafficking when it jeopardized relations between the State of origin and the State of destination; and, in the second case, because it posed a threat to people's health. He had therefore submitted two separate draft articles. But as the Commission's chosen method was to classify the crimes in the draft code into crimes against peace, war crimes and crimes against humanity, it was difficult to decide where to place the crime of drug trafficking. The difference between the two types of crime represented by drug trafficking was clear: in order to constitute a crime against peace, a crime must jeopardize the international public order and must therefore contain a transboundary element; a crime against humanity, in contrast, did not require a transboundary element but rather an element of large scale, even if confined to a single State. He would therefore prefer to retain two separate articles, but the Drafting Committee would doubtless convey its opinion on that point.

60. The question of an international criminal court was not a new one; many draft proposals had been produced by various individuals and bodies, including the Commission itself. Regrettably, so far it seemed

necessary to wait until a crime sufficiently troubled international public opinion, as in the case of drug trafficking for example, before the cry went up for an international criminal court.

61. The draft provisions he had submitted in part III of his report had no direct link with General Assembly resolution 44/39, for the subject had already been included in his work plan. But, since the horse must come before the cart, he had given priority to the draft code of crimes: there was no point in establishing a court which had no crimes to try. It was, for all that, encouraging to have the General Assembly's endorsement for working on the question of an international criminal court. Aware of the differences of opinion in the Commission, he had taken the "questionnaire-report" approach rather than presenting cut and dried articles.

62. On the question of the competence of the court, he had proceeded on the basis of the criminal responsibility of individuals; the criminal responsibility of States or of legal entities in general, to which some members attached great importance, could be taken up at a later stage. There seemed to be three approaches in the Commission. First, a maximalist approach, which had little support, according to which all international crimes should fall within the court's competence. If that proposition was rejected, the question arose as to what court would be competent to try the excepted international crimes. Secondly, there was a moderately restrictive approach, which commanded the most support, limiting competence to the crimes listed in the code. Thirdly, a very restrictive approach would leave it to individual States to decide which crimes should be brought before the court. He was personally in favour of the second approach, for the Commission, having drafted the code, could hardly argue that the court was not competent to try the crimes listed therein.

63. That brought him to the subject of attribution of jurisdiction. Mr. Bennouna (2154th meeting) had criticized him for not mentioning the provisions of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.¹⁴ The reason was that the situation had changed over the intervening 37 years, for in 1953 there had been no draft code. The need for an international criminal court now seemed necessary because of the code itself, and it would be illogical to allow States the right to decide whether to confer jurisdiction on the court. Such an arrangement would also give rise to great difficulties: in the case of a crime committed in several States, for example, it would be necessary to have a series of attributions of jurisdiction.

64. He did not think that the court should have appellate jurisdiction; rather, it should coexist with other jurisdictions. A State might choose to try a case itself or to bring it before the court, but it would be wrong to establish a hierarchy of jurisdictions. It would be better for judges to be appointed not by States parties to the statute of the court, but by the General Assembly, which was the broadest possible forum. Similarly, he opted for specialized prosecuting attor-

neys rather than for prosecutors appointed by States on an *ad hoc* basis.

65. The question of pre-trial examination was more difficult because of the differences between the two main judicial systems. He preferred pre-trial examination simply because it had been the option chosen, notwithstanding the difficulties, in the 1953 draft statute. He was aware of the opposition of some members of the Commission, and the issue would no doubt be taken up in the proposed working group.

66. With regard to the submission of cases to the court, he recalled that, in introducing his report, he had withdrawn item 1 (b) (Necessity or non-necessity of the agreement of other States) of the list of points submitted for consideration (A/CN.4/430 and Add.1, para. 79).

67. On the *non bis in idem* rule, he agreed with the majority of members that the court's decisions should be imposed on the jurisdictions of States. Some members felt that the same did not hold true for the inverse situation, for a State would then be able to try a person whom it viewed with favour, and impose a light penalty, simply to prevent him being tried by the international court. Hence there might be a need for exceptions to the rule.

68. In the matter of penalties, it was hard to know whether the rule *nullum crimen sine lege* should simply be applied. That rule had created many difficulties, especially with respect to the decisions of the Nürnberg Tribunal. Many experts argued that those decisions had not infringed the rule, while others disagreed, illustrating the difficulty of transferring a notion from one judicial system to another. Furthermore, as Mr. Barsegov (2157th meeting) had pointed out, there were so many different penalties provided in the various judicial systems that practical difficulties would inevitably arise. The Commission must proceed cautiously in setting penalties. His report did not discuss the problem of where a penalty should be enforced. He was not, in fact, sure whether it should be in the State where the crime had been committed or in the State where the criminal had been found, or whether some system of extraterritoriality should be established. When the Commission had settled the whole question of penalties it would have made much progress in its work.

69. He was grateful for the criticisms and suggestions offered by his colleagues in the Commission and would take them into account. It was important not to approach the problems overconfidently, for progress could only be slow. The revised draft articles which he had submitted at the previous meeting (paras. 23-26) should now be referred to the Drafting Committee, with which he would, of course, co-operate to the full.

70. The CHAIRMAN thanked the Special Rapporteur for his lucid summing-up of the debate. Now that the discussion was concluded, it was his understanding that members generally considered that a working group should be established with a mandate to draw up a draft response by the Commission to the request made of it by the General Assembly in paragraph 1 of its resolution 44/39 of 4 December 1989. After adop-

¹⁴ See 2150th meeting, footnote 8.

tion by the Commission, the draft response would become part of its report to the General Assembly.

71. He had been informed that the following members of the Commission might make up the working group: Mr. Al-Baharna, Mr. Beesley, Mr. Bennouna, Mr. Díaz González, Mr. Graefrath, Mr. Illueca, Mr. Koroma, Mr. Pawlak, Mr. Sreenivasa Rao and Mr. Roucounas. It had also been suggested, and the Bureau concurred, that the working group should include *ex officio* the Special Rapporteur and the Rapporteur of the Commission. If there were no objections, he would take it that the Commission agreed to establish the working group with the membership he had indicated.

It was so agreed.

72. Mr. KOROMA suggested that, notwithstanding the decision just taken, the Working Group should be open-ended.

It was so agreed.

The meeting rose at 1.10 p.m.

2159th MEETING

Thursday, 17 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/419 and Add.1,² A/CN.4/429 and Add.1-4,³ A/CN.4/430 and Add.1,⁴ A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

ARTICLES 15, 16, 17, X AND Y⁵ and

¹ 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.

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

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

⁴ *Ibid.*

⁵ For the texts, see 2150th meeting, para. 14, and 2157th meeting, paras. 23-26.

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (concluded)

1. Mr. THIAM (Special Rapporteur) said that mass international traffic in narcotic drugs could be regarded both as a crime against peace and as a crime against humanity. In his view, it would be preferable, rather than disturbing the structure of the draft code, to have two separate articles dealing with those two aspects. Accordingly, he submitted the following revised texts of draft articles X and Y:

Article X. Illicit traffic in narcotic drugs: a crime against peace

Any mass traffic in narcotic drugs organized on a large scale in a transboundary context by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against peace.

Article Y. Illicit traffic in narcotic drugs: a crime against humanity

Any mass traffic in narcotic drugs organized on a large scale, whether in the context of a State or in a transboundary context, by individuals, whether or not acting in association or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against humanity.

2. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer to the Drafting Committee the revised draft articles 15 (Complicity), 16 (Conspiracy) and 17 (Attempt) submitted by the Special Rapporteur at the 2157th meeting (paras. 23-25), as well as the revised draft articles X and Y on illicit traffic in narcotic drugs (para. 1 above).

*It was so agreed.*⁶

Jurisdictional immunities of States and their property (continued) (A/CN.4/415,⁷ A/CN.4/422 and Add.1,⁸ A/CN.4/431,⁹ A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

CONSIDERATION OF THE DRAFT ARTICLES¹⁰ ON SECOND READING (continued)

3. Mr. RAZAFINDRALAMBO said that he would comment on the proposals concerning articles 12 to 28 made by the Special Rapporteur in his third report (A/CN.4/431).

4. Article 12 (Contracts of employment) should be retained, since it would provide local employees of

⁶ For consideration of draft article X proposed by the Drafting Committee, see 2197th meeting, paras. 30 *et seq.*

⁷ Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

⁸ Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

⁹ Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

¹⁰ For the texts, see 2158th meeting, para. 1.

foreign States and of their official non-diplomatic agencies or offices with more effective protection. The words in square brackets in paragraph 1 of the text proposed by the Special Rapporteur, “and is covered by the social security provisions which may be in force in that other State”, could be deleted. Although registration of a worker in the social security system undoubtedly afforded protection, it did not seem appropriate to allow the employer State to invoke immunity on the ground that it had failed, whether intentionally or not, to register its local employee in that system.

5. The United Kingdom had rightly noted in its written comments that paragraph 2 (b) seemed to be redundant, since article 26 provided for immunity from measures of coercion: thus the State could not be compelled to recruit or renew the employment of a worker, or to reinstate him in the event of dismissal. Paragraph 2 (a), however, was still necessary. Some countries which had adopted the French system of administrative law took the view that civil-service disputes were a matter for special administrative courts, like the Council of State, with their own case-law. It would be difficult to require the Governments of such countries to appear before the courts of the forum State having jurisdiction in respect of employment contracts, which were often ordinary courts of law. The employees protected by paragraph 2 (a) would not necessarily be members of a diplomatic or consular mission: the second alternative text for the subparagraph proposed by the Special Rapporteur was therefore not acceptable.

6. Article 13 (Personal injuries and damage to property) was designed to protect persons and property against any act or omission attributable to a State. At first sight, that was a question of the international responsibility of the State. The scope of application of the article was, however, limited to the determination of responsibility by reference not so much to the rules of international law as to the municipal law of the court of the forum, pursuant to the *lex loci delicti commissi* rule. A more serious difficulty arose from the fact that, under the terms of the article, the State would have a narrower immunity than that conferred on its own diplomatic agents under article 31 of the 1961 Vienna Convention on Diplomatic Relations. The text adopted on first reading, which laid down the twin criteria of the place of the damage and the presence of the author of the act or omission, should be retained, since it was not as broad in scope as it seemed to be at first glance. To restrict the article to traffic accidents, as some recommended, would not be satisfactory, since it was difficult to differentiate between traffic and other accidents. That was borne out by the fact that, in some countries, damage caused by administrative vehicles was dealt with not through insurance, but in the same way as any other kind of damage caused by the State.

7. It had already been pointed out with regard to article 14 (Ownership, possession and use of property) that subparagraphs (c), (d) and (e) of paragraph 1 related to the practice of common-law countries and should not appear in a convention of a general nature.

Paragraph 1 (b) might open the door to the jurisdiction of a foreign court even if there were no link between the property and the forum State. For that reason, it should perhaps be provided, as in paragraph 1 (a), that the property must be “situated in the State of the forum”.

8. Paragraph 2 (a) of article 14 seemed to contradict paragraph 3 of article 7 as adopted on first reading. The latter text provided that a proceeding before a court of a State should be considered to have been instituted against another State when it was designed to deprive that other State of its property or of the use of property in its possession or control. In such a case, under paragraph 1 of article 7, the foreign State enjoyed immunity before the courts of the forum State. Paragraph 2 (a) of article 14, however, provided that a court of the forum State could exercise jurisdiction in such a case, notwithstanding the fact that the proceeding was designed to deprive the foreign State of property in its possession or control. The foreign State was thus rendered powerless simply because the proceeding had not been brought against it directly. The new text proposed by the Special Rapporteur for paragraph 3 of article 7 seemed to provide a remedy for that situation.

9. Paragraph 2 (b) of article 14 dealt with a more likely case, but one that none the less raised problems, since it could also result in a decision being handed down against a State without the latter being able to invoke lack of jurisdiction on the part of the court of the forum, or at least defend itself.

10. He had no comment to make on articles 15 to 17 other than to express his support for the Special Rapporteur's proposal to add a reference in subparagraph (a) of article 15 to plant breeders' rights and rights in computer-generated works.

11. With regard to article 18 (State-owned or State-operated ships engaged in commercial service), members had questioned the use of the expression “commercial [non-governmental]” in paragraphs 1 and 4. Some members who considered that the term “non-governmental” should be deleted saw nothing wrong with the fact that, in paragraphs 2, 5 and 7 of the same article, a ship—or its cargo or a service—was characterized as “government non-commercial”. If a single adjective (“commercial”) sufficed in the first case, he did not see why a single adjective (“government”) would not suffice in the second. In fact, “government non-commercial service” seemed to be the traditional formula and precedent was to be found for it, *inter alia*, in the 1958 Convention on the High Seas. Logically, the expression “commercial non-governmental” should be the counterpart of “government non-commercial” and there was no reason why the two expressions should not be used simultaneously. Legally, the use of two adjectives was justified because they referred respectively to the nature of the service and to the object pursued by the State in the case in point, it being understood that the criterion of object was paramount in respect of immunity. Matters would perhaps be clearer if the conjunction “and” were used, since that would underline the cumulative nature of the two

adjectives: thus, in paragraphs 1 and 4, the expressions "commercial and non-governmental service" and "commercial and non-governmental purposes" would be used and, in paragraphs 2, 5 and 7, the expression "government and non-commercial". If the word "and" was not acceptable, the term "non-governmental" in paragraphs 1 and 4 could be deleted, only the expressions "commercial service" and "commercial purposes" being retained; and, in paragraphs 2, 5 and 7, the term "non-commercial" could be deleted, only the expressions "government service" and "government character" being retained.

12. As the Special Rapporteur recommended, the question of the jurisdictional immunity of aircraft belonging to or operated by the State should not be covered, since it could raise extremely complex issues. In addition, he would prefer to reserve his position on the possibility of adding a provision on ships operated by State enterprises, since the concept of segregated State property was, in his view, still in the throes of development.

13. Article 19 (Effect of an arbitration agreement) called for reservations concerning the extension of the scope of the arbitration implicit in the words "civil matter", which appeared in the bracketed expression "civil or commercial matter". At best, it would be possible to agree to replace the bracketed words "commercial contract" by "commercial matter", with the addition, if need be, of the word "accessory" or "assimilated" to cover, for instance, disputes that might arise in connection with the salvage of commercial ships. Furthermore, as the Special Rapporteur had suggested in his second report (A/CN.4/422 and Add.1, para. 33), rather than qualifying the court in question by the phrase "which is otherwise competent", it would be better to revert to the wording proposed by the previous Special Rapporteur, namely "a court of another State on the territory or according to the law of which the arbitration has taken or will take place".

14. Also in his second report (*ibid.*, paras. 35 *et seq.*), the Special Rapporteur had included some particularly instructive information on the problem of the recognition and enforcement of an arbitral award. The question was whether recourse to arbitration, which involved waiver of immunity from jurisdiction, which also entail waiver of immunity from enforcement, which meant that the powers of supervision of the court would include the power to authorize the enforcement of the arbitral award. The Special Rapporteur rightly considered that it was preferable not to refer in article 19 to the procedure for the enforcement of arbitral awards, including the procedure to secure a preliminary order of *exequatur*. The reasons he gave in that connection were convincing.

15. The Special Rapporteur thus proposed that a new subparagraph (*d*) be added to article 19, reading: "(*d*) the recognition of the award", complementing the list of questions referred for decision to the court of the forum State. As indicated in the second report (*ibid.*, para. 39), recognition was the "normal complement of the binding character of the arbitration agreement". Thus, although immunity applied to the enforcement

process, it could not affect prior recognition of the arbitral award.

16. Turning to part IV of the draft (State immunity in respect of property from measures of constraint), whose importance for the developing countries he had already stressed, he noted that, in his third report, the Special Rapporteur proposed combining articles 21 and 22, introducing a number of amendments to the texts adopted on first reading. For example, the bracketed phrase "or property in which it has a legally protected interest" would not appear in the new article 21.

17. The reference to "property in its possession or control" would also not appear in the new text. While that was a welcome simplification, he wondered whether it did not leave a gap that it would be difficult to fill. The concept of "interest" was distinct from that of "property", as the Special Rapporteur had not failed to underline and as the Commission itself had recognized in its final draft articles on succession of States in respect of State property, archives and debts, adopted in 1981. In the commentary to article 8 of that draft, the Commission had stressed that the expression "property, rights and interests" referred to "rights and interests of a legal nature".¹¹ That was the meaning attached to the expression "legally protected interest" used in articles 21 and 22 of the present draft as adopted on first reading. In any event, it would be possible to revert to the original wording and to speak of "property in which [the State] has an interest".

18. Paragraph 1 (*c*) of the proposed new article 21 was so worded that it appeared to lay down two cumulative conditions: use for commercial purposes, and connection with the object of the claim. To avoid such a limitation, the word "and" linking those two conditions should perhaps be replaced by "or", since a single condition would suffice. Furthermore, as in the case of article 18, the use both of the expression "commercial purposes" and of the bracketed term "non-governmental" would seem to refer both to the object and to the nature of the operation in question. Thus what would be involved was recourse to a "government" operation for a "commercial" object. Conversely, it was conceivable that a government operation might be used for a non-commercial object. The words "intended for use by the State for commercial purposes" would, however, be acceptable.

19. Paragraph 1 (*b*) of the new text seemed to duplicate the second condition in paragraph 1 (*c*), referring to "a connection with the object of the claim". If that was so, it should be deleted.

20. He was in general agreement with the proposals in the third report concerning part V of the draft (Miscellaneous provisions). However, the proposed amendment to paragraph 2 of article 27 (Procedural immunities), exempting the defendant State alone from the requirement with respect to security, seemed to be ill-advised as its effect would be to restrict significantly any proceedings, no matter how legitimate, of potential plaintiff countries with limited financial resources, such

¹¹ *Yearbook* . . . 1981, vol. II (Part Two), p. 26, para. (10) of the commentary.

as the developing countries. That would run counter to the trend that had emerged in the General Assembly in favour of helping such countries financially to appear before the ICJ.

21. Article 28 (Non-discrimination) should not be included in the draft, as it provided for a restrictive application of the articles contrary to the very purpose of the present codification. Moreover, the opening clause of many articles (“Unless otherwise agreed between the States concerned”) already permitted limitations or extensions of immunity by way of agreement or reciprocity.

22. Lastly, the question of the settlement of disputes should be the subject of an optional additional protocol and should, in any event, be dealt with by the future diplomatic conference.

23. Mr. MAHIU said that, since he had spoken at length at the previous session on the Special Rapporteur’s preliminary and second reports, he would limit his comments to the new ideas proposed in the third report (A/CN.4/431) in the light of the discussion in the Commission and in the Sixth Committee of the General Assembly.

24. With regard to article 12 (Contracts of employment), he noted that the Special Rapporteur had tempered his position and reconsidered his proposal to delete paragraph 2 (a) and (b). Moreover, both the text of subparagraph (a) adopted on first reading and the new second alternative were acceptable. The purpose of subparagraph (b) was to give an employee the power to defend himself against a State once he had been hired. The recruitment itself, however, could not be challenged in court, for the State’s freedom to decide whether or not to hire or to renew employment should not be questioned. Only a case of failure to respect the rights granted to the employee by the contract of employment could be referred to the court. It should therefore be clear that recruitment should be understood to mean the State’s agreement to recruit an individual. For that reason, the Special Rapporteur’s explanations in paragraph (4) of his comments on article 12 did not seem convincing. Perhaps it should be made clear that the act of recruitment must be protected from any challenges.

25. In subparagraph (a) of article 15 (Patents, trade marks and intellectual or industrial property), the Special Rapporteur recommended adding a reference to “a plant breeder’s right”. He himself wondered whether such an addition was justified. Neither the State that had proposed it nor the Special Rapporteur had adduced enough evidence in support of the addition. Would not that aspect of intellectual or industrial property come within the field of patents? If special mention were made of that concept, why not also mention other concepts of the same nature? In his view, it would be better to refrain from any type of listing, which would open a Pandora’s box, and find general wording which would also cover plant breeding. Furthermore, assuming the addition were to be retained, he wondered whether it was satisfactorily worded, for the term “right” used with no other explanation might also be understood to mean a right

having nothing to do with intellectual or industrial property and would thus create a risk of departing from the purpose of article 15. What was more, the concept of *domaine* in the French text was quite broad and opened the door to all kinds of assumptions. Under those circumstances, what was the compelling reason for the reference?

26. In article 19 (Effect of an arbitration agreement), the Special Rapporteur proposed adding a new subparagraph, reading: “(d) the recognition of the award”. However, in paragraph (2) of his comments on the article, the Special Rapporteur appeared to indicate that he had doubts about the need for such an addition and he himself shared those doubts. The recognition procedure did not fall directly within the purview of that part of the draft and would rather concern the part relating to enforcement; above all, it appeared to be specific to certain legal systems.

27. He supported the Special Rapporteur’s suggestion that article 20 (Cases of nationalization) be deleted.

28. In the proposed new article 21 (State immunity from measures of constraint), the Special Rapporteur had made a number of changes to the texts of articles 21 and 22 adopted on first reading, the first being to eliminate the concept of “property in which [the State] has a legally protected interest”. He himself was not in favour of deleting that phrase, for the reasons he had stated at the previous session. Secondly, in paragraph 1 (c) of the new text, the Special Rapporteur suggested the deletion of the phrase “and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed”—a phrase to which he (Mr. Mahiou) attached even greater importance. That phrase was well-founded, for courts, especially lower courts, often confused State property with property of other agencies and even with the property of public enterprises, or confused completely different kinds of State property. The phrase in question would make it possible to avoid mistakes by lower courts, which were, moreover, occasionally censured by higher courts. It would thus be both a clarification and a guarantee.

29. He would like further explanations concerning the proposed new article 23. In his view, it related to draft article 11 *bis*, which the Drafting Committee was currently considering, and he therefore had doubts about whether it was needed. He would nevertheless reserve his position until a decision had been taken on article 11 *bis*, for that decision might make the scope of article 23 clearer.

30. The Special Rapporteur’s suggestions concerning article 24 (Service of process) were useful and simplified the drafting by making the article shorter without affecting its interpretation. They improved the text adopted on first reading.

31. Lastly, the Special Rapporteur’s proposal for article 25 (Default judgment), which consisted of the addition at the end of paragraph 1 of the words “and if the court has jurisdiction in accordance with the present articles”, was well-founded. It made the text clearer by avoiding the assumption that a State accepted a court’s competence and waived its immunity by

failing to appear after being served process. The Special Rapporteur was therefore correct in retaining the addition proposed by one Government, which made it easier to understand the concept of default judgment.

32. Mr. NJENGA said that, having discussed all the draft articles in detail at the previous session, he would comment only on the changes proposed by the Special Rapporteur in his third report (A/CN.4/431). The Special Rapporteur's proposals, which were based on the discussion in the Commission and in the Sixth Committee of the General Assembly, as well as on the written comments by Governments, would certainly facilitate the task of the Commission, which was continuing its consideration of articles 12 to 28, and that of the Drafting Committee, which had before it articles 1 to 11 and the new draft articles 6 *bis* and 11 *bis*.

33. He was particularly happy with the proposed new text of draft article 11 *bis*, which put the question of the immunity or lack of immunity of the State and State enterprises in its proper perspective. The proposed new article 23 was fully justified, for it was the corollary to draft article 11 *bis*. However, he did not agree with the concept of "segregated State property" and did not think anything would be lost by omitting it from the article.

34. As to the title of part III of the draft, the neutral formulation suggested by the Special Rapporteur, "Activities of States to which immunity does not apply", and Mr. Shi's suggestion at the previous meeting, "Activities of States in respect of which States agree not to invoke immunity", were both acceptable.

35. With regard to the proposed new text of article 12, on contracts of employment, he endorsed the Special Rapporteur's suggestion that the phrase "and is covered by the social security provisions which may be in force in that other State", in paragraph 1, should be deleted. The reference to social security provisions was not justified, for, as the Special Rapporteur himself had said, they were not common in all States.

36. He was, however, not convinced by the Special Rapporteur's reasoning in favour of the second alternative proposed for paragraph 2 (a) of article 12. In his view, the existing subparagraph (a) was broad enough to cover diplomatic and consular staff.

37. For the reasons he had given at the previous session, he would prefer the deletion of article 13. His main objection to the article was that it would make the State indictable in cases of personal injuries and damage to property, while its diplomatic agents enjoyed immunity for similar occurrences under customary and conventional law. Furthermore, the same cases might be dealt with by insurance companies. However, if the Commission decided to retain article 13, he would support the suggestion made by the Special Rapporteur in his preliminary report that the following new paragraph 2 be added:

"2. Paragraph 1 does not affect any rules concerning State responsibility under international law."

38. He hoped that the Commission would follow the Special Rapporteur's recommendation and decide to delete subparagraphs (c), (d) and (e) of paragraph 1 of

article 14, which did not reflect universal practice and might open the door to foreign jurisdiction even in the absence of any link between the property in question and the forum State.

39. The proposed addition in article 15 (a) of the phrase "including a plant breeder's right and a right in computer-generated works" was a definite improvement and met the needs of the modern world.

40. He fully endorsed articles 16 and 17 as adopted on first reading and supported the Special Rapporteur's suggestion that the words "State" and "another State" be replaced by "foreign State" and "forum State", as appropriate, in both articles. The same amendment should be introduced in other articles, where required.

41. Concerning article 18, he continued to believe that the deletion of the bracketed term "non-governmental" in paragraphs 1 and 4 would constitute a serious derogation from the principle of the jurisdictional immunity of States and frustrate the efforts of many developing countries to develop national shipping lines as a matter of national policy and not merely for commercial purposes.

42. He urged the Commission to be cautious in adopting article 19, in which the Special Rapporteur proposed the inclusion of a new exception to the rule of immunity. Arbitration, which the parties often preferred to judicial proceedings in order to save both time and money, would lose much of its interest if the validity or interpretation of the arbitration agreement, the arbitration procedure, the setting aside of the award and even, as the Special Rapporteur now proposed, the recognition of the award were open to adjudication in the forum State.

43. He fully endorsed the proposed deletion of article 20, which had no place in the draft articles and could lead to serious differences of opinion.

44. Turning to part IV of the draft, he said that there should be no exception to the principle of State immunity in respect of property from measures of constraint. Measures of constraint would simply strain relations between States and be used mainly by strong States against weak States. The recent tendency in some developed countries to restrict immunity from execution subject to certain safeguards for protected State property, to which the Special Rapporteur referred in paragraph (1) of his comments on articles 21 to 23, was a dangerous departure from the rules of international law relating to the sovereign immunity of States and should be curbed rather than encouraged by the Commission.

45. He had no objection to the new text proposed for article 22, in which the Special Rapporteur had added the words "and used for monetary purposes" in paragraph 1 (c).

46. He supported the miscellaneous provisions in part V of the draft. However, although he endorsed the Special Rapporteur's suggestion that the words "if necessary", in paragraph 3 of article 24, could be deleted, he proposed that that paragraph be reworded as follows:

“3. These documents shall be accompanied by a translation into the official language, or one of the official languages, of the State concerned, or at least by a translation into one of the official languages of the United Nations in use in that State.”

That formulation might go some way towards meeting the concerns expressed by Mr. Tomuschat at the previous meeting.

47. The proposed addition at the end of paragraph 1 of article 25 of the phrase “and if the court has jurisdiction in accordance with the present articles” was commendable. It was judicious to make it a general provision that, when a State chose not to appear, courts should investigate their competence under the present articles before rendering a default judgment.

48. With regard to article 27, he preferred the text adopted on first reading to the new text suggested by the Special Rapporteur. He did not see why exemption from the requirement to provide any security, bond or deposit should be restricted to the defendant State. In his view, the plaintiff State should also enjoy that exemption.

49. He had no objection to article 28, which definitely had a place in the draft articles.

50. In conclusion, he said he hoped that the Drafting Committee would be given adequate time to consider the draft articles it had before it and that the Commission would be able to complete the second reading of the draft articles during the term of office of its current members.

51. Mr. GRAEFRATH, reviewing the proposals concerning articles 12 to 28 made by the Special Rapporteur in his third report (A/CN.4/431), said that the second alternative for paragraph 2 (a) of article 12 was more acceptable than the text adopted on first reading. As for paragraph 2 (b), he was convinced of its importance and of the need to retain the word “recruitment”. It was not acceptable for the forum State to be able to compel a foreign State to recruit a particular person.

52. He again suggested that article 13 should either be deleted or that its scope should be limited to compensation arising from traffic accidents, as the Special Rapporteur himself had suggested in his second report. The text of the article was in complete contradiction with article 31 of the 1961 Vienna Convention on Diplomatic Relations, because mostly persons enjoying diplomatic immunities would be involved.

53. Concerning article 14, he supported the Special Rapporteur’s suggestion to delete subparagraphs (c), (d) and (e) of paragraph 1.

54. With regard to article 18, he noted that the problems raised could not be solved by a mere referral to draft article 11 *bis*. An article that covered both State-owned and State-operated ships engaged in commercial service, as did article 18, failed to take account of legal systems in which State-owned ships could be operated for commercial purposes by independent legal entities. Since the article referred only to commercial activities, only State-operated ships should be taken into account. An examination of the relevant conventions cited in the third report revealed that they

generally mentioned both the owner and the operator only when they dealt with ships used in non-commercial government service. When they dealt with ships used strictly for commercial purposes, only the operator was mentioned.

55. He had serious doubts about the Special Rapporteur’s proposal to add a new subparagraph (d) to article 19, under which a State could not invoke immunity from jurisdiction in a proceeding relating to recognition of an arbitral award. Such a provision might even be dangerous, for it might lead States to question the binding nature of the arbitration procedure.

56. Article 20 did not belong in an instrument on jurisdictional immunities and should be deleted.

57. In the proposed new article 21, on State immunity from measures of constraint, the phrase “and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed”, in paragraph 1 (c), should be retained; otherwise, measures of constraint might be taken against any property of a foreign State if it was used for commercial purposes.

58. Article 25 should be worded most carefully. In particular, it could not be presumed that the various documents mentioned in the article had been received. Like Mr. Tomuschat (2158th meeting), he believed the court could not issue a default judgment against a State until it had examined *ex officio* the question of the sovereign immunity of that State. In fact, courts should be bound in all cases to verify whether or not State immunity excluded their competence and a provision to that effect should be included in the draft articles. Since such a provision was a general one that went beyond the framework of article 25, it might be included in article 7, which dealt with modalities for giving effect to State immunity.

59. Lastly, he suggested that article 28, which was superfluous at the very least, should be deleted.

The meeting rose at 11.25 a.m. to enable the Drafting Committee to meet.

2160th MEETING

Friday, 18 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Benouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/415,¹ A/CN.4/422 and Add.1,²
A/CN.4/431,³ A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

CONSIDERATION OF THE DRAFT ARTICLES⁴ ON SECOND
READING (continued)

1. Mr. McCaffrey said that the Special Rapporteur had once again, in his third report (A/CN.4/431), responded to the discussion in the Sixth Committee of the General Assembly and in the Commission of the draft articles adopted on first reading and the various alternatives already submitted in previous reports.

2. He endorsed the proposal to change the expression "commercial contract" to "commercial transaction" in the new text proposed for article 2, as well as the consequential change in article 11. He also supported the merging of articles 2 and 3 as adopted on first reading, for he had always been mystified by the distinction between articles on "Use of terms" and on "Interpretative provisions". "Commercial transaction" was a broader expression and covered cases in which there was no formal contract under the law applied by the court of the forum State. In any event, the definition of a commercial contract in paragraph 1 (b) (iii) of article 2 as adopted on first reading broadened the notion so far as to make it almost equivalent to the expression "commercial transaction" as defined.

3. The text proposed for paragraph 2 of article 2 represented a commendable effort at a compromise between the "nature" test and a more "purpose-oriented" test for the determination of what a commercial transaction was. But the new text still begged the question of the relevance of an asserted governmental purpose of a transaction which was by its nature commercial. Any reference to purpose merely confused the issue.

4. The Special Rapporteur's proposal to delete the words in square brackets in article 6 depended ultimately on the final content of the entire draft, especially parts III and IV. Therefore both the Commission and the Drafting Committee should defer any decision until that content was clear. At the previous session, he had suggested that the forum court should *ex officio* satisfy itself that the requirements of the present articles were met before allowing a case to proceed. He agreed with Mr. Graefrath (2159th meeting) that the place for such a provision would be in article 7.

5. With regard to article 12, while it was true, as the Special Rapporteur had said in his oral introduction (2158th meeting), that legislation in the United States of America contained no specific provision on contracts of employment, there was no doubt that such contracts were covered by the general commercial-

activity exception in section 1605 (a) (2) of the *Foreign Sovereign Immunities Act of 1976*. The legislative history of the Act made that point clear. Contracts of employment were not mentioned simply because the entire approach was different from that taken in the present draft.

6. As to whether the exception to State immunity contained in article 13 should be retained, he would reiterate his conviction that the provision was essential. Without it, an injured individual would as a practical matter be without remedy, for in nearly all cases of personal injury and damage to property diplomatic protection would probably be unavailable. As a matter of international human-rights law, individuals must have some effective recourse. It was hard to understand Mr. Graefrath's point that the article was meaningless because all States that had ratified the 1961 Vienna Convention on Diplomatic Relations would be considered to have "otherwise agreed" under the terms of the article. Although that Convention provided for various immunities for diplomatic and consular premises and personnel, it contained nothing to make a foreign State immune from the courts of the State of the forum itself with respect, for example, to actions arising out of commercial contracts between the former State and a private person, or out of torts. That was precisely why the present articles were needed.

7. The Commission should not accept the proposal to delete subparagraphs (c), (d) and (e) of paragraph 1 of article 14 without thinking through the effects of such a deletion. Since the cases in question did not seem to be covered by other, more general provisions, the Commission should either retain the subparagraphs or add some such general provisions; there should certainly be no immunity in the cases covered in the subparagraphs.

8. The proposed addition to subparagraph (a) of article 15 and the suggestion to add a new subparagraph to article 19 reading: "(d) the recognition of the award" met with his approval.

9. The title of part IV of the draft might be altered to "Jurisdictional immunities of States in respect of their property", which would be clearer and much closer to the title of the topic. It was not certain that the expression "measures of constraint" in the present title of part IV really covered execution, which went well beyond constraint.

10. As to the Special Rapporteur's proposal to combine articles 21 and 22, the Commission must decide whether execution should be allowed whenever there was jurisdiction over the foreign State. If the answer was in the negative, the Commission was really saying that it thought an injured party should be able to sue the foreign State responsible, but that that State should not have to comply with any judgment rendered against it, something that seemed unsatisfactory from both a legal and a moral perspective. His basic position, therefore, was that there should be no requirement of a link between the claim and the property against which execution was sought. Because of the way the law in that area had developed, the extent of immunity of State property from execution in some régimes was different from the extent of State immunity

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

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

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

⁴ For the texts, see 2158th meeting, para. 1.

from jurisdiction. If the Commission wanted to maintain that difference, it should consider the requirement of a link. But it was often hard in practice to establish a link, as Mr. Tomuschat (2158th meeting) had pointed out, especially where money was involved. A court might well simply decide that a property or a bank account was being used for commercial purposes if it was not clearly earmarked otherwise.

11. United States legislation followed a two-track approach on the question of linkage, treating the property of State agencies and instrumentalities differently from other State property. If a judgment was against an agency or instrumentality engaging in commercial activities in the United States, it might be executed against any of the property of that agency or instrumentality, whether commercial or non-commercial, provided that the judgment related to a claim for which the agency or instrumentality was not immune. But other property of a foreign State was available for execution if used for the commercial activity on which the claim was based. There were thus many cases in which a plaintiff could obtain a judgment against a foreign State without being able to execute the judgment. Hence the problem of the United States approach was that it might permit the exercise of jurisdiction against a foreign State but not permit execution of the resulting judgment.

12. The Special Rapporteur's proposed textual changes to articles 21 to 23 were generally acceptable as a way of simplifying the texts. With reference to paragraph 1 (c) of the new article 21, he had just given his views on the question of linkage, and the Commission might want to consider introducing some of the kinds of nuance contained in United States or other legislation. However, he was not sure what it meant to say that property "has a connection with the . . . agency or instrumentality against which the proceeding was directed", although that formula had been adopted on first reading in subparagraph (a) of article 21. He agreed with Mr. Tomuschat that the proposed new article 23 might not be necessary, but the Commission should await the final definition of the term "State" in article 2 and the ultimate fate of draft article 11 *bis*.

13. He agreed with other members that article 26 needed clarification. If the only purpose was to protect States from "monetary penalties", it could be achieved in a much more direct way. The present wording would certainly not bar the issuance of an injunction against a foreign State, at least to the extent allowed under article 21.

14. Mr. BENNOUNA congratulated the Special Rapporteur on his third report (A/CN.4/431), which would greatly facilitate the adoption of the draft articles on second reading. He was optimistic about the future work on the topic, for it was proceeding along the right lines, i.e. on the basis of compromise. Articles 1 to 11 and the new draft articles 6 *bis* and 11 *bis* were already before the Drafting Committee, and the Commission should await the outcome of the Committee's work before commenting further on them.

15. The second alternative proposed by the Special Rapporteur for paragraph 2 (a) of article 12 was

acceptable, since it endeavoured to make the same content clearer and might provide a way out of the difficulty. He endorsed Mr. Mahiou's comment (2159th meeting) about the word "recruitment", now placed in square brackets in paragraph 2 (b). Since the State's discretionary power was total, jurisdictional recourse should not be permitted. In other words, the Commission should not exclude immunity with respect to recruitment.

16. Article 13 would probably cause problems in the Drafting Committee, because it contained a number of related notions whose difficulties could not be avoided. In particular, as Mr. Graefrath (*ibid.*) had pointed out, there was the problem not only of immunity, but also of diplomatic protection. The danger was that, by adopting too broad an article, the Commission might deprive immunity of its content and perhaps also jeopardize some aspects of diplomatic protection. The article spoke only of the State, not of diplomats, and of an act or omission "attributable to the State", a distinction that must be made clear. *A priori*, he was in favour of retaining the article, subject to the comments just made. Diplomatic protection in itself was not sufficient because, in the end, it depended on the good will of States. Individuals must have a means of recourse to protect their fundamental human rights.

17. He agreed with the Special Rapporteur's suggestion to delete subparagraphs (c), (d) and (e) of paragraph 1 of article 14, which were based on the common law. That would help the Commission to arrive at a consensus.

18. In article 15, the Special Rapporteur had taken account of certain views expressed both in the Sixth Committee of the General Assembly and in the Commission and had made a commendable effort to enlarge the notion of intellectual property by including a reference to plant breeders' rights and rights in computer-generated works in subparagraph (a). Personally, he was not opposed to that proposal, but wondered whether the two items in question could be said to be exhaustive and whether it would not be preferable simply to refer to them in the commentary rather than to cite them expressly in the text. It could, however, be left to the Drafting Committee to arrive at an appropriate formula.

19. He would have no objection to deletion of the bracketed term "non-governmental" in paragraphs 1 and 4 of article 18, provided that the meaning of the expressions "in commercial service" and "for commercial purposes" was made quite clear in the commentary and that it was explained that, if a ship was engaged on a government mission, the immunity would revive.

20. The Special Rapporteur's proposal that article 20 should be deleted also enlisted his support, since it would avoid a discussion on nationalization; in any event, the article had no place in the draft.

21. The proposal to simplify the texts of articles 21 and 22 by combining them in a single new article 21 was welcome. The phrase in square brackets in paragraph 1 (c) of the new article should be retained, for it provided a necessary link with the object of the claim, or with the agency or instrumentality against

which the proceeding was directed. That phrase would avoid confusion between different institutions that were autonomous, each of which being accountable for its own management. That, of course, was the theory of segregated property, which should also apply under the new article 21.

22. With regard to article 25, he fully agreed with Mr. Tomuschat (2158th meeting) that it should be made clear, in the Drafting Committee, that it was for the court of a State to raise the question of jurisdictional immunity on its own initiative, and that a foreign State was neither obliged nor required to appear before any court in the world to plead such immunity. That would provide States with the necessary protection and have the added advantage of avoiding the heavy legal costs they would otherwise incur.

23. In connection with article 27, the Special Rapporteur suggested that the provision in paragraph 2 on the non-requirement of security should apply solely to the defendant State. At first sight that suggestion seemed to have a certain logic, in so far as it was the plaintiff State that decided to bring a case before the courts and that could thus be said to submit, unlike the defendant State, to the same rules as those applying to any other plaintiff.

24. He had already spoken in favour of the deletion of article 28, but noted that the Special Rapporteur suggested that it be re-examined when all the other articles in the draft had been reviewed. He continued to believe, however, that the article would be dangerous for the existing balance with respect to treaties.

25. Lastly, it was gratifying to see that the Commission was moving forward in a spirit of compromise which alone would enable something tangible to be achieved on a difficult topic.

26. Mr. SEPÚLVEDA GUTIÉRREZ expressed appreciation to the Special Rapporteur for his third report (A/CN.4/431), which would facilitate the Commission's further work on the topic.

27. Commenting specifically on articles 12 to 28, he said that article 12 should be retained, as it would provide employees with protection. He agreed with the Special Rapporteur that the reference in paragraph 1 to the social-security requirement should be deleted. The second alternative of paragraph 2 (a) called for further discussion, while the deletion of paragraph 2 (b) seemed advisable, as it would help to clarify the provision.

28. Although some members of the Commission were in favour of deleting article 13, after careful reflection he had come to the conclusion that, to facilitate adoption of the article, it should be limited to damage caused by traffic accidents.

29. The Special Rapporteur was right to propose retaining article 14, subject to the deletion of subparagraphs (c), (d) and (e) of paragraph 1, for the reason given in the comments on the article in his report.

30. The text proposed for article 15, including the reference to plant breeders' rights in subparagraph (a), was acceptable. The nature and scope of those new rights, which were a hallmark of progress, should,

however, be made clear in the commentary. The same applied to rights in computer programmes and semi-conductor-chip layouts, which once again involved new subjects.

31. He agreed that the text of article 16 would be improved if the words "State" and "another State" were replaced by "foreign State" and "forum State", respectively. Furthermore, he would have no objection to retaining article 17 subject to the minor drafting amendments suggested by the Special Rapporteur.

32. The bracketed term "non-governmental" in paragraphs 1 and 4 of article 18 should indeed be deleted. He did not, however, concur with the recommendation that a new subparagraph, reading: "(d) the recognition of the award", should be added to article 19, and he preferred the text of the article adopted on first reading.

33. Article 20 dealt with a very sensitive matter—nationalization—and should therefore be removed from the draft as it would only give rise to controversy; in any event, the wording left much to be desired.

34. Combining articles 21 and 22 in a single new article 21 was a wise suggestion and acceptable as a matter of good legal technique. However, as already pointed out, it would be advisable to cover legally protected interests while, at the same time, deleting the phrase in square brackets in paragraph 1 (c) of the new text, "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed". The provision, given its importance, should be considered very carefully in the Drafting Committee.

35. The new article 22 (formerly article 23) should be retained. On the other hand, the new article 23 should be deleted or, if retained, be held in abeyance until article 11, on commercial transactions, had been carefully examined to ascertain the links between the two provisions.

36. Article 24 was superfluous and should be deleted.

37. He agreed with the Special Rapporteur with regard to article 25, and considered that a separate paragraph should be included to provide that it was for the court to ascertain whether it had jurisdiction. Mr. McCaffrey had spoken at some length on that point and he would not repeat the arguments advanced.

38. Lastly, article 28 should be deleted or at least be the subject of careful revision.

39. Mr. AL-BAHARNA, congratulating the Special Rapporteur on his third report (A/CN.4/431), said that the frequent revisions in the draft articles had caused him to alter his own position since the previous session.

40. With regard to article 12, the provisions which the Special Rapporteur, in his preliminary report, had suggested deleting had been restored and now appeared in square brackets in paragraph 1 and paragraph 2 (a) and (b) of the proposed text. Upon reflection, he himself had come to the conclusion that the reference to social security provisions in paragraph 1 was unnecessary, since several countries had no such provisions. As to paragraph 2 (a), he supported the first alternative, reading: "(a) the employee has been recruited to

perform services associated with the exercise of governmental authority”, but not the second. Paragraph 2 (b) should be retained, for he was inclined to agree with the Special Rapporteur’s statement in paragraph (4) of his comments on the article that “if immunity could be invoked in proceedings relating to recruitment, renewal of employment or reinstatement, little would remain to be protected by the local court”.

41. The Special Rapporteur had withdrawn the changes he had proposed earlier for article 13, and was now recommending the text as adopted on first reading. That was acceptable, subject to the addition of a clause to the effect that the article applied to injuries or losses arising out of traffic accidents. Also acceptable was the Special Rapporteur’s suggestion that subparagraphs (c), (d) and (e) should be deleted from paragraph 1 of article 14.

42. The terms of article 15 had been enlarged to cover plant breeders’ rights and rights in computer-generated works, additions which unduly extended the scope of the protection offered and thereby restricted the immunity principle. Unless it was absolutely essential, the Commission should be wary of extending the scope of the article, although he retained an open mind on the issue.

43. The changes proposed for the wording of articles 16 and 17 were acceptable. Furthermore, he agreed that the bracketed term “non-governmental” should be deleted from paragraphs 1 and 4 of article 18.

44. In article 19, the expression “commercial contract” was more precise in meaning and scope and therefore preferable to “civil or commercial matter”. The proposed new subparagraph (d), however worded, should not be retained, since recognition of an arbitral award was a first step towards execution, which required the express consent of the State concerned. In the last part of the introductory clause, the phrase “before a court of another State which is otherwise competent” was clearer than the alternative formula referred to by the Special Rapporteur in paragraph (3) of his comments on the article.

45. Article 20 should indeed be deleted, since the question of nationalization was far too complex to be dealt with in such a manner.

46. In paragraph (5) of his comments on articles 21 to 23, the Special Rapporteur expressed the view that “limited execution rather than its total prohibition would have a better chance of obtaining general approval”. Accordingly, he had proposed a revised article 21 which, in effect, withdrew the principle of prohibition set forth in the text adopted on first reading, despite the fact that, as he pointed out in paragraph (4) of his comments, several Governments had said that they were not basically opposed to that text. The Special Rapporteur thus proposed a radical departure from the balance struck between the interests of the parties concerned. Personally, he had an open mind as to whether to retain articles 21 and 22 as adopted on first reading, subject to certain changes, or to adopt the new article 21. If the original articles 21 and 22 were retained, however, he could agree to the deletion of the bracketed words “non-governmental” and

“or property in which it has a legally protected interest”, provided that the phrase “and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed”, in article 21 (a), was retained. In that way, the balance of the text adopted on first reading would be restored. In that connection, he drew attention to the text proposed for article 21 by Mexico in its comments and observations,⁵ which, in his view, was a better formulation and one he would commend for adoption.

47. With regard to article 23, he wished to confirm his earlier support for the deletion of the bracketed term “non-governmental” in paragraph 1 and for the addition of the words “and used for monetary purposes” at the end of paragraph 1 (c). While he agreed with the principle underlying the proposed new article 23, the wording was not satisfactory and he proposed the following text:

“A State cannot invoke immunity from measures of constraint, including measures of attachment, arrest and execution, in respect of the property of a State enterprise.”

48. As to article 24, he considered the text proposed by the Special Rapporteur in his preliminary report (A/CN.4/415, para. 248) far less ambitious than that adopted on first reading; to that extent, it was no doubt welcome. He still felt, however, that something was missing in the formulation. Every State had its own rules regarding service of process, and courts attached the greatest importance to those rules. As the Governments of the Nordic countries had rightly pointed out in their comments and observations,⁶ it could not be assumed that States would be willing to modify their domestic rules of civil procedure if a national ratification or accession so required. In the case of the present draft articles, it was advisable to include a clause ensuring service of process under the domestic law of the State of the forum. Article 24 should therefore include a new paragraph 1 (a), reading: “(a) in accordance with the rules of civil procedure of the State of the forum”. If such a clause could not be added, he would find it difficult to accept paragraph 4 of the article, which, in its present formulation, denied the State concerned the right to seek annulment of the proceeding on the ground that it had not been duly impleaded. He was not in favour of the amendments concerning translation suggested by the Special Rapporteur and appearing in square brackets in paragraph 3 of the text submitted in his third report as a basis for consideration, for they did not adequately safeguard the interests of the State concerned.

49. He could endorse article 25, subject to the adoption of the new paragraph 1 (a) he had proposed for article 24 (see para. 48 above); the reference to paragraph 1 of article 24 would thus extend to paragraph 1 (a), (b) and (c). Similarly, he had no objection to adding the words “and if the court has jurisdiction in accordance with the present articles” at the end

⁵ *Yearbook* . . . 1988, vol. II (Part One), p. 76, document A/CN.4/410 and Add.1-5.

⁶ *Ibid.*, p. 78.

of paragraph 1 of article 25, as suggested by the Special Rapporteur. However, for the reasons stated in connection with article 24, he was not in favour of deleting the words "if necessary" in paragraph 2.

50. He agreed with the suggestion made by the United Kingdom in its comments and observations⁷ that article 26 should be reframed in such a way that the immunity which it conferred was immunity not merely from the liability to a monetary penalty if an order of the kind referred to was disobeyed, but immunity from the very possibility of having such an order made against a State. In order to reflect that view, he proposed the following text for article 26:

"Where a State enjoys immunity in a proceeding before a court of another State, the court cannot issue any order against the State requiring it to perform or to refrain from performing a specific act."

That reformulation would dispose of the objection mentioned by the Special Rapporteur in the comments on the article in his third report.

51. He had no difficulty in accepting the addition to paragraph 2 of article 27 proposed by the Special Rapporteur in both his preliminary and his third reports.

52. Noting that article 28 was modelled on article 47 of the 1961 Vienna Convention on Diplomatic Relations and article 72 of the 1963 Vienna Convention on Consular Relations, he remarked that, while there might be a justification for such a provision to appear in those Conventions, he was not sure whether it needed to be included in the present draft. In the first place, the object of immunity was not the same in the two sets of cases: in the conventions on diplomatic and consular relations it was a diplomatic or consular agent, whereas in the present case it was the State itself. Since diplomatic and consular agents of several countries were present in the host country at a given time, it was logical that a rule of non-discrimination should be laid down; but since the matter of State immunity came before the Ministry of Foreign Affairs or the court of the forum State in one single instance, there was no need for such a rule in the present case. Secondly, the basis for immunity was not the same: whereas, in the case of the immunities of diplomatic and consular agents, it was reciprocity, in the case of State immunity it was the principle *par in parem imperium non habet*. Thus the inclusion of the principle of non-discrimination in the present articles seemed superfluous. Moreover, the qualifications in paragraph 2 of article 28 might upset the balance carefully worked out between the principle of immunity and the exceptions thereto. Thirdly, paragraph 2, which in subparagraph (a) referred to restrictive application and in subparagraph (b) to extension by agreement of the provisions of the present articles, seemed to be somewhat tangential. It should be noted that Governments which had commented on article 28 were sceptical about its formulation and its content. He personally would be in favour of eliminating the article altogether, especially if the Commission decided to delete the bracketed phrase in article 6.

53. Lastly, noting that articles 12 to 18 all began with the words "Unless otherwise agreed between the States concerned", he said that it might be preferable from the drafting point of view to state in a general provision that the articles in question would apply only in the absence of an agreement to the contrary between the States concerned.

54. Mr. KOROMA said that the Special Rapporteur's proposal for a neutral formulation for the title of part III of the draft was commendable and should not give rise to any objections, for the implication was that States were agreed that certain activities were excluded from the jurisdictional immunities of States.

55. He would have preferred a reformulation of article 11 which did not include any reference to the applicable rules of private international law. The text proposed by the Special Rapporteur was, in his view, somewhat eclectic and left room for a good deal of uncertainty. In that connection, he recalled that the business community had in the past deplored the frequent inclusion of similar vaguely worded references in international agreements. In his view, it would be preferable if paragraph 1 referred to international agreements concerning choice of jurisdiction or to clauses designating the governing law, and he requested the Special Rapporteur and the Drafting Committee to consider that suggestion.

56. Draft article 11 *bis* did not cover the situation in which, even if the State enterprise was engaged in a commercial transaction as defined in the article, differences arose regarding the contract as a result of *acta jure imperii*. Neither article 11 nor draft article 11 *bis* would seem to cover that possibility, and he would like to hear whether the Special Rapporteur considered that it was adequately addressed elsewhere in the draft.

57. Article 12, on contracts of employment, raised many issues and a number of problems. It drew on the 1972 European Convention on State Immunity and on the United Kingdom *State Immunity Act 1978*, whereas the United States *Foreign Sovereign Immunities Act of 1976* and Canada's *State Immunity Act, 1982* contained no provisions on the matter. In that connection, Mr. McCaffrey had provided helpful information earlier in the meeting. In the past, States had consistently granted immunity from claims brought by employees of a diplomatic mission employed in the work of the mission, the main reason for doing so being that working for a foreign State involved participation in the public functions of that State and that hearing the complainant was likely to involve investigation of governmental functions. It should be noted that most cases adjudicated in the past had fallen outside the category of governmental activity and involved employees working in semi-governmental institutions, such as cultural agencies and the like; in such cases, jurisdictional immunity clearly could not be claimed. On the other hand, where employees were recruited to work for a governmental institution or for the Government itself, their activities were considered to be governmental functions and the prerogatives of Governments were, by and large, respected. With those considerations in mind, he preferred the text of article 12 adopted on

⁷ *Ibid.*, p. 89.

first reading, which, while protecting the rights of the employee, also respected the jurisdictional immunity of the State. He would not wish the prerogatives of States to be further diluted.

58. With regard to article 14, he could agree to the Special Rapporteur's suggestion to delete terminology which was not universally accepted, but hoped that the underlying concept, which surely was universally valid, would not be lost in consequence.

59. He associated himself with the view expressed by one Government that article 15 applied only to the commercial use of patents or trade names in the forum State and not in connection with the determination of the ownership of such rights (see A/CN.4/415, para. 160). Even with that qualification, however, article 15 was not strictly necessary, since the problems it was intended to resolve were of a highly technical nature and should be left to specialized international conventions, such as those concluded under the auspices of WIPO.

60. Article 16 should be redrafted along the lines of article 29 of the 1972 European Convention on State Immunity.

61. Although he could accept article 19 as presently formulated and agreed with the suggestion that its scope be limited to commercial contracts, he would none the less suggest the inclusion of a provision to the effect that submission to arbitration should not be construed as submission to the jurisdiction of the forum State. The distinction might appear self-evident, but the tendency to construe submission to arbitration as a waiver of immunity did exist and a proviso along those lines would lend greater clarity to the text.

62. The Special Rapporteur's recommendation to delete article 20 was acceptable.

63. The reformulation of the articles in part IV of the draft, on State immunity in respect of property from measures of constraint, was to be welcomed. If the texts adopted on first reading were retained, he would prefer the bracketed phrase "or property in which it has a legally protected interest", in the introductory clause of article 21, to be retained also, so as to make it clear that the provision was concerned with legally protected interests. As to the texts proposed by the Special Rapporteur as the second alternative, his own view was that the basic rule prohibiting execution should be stated and the exceptions to that rule spelt out. That was the pattern followed in many municipal legislations, and he wished to recommend it for the Special Rapporteur's consideration.

64. He welcomed the changes suggested for article 24 and, in particular, the inclusion in paragraph 3 of a reference to translation into one of the official languages of the United Nations. Article 26 definitely had a place in the draft.

65. With regard to article 28, on non-discrimination, he recalled that in the past he had advocated a moratorium on national legislation on State immunities so as to allow the Commission to elaborate proposals for a uniform régime. Article 28, if retained, might interfere with that objective. In considering whether to

delete or retain it, the Commission should bear in mind the importance of avoiding a multiple régime and ensuring uniformity of the law on the matter.

66. Mr. PAWLAK said that, since he had spoken at some length on parts I, II and III of the draft at the previous session, he would confine his remarks to parts IV and V.

67. As he saw it, the most important problems involved with regard to those parts related to immunity from measures of constraint, and especially questions of execution. For that reason, he welcomed the Special Rapporteur's efforts to present new formulations of articles 21 to 23. The Special Rapporteur was in fact opposed to the idea of total prohibition of execution, an approach that had been endorsed in the comments and observations of many Governments and one that would probably enhance the chances of securing more universal approval for the draft articles.

68. Against that background, he himself could accept the new formulation of article 21. The text was simpler and clearer, although it still called for drafting improvements to eliminate some ambiguities. Mr. McCaffrey had already pointed to some of the weaknesses in the article, especially in paragraph 1 (c). A proper approach was also needed in regard to separation of property. He shared the view of Mr. Mahiou (2159th meeting) and Mr. McCaffrey that the proposed new article 23 was probably unnecessary in the light of draft article 11 *bis*. The question of retaining article 23 could be settled after a decision had been taken regarding article 11 *bis*.

69. It would be right to insert the words "and if the court has jurisdiction in accordance with the present articles" at the end of paragraph 1 of article 25, for express provision should probably be made for the right of *ex officio* examination of State immunity by the court.

70. As to article 26, he tended to agree with Mr. Tomuschat (2158th meeting) and Mr. Bennouna that a State should be free from unnecessary burdens other than monetary ones as a result of proceedings before a court of another State. As far as the wording was concerned, however, it would be best to retain the existing formulation.

71. The Special Rapporteur's proposal for article 27 was acceptable and, as other speakers had pointed out, article 28 should be deleted.

72. The topic now seemed ripe for completion during the term of office of the Commission's current members, but the draft articles should reflect the changes in relation to State property which were taking place in many countries, especially in eastern and central Europe. Constant observation of that problem was necessary and a new approach should be reflected in the formulations adopted by the Commission at the final stage.

Co-operation with other bodies

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN
LEGAL CONSULTATIVE COMMITTEE

73. The CHAIRMAN invited Mr. Njenga, in his capacity as Observer for the Asian-African Legal Consultative Committee, to address the Commission.

74. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee had held its twenty-ninth session at Beijing in March 1990. As the Committee's Secretary-General, he could vouch for its commitment to further strengthening its ties with the Commission. The Committee had been particularly happy to welcome at its twenty-ninth session the Commission's outgoing Chairman, Mr. Graefrath, who had stressed how valuable the Committee's experience was to members of the Commission, bearing in mind that the two bodies often worked on similar or closely related topics. The mutual exchange of experience was therefore a constant and much needed practice.

75. The Committee's twenty-ninth session had witnessed the largest number of representatives of member States and observer delegations at the very highest level, and had been attended by, among others, the Chairman of the Sixth Committee of the General Assembly, Mr. Türk. The Committee had expressed the hope that the participation of the Chairman of the Sixth Committee would become a regular feature at future sessions. He took the opportunity of drawing the attention of the Legal Counsel of the United Nations to that point, because of possible financial implications.

76. The Committee deeply appreciated the role of the Commission in the progressive development and codification of international law and its meticulous work on matters of vital importance to the family of nations. At the Commission's previous session, he had proposed the convening of a joint seminar on the law of the non-navigational uses of international watercourses and jurisdictional immunities of States and their property, adding that such a seminar would underscore the spirit of co-operation between the two bodies and would be of considerable benefit to them in their future work. At the Committee's twenty-ninth session, it had also been emphasized that it would be useful to hold regular meetings of legal advisers in order to benefit from the expertise of the special rapporteurs in their respective fields.

77. With regard to the law of the non-navigational uses of international watercourses, the view had been expressed that the Commission's work should be conducted within the conceptual framework of a formula based on optimum equitable and reasonable utilization of international rivers. In addition, it had been stated that an international watercourse was a shared natural resource and was therefore subject to equitable distribution among upper and lower riparian States. The use of, or activities involving, an international watercourse by an upper riparian State should not therefore adversely affect the rights and interests of lower riparian States. Accordingly, an enumeration of factors determining "appreciable harm" had to be part of any agreement on the subject. Emphasis had also been placed on the close connection between the law of the non-navigational uses of international watercourses

and environmental problems. Co-operation between States in such uses was thus becoming increasingly important at a time when the international community was called upon to co-operate on environmental protection. Lastly, it had been decided to put the international watercourses item back on the Committee's active agenda and to discuss it during the thirty-first session, in 1992.

78. On the topic of State responsibility, the view had been expressed that the Commission should speed up its work and attention had been focused on the concept of a "crime" as distinct from a "delict", on the responsibility of the wrongdoer *erga omnes* and on the notion of *jus cogens* as stipulated in the 1969 Vienna Convention on the Law of Treaties.

79. As to the draft Code of Crimes against the Peace and Security of Mankind, it had been thought that the Commission's work should proceed with the requisite degree of priority. Successful conclusion of the work on the topic would provide the international community with an instrument of deterrence and punishment for present and future violations of its provisions. To constitute a complete legal instrument, the code had to incorporate the three elements of crimes, penalties and jurisdiction. To be effective, it should concentrate on the hard core of clearly understood and legally definable crimes. The proposed establishment of an international criminal court had been endorsed, and it had been said that the court should have clearly defined jurisdiction, including jurisdiction over drug traffickers. It had also been suggested that the code should cover: (a) expulsion or forcible transfer of populations from their territory; (b) the establishment of settlers in occupied territory; (c) changes in the demographic conditions of a foreign territory.

80. The Committee had considered a number of other substantive items. Following the declaration by the General Assembly of the United Nations Decade of International Law,⁸ the Committee's secretariat had prepared a note for the twenty-ninth session on the role of the Committee in the realization of the objectives of the Decade. The Committee had called for the preparation of an in-depth study on the Decade, which would be submitted to the Legal Counsel of the United Nations, setting out the Committee's proposals and views on the matter. The Committee looked forward to making an active contribution to the realization of the Decade.

81. Among other things, the Committee hoped to undertake an in-depth study on enhanced use of the International Court of Justice in the broader context of promoting means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the ICJ, as stated in the General Assembly resolution on the United Nations Decade of International Law. The Registrar of the International Court of Justice had offered his co-operation in carrying out that venture.

82. The Committee had always attached great importance to the law of the sea, and an initiative would be

⁸ General Assembly resolution 44/23 of 17 November 1989.

undertaken by the secretariat on the subject of "Alternative cost-effective models for pioneer activities in exploration, development and training for joint ventures in deep-sea mining". Together with the International Ocean Institute and the Law of the Sea Institute, the Committee's secretariat proposed to organize a workshop on the subject of joint ventures in deep-sea mining in August 1990, in New York.

83. The significant and topical subject of the control of transboundary movements and disposal of hazardous wastes, particularly in the Afro-Asian region, was viewed by many as a vitally important aspect of acts not prohibited by international law. Many of the Committee's member States had already expressed concern at the Conference of Plenipotentiaries held at Basel in March 1989 and at the OAU meetings of legal and technical experts held at Addis Ababa in December 1989 and early May 1990. At the Committee's twenty-ninth session, the secretariat had been called upon to draw up a draft Asian-African convention on the control of transboundary movements and disposal of hazardous wastes, with a view to totally prohibiting the import of hazardous wastes in the region.

84. Other items in the Committee's work programme included the preparation of documents and studies on the status and treatment of refugees; the deportation of Palestinians as a violation of international law, particularly the 1949 Geneva Conventions; the criteria for distinguishing between international terrorism and national liberation movements; the extradition of fugitive offenders; the debt burden of developing countries; and a number of other subjects. Work was continuing on all those topics, which were among those to be considered at the Committee's thirtieth session, early in 1991.

85. The item "Co-operation between the United Nations and the Asian-African Legal Consultative Committee" was on the agenda of the forty-fifth session of the General Assembly. In pursuance of the programme of co-operation between the Committee and the United Nations, the Committee's secretariat would again prepare brief notes and comments on the legal aspects of some selected items likely to be allocated to the Sixth Committee at the forty-fifth session of the General Assembly, including notes on the progress of the work of the Commission at the present session and on other items related to the Committee's overall work programme.

86. Lastly, he extended an invitation, on behalf of the Committee, to the Chairman of the Commission to represent the Commission at the Committee's thirtieth session, to be held at Cairo in March 1991.

87. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his statement. The Committee's twenty-ninth session at Beijing had been a very happy occasion indeed. In keeping with its established policy, the Commission was committed to promoting co-operation with regional intergovernmental bodies involved in the field of international law. The Commission was particularly interested to have reports on activities of special concern to

each region. It was equally interested to learn of activities on which the Committee was working in close co-ordination with the Commission itself. Such co-operation between the two bodies would help the Commission, which would thus benefit from the views and comments from Asia and Africa.

88. He sincerely hoped that co-operation between the Committee and the Commission would not only be continued but also be intensified. He wished to thank the Observer for the Asian-African Legal Consultative Committee for his invitation to attend the Committee's thirtieth session, which he gladly accepted.

The meeting rose at 1 p.m.

2161st MEETING

Tuesday, 22 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property
(*continued*) (A/CN.4/415,¹ A/CN.4/422 and Add.1,²
A/CN.4/431,³ A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)
CONSIDERATION OF THE DRAFT ARTICLES⁴ ON SECOND
READING (*continued*)

1. Mr. BARSEGOV thanked the Special Rapporteur for endeavouring once again to find mutually acceptable compromise solutions and for submitting a third report (A/CN.4/431) which created the conditions for fruitful co-operation among the members of the Commission.

2. Recalling that he had had occasion to state his position on articles 1 to 11 and the new draft articles 6 *bis* and 11 *bis* at the previous session, he said that he would not revert to those articles, especially as they had been referred to the Drafting Committee, of which he was a member and in which he would be able to express his views on the proposed new texts. He would

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

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

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

⁴ For the texts, see 2158th meeting, para. 1.

therefore comment only on articles 12 to 28, but first wished to stress once more that draft article 11 *bis*, on segregated State property, was of capital importance to all countries, since every country in the world had economic relations with countries such as the USSR and China, where to varying degrees segregated State property played a considerable role. The proposals made on the question of segregated State property were aimed at promoting close economic relations in the interests of all parties. The dynamic process of reconstruction in progress in the Soviet Union and, in particular, the adoption of a new law on property and the economic reforms involving the introduction of a market economy brought the issue sharply into focus.

3. With regard to article 12 (Contracts of employment), he said that, like other members, he had doubts as to the appropriateness of some of its provisions. The Special Rapporteur himself showed that he was aware of the problem by placing in square brackets certain terms and phrases in paragraph 1 and paragraph 2 (a) and (b) of the proposed new text.

4. He agreed with the views expressed by several Governments and various members of the Commission and was prepared to accept the Special Rapporteur's suggestion that the reference to social security provisions in paragraph 1 should be deleted, since not all States had social security systems. He recalled that, in its comments and observations, Switzerland had suggested that, in order to deal with that problem, the word "and" in the phrase "and is covered by the social security provisions . . ." should be replaced by "or".⁵ He was also prepared to accept the proposal made by the Special Rapporteur in his preliminary report that paragraph 2 (a) and (b) should be deleted. However, if subparagraph (a) was to be retained, he would prefer the original text. A problem arose in cases where a contract of employment was concluded between a State and one of its nationals who had kept the nationality of that State, but did not habitually reside in its territory. The Soviet Union today was no longer indifferent to the fate of Soviet citizens residing abroad; those who wished to keep their Soviet nationality were considered fully-fledged Soviet citizens, with all the legal consequences deriving from that status. He therefore proposed that the words "nor a habitual resident" in paragraph 2 (c) should be deleted.

5. He found article 13 (Personal injuries and damage to property) as a whole unacceptable. In the first place, it referred to damage to persons or property resulting from an act or omission whose author—a physical or legal person—was a subject of law distinct from the State and present in the territory of the State of the forum, and it provided for the possibility that a court might attribute such an act or omission to a foreign State and declare that State to be responsible. The regulation of legal relations arising in connection with compensation for damage obviously went beyond the scope of the draft articles under consideration. Secondly, in matters of State responsibility, the question whether the conduct of a State was in conformity

with the law was determined through international procedures under the rules of international law and could not be determined by national courts. One of the reasons why it had been proposed that article 13 should be deleted was that its application could lead to a situation where a State enjoyed less immunity than its diplomats did under article 31 of the 1961 Vienna Convention on Diplomatic Relations. It should also be borne in mind that the existence of insurance policies and the possibility of settling problems of that kind through diplomatic channels reduced the number of disputes and made the issue less important.

6. In his preliminary report, the Special Rapporteur had endorsed the argument advanced by Spain with regard to article 13⁶ and had recommended the inclusion of a new paragraph 2 (A/CN.4/415, para. 143). Although that proposal had not given rise to any objection in the Commission, it was not taken up in the third report. On the other hand, it was true that, in reverting to the text adopted on first reading, the Special Rapporteur had abandoned the idea of extending the scope of the article to transboundary damage.

7. It should be noted that, at the present session, some members had made their acceptance of article 13 conditional upon its scope being limited to damage to persons or property caused by traffic accidents. Pending a decision on the desirability of retaining the article and on the definition of its scope, he wished to state that, if the article were retained, the expression "act or omission which is alleged to be attributable to the State" should be redrafted in more precise terms and the subjects and objects of regulation should be defined more clearly in the light of the comments made by Governments and by members of the Commission.

8. Article 14 (Ownership, possession and use of property) was difficult to understand because its scope was too broad and ill-defined. The practice of a limited number of States could not be adopted as the basis of the article; to do so would inevitably affect the content of the draft and its degree of acceptability. The differences and particularities of the legal systems of all groups of States should, on the contrary, be taken into account as far as possible. In that spirit, he thought that it would be advisable to delete subparagraphs (c), (d) and (e) of paragraph 1, as the Special Rapporteur suggested. The other subparagraphs listing categories of property required additional work and more precise drafting; their principal shortcoming was that they did not establish a connection between the place where the property was situated and the State of the forum.

9. With regard to article 15 (Patents, trade marks and intellectual or industrial property), he said that a clear statement was needed to the effect that the exception envisaged in the case of a proceeding relating to the determination of a right in intellectual or industrial property was applicable only in the State of the forum and did not extend to rights which were exercised or which existed in other countries. As Mr. Koroma (2160th meeting) had pointed out, the problem which article 15 was intended to regulate was that of the exercise of intellectual or industrial property rights in the

⁵ *Yearbook . . . 1988*, vol. II (Part One), p. 95, document A/CN.4/410 and Add.1-5.

⁶ *Ibid.*, p. 80.

forum State, not that of their acquisition. As to subparagraph (b), which the Special Rapporteur was recommending in the form adopted on first reading, he said that, in Soviet law, the State was not the subject of the rights in question; the subjects and beneficiaries of those rights in legal relations of that kind were specific physical or legal persons. The words "alleged infringement" were too broad and might pave the way for abuses. For those reasons, he was in favour of deleting subparagraph (b).

10. Like other members of the Commission, he did not think that the scope of protection of patents should be unduly expanded, since that would automatically limit the scope of the immunity principle. In his view, it was not the Commission's task to draw up either an exhaustive or an illustrative list of different types of intellectual or industrial property. Some members had pointed out that the highly technical nature of article 15 would make it very difficult to formulate in the context of the present draft.

11. The terminological changes proposed in articles 16 (Fiscal matters) and 17 (Participation in companies or other collective bodies) were acceptable. With regard to the proposal to redraft article 16 along the lines of article 29 (c) of the 1972 European Convention on State Immunity, concerning customs duties, taxes or penalties, he thought that the matter could, as the Special Rapporteur suggested, be left to the Drafting Committee. Article 17 as a whole could be referred to the Drafting Committee.

12. With regard to article 18, he was not in a position to give more than his personal view as to the advisability of extending the concept of segregated State property to State-owned or State-operated ships engaged in commercial service. He believed, however, that the reforms which would be carried out in that field in the Soviet Union would be in the spirit of the new laws on property and enterprises.

13. Concerning article 19 (Effect of an arbitration agreement), it should be assumed that the State agreed, voluntarily and contractually, that the difference in question should be submitted to arbitration. He endorsed the arguments of some Governments and members of the Commission to the effect that a State party to an arbitration agreement must retain its right to invoke immunity before the courts of a State that was not involved or designated by the agreement, unless the agreement contained an explicit provision to the contrary.

14. As to article 20 (Cases of nationalization), he believed that, as drafted, it might lend itself to an interpretation that would undermine the firmly established principle of international law that nationalization laws were applicable beyond the national territory. Measures of nationalization, as sovereign acts, were not subject to the jurisdiction of another State and could not be considered as representing an exception to the principle of immunity. He agreed that the question of nationalization was far too complex to be dealt with as it was in article 20. The members of the Commission who had suggested deleting the article had done so on the basis that the applicable rules of public or private

international law could be relied on to settle questions relating to nationalization before the courts. And, in fact, the Special Rapporteur, with his customary realistic approach, was recommending that the article be deleted.

15. Turning to part IV of the draft, he recalled that the text of article 21 (State immunity from measures of constraint) as adopted on first reading set forth, in its introductory clause, the principle of the inadmissibility of measures of constraint against a State on the basis of a decision by a foreign court—thus meeting the requirements of contemporary international law—but linked it to two exceptions, contained in subparagraphs (a) and (b). He also recalled that that text had been criticized and that the Special Rapporteur, having initially been opposed to the proposal to delete subparagraphs (a) and (b) on the ground that it might make all measures of constraint against a State inadmissible, had, in his third report, in paragraph (5) of his comments on articles 21 to 23, taken a different stand based on the idea that "carefully limited execution rather than its total prohibition would have a better chance of obtaining general approval". Thus the Special Rapporteur was proposing a new article 21, combining articles 21 and 22 as adopted on first reading. He himself was not opposed to the principle of such a combination, but the resulting text departed radically from article 21 and the principle of the inadmissibility of measures of constraint. He found that surprising and doubted that efforts to find compromise solutions would be successful if precisely that principle were not enunciated. At the current stage, in any event, the situation was unclear: some were trying to find a solution on the basis of the improvement of the texts of articles 21 and 22 as adopted, and others on the basis of the new article 21.

16. With regard to the new article 22 (Specific categories of property) and to the comments that had been made within and outside the Commission, he endorsed the opinion that there was an organic link between that article and draft article 11 *bis* that should be duly taken into account. He did, however, wish to draw attention to certain questions of principle that he found important. According to paragraph 1 (c) of the text adopted on first reading (art. 23), property of the central bank of the foreign State which was in the territory of the forum State was unconditionally exempted from measures of constraint, whatever the purpose for which it was used. That provision was based on the idea that central banks were instruments of the sovereign power of a State and that all the activities conducted by them enjoyed immunity from measures of constraint. What was more, in view of their legal status, central banks should be considered as State bodies and automatically enjoy immunity on that basis.

17. The Drafting Committee should consider how the wording of paragraph 2 of the new article 22 could better establish the protection of the specific categories of property in question against all measures of constraint, or, in other words, allow no derogations from the principle of immunity in respect of that property.

18. As for the advisability of the new article 23, he could only accept the legal arguments developed by the Special Rapporteur, especially with regard to the approach reflected in draft article 11 *bis*. He did not understand why the concept of segregated State property continued to raise opposition from certain members of the Commission. In the socialist States, where the immunity of State property had formerly been an iron-clad principle, consideration was now being given to using that concept to restrict considerably, at the least, the scope of immunity in order to promote economic relations. He wondered why that should raise objections in other countries.

19. Turning to part V of the draft (Miscellaneous provisions), he said that the changes proposed by the Special Rapporteur were for the most part an improvement over the previous texts. The Commission might entrust the Drafting Committee with the task of producing the final texts on the basis of the opinions expressed. With regard in particular to article 28 (Non-discrimination), he understood the position of the members of the Commission who had suggested either deleting the article or thoroughly examining its consequences in the context of the draft articles as a whole. In particular, consideration should be given to Mr. Al-Baharna's comments (2160th meeting) in that connection. As the Special Rapporteur said in the comments on article 28 in his third report, "the subject will require careful consideration after general agreement has been reached on the preceding articles".

20. Mr. ILLUECA said that he would speak first on articles 1 and 6, which determined the scope of jurisdictional immunities of States, and then on articles 12 to 28 under consideration by the Commission, reserving the possibility of attending the meetings of the Drafting Committee when it discussed the articles referred to it at the previous session.

21. In his third report (A/CN.4/431), the Special Rapporteur suggested adding to the text of article 1 adopted on first reading the words "and measures of constraint", which apparently amounted to adding to the idea of immunity from jurisdiction proper the idea of immunity from execution, to be dealt with in articles 21 to 23. However, in addition to the two types of jurisdiction mentioned, namely judicial procedures and measures of execution, there was a third type which should not be forgotten: legislative jurisdiction. As was well known, the jurisdiction of legislative bodies had the same status as that of other State bodies, including judicial bodies. Thus the PCIJ had stated in 1926, in the case concerning *Certain German Interests in Polish Upper Silesia*:

... From the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. ...⁷

The words "or bodies" should thus be added to the text of article 1 proposed by the Special Rapporteur, which would then read: "The present articles ... from the jurisdiction and measures of constraint before the

courts or bodies of another State." Article 6 should be amended in the same way, the relevant passage reading: "from the jurisdiction of the courts or bodies of another State".

22. According to the doctrine of absolute immunity, the question of immunity from legislative jurisdiction did not arise. It did become important under the method adopted by the Commission, which had decided at its previous session to come to an agreement on which State activities should enjoy immunity. Without going into detail concerning the act of State doctrine, it should be recalled that certain eminent jurists maintained that a foreign State could claim immunity from legislative jurisdiction in cases where the proceedings had been instituted as a result of a public act of the foreign State separate from the act that had been the basis for judicial competence.

23. Article 12, concerning contracts of employment, should be retained. The Special Rapporteur was correct in suggesting the deletion of the reference to social security provisions in paragraph 1. Paragraph 2 (*b*) could also be deleted for the reasons given by the Special Rapporteur, since subparagraphs (*c*) and (*d*) provided sufficient support for the rule set forth in the article.

24. Article 13 was a complex provision, and should be given careful consideration in the Drafting Committee. In particular, its legal relationship to the law of State responsibility should be clarified. The previous Special Rapporteur, Mr. Sucharitkul, had drafted the text thinking that it would apply only to traffic accidents. The present Special Rapporteur intended to limit the application of the article mainly to "pecuniary compensation arising from traffic accidents involving State-owned ... means of transport and occurring within the territory of the forum State", as he stated in paragraph (2) of his comments on the article. That was a fully acceptable approach.

25. Subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 of article 14 could be deleted, as the Special Rapporteur proposed, for they had not been shown to reflect universal practice. Paragraph 2 might also be deleted, since it seemed to duplicate paragraph 3 of article 7.

26. Article 15, with its new reference to "a plant breeder's right and a right in computer-generated works", as well as article 17, were on the whole acceptable. Article 16, however, should be deleted because of the implications it carried, unless the subject-matter of article 11 (Commercial contracts) was incorporated in it, as Mr. Koroma (2160th meeting) had suggested.

27. In article 18, dealing with State-owned or State-operated ships engaged in commercial service, it should be made clear that, in all cases where the public interest was involved in a particular commercial activity carried on by a State ship, the State concerned could invoke the immunity of the ship. That question was not purely theoretical and, to illustrate that point, he cited the following case: in 1973, at the time of the overthrow of the Allende Government, two ships, one chartered by Cuba and the other by the Soviet Union, had been unloading in Chilean ports. For political reasons, those two States had decided to recall their ships, which had

⁷ Judgment of 25 May 1926 (Merits), *P.C.I.J.*, Series A, No. 7, p. 19.

had to pass through the Panama Canal. The United States of America had then taken action to stop them from continuing their route and had arrested them at the entrance to the Canal. A protest had been made, not by the Soviet Union or by Cuba, but by Panama, which had invoked the immunity of the ships. The United States authorities had considered that protest admissible and had released the ships.

28. Also in connection with article 18, it was worth recalling that article 3, paragraph 1, of the 1926 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels recognized the immunity of ships "used at the time a cause of action arises exclusively on *governmental and non-commercial** service". It would therefore be logical to delete the square brackets in paragraphs 1 and 4 so that the expressions in question would read "commercial and non-governmental service" and "commercial and non-governmental purposes".

29. In article 19, the Special Rapporteur proposed the addition of a new subparagraph (*d*) referring to "the recognition of the award", but that addition would not be appropriate. However, as the Special Rapporteur indicated in paragraph (1) of his comments on the article, the terminology used should be brought into line with that of article 2, on the use of terms.

30. Article 20, dealing with cases of nationalization, should be deleted, as recommended by the Special Rapporteur. In the new article 21, the words in square brackets in paragraph 1 (*c*) should be retained. The new article 22 (formerly article 23) was acceptable, whereas the new article 23 in its present wording was unnecessary.

31. As a matter of prudence, article 25 should be amended, as one Government had pointed out in its written comments, in order to make it clear that a default judgment should not be rendered merely by virtue of due service of process. In addition, the words "and if the court has jurisdiction in accordance with the present articles" could be added at the end of paragraph 1, as the Special Rapporteur suggested. It would also be very important to include in that article, in one form or another, the idea that, in accordance with the provisions of article 9, paragraph 3, non-appearance could not be taken to constitute consent by the foreign State to the exercise of jurisdiction by a court of another State.

32. The Special Rapporteur preferred to retain the text of article 26 adopted on first reading. That wording should be strengthened as much as possible in order to stress that measures of coercion were not warranted.

33. The new wording proposed for paragraph 2 of article 27 was acceptable. Article 28, relating to non-discrimination, should either be deleted or be reworded.

34. Mr. EIRIKSSON, noting that he belonged to the school which supported the restrictive theory of State immunity, said that he would not dwell on the articles which took a position on the theoretical issues involved, some of which had already been referred to the Drafting Committee. He nevertheless took note of the Special Rapporteur's proposals regarding article 6

and the title of part III of the draft. As Mr. McCaffrey (2160th meeting) had suggested, no decision on wording in those cases should be taken until the Commission had the entire draft before it. Thus he would comment only on a few of the articles which had not yet been referred to the Drafting Committee.

35. He agreed with the Special Rapporteur's proposal that, in article 18, the bracketed term "non-governmental" should be deleted. In article 19, he preferred the expression "civil or commercial matter" to "commercial contract" and suggested that the Special Rapporteur's proposal to add a new subparagraph (*d*) referring to the recognition of the award should be considered in the context of part IV of the draft. He was in favour of the deletion of article 20.

36. He welcomed the proposed reformulation of articles 21 to 23 and supported the deletion of the bracketed phrase "or property in which it has a legally protected interest" in the introductory clause of article 21 and in paragraph 1 of article 22. In paragraph 1 (*c*) of the new article 21, the phrase in square brackets, "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed", should also be deleted. He agreed that the words "and used for monetary purposes" should be included in paragraph 1 (*c*) of the new article 22. The fate of the new article 23 depended on that of draft article 11 *bis*.

37. He generally supported the proposed redrafting of article 24, but, with regard to the provision in paragraph 3 on the language to be used for service of process by writ or other document instituting a proceeding, he proposed the following wording: "The documents should be made available in a language acceptable to the State concerned." The same proposal applied to paragraph 2 of article 25.

38. He supported the suggestion that wording on the obligation of *ex officio* determination of jurisdiction should be added to article 25. Like other members of the Commission, he had doubts about article 26. Lastly, he would have no objection to the deletion of article 28.

39. Mr. SOLARI TUDELA said that he had had the opportunity to speak on some of the draft articles at the previous session and would therefore comment only briefly on some of the amendments proposed by the Special Rapporteur in his third report (A/CN.4/431) for the articles that were before the Drafting Committee, before turning to the remaining articles 12 to 28.

40. In paragraph 2 of the proposed new text of article 2, concerning the criteria to be taken into account in determining whether a transaction was commercial, the Special Rapporteur had considerably reduced the importance to be attached to the purpose of the transaction. While it was true that the nature of the transaction had to be taken mainly into consideration, the purpose could not be disregarded. It would have been preferable to retain the text adopted on first reading (art. 3, para. 2).

41. With regard to article 4, on privileges and immunities not affected by the present articles, the Spe-

cial Rapporteur proposed the introduction in paragraph 2—which, as adopted on first reading, had embodied a rule of customary law—of wording recognizing the immunity *ratione personae* of heads of Government and Ministers for Foreign Affairs, in order to reflect the new situation. In the past 100 years, heads of Government had become more numerous and had acquired considerable political importance. In many countries, the head of Government had more power than the head of State. He could accept the text adopted on first reading, which limited that immunity *ratione personae* to heads of State, but he understood the concern that had led the Special Rapporteur to propose the addition.

42. The new article 6 was acceptable, because it would avoid the risk of unilateral interpretations of international law by domestic courts.

43. With regard to article 12, dealing with contracts of employment, he considered that State immunity should be subject to as few limitations as possible, but believed that the article had its justification and that, in general, the cases of non-application provided for in paragraph 2 had to be as few as possible.

44. As suggested by the Special Rapporteur, subparagraphs (c), (d) and (e) of paragraph 1 of article 14 could be deleted.

45. With regard to article 15, in which it was proposed to add a reference to “a plant breeder’s right and a right in computer-generated works”, he said that, even if those forms of intellectual property were already covered by the general formula “any other form of intellectual . . . property”, it would be possible to devise a broader formula that would apply to other developments in intellectual property in the field of science and technology. Perhaps WIPO could lend assistance in that regard.

46. The drafting amendments proposed by the Special Rapporteur for articles 16 and 17 made for greater precision. He had no objection to the deletion in article 18 of the bracketed term “non-governmental”. Like the majority of the members of the Commission, he supported the deletion of article 20.

47. He also supported the proposed combination of articles 21 and 22. In paragraph 1 (c) of the new article 22, however, referring to the property of the central bank, he could not agree to the addition of the words “and used for monetary purposes”, because of the way they could be interpreted by local courts.

48. The new text proposed for paragraph 3 of article 24, providing for documents to be translated into one of the official languages of the United Nations, did not entirely solve all the problems that could arise in connection with service of process.

49. Lastly, he supported the Special Rapporteur’s proposals for articles 25 and 27 and would prefer article 28 to be deleted.

50. Mr. ROUCOUNAS said that he supported the Special Rapporteur’s proposal to combine articles 2 and 3 and, in paragraph 2 of the new combined article 2 submitted in his third report (A/CN.4/431), to treat the nature of a transaction as the primary

criterion, and its governmental purpose as the subsidiary criterion. That solution seemed acceptable to him in view of the fact that, in several countries, case-law was not entirely settled one way or the other. In certain countries which had changed from a policy of absolute immunity to one of restricted immunity, courts faced with problems of characterization might prefer to have to deal with a single criterion, notwithstanding the rigidity of such a solution. Practice in other countries since the early part of the century had, however, shown that it was preferable to leave it to the courts to decide with flexibility the most appropriate approach in each particular case. On the other hand, the inclusion of the words “and the relevant rules of general international law” in article 6 would add nothing, in his view, for, even if the draft was incomplete, there would always be room for the application of new rules of international law.

51. The deletion of the express reference in paragraph 1 of article 11 to a presumption of consent by the State to the exercise of jurisdiction was acceptable.

52. The reference to social security provisions in paragraph 1 of article 12 should be retained, as difficulties often arose in that connection. Besides, the words “which may be in force” made it clear that States that did not have a social security system would not on that account be required to introduce one.

53. While he appreciated the problems to which the wording of article 13 gave rise, he considered that it should be retained, because it provided precisely for those situations that were not normally covered by international law.

54. He had voiced his support for the deletion of subparagraphs (c), (d) and (e) of paragraph 1 of article 14 at the previous session, since it was unnecessary for matters that came exclusively under certain domestic systems of law to be regulated by a text intended for universal application.

55. He agreed with the Special Rapporteur’s proposal to delete the bracketed term “non-governmental” in paragraphs 1 and 4 of article 18. The idea it reflected had no basis in law and, moreover, conflicted with the 1982 United Nations Convention on the Law of the Sea, under which immunity derived from the non-commercial, and not the non-governmental, character of a ship. Some other form of words should also be found for paragraph 7 of the article, under which the sole proof of the governmental and non-commercial character of a ship or cargo would be a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belonged. Quite apart from the fact that the question dealt with in that paragraph was a procedural one, the result could be to make the rules of evidence more restrictive for the court of the forum.

56. He agreed with the Special Rapporteur that, in the last part of the introductory clause of article 19, it would be better to use the other formula considered by the Commission, namely “a court of another State on the territory or according to the law of which the arbitration has taken or will take place”, rather than the formula which it had adopted on first reading. In

the case of a contract or international agreement in which the place of arbitration was named, it would, in his view, be advisable to be able to create a jurisdictional link with that place for any questions that might arise in connection with the arbitration. It had actually happened in practice that, in the absence of an express indication of the existence of a "territorial" link with the jurisdiction of the State where the arbitration was meant to take place, the courts of that State had declared that they had no jurisdiction, with the result that the provisions agreed on in respect of arbitration had remained a dead letter.

57. The deletion of article 20 was justified because questions of nationalization did not fall within the scope of application of the draft articles on jurisdictional immunities of States as envisaged by the Commission.

58. The proposal that article 25 should be amended to provide that the court of the forum would *ex officio* raise the question of immunity in the event of default procedure had definite advantages. It corresponded to the practice of some States whose constitutional law provided that international law should have primacy over domestic law or under which the rule of the immunity of foreign States was incorporated in civil-procedure codes. As immunity from jurisdiction of the foreign State was a rule of public law, the court automatically took that into account. In other countries where that was not the case, however, and where the court could not know that the subject of the dispute involved the sovereignty of the foreign State, the proposal in question could be very useful. The implications should, of course, be weighed, particularly so far as a possible multiplication of judgments by default was concerned, since the question of immunity would be raised in one form or another at the second tier of jurisdiction, provided that such a second tier existed. Possibly some other equally expeditious procedural way of solving the problem should be found.

59. The question dealt with in article 28 had caused perplexity from the outset of the Commission's work on the topic. While he had no objection to paragraph 2 (a), which reflected the immutable principle of reciprocity, he would point out that, as he had stated at the previous session with regard to article 32 (Relationship between the present articles and other conventions and agreements) of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the endeavour to codify international law was not compatible with an "open door" system, which would be tantamount to leaving the parties free to act as they saw fit, even if that had been the case with certain texts prepared by the Commission over the past 25 years.

60. Mr. CALERO RODRIGUES, noting that many members of the Commission had spoken on the topic, said that he did not want silence on his part to be interpreted as a lack of interest in the matters dealt with in articles 12 to 28 of the draft. That silence was due to the fact that he had already stated his position on those

articles at the previous session.⁸ The Special Rapporteur's third report (A/CN.4/431) contained proposals which had been carefully formulated in the light of the comments and observations made. Some of those proposals related to substance and indicated that a particular question should be studied from a fresh standpoint. Sometimes they coincided with his own analysis; sometimes they differed from it. All in all, however, his position remained unchanged and he was not convinced by the amendments proposed. Other proposals related solely to drafting amendments which, in his view, it was not appropriate to consider in the plenary Commission. He therefore saw no need to dwell further on the topic.

61. Mr. BEESLEY said that his position was very close to that of Mr. Eiriksson, whose support for the "restrictive" approach he endorsed, for the reasons Mr. Eiriksson had clearly explained.

62. He agreed with the general thrust of the proposals that had been made but, like Mr. Calero Rodrigues, considered that it was better to submit drafting points to the Drafting Committee rather than to the plenary Commission. The Special Rapporteur had made a praiseworthy attempt to reconcile opposing points of view. It was not certain, however, that those views could be reconciled in the Drafting Committee. There was a need for further discussion in the Sixth Committee of the General Assembly, or even at a diplomatic conference, in order to reach a basis for agreement.

The meeting rose at 11.30 a.m. to enable the Working Group on the question of the establishment of an international criminal jurisdiction to meet.

⁸ See *Yearbook* . . . 1989, vol. I, pp. 168-169, 2119th meeting, paras. 13-25.

2162nd MEETING

Wednesday, 23 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Jurisdictional immunities of States and their property (continued) (A/CN.4/415,¹ A/CN.4/422 and Add.1,² A/CN.4/431,³ A/CN.4/L.443, sect. E)

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

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

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

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)CONSIDERATION OF THE DRAFT ARTICLES⁴ ON SECOND READING (*concluded*)

1. Mr. OGISO (Special Rapporteur) said that he would sum up the debate on articles 12 to 28 (parts III, IV and V of the draft), which, in accordance with the Commission's decision at its previous session, had been the main subject of consideration. Some comments had been made on the earlier articles, but the points raised would be taken up by the Drafting Committee.

2. With regard to the title of part III, in his introductory statement (2158th meeting) he had asked members for their views on a neutral formulation such as "Activities of States to which immunity does not apply" or "Cases in which State immunity may not be invoked before a court of another State". In that connection, one member had proposed the formulation: "Activities of States in respect of which States agree not to invoke immunity". Two other members had commended both that proposal and his own suggestion. Actually, a neutral formulation had not been opposed by any member of the Commission, and the Drafting Committee could perhaps be requested to find one.

3. With one exception, all members who had spoken on article 12, concerning contracts of employment, appeared to recognize the need to retain it, and there was general support for deletion of the reference to the social-security requirement in paragraph 1.

4. The first alternative text for paragraph 2 (*a*), i.e. the text adopted on first reading, made the provisions of paragraph 1 inapplicable to an employee who had been recruited to perform services associated with the exercise of governmental authority. The second alternative limited the exception further by requiring the employee to be a member of the "administrative or technical staff of a diplomatic or consular mission". In that respect, the opinions of members were divided, some supporting the second alternative and others favouring the text adopted on first reading. Views were also divided on paragraph 2 (*b*). Three members had suggested deletion of the word "recruitment", appearing between square brackets, or indeed deletion of the entire subparagraph, while three other members had opposed such deletion. One member had suggested that paragraph 2 (*b*) might not be useful in the light of article 26, on immunity from measures of coercion. One solution might be to specify that, when the proceeding related to the recruitment, renewal of employment or reinstatement of an individual, it should be allowed only in so far as it was aimed at ensuring pecuniary compensation, but without allowing the court to issue an injunction against the foreign State. One member had suggested deleting the words "nor a habitual resident" in paragraph 2 (*c*), but a great variety of examples could be given in support of that formulation. The problem could be referred to the Drafting Committee.

5. Most members favoured retaining article 13, although one advocated deleting it and another agreed to retaining it on condition that a new paragraph 2 was included, reading:

"2. Paragraph 1 does not affect any rules concerning State responsibility under international law."

Five members supported the idea that application of the article should be limited to pecuniary compensation arising from traffic accidents, but that idea had been opposed by at least two other members. One member urged retention of the concluding phrase, "and if the author of the act or omission was present in that territory at the time of the act or omission", a view that had already been expressed by several members at the previous session. As Special Rapporteur, he would have no objection to keeping that phrase in order to ensure that article 13 would not apply to transboundary cases.

6. His own suggestion had been to consider the advisability of deleting paragraph 1 (*c*), (*d*) and (*e*) of article 14, an idea which had enlisted considerable support at both the previous and the present sessions. One member, however, had suggested a different course, namely to replace those subparagraphs by more general provisions and, if that proved impossible, to keep the text as it was. Another member had proposed deleting paragraph 1 (*b*) as well, and another had pointed out that the right or interest referred to in paragraph 1 (*b*) should be limited to those situated in the forum State. The majority view in the Commission was in favour of deleting paragraph 1 (*c*), (*d*) and (*e*), which were mainly based on the common-law system, and one member had even urged deletion of paragraph 2 as well.

7. With regard to article 15, he had proposed the insertion in subparagraph (*a*) of the phrase "including a plant breeder's right and a right in computer-generated works". Several members supported that proposal but others objected that a specific reference to a plant breeder's right might result in an unlimited enumeration of similar rights or that such a reference might cause an undue extension of the scope of the subparagraph. Some members had suggested that more general wording would be preferable. Actually, plant breeders' rights had, in some countries, been protected under specific legislation independent of patent law and the United Kingdom had referred to that point in its comments and observations. Computer-generated works, often referred to as computer-software, were a new area of intellectual property. As recently as 1989, a treaty on intellectual property in respect of integrated circuits had been concluded under WIPO auspices, representing one of the efforts to establish an international legal régime to protect such new types of intellectual property. His own view was that it would be proper to extend the scope of subparagraph (*a*) so as to cover new rights corresponding to recent technical developments. In any case, the problems involved were of a highly technical nature and the Drafting Committee should be asked to find an appropriate formulation for the subparagraph in question.

8. The only change he had recommended in article 16 was to substitute the words "foreign State" and "forum

⁴ For the texts, see 2158th meeting, para. 1.

State” for “State” and “another State”, respectively. That change had been suggested by one Government in its written comments and the problem was at present under consideration by the Drafting Committee in connection with other articles containing the same expressions. The question was one of drafting and should be carefully co-ordinated by the Drafting Committee. No member was opposed to the substance of the article. At the previous session, one member had urged that diplomatic and consular property should be excluded from the scope of article 16. At the present session, two members had recommended a simplified formulation in line with article 29 of the 1972 European Convention on State Immunity. All those questions should be referred to the Drafting Committee.

9. Three members had expressed support for the proposed changes in article 17. The substance of the article had not given rise to any opposition at either the present or the previous session.

10. No change other than the deletion of the bracketed term “non-governmental” in paragraphs 1 and 4 had been recommended for article 18, and the proposal had enlisted the support of three members and met with opposition from three others. Since many other members had expressed themselves in favour of the proposal at the previous session, he suggested that the term “non-governmental” be omitted from the text referred to the Drafting Committee.

11. As to the introduction into the draft of the concept of segregated State property, which had been suggested by some Governments, he would reiterate the opinion set out in paragraph (2) of the comments on article 18 in his third report (A/CN.4/431), namely that the Commission should be careful to avoid unnecessary duplication, in particular between draft article 11 *bis* and article 18. In that connection, one member had expressed concern that the present formulation of article 18 might not take fully into account the fact that, under the system adopted by some States, State-owned ships were operated for commercial purposes by independent State enterprises; and, according to that member’s interpretation, such a system did not fall within the scope of draft article 11 *bis*. Personally, he was not convinced that such an interpretation was consistent with the 1926 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, but the Drafting Committee could consider carefully that member’s view.

12. Two questions had been highlighted in the debate on article 19. On the first—the choice between the expressions “commercial contract” and “civil or commercial matter”—members’ views still seemed to be divided. At the previous session, three members had expressed a preference for the latter wording, while several others at both the previous and the present sessions were in favour of the expression “commercial contract”. One member had proposed a third formulation along the lines of “commercial or accessory [assimilated] matter”. Whatever the preference might be, the scope of an arbitration and the extent of a resulting waiver of State immunity depended primarily on the terms of the arbitration agreement, as he poin-

ted out in paragraph (1) of his comments on article 19, and he would recommend that the Drafting Committee decide the question in the light of all the views expressed.

13. As to the second question concerning article 19, namely the possible addition of a new subparagraph (d) on the recognition of the arbitral award, three members had spoken in favour and several others had opposed the addition on the grounds that recognition of the award could be deemed to constitute a first step towards execution. If recognition of the arbitral award was indeed interpreted under many domestic civil-law procedures as the first step towards its execution, it would be best not to include the proposed subparagraph (d). However, in view of the highly technical nature of the legal point involved, it should doubtless be considered by the Drafting Committee.

14. All members who had expressed their views on article 20 had agreed that the article should be deleted.

15. With reference to part IV of the draft (State immunity in respect of property from measures of constraint), he wished first of all to point out that an extensive debate had taken place at the previous session on the question of the principle involved. In his third report he had proposed alternative texts for articles 21 to 23 based on the idea that carefully limited execution, rather than total prohibition, would stand a better chance of obtaining general approval. On that point, a few members had reiterated their basic position that the draft articles should clearly set forth the principle of immunity from measures of constraint. The impression he had gained from the debate at the present session, however, was that the Drafting Committee should be able to reach agreement if the scope of the measures was carefully limited. It had been suggested that the title of part IV should read “Jurisdictional immunities of States in respect of their property”, in which connection he drew attention to the commentary to article 21⁵ and proposed that the wording of the title be left to the Drafting Committee.

16. The new text he had proposed for article 21 took into account the comments made by members at the previous session. Most of those who had spoken on article 21 at the present session had supported the idea of combining it with article 22, and accordingly the Drafting Committee should be able to proceed on the basis of the proposed new article 21. Views on the substance of the new article continued, however, to be divided, in particular with regard to two points. The first related to the proposed deletion of the bracketed phrase “or property in which it has a legally protected interest” in the introductory clause of article 21 and in paragraph 1 of article 22 as adopted on first reading. At both the previous and the present sessions, several members had endorsed that proposal, while some others had opposed it. One member had made a drafting suggestion in that connection at the present session. The second point concerned the bracketed phrase “and has a connection with the object of the claim, or with the agency for instrumentality against which the proceeding was directed” in paragraph 1 (c) of the new

⁵ *Yearbook* . . . 1986, vol. II (Part Two), pp. 17-18.

article 21. Most speakers had argued that the phrase was of crucial importance and should be retained, but two members had strongly criticized it and advocated deleting it. His own view was that both those points involved delicate legal problems and should be given careful consideration by the Drafting Committee.

17. Many members supported the proposed addition of the words "and used for monetary purposes" in paragraph 1 (c) of the new article 22. Three members agreed with the idea underlying the new article 23, but several others had doubted its necessity or usefulness. He would suggest that the Drafting Committee consider whether the use of such expressions as "segregated property", which were peculiar to only a small number of legal systems, would be appropriate. In any event, article 23 should not be considered until the Drafting Committee had reached a decision regarding draft article 11 *bis*.

18. Turning to part V of the draft (Miscellaneous provisions), most of the members who had spoken on article 24 had expressed support for the proposed changes. Some discussion had taken place on paragraph 3, with regard to the translation of documents. One member had opposed deleting the words "if necessary" and another had suggested that, if the parties explicitly agreed on the proper law of the contract, the specific language of the legal order concerned should be deemed sufficient. While welcoming the suggestion concerning translation into one of the official languages of the United Nations, the latter member stressed the need for a reasonable link between the official language used and the proceeding. The same point was also made by another member. The Drafting Committee should be asked to give due consideration to those suggestions.

19. The proposed addition of the words "and if the court has jurisdiction in accordance with the present articles" at the end of paragraph 1 of article 25 had commanded general support. On another point relating to the article, one member had drawn attention to the fact that, in some countries, default judgment was rendered against a foreign State simply because it failed to enter an appearance before the court in order to invoke immunity. With a view to affording States better protection, that member had suggested adding a separate paragraph stating that it was incumbent upon the judge to inquire *ex officio* into the issue of immunity under the present articles. The suggestion had been supported by several other members, one of whom had further suggested that, in view of its general nature, the proposed new paragraph should be inserted in article 7. In that connection, it would be recalled that, at the previous session, another member had suggested that it be stated, either in article 25 or in the commentary thereto, that the court of the forum must *ex officio* determine that the present articles had been complied with prior to rendering judgment. The Drafting Committee should consider those suggestions in conjunction with article 7.

20. Some members had sought clarification as to the objective of article 26. One member had referred to two possible interpretations of the article, one being that it prohibited domestic courts from issuing any order or

injunction against a foreign State carrying the threat of a monetary penalty, and the other that it would prohibit only the imposition of a monetary penalty on a foreign State. Another member had commented that article 26 in its present form seemed to allow only the latter interpretation. A third member had suggested a new text in order to accommodate the suggestion by one Government referred to in the comments on the article in his third report. In his own view, the article definitely required further consideration by the Drafting Committee, which should also consider the possibility of deleting it.

21. Members' views differed as to the proposed addition of the words "which is a defendant in a proceeding before a court of another State" in article 27, paragraph 2. The point—on which he had an open mind—involved legal technicalities and he therefore recommended that it be referred to the Drafting Committee.

22. Two members were in favour of retaining article 28, whereas several others were in favour of deleting it. As he stated in the comments on the article in his report, he would prefer to retain it in its present form for the time being, since the subject would require careful consideration after general agreement had been reached on the preceding articles.

23. In his opinion, articles 12 to 28 should now be referred to the Drafting Committee.

24. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles 12 to 28 to the Drafting Committee for their second reading, together with the amendments proposed by the Special Rapporteur.

*It was so agreed.*⁶

25. In reply to a point raised by Mr. KOROMA, the CHAIRMAN said that it was understood that the Drafting Committee would take into consideration all the views expressed by members of the Commission during the debate on the topic.

The law of the non-navigational uses of international watercourses (A/CN.4/421 and Add.1 and 2,⁷ A/CN.4/427 and Add.1,⁸ A/CN.4/L.443, sect. F, ILC (XLII)/Conf.Room Doc. 3)

[Agenda item 6]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR
PARTS VII TO X OF THE DRAFT ARTICLES *and*
ANNEX I

26. The CHAIRMAN recalled that, at the previous session, the Special Rapporteur had introduced articles 24 and 25 of parts VII and VIII of the draft,⁹ as contained in his fifth report (A/CN.4/421 and Add.1

⁶ For the report by the Chairman of the Drafting Committee on the draft articles proposed by the Committee, see 2191st meeting, paras. 24 *et seq.*

⁷ Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

⁸ Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

⁹ For a summary of the Special Rapporteur's introduction, see *Yearbook . . . 1989*, vol. II (Part Two), p. 128, paras. 677-682.

and 2), but that they had not been considered by the Commission due to lack of time. Those articles were therefore still before the Commission. He now invited the Special Rapporteur to introduce the first part of his sixth report on the topic (A/CN.4/427 and Add.1), namely chapters I to III containing articles 26 to 28 of parts IX and X of the draft and the eight articles of annex I. The draft articles in question read as follows:

PART VII

RELATIONSHIP TO NAVIGATIONAL USES AND ABSENCE OF PRIORITY AMONG USES

Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses

1. In the absence of agreement to the contrary, neither navigation nor any other use enjoys an inherent priority over other uses.
2. In the event that uses of an international watercourse [system] conflict, they shall be weighed along with other factors relevant to the particular watercourse in establishing equitable utilization thereof in accordance with articles 6 and 7 of these articles.

PART VIII

REGULATION OF INTERNATIONAL WATERCOURSES

Article 25. Regulation of international watercourses

1. Watercourse States shall co-operate in identifying needs and opportunities for regulation of international watercourses.
2. In the absence of agreement to the contrary, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayal of costs of such regulation works as they may have agreed to undertake, individually or jointly.

PART IX

MANAGEMENT OF INTERNATIONAL WATERCOURSES

Article 26. Joint institutional management

1. Watercourse States shall enter into consultations, at the request of any of them, concerning the establishment of a joint organization for the management of an international watercourse [system].
2. For the purposes of this article, the term "management" includes, but is not limited to, the following functions:
 - (a) implementation of the obligations of the watercourse States under the present articles, in particular the obligations under parts II and III of the articles;
 - (b) facilitation of regular communication, and exchange of data and information;
 - (c) monitoring international watercourse[s] [systems] on a continuous basis;
 - (d) planning of sustainable, multi-purpose and integrated development of international watercourse[s] [systems];
 - (e) proposing and implementing decisions of the watercourse States concerning the utilization and protection of international watercourse[s] [systems]; and
 - (f) proposing and operating warning and control systems relating to pollution, other environmental effects of the utilization of international watercourse[s] [systems], emergency situations, or water-related hazards and dangers.
3. The functions of the joint organization referred to in paragraph 1 may include, in addition to those mentioned in paragraph 2, *inter alia*:
 - (a) fact-finding and submission of reports and recommendations in relation to questions referred to the organization by watercourse States; and
 - (b) serving as a forum for consultations, negotiations and such other procedures for peaceful settlement as may be established by the watercourse States.

PART X

PROTECTION OF WATER RESOURCES AND INSTALLATIONS

Article 27. Protection of water resources and installations

1. Watercourse States shall employ their best efforts to maintain and protect international watercourses and related installations, facilities and other works.
2. Watercourse States shall enter into consultations with a view to concluding agreements or arrangements concerning:
 - (a) general conditions and specifications for the establishment, operation and maintenance of installations, facilities and other works;
 - (b) the establishment of adequate safety standards and security measures for the protection of international watercourses and related installations, facilities and other works from hazards and dangers due to the forces of nature, or to wilful or negligent acts.
3. Watercourse States shall exchange data and information concerning the protection of water resources and installations and, in particular, concerning the conditions, specifications, standards and measures mentioned in paragraph 2 of this article.

Article 28. Status of international watercourses and water installations in time of armed conflict

International watercourses and related installations, facilities and other works shall be used exclusively for peaceful purposes consonant with the principles enshrined in the Charter of the United Nations and shall be inviolable in time of international as well as internal armed conflicts.

ANNEX I

IMPLEMENTATION OF THE ARTICLES

Article 1. Definition

For the purposes of this annex, "watercourse State of origin" means a watercourse State within which activities are carried on or planned that affect or may affect an international watercourse [system] and that give rise or may give rise to appreciable harm in another watercourse State.

Article 2. Non-discrimination

In considering the permissibility of proposed, planned or existing activities, the adverse effects that such activities entail or may entail in another State shall be equated with adverse effects in the watercourse State where the activities are or may be situated.

Article 3. Recourse under domestic law

1. Watercourse States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of appreciable harm caused or threatened in other States by activities carried on or planned by natural or juridical persons under their jurisdiction.
2. With the objective of assuring prompt and adequate compensation or other relief in respect of the appreciable harm referred to in paragraph 1, watercourse States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Article 4. Equal right of access

1. A watercourse State of origin shall ensure that any person in another State who has suffered appreciable harm or is exposed to a significant risk thereof receives treatment that is at least as favourable as that afforded in the watercourse State of origin in cases of domestic appreciable harm, and in comparable circumstances, to persons of equivalent condition or status.
2. The treatment referred to in paragraph 1 of this article includes the right to take part in, or have resort to, all administrative and judicial procedures in the watercourse State of origin which may be utilized to prevent domestic harm or pollution, or to obtain compensation for any harm that has been suffered or rehabilitation of any environmental degradation.

Article 5. Provision of information

1. A watercourse State of origin shall take appropriate measures to provide persons in other States who are exposed to a significant risk of appreciable harm with sufficient information to enable them to exercise in a timely manner the rights referred to in paragraph 2 of this article.

To the extent possible under the circumstances, such information shall be equivalent to that provided in the watercourse State of origin in comparable domestic cases.

2. Watercourse States shall designate one or more authorities which shall receive and disseminate the information referred to in paragraph 1 in sufficient time to allow meaningful participation in existing procedures in the watercourse State of origin.

Article 6. Jurisdictional immunity

1. A watercourse State of origin shall enjoy jurisdictional immunity in respect of proceedings brought in that State by persons injured in other States only in so far as it enjoys such immunity in respect of proceedings brought by its own nationals and habitual residents.

2. Watercourse States shall ensure, by the adoption of appropriate measures, that their agencies and instrumentalities act in a manner consistent with these articles.

Article 7. Conference of the Parties

1. Not later than two years after the entry into force of the present articles, the Parties to the articles shall convene a meeting of the Conference of the Parties. Thereafter, the Parties shall hold regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time upon the written request of at least one third of the Parties.

2. At the meetings provided for in paragraph 1, the Parties shall review the implementation of the present articles. In addition, they may:

(a) consider and adopt amendments to the present articles in accordance with article 8 of this annex;

(b) receive and consider any reports presented by any Party or by any panel, commission or other body established pursuant to annex II to the present articles; and

(c) where appropriate, make recommendations for improving the effectiveness of the present articles.

3. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 1 of this article.

4. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a Party to the present articles, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

6. Any of the following categories of bodies or agencies which is technically qualified with regard to the non-navigational uses of international watercourses, including the protection, conservation and management thereof, and which has informed the Parties of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, observers representing these agencies and bodies shall have the right to participate but not to vote.

Article 8. Amendment of the articles

1. An extraordinary meeting of the Conference of the Parties shall be held on the written request of at least one third of the Parties to consider and adopt amendments to the present articles. Such amendments shall be adopted by a two-thirds majority of the Parties present and voting. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.

2. The text of any proposed amendment shall be communicated by the Party or Parties proposing it to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties that have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the [Depository Government] [Secretary-General of the United Nations]. Thereafter, the amendment shall enter into force for any other Party 60 days after that party deposits its instrument of acceptance of the amendment.

27. Mr. McCaffrey (Special Rapporteur) said that chapter IV of his sixth report (A/CN.4/427 and Add.1), containing annex II of the draft on fact-finding and settlement of disputes, would be issued later in the session. The Commission might wish to discuss that part of the report at its next session. Since the questions raised by article 1 [Use of terms] concerning the scope of the draft articles and the definition of the expression "international watercourse [system]" had not been discussed by the Commission in its present membership, he also intended to report briefly on them at the next session.

28. With regard to chapter I of his sixth report, he said it might be thought that draft article 26, on joint institutional management, was superfluous or at least went beyond the needs of a framework agreement. However, the needs of the modern world's expanding population made such an attitude obsolete. By virtue of the hydrologic cycle the amount of water on Earth was static, whereas the population depending on that water was increasing at an alarming rate and would continue to do so until well into the twenty-first century. The world's population would therefore have to become increasingly efficient in its utilization of freshwater resources. Every year the amount of water that could be wasted decreased radically, and in some parts of the world there was already a shortage. Since most of the world's major watercourses were international, greater efficiency in water use would depend on increased co-operation among watercourse States in the planning, management and protection of international watercourses. He did not therefore regard article 26 as a luxury, for joint management of international watercourses was an increasingly important form of international co-operation. The Commission would be remiss if it did not demonstrate to the international community that it recognized that fact.

29. As he noted in his report (*ibid.*, para. 7), the theme emerging from the extensive work done by international organizations on watercourse management was that, while there was no obligation under general international law to form joint management institutions, management through such institutions was not only an increasingly common phenomenon, but also almost indispensable to optimum utilization and protection of watercourse systems. The international agreements and studies reviewed in chapter I recognized the need for such institutions, not only to resolve issues of utilization, but also to undertake affirmative development and protection. Article 26 was a modest provision. At the previous session, he had been criticized for placing too much material in the survey section of his report and not enough in the comments. He had tried to correct that shortcoming, but no doubt the reverse criticism would now be levelled at him. He hoped that the Commission would realize that it was difficult to distil into a single article all the existing treaty provisions on watercourse management.

30. Turning to chapter II, he pointed out that he had listed (*ibid.*, para. 20) seven elements that could be included in draft articles on the subtopic of security of hydraulic installations. Two of his predecessors as Special Rapporteur, Mr. Evensen and Mr. Schwebel, had

both expressed hesitation about how far the Commission should go in that area. Mr. Evensen had subsequently concluded that a modest article was required on the question of security in times of armed conflict. He had himself reached a similar conclusion and was therefore submitting draft article 28. Draft article 27 was concerned with safety—a widespread problem—from a more general standpoint. For example, whenever a large volume of water was collected behind an unsuitable structure, the downstream State had an obvious interest in the safety standards applied in construction and maintenance of the structure.

31. With regard to chapter III of the report, on implementation of the articles, he wished to apologise for not mentioning that question in the outline of the topic presented in his fourth report.¹⁰ The more he had thought about how watercourse problems were dealt with in practice, the more he had become convinced that the draft should include a section on such principles as equal right of access and non-discrimination. In their statement in the Sixth Committee of the General Assembly at its forty-fourth session on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the Nordic countries had stressed the importance of civil-liability régimes in ensuring compensation to victims. Their arguments applied equally to the case of international watercourses, for both topics dealt to some extent with transboundary harm. The Nordic countries had pointed to the need for State and civil-liability régimes to complement each other and for States to be encouraged to use existing civil-liability régimes. It was in that spirit that he was submitting the eight draft articles on implementation contained in annex I. The principles covered by those articles were summarized in the report (*ibid.*, para. 38). He had initially envisaged that articles 7 and 8 of the annex would be included among the provisions on the settlement of disputes, but on reflection he had thought them better placed in the articles on implementation.

32. Mr. AL-BAHARNA said that, in view of the provision contained in paragraph 2 of article 2 as provisionally adopted by the Commission,¹¹ the inclusion of part VII of the draft (Relationship to navigational uses and absence of priority among uses) was clearly necessary. Since the two paragraphs of draft article 24 dealt with two separate subjects, however, each paragraph should be made a separate article.

33. Although he agreed with the principle of law contained in paragraph 1 of article 24 as formulated by the Special Rapporteur, he wished to submit for consideration the following alternative wording:

“In the absence of agreement to the contrary, navigational uses are not entitled to any preference over any other use or category of uses.”

The suggested changes consisted, on the one hand, in the replacement of the word “priority” by “preference” and, on the other hand, in widening the meaning of the

words “other uses” by including a reference to “category of uses”.

34. Paragraph 2, concerning the absence of priority among uses, was by far the more important of the article’s two provisions; the subject-matter was of real significance and had implications for watercourse States. In postulating that uses should be weighed along with other factors relevant to the particular watercourse, the Special Rapporteur appeared to have over-simplified the issue of conflict between uses of international watercourses. The problem called for more comprehensive and detailed treatment, and he urged the Commission to consider incorporating in the draft the substance of articles VII and VIII of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966 (see A/CN.4/421 and Add.1 and 2, footnote 197), which dealt with that aspect of the matter.

35. In his fifth report, the Special Rapporteur said that the expression “regulation of international watercourses” in draft article 25 meant specifically “the control of the water in a watercourse, by works or other measures, in order both to prevent harmful effects . . . and to maximize the benefits that may be obtained from the watercourse” (*ibid.*, para. 129). It might therefore be necessary to define the term “regulation”, either in article 25 itself or in the article on the use of terms. He personally endorsed the following definition proposed by Mr. Schwebel and cited by the Special Rapporteur in paragraph (3) of his comments on article 25 in his fifth report:

“Regulation”, for the purposes of this article, means the use of hydraulic works or any other continuing measure to alter or vary the flow of the waters in an international watercourse system for any beneficial purpose.

36. He agreed with the underlying idea of paragraph 2 of article 25 that the construction and maintenance of regulation works should be based on the principle of equitable utilization. However, the Commission should also include some of the more important provisions of the articles on “Regulation of the flow of water of international watercourses” adopted by ILA at Belgrade in 1980 (*ibid.*, para. 139), particularly the substance of articles 4 and 6 thereof, for such provisions might be helpful in resolving conflicts arising from the regulation of international watercourses.

37. He welcomed the sixth report of the Special Rapporteur (A/CN.4/427 and Add.1) and thanked him for keeping to the schedule of work outlined in his fourth report. The Special Rapporteur had completed the major part of his work, and it was now for the Drafting Committee and the Commission to ensure that the first reading of the draft articles was completed by the end of the term of office of the Commission’s current members. The methodology adopted by the Special Rapporteur in the sixth report, as in his previous reports, namely first to set out State practice and resolutions of intergovernmental organizations and then to present the draft articles, had somewhat impaired the full impact of the analysis and presentation of the subjects covered. Nevertheless, the report was quite stimulating.

¹⁰ *Yearbook . . . 1988*, vol. II (Part One), pp. 207-208, document A/CN.4/412 and Add.1 and 2, para. 7.

¹¹ *Yearbook . . . 1987*, vol. II (Part Two), p. 25.

38. In its present formulation, draft article 26, on joint institutional management, went beyond general or customary international law. As the Special Rapporteur pointed out (*ibid.*, para. 7), there was no obligation under general international law to form joint organizations. The State practice cited indicated, at best, the conclusion of bilateral or regional treaties setting up joint commissions, but such treaties could not be regarded as typical of general practice. It was probably for that reason that the articles on "International water resources administration" adopted by ILA at Madrid in 1976 (*ibid.*, para. 17) suggested only that "the basin States concerned and interested *should** negotiate in order to reach agreement on the establishment of an international water resources administration" (art. 2, para. 1). Similarly, the Economic Commission for Europe had recommended in a recent decision containing "Principles regarding co-operation in the field of transboundary waters" (see A/CN.4/427 and Add.1, para. 15) that "riparian countries *should** consider the setting up... of appropriate institutional arrangements" (Principle 6). The Commission should therefore proceed cautiously in formulating proposals for institutional arrangements. Specifically, in paragraph 1 of article 26 the verb "shall" should be replaced by "should" and the words "at the request of any of them" should be deleted, in order to diminish the obligatory character of consultations. As the institutional arrangements could proceed only with the consent of the watercourse States concerned, wording suggestive of an obligation should be replaced by wording suggestive of consent or co-operation. Again, paragraph 1 should be worded so as to encourage watercourse States to strengthen existing institutional arrangements, as in the corresponding draft articles submitted by Mr. Schwebel and Mr. Evensen, which were reproduced in paragraph (2) of the Special Rapporteur's comments on article 26 in his sixth report. Furthermore, the word "rational" should be inserted before "management" in paragraph 1, so as to impart a sense of realism to the whole scheme.

39. From both the substantive and the drafting standpoints it might be desirable to combine paragraphs 2 and 3 of article 26, and the functions described therein should be made sharper in tone and language. Paragraph 2 (b), for example, might mention the research function of the international organ, and in paragraph 2 (e) the qualification "optimum" should be added before the word "utilization". Lastly, the article should appear in the main body of the text rather than in an annex, if the Commission decided to add such an annex.

40. Draft article 27 imposed a direct obligation, in paragraph 1, with regard to the safety of water resources and installations, and it might therefore be appropriate to include a reference in the text to the safety element. Thus the words "the safety of" could be added between the words "protect" and "international watercourses". Also, while he agreed with the general thrust of paragraph 2 (a), he would suggest that the word "sites" be added before "installations", and again in paragraph 2 (b), in order to strengthen the protection of water resources. The Special Rapporteur stated

in paragraph (3) of his comments on article 27 that he had not included a reference to "hazards and dangers created by faulty construction, insufficient maintenance or other causes" in paragraph 2 (b) as such hazards and dangers were covered by paragraph 2 (a). It was hard to share that reasoning, since paragraph 2 (a) laid down a general obligation with regard to the safety of watercourses, whereas paragraph 2 (b) provided for specific arrangements. He would therefore like the reference to such dangers to be included in the article.

41. Draft article 28, as the Special Rapporteur pointed out in paragraph (1) of his comments on the article, closely paralleled the corresponding provision submitted by Mr. Evensen in 1984. The article reflected modern trends in international law as evidenced by the resolution on "Protection of water resources and water installations in times of armed conflict" adopted by ILA at Madrid in 1976 (*ibid.*, para. 30) and the 1977 Additional Protocols to the 1949 Geneva Conventions. The text also had his support because, as a shared natural resource, an international watercourse should be held immune from attack in both peacetime and wartime. A state of war or armed hostilities was no longer a justification for an attack on an international watercourse. Consequently, he did not share the scepticism of the Special Rapporteur, who expressed the view in paragraph (2) of his comments that the first limb of article 28 "is not clearly required" by Additional Protocol I and that it was uncertain whether the second limb "is literally required by international law". He would urge the Special Rapporteur to reconsider his comments in the light of contemporary trends in international law. He also had reservations about the reference in paragraph (2) of the comments to the views of Fauchille and Oppenheim, which did not seem to be in keeping with the spirit of the times. Indeed, in the same paragraph, the Special Rapporteur himself recognized that the rule formulated in article 28 had "compelling force".

42. Referring to annex I, on implementation, he reserved his position as to the desirability of including the principles contained therein, and felt bound to comment on the unorthodoxy of such an approach. Except in cases where an institutional mechanism was set up for implementation purposes, States parties normally implemented a treaty in such manner as they saw fit, under their municipal-law procedures. The draft articles in annex I, however, seemed to go beyond that practice, and articles 2, 3, 4 and 5 were frankly impracticable. He also had misgivings about the Special Rapporteur's approach in relying for precedents on recommendations of the OECD Council and on the 1974 Nordic Convention on the protection of the environment (*ibid.*, annex). Whatever the justification for such principles in Western and developed countries, there was no reasonable ground for introducing them into a convention of universal significance.

43. Furthermore, he had doubts about the effect annex I would have on municipal law and procedure. For instance, the effect of draft article 2, legally construed, would be to equate a nuisance caused by harmful activities in a downstream State with a nuisance in an upstream State. So long as the rules of liability for

tortious acts were not internationally uniform, and so long as rules of procedure and evidence differed from one country to another, how could such a rule be grafted on to international law? The same criticism applied to draft article 3, since the rule laid down in paragraph 1 would have the effect of altering municipal law and procedure with respect to the cause of action and to the forum. It might therefore be unwise to include such provisions until their full implications were examined and a consensus was reached in the Commission on the matter.

44. Mr. TOMUSCHAT said it had been with great pleasure that he had read the Special Rapporteur's sixth report (A/CN.4/427 and Add.1), which contained a wealth of information on parallel instruments and thus made it clear that the Commission was on safe ground. The Special Rapporteur had done his work, and it now remained for the Commission to examine the draft articles he had proposed with a view to giving them definitive shape.

45. Draft article 26 enlisted his support. It could be argued that the establishment of joint institutions for the management of international watercourse systems was no more than a consequence of the general obligation of co-operation under article 9 of the draft and, consequently, that there was no need to refer to it. He did not agree. The entire draft boiled down to the elaboration of a few basic principles, and the obligation of co-operation figured prominently among those principles. The merit of such elaboration was that the draft would help to stimulate and educate, while setting out in detail all the elements of an efficient watercourse régime.

46. There could, of course, be no obligation under international law to establish common institutions, as States must be free to decide whether it was necessary or appropriate to confer certain functions on an international body. The Special Rapporteur's proposition that watercourse States should simply be required to enter into consultations at the request of any one of them therefore struck a fair balance, particularly since the establishment of a joint organization presupposed the consent of each individual watercourse State in accordance with the general rules of treaty law. He did not agree that the obligation in article 26 was too rigid: all that would be required of a watercourse State was for it to enter into consultations.

47. The list in article 26 of functions to be discharged by a joint watercourse organization also seemed satisfactory, particularly since the draft was designed to offer guidelines for the future activities of States. Although conventions such as that creating the Niger Basin Authority were far more detailed, a framework agreement necessarily had to be modest in its objectives and to adopt fairly broad formulas in order to remain flexible. He could accept the drafting proposals made by Mr. Al-Baharna in that connection (para. 39 above).

48. There seemed to be some uncertainty about the scope of draft article 27, for it appeared in the chapter of the report entitled "Security of hydraulic installations" yet seemed to go further by providing that international watercourses themselves should be maintained

and protected. The Special Rapporteur had provided a considerable amount of information on the prohibition on poisoning water or rendering it otherwise unfit for human consumption. For his own part, however, he was not convinced that that latter aspect could be regarded as a typical component of the present topic, since it applied to all kinds of water supplies, whether national or international, small or large. In his view, protection of water as such was to be distinguished from specific aspects of international watercourses, on which topic the Commission was required to concentrate. He had no doubt that intentional poisoning fell within the purview of pollution, although it constituted an aggravated case of pollution. His conclusion, therefore, was that the scope of article 27 should be confined to hydraulic works and related installations, as suggested by the title of chapter II of the report.

49. He agreed with the Special Rapporteur that artificial man-made works, such as dykes, dams and sluices, gave rise to special safety problems. Accordingly, for protection of the population it was necessary to comply with safety standards that were constantly adapted to developments in the relevant technology. Consequently, there was a clear need for international regulation with regard to man-made water-related installations but not with regard to the protection of watercourses in general, which was the subject of the draft as a whole. If the Commission favoured the adoption of a provision on contamination of water supplies, however, it should be incorporated in a separate article, so as to avoid confusion.

50. Draft article 28 would gain in clarity if the different legal concepts it contained were separated. He agreed that water-related works and installations, and dams and dykes in particular, should be protected from any form of attack in time of armed conflict, as provided for in Additional Protocol I to the 1949 Geneva Conventions, but found it hard to understand what was meant by the inviolability of a watercourse. Of course, dams and dykes might be wilfully destroyed in order to inflict harm upon an enemy, but he doubted whether it was really necessary to have a rule to cover that eventuality. Comparison with article 56 of Additional Protocol I also revealed the dangers inherent in a succinct reference to the laws of war. Article 56 contained many important conditions that were absent from draft article 28—and understandably so, since the function of article 28 was basically to serve as a reminder. On balance, therefore, he was in favour of deleting article 28.

51. Annex I as proposed by the Special Rapporteur contained a number of extremely important provisions, all of which were concerned with the role of the individual in fending off environmental hazards. Conferring the right of legal action on individuals would give teeth to the draft articles. An aggrieved individual would have far fewer inhibitions about asserting his rights than Governments, which often adopted a give-or-take approach. The greatest success story in that regard was the treaty establishing the European Economic Community, whereby, in principle, all obligations incumbent on Member States could also be claimed by individuals as subjective rights, provided

that those obligations were sufficiently precise. Given the crucial importance of the articles on implementation, he would have preferred them to be incorporated in the body of the draft, rather than in an annex, and he wondered why the Special Rapporteur had not adopted such a course. Also, many other articles in the draft already dealt with implementation. In any event, the title of annex I would have to be modified, for the special feature of the annex was the fact that it dealt with the active role accorded to individuals, not the fact that it dealt with implementation.

52. He agreed with the substance of draft article 2 of annex I, but would ask, first, by what criteria "another State" would be identified. To put it more bluntly, were the provisions of the annex also designed to operate in favour of third States that were not parties to the articles? Was article 2 to be conceived as a provision conferring rights on third States irrespective of considerations of reciprocity? Again, with regard to the title of the article, one normally spoke of non-discrimination in reference to a right bestowed on a person. Under the terms of article 2, however, State agencies were enjoined to take harm caused abroad as seriously as harm caused at home. In the circumstances, he would prefer some other wording, such as "Identity of standards of assessment".

53. He agreed in principle with draft article 3, yet considered that the order of the remedies should be reversed. Indeed, throughout the draft, the main emphasis should be on prevention, financial compensation being treated as a subsidiary remedy. The reason was simple: in many instances, environmental damage could never be made good, and that was justification enough for departing from the model afforded by article 235 of the 1982 United Nations Convention on the Law of the Sea.

54. He fully endorsed the rule, laid down in draft article 4, of equal right of access to administrative and judicial procedures in the State of origin, but considered that the article as worded, like the OECD Council recommendation cited by the Special Rapporteur in paragraph (1) of his comments on the article, missed the point, namely that there should be equality of treatment between alien victims of harm and the nationals of the State of origin—to the extent that, apart from the criterion of nationality, the circumstances were the same or similar, of course. The essence of the rule, to his mind, should lie in a prohibition on discrimination on the ground of nationality. States should be under an obligation to treat everyone alike, taking account solely of the extent to which the person concerned was affected. Many States had not so far granted foreign citizens the right to participate in administrative proceedings or to challenge an administrative decision before the courts. In that connection, the decision of 17 December 1986 by the Federal Administrative Court of the Federal Republic of Germany,¹² referred to in the Special Rapporteur's comments (A/CN.4/427 and Add.1, footnote 97), represented a landmark. That decision, however, was

somewhat more limited in scope than the excerpt cited by the Special Rapporteur seemed to suggest, for the court had hinted that one of its main considerations was the existence of strong ties of solidarity within the EEC. It was not clear, therefore, whether the court would extend its case-law for the benefit of countries outside the EEC which did not grant reciprocal treatment.

55. Draft article 6 seemed unnecessary, for it regulated a situation already fully covered by draft article 4. If article 4 were clearly formulated, there would be no need for a provision that enunciated the same rule in slightly restricted terms. Also, he would prefer not to speak of "immunity" in cases where the judicial system of the State of origin did not provide for a remedy. Immunity should remain a term of art for cases in which a foreign State was impleaded in a forum State. The Special Rapporteur did not deal, however, with situations in which an aggrieved individual sued the State of origin before the courts of another country, since that fell within the scope of the topic of jurisdictional immunities. Obviously, the management of a watercourse did not qualify as a commercial activity and would therefore come under the special protection of sovereign immunity.

56. Paragraph 2 of article 6 was also unnecessary. If such a provision were deemed essential, however, then it should be set forth in the first part of the draft. A number of treaties in which the obvious was stated sprang to mind—article 2 of the International Covenant on Civil and Political Rights and article 2 of the International Covenant on Economic, Social and Cultural Rights being cases in point—but, strictly speaking, such reminders were superfluous.

The meeting rose at 1 p.m.

2163rd MEETING

Friday, 25 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

¹² *Entscheidungen des Bundesverwaltungsgerichts*, vol. 75 (1987), p. 285.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/421 and Add.1 and 2,¹ A/CN.4/427 and Add.1,² A/CN.4/L.443, sect. F, ILC (XLI)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR
(continued)

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) and

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (continued)

ANNEX I (Implementation of the articles)³ (continued)

1. Mr. CALERO RODRIGUES said that the Special Rapporteur's fifth and sixth reports (A/CN.4/421 and Add.1 and 2 and A/CN.4/427 and Add.1) were, as usual, excellent. However, he had doubts about some of the proposed articles.

2. In the first place, chapter II of the fifth report, entitled "Relationship between non-navigational and navigational uses", provided a good demonstration of the fact that, as a general rule, navigation no longer enjoyed preference over other uses, although it might be given such preference in specific instances and preference might also be given to any other use. Those two ideas were clearly expressed in paragraph 1 of draft article 24, which had his support.

3. In section C of the same chapter, the Special Rapporteur raised the question: "how is a conflict between navigational and other uses to be resolved under contemporary international law?", to which he gave the answer: "Such a problem would be resolved in the same way as would a conflict between competing non-navigational uses: by considering all relevant factors, as provided in article 7 of the present draft, with a view to arriving at an equitable allocation of the uses and benefits of the international watercourse system in question." (A/CN.4/421 and Add.1 and 2, para. 125.) Accordingly, paragraph 2 of article 24 had been worded to read: "In the event that uses . . . conflict, they shall be weighed along with other factors relevant to the particular watercourse in establishing equitable utilization thereof . . .". That paragraph, which did not refer to navigation at all, seemed to answer a question that was wider than the one posed in the report. Moreover, paragraph 1 of the article provided that "neither navigation nor any other use enjoys an inherent priority over other uses", and that made it quite clear that the provision was intended to address not only the question of the relationship and possible

conflicts between navigational and non-navigational uses, but also the relationship between any uses. He agreed entirely with that approach and believed that the wording of paragraph 2, which was entirely satisfactory in other respects, could be improved to leave no possible room for doubt that the intention was to indicate how conflicts between any uses should be resolved. He also considered that the reference to the resolution of conflicts should be modified and that, instead of providing that the uses in conflict should be "weighed along with other factors" (those mentioned in articles 6 and 7 of the draft), it would be better to state that they should be "weighed against each other, taking into account" those factors. The Drafting Committee could, of course, deal with the changes he had suggested, whose purpose was to reflect more completely the broad intent of article 24.

4. For reasons that he would explain, he would refer to draft article 25, on the regulation of international watercourses, and draft article 26, on the management of watercourses, together.

5. A sizeable part of the Special Rapporteur's sixth report (A/CN.4/427 and Add.1) was devoted to demonstrating that joint arrangements for watercourse management had been, and still were, widely used, the apparent purpose being to prove that a reference to such arrangements should be included in the draft articles. Without elaborating on the point, he considered that, no matter how sound the demonstration might be, it could equally well be concluded that a provision to that effect was not necessary and that States would continue to conclude such arrangements as they had done until the present time, without the need to rely on the articles.

6. In the sixth report (*ibid.*, para. 7), the Special Rapporteur recognized that there was no obligation under general international law to form joint bodies for the management of international watercourses. That premise was quite correct, but it left very little room for a provision having significant legal content. Draft article 26 therefore merely imposed an obligation on watercourse States to enter into consultations with a view to the establishment of a joint organization for the management of an international watercourse when any one watercourse State so requested. In paragraph (4) of his comments on the article, the Special Rapporteur envisaged the possibility of going further and establishing an obligation to enter into "negotiations", as Mr. Schwebel had suggested in his third report. The Special Rapporteur had not incorporated that obligation in article 26, first because the obligation to establish joint institutions did not exist under general international law; secondly, because such establishment "may not even be necessary", as he stated in his comments; and, thirdly, because previous debates in the Commission on article 7 and articles 11 to 21 of the draft did not seem to favour the introduction of such an obligation. He himself could not but agree, although it was a matter of regret to him that the Commission had decided against any difference in the treatment of contiguous and successive rivers. On that specific point, one might well take the view that, in the case of successive rivers, consultations would suffice, whereas, in

¹ Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

² Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

³ For the texts, see 2162nd meeting, para. 26.

the case of contiguous rivers, the nature of the co-operation required would justify an obligation of negotiation. As matters stood, only the obligation of consultation was recognized. He wondered, however, whether that did not involve a duplication of the terms of paragraph 3 of article 4 as provisionally adopted by the Commission,⁴ which read:

Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse [system], watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a [watercourse] [system] agreement or agreements.

What was the "establishment of a joint organization for the management of an international watercourse" (art. 26, para. 1) if not an agreement to apply the provisions of the articles, or, in other words, a "watercourse agreement"? The obligation to consult thus arose under paragraph 3 of article 4 and there was no need to repeat it in paragraph 1 of article 26.

7. As the Special Rapporteur pointed out in paragraphs (5) and (6) of his comments, paragraph 2 of article 26 contained "an illustrative list of functions that joint organizations might perform", while paragraph 3 proposed "a non-exhaustive list of additional functions" that might be entrusted to such an organization. He saw no need for article 26, but, if the Commission decided to retain it, he considered that, instead of trying to illustrate the possible functions of joint organizations, it would be better to try to define "management", with which the joint organization would, after all, be concerned. In that connection, he would follow the definition of "water resource management" laid down in section 2.1 of the *Canada Water Act, 1969-1970*, which read: "'water resource management' means the conservation, development and utilization of water resources, and includes, with respect thereto, research, data collection and the maintaining of inventories, planning and the implementation of plans, and the control and regulation of water quantity and quality". If the words "water resource management" were replaced by "international watercourse management", that would be an excellent definition which would have the advantage of introducing the concept of regulation—the subject of draft article 25.

8. Draft article 25 was even more devoid of legal content than draft article 26, merely providing in paragraph 1 that "Watercourse States shall co-operate in identifying needs and opportunities for regulation of international watercourses". A general obligation of co-operation to "attain optimum utilization and adequate protection of an international watercourse" was already laid down in article 9 of the draft. Was it necessary to reaffirm that obligation in the matter of regulation? As to paragraph 2 of article 25, which introduced the concept of equitable cost-sharing, the principle was sound, but why should its application be limited to the field of regulation? Should it not apply to all aspects of watercourse management? In short, article 25 seemed as unnecessary as article 26, since "regulation" should in any event be treated as part of "management".

⁴ *Yearbook . . . 1987*, vol. II (Part Two), pp. 26-27.

9. Chapter II of the sixth report was entitled "Security of hydraulic installations", whereas part X of the draft articles and draft article 27 were entitled "Protection of water resources and installations". There was no substantial difference between "security" and "protection" or, in the end, perhaps between "hydraulic installations" and "installations". However, the addition of the words "water resources" might considerably broaden the scope of the article. That was one of the questions on which he wished to comment, the other being the question whether the draft should address the problems arising out of situations of armed conflict.

10. There was no doubt that attention should be paid to the security of hydraulic installations, for, if they were not properly monitored, they could release "dangerous forces" which might harm international watercourses. The security of hydraulic installations was therefore directly linked to the protection of a watercourse. It should be noted that the damage to the watercourse might affect only one State or it might spread to parts of the watercourse in the territory of other States. In the latter case, those other States would have a direct interest in the security of the installations and that consideration should be the foundation of any provision on the subject which might be included in the draft articles. In that connection, he referred to the 1963 Convention between France and Switzerland on the Emosson hydroelectric project and the 1957 Convention between Switzerland and Italy concerning the use of the water power of the Spöl mentioned in the sixth report (A/CN.4/427 and Add.1, paras. 25-26 and annex). In both cases, the installations had been set up by joint action of the two States concerned and it was only natural that they should involve security specifications. However, he was not aware of any case in which installations in one country which did not affect an international watercourse in another country could be made subject to a system of security on which that other country would have the right to give its opinion. That had perhaps not been the Special Rapporteur's intention in proposing paragraph 2 of article 27, but that was what was contained in that provision, which stated:

2. Watercourse States shall enter into consultations with a view to concluding agreements or arrangements concerning:

(a) general conditions and specifications for the establishment, operation and maintenance of installations, facilities and other works;

(b) the establishment of adequate safety standards and security measures . . .

There was no indication of the conditions and circumstances in which those consultations and agreements would be required.

11. He also noted that paragraphs 1 and 2 of draft article 27 referred to the protection of both international watercourses and related installations. The protection of installations was a well-defined concept which seemed easy to manage in the framework of a legal provision. The protection of international watercourses, however, was a much broader question and he had the impression that the whole exercise of drafting the present articles was in one way or another aimed at such protection. In that connection, it was enough to

refer to paragraphs 1 and 2 of article 6⁵ and to article 9,⁶ already provisionally adopted by the Commission, as well as to draft article 17 [18],⁷ referred to the Drafting Committee in 1988, and draft articles 22 and 23,⁸ referred to the Drafting Committee in 1989. The protection of international watercourses could be achieved only through strict observance of the rights and obligations assumed under the present articles and through the conclusion of the agreements provided for in articles 4 and 5. In the circumstances, was it really necessary to say in paragraph 1 of draft article 27 that “Watercourse States shall employ their best efforts to . . . protect international watercourses . . .” and in paragraph 2 that they should enter into consultations with a view to concluding agreements or arrangements concerning “the establishment of adequate safety standards and security measures for the protection of international watercourses . . .”?

12. He therefore proposed that, in article 27, the references to the protection of international watercourses should be deleted, thus leaving only three elements in the article: the obligation for States to “employ their best efforts” to protect installations (para. 1); the obligation to enter into consultations with a view to concluding agreements or arrangements concerning the establishment and operation of installations and the adoption of safety measures to protect them (para. 2); and the obligation to “exchange data and information concerning the protection” of installations (para. 3). Even if they were shortened in that way, those provisions would still be much too broad in scope. The obligations envisaged should be maintained only in cases where the malfunctioning of the installation or an accident or disaster could have effects on the watercourse beyond the borders of the State in which they occurred. Strictly speaking, he had doubts, in the light of other articles of the draft, whether those obligations should really be provided for in draft article 27. The obligation set forth in paragraph 1 was already included in articles 6 and 8; the one stated in paragraph 2 was contained in paragraph 3 of article 4; and the one provided for in paragraph 3 came under paragraph 1 of article 10. Since the Commission was preparing a framework agreement which, by its very nature, should not go into much detail, he was not convinced that a provision on installations was needed. His position was, however, flexible and he was prepared to reconsider it if good arguments were advanced against it.

13. On the question whether the draft articles should contain a provision on situations of armed conflict, there were three possible approaches: to deal somewhat extensively with the subject, as Mr. Schwebel had done in his third report; not to deal with it at all, the approach of Mr. Evensen in his first report; and to deal with it in very general terms, as Mr. Evensen had done in his second report (see A/CN.4/427 and Add.1, para. 21). The Special Rapporteur had decided to

follow the third approach and proposed an article 28 which was based on draft article 28 *bis* submitted by Mr. Evensen in his second report. According to the article, international watercourses and related installations, facilities and other works “shall be used exclusively for peaceful purposes” and “shall be inviolable in time of international as well as internal armed conflicts”. The intention was good and he himself would have no objection to that approach if he did not have some doubts about the proposed wording.

14. In the first place, “watercourses” and “installations” were once again grouped together as in draft article 27. Furthermore, the concepts of “exclusive use for peaceful purposes” and “inviolability” were far from clear. Article 88 of the 1982 United Nations Convention on the Law of the Sea provided that “The high seas shall be reserved for peaceful purposes”. That did not, however, imply the demilitarization of the high seas, since not only did the high seas remain open to warships, but naval warfare on the high seas could not be said to have been prohibited by that provision. The same would probably be the case with draft article 28. Was it realistic to believe, for example, that hostilities would stop at the edge of watercourses? If that was not the case, however, what was the meaning of the assertion that international watercourses “shall be used exclusively for peaceful purposes”? The concept of “inviolability” also gave rise to problems. Reference could, of course, be made to the inviolability of the premises of a diplomatic mission, but what was meant by the inviolability of watercourses “in time of international as well as internal armed conflicts”? Did that mean that an invading army had to stop when it reached the edge of a watercourse? As far as installations were concerned, the 1977 Additional Protocols to the 1949 Geneva Conventions did not refer to inviolability and simply stated that installations containing dangerous forces must not be made the object of attacks. If that was the meaning to be attached to the concept of inviolability, it would be preferable not to use different wording.

15. He did not believe that either the Special Rapporteur or Mr. Evensen could have done any better because those drafting problems seemed inherent in any attempt to deal with the question in a single article. On the other hand, the approach adopted by Mr. Schwebel involved the risk, to which Mr. Evensen had drawn attention (*ibid.*), that the new provisions might be considered as constituting an amendment or an addition to the 1977 Additional Protocols and might reopen the discussion on the principles and rules pertaining to international and internal armed conflicts. The formulation of the draft articles on the law of the non-navigational uses of international watercourses should have neither the purpose nor the effect of reopening that discussion.

16. In the light of those considerations, he agreed with Mr. Tomuschat (2162nd meeting) that the Commission should revert to the approach proposed in Mr. Evensen’s first report and not include in the draft articles any provision on the status of international watercourses and related installations in situations of armed conflict.

⁵ *Ibid.*, p. 31.

⁶ *Yearbook . . . 1988*, vol. II (Part Two), p. 41.

⁷ *Ibid.*, p. 31, footnote 91.

⁸ *Yearbook . . . 1989*, vol. II (Part Two), p. 124, para. 637, and p. 125, para. 641, respectively.

17. Mr. MAHIU said that the Special Rapporteur's fifth and sixth reports (A/CN.4/421 and Add.1 and 2 and A/CN.4/427 and Add.1) were fully in keeping with his previous reports and, like them, would serve as an excellent basis for the Commission's work.

18. Concerning draft article 24 (Relationship between navigational and non-navigational uses; absence of priority among uses), he agreed with the Special Rapporteur that the subject should be dealt with in the draft articles: the Commission should consider possible priorities among the uses of international watercourses, for that problem arose in practice. He also agreed with the Special Rapporteur that the answer to that question had to be qualified on the basis of considerations such as those set out in article 24. It was impossible to give preference to one use rather than another, but, since conflicts might arise among the different uses, the Commission should establish some rules of conduct for States, taking account of certain factors that were important enough to list. Apparently, however, it could only provide some very general indications. Once it had posited the principle of equitable use, it would be difficult for it to go further. The Special Rapporteur himself, who was aware of that problem, had invited the Commission to think about the advisability of establishing a ranked order of uses for international watercourses, while urging it to be cautious. Caution was fully justified in the present case, for it was difficult, if not pointless, to try to formulate general rules to govern situations that were variable in more than one respect. The uses of watercourses could vary according to region, especially in terms of geography, according to time or season and according to human factors. It was therefore difficult to draw up an exact list of all the parameters involved. In any event, it was obvious that the priorities could not be the same in a desert area as in a rainy area, for example: it was possible that, in the former, agricultural and domestic requirements would take precedence over the others and that, in the latter, where such requirements were met by natural rainfall, priority would go to energy production and navigation. It was ultimately for the watercourse States to decide, in the framework of each watercourse system, which parameters might be used for determining priorities. That was why, in a framework agreement such as the one under consideration, the only possible approach was to allow the States concerned to agree on the best possible uses of a watercourse and to establish priorities, and simply recommend that they should take account of certain factors and principles, such as equity. It was thus in the light of the principle of equity that article 24 should be considered and its wording improved.

19. With regard to draft article 25 (Regulation of international watercourses), he shared the view expressed by the Special Rapporteur in his fifth report (A/CN.4/421 and Add.1 and 2, para. 130) that the unilateral regulation of waters by one watercourse State would operate either to the advantage or to the disadvantage of the other watercourse States. Of course, the advantages should be fostered and the adverse effects discouraged. In that connection, he wondered whether the Commission should proceed along those lines or

whether it would not ultimately be enough to prohibit the adverse effects. If the unilateral regulation operated to the advantage of all the States of the watercourse in question, there was no reason to prohibit it, but, if it had adverse effects, then joint planning and co-operation should come into play precisely in order to prevent them. *A priori*, the situation thus appeared simple. The Commission could confine itself to preventing the unfavourable consequences of unilateral regulation. From that point of view, it would be useful to specify first of all that each watercourse State could regulate an international watercourse provided that such regulation had no negative or harmful effects for any other watercourse State, and then to urge the States concerned to co-operate in exploring possibilities of regulation that would be profitable to all, and finally to enunciate the principle of equitable distribution of the burdens that might arise from joint regulation. A paragraph should therefore be added at the beginning of article 25 to take account of the first element, namely a watercourse State's power of regulation.

20. Turning to the sixth report (A/CN.4/427 and Add.1), and in particular draft article 26 (Joint institutional management), he wondered whether, by introducing the concept of international management, that title would not give rise to contention and debate. It was true, as the Special Rapporteur had demonstrated, that watercourse management was particularly well suited to institutional co-operation. The Commission might thus be tempted to be ambitious and decide on all the details of the organization of such co-operation, including its machinery. It might, however, also hesitate to go that far. The Special Rapporteur asked, both in the body of his report (*ibid.*, para. 19) and in paragraph (1) of his comments on article 26, whether the subtopic should be dealt with in the draft articles themselves or in an annex. He himself was inclined to think that the principle of such institutional co-operation had a place in the draft articles themselves, but that the details and machinery of co-operation should be dealt with in an annex. Thus, in his view, article 26 should be drafted in that spirit and the machinery of institutional co-operation, which related in a way to implementation, should be set out in the proposed annex.

21. There was still the problem of how to enunciate the principle of institutional co-operation. In paragraph (4) of his comments on article 26, the Special Rapporteur explained that he had attempted to strike a balance by not requiring the establishment of joint institutions—to which certain States might react negatively—and also by not making a mere recommendation to that effect, which might simply be seen as a standard clause. The Special Rapporteur had thus proposed that watercourse States should enter into consultations concerning the establishment of a joint organization, while asking whether the Commission should not go further and perhaps consider an obligation to negotiate, such as that envisaged in other provisions of the draft articles. In his view, the course of events should not be forced. If, following consultations, the States of an international watercourse considered that it was in their common interest to do so, they would enter into negotiations with a view to estab-

lishing a joint body. The Commission should leave the States concerned some flexibility and avoid carrying the obligation to negotiate too far.

22. He endorsed both the principle and the wording of draft article 27 (Protection of water resources and installations).

23. Referring to draft article 28 (Status of international watercourses and water installations in time of armed conflict), he said that the Commission was faced with a delicate problem: whether such a provision was advisable. As the Special Rapporteur indicated in his report (*ibid.*, para. 21) and as Mr. Calero Rodrigues had pointed out, it had to be decided whether such a provision might not undermine the 1977 Additional Protocols to the 1949 Geneva Conventions. In fact, the answer depended on its wording. He believed that a provision on the status of international watercourses and water installations in time of armed conflict might be useful and even necessary, but it must be fully in keeping with the rules of international law governing armed conflicts. It was true that the Commission could neither add to nor change the rules of customary international law relating to armed conflicts. The provision would certainly not be easy to draft, but it did have a place in the draft articles.

24. Turning to annex I (Implementation of the articles), he said that he would merely state his position in principle without going into the details of the draft articles submitted, although he had a great deal to say on each one. He wondered whether the content of the annex was not in the final analysis linked to its status. If the annex was to be optional, it was possible to envisage an ambitious text that would define clearly and in detail the rules and mechanisms for implementation, including those relating to institutional management—the principle of which was stated in draft article 26—and protection of water resources and installations—the principle of which was stated in draft article 27. He agreed that watercourse States should be urged to co-operate as fully as possible, as was already the case in various parts of the world under agreements in force. Precise and binding obligations could be set out in the annex. On the other hand, if the annex was to be an integral part of the future instrument and had to be ratified together with it, it would not be wise to be so ambitious. The Commission should be satisfied with the least common denominator and lay down a number of minimum rules and guidelines for States. When the Commission had made its choice and indicated its inclinations in the course of the debate, the Special Rapporteur would be in a better position to review the provisions of the annex.

25. Mr. NJENGA said that, before analysing the sixth report (A/CN.4/427 and Add.1), he would make a few brief comments on draft articles 24 (Relationship between navigational and non-navigational uses; absence of priority among uses) and 25 (Regulation of international watercourses) submitted at the previous session in the fifth report (A/CN.4/421 and Add.1 and 2).

26. In view of the many uses besides navigational ones to which international watercourses were put, it

was essential to include a provision in the draft articles on the interrelationships between their various uses. Given the increasing demands on the limited resources of international watercourses because of technological advances and the population explosion, in particular in the developing countries, navigational uses no longer had the priority they had enjoyed at the beginning of the century. In fact, it was the use of international watercourses for water consumption and irrigation that now had pride of place, particularly in the developing countries and especially Africa, where more than 70 per cent of the population living in rural areas often consumed untreated water. Consequently, the Commission should de-emphasize the navigational uses of international watercourses, which, moreover, contributed significantly to the pollution of those watercourses, as could be seen in rivers that were used heavily for navigation in Europe and North America.

27. Draft article 24 was well balanced in that it categorically removed the assumption of priority for navigational uses. The opening phrase, "In the absence of agreement to the contrary", was very apt, for it allowed the allocation of priority to a given use, such as water consumption, through specific agreements. He also agreed with paragraph 2, which provided that, in the event of a conflict of uses, all relevant factors would be taken into account to establish equitable utilization of the watercourse in accordance with articles 6 and 7. He would, however, also like to see a reference to article 8, which established the obligation not to cause appreciable harm, for that was, after all, the goal behind the balancing of interests. He would appreciate the Special Rapporteur's comments on that suggestion.

28. With regard to draft article 25, he stressed the importance of the definition of "regulation" of an international watercourse given by the Special Rapporteur in his fifth report (*ibid.*, para. 129). In his view, that definition should feature in the article on the use of terms. As the Special Rapporteur had pointed out, the regulation of international watercourses might have both positive and adverse effects on other watercourse States. It was therefore important to deal with it in a specific provision, to assist States in their efforts to develop international watercourse systems in a manner beneficial to all, achieve optimum utilization of the watercourse and diminish any adverse effects. The thrust of article 25, submitted by the Special Rapporteur on the basis of a thorough analysis of State practice, was therefore acceptable, although he had some reservations concerning the expression "In the absence of agreement to the contrary" in paragraph 2. Even where there was agreement, its objective was the equitable sharing of the burden and the benefits. He therefore suggested deleting that expression and perhaps adding another sentence to paragraph 2, reading: "The States concerned shall endeavour to conclude specific agreements to implement this obligation."

29. Turning to the sixth report (A/CN.4/427 and Add.1), which dealt with the final parts of the draft articles, namely management of international watercourses, protection of water resources and installations, and the implementation of the articles, he noted its

excellent supporting material and the exhaustive comments by the Special Rapporteur. Since the Commission now had practically all the necessary material before it, it would probably be able to complete the first reading of the draft articles before the end of the term of office of its current members in 1991.

30. Given the interdependence of the community of States sharing an international watercourse, the need for rational management and optimum utilization of the watercourse was self-evident. Such rational management and optimum utilization could be realized only through co-operation among the States concerned—for example, through consultations, regular exchanges of data, joint projects, bilateral arrangements and, where deemed appropriate, the establishment of permanent institutional machinery. In his report (*ibid.*, para. 6), the Special Rapporteur drew the Commission's attention to the impressive number of commissions and other administrative arrangements established by watercourse States. The recent droughts in Africa and devastating floods in Bangladesh and elsewhere bore witness to the need to establish such permanent mechanisms and also to involve the international community, in addition to the watercourse States concerned. He shared the Special Rapporteur's conviction that, while there was no obligation under general international law to form joint river and lake commissions, management of international watercourse systems through joint institutions "is not only an increasingly common phenomenon, but also a form of co-operation between watercourse States that is almost indispensable if anything approaching optimum utilization and protection of the system of waters is to be attained" (*ibid.*, para. 7).

31. He therefore welcomed draft article 26 (Joint institutional management), which encouraged the establishment of joint management organizations without making it mandatory. The wording of the article was, in general, acceptable, but he would like a function defined in the following terms to be added to those listed in paragraph 2: "(g) co-ordinating measures on the eradication of water-borne diseases". That problem, to which he had had occasion to refer at the previous session, was an important one and deserved specific mention. The reference to "water-related hazards and dangers" in subparagraph (f) of paragraph 2 was not sufficient, especially as the subparagraph dealt with warning and control systems relating to pollution, other environmental effects of the utilization of international watercourses and emergency situations. He would appreciate the Special Rapporteur's views on his suggestion. He also endorsed Mr. Mahiou's proposal that the principle of institutional co-operation should be set forth in the main body of the future instrument, the details of the proposed machinery being consigned to an annex.

32. As for paragraph 1, he noted that the formula "at the request of any of them" might not be the most suitable, as it could give the unintended impression that consultations had to commence forthwith at the whim of any watercourse State. It might be preferable to substitute the words "where it is deemed practical and advisable" appearing in the corresponding provision

submitted by Mr. Evensen, which was reproduced by the Special Rapporteur in paragraph (2) of his comments on article 26, or simply the words "when necessary". The Special Rapporteur might wish to consider those suggestions.

33. Turning to chapter II of the sixth report, dealing with the security of hydraulic installations, he said that the need for provisions on the protection of water resources and installations, whether in peacetime or in wartime, was self-evident. The work of previous special rapporteurs had made it possible to identify a number of elements, which were set out in the report (*ibid.*, para. 20). All those obligations had become part of customary international law and the draft would be deficient if it failed to mention them. The Special Rapporteur had provided ample justification for the two draft articles he submitted under the general heading "Protection of water resources and installations" (part X), a title which he (Mr. Njenga) thought should read: "Security of water resources and hydraulic installations".

34. Paragraph 1 of draft article 27 (Protection of water resources and installations) should be recast, since it dealt not with the international watercourse as such, but with the danger it could represent in the event, for example, of a defect in the construction or maintenance of its "related installations, facilities and other works". That was brought out clearly in paragraph 2. As indicated by the title of part X, what were involved were the installations and other works.

35. With regard to draft article 28 (Status of international watercourses and water installations in time of armed conflict), he said that the reluctance of some members of the Commission to have an article relating to armed conflicts included in the draft was understandable. Such a provision could be construed as an attempt to revise or amend the delicate balance achieved in the 1977 Additional Protocols to the 1949 Geneva Conventions, the relevant provisions of which were cited by the Special Rapporteur in his report (*ibid.*, paras. 31-34). Nevertheless, article 28 was a fundamental provision and was not inconsistent with the humanitarian principles underlying the Protocols. The article proposed and the general approach adopted by the Special Rapporteur were therefore quite acceptable.

36. In chapter III of the sixth report, the Special Rapporteur proposed an annex on implementation of the articles which contained provisions enabling individuals to obtain redress in the "watercourse State of origin" for activities causing appreciable extraterritorial harm. Annex I contained eight draft articles. Summarizing their content, he said that the task was very ambitious and, although it was interesting and relevant, the Commission had not expected to embark on it, since the Special Rapporteur had not referred to it in the outline of the topic presented in his fourth report. The entire question of recourse for extraterritorial harm was an uncharted field in which virtually no State practice existed, as could be seen from a study of numerous international instruments, including those cited by the Special Rapporteur. The few authorities the Special

Rapporteur had referred to related primarily to the environmental field and then only within relatively integrated communities such as OECD (OECD Council recommendation of 1977 (*ibid.*, footnote 85)) and the Nordic countries (1974 Nordic Convention on the protection of the environment (*ibid.*, annex)). Trends among those groups of countries might be setting the pace for future developments in the law in that field, but that was far from true in the case of international watercourses.

37. In any event, the articles proposed in annex I were likely to be rejected out of hand by many States because, contrary to what happened in the general environmental field, they created—except in very few cases—one-sided obligations for upper riparian States. Apart from the possible existence of a dam near the border which flooded lands in the upper riparian State, a situation which was almost invariably covered by agreements between the States concerned, he could not envisage any situation in which citizens of the upper riparian State would benefit from the rather generous provisions of the proposed annex.

38. Despite his excellent efforts to draft implementation proposals, the Special Rapporteur would do well to reconsider the advisability of embarking upon a course which would inevitably delay the Commission's work and for which, in any case, there was no need in the context of a framework agreement. At most, the proposed provisions might be offered in the form of optional recommendations.

39. Those comments did not, of course, detract in any way from the value he attached to the sixth report, which would no doubt enable the Commission to complete the first reading of the draft articles at its next session. He had no hesitation in recommending that draft articles 24, 25, 26 and 27 be referred to the Drafting Committee.

40. Mr. PAWLAK said that the Special Rapporteur's idea of including in the draft articles an annex dealing with their implementation was a most interesting one.

41. Draft article 26 (Joint institutional management) was one of the most important provisions of the draft. The need for such an article derived from State practice and from the full logic of the draft prepared by the Special Rapporteur and his predecessors. A modern system of watercourse management was needed because of the growing diversity of watercourse uses. While in the nineteenth century regulation and co-operation between watercourse States had been concerned principally with navigation and fishing, there was now a wide variety of problems relating to irrigation, hydroelectric power generation, flood control and, most of all, pollution.

42. Paragraph 1 of article 26 provided a "soft" obligation of consultation on the subject of joint management, paragraph 2 provided a broad definition of management functions and paragraph 3 indicated certain other functions which might be undertaken by a joint management system. While he had no doubt as to the usefulness of article 26, he wondered whether it met all the present and future requirements for co-operation among watercourse States. He agreed with the state-

ment by the Special Rapporteur in his sixth report (A/CN.4/427 and Add.1, para.19) that the article provided for a practical context within which watercourse States could work together in planning and monitoring the utilization, protection and development of their joint water resources; it should not be overlooked, however, that there were nearly as many joint bodies as there were international watercourses and that they might be *ad hoc* or permanent and might possess a wide variety of functions and powers (*ibid.*, para. 4). In the circumstances, he wondered whether the joint organizations proposed by the Special Rapporteur should duplicate existing institutions, supplement or replace those institutions or be established only in situations where such institutions did not exist. He looked forward to hearing the Special Rapporteur's views on that point at the end of the debate.

43. The main argument in favour of provisions such as those of article 26 lay in the duty of co-operation set forth in articles 5, 9 and 11 to 21 of the draft and, more especially, in the major obligation of equitable and reasonable utilization and participation formulated in article 6. Generally speaking, he supported article 26, but thought that it needed some drafting changes; in particular, it should be brought more closely into line with other articles already adopted on first reading.

44. Paragraph 1, in particular, should be reformulated in such a way as to indicate clearly the obligation to enter into consultations in order to explore the need for the establishment of a joint organization. In that respect, he tended to agree with Mr. Tomuschat rather than with Mr. Al-Baharna (2162nd meeting). As for paragraphs 2 and 3, he thought that they should be combined; in that connection, he supported the idea put forward by Mr. Mahiou and supported by Mr. Njenga of an annex containing a list of activities. With regard to the language used in the article, he had doubts about the expression "joint organization for the management...", the customary expression being "international joint commission".

45. The scope of draft article 27 (Protection of water resources and installations) needed further clarification; in the existing formulation, it seemed too broad. The article should provide for the physical protection of the very existence and operation of the international watercourse system. In that light, the expression "employ their best efforts to maintain and protect international watercourses" in paragraph 1 was perhaps not entirely adequate. He would have preferred to speak of undertaking the necessary steps or arrangements in order to maintain, protect and improve international watercourse systems. The article should define what was meant by the physical protection of international watercourse systems; paragraphs 2 (b) and 3, in particular, should be reformulated with that purpose in mind. Furthermore, the article should not only create the obligation to prohibit the poisoning of water resources, but also eliminate outdated nineteenth-century concepts according to which it was permissible to cut the enemy's water supply, to dry up springs or to divert rivers from their courses. In short, the Commission should seek ways of protecting international watercourses in time of armed conflict.

46. Turning to the proposed annex I, he said that the importance of its provisions, intended to assist the implementation of the principles set forth in the draft, was self-evident. The remarks he wished to make were of a preliminary nature. Since the only purpose of draft article 1 was to define the expression "watercourse State of origin", the words "and that give rise or may give rise to appreciable harm in another watercourse State" at the end of the article might not be necessary; in his view, they should be deleted.

47. The purpose of draft article 2 was to implement the general principle of non-discrimination and to provide a legal basis for administrative consideration of the extraterritorial effects of planned activities. He agreed in principle that such a provision was needed in a framework agreement, but wondered whether, in view of its importance, it should not be moved to the main body of the draft. Moreover, the title of the article should be changed so as to reflect its substance more adequately; for example, it could read: "Regulation of existing or prospective activities".

48. The text of draft article 3, and especially the English version, should follow more closely the wording of article 235, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea; the words "appreciable harm caused or threatened" in paragraph 1 should be replaced by "appreciable damage caused". He saw no point in extending the obligation of States beyond the provisions of that Convention.

49. He endorsed draft article 4, which protected not only the interests of States, but also the rights of any person who had suffered appreciable harm or was exposed to significant risks. However, he wondered whether draft articles 4 and 5 could not be merged.

50. Lastly, draft article 6 seemed to go beyond the scope of the articles adopted thus far and to encroach on the topic of jurisdictional immunities of States; it should therefore be deleted.

The meeting rose at 11.40 a.m. to enable the Drafting Committee to meet.

2164th MEETING

Tuesday, 29 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/421 and Add.1 and 2,¹ A/CN.4/427 and Add.1,² A/CN.4/L.443, sect. F, ILC (XLII)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR
(*continued*)

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) *and*

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (*continued*)

ANNEX I (Implementation of the articles)³ (*continued*)

1. Mr. BENNOUNA said that, in his sixth report (A/CN.4/427 and Add.1), the Special Rapporteur had drawn on doctrine, practice and case-law in supplying the elements for a detailed analysis of the topic. His consistent efforts augured well for the adoption of the draft articles on first reading during the term of office of the Commission's current members.

2. Referring first to draft articles 24 (Relationship between navigational and non-navigational uses; absence of priority among uses) and 25 (Regulation of international watercourses) submitted in the fifth report (A/CN.4/421 and Add.1 and 2), he said he agreed with the Special Rapporteur that developments in the twentieth century, and in particular the growing need for water for consumption and irrigation, meant that the use of international watercourses for navigational purposes could no longer be regarded as a priority. Article 24 should, however, more narrowly pin-point the question of the conflict between the different uses and the possibilities for a solution. Paragraph 1, for instance, simply provided that neither navigation nor any other use enjoyed an inherent priority over other uses, without specifying what those other uses were. The paragraph should therefore be more clearly drafted to contrast the navigational and non-navigational uses of international watercourses. Again, paragraph 2, which dealt with conflicts that might arise between several uses of an international watercourse, did not make it clear that such conflicts would be between navigational and non-navigational uses. That paragraph therefore called for further consideration, so as to arrive at more concise wording. A reference to articles 6 and 7 of the draft was not sufficient. Rather, reference should be made to the obligations of States in

¹ Reproduced in *Yearbook* . . . 1989, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1990, vol. II (Part One).

³ For the texts, see 2162nd meeting, para. 26.

the matter of navigation, where such obligations existed. Otherwise, in their consultations on the use of an international watercourse for navigational purposes, the parties should be required to take account of the provisions of the present articles, in particular paragraph 3 of article 4 as provisionally adopted by the Commission.⁴

3. It might indeed be useful to include a definition of the term "regulation" at the beginning of draft article 25 and the definition contained in article 1 of the articles on "Regulation of the flow of water of international watercourses" adopted by the International Law Association at Belgrade in 1980 (*ibid.*, para. 139) could be used. Paragraph 2 of article 25, which suggested that watercourse States would participate automatically in the construction, maintenance and, where appropriate, financing of regulation works, should perhaps also include a reference to the participation of such States in the operation of those works on an equitable basis. Furthermore, the Commission should perhaps be guided by ILA's draft, particularly article 3 thereof, and introduce between paragraphs 1 and 2 of article 25 a provision reading: "Where they engage in a joint regulation, watercourse States shall settle all matters concerning its management and administration." That would provide a link between paragraphs 1 and 2.

4. Turning to the articles submitted in the sixth report, he said that draft article 26 (Joint institutional management) was couched in sufficiently broad terms to cover very diversified international practice. It would seem implicit in the terms of the article that the proposed organization for the management of an international watercourse should comprise all the States concerned. He wondered, however, whether that should not be spelt out in the text itself to ensure that, during negotiations, a State was not excluded from the future organization. Another question which called for reflection was what the position would be if, once the organization was formed, one of the member States decided to withdraw. Was it conceivable to have an organization in which all the States concerned would not automatically participate? Possibly, therefore, a paragraph 1 *bis* could be envisaged stipulating that a joint organization should necessarily comprise all the States of the international watercourse system. The idea put forward in the report concerning the establishment of contacts between members of existing international river commissions (A/CN.4/427 and Add.1, para. 11) could also be dealt with in paragraphs 2 or 3 of article 26, possibly by a reference to the need for co-ordination between the various agencies or organizations concerned with a view to improved application of the future convention, and also for the purpose of deriving mutual benefit from the experience gained.

5. Draft article 27 (Protection of water resources and installations) posed problems as it dealt with subjects that differed too much and were dealt with in other parts of the draft, such as maintenance of works (dealt with in draft article 25) and protection of installations and works against risks of danger resulting from the forces of nature (dealt with in draft article 23). Was such a provision really useful, at least as drafted, or

could it be dispensed with? Article 27 also covered the exchange of data and information concerning protection of water resources and installations and concerning security standards, a matter dealt with from a different angle in article 20 as provisionally adopted by the Commission, which provided that a watercourse State was not obliged to communicate information vital to its national security. His question to the Special Rapporteur, therefore, was whether the safety standards and security measures that had to be established under the terms of draft article 27 could be considered by the State as involving data vital to its national security.

6. The idea underlying draft article 28 (Status of international watercourses and water installations in time of armed conflict) was a good one, but the article was badly formulated. In his view, the principle of inviolability went beyond the terms of Additional Protocols I and II to the 1949 Geneva Conventions. It was therefore necessary, as the previous Special Rapporteur, Mr. Evensen, had recommended, to provide for the modalities of a relationship between the present articles and Protocols I and II. The Special Rapporteur had, however, remained silent on the question of the legal relationship between article 28 and the two Protocols, or at least had not tackled it head on. Possibly, therefore, some reference could be made to the need, in the context of international watercourses, for States to respect fully the obligations imposed by international humanitarian law, whether customary or conventional.

7. As to chapter III of the report, on the implementation of the articles, like Mr. Tomuschat (2162nd meeting) he wondered why the Special Rapporteur had chosen to place the articles in question in an annex rather than in the body of the draft. They were, after all, concerned not with the technical specifications that were generally set forth in an annex but with substantive norms that had the same value as the other articles.

8. He subscribed to the global approach underlying the draft articles in annex I, since individuals should be involved in the treaty system in one form or another, particularly in the case of rivers, where the environment was crucial, by putting emphasis on the exhaustion of domestic remedies. The main point, as the Special Rapporteur had said, was to avoid a multiplication of inter-State disputes, for if minor problems could be settled by the courts and through the action of individuals, it was not worth while bringing States into confrontation.

9. The title of draft article 2, "Non-discrimination", did not match the content of the article, for non-discrimination was, if anything, covered in draft article 4 (Equal right of access). The purpose of article 2 was in fact to assimilate extraterritorial adverse effects to territorial adverse effects; but that could have a perverse result, particularly where the link between article 2 and article 8 of the draft articles, concerning the obligation not to cause appreciable harm, was concerned. National laws might, for instance, be more lenient than the requirements under the draft. If so, should an activity be authorized on the ground that the effects were not adverse under the law of the country con-

⁴ *Yearbook* . . . 1987, vol. II (Part Two), pp. 26-27.

cerned? Accordingly, to comply with the object of article 2 as explained in the Special Rapporteur's comments, the rule set forth in the article should be formulated to provide that a State, when authorizing a certain activity on an international watercourse, should take account both of the adverse effects that it might cause in its own territory and of those that might be caused in the territory of other watercourse States, with a view to ensuring that a foreigner had a remedy against a national administration.

10. While paragraph 1 of draft article 3 (Recourse under domestic law) did match the title of the article, paragraph 2 dealt with an entirely different matter, namely the application and development of the international law of responsibility. Domestic remedies would then be applied according to national procedure and would give rise to the application of the municipal law on responsibility, even though that law might incorporate certain international norms. There again, further consideration of the article was needed, with special reference to the link between the application of the rules of international responsibility and the domestic remedy that was available.

11. Draft article 4 (Equal right of access) pertained to the question of non-discrimination and called for closer attention at a later stage. In his view, however, to place nationals and foreigners on an equal footing, in the context of a universal convention, could give rise to certain problems. Further scrutiny was therefore required of the different systems of national law and of the possibilities afforded to foreigners, in particular for remedies against a State.

12. Draft article 6 (Jurisdictional immunity) was not in fact concerned with the question of immunity, which was something invoked by a State before the courts of another State. Rather, what the Special Rapporteur had in mind was the theory of acts of government, namely those acts that were not subject to proceedings brought by an individual and for which no judicial remedy was available. Accordingly, the wording of the article should be recast.

13. Lastly, the articles in the annex should in his opinion be redrafted by the Special Rapporteur before they were referred to the Drafting Committee, but he would not oppose the wish of the majority of the members of the Commission.

14. Mr. SEPÚLVEDA GUTIÉRREZ congratulated the Special Rapporteur on the calibre of his sixth report (A/CN.4/427 and Add.1), which provided the basis for a constructive discussion and would be of great help in codifying a difficult and vital topic. With its wealth of legal material, the report should enable the Commission to conclude the first reading of the draft articles before the end of the term of office of its current members.

15. The completion of a set of draft articles would also temper the concern of many countries, particularly in the third world, which had serious problems owing to the lack of any legal regulation of international watercourses, and it would constitute a very important addition to international legal doctrine. That explained the keen interest in rules and institutions capable of

dealing with disputes in connection with international river basins. The Special Rapporteur deserved appreciation for his efforts, which would make it possible to propose norms and organizations to regulate the uses of the waters of international watercourses and to prevent abuse. Protection of such a valuable resource would also help to eliminate tension between States and contribute to the well-being of their peoples.

16. Commenting first on the articles submitted in the fifth report (A/CN.4/421 and Add.1 and 2), he said that draft article 24 did not specify what weight should be given to the various uses of international watercourses in different circumstances. Hence a reference should perhaps be included to establish the priority to be accorded to the various uses; the Special Rapporteur would no doubt offer a solution in that respect. The wording of paragraph 2, as other members had mentioned, also required improvement, as did the wording of draft article 25. For instance, the opening clause of paragraph 2, "In the absence of agreement to the contrary", was ambiguous: if there was agreement, there was no need for the paragraph. Moreover, the works in question were necessarily carried out on the basis of agreement and after lengthy negotiations. If the paragraph was retained, however, it should be subdivided into two parts for the sake of clarity, dealing separately with participation in the construction of regulation works and with maintenance. Also, the scope of the concept of equitable use, which was not very well defined, should be spelt out.

17. Turning to the sixth report, he said that draft article 26, as a key part of the system, had to be carefully worded. Paragraph 1 should be more categorical and should compel the parties to accept the consultations. The question of joint institutional management was extremely important, but it was also true that difficulties of a very delicate nature might arise in the absence of advance planning, since without an agreement the bodies in question could not operate. Thus their functions should be carefully specified from the outset. For example, a joint commission established between Mexico and the United States of America at the beginning of the century had resolved many differences but had also encountered problems for lack of proper planning. The overall results had none the less been positive, and he would have been happy to see that commission mentioned in the Special Rapporteur's comments as a useful example. He shared Mr. Njenga's view (2163rd meeting) that the phrase "at the request of any of them" in paragraph 1 was not satisfactory and that wording should be found which better reflected the goals sought. The term "multi-purpose" in paragraph 2 (d) was confusing and should either be deleted or be replaced by a more technical term. Paragraph 3 was fully acceptable.

18. The expression "best efforts" in paragraph 1 of draft article 27 was not very convincing and was inconsistent with the general tone of the draft. The expression "water resources" in paragraph 3 was unclear, since it could refer to many things. Furthermore, in his view the article should cover other related matters such as the protection of human beings and animals from water-borne diseases.

19. In the Spanish text of draft article 28, the term *incorporados*, in reference to the principles enshrined in the Charter of the United Nations, was weak and should be replaced by *consagrados* or an equivalent expression. Again, to speak of inviolability in connection with international watercourses and related installations was technically unacceptable, since there was no basis for doing so in the legal texts, and the Special Rapporteur himself expressed doubts in that connection in paragraph (2) of his comments on the article. Another term should be found. Like Mr. Al-Baharna (2162nd meeting), he could not accept the views referred to in footnotes 75 to 77 of the sixth report (A/CN.4/427 and Add.1), both because they were outdated and because they might lead to undesirable conditions in certain sectors. He therefore shared the view that the article should be more appropriately formulated.

20. As his brief comments on draft articles 24 to 28 did not call for extensive changes to the texts, he was in favour of referring those five articles to the Drafting Committee.

21. Chapter III of the report, on implementation, represented a very progressive step, since the provisions submitted therein virtually signified access for individuals to treaty régimes as subjects of international law. The proposed articles might be a useful addition to the draft, provided it was first determined whether they were to be considered as an optional protocol, an annex, a list for eliciting reactions by States or as a basis for making recommendations to States. Adding the eight articles to the draft in the form of an annex would not be acceptable and would raise several problems. For example, some of the provisions proposed by the Special Rapporteur affected the domestic legislation of States, such as draft article 2, on equating the adverse effects of activities in another State with adverse effects in a watercourse State, and draft article 3, relating to compensation for harm and to co-operation in the development of international law in that field. Other provisions affected the internal jurisdictional immunity of States, which varied extensively from country to country, for most States did not provide for it in their domestic law. Draft article 5 obliged States to inform the nationals of other States that they were exposed to risk of harm and to establish special authorities to do so. Draft article 6 laid down the obligation for watercourse States to ensure that their agencies and instrumentalities acted in a manner consistent with articles 2 to 5. Some of the provisions would be acceptable for contiguous or near-neighbouring countries with the same degree of development and cultural background, but the system would not function for neighbouring or riparian States that were not equally advanced.

22. Draft article 7 involved a very ambitious process and would not make for acceptance of the draft. Complications would arise in bringing together the parties so close to the adoption of the draft articles, and it was not for the Commission to deal with arrangements subsequent to the entry into force of the draft articles. He therefore regretted having to disagree with the Special Rapporteur's proposal. The same was true of draft

article 8: the temptation to amend the articles would act against the permanent nature of an instrument arrived at with great difficulty. He would, however, express his views more categorically when the articles were examined in depth. For the time being, he would come to no final decisions regarding the Special Rapporteur's proposals for annex I.

23. Mr. ILLUECA said that draft article 24 reflected the fact that the priority traditionally assigned to navigation was no longer justified in view of the many different uses of international watercourses in the modern world. The principle that no automatic priority was to be accorded to one use over others, contained in paragraph 1, was based on the third report of the former Special Rapporteur, Mr. Schwebel, submitted in 1982, and on article VI of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966 (see A/CN.4/421 and Add.1 and 2, para. 124). However, article VI referred explicitly to a "use or category of uses", while draft article 24 simply referred to "use". Therefore, although paragraph 1 was generally acceptable, the Special Rapporteur should be asked about the scope of the expression "category of uses", used twice in article VI of the Helsinki Rules, and whether or not failure to include it would affect the scope of article 24.

24. The opening phrase of paragraph 1, "In the absence of agreement to the contrary", did not seem necessary and should be deleted. Admittedly, the Special Rapporteur had included it in recognition of the consideration granted to navigation by certain treaties, but it weakened the goal of paragraph 1. Deleting it would not nullify existing treaties, and it was preferable for the issue to be dealt with in the commentary to the article or in the preamble to the draft.

25. Fortunately, paragraph 2 did not mention or single out navigation. Thus not only did it highlight the fact that there were no specific uses involving the right to an inherent priority, but it also stipulated that any conflict between the uses of an international watercourse should be weighed along with other relevant factors in accordance with articles 6 and 7. Nevertheless, greater weight should be given to certain factors, such as the health of the population and maintaining suitable water quality for domestic and agricultural uses, as well as the adverse effect of certain uses on the environment. He agreed with the representatives in the Sixth Committee of the General Assembly who had contended that any use that was not harmful to the waters of an international watercourse over the long term should be given priority over a use that could lead to harmful effects for future uses.

26. Since parts VII and VIII of the draft contained only one article each, the titles of the part and of the article should be the same in both cases. The title of article 24 was clearer than the title of part VII and should be the one used. In the Spanish version of the title of article 24, the words *de la navegación* should be replaced by *para la navegación*, for obvious reasons.

27. Both paragraphs of draft article 25 were acceptable and he endorsed the Special Rapporteur's suggestion that a definition of the term "regulation" should

eventually be included in article 1 of the draft. The definition should make it clear that the purpose of any hydraulic works or other measures of regulation was to achieve beneficial results, avoid harmful effects and obtain the best possible use of the watercourse. The definition proposed by Mr. Schwebel in his third report and the one contained in article 1 of the articles on "Regulation of the flow of water of international watercourses" adopted by ILA at Belgrade in 1980, both referred to in paragraph (3) of the Special Rapporteur's comments on article 25 in his fifth report, embodied the necessary elements for formulating a generally acceptable definition.

28. Draft article 26, on joint institutional management, was based on articles 2 and 3 of the articles adopted by ILA at Belgrade in 1980 and on the corresponding draft articles submitted by Mr. Schwebel in his third report and Mr. Evensen in his second report and reproduced in paragraph (2) of the Special Rapporteur's comments on article 26 in his sixth report (A/CN.4/427 and Add.1). The article was properly consistent with parts II and III of the draft.

29. With regard to paragraph (1) of the Special Rapporteur's comments on article 26, the subtopics covered in parts IX and X of the draft should be dealt with in the draft articles themselves rather than in an annex.

30. Article 26 was technically applicable to both contiguous and successive rivers, which took on an international character as a result of the legal obligations imposed on the riparian States by international custom, chiefly with regard to navigation. It should be pointed out that, although navigation rights were contained in treaties on specific rivers, the PCIJ had ruled in the *River Oder* case that riparian States shared a natural "community of interest" in the use of both contiguous and successive rivers.⁵ The extraordinary development of the different uses of navigation in the past 50 years would indicate that the Court's conclusion in that case had become applicable with regard to equality of rights and community of interests in the entire field of the use of international watercourses. In that connection, it should be noted that State responsibility regarding management of water resources was no longer confined to watercourses that divided or crossed two or more States, for the physical link with bodies of water that flowed into international watercourses could not be ignored.

31. Paragraph 2 of article 26, while not restrictive, was drafted appropriately for a framework agreement, since it served as guidelines for the functions that might be assigned to any joint institutions the watercourse States might decide to establish. Paragraph 3 (b), which provided that one of the functions of the joint organization might be to serve as a forum for consultations, negotiations and procedures for peaceful settlement of disputes, was extremely important and consistent with the decision of the international arbitral tribunal in the *Lake Lanoux* case.

32. He endorsed the Special Rapporteur's treatment of the protection of water resources and installations in draft article 27. The title of the article was useful because of both its technical meaning and its psychological effect. The article provided a good basis for preventing and confronting hazards and dangers due to the forces of nature or to wilful or negligent acts. The exchange of data and information provided for in paragraph 3 was essential to the goals sought.

33. Draft article 28, which, as the Special Rapporteur pointed out in paragraph (1) of his comments on the article, was based on the corresponding provision submitted by Mr. Evensen in his second report, was an excellent contribution. It in no way undermined the 1949 Geneva Conventions or the 1977 Additional Protocols thereto, and in any case fell within the purview of international humanitarian law, since there was not the slightest doubt that poisoning a water supply was even worse than the use of chemical weapons and should be universally repudiated.

34. Mr. SOLARI TUDELA, referring to draft article 24, said that the Special Rapporteur had given a clear account of the manner in which navigational uses of international watercourses had begun to be outstripped in importance by other uses, rightly pointing out in his fifth report that, as a result, "a general assignment of absolute priority to any one use frustrated the achievement of optimum utilization of the watercourse" (A/CN.4/421 and Add.1 and 2, para. 123). That new situation was reflected in the adoption by the International Law Association in 1966 of article VI of the Helsinki Rules on the Uses of the Waters of International Rivers (*ibid.*, para. 124).

35. Clearly, navigation today was deprived of the preferential status it had still possessed in 1921, on the adoption of the Barcelona Convention and Statute on the Régime of Navigable Waterways of International Concern (*ibid.*, para. 122 and annex). In that connection, however, he wished to add two further considerations. The first was the enormous growth in importance of alternative means of communication, in particular road traffic and civil aviation, which had relegated inland waterway navigation to a very secondary role, except in rare instances. The second consideration was the increasing scarcity of water, which had become a matter of world-wide concern. Domestic and agricultural utilization of water would thus have to be given priority over other uses. He felt certain that, if article 24 were to be formulated 10 years hence, it would incorporate that priority. Draft article 24 did reflect the present position, yet it failed to look sufficiently to the problems of the future.

36. He had no objection to the formulation of draft article 25. In paragraph (2) of his comments on the article in his fifth report, the Special Rapporteur explained the meaning attached to the term "equitable", and participation on an equitable basis was taken to mean that watercourse States receiving benefits from a particular project should contribute proportionately to its construction and maintenance. The Special Rapporteur added that the term also meant that such contributions would be required only to the

⁵ *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment No. 16 of 10 September 1929, P.C.I.J., Series A, No. 23, at p. 27.

extent that the watercourse State in question was in a financial position to make them. A definition of the term "regulation", as used in article 25, should be included in article 1.

37. Turning to the Special Rapporteur's excellent sixth report (A/CN.4/427 and Add.1), he said that draft article 26 was a concrete application of the principle of co-operation established in article 9 of the draft. Article 26 laid down the duty to enter into consultations on the establishment of a joint organization for the management of an international watercourse, an approach that differed from the one adopted by the two previous Special Rapporteurs.⁶ Mr. Schwebel had specified the duty to negotiate subject to the requirement that "the economic and social needs of the region are making substantial or conflicting demands on water resources, or... the international watercourse system requires protection or control measures". Mr. Evensen had specified the requirement: "where it is deemed practical and advisable for the rational administration, management, protection and control of the waters of an international watercourse", in laying down an actual obligation for watercourse States to establish permanent institutional machinery.

38. He agreed with the Special Rapporteur's formulation of paragraph 1 of article 26, establishing the duty of a watercourse State to enter into consultations at the request of any other watercourse State. However, there were instances in which that duty should go further. He was thinking of the circumstances mentioned in the text proposed by Mr. Schwebel, namely where the economic and social needs of the region were making substantial or conflicting demands on water resources. In that situation, there should be an obligation to negotiate, which implied the duty to arrive at some result.

39. He agreed with the texts proposed for article 27 and article 28. However, the term "inviolable", used in article 28, needed clarification. The underlying idea was acceptable, but he was not at all certain of the adequacy of the actual term.

40. Lastly, the provisions of annex I on the implementation of the articles were not an indispensable part of the draft and should be left out of the body of the future instrument. The draft articles should be confined to the rules on the non-navigational uses of international watercourses, framed so as to attract maximum acceptance from the international community. The annex should take the form of an optional instrument to be adopted by States at their choice and to serve in any case as guidance for the application of the main articles.

41. The CHAIRMAN, speaking as a member of the Commission, said that he could readily accept draft article 24, submitted in the Special Rapporteur's scholarly and well-documented fifth report (A/CN.4/421 and Add.1 and 2). The article was consistent with article 2, on the scope of the present articles, which recognized the interrelationship between naviga-

tional and non-navigational uses of international watercourses. A provision along the lines of article 24 was needed in view of technological developments, the increase in population and the relative scarcity of water resources. As a general rule, no inherent priority should be accorded to any use of an international watercourse, other than by specific agreement, of course. The Special Rapporteur had therefore been wise to include the words "In the absence of agreement to the contrary", in paragraph 1, a proviso that was not strictly necessary and was simply intended as a recognition of the preference given to navigation in certain treaties. He also subscribed to paragraph 2 of article 24, which provided for an equitable and reasonable resolution of any conflict between uses by weighing uses against one another in accordance with articles 6 and 7.

42. Paragraph 1 of draft article 25 was acceptable, since it did not make regulation an obligation for riparian States. A watercourse State had a right to regulate the part of an international watercourse within its own territory. As the Special Rapporteur had pointed out, however, the fact that river regulation was at once necessary for optimum utilization and potentially harmful made co-operation between watercourse States essential. Paragraph 1 was a concrete application of article 9, on the general obligation to co-operate, and co-operation under article 25 should therefore be based on general principles of international law such as sovereign equality and territorial integrity. Paragraph 2 contained a residual rule which could be considered superfluous. It was inconceivable that a watercourse agreement on regulation works would neglect to provide for a sharing of the burdens. Besides, the general rule of participation on an equitable basis had already been set out in article 6 of the draft. The word "regulation" itself must be defined in article 1, on the use of terms, because "regulation" had a specific meaning with a technical connotation.

43. As to draft article 26, the Special Rapporteur acknowledged in his sixth report (A/CN.4/427 and Add.1, para. 7) that there was no obligation under general international law to form a joint institution for the management of an international watercourse system. On the other hand, research had shown that management of international watercourse systems through joint institutions was becoming more common and also an indispensable form of co-operation between watercourse States. To try to resolve that dilemma, the Special Rapporteur had devised the obligation of consultation at the request of any riparian State. His own understanding was that an obligation of consultation was not the same as an obligation of negotiation and might not necessarily result in negotiation. The question whether consultations would ultimately lead to negotiations for an agreement on joint institutional management was a matter entirely for the States concerned. On that understanding, paragraph 1 of article 26 stood a chance of general acceptance by States.

44. By and large he agreed with the Special Rapporteur on the protection of water resources and installations, dealt with in part X of the draft. In particular, draft article 28, on the protection of water resources

⁶ For the corresponding draft articles submitted by Mr. Schwebel in his third report and by Mr. Evensen in his second report, see para. (2) of the Special Rapporteur's comments on draft article 26 in his sixth report (A/CN.4/427 and Add.1).

and installations in time of armed conflict, was necessary. Admittedly, the article went beyond the requirements of general international law and the relevant international instruments. Neither general international law nor the 1977 Additional Protocols to the 1949 Geneva Conventions required that international watercourses and their installations and facilities be used exclusively for peaceful purposes; nor were they granted inviolability in time of armed conflict. Nevertheless, the notion of inviolability set out in article 28 was a matter of progressive development of the law, in view of the scarcity of fresh water in the modern world and the humanitarian principles underlying the two Additional Protocols. The exclusively peaceful use of watercourses and related installations and works constituted a pre-condition for such inviolability. Naturally, the poisoning of watercourses could not be permitted under any circumstances, since such an act was a serious war crime as well as a crime against humanity.

45. With regard to annex I, on the implementation of the articles, the Special Rapporteur was to be commended for his efforts to devise provisions intended to make redress for injury more readily available. However, taking into account the present stage of international relations and the sensitive nature of some of the issues involved, he felt that the inclusion of the articles in question, even as an annex, could make the future framework agreement less attractive to a number of States. Two solutions were possible, one being to provide for optional acceptance of the annex by means of a formal declaration by States, another being for the articles on implementation to take the form of a separate optional protocol.

46. Lastly, he had some difficulty in reaching a position on all of the articles under consideration because they made no distinction between contiguous and successive international watercourses, through no fault of the Special Rapporteur. For instance, in the case of joint institutional management, the situations of contiguous and non-contiguous watercourse States were not the same; hence the needs of those two categories of States might not be the same. In formulating the draft articles, the obligations of those two categories of States should not be the same either.

47. Mr. KOROMA said that, traditionally, States had regarded freedom of navigation of a watercourse as a specially protected right. For example, the principal reason for convening the Berlin Conference of 1884 had been the desire to resolve what had become known as the "Congo question", i.e. whether to extend the principle of freedom of navigation, as stipulated at the Congress of Vienna in 1815, to the Congo and Niger rivers. Freedom of navigation could be said to have been a universal principle. On the other hand, one was bound to agree with the Special Rapporteur that, as a result of technological developments and of other increasing uses made of watercourses, it was no longer tenable to give pre-eminence to navigation over other uses as a general rule.

48. Nevertheless, the two kinds of use could not be separated. Just as navigational requirements could

affect the quality and quantity of the water, harm could also be caused to navigation by construction works on a river or by utilization of the watercourse for some other purpose which temporarily or permanently obstructed navigation. The Senegal River, for example, was used not only for navigation, but also for other purposes. In Africa, riparian States utilized rivers from the triple standpoint of agriculture, navigation and hydroelectric power.

49. Two issues might arise. The first was that the absence of pre-eminence of any of the uses of the watercourse could lead to a conflict of interests, and the second was that the watercourse States could agree among themselves to accord priority to one category of use. With regard to the first situation, the Special Rapporteur was right to state that the general principles already adopted by the Commission on equitable utilization, the obligation not to cause appreciable harm and the duty to co-operate would apply in resolving such conflicts. In the second situation, as correctly noted by the Special Rapporteur, the watercourse States concerned could reach agreement on any particular priorities. The importance and significance of navigation for some watercourse States could not be underestimated or fail to have a substantial impact on the exploitation of natural resources, including food production, and on road and railway construction. He agreed with Mr. Solari Tudela that it was necessary to have in mind not only the present situation, but also future possibilities. From that standpoint, it was essential for the Commission not to imply that it was underrating navigational uses.

50. The title of draft article 24 might be amended to read: "Relationship to navigational uses and non-priority among uses" or simply "Relationship to navigation and non-priority among uses", thus avoiding the word "absence", which might prove confusing in view of the reference to "absence of agreement" in paragraph 1. Paragraph 2 should be amended to read: "In the event of a conflict regarding the uses of an international watercourse [system], the relevant principles of this Convention shall apply in establishing equitable utilization." Moreover, the Commission would be remiss if it failed to state that navigation was indeed different from other watercourse uses, and therefore, in the commentary, it should reformulate accordingly the third sentence of paragraph (1) of the Special Rapporteur's comments on the article in his fifth report (A/CN.4/421 and Add.1 and 2).

51. Expressing agreement with the intent and thrust of draft article 25, he said that diverting a watercourse, operating a hydroelectric power station or carrying out irrigation work could have both positive and harmful consequences. Such uses could help to increase agricultural production, serve to prevent floods or mitigate their effects, or even affect the freedom of navigation. Regulation was essential for the manifold uses made of watercourses today. Hence the Special Rapporteur was right to propose a provision on regulation of international watercourses with a view not only to attaining the twin objectives of optimum and equitable utilization, but also to preventing serious or appreciable harm being caused to other States.

However, the text of article 25 should be recast. He agreed with the Special Rapporteur that the article incorporated the principles of the duty to co-operate and not cause serious harm, equitable utilization and the duty to exchange information or to consult, and he endorsed the spirit underlying the article. But its provisions should not be couched in mandatory terms, first, because watercourse States might have different priorities with regard to the regulation of a watercourse, and secondly, because some States still considered that projects being carried out within their boundaries were a matter exclusively for them and not for other States. Without sharing that view, he none the less considered that an article forming part of a framework agreement should be made more flexible so as to command general acceptance. It might also be desirable to indicate that the co-operation referred to in paragraph 1 should be on an equitable basis. Paragraph 2 could be amended to read:

“In the absence of agreement regarding the sharing of the costs of a project, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayal of costs of such regulation works as they may have agreed to undertake, individually or jointly.”

The present wording could be construed to mean that, even in the absence of an agreement, watercourse States would be expected to pay towards a project simply because they happened to derive benefits from it. The suggestion made by Mr. Njenga (2163rd meeting, para. 28) was constructive and would help to clarify the article. As to the point raised by the Special Rapporteur in paragraph (3) of his comments on the article, the term “regulation” should be defined in article 25 itself, where it had a specific meaning different from the one it had elsewhere in the draft.

52. He was grateful to the Special Rapporteur and the Secretariat for circulating the first part of the sixth report (A/CN.4/427 and Add.1) before the beginning of the session. Draft article 26 was very important in several particulars. First, the article took up the fundamental issue of the hydrological régime of rivers and the physical factors which governed them and on which the contemporary rules were based. As the Special Rapporteur had pointed out in his oral introduction (2162nd meeting), citing the former Special Rapporteur, Mr. Schwebel, the natural sciences now regarded international watercourses as part of a natural unity composed of the aggregate of all surface and underground waters flowing into a common watercourse. A number of watercourse agreements and arbitral decisions had been based on that concept. Secondly, article 26 attempted to implement the various rules already adopted in relation to the present topic. By inviting watercourse States to enter into consultations concerning the possible establishment of a joint organization for the management of the watercourse, the article implied that a watercourse was indivisible. Through the proposed organization, serious problems or consequences which might result from different or competing uses could be resolved. The approach was universally appealing, and for developing countries in general and African countries in particular it could be

said to be indispensable. For most of those countries, uses such as irrigation, flood control and hydroelectric development, and the prevention of pollution, could be effectively tackled only through joint institutional mechanisms. In paragraph (3) of his comments on article 26, the Special Rapporteur was therefore right to conceive the article as providing guidance to watercourse States with regard to the powers and functions that could be entrusted to such joint institutions as they might decide to establish.

53. Although article 26 was based on various legal rules which were now accepted in relation to the present topic, he considered that, in view of its intended role as part of a framework agreement, and given the position taken by some States that they were not bound to furnish information on all projects, it could be modified, at least to some extent, along the lines of the corresponding draft article submitted by Mr. Schwebel, reproduced in paragraph (2) of the Special Rapporteur's comments. He would favour retaining the list of functions contained in paragraph 2, or even, where necessary, adding to it, but the list would be more appropriately placed in an annex rather than in the main body of the draft. He wished to endorse the comments on article 26 made by Mr. Solari Tudela earlier in the meeting.

54. Draft article 27 was predicated on the principles of equitable utilization, the duty to exchange information and data and the duty not to cause harm, and it thus had a place in the draft. However, the two issues of non-contamination of a watercourse and safety of hydraulic installations should be addressed separately.

55. As for draft article 28, it was consistent both with the spirit of the Charter of the United Nations and with the progressive development of international law, since the poisoning of watercourses was to be considered not only as a war crime, but also as a crime against humanity within the meaning of the draft Code of Crimes against the Peace and Security of Mankind. He none the less agreed with Mr. Sepúlveda Gutiérrez that it would have been helpful, particularly to students and others who studied the Commission's reports, if the reference to the views of Fauchille and Oppenheim in paragraph (2) of the Special Rapporteur's comments on the article had been accompanied by an appropriate rider making it clear that the Commission did not consider those views to be in accordance with contemporary international law. That objection notwithstanding, he wholeheartedly supported article 28.

56. With regard to annex I, the Special Rapporteur was to be commended for attempting to lay down principles designed to facilitate implementation of the articles, make redress more readily available to private parties and help to avoid disputes between watercourse States. He would agree with the proposition that actual and potential watercourse problems should be resolved on the private level, through courts and administrative bodies, in so far as possible, if the problems were those arising within the same jurisdiction or between countries in the same geographical region; but the Special Rapporteur was apparently referring to problems which might arise between watercourse States. While

the idea developed in the sixth report in that regard (A/CN.4/427 and Add.1, para. 39) was no doubt an interesting one, the issues it raised were so complex that separate meetings would have to be set aside to consider it properly and do it justice.

57. The call for private remedies would imply a lack of legal rules at the international level to decide problems that might arise between nationals of watercourse States. Such an attitude on the part of a body currently engaged in elaborating precisely such rules would surely be ironic. Even if no law on the non-navigational uses of international watercourses were available, States could resort to the law of State responsibility or to customary international law. In view of the complex nature of the rule on the exhaustion of local remedies, which could be used either as a shield or as a sword, he did not consider it a reliable basis for the proposal. Moreover, the proposal did not address the issue of procedure whereby a private litigant could sue in the courts of a foreign State for harm which might have been caused in another State. How did the proposal surmount the formidable obstacle of jurisdiction? There was also the question of the high cost of litigation to private individuals. While recognizing the positive aspects of the idea and acknowledging that, if only in a very limited number of cases, it had already been implemented, he considered that remedial measures for problems arising between two or more watercourse States would be best handled by States at the international level, thus providing the necessary uniformity of jurisprudence to ensure the durability of the law under consideration. Without wishing to detract in any way from the high calibre of the sixth report, he did not think that the draft articles in annex I were ready for referral to the Drafting Committee.

58. Mr. ROUCOUNAS, after congratulating the Special Rapporteur on the method adopted in the preparation of his sixth report (A/CN.4/427 and Add.1), said that the terms employed in draft article 26 were somewhat vague. He agreed with Mr. Sepúlveda Gutiérrez that a more firmly worded text along the lines of those proposed by the two previous special rapporteurs might be preferable. In particular, he would welcome the reinstatement of references to the permanence of the proposed joint organization and to the strengthening of existing organizations. He also wished to reiterate the point he had made at the previous session to the effect that a joint organization should be required to meet at specified intervals.

59. Draft article 27, too, was rather weakly worded and should be recast. Mr. Bennouna had referred to article 20 of the draft in connection with the requirement concerning the exchange of data and information in paragraph 3 of article 27, but article 10 also had a bearing on that issue. It might be preferable if all provisions relating to the exchange of information were grouped together.

60. With regard to draft article 28, he endorsed the reference in paragraph (2) of the Special Rapporteur's comments on the article to the 1977 Additional Protocols to the 1949 Geneva Conventions and sug-

gested that, besides article 56 of Additional Protocol I, mention should also be made of article 54 of that Protocol and articles 14 and 15 of Additional Protocol II; a reference to article 85 of Protocol I might also be appropriate. In his opinion, article 28 should be divided into two paragraphs, the first relating to the use of international watercourses exclusively for peaceful purposes and based, in essence, on the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, and the second referring to cases of international armed conflict. In that connection, he had no objection in principle to the concept of inviolability, but it would be better if the provision were based on concepts already embodied in international instruments, such as the Geneva Conventions and Additional Protocols, making it quite clear that the provision was proposed in application of existing international law rather than as part of the progressive development of international law.

61. As to annex I, on implementation of the articles, he had been greatly impressed by the arguments advanced by Mr. Koroma. Implementation was a matter not only of harmonization of domestic legal systems, but also of international procedures. Avoidance of recourse to traditional diplomatic procedures was possible only where an advanced level of integration already existed. In that regard, he noted the reference to reciprocity made by Mr. Tomuschat (2162nd meeting) and remarked that certain provisions of the General Agreement on Tariffs and Trade were interpreted differently depending on the degree of integration among groups of contracting parties.

62. The term "extraterritorial" employed in paragraph 38 of the sixth report was inappropriate: the correct term was "transfrontier". Draft article 2 of annex I should specify by whom the activities referred to were proposed or planned.

63. The wording of draft article 3 was slightly inconsistent with that of articles 14, 16 and 17 as provisionally adopted by the Commission.⁷ With regard to paragraph 2, he would point out that, unlike that provision, article 235, paragraph 3, of the 1982 United Nations Convention on the Law of the Sea, on which the text was based, dealt with the international responsibility of States and not of private individuals.

64. The remarks he had made in connection with paragraph 3 of draft article 27 and other provisions dealing with the exchange of information were also applicable to draft article 5 of annex I. Lastly, he said that he would not comment on draft article 6, especially since article 13 (Personal injuries and damage to property) of the draft articles on jurisdictional immunities of States and their property was still before the Drafting Committee on second reading.

The meeting rose at 1.05 p.m.

⁷ *Yearbook . . . 1988*, vol. II (Part Two), pp. 50-51.

2165th MEETING

Wednesday, 30 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Filling of a casual vacancy in the Commission (article 11 of the statute) (*concluded*)* (A/CN.4/433 and Add.1, ILC(XLII)/Misc.1)

[Agenda item 2]

1. The CHAIRMAN invited the Commission to hold a private meeting in order to fill the casual vacancy created by the death of Mr. Paul Reuter.

The meeting was suspended at 10.10 a.m. and resumed at 10.20 a.m.

2. The CHAIRMAN announced that the Commission had elected Mr. Alain Pellet to fill the casual vacancy created by the death of Mr. Paul Reuter. On behalf of the Commission, he would inform Mr. Pellet of his election and invite him to participate in the work of the current session.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/421 and Add.1 and 2,¹ A/CN.4/427 and Add.1,² A/CN.4/L.443, sect. F, ILC(XLII)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) *and*

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (*continued*)

ANNEX I (Implementation of the articles)³ (*continued*)

3. Mr. GRAEFRATH said that the Special Rapporteur's sixth report (A/CN.4/427 and Add.1) contained several important provisions, in particular the draft articles on joint institutions and on implementation, which touched on the entire draft. The implementation stage was, in a sense, the moment of truth for every legal instrument, since the methods of implementation often revealed the instrument's true legal nature and the scope of the obligations it embodied.

4. With regard to draft article 26, he fully agreed with the Special Rapporteur that institutionalization might itself be viewed "as a form of implementation of the articles" (*ibid.*, para. 19). Institutional mechanisms not only provided States with a means of joint planning and monitoring of the utilization and protection of an international watercourse, but also introduced a new entity, able to act on its own initiative and to centralize certain functions, into the implementation process. In that light, he could not fully agree with the view expressed by Mr. Calero Rodrigues (2163rd meeting) that the provisions of articles 4, 9 and 10 already contained all necessary elements of co-operation among watercourse States, making a separate article on institutional co-operation unnecessary. The establishment of a joint organization represented a new aspect of such co-operation and deserved separate treatment. He was therefore in favour of the inclusion of a general provision on institutional management in the draft as a recommendation to watercourse States.

5. The question that arose in connection with paragraph 1 of article 26 was whether there was a rule in the law of the non-navigational uses of international watercourses involving a duty to consult with a view to establishing a joint body or organization. His view was that, while there was no such duty in general international law, there were specific fields of regulation where the establishment of institutional mechanisms was dictated by the logic of the subject-matter being regulated and by the interdependence of the States concerned. That seemed to be true in the case under consideration. He therefore supported the inclusion of a provision along the lines proposed by the Special Rapporteur, although some drafting amendments were certainly necessary and, for example, the position of article 26 in the overall structure of the draft would have to be reviewed. He would come back to that question at a later stage.

6. Paragraphs 2 and 3, whose main purpose was to list the functions and powers with which a river commission might be entrusted, raised problems of a different kind. In view of their framework-agreement nature, the draft articles did not provide for the establishment of a permanent organization, as the Special Rapporteur rightly made clear in paragraph (3) of his comments on draft article 7 of annex I. It would therefore be for the parties to future watercourse agreements to define the functions of the body to be set up under those agreements. The purpose of paragraph 2 of article 26 could thus be only to indicate what might be the functions of a joint body under an efficient

* Resumed from the 2152nd meeting.

¹ Reproduced in *Yearbook* . . . 1989, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1990, vol. II (Part One).

³ For the texts, see 2162nd meeting, para. 26.

management scheme. Watercourse States had no duty to adopt the functions indicated in a framework agreement, to which they might not all be parties. The functions would therefore have to be described in very general terms or else the list of functions would have to be drawn up as a purely illustrative rather than non-exhaustive one, the word "includes" in the introductory clause of paragraph 2 being replaced by the words "may include". In the same clause, it should be stated clearly that paragraph 2 defined the possible functions of the organization and not the concept of management; paragraph 3 was already drafted in that way.

7. Improvements were also necessary in paragraph 2 (a), since, as it now stood, it suggested that the principal function of a future river commission would be to implement the obligations of watercourse States under the present articles, whereas, in fact, the commission in question would, of course, have to perform functions under the specific watercourse agreement establishing it. The subparagraph was not precise enough in another respect: it was not for the organization, but for the States themselves, to discharge the obligations incumbent upon them. The organization's purpose was to promote and monitor implementation by watercourse States and to perform certain centralized functions. The references to the present articles and to parts II and III thereof should be deleted.

8. The list of the joint organization's implementation functions in paragraph 3 might be supplemented by a new subparagraph, which should become subparagraph (a), referring to promoting agreement on institutionalized procedures for monitoring compliance and recommending corrective action by the organization and by member States in order to assist States in implementing their obligations. A similar provision was contained in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. That element of co-operation was different from fact-finding and the settlement of disputes and should be stressed by the inclusion of a separate provision.

9. Taken as a whole, the changes he had proposed would strengthen the organization's implementation functions. Finally, he proposed that, with a view to shifting the emphasis from the management aspect to the institutional element, the title of article 26 should be amended to read: "Institutional arrangements".

10. Turning to part X of the draft articles, on protection of water resources and installations, he associated himself with the members of the Commission who considered that extending the scope of draft article 27 to protection of international watercourses themselves in paragraphs 1, 2 (b) and 3 of the article was inappropriate because the subject was already dealt with in other articles. The main purpose of article 27 was to regulate co-operation among watercourse States in order to ensure the security of watercourse-related installations, facilities and works. That purpose should be made clear in the article and general references to protection should be deleted. Paragraph 1, which did not add new substance to the draft, might be deleted or redrafted. The main question arising in connection with the scope of article 27 and its place in the draft was,

however, whether it covered new (planned) or existing installations, or both. In his opinion, new installations represented a typical example of "planned measures with possible adverse effects", as envisaged in part III of the draft.⁴ The residual rule on the safety of existing installations, the exchange of information relative thereto and, possibly, the establishment of safety standards would be most appropriately placed between article 10, on regular exchange of data and information, and part III on planned measures.

11. With regard to draft article 28, he said that he favoured the idea of strengthening the protection of international watercourses, which were the main sources of fresh water, also in times of armed conflict. The rules of international humanitarian law in force might not suffice and might need to be amended in order to cope with problems of the environment and developments in weapons technology. He also understood the broad approach revealed by the choice of such terms as "peaceful purposes" and "inviolable", neither of which was a term of art in international humanitarian law. However, he shared the scepticism about the article expressed by other members. While it might be impossible to amend or improve existing international humanitarian law by adding an article on protection in times of armed conflict to a framework agreement on international watercourses, the Commission might try recommending to watercourse States that, when determining the equitable and reasonable utilization of a watercourse in a specific watercourse agreement, they should ensure that the watercourse was used exclusively for peaceful purposes. Such a provision would have its place in part II of the draft, on general principles.

12. Transferring articles 27 and 28 to a more suitable place in the draft would have the welcome effect of establishing a direct connection between article 26 and the draft articles on implementation in annex I. Moreover, article 26 might be combined with the articles of annex I into a fully-fledged part on implementation. That would eliminate a major deficiency of annex I, namely the fact that the implementation measures for which it provided were restricted to recourse possibilities for individuals under domestic law. The draft articles had to take account of the fact that, in the law of the non-navigational uses of international watercourses, as in other related branches of international law, implementation measures encompassed a combination of inter-State and private remedies, the former being quite often implemented through institutionalized procedures. Thus the inclusion of article 26 in a part on implementation could re-establish the balance between inter-State and private remedies. In addition to article 26, the part in question could contain a new article combining the provisions of draft article 3, paragraph 1, and draft article 4 of annex I, on recourse under domestic law and equal right of access, respectively.

13. As for the other articles of annex I, he said that draft article 1, being a definition, could be incorporated in the article on the use of terms, while draft articles 2

⁴ See *Yearbook . . . 1988*, vol. II (Part Two), pp. 45 *et seq.*, especially p. 46 (art. 12).

and 5, which did not, strictly speaking, deal with implementation measures, could either be deleted or be incorporated in the part of the draft on planned measures, to which they belonged by their very nature. Draft article 6 was not necessary in an instrument on international watercourses and should be deleted.

14. In paragraph (3) of his comments on draft article 7, the Special Rapporteur admitted being hesitant to propose a permanent institution in connection with what was envisaged as a framework agreement. He himself would go even further and say that the framework-agreement character of the draft and the general nature of its provisions did not justify the establishment of an organization or conference, whether permanent or non-permanent. The conventions containing provisions on the establishment of a review conference cited by the Special Rapporteur were not framework conventions comparable to the draft articles under consideration. The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1979 Convention on Long-range Transboundary Air Pollution (see A/CN.4/427 and Add.1, annex) all created specific legal régimes for particular activities or resources which had to be kept under constant review. That was not the case with a framework convention, which would be concretized by the conclusion of specific watercourse agreements creating specific legal régimes for particular watercourses and, in most cases, providing for the establishment of some form of permanent body. Should amendments to the present articles become necessary, they could well be made through annexes or protocols.

15. In conclusion, he said that the sixth report contained all the necessary elements of a part dealing with implementation. Although those elements would, in his opinion, have to be reorganized, most of the groundwork had already been done.

16. Mr. CALERO RODRIGUES, referring to chapter III of the Special Rapporteur's sixth report (A/CN.4/427 and Add.1) on implementation of the articles, noted that the eight articles it contained were being proposed as an annex to the draft articles, but that the Commission had been asked to consider the possibility of including them in the body of the draft.

17. He would begin by focusing on draft articles 2 to 6, which established five substantial obligations for States.

18. The first was the obligation for States to take into account adverse effects in another State in the same manner as adverse effects in their own territory, as set forth in draft article 2. In the light of paragraph 1 (c) of article 7 of the draft as provisionally adopted by the Commission, which stipulated that the utilization of an international watercourse in an equitable and reasonable manner required taking into account "the effects of the use or uses... on other watercourse States", he found that provision to be unnecessary.

19. The second obligation was for States to give persons harmed or subjected to risk in another State the same treatment as persons in the same situation in their own territory. In his view, that obligation had been

developed too lengthily. First of all, draft article 3, paragraph 1, laid down the obligation for States to ensure "that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of appreciable harm caused or threatened in other States by activities carried on or planned by natural or juridical persons under their jurisdiction"; and draft article 4, paragraph 1, enunciated the obligation to ensure that any person in another State who had suffered appreciable harm or was exposed to a significant risk thereof "receives treatment that is at least as favourable as that afforded in the watercourse State of origin in cases of domestic appreciable harm... to persons of equivalent condition or status", including the right (art. 4, para. 2) to take part in or have resort to all relevant administrative and judicial procedures and the right (art. 6, para. 1) to equality of treatment with regard to jurisdictional immunity. Such a detailed enumeration seemed to depart from the Special Rapporteur's stated intention to lay down "overarching principles" (A/CN.4/427 and Add.1, para. 37).

20. In fact, a careful examination of the provisions he had just mentioned led to the conclusion that they simply presented different aspects or cases of application of a single obligation, clearly stipulated in article 3, paragraph 1, to ensure that the administrative and judicial institutions of the State provided the "foreign victims" of real or potential damage with the same remedies that were available to the State's own nationals. That was an "overarching principle" and it would be sufficient in a framework agreement. It should, however, not be set out in an annex and he doubted whether there was a need for an annex to the articles: if some provisions did not fit into the structure that was being developed, they could be placed either in a new part entitled "Miscellaneous provisions", as had been done in other instruments, or in part II of the draft, on "General principles".

21. In the light of those comments, he suggested the following wording, which might cover the obligation in question concisely:

"A watercourse State shall ensure that the protection and redress available to persons in its territory who are subject to risk or suffer damage as a result of activities related to the utilization of an international watercourse are available on the same basis to persons who are subject to a similar risk or suffer similar damage in other States."

22. The third obligation was the obligation to provide information to persons in other States who were subject to significant risk of appreciable harm, which was set forth in draft article 5. However, the articles already provisionally adopted by the Commission on first reading contained obligations to provide information: article 10 laid down the obligation to exchange data and information on the condition of the watercourse, and article 11 the obligation to provide information on the possible effects of planned measures on the condition of the watercourse; and article 12 was even more specific with regard to measures which might have an appreciable adverse effect on other watercourse States.

Obligations to provide information were also contained in draft articles 22 and 23,⁵ referred to the Drafting Committee at the previous session. In fact, there seemed to be only two new elements that were specific to draft article 5: first, that the information would be provided with the purpose of allowing persons in other States who were exposed to a significant risk of appreciable harm "meaningful participation in existing procedures in the watercourse State of origin" (para. 2); and, secondly, that the information would be provided to one or more authorities in the "exposed country", which would disseminate it.

23. He did not believe that the element of purpose justified yet another provision on information. States would already be receiving the information provided for in articles 10, 12, 22 and 23. Nothing would prevent them, if they found it useful, from transmitting that information to interested persons in their territory and he did not see the need to establish a separate international obligation on that point. With regard to the second element, was it really necessary, in a framework agreement, for the Commission to involve itself in the bureaucratic procedures of a State which received information and was to disseminate it within its jurisdiction? The fact that a provision of that kind was contained in a recommendation of the OECD Council was not a justification for adopting such a provision in the far more general instrument the Commission was drafting. He was therefore not in favour of retaining draft article 5.

24. The fourth obligation was the obligation for watercourse States to ensure that their agencies and instrumentalities acted in a manner consistent with the present articles, as stipulated in draft article 6, paragraph 2. When a State assumed obligations, it was obvious that its agencies and instrumentalities must also abide by them. It would therefore be unnecessary to say so. In the particular case of the present articles, however, States would have the obligation not only to act in a certain manner, but also to ensure that anyone in their territory also acted in that manner. That applied to individuals or entities, private or public. The articles were not confined to regulating activities of the State, but covered all activities carried on in the territory of the State. To say, therefore, that the State had an obligation to ensure that the conduct of its agencies and instrumentalities was consistent with the articles might be interpreted too restrictively as meaning that the State had no obligation to ensure similar conduct by individuals and private entities. In addition to being unnecessary, the provision might therefore be dangerous.

25. The Special Rapporteur said in paragraph (4) of his comments on article 6 that paragraph 2 was based on article 236 of the 1982 United Nations Convention on the Law of the Sea. He would point out, however, that the situation referred to in article 236 was of an entirely different nature. Having exempted warships and other State vessels from the provisions concerning the protection and preservation of the marine environ-

ment, that article stated that such vessels must nevertheless not act in a manner inconsistent with the Convention, adding, for good measure, the words "so far as is reasonable and practicable". The two situations were so different that he could not see how article 236 could be a basis for draft article 6, paragraph 2.

26. The fifth obligation was the obligation to co-operate in the implementation and development of international law relating to responsibility and liability for compensation for damage and the settlement of related disputes, as set out in draft article 3, paragraph 2. There was no doubt whatever that the establishment and application of clear rules on responsibility and liability would be very helpful in solving the problems of compensation for damage to which the articles under consideration would probably give rise. He was nevertheless not sure whether a provision containing an obligation for States to co-operate in developing and implementing such rules was needed. As far as the development of international law was concerned, the obligation would be a rather vague one, for when could it be said that there had been no compliance with such an obligation? Some States might find, for instance, that the rules proposed in the draft articles the Commission was preparing on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law were not satisfactory. If, at an international conference convened to conclude a convention, they expressed their disapproval and decided not to become parties to the convention, could it be said that they had not complied with their obligation to co-operate? The obligation to co-operate in the implementation of international law was even more problematic, since it might be asked whether an obligation to co-operate in the implementation of a rule that a State had accepted was different from the obligation to implement that rule. In the light of those considerations, he would prefer that paragraph 2 of article 3 be deleted.

27. The only possible conclusion he could reach was that, with the exception of article 3, paragraph 1, which embodied a principle that could be expressed in a provision of part II of the draft, on "General principles", no provision in the proposed annex on implementation appeared necessary and the annex as a whole therefore seemed superfluous.

28. As to the definition contained in draft article 1 of annex I, since it was intended to explain an expression used only in the annex, it also had no *raison d'être*, except in so far as it contained a concept which was to be found in several other provisions of the draft articles and which warranted a more precise formulation. The expression "watercourse States" sometimes referred not to watercourse States in general, but to watercourse States whose activities had or might have adverse effects or cause harm in other States. A concise expression might be found to characterize such States and it might be defined in the article on the use of terms. That question could be dealt with during the second reading of the draft articles.

29. Draft article 7 of annex I provided that the parties would meet every two years in a "Conference of the

⁵ *Yearbook* . . . 1989, vol. II (Part Two), p. 124, para. 637, and p. 125, para. 641, respectively.

Parties". The Conference would consider and adopt amendments, but that would be an occasional task, for it was not likely that proposed amendments would always be before it when it met. It would make "recommendations for improving the effectiveness" of the articles (para. 2 (c)), but that would also be occasional, since the provision itself said that it would be done "where appropriate". The Conference would "receive and consider any reports presented by any Party" (para. 2 (b)) or by any panel, commission or other body established under the provisions on the settlement of disputes in annex II. However, there was no mention of such reports anywhere in the draft articles.

30. In paragraph (3) of his comments on article 7, the Special Rapporteur seemed to want to go even further, stating that, if a convention were eventually concluded on the basis of the present articles, the parties might establish a secretariat. In paragraph (2) of his comments, the Special Rapporteur explained that he had based the article on the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora. Under that Convention and the other conventions referred to by the Special Rapporteur (A/CN.4/427 and Add.1, footnote 114 and annex), secretariat functions concerning the instruments in question had been attributed to some existing secretariat, and that was justified because of the nature of those instruments. In the case of the 1973 Convention, a full system of control over the trade in endangered species had been created and a secretariat had been considered necessary to co-ordinate that action. In the case of the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, a secretariat was also needed to co-ordinate research and information on scientific assessment. And as soon as there was a secretariat, regular meetings of the parties were necessary, if only to adopt financial provisions concerning the functioning of the secretariat. However, in the case of the draft articles under consideration, the situation was entirely different: no secretariat was needed, for, in fact, although the articles established rules which might be susceptible of universal application, they would not be directly applied universally. Each water-course was a universe in itself and only States belonging to that universe would participate directly in the application in their territory of the rules embodied in the articles. What assistance would come from a central secretariat? And if there was no secretariat, where was the need to establish a regular schedule for meetings of the parties? None of the functions indicated in article 7, neither "review [of] the implementation of the . . . articles" nor those set out in paragraph 2 (a), (b) and (c), justified the institutionalization of such meetings. If the parties themselves decided that a meeting would be useful, they could hold it free of the constraints of a rigid and financially onerous schedule. He could therefore not endorse article 7.

31. Draft article 8 of the annex concerned amendments to the articles. That matter, as was well known, was dealt with in article 40 of the 1969 Vienna Convention on the Law of Treaties, which referred to the possibility that more specific provisions might be

required in some instruments to regulate the question of the presentation and adoption of amendments. He was not at all sure that that would be the case of the draft articles under consideration, but, in any event, he doubted that what was suggested in draft article 8 would be an improvement on the general procedures laid down in the Vienna Convention.

32. According to that Convention, any State party to a treaty could propose an amendment. However, under the terms of draft article 8, which, like draft article 7, was based on the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, an amendment would be considered only if it had been proposed in writing by at least one third of the parties. The other instruments mentioned by the Special Rapporteur all followed the model of the Vienna Convention on the Law of Treaties. In the light of that Convention and of article 312 of the 1982 United Nations Convention on the Law of the Sea, there seemed to be no valid reason for denying a State the right to submit amendments. Furthermore, any provision on amendments was usually part of the final clauses of an international instrument. So far as he knew, the Commission had made a point of not drafting final clauses, leaving them to be worked out by States when they considered the draft articles it proposed. The Commission should depart from that tradition only if there were good reasons for doing so, and that did not seem to be the case. In his view, the inclusion of article 8, or indeed of any provision on amendments, was therefore of no importance.

33. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on his sixth report (A/CN.4/427 and Add.1), which, like the previous ones, bore the stamp of erudition.

34. Commenting first on the articles submitted in the fifth report (A/CN.4/421 and Add.1 and 2), he said that he endorsed the underlying principle of draft article 24 (Relationship between navigational and non-navigational uses; absence of priority among uses), a principle based on a penetrating analysis of the gradual change-over from a preferential status for navigation to a situation in which priority was given to the other uses of international watercourses. That evolution could be explained by the overwhelming importance that road, rail and air transport had assumed and also by the ever greater shortage of water resources which affected all parts of the world, but particularly the developing countries, such as the sub-Saharan countries. A provision could therefore conceivably be included, as the Special Rapporteur proposed in paragraph 1 of article 24, to the effect that no use would have priority over other uses. With regard to paragraph 2, which dealt with possible conflict between several uses and the factors to be taken into account in assessing the respective importance of such uses, he wondered, like Mr. Njenga 2163rd meeting), whether it would not be advisable to refer to the obligation not to cause appreciable harm set forth in article 8 of the draft, in addition to the principle of equitable utilization in accordance with articles 6 and 7.

35. Draft article 25 (Regulation of international watercourses) was a specific example of the application of the general obligation to co-operate laid down in article 9 of the draft and naturally had his support. It would perhaps be more logical, however, to start by defining the term "regulation", as the articles on "Regulation of the flow of water of international watercourses" adopted by the International Law Association at Belgrade in 1980 (see A/CN.4/421 and Add.1 and 2, para. 139) had done. The definition proposed by Mr. Schwebel cited by the Special Rapporteur in paragraph (3) of his comments on article 25 in his fifth report seemed to be sufficiently concise and clear to be included in an opening paragraph of the article. So far as paragraph 2 was concerned, the opening clause did not seem altogether appropriate as it could be interpreted as authorizing an agreement contrary to the principle of participation "on an equitable basis". He would prefer a reservation clause of the kind used in the French text of paragraph 1 of draft article 24 and which might read: "Unless they agree otherwise, watercourse States...". He also wondered whether the words "and other measures" or "and other installations" should not be added after the words "regulation works", on condition that the term "regulation" was defined.
36. The sixth report (A/CN.4/427 and Add.1) dealt with the final parts of the draft articles, concerning management of international watercourses and protection of water resources and installations. In that connection, he noted that, although the Special Rapporteur had announced at a previous session that he would also submit a part on the settlement of disputes, he had dealt in annex I, entitled "Implementation of the articles", with ways and means of facilitating private remedies for existing or potential harm. At the end of his statement, he would raise the question whether the time had in fact come to deal with that matter.
37. Like Mr. Calero Rodrigues (2163rd meeting), he wondered whether draft article 26 (Joint institutional management), which was simply a concrete application of the general obligation to co-operate laid down in article 9, was absolutely necessary. All things considered, however, it did seem to him that, even if there was a direct link between regulation and management of an international watercourse, it would be useful to have a separate provision on the establishment of a joint organization responsible for such management, which would be entirely in keeping with the rule of co-operation laid down in draft article 25. Furthermore, a list of the functions of the organization as set forth in paragraphs 2 and 3 had its place in article 26, for two reasons. First, an enumeration of the functions to be entrusted to the joint organization would enable the scope of the concept of "management" to be determined and was the logical consequence of paragraph 1. Secondly, it was hardly conceivable to devote an annex, or a protocol, solely to management functions—unless, of course, the Special Rapporteur was prepared to submit a comprehensive text on the establishment of a permanent institution for management and regulation, describing in minute detail its objectives and functions and the procedure for the settlement of disputes. No previous special rapporteur had gone that far.
38. Although the list of functions was not meant to be exhaustive, it might be useful to mention the functions that were peculiar to watercourses in third world countries, and in African countries in particular, for example action to combat endemic diseases transmitted by river waters. In that connection, it would be advisable to follow the 1980 Convention creating the Niger Basin Authority, cited by the Special Rapporteur in paragraph (3) (a) of his comments on article 26 in his sixth report, under which the Authority was also responsible for the preservation of human health and genetic resources (fauna and flora) (art. 4, para. 2 (d) (iii)).
39. He had certain changes to suggest to the French text of article 26, for the consideration of the Drafting Committee. In particular, he proposed that the word *conjointe* be substituted for the word *mixte*, which qualified the organization in question and was rather used in reference to a difference of kind or of status as between the participants. He would further propose that the word *organisation* be replaced by *organisme*.
40. With regard to draft article 27 (Protection of water resources and installations), he noted that the text dealt mainly with watercourses and that protection of water resources was mentioned only in paragraph 3 in connection with the exchange of data and information. He wondered whether it would not be advisable to repeat the expression "water resources", which appeared in the title of the article, in the body of the text, since it was a less restrictive formula than "watercourse" in that it encompassed all the water resources of the watercourse, including those that supplied the watercourse proper, and hence the whole of the river basin.
41. He agreed that there might be some question about the usefulness of article 27, having regard to the obligations of prevention, co-operation and information imposed on watercourse States independently of the article. As with the management of watercourses, however, a reference to those obligations in the case of the protection of water resources and installations would not be superfluous, in his view.
42. He could accept the terms of draft article 28 (Status of international watercourses and water installations in time of armed conflict) within the context of the progressive development of international law and having regard to the observations of the Special Rapporteur, in particular those made in paragraph (2) of his comments on the article.
43. His comments on annex I (Implementation of the articles) would, at the current stage, be of a preliminary nature only. The approach adopted by the Special Rapporteur was somewhat evocative of the approach of the authors of the International Covenant on Civil and Political Rights, who had decided on an optional protocol to deal with the remedies available to private persons against States accused of violating the rights embodied in the Covenant. Given the objective of the annex, he considered that it would indeed be difficult to incorporate its provisions in the body of the draft articles.

44. In the event, the Special Rapporteur had apparently been guided above all by treaty provisions relating to environmental protection and transboundary pollution, but that link was not in itself likely to call into question the usefulness of the provisions in annex I, provided that they formed the subject of a protocol that was optional.

45. Since the Commission planned to complete its consideration of the draft articles on first reading at its next session, however, it would be preferable if the Special Rapporteur could submit to it as a matter of priority the articles that had been announced on the settlement of disputes. He, too, therefore considered that it would be advisable to postpone consideration of the proposed articles on implementation until after the first reading and not to refer them to the Drafting Committee at the current stage, particularly since some members of the Commission had pointed out that some of those articles should rather be placed among the general principles, and that would call into question provisions already adopted by the Commission.

46. Mr. McCaffrey (Special Rapporteur) said that he had submitted provisions on the settlement of disputes to the Secretariat and trusted that they would be distributed during the course of the current session.⁶ That would enable members to take cognizance of the provisions in time for the next session and to express their views on the matter then.

47. Mr. Francis, referring to the comments made by Mr. Bennouna at the previous meeting with regard to the wording of paragraph 1 of draft article 24 (Relationship between navigational and non-navigational uses; absence of priority among uses), said that, in his view, it would be difficult for the Special Rapporteur to avoid referring to navigation, since the objective was also to lay down the principle of equality between the different uses to which an international watercourse might be subject. He would, however, have preferred paragraph 1 to read:

“Neither navigational use nor any use contemplated by these articles shall enjoy any inherent priority over any other use.”

Worded in that way, the paragraph would probably have more chance of being accepted.

The meeting rose at 11.30 a.m. to enable the Drafting Committee to meet.

⁶ Annex II to the draft articles, on fact-finding and settlement of disputes, is contained in chapter IV of the Special Rapporteur's sixth report (A/CN.4/427 and Add.1).

2166th MEETING

Thursday, 31 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna,

Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

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

2. Mr. GUERREIRO (Observer for the Inter-American Juridical Committee) said that, fortunately, the Commission and the Inter-American Juridical Committee had been able to maintain the co-operation provided for in their statutes. The visit by the Commission's outgoing Chairman, Mr. Graefrath, at the Committee's August 1989 session held at Rio de Janeiro had been much appreciated.

3. The Inter-American Juridical Committee's field of operation covered not only public international law but also private international law, consultative opinions, legal aspects of regional integration and studies on the possibilities for uniform legislation. The Committee was in a sense the heir to various legal organs of the inter-American system going back to 1906. For its part, the Commission was the result of a General Assembly decision pursuant to Article 13, paragraph 1 (a), of the Charter of the United Nations, and its statute reflected the trends prevailing at the time the Commission had been established: the trend which favoured conventions as the only proper method of codification; the school which thought that anything beyond "restatements" was dangerous; and the middle course which advocated flexibility, leaving it open to the Commission to recommend the conclusion of a treaty or the adoption of a resolution, or even simply to take note of something. The Committee followed more informal methods, probably because of its regional character and smaller membership. However, the spirit of both the Commission and the Committee, and to a large extent the topics discussed, were similar.

4. In recent years, the Committee's agenda had been dominated by items connected with the drug problem and preservation of the environment. In 1989, it had held only one session, at which it had completed its draft American Declaration on the Environment. Article 1 contained the essence of the right of man to a balanced and healthy environment, while article 2 stressed that preservation of the environment was not only everyone's right, but also their duty. The draft declaration was thus addressed to the public at large.

* Resumed from the 2160th meeting.

Accordingly, it also established the duty for States and communities to include topics on preservation of the environment in educational programmes.

5. Article 3 of the draft declaration, which was of fundamental importance for the western hemisphere, provided for mutual technical assistance. Preserving, sustaining, restoring and improving the quality of the environment obviously required experience and often costly research. Article 4 embodied well-known principles from the 1972 Stockholm Declaration¹ and other United Nations resolutions and said that the American States had the sovereign right to exploit their own natural resources and to produce man-made goods pursuant to their environmental laws and policies and development plans and to ensure rational exploitation of such resources so that production of such goods would ensure their sustained availability and the general interest of the community. As the Committee saw it, there was no contradiction between preservation of the environment and development, although there could be difficulties in maintaining a balance between the two.

6. Article 5 of the draft declaration limited sovereign rights in matters pertaining to the environment by application of the principle of responsibility for damage to third parties. For the damage to be legally relevant, the article specified that it had to be "significant". Article 6 referred to the State's duty to require individuals and corporations to submit prior assessments of any planned activity that might affect its own environment or that of other States. Such prior assessment was commonly required in national legislations.

7. Article 7, which established liability for damage caused to the environment of another State by trans-frontier pollution, laid down the duty to restore the environment to its previous condition and to compensate for loss and damage. It recognized the State's right to proceed against the polluters whose action had given rise to its liability. Although that right was a normal rule in domestic legislation, the Committee had deemed it necessary to spell it out because of some concern about possible international effects; the text even said: "including transnational corporations". Article 8 in a sense limited the liability of the State responsible for transfrontier pollution by specifying that such pollution was relevant only when it exceeded the levels considered acceptable under comparable conditions and in comparable zones inside the country in which the pollution originated. Such a standard of equity was to be found in the "Principles concerning transfrontier pollution" adopted by the Council of OECD in 1974.

8. The second part of the draft declaration consisted of articles 9 to 18, which were procedural and referred to the duty of information and consultation. The parties were called upon to have recourse to a procedure of inquiry and conciliation in environmental disputes, in which connection provision was made for a joint commission, which was not an arbitration tribunal. If everything failed, however, article 17 specified that the States involved in the environmental dispute agreed to

seek any other procedure for peaceful settlement provided for in the Charter of the Organization of American States.

9. Article 18 established that an American State had to give precedence to the procedure established in the draft declaration if another American State resorted to the declaration to facilitate settlement of an environmental dispute, even if it was a party to international treaties relating to certain forms of pollution. Of course, that provision did not mean that a State which was bound by a treaty should disregard its commitments thereunder in order to give preference to the declaration. Article 18 laid down an obligation on States "to the extent of their abilities" and the legislative history of the article showed that the intention was to set forth a plea rather than a binding obligation.

10. The draft declaration was important because it was the first instrument on the environment of such general scope to be adopted by the member States of OAS. It was the outcome of a serious analysis of relevant treaties, national legislations and recommendations by international bodies.

11. At its August 1989 session, the Committee had also adopted a resolution on improvement of the administration of justice in the Americas, a matter of great importance for strengthening democratic processes and institutions. It had resolved that an inter-American association should be formed on a private basis, working in close co-operation with governmental and intergovernmental bodies and in harmony with the General Secretariat of OAS, in order to facilitate inter-American discussion and consideration of methodologies and activities for better administration of justice in the Americas. Steps to expedite the formation of the new association would be taken by the American Society of International Law. For reasons of efficiency, and also on budgetary grounds, the Committee had recommended that the task be undertaken by private efforts.

12. The Committee had heard proposals and progress reports on a number of other items: co-operation in preventive measures on criminal matters, more particularly suppression of drug trafficking; legal aspects of foreign debt; legitimacy in the American system and the interaction of the provisions of the OAS Charter regarding self-determination, non-intervention, representative democracy and protection of human rights; and the reasons why a greater number of States were not parties to the 1948 American Treaty on Pacific Settlement (Pact of Bogotá).

13. Lastly, one of the Committee's most interesting activities was the course on international law it organized with the help of OAS and the Getulio Vargas Foundation. Students came from many States members of OAS and included young university professors and diplomats. The subjects were very varied and highly appreciated lectures had been given by, among others, a number of members of the Commission in attendance at the Committee's sessions. It was to be hoped that in 1990 it would again be possible to benefit from such an opportunity.

¹ See 2151st meeting, footnote 1.

14. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his very clear presentation of the Committee's work. The topics it had under consideration were of great interest to the international community, and to the Commission in particular. The two bodies had common objectives, and co-operation between them was of very great benefit to both. They had much to learn from each other and he sincerely hoped that such co-operation would become closer, in the interests of the progressive development and codification of international law.

15. Mr. McCAFFREY, speaking on behalf of members of the Commission from the Western group of countries, welcomed the lucid and very informative statement made by the Observer for the Inter-American Juridical Committee, which had dealt with matters connected with some of the items on the Commission's own agenda, such as the law of the non-navigational uses of international watercourses, and international liability for injurious consequences arising out of acts not prohibited by international law. In 1987 it had been his privilege to represent the Commission at the Inter-American Juridical Committee's session and, like other members of the Commission who had had the same experience, he had been impressed by the Committee's very effective methods of work—an effectiveness which was demonstrated by its remarkable output.

16. Mr. DÍAZ GONZÁLEZ, speaking on behalf of members of the Commission from Latin American countries, extended a warm welcome to the Observer for the Inter-American Juridical Committee and thanked him for his admirable summary of the Committee's work. It was a tradition for the Committee to be represented by an observer at each session of the Commission and for the Commission, in turn, to be represented by its chairman at the sessions of the Committee, which was actually one of the oldest organs of its kind established by the international community. Indeed, when the General Assembly had decided in 1947 to establish the International Law Commission, the experience at the inter-American level had served as a model, and a very extensive study of the subject had been prepared at the time by the United Nations Secretariat.

17. The Committee dealt with topics of great contemporary importance, not only at the regional American level but also at the world-wide level. That was particularly true of the subject of the environment. On that topic as well as on that of international watercourses and others, it was of the utmost importance for the Commission and the Committee to co-operate closely with each other. The illicit drug traffic was a universal problem and acutely affected a number of Latin American countries. It was therefore essential to examine the problem and he noted with interest that the Inter-American Juridical Committee's work on the subject covered also the criminal-law aspect. The Committee's annual seminars were veritable courses on contemporary international law and the practice of enlisting the assistance of private organizations provided a useful example that the Commission could well follow with regard to its annual International Law Seminar.

18. Mr. GRAEFRATH thanked the Observer for the Inter-American Juridical Committee in the name of members of the Commission from the Eastern European countries. He had had the privilege of seeing at first hand the work of the Committee in Rio de Janeiro and had been deeply impressed by the Committee's broad agenda and had admired its working methods. The Committee was of course a comparatively small body, working in one language, and its members came from countries which had to a large extent a common history. It was easier for them to avoid long statements and to concentrate on workable solutions. Strengthening the co-operation between the Committee and the Commission would be helpful to both bodies.

19. Mr. THIAM thanked the Observer for the Inter-American Juridical Committee for his comprehensive statement. The Committee and the Commission had largely identical concerns, as he had been able to observe on the occasions on which he had had the pleasure of attending the Committee's sessions. The very thorough and expeditious work of the Committee was of great value to the Commission in its own work. He was highly appreciative of the Committee's annual seminar, at which he had had the honour of being invited to lecture.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/421 and Add.1 and 2,² A/CN.4/427 and Add.1,³ A/CN.4/L.443, sect. F, ILC (XLII)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR
(*continued*)

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) *and*

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (*continued*)

ANNEX I (Implementation of the articles)⁴ (*continued*)

20. Mr. BARSEGOV said that, at the present stage in the consideration of the topic, when, as a result of many years of effort, the Commission, with the assistance of the Special Rapporteur, was entering the final stage of its work on the draft articles, he was particularly reluctant to make critical comments. However, precisely because of the importance he attached to the draft, he felt obliged, with all due respect to the Special Rapporteur, to state his views in the hope that by so doing he would advance the Commission's work. His task was greatly facilitated by the objective in-depth

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

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

⁴ For the texts, see 2162nd meeting, para. 26.

analyses already made by other members of the Commission.

21. It had been obvious from the outset that the earlier the Commission reached a decision on the nature of the draft, the more easily it would achieve agreement on the content of the articles. If the draft articles were to be recommendations of an optional nature, they could be formulated more ambitiously than if they were intended to be binding; in the latter case, the Commission would have to stand firmly upon existing international law, limiting such elements of progressive development of international law as might enter into the draft to what was acceptable to the majority of States. That, of course, required a realistic evaluation of sources of law. As to treaty practice, it had to be borne in mind that treaties did not always embody rules of a universal nature: sometimes they reflected the interests of a limited number of States in a specific situation. That requirement was not entirely met by the reports under consideration.

22. Another general shortcoming to which he had drawn attention in the past but which, unfortunately, was still in evidence was that the draft articles drew practically no distinction between States whose geographical positions with respect to the watercourse were not the same. The relationship between States situated on opposite sides of a river was obviously different from the relationship between States situated in the river's upper reaches and lower reaches; while, in the former case, their interests were more or less symmetrical, in the latter case they were not only asymmetrical but might even be mutually contradictory. The Special Rapporteur's failure to draw that distinction made itself felt in the draft as a whole, and particularly in draft article 24, the first provision on which he wished to comment.

23. By emphasizing the absence of priority among uses, draft article 24 seemed to imply that some priority had previously been granted to navigation by legal rules. But the situations of upstream and downstream States with respect to navigation always differed so widely, as also did the practice in the case of specific watercourses, that a general rule was quite impossible to establish. To prescribe what uses States should favour was, of course, still less appropriate, as Mr. Shi (2164th meeting) and other members had pointed out. The provision in paragraph 2 of article 24 went beyond the scope of the draft and, indeed, beyond that of international law. Therefore, while agreeing with the principle enunciated in paragraph 1 that neither navigation nor any other use enjoyed an inherent priority over other uses, he could see no point in the article as a whole other than stating the obvious: that States themselves determined their uses of watercourses, taking into account the interests of optimum utilization and other relevant factors, not least their own geographical situation with respect to the watercourse.

24. The provisions of draft article 25 appeared to go beyond the scope of its title, "Regulation of international watercourses", as defined by the Special Rapporteur in his fifth report (A/CN.4/421 and Add.1 and 2, para. 129). The reference in paragraph 1 to co-opera-

tion among watercourse States in identifying their needs was not very clear, especially in the case of downstream States. He had no objection in principle to the provision in paragraph 2, but suggested that States should also be required to participate on an equitable basis in the maintenance of such structures as they might have agreed to construct, individually or jointly.

25. Draft article 26, whose purpose appeared to be to transfer to the international level the mechanisms for the multi-purpose planning and integrated development of watercourse systems established between different units of a federal system or, to put it more simply, within a single State, gave rise to a number of problems. He welcomed the idea of co-operation in the management of international watercourses, yet the provision in paragraph 1 seemed too comprehensive on the one hand, and too mandatory on the other. Most members of the Commission had expressed the view that the proposed provision might, at most, take the form of a recommendation and that it should therefore be recast in less peremptory terms. As the Special Rapporteur himself pointed out in his sixth report (A/CN.4/427 and Add.1, para. 7), there was no obligation under general international law to form joint river and lake commissions. Nor was there any obligation for States to enter into consultations, at the request of any other State, concerning the establishment of such a joint organization. Indeed, most States—perhaps regrettably—did not accept any obligation to consult. He entirely shared the Special Rapporteur's views on the need for new organizational solutions, but believed that the shortest way towards that goal lay in adopting recommendations which each State could use in the light of its specific situation. Any attempt to raise mechanisms established by virtue of bilateral agreements to the status of binding international rules would be premature. In that connection, he would point out that the Soviet Union had such agreements with practically all its neighbours.

26. Like Mr. Calero Rodrigues (2163rd meeting), he had doubts as to the legal significance of paragraph 1. To declare that States were under an obligation to comply with that provision was obviously incorrect at the present stage of development of international law, while to say that they could do so seemed redundant. In any event, the earlier proposals by Mr. Schwebel and Mr. Evensen, reproduced by the Special Rapporteur in paragraph (2) of his comments on article 26, seemed more appropriate and more acceptable. However, he approved of the list of functions of the proposed joint commissions set out in paragraph 2 of the draft article, and considered that, combined with elements drawn from the earlier proposals, it would provide a basis for a model statute to be annexed to the draft or even included in the body of the articles.

27. Draft articles 27 and 28 were dictated by humanitarian considerations and met the general interests of the peoples of watercourse States. He had no doubt as to the need for protection of water resources and installations, and also welcomed the fact that the provision in article 28 was applicable not only to international but also to internal armed conflicts, a point which, unfortunately, was important to his country at

the present juncture. Poisoning as well as other acts causing damage to watercourses violated the security of peaceful populations and could, in terms of the objectives pursued by such acts, be regarded as crimes against humanity. The problems connected with the relationship between draft article 28 and the 1977 Additional Protocols to the 1949 Geneva Conventions were, in his view, readily surmountable; they could be resolved either by the codification of international law or by its progressive development. However, if any doubts on that score still persisted among members of the Commission, a question concerning article 28 could perhaps be addressed to the General Assembly. The arguments advanced by the Special Rapporteur in support of article 28 were highly convincing and not likely to encounter much opposition. The wording of the article and the question of its eventual position in the draft would none the less require further work. In pursuit of concision the Special Rapporteur had made the text unnecessarily obscure; its meaning should be spelt out in greater detail and it should be brought into line with instruments of international law already in force.

28. Like most members, he found annex I, on implementation of the articles, somewhat disappointing and lacking in consistency. Some of the articles it contained should be transferred elsewhere; others called for additional work, while still others should be omitted altogether. Thus draft article 1, if needed at all, should be related to article 1, on the use of terms, in the body of the draft. He agreed with Mr. Graefrath (2165th meeting) that draft articles 2 and 5 should either be eliminated or be transferred to part III of the draft articles (Planned measures). Draft articles 3 and 4, on the other hand, did appear to relate to the subject-matter of the proposed annex.

29. He agreed with the view that draft article 6 was superfluous and should be deleted. The Special Rapporteur introduced a new form of jurisdictional immunity of States, and then immediately imposed limits upon it. The problems raised by the article outnumbered the solutions proposed, and he was opposed to it. The provisions of draft article 7 constituted a denial of the framework-agreement nature of the articles under consideration. As Mr. Calero Rodrigues (*ibid.*) had pointed out, the examples cited by the Special Rapporteur related to completely different situations. He saw no need for the establishment of a permanent or temporary supra-State control organization along the lines proposed. Lastly, draft article 8 was, in his view, also unnecessary for similar reasons. As many members had already said, the annex as a whole was not ready for referral to the Drafting Committee.

30. In conclusion, he expressed the hope that the first reading of the draft articles as a whole could be completed before the expiry of the term of office of the Commission's current members. In order to achieve that end, the Special Rapporteur would have to concentrate his own and the Commission's efforts on articles which were really necessary and exclude those which were superfluous or fell within the scope of other topics. Despite the critical comments he had made in the interests of advancing the common task, he wished

to express his profound appreciation of the Special Rapporteur's tireless and unceasing efforts.

31. Mr. DÍAZ GONZÁLEZ expressed appreciation to the Special Rapporteur for his fifth and sixth reports (A/CN.4/421 and Add.1 and 2 and A/CN.4/427 and Add.1), which contained a wealth of information on the practice of States and international organizations, as well as on doctrine, in relation to a topic that was essentially concerned not with the codification but with the progressive development of international law.

32. His comments would be based on the premise that the Commission was engaged in preparing a framework agreement. He did not think the Commission should go further than that or embark on an enterprise that went beyond its mandate. The Commission, having changed special rapporteurs for the topic a number of times, had had to adopt a different approach to its work with a view to making progress. However, as Mr. Barsegov had observed, each watercourse system had its own special characteristics, so that a universal obligation could not be imposed on all riparian States to apply a given set of norms.

33. So far as the articles proposed in the fifth report were concerned, it should be made quite clear in draft article 24 that the multiple uses of an international watercourse signified that a particular use must not cause prejudice to other uses provided for under bilateral or multilateral agreements or to the needs of any State through which the international watercourse in question flowed. Paragraph 2 of the article referred to the principle of equitable utilization "in accordance with articles 6 and 7", in which connection it had rightly been noted that the concept of priority had changed over the years. The use of international watercourses for navigational purposes had become far less of a priority, even though it remained so for some countries, such as those in Africa. Also, as Mr. Solari Tudela (2164th meeting) had pointed out, in 10 years' time it would be necessary to think in terms of yet other priorities. All those facts had to be borne in mind.

34. He agreed that draft article 25 provided a very good basis for the draft, since it laid down an obligation to co-operate and not to regulate.

35. The Special Rapporteur's sixth report was concerned with the practical application of the draft articles adopted by the Commission on first reading and, in particular, with the management of international watercourses, dealt with in draft article 26. In that regard, he, like Mr. Graefrath (2165th meeting), would prefer to talk of the institutionalization or co-ordination of the management of international watercourses. Like other members of the Commission, he considered that it would suffice to indicate the elements that should figure in a framework agreement and what the obligations of each State forming part of the watercourse system would be. There could obviously be no obligation to set up an international organization: even though certain multilateral agreements, such as the one concluded with respect to the River Danube, had established a permanent institution to regulate the water-

course, that was not necessarily a reason for the Commission to advocate the same idea in the present case.

36. Draft articles 27 and 28 had their *raison d'être* in that it was certainly necessary to protect water resources and hydraulic installations. At the same time, he would agree that draft article 27 simply repeated what was already stated in articles 6⁵ and 8⁶ as provisionally adopted by the Commission, while article 10,⁷ also provisionally adopted, contained a provision similar to that set out in paragraph 3 of draft article 27. Also, paragraph 1 of draft article 27 added little, in his view. It was therefore perhaps more a matter of the application of articles 6, 8 and 10 than of drafting a new article.

37. Draft article 28 raised a certain number of difficulties, since it covered matters already dealt with in other instruments, such as the 1977 Additional Protocols to the 1949 Geneva Conventions. He would therefore urge caution, as the article could give rise to certain questions regarding, for example, inviolability. In any event, it should be expressed in different terms. The Commission should also take care not to give the impression that it relied on outmoded ideas such as those of Fauchille and Oppenheim, cited in footnotes 75 and 60, respectively, of the sixth report (A/CN.4/427 and Add.1). In the modern day and age, such quotations were no longer valid and should not be included in the commentary.

38. He furthermore agreed that, if the provisions contained in annex I, on implementation of the articles, had been placed there because they had been omitted from the main part of the draft articles, they should indeed figure in the body of the draft. However, as Mr. Graefrath had clearly demonstrated, inclusion of those provisions could create problems, and even aggravate existing ones, rather than facilitate acceptance of the draft. Once more, he would remind members that what was involved was a framework agreement. Certain obligations of a general character could be retained, but if the Commission tried to regulate everything in detail, that would only impede adoption of the draft articles as a whole. Draft article 6 of the annex, for example, was unnecessary and dangerous. The Commission was dealing with the question of jurisdictional immunities in another draft and, again, that question had no place in a framework agreement of the kind under consideration. He would reiterate that the Special Rapporteur was perhaps being too precipitate, as the Commission had never received a mandate to establish an international organization for the regulation and study of international watercourses. In his view, that question should be set aside, unless it was decided to suggest that the General Assembly confer a mandate on the Commission to draft a statute for the establishment of such an organization. Possibly the Special Rapporteur had been unduly influenced by the deliberations on the law of the sea, which had resulted in the establishment of an international sea-bed authority. The present case was different, however.

Even the reference to pollution in the annex was inappropriate, for the 1982 United Nations Convention on the Law of the Sea dealt with one specific aspect of the matter, namely protection of the marine environment from pollution caused by navigation.

39. Mr. THIAM thanked the Special Rapporteur for his thoroughly researched and richly documented sixth report (A/CN.4/427 and Add.1), which would undoubtedly enable the Commission to advance its work on a highly sensitive topic that involved not only the sovereignty of States, but also, and above all, the management of a vital resource.

40. Commenting first on draft article 24, submitted in the fifth report (A/CN.4/421 and Add.1 and 2), he noted that it laid down the principle that there was no priority in so far as the uses of an international watercourse were concerned, whether those uses were for navigation or any other purpose. He had, however, been somewhat surprised to see that the question of navigation was being dealt with in the context of a topic that was limited to the non-navigational uses of international watercourses. Although he appreciated that there was no strict division between the topics referred to the Commission, he none the less considered that, if a specific point of referring to non-navigational uses had been made, the Commission should not then deal with the question of navigation.

41. In paragraph (1) of his comments on draft article 24, the Special Rapporteur stated that "the fact that navigation was in the past accorded preferential status militates in favour of a clear statement that such is not the case under the present draft articles"; in paragraph (2) of his comments, he pointed out that "the opening clause of paragraph 1 preserves any agreements that accord priority to navigation or to any other use". Those statements prompted the question whether there had in fact existed in the past a preferential régime—and he would stress the word "régime"—deriving from treaties. The Special Rapporteur had furnished a number of examples of treaties but, surprisingly, had not supplied even one example that established such a preferential régime for navigation. At a particular point in history mankind had, of course, recognized the need to use watercourses for navigation. That did not, however, mean that there had been a legal régime derived from treaties whereby navigation had had priority. He would therefore ask the Special Rapporteur to indicate his sources. In the circumstances, he had reservations about adopting paragraph 1 of article 24. Also, it would be better, in matters involving State sovereignty, not to lay down a rule: it was for States to stipulate the form of use they wished to adopt at any given moment.

42. Turning to the sixth report, he said that draft article 26 was central to the draft articles. Paragraph 1 provided that watercourse States should enter into consultations "at the request of any of them" concerning the establishment of a joint organization for the management of an international watercourse. Once again, the Commission must not be too precipitate. Such a request must be well-founded and must state the reasons for it. In addition, the object of the request

⁵ *Yearbook* . . . 1987, vol. II (Part Two), p. 31.

⁶ *Yearbook* . . . 1988, vol. II (Part Two), p. 35.

⁷ *Ibid.*, p. 43.

must be attainable. The establishment of regional organizations was a matter of particular interest to him, for all African States were members of some regional organization or other and those organizations provided the channels through which endeavours were made to set up bodies for the purposes of co-operation. However, he had begun to doubt the value of such organizations. Admittedly, they had their uses, but to believe that the establishment of an organization sufficed for all problems to be automatically resolved was another matter entirely.

43. The sixth report contained some significant information in that connection. The United Nations Inter-regional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, held at Addis Ababa in October 1988, had noted that river basin development strategies in the past 20 years had met with varying and sometimes limited success, due to various factors (see A/CN.4/427 and Add.1, para. 14 *in fine*). Although a considerable number of organizations of the type in question were in existence, he wondered whether that was the goal the Commission wished to pursue. An organization could not be established simply at the request of one State: the proper climate was required, as well as other elements such as those to which the former Special Rapporteur, Mr. Schwebel, had drawn attention. Hence draft article 26 was too general, yet somewhat rigid in that the rule it laid down was not always applicable. It might be preferable to manage international watercourses through agreements and avoid a proliferation of bureaucratic systems, with all the expenses they entailed.

44. He wondered what new elements were actually provided by draft article 28. There already existed a body of law governing armed conflicts, which constituted a complex problem that should be treated separately from all outside considerations. As far as internal armed conflicts were concerned, was it really necessary to remind countries not to do themselves harm?

45. The proposed annex I, on implementation of the articles, also raised many problems that might lead to future contradictions with existing precepts, and in his view it could not be retained as currently drafted.

46. Mr. ILLUECA said that he agreed with the suggestion by the Special Rapporteur in his sixth report (A/CN.4/427 and Add.1, para. 38 *in fine*) that draft articles 7 and 8 of annex I might be included in the main body of the draft articles. Those two articles were guided by foresight and acquired increasing importance in view of such disastrous phenomena as the destruction of the ozone layer and global warming, which were leading to world-wide changes in sea, lake and water-course levels. Therefore articles 7 and 8, together with draft article 1 of the annex, should indeed be included in the body of the draft.

47. Draft articles 2, 3, 4, 5 and 6 of annex I, however, should form part of an optional protocol. In that connection, since the Special Rapporteur had recognized that the outline of the draft articles approved by the Commission did not mention provisions of the kind

proposed in annex I and since there was not sufficient time to examine each article in depth, the Commission should now choose the methodology to be followed.

48. Several members of the Commission had expressed fears that the inclusion of the articles proposed in annex I might have the effect of making the future framework agreement less attractive or unacceptable to a number of States and had suggested that, since those articles represented progressive development of the law, they should form part of an optional protocol. The Special Rapporteur's arguments were well-founded and showed that the law had been evolving in the direction indicated by the proposed articles. Nevertheless, in some countries the principles covered by draft articles 3 and 4 of annex I and by article 8 of the Montreal Rules on Water Pollution in an International Drainage Basin adopted by the International Law Association in 1982,⁸ although they had evolved favourably, had met with difficulties in practice. He understood that the EEC had adopted measures to expand the rights and remedies of persons harmed by transboundary pollution, along the lines recommended in article 8 of the Montreal Rules. However, courts in other countries applied what was called the "local action rule", whereby a court refrained from exercising its competence in proceedings relating to harm occurring in foreign territory. Those situations highlighted the Special Rapporteur's worthy efforts to formulate the articles in annex I and revealed the need to revise the outline of the draft approved by the Commission.

49. Since he shared the concerns expressed by a substantial number of members to the effect that articles 2 to 6 of annex I should not be included in the body of the draft articles, he would suggest, as a methodological approach, that the first reading be continued with a view to dividing the provisions of the draft into three areas: (a) the draft articles themselves, in other words the main body of the future framework agreement; (b) an optional protocol on equal access to judicial and administrative procedures; (c) an optional protocol on the settlement of disputes. It would be recalled, in that connection, that the 1961 Vienna Convention on Diplomatic Relations included two optional protocols, one concerning acquisition of nationality and the other concerning the compulsory settlement of disputes.

50. Mr. McCAFFREY (Special Rapporteur), replying to a question raised by Mr. Thiam, said that the 1921 Barcelona Convention and Statute on the Régime of Navigable Waterways of International Concern was the treaty universally referred to to indicate the priority formerly given to navigation. He had cited that instrument in his fifth report (A/CN.4/421 and Add.1 and 2, para. 122 and annex). The instrument had had broad support, although it had since been overtaken by events and current needs.

The meeting rose at 12.40 p.m.

⁸ See para. (3) of the Special Rapporteur's comments on draft article 4 of annex I in his sixth report (A/CN.4/427 and Add.1).

2167th MEETING

Friday, 1 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/421 and Add.1 and 2,¹ A/CN.4/427 and Add.1,² A/CN.4/L.443, sect. F, ILC (XLII)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH REPORT (concluded) AND SIXTH REPORT (continued) OF THE SPECIAL RAPPORTEUR

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) and

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (concluded)

ANNEX I (Implementation of the articles)³ (concluded)

1. Mr. BARBOZA said that the Commission had long before decided that the draft articles were to take the form of a framework agreement, and there was no going back on that decision. A framework agreement was an agreement of a general nature which set forth principles and other general rules in the form of obligations, not of recommendations. Other, more specific conventions could then be inserted within the frame provided by those rules and principles. The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, along with other instruments on similar subjects, such as the 1972 Convention on International Liability for Damage Caused by Space Objects, provided examples; another was the 1985 Vienna Convention for the Protection of the Ozone Layer and the protocols thereto.

2. It was from that standpoint that he proposed to comment on the draft articles, starting with articles 24 and 25 submitted by the Special Rapporteur in his fifth report (A/CN.4/421 and Add.1 and 2).

3. Draft article 24, which elucidated the relationship between navigational and non-navigational uses, correctly defined the problem and supplied the correct answer: no single use enjoyed inherent priority over other uses, and any conflict that might arise had to be settled in accordance with articles 6 and 7 of the draft. Draft article 25, on regulation of international watercourses, was an appropriate application of the general obligation to co-operate set out in article 9, and was thus entirely acceptable.

4. Turning to the articles submitted in the sixth report (A/CN.4/427 and Add.1), he said that draft article 26, on joint institutional management, established an obligation which began as an obligation to consult, but which became an obligation of management as a result of the establishment of joint machinery. Management of an international watercourse was very important because it was the ultimate purpose of the sequence of obligations. Yet it was not defined anywhere, either in the earlier drafts prepared by Mr. Schwebel and Mr. Evensen or in the other instruments cited by the Special Rapporteur. The proposed text provided only an enumeration of functions, which were undoubtedly helpful in managing a watercourse but did not actually constitute management. The difference had to be clarified: management of the watercourse could not be defined through the functions of the organization concerned.

5. Furthermore, the obligation set out in article 26 was conditional only upon "the request of any" watercourse State. On that point, the draft diverged from previous proposals. The corresponding draft article submitted by Mr. Evensen, reproduced in paragraph (2) of the Special Rapporteur's comments on article 26, had specified that watercourse States had to deem it practical and advisable to establish permanent institutional machinery for the rational administration, management, protection and control of the waters of an international watercourse, and the obligation established had been further toned down by the use of the word "should" in paragraph 2. In Mr. Schwebel's draft, also reproduced in paragraph (2) of the comments, the commencement of negotiations was predicated not only upon "the request of any system State", but also on the additional condition: "where the economic and social needs of the region are making substantial or conflicting demands on water resources, or where the international watercourse system requires protection or control measures". Personally, he tended to agree with the Special Rapporteur's wording, which made the obligation stronger: the nature of the thing to be managed was such as to make joint institutional management a necessity.

6. Draft article 27, on protection of water resources and installations, established yet another obligation, namely to maintain and protect international watercourses. It called for two comments. The first was that the words "shall employ their best efforts", in paragraph 1, should be interpreted as establishing an

¹ Reproduced in *Yearbook* . . . 1989, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1990, vol. II (Part One).

³ For the texts, see 2162nd meeting, para. 26.

international standard. It had been argued that a State “naturally” protected related installations, facilities and other works. Article 27 was based on the view that that was not enough: a State had to employ its best efforts, not simply do what it deemed appropriate with regard to the way in which it normally treated its water resources.

7. The second comment related to paragraph 2, which established an unconditional obligation for watercourse States to enter into consultations. In his view, the peremptory character of that provision was, as the Special Rapporteur said in paragraph (3) of his comments on the article, “made necessary by the disastrous consequences that could ensue from the failure of a major installation or from the contamination of water supplies”.

8. Draft article 28, regulating the status of international watercourses and water installations in time of armed conflict, was also acceptable in that it represented a compromise position between two opposite approaches.

9. With regard to annex I, he doubted—despite the title—whether the eight articles it contained could be viewed as “implementation” provisions. Draft article 1, which defined a “watercourse State of origin”, might well be incorporated in the main body of the draft; apparently, its only purpose in the annex was to introduce the concept of liability. Draft articles 2, 3 and 4 purported to implement the principle of non-discrimination. They provided for equality of States with regard to the harmful effects of certain activities, equality of foreign and local residents regarding recourse for prompt and adequate compensation and, lastly, equality of right of access to administrative and judicial procedures. An attempt to explain a principle through its various aspects always entailed the risk that some aspect might be omitted, thus creating a lacuna. In his opinion, it would be preferable to establish the principle of non-discrimination in the simplest and most direct terms possible.

10. Draft articles 5 and 6 related to two applications of that principle. Article 5 established the duty to provide information in order to ensure the smooth functioning of the preceding provisions. Article 6 ruled out the possibility of a State claiming immunity in respect of proceedings brought by an injured person. All those provisions were thus ruled by a common logic.

11. The same could not be said, however, of draft articles 7 and 8. Article 7 provided for the convening of a conference of the parties. Such a technique was advisable when the scope of a convention was strictly limited, as was the case with the numerous instruments referred to by the Special Rapporteur in his comments on article 7. But the draft under consideration was a framework agreement, and the watercourse States parties to a treaty relating to the watercourse in question could make any changes they considered appropriate, without having to go through a conference of the parties to the framework agreement. As for the question of amendment of the articles, dealt with in article 8, it should be left to the future codification conference.

12. Generally speaking, annex I as a whole raised a hidden problem with far-reaching implications, namely that of civil liability, in other words the obligation of reparation in respect of the harmful effects of certain activities. The draft articles had not so far dealt with actions which might be brought by individuals before the administrative or judicial organs of the State of origin. Obviously that possibility had existed, but the recourse opportunities for individuals had depended entirely on the domestic law of the State in question. Under article 3 of the annex, States were obliged to provide recourse opportunities in their domestic law so that individuals might obtain adequate compensation. In other words, article 3 imposed an international standard on States parties. It might well be that their domestic law did not offer such recourse opportunities even to their own nationals. If that was the case, those States would, by virtue of article 2 of the annex, on non-discrimination, be obliged to amend their domestic law so as to make such recourse opportunities available not only to foreigners, but also to their own nationals.

13. From the point of view of reparation machinery, it was to be noted that the draft articles said nothing about the relationship between reparation claims brought by private individuals and those which might be brought by States. However, the Special Rapporteur’s position emerged very clearly from his sixth report, in which he stated that it was a major premise of annex I that “watercourse problems should be resolved at the private level, through courts and administrative bodies, in so far as possible”, adding that “resolution at this level will usually bring relief to those actually suffering injury more rapidly than diplomatic procedures” (*ibid.*, para. 39). That view was not shared by all commentators, since it had been demonstrated—in the Bhopal case, for example—that private procedures could take longer than diplomatic procedures. Nevertheless, the Special Rapporteur obviously preferred private action.

14. Yet what would happen if both a State and a private individual resident in its territory could bring an action? Did States parties have to wait for resident private individuals to start any diplomatic action? Was their action confined to supporting the claims of their nationals? Article XI of the 1972 Convention on International Liability for Damage Caused by Space Objects opted for the opposite solution: it did not “require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents”. Furthermore, under that Convention, nothing prevented a State or one of its nationals from instituting judicial or administrative proceedings before the courts of the State of origin. In such a case, however, the State which might represent an injured individual could not support that individual’s claim until local remedies had been exhausted. The State could also pursue a claim on behalf of other injured individuals who had not had recourse to the domestic procedures of the State of origin. The Convention thus regulated, expressly and in a most adequate manner, the relationship between actions brought at the diplomatic level and those brought at the judicial level. Without going so far as to

say that the Special Rapporteur's position was indefensible, he considered that the question of that relationship required further in-depth study.

15. Mr. BEESLEY said that, in his fifth and sixth reports (A/CN.4/421 and Add.1 and 2 and A/CN.4/427 and Add.1), the Special Rapporteur had once again submitted draft articles that pointed the way to generally acceptable texts and had supported his proposals with authoritative precedents and formulations taken from treaty law and legal opinion. As he himself had pointed out on a previous occasion, bilateral and multilateral conventions and related agreements could serve as sources of law in the matter, perhaps to a greater extent than in other fields, because the nature of the present topic lent itself to the conclusion of bilateral and multilateral agreements.

16. He wished to begin with a general observation. Should the draft articles under consideration take the form of a framework agreement or of some other kind of instrument? The members of the Commission were clearly unanimous in favouring a framework agreement. He had doubts, however, as to whether that expression had the same meaning for all of them. For him, the meaning of the expression was very close to that attached to it by Mr. Barboza: a framework agreement was one which laid down general principles, but which was nevertheless binding upon the parties and which occasionally reflected rules of customary international law. In any event, a framework agreement was much more than a mere set of recommendations. Article 4 of the draft, entitled "[Watercourse] [System] agreements", and more particularly its paragraph 1, appeared to support that interpretation. Possibly the opinions of other members had evolved on that point as the need for a framework agreement of that type had become gradually more apparent.

17. He shared Mr. Barboza's view of the framework-agreement nature of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, which had led to several treaties, such as the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, as well as part XII (Protection and preservation of the marine environment) of the 1982 United Nations Convention on the Law of the Sea, were similarly of a framework-agreement nature. For the participants in the negotiations on the United Nations Convention on the Law of the Sea, part XII had represented a framework or umbrella agreement within the Convention itself. Actually, later events had shown that they had been right: numerous regional agreements had been concluded on the basis of that part of the Convention, which had laid down the essential rules to be followed in the matter. Indeed, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, though adopted before the Convention on the Law of the Sea, had incorporated almost by reference certain provisions of the future convention, which was then still in the negotiating stage. Similarly, part XII of the Convention on the

Law of the Sea contained a number of provisions which were of direct concern to the draft articles now under consideration. He had in mind article 195 (Duty not to transfer damage or hazards or transform one type of pollution into another), article 207 (Pollution from land-based sources) and article 213 (Enforcement with respect to pollution from land-based sources).

18. It was clear from the discussion and from the Special Rapporteur's reports that, at one time, it could have been said that, among the various uses of watercourses, navigation was regarded as having priority. Because of technological advances which, in many respects, had completely altered the perspective from which those uses were viewed, he had no objection to the Special Rapporteur's proposal not to attach priority to any one use over another. There now seemed to be a tendency within the development of technology and the parallel development of the law to review the many uses to which rivers could lend themselves—they had always served as sewers and as sources of drinking-water, but had gradually been developed for many other uses—perhaps not in order to give priority to ecological and environmental considerations, but, rather, to emphasize such considerations in order to restore an earlier balance. In that respect, too, the Special Rapporteur had dealt wisely with the question and put forward solutions which should make it possible to deal with the problems raised by conflicting uses. Draft articles 24 and 25 did not present any difficulty, but it was his intention to submit a few drafting amendments to the Drafting Committee.

19. One question remained. To what extent would the Commission codify and to what extent would it contribute to the progressive development of the law on the topic? In the present case, the problem was complicated by the fact that some members of the Commission, as well as some representatives in the Sixth Committee of the General Assembly, would not be prepared to go ahead unless the draft articles were dealt with as a framework agreement or a draft code. He hoped that the discussion would lead them to modify their views in favour of what might be regarded as work of progressive development and not simply codification. The Commission should be able to incorporate into the draft those considerations which were deemed to be universally desirable and, indeed, imperative. Once again, he was thinking of the interaction which was becoming increasingly apparent in the elaboration of the law, whether in connection with outer space, the ozone layer, the marine environment or watercourses. In the final analysis, the Commission would also have to tackle a problem which arose in several topics, more especially the one under consideration, namely the relationships between sovereignty, the now widely accepted duty of co-operation and the less widely accepted notion of custodianship or stewardship which was gaining ground in the law. That question had already arisen during the discussion on the need to protect watercourse systems from pollution, but the interaction called for more thorough examination when the time came to consider the provisions dealing with management and the draft articles of annex I, which went

beyond the mere concepts of management and implementation and were at the forefront of the elaboration of the law in that field.

20. In short, he was inclined to share the view that it was not possible to legislate in the matter of institutionalized management but believed that the Special Rapporteur had succeeded in showing that there was an intrinsic connection between any attempt at the management of an international watercourse and the need for some institutional process. It was essential to include a substantive article on that subject. If, however, difficulties were to arise in that connection, such a provision could find a place in an optional protocol, which would in due course not fail to command general support. It would be remembered in that regard that North America had some experience in the search for solutions through international joint commissions or recourse to arbitration for the purpose of ensuring the efficient management of its international watercourses.

21. As to annex I, the various ideas it contained had given rise to a useful discussion. It ought not to be too difficult to include provisions on non-discrimination in the main body of the draft. He was somewhat reluctant to forgo the provisions on equal right of access because it was becoming increasingly clear that they constituted the very essence of the topic.

22. Mr. AL-KHASAWNEH said that he felt compelled to revert to the question of the approach to the topic, because many forward-looking and interesting ideas proposed by the Special Rapporteur had been criticized for their alleged incompatibility with the framework-agreement approach. However, if such incompatibility existed, it argued for abandoning not those ideas, but the framework-agreement approach, which was not an end in itself. There was also nothing in the Commission's terms of reference that required it to follow that course. In addition, such incompatibility was more apparent than real, for the difference between a framework agreement and a treaty in the ordinary sense was one of degree rather than of kind. It was perfectly possible for a framework agreement to contain relatively detailed rules. A framework agreement did not have to be an exercise in generality.

23. On reading the Special Rapporteur's comments on draft article 24 in his fifth report (A/CN.4/421 and Add.1 and 2), he had had the same impression as Mr. Thiam (2166th meeting). The priority that navigational uses of international watercourses had allegedly had in the past might, on closer analysis, have been the result of economic and social needs rather than of an established legal régime. Article 10 of the 1921 Barcelona Convention and Statute on the Régime of Navigable Waterways of International Concern, quoted in the fifth report (A/CN.4/421 and Add.1 and 2, para. 122), did not provide a firm basis in support of the proposition that navigational uses had formerly enjoyed priority. It simply laid down the duty of riparian States "to refrain from all measures likely to prejudice the navigability of the waterway".

24. At any rate, paragraph 1 of draft article 24 appeared to state the obvious and might therefore not

be necessary. Paragraph 2 extended the rule of weighing the relevant factors, as provided for in articles 6 and 7 of the draft with regard to equitable utilization, to the new field of resolving conflicts between several uses. Perhaps that was the only possible solution, but the inherent elasticity of the rule and the fact that the relationship between the avoidance of appreciable harm and the determination of equitable utilization was not free from problems would reduce the usefulness of the articles, which were intended to serve as a clear yardstick against which disputes concerning the interpretation or application of the future convention could be measured.

25. The obligation to co-operate provided for in draft article 25 should be cast in less rigid terms. That could be done by adding the words "as appropriate" between the word "co-operate" and the words "in identifying" in paragraph 1. States could co-operate through a regional or international organization as well as directly. In an instrument intended for world-wide use it was important that the modalities for co-operation should be flexible, so as to allow for the discharge of the duty of States to co-operate even in cases where political realities did not favour direct co-operation. The article was, however, acceptable.

26. Draft article 26 raised similar problems. In the first place, he wished to know how the obligations it embodied could be harmonized with article 21 as provisionally adopted by the Commission.⁴ Secondly, he shared the view that the obligation to enter into consultations should not be triggered simply by a request by one watercourse State: an objective element should be involved. He therefore preferred the wording used in the corresponding provision submitted by the previous Special Rapporteur, Mr. Evensen, which was reproduced by the Special Rapporteur in paragraph (2) of his comments on article 26 in his sixth report (A/CN.4/427 and Add.1), namely "where it is deemed practical and advisable", or some similar wording. Thirdly, he had no difficulty in accepting paragraph 3, but he believed it was of the utmost importance that the conferring of such functions as fact-finding and peaceful settlement on joint organizations should not obscure the need for third-party fact-finding and the compulsory settlement of disputes. In his sixth report, the Special Rapporteur recognized the "generality and flexibility" of the rule of equitable utilization (*ibid.*, para. 19). Those qualities were clearly evident with regard to the other substantive obligations. The ultimate success or failure of the work now in progress would depend on whether the Commission could provide the necessary mechanisms to verify the fulfilment of the substantive obligations. Otherwise, given the generality of those obligations, the Commission's contribution to the avoidance of conflict would be very limited.

27. With regard to the security of hydraulic installations, the Special Rapporteur had more or less followed Mr. Evensen's suggestion to avoid dwelling on the issue in order not to reopen the lengthy negotiations that had preceded the adoption of the 1977 Additional

⁴ *Yearbook* . . . 1988, vol. II (Part Two), p. 54.

Protocols to the 1949 Geneva Conventions. The difficulties faced by the Geneva Conference had, however, not had anything to do with the question of the security of hydraulic installations. Perhaps there was a need for developing humanitarian law in that particular area. Obviously, if the exercise was going to be meaningful, the draft articles should go beyond what was contained in articles 54 and 56 of Additional Protocol I. Draft articles 27 and 28 nevertheless dealt with the question only perfunctorily and did not add anything to Protocol I. He admitted, however, that any solution that might be adopted would give rise to objections.

28. Draft articles 7 and 8 of annex I should form part of the miscellaneous provisions to be worked out by a conference of plenipotentiaries. Nevertheless, the idea of a permanent conference of the parties could not be completely ruled out and it would be interesting to see the reaction of the Sixth Committee of the General Assembly on that point. The annex raised two other problems. First, it had been suggested that the obligations for which it provided were more appropriate for a small group of integrated States and were therefore somewhat out of place in an instrument intended for world-wide use. There was an element of truth in that statement, but it also applied to a number of other obligations, such as that of co-operation. Secondly, the view had been expressed that the specific obligations set forth in the annex might have a bearing on the prospects of acceptance of the draft by States. Perhaps the Special Rapporteur might consider making the annex optional. On the other hand, there was something to be said against the idea of making implementation—which Mr. Graefrath (2165th meeting) had rightly described as the instrument's "moment of truth"—optional. He could, however, support the other provisions contained in the annex.

29. Mr. EIRIKSSON said that he, too, wished to thank the Special Rapporteur for having complied with the schedule he had outlined in his fourth report and for presenting the Commission with the final draft articles on the topic.

30. As a general point, he considered that the draft articles under consideration should be read in the light of the articles already adopted and possibly be brought into line with, or incorporated into, those articles.

31. In his view, there was a need for a statement on non-priority of uses of international watercourses, as contained in draft article 24. He wondered, however, whether regulation of international watercourses, as dealt with in draft article 25, should in fact be the subject of a separate article or whether it could not be incorporated into earlier articles.

32. The obligation stated in draft article 26, on joint institutional management, was set forth in very loose terms. It was in effect no more than an appeal, and he wondered, on the basis of his own experience, whether that appeal, which might well go unheeded, was really necessary. He would therefore suggest that the type of co-operation envisaged should be provided for in article 9, which dealt with the general obligation to co-operate, and that the forms of co-operation which the

management of international watercourses should take could be spelt out in the commentary.

33. Draft article 27, on protection of water resources and installations, should be considered in the light of the draft articles on protection and preservation of international watercourses already referred to the Drafting Committee. He agreed in principle on the need to have a separate article on installations, but the reference to international watercourses themselves should, in his view, be reconsidered.

34. He shared the view of other members that the Commission should proceed with caution in the case of the status of international watercourses and water installations in time of armed conflict—the subject of draft article 28—and take care to comply with existing law on armed conflict. As to the suggestion that an admonition that international watercourses be used for peaceful purposes should be included in the general principles, he would refer members to article 88 of the 1982 United Nations Convention on the Law of the Sea, which reserved the high seas for peaceful purposes and which, under the terms of article 58, paragraph 2, also applied to the exclusive economic zone; to article 301 of that Convention, which established the principle of the peaceful uses of the seas and derived from the Definition of Aggression adopted by the General Assembly in 1974; and, lastly, to article 35 of Additional Protocol I to the 1949 Geneva Conventions, which dealt with protection of the environment in times of armed conflict.

35. He welcomed the articles in annex I on private remedies, particularly draft articles 3 and 4, which the Drafting Committee should study carefully. He also welcomed the Special Rapporteur's efforts to provide a framework of dispute-settlement mechanisms, the consideration of which, if it was to be really fruitful, should depend on the progress of work. Traditionally, such questions had been taken up in the final stage of the consideration of topics.

36. Finally, he trusted that, at its next session, the Commission would complete its consideration of the draft articles on first reading.

37. Mr. McCAFFREY (Special Rapporteur), summing up what had been a very rich debate, said that he would endeavour to refer to the broad lines of the discussion and to make certain proposals on the basis of the conclusions he had drawn from that discussion. He would not dwell on the general comments that had been made at various points in the discussion, but would note that it had never been his intention to propose anything other than a framework agreement. He apologized to any members of the Commission who felt that he had sometimes gone into too much detail.

38. Commenting first on the articles submitted in his fifth report (A/CN.4/421 and Add.1 and 2), he noted that draft article 24 had received general support and that, on the whole, members agreed that there should be no priority between the different uses of an international watercourse. Mr. Thiam (2166th meeting) and Mr. Al-Khasawneh had even expressed some doubt that navigation had ever had priority over other uses. Some speakers, however, such as Mr. Koroma (2164th

meeting), had stressed that the significance of navigation for certain States should not be underplayed. For that very reason, he had attempted, in article 24, to strike a fair balance between the various considerations at issue and trusted that he had succeeded in doing so. Mr. Koroma had also rightly pointed out that the word “absence” in the title of the article was used in a different context in paragraph 1. Mr. Njenga (2163rd meeting) and Mr. Razafindralambo (2165th meeting), for their part, had suggested that, in paragraph 2 of article 24, a reference should be added to article 8. Those comments and suggestions would duly be taken into account.

39. Draft article 25 had likewise received general support, although most members felt that the term “regulation” should be defined. He agreed on that point and considered that, as had been suggested, the Commission could look for guidance to the articles on the subject adopted by the International Law Association at Belgrade in 1980 (see A/CN.4/421 and Add.1 and 2, para. 139) and also to the third report of the former Special Rapporteur, Mr. Schwebel.⁵

40. Some members had expressed doubts with regard to paragraph 2 of article 25, querying the extent to which watercourse States could be required to “participate” in regulation works from which they derived no benefit. What he had had in mind was that the wording which he had used (“watercourse States shall participate on an equitable basis . . .”) and which was drawn from article 6 of the draft would denote that such participation would be proportional to the benefits received. That point was in fact addressed in paragraph (2) of his comments on article 25.

41. Turning to the articles submitted in his sixth report (A/CN.4/427 and Add.1), he said that draft article 26, regarded by most members as important, had attracted the most comments. In the first place, it had been suggested that the word “organization”, which had been the subject of criticism, should be replaced by “commission”. He would have no objection to that. He would also have no objection to the proposal by Mr. Njenga and Mr. Razafindralambo that action to combat water-borne diseases should be added to the list of functions for which the organization or commission contemplated could be responsible, in view of the seriousness of that problem, particularly in Africa. He was also prepared to reformulate paragraph 3, in particular subparagraph (a), which referred to fact-finding functions and the submission of reports and recommendations.

42. As to the stringent nature of the provisions relating to consultations, some members thought that it was going too far to provide that “Watercourse States shall enter into consultations, at the request of any of them . . .” (para. 1); others, including Mr. Eiriksson and Mr. Thiam, considered, on the contrary, that that point could not be made too strongly. It had even been suggested that existing watercourse commissions should actually be required to meet, which was not always the case. One member had said that the obligation to con-

sult applied above all in the case of contiguous watercourses, while another believed that it also applied to successive watercourses.

43. His object had been to formulate paragraph 1 in such a way as to strike a fair balance between a simple recommendation to enter into consultations and an obligation to enter into “negotiations”, as proposed by Mr. Schwebel in his third report. Furthermore, some members had proposed that the obligation to consult should be made subject to certain conditions. While he was prepared to give consideration to that proposal, his fear was that it would provide States with an excuse that would make the obligation to enter into consultations—which was already not very stringent—practically illusory.

44. Some members considered that the term “management” in paragraph 2 should be properly defined and that a list of management functions was not enough. Others, however, took the view that the parties should be free to define management in the particular context. He was not opposed to the latter suggestion. He also agreed with Mr. Graefrath’s comment (2165th meeting) that a list of management functions could only be indicative. He would have no objection to such a list appearing in an annex, as some members had proposed, or to action to combat water-borne diseases being added to the list, as requested.

45. In reply to those members who had questioned the value of article 26, having regard to the number of watercourse commissions that already existed, he would point out, first, that many of them were very specialized and were not necessarily concerned with management and, secondly, that specialists involved in the day-to-day operation of international watercourses who had had occasion to express their views at regional meetings held under United Nations auspices, such as the one at Addis Ababa in 1988, had called for the establishment of such bodies.

46. He also welcomed the quality of the drafting amendments which had been proposed, in particular for article 26, paragraphs 2 and 3, and which bore witness to the time and thought that had gone into them. He was not opposed to Mr. Al-Khasawneh’s suggestion to harmonize draft article 26 and article 21,⁶ and that could perhaps be accomplished by adding a cross-reference to article 21 in article 26.

47. With regard to draft article 27, he noted that some members believed that the question of protection was already amply covered by other articles; other members, while stressing the importance of the subject, had asked whether the article should not be confined to protection of installations without mentioning protection of watercourses. Mr. Graefrath had even suggested referring only to existing installations, as new installations would be covered by part III of the draft (Planned measures); he had also suggested that article 27 should be placed between article 10, on regular exchange of data and information, and part III, and that seemed to make sense.

⁵ See para. (3) of the Special Rapporteur’s comments on draft article 25 in his fifth report (A/CN.4/421 and Add.1 and 2).

⁶ See footnote 4 above.

48. Mr. Calero Rodrigues (2163rd meeting) considered that paragraph 2 of article 27 went too far, since its provisions would apply even if there were no effect on another State. He recognized that that comment was justified.

49. Some members had said that the text of paragraph 3 of article 27 should be harmonized with that of article 20 (Data and information vital to national defence or security), as provisionally adopted by the Commission. The idea of stating that the provisions of paragraph 3 were without prejudice to the exception set forth in article 20 was well worth considering.

50. Draft article 28, on the status of international watercourses and water installations in time of armed conflict, had also produced mixed reactions, some members considering it superfluous and others, on the contrary, viewing it as very important. A majority of members seemed to be in favour of at least trying to address the subject, although some had questioned the meaning of the word "inviolable", which was indeed somewhat problematical and should perhaps be replaced by a more felicitous term. The point made by several members, including Mr. Mahiou (*ibid.*) and Mr. Bennouna (2164th meeting), that reference might be made to the rules of international law governing armed conflicts was well taken. He had no objection to the suggestion that a paragraph 2 should expressly refer to the poisoning of watercourses, which, according to several members, constituted both a war crime and a crime against humanity. The suggestion that the article should be divided into two parts, one on peaceful uses and the other on armed conflicts, was also acceptable.

51. He had thus concluded his summing-up of the discussion on draft articles 24 to 28, and recommended that they be referred to the Drafting Committee.

52. With regard to annex I, on implementation of the articles, he noted that several speakers had criticized the title. There seemed to be general agreement that draft articles 6 to 8 went beyond the scope of a framework agreement. Differing views had been expressed on draft articles 1 to 5, but, on the whole, there had been substantial support for the ideas of non-discrimination and equal right of access as expressed in article 3, paragraph 1, and article 4, respectively. Draft article 2, on the other hand, had been quite heavily criticized and, although some members had been in favour of referring articles 1 to 5 to the Drafting Committee *en bloc*, he had come to the conclusion that annex I was not yet ripe for such action. He therefore recommended that only article 3, paragraph 1, and article 4 be referred to the Drafting Committee, without prejudice to whether they would ultimately be incorporated in the body of the draft articles or be included in an optional protocol, as some members had suggested. Article 3, paragraph 2, could be considered to go beyond the scope of the topic and might therefore be omitted. He reserved the possibility of submitting proposals on the other articles of annex I at the next session, subject to the demands of brevity which would have to be borne in mind if the Commission was to complete the consideration of the draft articles in 1991.

53. The CHAIRMAN thanked the Special Rapporteur for his clear and excellent summing-up. He invited the Commission to indicate whether it wished to refer draft articles 24 to 28 and draft article 3, paragraph 1, and draft article 4 of annex I to the Drafting Committee, as recommended by the Special Rapporteur.

54. Mr. KOROMA also thanked the Special Rapporteur for his excellent summing up. He agreed with the Special Rapporteur's recommendation, on the understanding that it was without prejudice to whether draft article 4 of annex I would eventually be placed in the body of the future instrument or in an annex.

55. Mr. DÍAZ GONZÁLEZ also thanked the Special Rapporteur for his excellent summing-up of what had certainly been a most fruitful debate. He was not, in principle, opposed to the Special Rapporteur's recommendation, subject to the reservation expressed by Mr. Koroma, especially as it was in any case the Commission's tendency to refer to the Drafting Committee all the draft articles that had been submitted to it, whether or not it had approved them.

56. In the case under consideration, however, he failed to see how it was possible to refer to the Drafting Committee a paragraph of a draft article whose full wording was still completely unknown and another draft article of which it was not known whether—if it was to be retained—it would appear in the part of the draft devoted to general principles, in a special part, in an annex or in a protocol.

57. It would have been more logical for the Commission to start by deciding on the fate of annex I before referring some of the articles it contained to the Drafting Committee. The matter could hardly be considered urgent, since the Drafting Committee already had more than enough work to do.

58. Mr. BARBOZA asked why the Special Rapporteur was not recommending that draft article 2 of annex I, which was closely connected with draft articles 3 and 4, should also be referred to the Drafting Committee.

59. Mr. McCAFFREY (Special Rapporteur) said that the reason was not that he personally did not wish to recommend the referral of draft article 2 to the Drafting Committee. The recommendations he made were meant to reflect the Commission's debate and article 2 of annex I had given rise to serious reservations, not as to its title or to the principle of non-discrimination, but as to substance, since the provision might require amendments to national legislations and might go beyond the limits of a framework agreement. He had considered that recommending the referral of all the provisions of annex I to the Drafting Committee would be going too far, since some of them had been approved, while others had not.

60. Mr. BENNOUNA said that he, too, wished to thank the Special Rapporteur, who had once again displayed his constructive spirit and talent for compromise.

61. Since the Commission had set itself the goal of completing the first reading of the draft articles at the following session, he wondered whether it was intended to resume their consideration at the present session. He

also wished to know whether the Special Rapporteur intended to submit any provisions on the settlement of disputes. Lastly, he asked whether the Special Rapporteur, having recommended the referral of draft article 3, paragraph 1, and draft article 4 of annex I to the Drafting Committee, had given up the other provisions of the annex. Did he intend to incorporate them in the body of the draft and to set the annex aside for the question of the settlement of disputes? Those were important questions and the progress of work on the topic would depend on the answers to them.

62. The CHAIRMAN said that, as he understood the situation, the Special Rapporteur had not recommended that all the draft articles submitted in annex I should be referred to the Drafting Committee because he wished to have more time for reflection, possibly with a view to submitting new draft articles at the next session.

63. Mr. McCaffrey (Special Rapporteur) said that he did wish to give further consideration to the draft articles in annex I whose referral to the Drafting Committee he was not recommending, but he was not sure that he would be able to submit revised texts at the next session.

64. Replying, in particular, to Mr. Bennouna, he said that he had not given up the other provisions of annex I and had in fact submitted to the Secretariat a chapter IV of his sixth report (A/CN.4/427 and Add.1) containing several articles on the settlement of disputes. He hoped that that part of the report could be made available during the current session so that members would have time to study it with a view to discussing it at the next session.

65. Mr. Barboza said that the reason given by the Special Rapporteur as justification for his decision not to recommend the referral of draft article 2 of annex I to the Drafting Committee applied even more to paragraph 1 of draft article 3, which would undoubtedly require changes in national legislations. If draft article 3, paragraph 1, and draft article 4 of annex I were to be referred to the Drafting Committee, draft article 2 should also be so referred in order to give the Committee all the elements it needed to find a solution concerning the principle of non-discrimination.

66. Mr. Koroma said that, if the Commission so decided, he would have no objection to draft article 2 of annex I also being referred to the Drafting Committee, without prejudice, of course, to the place it would ultimately occupy in the future instrument.

67. Mr. McCaffrey (Special Rapporteur) said that he was, of course, not opposed to draft article 2 of annex I being referred to the Drafting Committee, especially if that were done on the understanding that it was without prejudice to the article's final place in the future instrument—in the body of the instrument, in an annex or in an optional protocol. Such a course would in fact be compatible with his recommendation that draft article 3, paragraph 1, and draft article 4 of the annex should be referred to the Drafting Committee.

68. He did not agree with Mr. Barboza's comment concerning paragraph 1 of draft article 3 of annex I.

69. Mr. Bennouna said that the discussion had shown that the time was not yet ripe for the referral of draft article 2 of annex I to the Drafting Committee. That article, which had not yet been thoroughly discussed, gave rise to some very thorny problems and, as some members of the Commission had pointed out, did not even deal with non-discrimination. He supported the original recommendation which the Special Rapporteur had made in concluding his summing-up (see para. 52 above).

70. Mr. Tomuschat said that he agreed with Mr. Bennouna.

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the Special Rapporteur's recommendation that draft articles 24 to 28, as well as draft article 3, paragraph 1, and draft article 4 of annex I, should be referred to the Drafting Committee, without prejudice to the final place of the last two provisions in the future instrument.

It was so agreed.

The meeting rose at 11.50 a.m. to enable the Drafting Committee to meet.

2168th MEETING

Tuesday, 5 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

later: Mr. Juri G. BARSEGOV

later: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Welcome to a new member

1. The CHAIRMAN extended a warm welcome to Mr. Pellet, the newly elected member of the Commission.

State responsibility (A/CN.4/416 and Add.1,¹ A/CN.4/425 and Add.1,² A/CN.4/L.443, sect. C)

[Agenda item 3]

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

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

*Part 2 of the draft articles*³

SECOND REPORT OF THE SPECIAL RAPPORTEUR

NEW ARTICLES 8 TO 10

2. The CHAIRMAN recalled that the Special Rapporteur had submitted his second report on the topic (A/CN.4/425 and Add.1) at the previous session, but that it had not been considered by the Commission due to lack of time. He invited the Special Rapporteur to introduce the report, as well as the new articles 8 to 10 of part 2 of the draft contained therein, which read:

Article 8. Reparation by equivalent

1 (ALTERNATIVE A). The injured State is entitled to claim from the State which has committed an internationally wrongful act pecuniary compensation for any damage not covered by restitution in kind, in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed.

1 (ALTERNATIVE B). If and in the measure in which the situation that would exist if the internationally wrongful act had not been committed is not re-established by restitution in kind in accordance with the provisions of article 7, the injured State has the right to claim from the State which has committed the wrongful act pecuniary compensation in the measure necessary to make good any damage not covered by restitution in kind.

2. Pecuniary compensation under the present article shall cover any economically assessable damage to the injured State deriving from the wrongful act, including any moral damage sustained by the injured State's nationals.

3. Compensation under the present article includes any profits the loss of which derives from the internationally wrongful act.

4. For the purposes of the present article, damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link.

5. Whenever the damage in question is partly due to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State, the compensation shall be reduced accordingly.

Article 9. Interest

1. Where compensation due for loss of profits consists of interest on a sum of money, such interest:

(a) shall run from the first day not considered, for the purposes of compensation, in the calculation of the amount awarded as principal;

(b) shall run until the day of effective payment.

2. Compound interest shall be awarded whenever necessary in order to ensure full compensation, and the interest rate shall be the one most suitable to achieve that result.

Article 10. Satisfaction and guarantees of non-repetition

1. In the measure in which an internationally wrongful act has caused to the injured State a moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation, the State

³ 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook* . . . 1989, vol. II (Part Two), pp. 72-73, paras. 229-230.

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.

which has committed the wrongful act is under an obligation to provide the injured State with adequate satisfaction in the form of apologies, nominal or punitive damages, punishment of the responsible individuals or assurances or safeguards against repetition, or any combination thereof.

2. The choice of the form or forms of satisfaction shall be made taking into account the importance of the obligation breached and the existence and degree of wilful intent or negligence of the State which has committed the wrongful act.

3. A declaration of the wrongfulness of the act by a competent international tribunal may constitute in itself an appropriate form of satisfaction.

4. In no case shall a claim for satisfaction include humiliating demands on the State which has committed the wrongful act or a violation of that State's sovereign equality or domestic jurisdiction.

3. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, following the treatment of cessation and restitution in kind in his preliminary report (A/CN.4/416 and Add.1), the second report (A/CN.4/425 and Add.1) should have dealt primarily with reparation by equivalent. However, the study of the existing law of State responsibility indicated that two further sets of consequences of an internationally wrongful act, functionally distinct, must be taken into account: the forms of reparation generally grouped under the concept of "satisfaction and guarantees of non-repetition" and under the single concept of "satisfaction".

4. Chapter I of the second report dealt with the relationship and distinction between compensation and satisfaction. The notion that the specific function of reparation by equivalent was essentially to compensate material damage was ambiguous and called for important qualifications. Admittedly, reparation by equivalent did not ordinarily cover moral, or non-material, damage to the injured State, but it was not true that it covered only material damage to the persons of nationals or agents of the injured State.

5. The most frequent among internationally wrongful acts were those which inflicted damage upon natural or legal persons connected with the State. Such damage, which affected the State directly even though it affected the persons in question in their private capacity, was not always exclusively material. It was also frequently or exclusively moral damage, in respect of which a claim for compensation was no less valid than it would be for material damage. Despite lack of uniformity among national legal systems with regard to moral damage, the practice and literature of international law showed that moral losses caused to private parties by an internationally wrongful act were to be compensated as an integral part of the principal damage suffered by the injured State.

6. One of the leading examples in that regard was the "*Lusitania*" case, decided by the United States-German Mixed Claims Commission in 1923 (*ibid.*, para. 10), in which the umpire had stated that there should be reasonable compensation for any mental suffering or shock caused by the violent severing of family ties. International tribunals had always granted pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties. Further examples were found in the report (*ibid.*, paras. 11-12).

7. Moral injury to human beings, including not only private parties but also State agents in a private

capacity, should be distinguished from injury to the aggrieved State's honour, dignity and prestige, something which was at times considered to be a consequence of any wrongful act, regardless of specific material damage. It seemed evident that moral injury to the State was a distinct kind of injury, for three reasons: (a) it was not moral damage in the sense in which that term was used within inter-individual legal systems, but moral damage in the specific sense of an injury to the State's dignity; (b) it was one of the consequences of any internationally wrongful act, regardless of whether the act had caused material, moral or other non-material damage to the injured State's nationals or agents; (c) in view of its distinct nature, it found remedy not in pecuniary compensation *per se*, but in one or more of the special forms of reparation generally classified under the concept of "satisfaction" in the technical, narrow sense of the term.

8. Those considerations were more fully supported in the part of the report on satisfaction as a remedy distinct from compensation (*ibid.*, paras. 106 *et seq.*). For the moment, it must be noted that they seemed to be contradicted by the fact that reparation for the offended State's moral injury at times appeared to be absorbed, in practice, into the sum awarded by way of pecuniary compensation. One example was the ruling of 6 July 1986 by the Secretary-General of the United Nations in the first "*Rainbow Warrior*" case (*ibid.*, para. 134). However, there were numerous examples in international case-law and diplomatic practice, especially where the injured State's moral prejudice was manifestly covered by the specific kinds of remedies that were classed as "satisfaction". It should be noted that there were frequent instances of international judicial decisions on moral damage to human beings in which arbitrators had expressly qualified the award of a sum covering such damage as "satisfaction" rather than pecuniary compensation: examples were the *Janes* and *Francisco Mallén* cases (*ibid.*, para. 17). The tendency to use the concept of "satisfaction" with regard to such situations was also clearly present in the literature.

9. Nevertheless, the practice and literature to which he had referred did not in his view contradict the distinction between moral damage to persons, which could be the subject of pecuniary compensation, on the one hand, and moral damage to the State as a possible object of the specific remedy of satisfaction in a technical sense, on the other. The term "satisfaction", as used in some of the cases and literature cited in paragraph 17 of the report, was to be understood either very generally, as a synonym of reparation in the broadest sense, or in a sense closer to the technical meaning of the term and in a context within which moral damage to an individual was identified with moral damage to the State. Again, those examples of practice, which at first sight appeared to contradict the autonomy of the role of satisfaction, did not actually do so, in his opinion. Moral damage to the State, which was more exclusively typical of international relations, was a matter for satisfaction in a technical sense and was dealt with as such in chapter III of the report.

10. Chapter II of the report dealt with reparation by equivalent, as distinct from satisfaction. The concept was governed by the well-known principle that the result of reparation in a broad sense should be the "wiping out", to use the dictum of the *Chorzów Factory* case (Merits), of "all the consequences of the illegal act" in such a manner as to re-establish, in favour of the injured party, "the situation which would . . . have existed if that act had not been committed" (*ibid.*, para. 21). In view of the incompleteness that frequently characterized restitution in kind, it was obviously through pecuniary compensation that the so-called *Chorzów* principle could eventually be effectively applied.

11. Reparation by equivalent was qualified by three features that distinguished it from other forms of reparation. The first was that it could be used to compensate for damage which could be evaluated in economic terms, including moral damage. The second was that, although some measure of retribution was present in any form of reparation, reparation by equivalent performed an essentially compensatory function by nature. The third was that the objective of reparation by equivalent was to compensate for all the economically assessable damage caused by the internationally wrongful act, but only for such damage. Indications to that effect were to be found in the relevant literature and in case-law, for example the "*Lusitania*" case (*ibid.*, para. 24) and the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war* (*ibid.*, para. 25).

12. The issues which arose in connection with reparation by equivalent, and which should be covered either by articles or by commentaries, were set out in the report (*ibid.*, para. 22). Notwithstanding the relative abundance of case-law and State practice covering most of those issues, most authors were inclined not to recognize the existence of any rules of general international law more specific than the *Chorzów* formulation. The lack of international rules more specific than the *Chorzów* principle was probably not so radical as a considerable part of the doctrine believed. Even in the less recent literature, there were indications that the field was not lacking in regulation. The authors cited in paragraph 27 of the report noted the evident similarity of international dicta with the rules of the law of tort in municipal legal systems and the natural tendency of international tribunals and commissions to have recourse to rules of private law, especially of Roman law. More persuasively, they applied international legal principles modelled on municipal principles or rules. In other words, on the basis of what Lauterpacht had called "private-law analogies" in international law, States had, through case-law and their own diplomatic practice and through the process known as international custom, developed rules that were part and parcel of international law, however similar to rules of municipal law they might be.

13. Such rules could not be expected to be very specific. Inevitably, in matters such as pecuniary compensation, everything depended on the facts and circumstances of each case, which would be decided by an international tribunal or commission or by diplomacy.

It should be stressed, however, that the fact that the rules were bound to be relatively general and flexible did not imply that they were mere "guiding principles" and could not be codified. They were rules setting forth the rights of the injured State and the corresponding obligations of the wrongdoing State. Moreover, in the field of international responsibility more than in any other, the Commission was not entrusted with the task of codification alone. Whenever the study of doctrine and practice indicated a lack of clarity, uncertainty or a "gap" in existing law, the Commission should not necessarily declare a *non liquet*. An effort should be made to examine the issue *de lege ferenda* and find out whether the uncertainty might be removed or the gap filled by developing the law.

14. In fact, he believed that the incorporation of elements of progressive development into the draft articles seemed to be particularly appropriate because of the nature of the subject-matter of State responsibility in general and of pecuniary compensation in particular. It was normally more difficult to achieve progressive development with regard to primary rules because the conflicts of interests between States were more direct. In the field of State responsibility, however, despite distinctions between States there was a greater chance that States would agree on general principles of pecuniary compensation for the simple reason that any State might find itself in the position either of injured State or of author State. Because secondary rules were at issue, the field of State responsibility provided the possibility of going beyond strict codification.

15. Once it was agreed that all the injuries and only the injuries caused by a wrongful act must be indemnified, efforts must be aimed at identifying the consequences which might be considered as having been caused by the wrongful act, and hence as indemnifiable. In that connection, one might discuss the controversial and controvertible distinction between "direct" and "indirect" damage. Both writers and case-law occasionally referred to the difference between direct and indirect damage and justified the non-award of damages by the argument that the damage had been indirect. In his view, it was probably causation that was at issue: what was really being contested was not whether the damage caused by the wrongful act had been direct or indirect but whether there had been an uninterrupted chain of causation between the wrongful act and the damage. The lengthy section of the report that dealt with direct and indirect damage and causation (*ibid.*, paras. 34 *et seq.*) might be summarized as follows: (a) damages must be fully paid in respect of injuries that had been caused immediately and exclusively by the wrongful act; (b) damages must be fully paid in respect of injuries for which the wrongful act was the exclusive cause, even though they might be linked to that act not by an immediate relationship but by a series of events each exclusively linked with each other by a cause-and-effect relationship. Bollecker-Stern's discussion of the problem in algebraic terms was to be found in paragraph 43 of the report.

16. The report also dealt with the question of causal link and concomitant causes (*ibid.*, paras. 44 *et seq.*),

including the injured State's conduct (*ibid.*, paras. 47 *et seq.*), in respect of which practice and doctrine on the matter were merely an application of the rule of causation and of the criteria governing any case of multiplicity of causes.

17. The scope of reparation by equivalent had to cover the totality of the material injury suffered by the aggrieved State, including moral damage to the persons of private parties or State agents. Accordingly, pecuniary compensation must cover both direct damage to the State, such as that caused to its territory in general, its organization in a broad sense, its property at home and abroad, its military installations, diplomatic premises, ships, aircraft and spacecraft, and also indirect damage to the State, such as that caused through the persons, natural or legal, of its nationals or agents. As he had already explained in his preliminary report (A/CN.4/416 and Add.1), he did not accept the distinction between direct and indirect damage and would refer members to the statement by the late Paul Reuter cited in his second report (A/CN.4/425 and Add.1, footnote 110). Damage to private parties, of course, included damage to State agents to the extent that such agents were regarded as private persons.

18. Within that context, a distinction could be drawn between patrimonial damage and personal damage. The latter included physical and moral damage to persons and involved such injuries as unjustified detention or any other restriction on freedom, torture or other physical injury to the person, and death. In international case-law and State practice, injuries of that kind were treated, in so far as they were capable of economic assessment, according to the rules and principles that applied to pecuniary compensation for material damage to the State. There was no need for him to refer again to the "*Lusitania*" case (*ibid.*, para. 56) and the *Corfu Channel* case (*ibid.*, paras. 57-58), in which death and physical injury to persons had clearly been issues.

19. "Patrimonial damage" meant damage involving the assets of a natural or legal person, including possibly the State, but extraneous to the person. Patrimonial damage had always been the area in which pecuniary compensation had found its most natural scope, and it was in connection with such damage that the principles, rules and standards for the application of the remedy of pecuniary compensation had been developed by judicial decisions and diplomatic practice. It was mainly in relation to patrimonial injury that judicial decisions and doctrine had had recourse to distinctions and categories typical of private law—whether civil or common—and had adapted them to the peculiar features of international responsibility.

20. Moreover, it was within that framework that the distinction lay between *damnum emergens* and *lucrum cessans*, a distinction drawn by virtue of the fact that *lucrum cessans* was part and parcel of reparation by equivalent. The difficulties to which compensation for *lucrum cessans* had at times given rise, in both case-law and doctrine, explained why the question had been dealt with at some length in the report (*ibid.*, paras. 63-76).

21. The first question discussed concerned the role of causation in the determination of *lucrum cessans*, in which connection it had been necessary to dispel some confusion about the distinction between direct and indirect damage, for *lucrum cessans* had been wrongly qualified as involving indirect damage, whereas, as Bollecker-Stern had explained (*ibid.*, para. 65 *in fine*), what was involved was causation.

22. The second question concerned the method of evaluation of lost profits. The more commonly used *in abstracto* method was to levy interest on the amounts due by way of compensation for the principal damage—a method that was often the outcome of a negotiated settlement between the parties. Other methods of assessing *lucrum cessans* were less abstract, being based on paradigms that seemed to be more concrete than the mere application of interest to capital. Such methods were based either on the profits earned by the same natural or legal person as had been dispossessed or had suffered damage, or on the profits earned during the same period by similar business concerns. The so-called *in concreto* method was used when the estimate was, in the words of Gray, “based on the facts of the particular case, on the profits which the injured enterprise or property would have made in the period in question” (*ibid.*, para. 70).

23. A further matter dealt with under the heading of *lucrum cessans* was the evaluation of lost profits in the case of unlawful expropriation of foreign industrial or commercial assets as going concerns. Practice in the matter, which was not very clear and was at times highly technical, was reviewed in the report (*ibid.*, paras. 71-76), and he had examined a number of cases, ranging from the *Chorzów Factory* case (Merits) to some of the cases decided by the Iran-United States Claims Tribunal. It was not easy to arrive at a definite conclusion, and he would welcome the Commission’s guidance in the matter.

24. The last issue which arose in connection with reparation by equivalent was interest, and the first question to be considered was whether interest was due as a matter of general law (*ibid.*, paras. 77-81). The minority, and negative, position had been rejected by both doctrine and practice. That interest was due was deemed to be an application of the principle of full compensation and of the consequent logical tenet expounded by Subilia, according to whom interest, being an expression of the value of the utilization of money, was nothing more than a means open to the judge for determining the injury sustained by a creditor from the non-availability of the principal for a given period (*ibid.*, para. 78).

25. On the question of *dies a quo*, three positions had emerged in judicial practice: that *dies a quo* was the day on which the damage occurred; that it was the day on which the final decision as to *quantum* was handed down; and that it was the day on which the claim for damages had been filed at the national or international level (*ibid.*, paras. 82-84). Practice in the matter was briefly reviewed in the report (*ibid.*, paras. 85-87).

26. Decisions in most cases tended to favour the time of the claim as *dies a quo* in order not to burden the

responsible State with payment of interest for a period during which it might have had no knowledge of the existence of its obligation. In most of the cases considered, however, there were additional considerations specific to each case which suggested giving preference to the date of the claim (*ibid.*, para. 89). For his own part, he was inclined to believe that *dies a quo* should be the date of the damage, and he agreed with Brownlie that: “In the absence of special provision in the *compromis* the general principle would seem to be that, as a corollary of the concepts of compensation and *restitutio in integrum*, the *dies a quo* is the date of the commission of the wrong” (*ibid.*, para. 92).

27. Judicial practice regarding *dies ad quem* was somewhat more uniform, the general idea being that it should be the date of the decision or final award.

28. He had not reached any firm conclusion on the question of the rate of interest (*ibid.*, paras. 95-97). So far as practice was concerned, it had been noted that it was not possible to determine why arbitrators had adopted one rate rather than another. In many instances, and particularly in cases decided by claims commissions, the interest awarded was assessed on the basis of the statutory rate adopted in the respondent State. In other cases, the rate in force in the claimant State, the commercial rate or the creditor’s home rate had been adopted. In that regard, it was interesting to compare the conflicting decisions in the “*Lord Nelson*” case and the *Royal Holland Lloyd* case (*ibid.*, para. 96). He would welcome members’ views on the matter.

29. A number of decisions concerning the controversial issue of compound interest versus simple interest were analysed in the report. Thus, although the possibility of compound interest had been considered in the *Norwegian Shipowners’ Claims* case (*ibid.*, para. 98), it had not been awarded, on the ground that the claimants had failed to put forward sufficiently cogent reasons for making such an award. However, in two other cases—*Compagnie d’électricité de Varsovie* (Merits) and *Chemins de Fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan* (*ibid.*, para. 99)—compound interest had been awarded; and, in the *Fabiani* case (*ibid.*, paras. 99-100), compound interest had not been rejected in principle although it had in fact been refused. No clear explanation as to principle had been given in any of those cases. On the other hand, in the *British Claims in the Spanish Zone of Morocco* case (*ibid.*, para. 101), the arbitrator had stated that there would have to be particularly strong and quite special arguments to justify a decision that went against prevailing case-law. Also, in the *Portuguese Colonies* case (Naulilaa incident) (*ibid.*, para. 102), Portugal had filed a claim for compound interest, yet the tribunal had awarded simple interest for the reason quoted in the report, apparently rejecting compound interest because the result would have been to award a sum far in excess of the *lucrum cessans*. His own tentative conclusion was that compound interest should be awarded whenever it was proved to be indispensable in order to ensure full compensation for the damage suffered by the injured State.

30. Chapter III of the report dealt with the second form of reparation—satisfaction—and was divided into four sections dealing respectively with the literature on the subject, jurisprudence, diplomatic practice, and the nature of satisfaction and its relationship to other forms of reparation. So far as the first section was concerned (*ibid.*, paras. 106 *et seq.*), most writers regarded satisfaction as a specific remedy for injury to a State's dignity, honour or prestige, and perhaps also as a remedy for injury caused by a breach of the subjective right of the aggrieved State. That latter element was stressed in particular by Bluntschli and Anzilotti. Thus satisfaction, though somewhat underestimated in his view, was recognized in the literature as an autonomous remedy, distinct from reparation. That did not, however, preclude a combination of satisfaction with, and even its absorption into, other forms of reparation. For that reason, he was not convinced by the negative attitude to such autonomy recently adopted by Dominicé (*ibid.*, para. 108). Satisfaction was also identified in the literature by its typical forms, which differed from *restitutio in integrum* and compensation and were mentioned in the report (*ibid.*, para. 107). One crucial issue was whether the nature of satisfaction was punitive or afflictive or, on the other hand, compensatory. While many writers regarded satisfaction as purely reparatory, others recognized its afflictive nature. Linked to the latter idea was the notion that satisfaction should be proportional to the gravity of the offence or to the degree of fault of the responsible State. Another question was whether the injured State had a choice as to the form the satisfaction should take, which in turn raised the question of the limitations that should be placed on such choice in order to prevent abuse. A number of authors pointed out that practice, especially prior to the First World War and also, in some instances, between the two world wars, showed that powerful States tended to make requests that were not compatible with the dignity of the wrongdoing State or with the principle of equality.

31. While he had not referred in the report to the entire body of diplomatic practice, his conclusion was that both judicial decisions and diplomatic practice provided overwhelming proof of the existence of various forms of satisfaction as a mode of reparation in international law. They confirmed in particular the prevailing doctrine according to which the remedy for the moral, political or juridical wrong suffered by the injured State was satisfaction, in other words a form of reparation of an afflictive nature distinct from compensatory forms of reparation such as *restitutio in integrum* and pecuniary compensation. In that regard, while the award in the first "Rainbow Warrior" case (*ibid.*, para. 134) had been construed as including an element of satisfaction, the more recent award, in the second "Rainbow Warrior" case,⁴ was marked by two new features: recognition by the arbitral tribunal of the non-conformity of the conduct of the defendant State with the agreement that had followed the 1986 ruling by the Secretary-General of the United Nations concerning the detention of two persons on a Pacific island; and a

recommendation that the two States concerned should devote a fairly substantial sum to the development of friendly relations between their respective peoples.

32. The punitive or afflictive nature of satisfaction was not in contrast with the sovereign equality of the States involved. The question might, of course, arise at a later stage of a sanction to be inflicted upon the offending State by direct conduct on the part of the injured State, for example in the form of reprisals. That would be the stage at which, demands for reparation and/or satisfaction having been unsuccessful, there would be a move from the substantive or immediate consequences of the wrongful act to the consequences as represented by the reaction of the injured State to non-compliance by the offending State with its so-called "secondary" obligation to make reparation. Prior to that more crucial stage, satisfaction did not involve direct measures of that kind. Although the demand for satisfaction would normally come from the injured State—unless happily preceded by the offending State's own initiative—the satisfaction would consist of action taken by the offender itself. There was therefore no need to fear that satisfaction would entail the notion of a sanction applied by one State against another, which would be a serious encroachment upon the offending State's sovereign equality. It was not so much a question of a sanction inflicted upon the offending State as one of a "self-inflicted" sanction intended to cancel, by the deed of the offender itself, the moral, political and/or legal injury suffered by the offended State. In that connection, he referred members to the statement by Morelli cited in the report (*ibid.*, para. 144 *in fine*).

33. Guarantees of non-repetition, though dealt with separately in chapter IV of the report, were a particular form of satisfaction. There were various degrees to which States would go in that respect, but there seemed to be three possibilities. In one set of cases, the request for guarantees took the form of a demand for formal assurances from the offending State that it would in future respect given rights of the aggrieved State or that it would recognize the existence of a given situation in favour of the aggrieved State. On other occasions, the injured State asked the offending State to give specific instructions to its agents. In a third set of instances, the injured State asked the offending State to adopt certain conduct regarded as likely to prevent the creation of the conditions that had allowed the wrongful act to take place. In a number of cases, that even included the adoption or abrogation by the offending State of specific legislative provisions. In his view, that extremely useful study of practice indicated that the remedy was part and parcel of the consequences of an internationally wrongful act.

34. With regard to chapter V of the report, on the forms and degrees of reparation and the impact of fault, whatever the Commission's position on the issue of fault, some mention of it undoubtedly had to be made, expressly or by implication, within the framework of regulation of the consequences of internationally wrongful acts. It was one thing to believe that a wrongful act might exist with or without the presence of fault, but quite another to consider that

⁴ Decision of 30 April 1990 by the France-New Zealand Arbitration Tribunal (*International Law Reports* (Cambridge), vol. 82 (1990), pp. 500 *et seq.*).

fault was irrelevant, either from the standpoint of the act's substantive consequences—in other words, compensation and satisfaction—or from the standpoint of measures, countermeasures, reprisals or sanctions to be adopted *vis-à-vis* the offending State, which would form the subject of his third report. Whatever position the Commission adopted on the first of those two aspects, it would have to acknowledge that fault played a major role with regard to the substantive and procedural consequences of internationally wrongful acts. Such an acknowledgement would be particularly important because the Commission was called upon to deal not only with delicts, but also with crimes.

35. Noting that doctrine on the issue was somewhat scarce, he cited the opinions of Oppenheim (*ibid.*, para. 181) and Ago (*ibid.*, para. 182). In terms of practice, a distinction as to method had to be drawn between such forms of reparation as *restitutio in integrum* or pecuniary compensation, on the one hand, and on the other, satisfaction in a distinct but broad sense, including the various forms of atonement, so-called punitive damages, guarantees of non-repetition, and so on. With regard to the impact of fault on pecuniary compensation, he drew attention to section C.1 of chapter V (*ibid.*, paras. 183 *et seq.*). But it was, of course, with regard to satisfaction, a remedy too often underestimated or neglected, that the impact of fault was most clearly felt (sect. C.2) (*ibid.*, paras. 187 *et seq.*). Fault had played a significant role in introducing satisfaction in place of, or as an important complement to, pecuniary compensation in all the cases he had studied and, in a large number of instances, it had also played a significant role in connection with the quality and number of the forms of satisfaction claimed and in most cases obtained. In that respect, he again referred to the 1986 ruling by the Secretary-General of the United Nations in the first "*Rainbow Warrior*" case (*ibid.*, para. 134).

36. While he would emphasize the distinctions between the various forms of reparation, he was sufficiently realistic and sufficiently conscious of the realities of international life and of the application of law to realize that different forms of reparation did not necessarily operate in isolation from one another. The distinction was essentially one of degree, in which some element of fault was most likely to be present. In the *Panay* incident of 1937 between Japan and the United States of America (*ibid.*, paras. 126 and 189), for example, as well as in a post-1945 case involving the USSR and the United States, the satisfaction given by the offending State could on no account be interpreted as the action of a weak State yielding to the arrogance of a big Power. In analysing the hundreds of cases of satisfaction which had occurred in direct diplomatic relations, he had not attempted to determine what those cases meant from the point of view of the presence or absence or degree of fault. The Commission should, in his view, conduct a study on that subject before dismissing the concept of the role played by fault in the matter of satisfaction.

37. Referring to the draft articles submitted in the second report, he drew attention to alternatives A and B proposed for paragraph 1 of article 8 (Reparation by

equivalent). Paragraph 2 introduced the concept of economic assessability, and paragraph 3 related to loss of profits caused by the internationally wrongful act. In paragraph 4, which also dealt with causation, no distinction was drawn between direct and indirect damage. Paragraph 5 referred to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State. With regard to draft article 9 (Interest), he recalled the doubts he had expressed on the questions of the rate of interest and of compound interest versus simple interest. Lastly, in draft article 10 (Satisfaction and guarantees of non-repetition), he had endeavoured to make provision for the remedy of satisfaction while admitting that no injured State should make humiliating demands on the State which had committed the wrongful act.

Mr. Barsegov, Second Vice-Chairman, took the Chair.

38. Mr. CALERO RODRIGUES said that he wondered whether, in view of the limited number of meetings allocated to the topic, it might not be advisable to divide the debate under two separate headings: reparation and satisfaction.

39. After a brief discussion in which Mr. ARANGIO-RUIZ (Special Rapporteur), the CHAIRMAN and Mr. ILLUECA took part, Mr. CALERO RODRIGUES withdrew his suggestion.

40. Mr. BENNOUNA, noting that chapter V of the second report (A/CN.4/425 and Add.1) did not appear to have any direct bearing on the draft articles submitted, inquired whether the question of fault was to be considered at the present session or at a later stage.

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the concept of fault was inherent in the wording of draft article 10, and more particularly paragraph 2. The subject had not been dealt with by previous special rapporteurs and he thought that introducing it in the context of his second report was both justified and timely.

Mr. Barboza, First Vice-Chairman, took the Chair.

42. Mr. GRAEFRATH congratulated the Special Rapporteur on his rich and well-documented second report (A/CN.4/425 and Add.1). Resisting the temptation to follow the Special Rapporteur into the jungle of a century-old discussion of principled theoretical theses and dubious decisions by arbitral tribunals, he would confine himself to some brief comments on questions which had a direct bearing on the wording of the draft articles submitted.

43. As the PCIJ had stated in 1927, it was "a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".⁵ Draft article 7, submitted by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1), and draft articles 8 and 10 dealt with different forms of reparation. There was a certain interdependence between those forms, and some conformity was needed so that the reparation would wipe out all the consequences of the illegal act. Conformity was also needed in order to ensure that com-

⁵ *Factory at Chorzów, Jurisdiction*, Judgment No. 8 of 26 July 1927, P.C.I.J., Series A, No. 9, p. 21.

pensation could be claimed only for "the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it".⁶ That much was common ground since the PCIJ's famous *Chorzów Factory* decision. The trouble with draft articles 7 and 8 was that the relationship between restitution in kind and pecuniary compensation was not brought out clearly. Article 7 did not define the content of restitution, and it was therefore difficult to determine the scope of pecuniary compensation in article 8. That would seem to be the reason why the Special Rapporteur was submitting two alternatives for paragraph 1 of article 8. It was not apparent, however, whether those alternatives were based on different concepts of restitution in kind.

44. Both alternatives were somewhat ambiguous, possibly because in alternative A the Special Rapporteur tried to imply, and in alternative B explicitly spelled out, a definition of restitution in kind that was based not on the re-establishment of the situation as it had existed before the wrongful act but on the establishment of a theoretical or hypothetical situation which would have existed if the breach had not occurred. That point, however, was blurred by the wording used in alternative A, which simply spoke of "any damage not covered by restitution in kind", without giving any explanation about the meaning of that phrase. In alternative B, the confusion was compounded by the use of the term "re-establish" for a situation which had never existed earlier. If such a broad definition of restitution in kind was used, restitution in kind necessarily covered the whole range of the reparation claim and always comprised a certain amount of pecuniary compensation, that being the usual method of paying for loss of profit. He was none the less afraid that such use of terms in article 8 would only cause confusion, especially if article 8 could not be based on article 7, since it failed to provide any definition of what was understood by the expression "restitution in kind".

45. For those reasons, he could not support either alternative A or alternative B and would prefer a text which made it clear that, within the claim for reparation, pecuniary compensation could be claimed to the extent that reparation had not been made or could not be made by restitution. That would include two aspects, namely a request for pecuniary compensation in place of restitution, and payment of damages for loss sustained which was not covered by restitution in kind. Such a provision would presuppose that restitution in kind meant the re-establishment or restoration of the situation which had existed prior to the wrongful act. That, he believed, had been the Commission's understanding when it had decided at its thirty-sixth and thirty-seventh sessions to refer the previous Special Rapporteur's draft articles 6 and 7 to the Drafting Committee.⁷ A differentiation of that kind between restitution and the broader claim of reparation would also be in keeping with the structure and approach

adopted for part I of the draft, which was based on the breach of an international obligation rather than on the damage caused. In his view, it was also more in keeping with modern State practice, as could be seen from the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities and from article XII of the 1972 Convention on International Liability for Damage Caused by Space Objects.

46. Such an interpretation would also take into account that there might be a number of different injured States. If an *erga omnes* obligation was breached, and if all States parties to the legal relationship concerned were considered to be injured States, it followed that all those States could claim cessation of the wrongful act and restitution, in particular legal restitution. But reparation by equivalent for damage not already covered by restitution could be claimed only by a State which had actually suffered from such damage. A general reference to the injured State was therefore insufficient in such cases. A clear statement would have to be made to the effect that the injured State was entitled only to claim compensation not covered by restitution for damage it had suffered itself, directly or through its nationals. That, as far as he could see, had not so far been made explicit in the draft.

Mr. Shi resumed the Chair.

47. In terms of environmental protection, too, it was obvious that there were many cases where there might be several injured States entitled to claim cessation and restitution. Very often, however, only one or two States might actually have suffered harm not covered by restitution and therefore be entitled to make a claim for compensation, which was not justified in the case of other injured States. A certain parallel existed between such a situation and that covered by article 60, paragraph 2 (b), of the 1969 Vienna Convention on the Law of Treaties.

48. It had to be made clear whether draft article 8 was meant to cover pecuniary compensation for any damage caused, including compensation in place of restitution, or only for such damage as was not already covered by restitution of the situation existing before the breach. The distinction between those two different elements was a basic issue in terms not only of the amount of compensation, but also of the concept of the wrongful act and of the injured State entitled to claim compensation. He did not believe that all injured States which had a right to claim cessation and restitution also had a claim to pecuniary compensation.

49. The draft as a whole was based on the assumption that it was the breach of an international obligation, not the damage caused, which entailed State responsibility and determined its content. Damage was not listed in article 3 of part I as a constituent element of an internationally wrongful act entailing State responsibility. Nevertheless, damage not covered by restitution was a *sine qua non* for an injured State to claim compensation. It was sufficient for an injured State to prove that its rights had been infringed by the breach of the obligation in order to require cessation of the wrongful act or re-establishment of the situation as it

⁶ *Factory at Chorzów, Merits*, Judgment No. 13 of 13 September 1928, *P.C.I.J., Series A, No. 17*, p. 47.

⁷ See footnote 3 above.

had existed before the act. However, in order to claim compensation for damage not covered by restitution, that additional damage and the causality of the wrongful act had also to be proven. With regard to a claim for compensation for damage not covered by restitution, the actual occurrence of the damage could, indeed, be considered to be a constituent element of the claim. In that connection, it might facilitate the Commission's work if the Drafting Committee reverted to the method used in earlier reports by avoiding Latin terminology, which was not common to all legal systems and was open to widely differing interpretations.

50. Paragraphs 2, 3 and 4 of draft article 8 raised many complex problems, mainly because they went too far into the details of damage assessment or took those details for granted without clearly defining what kind of damage was covered by the compensation claim and what the legal criteria were for assessment. If the Commission wanted to do more than affirm the principles of restitution and reparation by equivalent, it would have to be far more precise than was proposed in those paragraphs. What, for instance, was the meaning of the expression "economically assessable damage" (para. 2)? The answer largely depended on the philosophical approach adopted and, of necessity, controversial interpretations emerged. The expression was neither explained in the report nor made clear in the article itself. No indication was given whether it excluded moral damage to the State itself or included costs of preventive measures or economic losses actually sustained as a direct result of such measures. Obviously, the expression did not refer to quantifiable economic losses alone. But was it sufficient for a loss to be economically quantifiable in order to be regarded as economically assessable damage? Or did the loss have to have been actually sustained? Such questions, which took on particular importance in environmental law, were unlikely to be reflected in decisions of arbitral tribunals dating back to the nineteenth century.

51. He was not convinced that a draft of a general convention on State responsibility ought to go into so much detail, but if it did so, it should at least meet the level already covered by specific conventions. In that connection, he referred, by way of example, to the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. That Convention, of course, represented an extremely narrow approach inasmuch as it was limited to accidents. Still other issues arose in the case of damage caused by permanent activities. The question of what could or should be understood by the expression "economically assessable damage" gave rise to many complex issues, many of them of a specifically modern nature, which the second report and the draft articles failed to elucidate. Admittedly, material damage suffered by the injured State's nationals was generally considered to be covered by a reparation claim, but it might prove difficult, if not impossible, to find generally accepted criteria for economic assessment of damage of that kind.

52. The statement in the report (A/CN.4/425 and Add.1, para. 59) that courts had been able to quantify

compensation on the basis of an economic assessment of the damage actually caused to the victim seemed somewhat exaggerated. The measuring by arbitral tribunals of non-material damage had been described by highly respected authors as presenting a patchwork of seemingly arbitrary determinations. Unfortunately, the report failed to draw attention to the problems which surrounded the decisions of such tribunals and thus cast doubt on the value of many of the examples cited. What had been true in the nineteenth century still applied today. For example, the United States of America had been prepared to pay \$75,000 for each victim of the Iranian airliner shot down by a United States Navy vessel in 1988, but had itself claimed \$800,000 per victim when another United States Navy vessel had been hit by missiles fired from an Iraqi aircraft in 1987. Nor was there any consistency in the compensation awarded by arbitral tribunals for unlawful arrest or imprisonment, for grief and indignity or for death. Damages for unlawful detention, for instance, had varied between \$8 a day, \$2,000 for one and a half hours and \$25,000 for four hours of arrest. The Bhopal disaster, in relation to which the amount of damages available to victims in the United States could be up to 10 times as much as in India, was another case in point. The expression "economically assessable" was thus devoid of specific content, and it was over-optimistic to believe, as did the Special Rapporteur (*ibid.*, para. 29), that relatively uniform solutions could be identified and corresponding rules or standards could be assumed to exist. That, of course, would not prevent the Commission from establishing such standards if it deemed it possible, necessary and wise to do so: he, for his part, would not be in favour of such a course. Failing a definition, based on legal criteria, of the expression "economically assessable", the Commission should refrain from adopting paragraph 2 of draft article 8, or should at least separate moral damage to the injured State's nationals from economically assessable damage to the State. The word "including" did not seem particularly helpful in paragraph 2.

53. The formula "any profits the loss of which derives from the internationally wrongful act", in paragraph 3, was much too broad and loosely formulated. It could encompass all possible profits without any qualification, whereas care should be taken to cover only the lost profits which could be clearly defined and were more than a mere possibility or hope, or again, were speculative profits. In connection with damage caused by pollution, it had often been held that the loss of profits had to be a direct result of the pollution or at least that the loss should have been foreseeable. He failed to see why the Special Rapporteur had not introduced into the text of draft article 8 any of the qualifications discussed in the report (*ibid.*, paras. 65-76).

54. With regard to methods of assessment, most of the methods discussed had been taken from nationalization cases and did not result in any clear-cut measurement. There were of course differences, depending on whether the measure of compensation was the net book value or assets minus liabilities or whether a company's value was measured as the value

of a going concern. Even when the going-concern method had been applied, as in the *American International Group, Inc. v. Iran* case (1983), there had been a difference of \$20 million between the claim and the compensation awarded. One writer had pointed out recently that, despite—or perhaps because of—the vast number of claims dealt with by the Iran-United States Claims Tribunal, the Tribunal had made only a small contribution to the question of remedies in international law. Perhaps less weight ought to be given to such procedures and more attention to treaty regulations on international transport and pollution. In any case, not all lost profits had to be compensated for, only those which were “normal and foreseeable” and which would “in all probability have been obtained” if the wrongful act had not been committed (*ibid.*, para. 65 *in fine*).

55. It was difficult to accept the formula “uninterrupted causal link”, in paragraph 4. When and under what conditions was a causal link uninterrupted? The question also arose whether the length of the chain was material. Such wording was even broader than the concept developed by the Special Rapporteur in the report (*ibid.*, paras. 37-42). It would have been more reasonable to use the formula “the causality link exists whenever the objective requirement of ‘normality’ or the subjective requirement of ‘predictability’ is met” (*ibid.*, para. 37).

56. In cases of international delicts, the general interest was to limit the scope of consequences that would be covered by damages. In order to avoid a causal link growing to infinity, decisions and scholars usually spoke of “proximate cause”, “adequate causality” or “ordinary course of events”, or stated that “the cause must not be too remote or speculative” or that there must be “a sufficiently direct causal relationship”. The term “foreseeability” was also used to describe a causal relationship which was considered to be normal. That was the meaning of *proxima causa*, a well-established expression which was more precise and acceptable than the reference to an uninterrupted causal link, “however long” (*ibid.*, para. 43). The question was whether, from the course of events, a court got clear and convincing evidence, to borrow the language used in the *Trail Smelter* case. In his opinion, it was against the practice of all systems of civil and criminal law to rely without any limitation on an uninterrupted chain of events, however long. All legal systems, and also many arbitral decisions, relied on “proximate causation” to get adequate results and did not reduce that expression to closeness in time or to the series of events forming the causal chain.

57. With regard to paragraph 5, he had doubts as to whether it was compensation, or rather the claim to compensation, that was reduced in the case of a contributory act—not only negligence—by the injured State.

58. A special provision on interest, as in draft article 9, might be useful, but he questioned the advisability or helpfulness of paragraph 2, on compound interest. The rule embodied in the paragraph was not supported

by international practice and, moreover, could well make the resolution of reparation claims more difficult.

59. The structure of draft article 10 differed from that of draft articles 7 and 8 in that, instead of stressing that the injured State was entitled to a claim, it said that the wrongdoing State was under an obligation to give adequate satisfaction. That presentation appeared to be an attempt to introduce the concept of fault. There was undoubtedly a certain relationship between the extent to which an internationally wrongful act caused damage and the satisfaction a State was under an obligation to provide. That proposition, however, could not be reduced to fault. The forms of satisfaction, like reparation in general, corresponded to the specifics of the unlawful act. Paragraph 2 of article 10 was therefore much too narrow in that it took into account only wilful intent and negligence. For example, the reparation claim in the case of a terrorist attack against an embassy would always contain an element of satisfaction. Much would depend on whether the receiving State had taken all the usual measures of protection. Quite different measures would be necessary if the attacks were prepared or executed by certain organizations, as had been the case some years previously with attacks against Yugoslav consuls in the Federal Republic of Germany. In such cases, apart from apologies and punishment of the persons responsible, demands could be made for measures against the organizations involved. However, the main element of satisfaction was to forestall continuation or repetition of the wrongful conduct.

60. Contrary to that approach, the Special Rapporteur's whole concept of satisfaction was based on the assumption that it had a punitive function. The Special Rapporteur even admitted punitive damages as a form of satisfaction, when that idea had no support in international practice. The examples cited in the report were mostly drawn from diplomatic activity and it was an open question whether they reflected a legal rule or merely diplomatic practice. Personally, he tended to relate satisfaction not to moral or political damage alone: it also meant all measures taken by the author State to acknowledge that certain conduct was wrongful, to affirm the existence of the obligation affected and to prevent continuation or repetition of the wrongful act. Satisfaction therefore had a place in modern international law and constituted an essential part of the claim to reparation. However, he was strongly opposed to any punitive elements being introduced into the notion of satisfaction. As explained by the umpire, Edwin B. Parker, in the “*Lusitania*” case, “as between sovereign nations the question of the right and power to impose penalties . . . is political rather than legal in its nature” (*ibid.*, para. 114). With regard to satisfaction, the point was restatement of the law and a guarantee that the obligation would be observed in the future. If satisfaction was understood in that way and one did not look back on how it had been used and misused in the nineteenth century, then satisfaction would seem to be more a non-pecuniary form of reparation than a form of reparation for non-material damage. If one considered environmental cases, measures against repetition and guarantees to avoid

future damage were in the forefront and were closely tied in with the material damage caused. Thus satisfaction could not be limited to moral damage. Guarantees of non-repetition largely determined the concrete forms of satisfaction.

61. With regard to the forms of satisfaction, thought should be given to adopting some general terms to cover the various measures which might be necessary, or which were used, to restate the law and to guarantee non-repetition. That would involve more than apologies, punishment of responsible individuals or assurances: it could include acknowledgement of the breach by the author State as well as a declaration or finding by a competent international body, legislative or administrative measures, and so on.

62. Accordingly, draft article 10 should be recast so as to bring it into line with the structure of draft articles 7 and 8. The reference to punitive damages should be deleted from paragraph 1 and general terms should be used to point to the purpose of satisfaction. Paragraph 2 should be deleted or reworded. Paragraph 3 should be broadened and made part of paragraph 1, because it described only one possible form of satisfaction. Paragraph 4, though perhaps superfluous, might none the less be desirable because of the humiliating practices of the past in connection with satisfaction. However, a much better protection against such practices would be unambiguously to reject the concept of a punitive function. He knew of no case in which a small State had made humiliating demands or claims for satisfaction against a strong State. The punitive function was a one-way street of power politics and openly contradicted the prohibition of collective punishment.

63. During the Commission's discussion of the topic of the law of the non-navigational uses of international watercourses, serious objections had been raised against quoting old opinions or cases which no longer corresponded to the present state of international law. With that in mind, he urged that the Commission's documents should not mention, as alleged evidence of existing rules of modern international law, such examples as the claims raised in connection with the *Boxer* case against China or the *Tellini* case against Greece, to which the Special Rapporteur referred in paragraphs 124, 158(c) and 159 of the report.

64. Mr. ILLUECA noted that draft articles 8 and 10 related to restitution in kind, which had already been dealt with in draft article 7 submitted by the Special Rapporteur in his preliminary report (A/CN.4/416 and Add.1), and that they set forth the scope of compensation and satisfaction, which were modalities for the reparation of damage caused to the injured State. The texts thus proposed by the Special Rapporteur took into account the basic principles governing reparation, as laid down by the PCIJ in 1927 in the *Chorzów Factory* case (Jurisdiction):

... It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. ...⁸

65. In 1928, in the same case, dealing with the merits, the PCIJ had ruled

that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁹

In that ruling, pride of place had been given to restitution in kind as the normal and logical means of reparation; only where restitution in kind was not possible did payment of compensation apply. In cases where an arbitration agreement was entered into, however, the arbitral tribunal was empowered to take into account the practical difficulties of restitution in kind and resort to the modes of reparation set out in draft articles 8 and 10, namely reparation by equivalent, satisfaction and guarantees of non-repetition, thereby exercising the same discretion that Judges of the ICJ had under Article 36, paragraph 2(d), of the Statute of the Court to decide on "the nature or extent of the reparation to be made for the breach of an international obligation". The Special Rapporteur was no doubt right to draw a functional distinction between satisfaction, on the one hand, and restitution and pecuniary compensation, on the other; as he pointed out in his second report (A/CN.4/425 and Add.1, para. 137), however, both in jurisprudence and in diplomatic practice satisfaction was often accompanied by pecuniary compensation.

66. With regard to the formula "moral or legal injury" used in paragraph 1 of draft article 10, he himself would not speak of "legal" injury, an expression which was unsuitable. As for moral injury, paragraph 1 envisaged "nominal or punitive damages", and there appeared to be some contradiction in the paragraph, since it was not possible to ignore the pecuniary character of punitive damages or divorce pecuniary damages from the deterrent effect, or sanction, attributed to them. Moreover, draft article 8, on reparation by equivalent, set forth the right to claim from the wrongdoing State pecuniary compensation in an amount that would "cover any economically assessable damage to the injured State deriving from the wrongful act, including any moral damage sustained by the injured State's nationals" (para. 2). Could it perhaps be argued that article 8 dealt with economically assessable damage and article 10 with damage that was not economically assessable? In any case, the question still arose, as the Special Rapporteur himself pointed out, whether "satisfaction is punitive or afflictive, or compensatory in nature" (A/CN.4/425 and Add.1, para. 108).

67. As a matter of prudence, he would suggest that paragraph 1 of article 10 and paragraphs 1 and 2 of article 8 should be revised in order to avoid the predicament to which the umpire, Edwin B. Parker, had referred in the "*Lusitania*" case, in declaring:

The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought. ... (*Ibid.*, para. 114.)

⁸ See footnote 5 above.

⁹ See footnote 6 above.

68. Lastly, he reserved the right to comment later on draft article 9, which could not be confined to dealing with the case of "compensation due for loss of profits" (para. 1). The term "profits" was much too restrictive, since there existed other earnings, benefits, etc. which could be lost and thereby provide grounds for reparation.

The meeting rose at 1 p.m.

2169th MEETING

Wednesday, 6 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (continued) (A/CN.4/416 and Add.1,¹ A/CN.4/425 and Add.1,² A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles³

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

ARTICLE 10 (Satisfaction and guarantees of non-repetition)⁴ (continued)

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

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

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

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.

⁴ For the texts, see 2168th meeting, para. 2.

1. Mr. RAZAFINDRALAMBO congratulated and thanked the Special Rapporteur for his valuable second report (A/CN.4/425 and Add.1) and for his oral introduction (2168th meeting), which had made the report easier to understand.

2. Chapter I of the report dealt with moral injury to the State and the distinction between satisfaction and compensation. He shared the Special Rapporteur's view that reparation by equivalent also covered moral damage to the persons of nationals or agents of the injured State, as an integral part of the principal damage suffered by that State: the examples given in support in the report (A/CN.4/425 and Add.1, para. 10) and in the Special Rapporteur's introduction were conclusive. As to moral damage inflicted directly on the State, there was no doubt that it was specific damage which was different from that caused to the State's nationals or agents, as well as from material damage caused to the State itself. As convincingly shown by the Special Rapporteur, moral damage of that kind was both "legal" and "political" in that, first, it was the result of a breach of an international obligation *vis-à-vis* the injured State and, secondly, it was an offence against the honour, dignity and prestige of that State. Legal writings and case-law were unanimous in recognizing that such damage required a specific form of reparation designated by the generic term "satisfaction".

3. Chapter II dealt with reparation by equivalent, a form of reparation applicable where *restitutio in integrum* was not possible and consisting in pecuniary compensation equivalent to the value of the damage caused. The term generally used in French to designate that form of reparation was *indemnisation*. However, since that term was used both in the case of responsibility for the breach of an international obligation and in the case of liability for injurious consequences arising out of acts not prohibited by international law—such as nationalization—the Special Rapporteur had done well to propose the expression "reparation by equivalent". No useful purpose would be served by reviewing all the issues raised by that form of reparation: the list given in the report (*ibid.*, para. 22) seemed exhaustive and covered all the legal aspects that were worth considering in the present instance. He would therefore make only a few comments.

4. He would not take sides in the doctrinal dispute as to whether there were any specific rules of international law relating to the various aspects of the problem of reparation by equivalent. As the Special Rapporteur pointed out, however, while the number and variety of concrete cases led one to exclude the actual existence *de lege lata* of very detailed rules, that did not exclude the possibility of reasonably developing any such rules (*ibid.*, paras. 28-29). The formulation of such rules was all the more desirable in that, as the Special Rapporteur so wisely indicated, the topic of State responsibility dealt with so-called "secondary" legal situations, with regard to which any State could find itself with an equal degree of probability either in the position of offending, responsible State or in the position of injured State, both of which would share the same

“prospective” or “hypothetical” interests (*ibid.*, para. 33).

5. The study of arbitral practice and legal writings had led the Special Rapporteur to reject the distinction between direct and indirect damage in favour of a “clear”, “continuous” and even “uninterrupted” causal link. The Special Rapporteur nevertheless stressed that the concepts of the “normality” and “predictability” of the damage also had to be taken into account. Although the subjective requirement of predictability seemed to prevail in judicial practice, the Special Rapporteur considered that the causal relationship must be “immediate” and “exclusive”, or simply “exclusive” when the injuries were linked “by a series of events each exclusively linked with each other by a cause-and-effect relationship” (*ibid.*, para. 42). In view of all those qualifying elements, which were none the less probably justified by the uncertainty of the case-law on the question of causality, some confusion was quite normal, at least when it came to making a choice. He was not sure that the term “uninterrupted” used by the Special Rapporteur might not be taken to mean “without a break”, which would be difficult to reconcile with the idea of a “series of events”. He was also not sure whether it should be left to the court to impose the dual requirement of “normality” and “predictability”, which was not referred to in draft article 8. The Special Rapporteur appeared to be resigned to the solution of leaving it to the court to choose from among the concomitant causes which had played a decisive but not exclusive role in the injury. He also gave arbitrators and diplomatic negotiators discretionary power in that regard. That might be an admission of helplessness that would hardly be compatible with the task of codifying the law.

6. The Special Rapporteur dealt with the conduct of the injured State not from the point of view of the rule of “contributory negligence” or the lack of “due diligence”, but rather as an application of the rule of “concomitant causality”. That position appeared to be in keeping with the approach he was advocating with regard to the impact of fault on compensation.

7. The report contained sufficiently clear and comprehensive explanations on the scope of reparation by equivalent and the concept of material injury suffered by the State, so that few comments were necessary. In particular, the Special Rapporteur had made a very interesting study of the concept of *lucrum cessans* and rightly noted that it was connected with the idea of profit and not with that of indirect damage. The analysis of judicial practice and legal writings had led the Special Rapporteur to conclude that *lucrum cessans* could in principle be the subject of compensation on the basis not only of the presumption of a cause-and-effect relationship between the wrongful act and the damage, but also of the presumption of the existence of profits in respect of which compensation was claimed. As the Special Rapporteur indicated, there were several methods of determining *lucrum cessans*. The main point was that the compensation should be as close as possible to the damage actually caused. In any event, it was difficult to make a choice, which would depend on

the circumstances of the case, go beyond any codification and be a matter for judicial determination.

8. The Special Rapporteur had made a special analysis of the case of the expropriation of a going concern. In the context of the subject-matter, such an expropriation had to be unlawful. It was therefore not surprising that *lucrum cessans* would then be assessed on the basis of the principle of full compensation (*restitutio in integrum*) in the broad sense of the ruling handed down in the *Chorzów Factory* case (Merits) (*ibid.*, para. 72).

9. While the determination of compensation was governed by the general principle of full reparation for the damage, the same was not true of the assessment of *lucrum cessans* proper, in respect of which several methods could be applied, so that, as the Special Rapporteur pointed out, one arbitrator had ruled, apparently rightly, that that was “a question of fact to be evaluated by the arbitrator” (*ibid.*, para. 74). There could therefore be no question of including in the draft articles a provision relating to the method of assessing compensation, and in fact the Special Rapporteur had merely described the main methods of assessment used, in particular the discounted cash-flow method.

10. He had no particular comments to make on what the Special Rapporteur said with regard to the allocation of interest, the determination of the *dies a quo* and the *dies ad quem* and the rate of interest. He nevertheless thought that the allocation of interest was usually regarded as being intended to compensate for the additional damage suffered by the victim as a result of the period of time which elapsed between the occurrence of the injurious, i.e. wrongful, act and the final payment of compensation. In such a case, interest was allocated on the compensation as a whole without any distinction between *damnum emergens* and *lucrum cessans* and it was paid as of the date of the damage, the date of the claim or the date of the award. Not infrequently, such interest was calculated on the whole of the compensation assessed, including, in the event of unlawful expropriation, compensation for loss of profits, as in *Benvenuti et Bonfant v. People's Republic of the Congo* (1980). However, the Special Rapporteur seemed to place greater emphasis on the case of a claim regarding a sum of money, for example capital, and on the fact that, in such a case, interest was awarded in order to compensate the loss of earnings resulting from the non-availability of that capital. That was the case that was apparently dealt with in draft article 9. The Special Rapporteur therefore appeared to have opted, with regard to the *dies a quo*, for a different solution from the three points of departure for interest accepted in practice. He had to confess that he had some difficulty in understanding the scope of the wording proposed by the Special Rapporteur in that regard.

11. As to the rate of interest, he was inclined to agree with the opinion expressed by Subilia (*ibid.*, para. 97) that it could be useful to refer to the lending rate laid down annually by the World Bank, since that rate had the advantage of being accepted by practically all States. It should be noted, however, that the Special Rapporteur, apparently rightly, had not considered it

necessary to mention a given rate of interest in draft article 9.

12. Chapter III of the report dealt with satisfaction as a specific mode of reparation. In view of the moral and political nature of that form of reparation, the Special Rapporteur had carried out a scholarly and exhaustive analysis of legal writings, international case-law and diplomatic practice. The analysis showed that satisfaction was undoubtedly of an "exemplary", "punitive" and "vindictive" nature and that it was quite different from modes of compensatory reparation such as restitution and reparation by equivalent. To use the term repeatedly employed by the Special Rapporteur, satisfaction was of an "afflictive" or punitive nature. The word "afflictive" seemed to have been taken by the Special Rapporteur from Morelli (*ibid.*, para. 144 *in fine*). The meaning of that term was etymologically clear, but its use was somewhat doubtful. The term was habitually used in the French criminal-law expression *peines afflictives et infamantes* and meant, according to the Robert dictionary, a penalty which affected the criminal in his body and life (*qui frappe le criminel dans son corps, sa vie*). The afflictive nature was thus reflected in physical suffering or discomfort and, in that regard, could be applied to all penalties involving deprivation of freedom. An afflictive penalty could, however, apply only to a physical person. In the case under consideration, therefore, it would be inappropriate to use the word "afflictive". Although use of the word "afflictive" might be confusing for Roman-law jurists and the word "punitive" would be more than enough, he could agree that the term "afflictive" should be taken in the figurative sense and placed systematically in quotation marks. In any event, he agreed with the Special Rapporteur that satisfaction should be dealt with specifically in the part of the draft articles relating to the legal consequences arising out of an internationally wrongful act.

13. In chapter IV, the Special Rapporteur had carried out an equally well-documented and persuasive analysis of the need to include among the consequences of an internationally wrongful act guarantees of non-repetition of the act. Of the various types of guarantees that could be required, he had referred to explicit requests made by international bodies for the amendment of existing legislation or the adoption of new legislation, and, in his oral introduction, he had referred to the "Rainbow Warrior" case. In that connection, he had also mentioned the complaints procedure under the Optional Protocol to the International Covenant on Civil and Political Rights. In that case, however, what were involved were complaints by private individuals. A much more relevant example was provided by the procedure set forth in articles 26 to 34 of the Constitution of the International Labour Organisation and relating to complaints filed by one member State against another member State. That procedure involved the establishment of a commission of inquiry whose conclusions might be as binding as recommendations of the International Labour Conference itself and be aimed at the amendment of the legislation or practices complained of or the adoption of measures to remedy certain irregular situations. An example had been the

complaint lodged by France against the Government of Panama with regard to the application of certain maritime conventions. It was therefore entirely appropriate to assign guarantees of non-repetition an autonomous role in relation to other forms of reparation.

14. In chapter V, the Special Rapporteur considered the problem of attribution of fault to a State and explained his position in that regard. First of all, in part 1 of the draft articles, the Commission had not "excluded" fault from the constituent elements of an internationally wrongful act; in that connection, the Special Rapporteur cited article 31 (*Force majeure* and fortuitous event), which in his view contained an implicit reference to fault. It was difficult to agree unreservedly with that interpretation: *force majeure* and fortuitous event were concepts that presupposed the absence of any "fault" and also, in his own view, the absence of a violation of an obligation giving rise to responsibility. They might have a place within the system of "objective responsibility" based on an "internationally wrongful act". In that regard, the Special Rapporteur had undertaken a clear and concise analysis of the respective merits of the "fault theory" and the "objective theory" and had given an original interpretation of the attribution of conduct to a State, namely that it involved a simple operation carried out by a foreign-office lawyer or by an international judge called upon to interpret the law. On that point, the Special Rapporteur had apparently merely described the intellectual exercise normally engaged in by the person called upon to interpret the law in a particular case, noting the result of that exercise without questioning the basis of the responsibility in question. However, as pointed out in the study prepared by the Secretariat on "'Force majeure' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", the concept of "internationally wrongful act", with both its elements (subjective and objective), had been generally accepted as the point of departure for the rules of international law governing State responsibility for international wrongs both by those favouring the subjective fault theory and by those supporting the "objective theory".⁵ He believed that there was therefore no need at the current stage to consider whether and to what extent the element of fault should be taken into account in the definition of an internationally wrongful act. In his view, what the Commission should determine was the effect of the fault element on the forms and degrees of reparation. In that connection, the relevance of such an element to reparation was, as noted in the above-mentioned study, recognized by many writers, including those who favoured "objective" responsibility. The Special Rapporteur also cited some concrete and significant examples which attested to the fact that international jurisprudence took account, at least implicitly, of the effect on pecuniary compensation of the so-called "subjective" element of an internationally wrongful act.

⁵ *Yearbook ... 1978*, vol. II (Part One), p. 201, document A/CN.4/315, para. 511.

15. He fully endorsed the conclusion which had been drawn by the Special Rapporteur from the study of jurisprudence and diplomatic practice and which confirmed the views of many writers that the so-called “subjective” element represented by fault in a minor or major degree had played a significant role with regard to both the coming into play of satisfaction and the quality and number of the forms of satisfaction claimed (*ibid.*, para. 188).

16. It would also be worth answering the question posed by the Special Rapporteur (*ibid.*, para. 190) as to whether and to what extent fault on the part of a low-ranking State agent was, according to jurisprudence, a fault of the State itself or whether jurisprudence indicated that the responsibility of the State was predicated on a merely objective basis. Actually, however, the problem would seem to be of mainly theoretical interest in so far as the Commission chose, as he trusted it would and as the Special Rapporteur invited it to do, if only in the interests of the progressive development of international law, to take account of the so-called “subjective” element to some extent in the case both of pecuniary compensation and of the coming into play of satisfaction.

17. Turning to the proposed articles, he expressed his preference for alternative A of paragraph 1 of draft article 8 (Reparation by equivalent), since alternative B, which dealt both with the pre-existing situation not re-established by restitution in kind and also with any damage not covered by restitution in kind, was redundant. He had no objection to paragraph 2, but would have liked paragraph 3 to include a specific reference to the direct, normal and reasonable nature of loss of profits. Paragraph 4, which apparently completed the preceding paragraph on the requirement of a causal link, was actually concerned with an uninterrupted causal link. The Special Rapporteur therefore saw no need to refer to the concepts of normality and predictability, which might make the paragraph somewhat too general in scope. Paragraph 5 was mainly concerned with the negligence of the injured State. He would not express an opinion on the content of the concept of negligence, regarded by some as a form of subjective fault and by others as linked to non-compliance with an international obligation of vigilance, but wondered why the Special Rapporteur had not dealt in paragraph 5 with the aggravating circumstances of an internationally wrongful act, which could increase compensation.

18. Draft article 9 (Interest) dealt only with interest intended to compensate for loss of profits. Why had the Special Rapporteur decided not to include a more general provision whereby interest could accrue to compensate for further damage arising by virtue of the fact that there was a lapse of time between the wrongful act and the final settlement? In the restricted context of *lucrum cessans*, the *dies a quo* proposed by the Special Rapporteur in paragraph 1 seemed to differ from the three solutions referred to in the report (*ibid.*, paras. 82 *et seq.*) and regarded as those generally adopted in national and international practice. The formula proposed in paragraph 2 with regard to compound interest, which could remain valid in the context of a

general provision on interest, would be clearer if the second part of the sentence formed a separate subparagraph, reading: “The interest rate applied shall be the rate that is the most appropriate for ensuring full compensation.” It would be followed by a second subparagraph, reading: “Compound interest shall be awarded for that purpose.”

19. Given the many and varied forms of satisfaction, the list drawn up at the end of paragraph 1 of draft article 10 (Satisfaction and guarantees of non-repetition) should be purely indicative, with the word “including” being added after the words “adequate satisfaction”. Also, the form of satisfaction provided for in paragraph 3 should be the subject of a provision that would come immediately after paragraph 1.

20. Mr. CALERO RODRIGUES, commenting first on a point of terminology, noted that, in the very first paragraph of his second report (A/CN.4/425 and Add.1), the Special Rapporteur announced that he would deal with the “substantive consequences of an internationally unlawful act”. In his preliminary report (A/CN.4/416 and Add.1, para. 20), however, he had proposed an outline of work for part 2 of the draft containing a chapter II entitled “Legal consequences deriving from an international delict”, which would include a section 1 entitled “Substantive rights of the injured State . . .”. In the latter case, the word “substantive” seemed to have no other purpose than to distinguish those rights from “procedural” rights, in other words from “measures to which resort may be had in order to secure cessation . . .”, the subject of section 2. He did not know whether the word “substantive” was used in paragraph 1 of the second report with the same limited intent, but at least it called attention to a distinction that might be of some importance when the Commission entered into the detail of the consequences of an internationally wrongful act in part 2 of the draft articles.

21. All the consequences with which the Commission was dealing could be said to be legal consequences, since they were the result of the operation of legal rules. If the Commission went a little deeper, however, consequences that operated purely on the legal plane could be called legal consequences. The legal situation had to be redressed and the legal relationship restored. In some cases, however, the internationally wrongful act might cause material damage and a simple re-establishment of the pre-existing legal situation might not suffice to redress it. The obligations created in such cases could be referred to as substantive consequences, which differed from legal consequences *stricto sensu*.

22. The consequences of an internationally wrongful act as proposed by the Special Rapporteur comprised cessation, restitution in kind, reparation by equivalent, and satisfaction, including guarantees of non-repetition. The first consequence operated only on the legal plane and was a legal consequence *stricto sensu*. The second operated on both the legal and the material planes: it was therefore partly legal and partly substantive. The other two consequences were not designed to change the legal situation and operated on the material plane only in the case of reparation by equivalent and on the

moral plane in the case of satisfaction. That distinction should serve to dispel the doubts the Special Rapporteur seemed to entertain. In his preliminary report, he had noted that "restitution in kind does not always constitute necessarily, *in concreto*, the adequate, complete and self-sufficient form of reparation of an internationally wrongful act" (*ibid.*, para. 117). In other words, if restitution in kind was indispensable to redress the situation on the legal plane, it might not be effective outside that plane. That was why the Special Rapporteur stated in his second report that "reparation by equivalent, or pecuniary compensation, is the main and central remedy resorted to following an internationally wrongful act" (A/CN.4/425 and Add.1, para. 2). As a legal consequence *stricto sensu*, *restitutio* was irreplaceable; as a substantive consequence, reparation by equivalent might prove more effective.

23. The Special Rapporteur drew on many authorities in emphasizing the essentially compensatory function of reparation by equivalent. It could even be said that it should have an exclusively compensatory function. As stated in the second report, it should cover "the 'material' injury suffered by the offended State which has not already been covered and is not coverable by restitution in kind" (*ibid.*, para. 52). In that connection, he noted, with regard to the explanations concerning use of terms given by the Special Rapporteur in paragraph 3 and footnote 4 of the second report, that the Commission should use the word "damage" to refer to material or moral *préjudice* and the word "injury" to refer to legal *préjudice*. The question, however, was how to determine which damage should be compensated for. The two elements traditionally mentioned did not seem very useful. One was the distinction between direct and indirect damage which, though it had been used for a long time, raised more problems than it solved. The other was the concept of "predictability". The Special Rapporteur was inclined to accept that criterion, which, in his view, "prevails in judicial practice", and as a "clear example" of it he mentioned the *Portugese Colonies* case (Naulilaa incident) (*ibid.*, para. 38). That was a controversial case, however, as was apparent from the sources cited by the Special Rapporteur himself. In any event, predictability introduced an element of subjectivity which should be avoided. In fact, in summing up the causal-link criterion (*ibid.*, para. 42), the Special Rapporteur did not mention predictability. In the case of "concomitant causes", considered from the standpoint of compensation, only partial damages should be paid in view of their relative effectiveness.

24. Those concepts, which were inherent in the principle of compensation, were set forth in paragraphs 4 and 5 of draft article 8. While the drafting of those paragraphs might need some revision, he agreed with their substance, for they established the relationship between the State that committed a wrongful act and the State that suffered damage as a consequence of that act.

25. In its other paragraphs, article 8 was intended to indicate when reparation by equivalent intervened, what damage should be compensated for and what compensation should be paid. The first question was

dealt with in paragraph 1. The two alternatives proposed for that paragraph seemed to differ only in their wording. He preferred alternative A because it was shorter, but its wording could be improved.

26. Paragraph 2 of article 8 stated that pecuniary compensation should cover "any economically assessable damage to the injured State... including any moral damage sustained by the injured State's nationals". In saying that the damage to be covered should be "economically assessable", the provision was surely not trying to give instructions to courts on how to assess damage. It was simply stating the obvious but fundamental principle that, in order to be compensated for in pecuniary terms, damage had to be capable of being assessed in economic terms. But, in that case, what was the situation with regard to "moral damage"? In the report, the Special Rapporteur stated that "the practice and literature of international law show that moral (or non-patrimonial) losses caused to private parties by an internationally wrongful act are to be compensated for as an integral part of the principal damage suffered by the injured State" (*ibid.*, para. 9) and cited, *inter alia*, the "*Lusitania*" case (*ibid.*, para. 10) and the *Heirs of Jean Maninat* case (*ibid.*, para. 12). In his own view, however, those were extreme cases. More often, the tendency was to try to assess non-patrimonial damage in terms of its economic or material aspects or consequences, which could serve as a basis for calculating compensation. That was what had happened in the *Corfu Channel* case (*ibid.*, para. 57) and in the "*Lusitania*" case (*ibid.*, para. 56). In instances of death or physical injury, as in cases of detention, etc., it was relatively easy to assess in pecuniary terms the damage to be compensated for. It was, however, practically impossible to do so in cases of mental suffering, such as humiliation, shame or degradation. That did not mean that, in such cases, the injured person should not claim satisfaction (in the general sense indicated in paragraph 18 of the report); but treating such satisfaction as reparation by equivalent was not in keeping with the principle that reparation by equivalent was of an exclusively compensatory nature.

27. For that reason, he did not agree with the proposal in paragraph 2 of article 8 that pecuniary compensation should cover "any economically assessable damage... including any moral damage sustained by the injured State's nationals". The text should read either: "... any economically assessable damage to the injured State or to its nationals"; or "... any material damage to the injured State or to its nationals". The reference to "moral damage sustained by the injured State's nationals" should be transferred, in one form or another, to draft article 10, which dealt with satisfaction and referred to the possibility of "nominal or punitive damages" (para. 1). As the Special Rapporteur himself pointed out, citing several examples in support, "situations are not infrequent in international jurisprudence concerning moral damage to human beings where the arbitrators have expressly qualified the award of a sum covering such damage as 'satisfaction' rather than pecuniary compensation" (A/CN.4/425 and Add.1, para. 17). Thus, if the

reference to “moral damage sustained by the injured State’s nationals” were deleted from paragraph 2 of article 8, all that would be left would be the obligation to compensate for material or “economically assessable” damage, and that was the essential function of reparation by equivalent.

28. The concept of material damage nevertheless had to be developed further, and that was done in paragraph 3 of article 8 and in article 9. Paragraph 3 of article 8 dealt with the general question of *damnum emergens* and *lucrum cessans*. That question was dealt with masterfully in paragraphs 63 to 76 of the report, which did honour to the Special Rapporteur and the Commission. It was precisely on account of the high quality of that analysis that he did not feel entirely satisfied with paragraph 3 of article 8, which, although he could not say exactly what was wrong with it, left him with the feeling that something was missing.

29. Draft article 9 gave rise to doubts of a far more precise nature. The Special Rapporteur devoted a considerable part of his report to the question of interest. On the question itself there seemed to be little doubt. As the Special Rapporteur pointed out, “authors seem to agree that interest on the amount of compensation for the principal damage is due under international law not less stringently than under municipal law” (*ibid.*, para. 77); and he added that “International practice seems to be in support of awarding interest in addition to the principal amount of compensation” (*ibid.*, para. 80). Article 9 took that for granted in paragraph 1, but then went on to deal with two very controversial questions, that of the *dies a quo* and the *dies ad quem* of the interest and the problem of compound interest. After reviewing various decisions and doctrinal analyses, the Special Rapporteur came to the conclusion that the *dies a quo* should be the date of the damage and the *dies ad quem* the date on which compensation was actually paid (*ibid.*, paras. 92 and 94). While the *dies ad quem* was clearly indicated in paragraph 1 (b) of article 9, the definition of the *dies a quo* in paragraph 1 (a) was a good deal less clear.

30. As to compound interest, paragraph 2 of article 9 stated that it should be awarded “whenever necessary in order to ensure full compensation” and that “the interest rate shall be the one most suitable to achieve that result”. That formulation would be of little use to States or courts except as an indication that the possibility of including compound interest in an award was not excluded. In section A.3 of chapter II of the report (*ibid.*, paras. 26 *et seq.*), the Special Rapporteur reviewed the problems relating to the determination of rules of general international law regarding reparation by equivalent and the role which the Commission could play in the codification of such rules and in the progressive development of international law through the draft articles under consideration. His optimism could be shared, but with some caution. It could thus be asked whether the provisions on interest were not too detailed to be included in the draft, even if some of them—paragraph 2 of article 9 in particular—did not establish very clear rules. Paragraph 3 of article 8, with regard to which he had confessed to some embarrassment, might perhaps be recast in such a way as to

incorporate a reference to interest. In that case, article 9 could be dispensed with altogether.

31. In conclusion, he said that he would devote the remaining part of his analysis to draft article 10, on satisfaction and guarantees of non-repetition. He would continue his statement at a later meeting.

32. Mr. JACOVIDES said that, while the topic of State responsibility belonged to the category of classical international law and was firmly based on long practice and a wealth of judicial decisions, it had particular topical significance at the present time. It was therefore doubly important to examine the topic in earnest in order to complete its consideration as soon as possible.

33. He wished to make two points by way of general observations. The first was that, once the Commission had completed its work on the topic, many of the problems encountered in the preparation of the draft Code of Crimes against the Peace and Security of Mankind and the draft articles on international liability of injurious consequences arising out of acts not prohibited by international law would have been solved or would be seen in a different light. That was yet another reason for proceeding at a more rapid pace with the study now in progress.

34. The second point was that the days were gone when State responsibility had concentrated on injury done to aliens and had catered to the needs of a small number of powerful developed States, often at the expense of weaker and less developed States. With the development and acceptance of the concept of *ius cogens* in the 1969 Vienna Convention on the Law of Treaties and the existence of hierarchically superior rules as set out in the Charter of the United Nations, the topic of State responsibility now had a much broader foundation. Moreover, the ICJ also recognized that there were obligations *erga omnes* and that the interests of the international community as a whole needed to be duly taken into consideration. The present topic was thus an illustration of the progressive development of international law.

35. The Commission should ensure that the expectations of the international community and, in particular, of new States which had come into existence after the classical rules of international law on the topic had been formulated were not disappointed. It had to keep pace with contemporary concepts in international law, such as that of international crimes, as well as with current developments on the international scene, and should not be slow in recognizing the opportunities provided by recent positive shifts in the attitudes of the major Powers, which now accepted the concept of compulsory third-party dispute settlement. That effective and expeditious procedure, which, for reasons of political reality, had in the past eluded the international law community in such areas as the law of treaties and the law of the sea, was now within reach. The Commission should aim at including such a system in part 3 of the draft articles under consideration, dealing with implementation and the settlement of disputes, or even in the body of the draft convention itself.

36. To the earlier draft articles on cessation of an internationally wrongful act (art. 6) and restitution in

kind (art. 7)—and, there, he entirely agreed with the idea that restoration of a situation through restitution in kind should be given priority wherever restitution was practical and legally possible or, indeed, indispensable where there had been a violation of *jus cogens*—the Special Rapporteur had, in his second report (A/CN.4/425 and Add.1), added three draft articles accompanied by a wealth of material and an excellent analysis of that material.

37. Of the alternative texts proposed for paragraph 1 of draft article 8, on reparation by equivalent, he would opt for alternative A. The issues involved in the proposed articles had given rise to an interesting and, in some respects, lively debate. Mr. Graefrath (2168th meeting) had thus given some thought-provoking facts and figures to illustrate the problems involved in the use of the words “economically assessable damage” in paragraph 2 of article 8. He had also made a cogent case against incorporating in draft article 10 the concept of “punitive damages”, which, although based on past practice, might not have a place in contemporary law. That example illustrated the comment he had made earlier about the relationship between the draft Code of Crimes against the Peace and Security of Mankind and State responsibility. The element of punishment and, consequently, of punitive damages in the case of an international crime would come more naturally under the draft code than under reparation or satisfaction as dealt with in the context of State responsibility.

38. In conclusion, he reserved the right to make additional comments at a later stage in the debate.

The meeting rose at 11.20 a.m. to enable the Drafting Committee to meet.

2170th MEETING

Thursday, 7 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

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. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (continued) (A/CN.4/416 and Add.1,¹ A/CN.4/425 and Add.1,² A/CN.4/L.443, sect. C)

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

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

[Agenda item 3]

*Part 2 of the draft articles*³

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

ARTICLE 10 (Satisfaction and guarantees of non-repetition)⁴ (continued)

1. Mr. TOMUSCHAT said that the Special Rapporteur's analysis in his excellent second report (A/CN.4/425 and Add.1) was largely based on the precedents of arbitral awards as from the beginning of the nineteenth century. The report was almost exhaustive inasmuch as some very little known cases had been unearthed. In that strength, however, lay a weakness: the subject-matter of most of the arbitral proceedings in question consisted of claims in respect of alleged damage to the property of aliens or alleged bodily harm or loss of life affecting aliens. Thus, in terms of private law, the bulk of the cases referred to in the report were cases of tort. The report contained very little material on different situations, in which there had been simply a violation of a rule of international law not directly related to harm done to a concrete good. An example would be the conclusion of a disarmament treaty between States A and B, following which State A scrapped, among other equipment, 1,000 tanks. It then discovered that State B had failed to keep its disarmament promises. Thus State A's legally justified hopes of savings on armaments were founded. It was not certain how that situation, where the aggrieved party had caused the damage itself, was to be assessed in the light of the draft articles. Certainly, injured State A could suspend or terminate the treaty or resort to reprisals, but the question was whether it had a right to financial compensation. Practice did not seem to support such a right.

2. One could imagine another example in which two States agreed to merge, but, at the last moment, before actual implementation of the plan, one of them decided to remain a separate entity. Could the other, which had hoped for a substantial increase in gross national product, raise a claim for the resultant loss? It was

³ 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook* . . . 1989, vol. II (Part Two), pp. 72-73, paras. 229-230.

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.

⁴ For the texts, see 2168th meeting, para. 2.

necessary to be aware of the difference between typical tort cases and cases in which the aggrieved party pursued an expectation. A tort case involved interference with goods, rights or interests of the injured party. An expectation was of a different nature. The aggrieved party claimed compensation for *lucrum cessans* and wished to be placed in as good a financial position as that in which it would have been if the conventional instrument concerned had been duly performed. That was conceivable only in the case of a breach of a treaty provision. He did not have an immediate answer to his question and would only note that all the cases referred to by the Special Rapporteur in support of draft article 8 were tort cases. There was not a single decision confirming that the expectation interest was to be regarded as part and parcel of the damage. Unfortunately, by virtue of articles 1 and 3 of part 1 of the draft, there was only one category of internationally wrongful acts and no distinction was drawn between tort claims and contractual claims.

3. In the European Community, no State had ever made a claim for financial compensation in instances where another member State had breached its obligations. That had not even happened when France, some 10 years previously, had prohibited imports of British mutton. It was not even clear whether in such cases the Court of Justice of the Community would have jurisdiction to adjudicate such a claim. Again, in the GATT system, none of the panels which dealt with disputes between the contracting parties had ever awarded financial damages, although the General Agreement protected economic rights and thereby created economic expectations.

4. The rules proposed by the Special Rapporteur reflected perfectly well the legal position governing liability in tort but, outside that specific field, other considerations might prevail. Of course, diplomatic practice concerning typical inter-State relationships was much more difficult to pinpoint, yet he suspected that, apart from liability in tort, financial liability played only a limited role. As regards damage caused by armed conflict, it had never been considered possible to burden the defeated State with all the costs entailed in the work of reconstruction. That example showed that the rules devised by the Special Rapporteur were well suited to individual cases of harm to property or to persons, but did not provide general answers.

5. He had doubts about the key concept of the "injured State" in paragraphs 1 and 2 of draft article 8. According to article 5 of part 2 of the draft already provisionally adopted by the Commission, there were often many injured States, but not all of them could have the right to financial compensation. A practical difficulty would arise where a person had suffered damage as a result of a violation of a human-rights treaty. Every other State party was then deemed to have been injured. But to what State could the economically assessable damage be imputed? If it were maintained that the damage caused to a national of a State was always damage to the State itself, the right to claim compensation would be denied because it was normally the home State which violated the rights of its own national. He nevertheless agreed that moral

damage suffered by a national of the injured State should give rise to a right to financial compensation, although that rule should be modified to reflect the one contained in paragraph 3 of draft article 10. Individuals could not claim compensation in all cases of moral damage. The European Court of Human Rights had granted financial compensation only in special cases, such as those in which, as a result of the violation, the victim had lived in prolonged and distressing uncertainty and anxiety. Normally, the Court considered that a finding that the requirements of the European Convention on Human Rights had not been complied with constituted adequate and just satisfaction.

6. With regard to paragraph 1 of draft article 8, alternative A appeared to suggest that the status quo should be restored, whereas alternative B left room for a hypothetical assessment of a course of events had the internationally wrongful act not been committed. In both alternatives, it was necessary to determine what was meant by "damage". As he saw it, "damage" primarily meant the loss of rights, goods and concrete opportunities as a result of the act of the author State. The question was, however, whether or not to include, in the case of treaty violations, any financial drawback revealed by a hypothetical comparison of the real situation and the one which would have existed if the relevant treaty obligation had been properly discharged. In that respect, he did not believe that paragraph 2 provided the requisite solution. What was "economically assessable damage"? In particular, did it include the expectation of the aggrieved party?

7. Paragraph 3 was manifestly a tort provision. Where an object had been destroyed or a person injured, compensation for *lucrum cessans* could be justified, covering, for example, loss of earnings. In the event of damage to property, however, the chances of making a profit would normally be reflected in the market price of goods. He noted that English courts, for example, were reluctant to take into account loss of profits as an additional factor over and above the market price of the goods involved.

8. The inclusion in paragraph 4 of a rule on the necessary causal link was welcome. Of the many solutions suggested by national schools of thought, however, the Special Rapporteur had opted for the theory of an "uninterrupted causal link". Personally, he hesitated to endorse that formulation because it was devoid of substance and did not provide concrete answers. There could be occasional instances in which a causal link was truly interrupted, but other criteria were normally relied upon. The consequences were too remote or too unpredictable to warrant imputation of the damage to the potential author. Accordingly, reference to an uninterrupted chain of events might satisfy academic needs, but it would not be helpful in practice.

9. Paragraph 5 of article 8 would stand better as a separate article. Essentially, he could agree with the rule it set out, namely that compensation would be reduced in cases where the victim had contributed to the emergence of the damage. The rule corresponded to established principles of private law from time

immemorial and no different solution could be applicable in public international law.

10. As to draft article 9, the Special Rapporteur had refrained from laying down a rule on the actual obligation to pay interest, and had simply specified the point in time from which it should come into operation. The article thus dealt with only a secondary problem and it should state clearly when interest would be due to the aggrieved party. Paragraph 1 stated that interest could be "due for loss of profits", but that was only one instance of injury. There was no reason why interest should not be payable where loss of property had been caused and where the aggrieved State confined its claim to compensation for loss of substance. He agreed that interest should run until the day of effective payment.

11. It was gratifying that the Special Rapporteur had proposed a specific rule on satisfaction, but the scope of draft article 10 should be more clearly defined. The law should indeed impose specific secondary obligations on the author State for moral damage, yet moral damage was more than bureaucratic negligence: it presupposed a certain degree of gravity. Examples could be given—such as the arrest of a diplomat—in which the honour or dignity of a foreign State was encroached upon. Nevertheless, it was a totally different matter when, for instance, a watercourse State failed to inform another of planned works, thereby violating the obligations set forth in article 12 of the draft articles on the law of the non-navigational uses of international watercourses. The Special Rapporteur apparently agreed with that approach by mentioning "moral injury" alongside "legal injury" in draft article 10, but the consequences suggested in paragraph 1, namely apologies, damages, and so on, would automatically apply in all cases of a breach of an international commitment. Such a proposition was exaggerated. Because of the great increase in the volume of international co-operation agreements, breaches often constituted a mere bureaucratic phenomenon. In most cases, it was enough for the aggrieved State to remind the other State of its obligation. The question of punishment of responsible agents or safeguards against repetition did not arise. The draft articles should display some degree of moderation with respect to petty violations of that kind.

12. He categorically rejected the notion of "punitive damages" contained in paragraph 1 of article 10. Actual loss or actual damage could always be assessed; reference to the relevant economic figures was all that was necessary. Punitive damages, on the other hand, automatically called for third-party adjudication. No State would voluntarily agree to be punished. Punitive damages, apart from being contrary to the principle of the sovereign equality of States, were also a practical impossibility. Accordingly, all references to punitive damages should be deleted. The proper place for notions of punishment was in the draft Code of Crimes against the Peace and Security of Mankind. The draft code, however, laid down penalties only against individuals.

13. He agreed with members of the Commission who had stressed that assurances or safeguards against

repetition could not be confined to instances of non-material damage. That remedy was also needed, and perhaps even more so, when there was a threat that acts which had caused tangible damage might be repeated. It should also be made clear that material damage and non-material damage were not mutually exclusive. Thus if a mob, which the local police deliberately chose not to contain, set fire to the premises of a foreign embassy, the destruction of the building amounted to material as well as non-material damage. The existence of two separate articles appeared to indicate at first glance that the scope of the two provisions was separated by a clear-cut dividing line.

14. He fully endorsed paragraph 3 of article 10, which reflected the rulings of the International Court of Justice and the European Court of Human Rights. The European Court had ruled that its findings—to the effect that a violation had occurred—played a major role as the appropriate remedy. The Court was extremely reluctant to grant financial compensation in cases of human-rights violations and he knew of only one case in which it had been awarded generously, namely the case of a person who had been deported illegally, in disregard of lawful procedures of extradition.⁵

15. He was opposed to paragraph 4. There had, of course, been cases of humiliating demands made on the author State and the Special Rapporteur's reference to the *Boxer* case (A/CN.4/425 and Add.1, para. 124) was relevant. There was, however, no need to mention the matter in article 10: humiliation had no place in a world of sovereign States that were equal. At most, the matter could be mentioned in the commentary.

16. In conclusion, notwithstanding his partly critical observations, he wished to emphasize his great appreciation for the Special Rapporteur's well-documented report.

The meeting rose at 10.45 a.m. to enable the Drafting Committee to meet.

⁵ See the judgment of 2 December 1987 of the European Court of Human Rights in the *Bozano* case, *Publications of the European Court of Human Rights, Series A: Judgments and Decisions*, vol. 124, p. 42, at p. 48, para. 10.

2171st MEETING

Friday, 8 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (*continued*) (A/CN.4/416 and Add.1,¹ A/CN.4/425 and Add.1,² A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles³

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) and

ARTICLE 10 (Satisfaction and guarantees of non-repetition)⁴ (*continued*)

1. Mr. OGISO congratulated the Special Rapporteur on his masterly second report (A/CN.4/425 and Add.1) on the complex topic of State responsibility.

2. The various problems which might arise in the application of the rules set forth in draft articles 8 to 10 should be carefully considered with a view to facilitating the peaceful settlement of a dispute between an author State and an injured State. As he had stated at the Commission's thirty-seventh session with regard to draft article 6 as submitted by the previous Special Rapporteur, there were many examples of *ex gratia*, lump-sum settlements in which reparation was not necessarily based on recognition by the author State of the existence of a wrongful act and which therefore did not take the form of payment of compensation corresponding to "the value which a re-establishment of the situation as it existed before the breach would bear".⁵ That had been true, for example, in a considerable number of cases relating to damage caused during wartime or damage caused accidentally by warships or military aircraft to merchant ships or commercial aircraft in which the States concerned had agreed on such forms of settlement without recognizing their responsibility as the authors of the damage. Such settlements, which were often classified as "political" or extralegal, fell completely outside the topic of State responsibility.

3. That seemed to have been the approach adopted in part 2 of the draft, which made no mention of such forms of settlement and according to which only legal rules and principles should be included in the draft articles. He wondered whether that was the right approach. Having regard to State practice and to the fact that there were many unsettled cases of potential or alleged internationally wrongful acts causing harm, he considered that the draft articles on reparation should be formulated in such a way that, at least, they did not obstruct or interfere with the attempts of the alleged author State and the injured State to arrive at a peaceful settlement by means of an *ex gratia*, lump-sum settlement or of any other type of political settlement. Accordingly, he considered that an article should be included in the draft stipulating expressly that the forms of reparation provided for under articles 7 to 10 should apply without prejudice to any other form of settlement based on an agreement between the alleged author State and the injured State. Neither article 2 nor article 3 of part 2 as provisionally adopted by the Commission referred to that type of settlement.

4. He agreed with Mr. Graefrath (2168th meeting) and Mr. Tomuschat (2170th meeting) that problems could arise in determining which injured State, as defined in article 5 of part 2, would be entitled to claim which form of reparation, as provided for in draft articles 7, 8 and 10. As a general rule, reparation by equivalent under draft article 8 could be claimed only by the directly injured State. A similar problem might also arise in respect, for instance, of a declaratory judgment of an international tribunal under draft article 10, paragraph 3, bearing in mind that the ICJ, in its 1966 judgment in the *South West Africa* case,⁶ had taken a negative stance with regard to an *actio popularis*, whereas article 5 seemed to be based on the existence in international law of obligations *erga omnes*, as had been suggested in the 1970 judgment of the ICJ in the *Barcelona Traction* case.⁷ The relationship between article 5, on the one hand, and articles 7 to 10, on the other, therefore required careful consideration by the Commission.

5. Having made those general remarks, he would comment separately on draft articles 8 to 10 submitted by the Special Rapporteur.

6. Two alternatives were proposed for paragraph 1 of draft article 8. Alternative A, in which the Special Rapporteur defined the damage that should be covered by reparation by equivalent by applying the so-called *Chorzów* principle, read: "The injured State is entitled to claim . . . pecuniary compensation . . . in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed." Not being of English mother tongue, he had some difficulty in understanding the meaning of the words "in the measure". If, as he assumed, they were more or less equivalent to the words "to the extent", there was still uncertainty as to the range of damage to be compensated for. That uncertainty derived, in his view, from

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

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

³ 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

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.

⁴ For the texts, see 2168th meeting, para. 2.

⁵ *Yearbook . . . 1985*, vol. I, pp. 122-123, 1896th meeting, para. 8.

⁶ *South West Africa, Second Phase*, Judgment of 18 July 1966, *I.C.J. Reports 1966*, p. 6.

⁷ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.

the phrase "the situation that would exist if the wrongful act had not been committed", because the situation to be re-established was not clearly specified and might not lend itself to application of the *Chorzów* principle. Would the injured State be justified in claiming increased compensation because the agreed compensation would not suffice to "re-establish the situation that would exist if the wrongful act had not been committed"? To illustrate his point, he gave the following example. Supposing that State A bombed and destroyed a dam in State B by mistake and that both States agreed on the amount of compensation State A should pay for that internationally wrongful act, the amount being calculated on the basis of the expected cost of rebuilding the dam; and supposing further that, after the agreement was signed but before the work was completed, flooding caused severe damage in State B, could State B invoke alternative A, in particular the words "the situation that would exist", to claim increased compensation? He assumed that alternative A was designed to re-establish the situation that "would" exist at the time of the agreement if the wrongful act had not been committed and that, in that case, the claim by State B would not be justified, having regard in particular to the fact that there was no "uninterrupted causal link" as required under paragraph 4. Alternative A was not clear on that point, however.

7. Alternative B, which also contained the phrase "the situation that would exist if the internationally wrongful act had not been committed", was in addition ambiguous on the question of the point or stage at which the injured State was entitled to claim pecuniary compensation and made such a claim subject to the condition: "If and in the measure in which the situation that would exist if the internationally wrongful act had not been committed is not re-established by restitution in kind...". Did that mean that the injured State could exercise the right to claim pecuniary compensation only after it had been established, by agreement, that restitution in kind was impossible? Or did it mean that the injured State could claim pecuniary compensation if and to the extent that the re-establishment of the situation that would exist if the internationally wrongful act had not been committed was deemed to be materially impossible? If the former interpretation was correct, the injured State would be prevented from making a timely claim for pecuniary compensation, and that would be contrary to the objective of facilitating a practical solution to disputes arising out of internationally wrongful acts. It seemed, despite the reference to "the provisions of article 7" that the problem could not be solved.

8. With regard to paragraph 2 of article 8, he said that he agreed with those members of the Commission who considered that the expression "economically assessable" could pose a problem, for the question could arise, first, whether all damage was "economically assessable" and, secondly, how the assessment was to be made. He would like the paragraph to provide expressly that the assessment of the damage, if not agreed between the parties, should be referred immediately for third-party settlement. That would help to facilitate practical solutions to disputes.

9. He supported paragraph 3 because of its concise reference to the principle of compensation for loss of profits (*lucrum cessans*). In the absence of detailed rules of international law on the matter, however, he believed that the formulation of more specific provisions on the issue would not serve the purpose of the draft articles.

10. Commenting briefly on draft article 9, concerning interest, which, according to the Special Rapporteur, was "obviously a part of" *lucrum cessans* (A/CN.4/425 and Add.1, para. 78), he said that, while he appreciated the Special Rapporteur's efforts to discern rules of international law on that complex issue and to contribute to the progressive development of international law in the area, he believed that the Commission should refrain from formulating too detailed rules on such issues as the rate of interest and compound interest, on which international law was not clear.

11. With regard to paragraph 1 of draft article 10, he said that, in addition to the point concerning the meaning of the words "in the measure" which he had raised in connection with article 8, he would like to have clarifications concerning the phrase "moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation" and concerning its legal consequences as provided for in that paragraph. According to the explanations given by the Special Rapporteur in his report, "the 'moral' damage to the State so described is in fact distinct... in particular, from the 'private' moral damage to nationals or agents of the State" and, furthermore, such "moral damage to the State" notably consisted "on the one hand, in the infringement of the State's right *per se* and, on the other, in the injury to the State's dignity, honour or prestige" (*ibid.*, para. 14). Moreover, the Special Rapporteur characterized the first kind of injury as "legal", since it was an effect of any infringement of an international obligation. In that connection, he would like to have clarifications on two points. First, although "private" moral damage to agents of the State was distinct from moral damage to the State, were certain kinds of "private" moral damage, such as insults addressed to high-ranking agents of a State, assimilated in principle to "moral damage to the State"? Secondly, if legal damage was such damage as was an "effect of any infringement of an international obligation", could it not be said that almost all internationally wrongful acts would cause "legal" injury to the other State or States, even where physical injury was caused to nationals of the State or States concerned, and that, consequently, in all those cases the author State would be under an obligation to provide the injured State with adequate satisfaction in one of the forms or any combination thereof prescribed in paragraph 1? That might not be what the Special Rapporteur had had in mind. According to State practice, a State which caused "moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation" was not always under an obligation to give satisfaction to the injured State in the forms provided for in paragraph 1. In that connection, he wondered whether the Special Rapporteur considered that it was necessary to define the words "moral or legal injury" in the article itself.

12. Still with regard to paragraph 1, although, in the report (*ibid.*, para. 144), the Special Rapporteur described punitive damages as a kind of “self-inflicted” sanction, he wished to associate himself with the negative views expressed in that regard by certain members.

13. Lastly, since paragraph 1 referred to “any combination” of forms of satisfaction, it might also be advisable to refer in the draft articles to the possibility of a combination of reparation by equivalent and some form of satisfaction or guarantees of non-repetition.

14. He agreed with the idea expressed in paragraph 4, which provided that “In no case shall a claim for satisfaction include humiliating demands on the State which has committed the wrongful act...”, since humiliating demands were a source of new friction and prevented the parties concerned from reaching an amicable settlement. He considered, however, that the practical problems which might arise in the application of that provision should be borne in mind. Who, for example, would be empowered to judge whether a particular claim was humiliating, since the word “humiliating” was highly subjective? He therefore joined with previous speakers in recommending that the provision be deleted.

15. Mr. NJENGA expressed his appreciation to the Special Rapporteur for his second report (A/CN.4/425 and Add.1), which contained a wealth of case-law and *opinio juris* on the issues of compensation or reparation by equivalent, satisfaction and other forms of reparation. It was, however, a matter of regret that the English mimeographed version of the report contained lengthy quotations from decisions and publications that had been kept in the original language, thereby causing serious problems for those who did not master the language in question. It was to be hoped that, in future, such quotations would be translated.

16. The Special Rapporteur had managed in his report to reflect faithfully the customary international law in the matter, while at the same time raising some issues in the context of contemporary international law. In his systematic and logical approach, the Special Rapporteur had followed in the footsteps of his predecessors, who had contributed immensely to the work of the Commission on the topic. The great respect enjoyed by that work had recently been demonstrated in the international arbitral award handed down on 30 April 1990 in the “*Rainbow Warrior*” case,⁸ in which both France and New Zealand as parties and the arbitral tribunal itself had relied on it as representing the customary international law.

17. The point of departure of the law in the matter had been aptly summarized by the PCIJ in the following fundamental principle which it had enunciated in 1927 in the *Chorzów Factory* case (Jurisdiction):

... It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention ...⁹

⁸ See 2168th meeting, footnote 4.

⁹ *P.C.I.J., Series A, No. 9 (ibid., footnote 5)*, p. 21.

The same principle had been reiterated by the ICJ in 1950 in its advisory opinion on *Interpretation of Peace Treaties* (Second Phase), as follows:

... it is clear that refusal to fulfil a treaty obligation involves international responsibility ...¹⁰

18. The Special Rapporteur had referred to many cases in which that principle had been applied and had extensively analysed the opinions of learned authors, all of whom tended to uphold it. He did not think that the fact that the overwhelming majority of those cases dealt with material damage to property or injury to persons and therefore with situations relating to contracts or tortious liability in any way vitiated the general rule that the breach of an engagement in international law triggered the obligation to make reparation, whether such breach resulted in material damage to the State or its nationals or in what had been referred to as “moral”, non-material damage to the State. According to the Special Rapporteur, the latter damage consisted “on the one hand, in the infringement of the State’s right *per se* and, on the other, in the injury to the State’s dignity, honour or prestige” (*ibid.*, para. 14). The predominance of cases involving material damage arising out of a wrongful act was not, in his view, so much the result of the fact that “moral” damage to the State did not require reparation as of the fact that such damage was not so amenable to arbitration or judicial proceedings for compensation. It did, however, lend itself to the particular form of remedy which the Special Rapporteur termed “satisfaction”. He therefore did not agree with Mr. Tomuschat (2170th meeting) that there had been no cases involving “moral” injury to the interests of a State. Moral damage had been involved in the “*Rainbow Warrior*” case relating to the breach of the 1986 agreement between France and New Zealand under which the two criminals who had been involved in the bombing of the Greenpeace International ship were to serve their sentence on the island of Hao, under French jurisdiction, but had been surreptitiously and prematurely repatriated from that island by France. The arbitral tribunal in that case had stated:

... the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary law of State responsibility.

The reason is that the general principles of international law concerning State responsibility are equally applicable in the case of breach of a treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and, consequently, to the duty of reparation. ...¹¹

19. It was clear that the nature and extent of the reparation—whether it was reparation for material or moral damage, contractual or tortious, and whether involving injury to the State directly or to individuals—would vary depending on the extent of the damage in question and the culpability of the author or respon-

¹⁰ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion of 18 July 1950, *I.C.J. Reports 1950*, p. 221, at p. 228.

¹¹ *International Law Reports*, vol. 82 (see 2168th meeting, footnote 4), p. 551, para. 75.

sible State. Accordingly, most of the cases cited in the report could be considered only as examples, since circumstances could be infinitely variable.

20. He agreed with the Special Rapporteur that reparation by equivalent was governed by the general principle that

the result of reparation in a broad sense—namely of any of the forms of reparation or a combination thereof—should be the “wiping out”, to use the dictum of the *Chorzów Factory* case (Merits), of “all the consequences of the illegal act” in such a manner and measure as to establish or re-establish, in favour of the injured party, “the situation which would, in all probability, have existed if that act had not been committed” (A/CN.4/425 and Add.1, para. 21).

21. He also fully shared the view expressed in the “*Lusitania*” case that punitive and exemplary damages, which were common in internal law, were not applicable in international law because “the fundamental concept of ‘damages’ is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong” (*ibid.*, para. 24). It was in that context that the concept of “direct” and “indirect” damage became irrelevant so long as the damage could be attributed to the wrongful act and was not so remote as to have been totally unforeseen. As stated in administrative decision No. II of the United States-German Mixed Claims Commission of 1 November 1923: “It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany’s act and the loss complained of.” (*Ibid.*, para. 36.)

22. The thorough analysis which the Special Rapporteur had carried out thus presented sufficient authority for the views he expressed as to the way in which the causal link criterion should operate for the purpose of compensation for damage (*ibid.*, para. 42). The “uninterrupted causal link” which formed the basis of draft article 8, paragraph 4, seemed to be taken from the above-mentioned administrative decision No. II of the United States-German Mixed Claims Commission (*ibid.*, para. 39) and from the *Portuguese Colonies* case (Naulilaa incident) (*ibid.*, para. 38), in which the invasion by Germany of the Portuguese colonies had led to a revolt by the indigenous population which had been held to be a predictable event. It should, however, be emphasized that the rule of a direct and uninterrupted causal link had to be applied by the tribunal or other third-party mechanism to exclude damage which, though causally connected with the internationally wrongful act, was too remote in the causal chain or in time or totally unpredictable. He was not at all certain that that point was properly reflected in paragraph 4 of article 8.

23. He nevertheless supported paragraph 5, which correctly reflected the universally accepted principles of internal law relating to the contributory negligence of the injured State or any other circumstance foreign to the author State that had contributed to the occurrence of the internationally wrongful act, as well as to the abatement of damages to the extent of the parties’ share of the blame for the injury. The paragraph was in conformity with the general principle that the purpose of reparation was, to the extent possible, *restitutio in integrum*, and not retribution.

24. As to the nature of damage or the scope of reparation by equivalent, he fully concurred with the Special Rapporteur that pecuniary compensation should cover “material” damage suffered by the offended State which had not already been and could not be covered by restitution in kind (*ibid.*, para. 52). That would include both direct damage caused to the territory of the State or to its property, including all its property abroad, and damage caused to the State through the persons, physical or juridical, of its nationals or agents. Whether such damage was referred to as “direct” when caused to the State or as “indirect” when caused to its nationals did not seem very important. The authorities considered by the Special Rapporteur—the “*Lusitania*” case, the *Corfu Channel* case and the *William McNeil* case (*ibid.*, paras. 56-58)—all demonstrated conclusively that such damage, whether “material” or “moral”, could give rise to pecuniary compensation.

25. It was, however, difficult to establish whether there was a uniform rule providing for recovery of *lucrum cessans*. He believed that the authorities cited in the report did not justify such compensation, except in certain limited circumstances. As the arbitrator had stated in the *Shufeldt* case involving a claim brought by a United States citizen whose property had been expropriated in Guatemala:

The *damnum emergens* is always recoverable, but the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative.

... this is essentially a case where such profits are the direct fruit of the contract and may reasonably be supposed to have been in the contemplation of both parties as the probable result of a breach of it. (*Ibid.*, para. 66.)

26. Each case should therefore be considered on its own merits. He believed that damages for expropriation, for example—whether wrongful or not—should be based on adequate compensation for the property expropriated and not on speculative profit, the award of which could be considered as a punitive measure going beyond the scope of the topic. He therefore had grave doubts concerning paragraph 3 of draft article 8, reading: “Compensation under the present article includes any profits the loss of which derives from the internationally wrongful act.” It should not be forgotten that, because of a variety of unforeseen circumstances, there was always the risk that expected profits would not materialize; moreover, the possibility of a loss and even of bankruptcy could never be ruled out. If provision was to be made for compensation for *lucrum cessans*, what would happen in the case of an actual loss? The question of interest, to which he would refer later, was, however, a different problem.

27. With regard to paragraph 1 of article 8, he preferred alternative A, which was clearer and framed in a more positive way than alternative B. Unless the Special Rapporteur had a particular reason for preferring alternative B, he believed that the Commission could concentrate at the appropriate time on alternative A, perhaps redrafting it along the lines suggested by Mr. Ogiso.

28. On the basis of the authorities cited by the Special Rapporteur, he was convinced that reparation designed

“to re-establish the situation that would exist if the wrongful act had not been committed” should necessarily include the award of interest, although he did not think that interest could be granted to compensate for loss of profit, as the Special Rapporteur appeared to suggest in the report (*ibid.*, para. 78). Nevertheless, he admitted that “The awarding of interest seems to be the most frequently used method for compensating the type of *lucrum cessans* stemming from the temporary non-availability of capital” (*ibid.*). Whether interest should be paid from the date of the wrongful act, from that of the claim or from that of the award did not seem to be firmly established by judicial practice, since all factors had to be taken into account, including the vigilance or laxity of the claimant. On balance, however, where there were no other considerations to be taken into account, it seemed logical to agree with the Special Rapporteur and with Brownlie that “In the absence of special provision in the *compromis* the general principle would seem to be that, as a corollary of the concepts of compensation and *restitutio in integrum*, the *dies a quo* is the date of the commission of the wrong” (*ibid.*, para. 92). It also seemed logical that interest should cease to run on the date on which compensation was actually paid.

29. It was not generally possible to set a uniform rate of interest for all claims, since decisions in that regard tended to vary. There was a great deal to be said, however, for the reasonable suggestion by Subilia (*ibid.*, para. 97) that it could be useful to refer to the lending rate laid down annually by the World Bank, particularly in cases of damage caused directly to a State without the intervention of private individuals.

30. He did not believe that a general case could be made for compound interest, except perhaps in very exceptional circumstances when that was the only way to achieve full compensation. That appeared to be the only conclusion to be drawn from the *Norwegian Ship-owners' Claims* and *British Claims in the Spanish Zone of Morocco* cases referred to in the report (*ibid.*, paras. 98 and 100-101).

31. Unfortunately, draft article 9 dealt only partially with the problem of interest: it referred only to the date from which it was payable and the date when it ceased to be payable and merely touched on the complex issue of compound interest. He believed the article should be redrafted to specify the circumstances in which interest was payable and the exceptional circumstances in which the award of compound interest should be considered.

32. Referring to chapter III of the report, on satisfaction, he said that to the extent that reference was being made to attacks on diplomatic agents, diplomatic premises or State property by private individuals, agents of another State or uncontrolled mobs, two problems arose: that of material damage to the State concerned; and that of injury to what had been described as the State's dignity, honour or prestige. The first case involved the same principles as those dealt with in regard to *restitutio in integrum*, and pecuniary compensation was clearly called for. In the second case, satisfaction could take many forms, such as expression

of regrets, apologies, payment of symbolic amounts or punitive damages, and punishment of the perpetrators.

33. The question was whether such satisfaction could take the form of punitive or humiliating demands. The Special Rapporteur referred to many cases of humiliating conditions imposed by the then great Powers upon other States on which they had imperial or colonial designs, such as the case of the Boxer uprising (*ibid.*, para. 124), and described a practice that would be totally unacceptable today. Other forms of satisfaction which must now be considered outmoded and unacceptable included saluting the flag and expiatory missions.

34. The arbitral tribunal in the “*Rainbow Warrior*” case had found a more modern form of satisfaction. In paragraph 8 of its decision, it had stated that it

declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand;¹²

and it had gone on to say, in paragraph 9, that

in the light of the above decisions, [it] recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries, and that the Government of the French Republic make an initial contribution equivalent to \$US 2 million to that fund.¹³

In many ways, that decision indicated the proper scope of punitive damages for a deliberate breach of international law. As the Special Rapporteur rightly stated in the report: “The punitive or afflictive nature of satisfaction is not in contrast with the sovereign equality of the States involved.” (*Ibid.*, para. 144.) That was particularly true when satisfaction was awarded through third-party machinery, as in the “*Rainbow Warrior*” case.

35. It would be entirely contradictory to provide that States could be held responsible for criminal acts, but then rule out sanctions, whether self-inflicted—as in the recent case of the apology offered by the Emperor of Japan to the Korean people—or imposed by the General Assembly or the Security Council. The imposition of mandatory sanctions against the racist régime of South Africa must be considered a legitimate form of punitive satisfaction by the international community.

36. In chapter IV of the report, the Special Rapporteur provided a sufficient basis for the remedy of “guarantees of non-repetition of the wrongful act”. There had been cases where an international organization such as GATT or a human-rights body such as the European Court of Human Rights had demanded that a State amend its legislation. What must be emphasized was that, when any punitive remedy was imposed, international law permitted it only if it was done through third-party machinery. The principle of sovereign equality ruled out self-help in that regard. That point should be clearly brought out in draft article 10, paragraph 4 of which was of paramount importance. That paragraph should be retained, not deleted as Mr. Tomuschat had proposed at the pre-

¹² *Ibid.*, p. 579.

¹³ *Ibid.*

vious meeting. There were, however, a number of drafting changes to be made in the article.

37. Mr. CALERO RODRIGUES, continuing the statement he had begun at the 2169th meeting, noted that, in chapters III and IV of his second report (A/CN.4/425 and Add.1), the Special Rapporteur made separate studies of the questions of satisfaction and guarantees of non-repetition of the wrongful act. Draft article 10 was entitled "Satisfaction and guarantees of non-repetition", but, in the text of the article, the words "assurances or safeguards against repetition" were used only once in paragraph 1 as a form of satisfaction, together with apologies, nominal or punitive damages and punishment of the responsible individuals. He agreed with the approach taken in the article and with the conclusion arrived at by the Special Rapporteur after a thorough examination of international jurisprudence and diplomatic practice that "guarantees against repetition constitute a form of satisfaction" (*ibid.*, para. 163), although he admitted that they performed a "relatively distinct and autonomous remedial function". On the basis of that reasoning, the reference to guarantees of non-repetition should be deleted from the title of article 10.

38. Satisfaction corresponded on the moral plane to reparation by equivalent on the material plane, being aimed at "putting things right" in a moral sense. On the material plane, that meant ensuring pecuniary compensation corresponding to the material damage or loss. Such equivalence was relatively easy to establish. However, if the damage was moral and if a State was injured in its "dignity, honour or prestige" (*ibid.*, para. 14), how was such a loss to be evaluated and how was the reparation owed to be calculated? It was not easy to establish either that there had in fact been "moral damage" or what the appropriate reparation would be.

39. In section C of chapter I, the Special Rapporteur considered the question of moral damage to the State as a distinct kind of injury in international law, stating that it consisted either in "the infringement of the State's right *per se*" or in "injury to the State's dignity, honour or prestige" (*ibid.*). In terms of legal philosophy, it could be accepted that the infringement of the State's right *per se* should be regarded as moral damage, as claimed by Anzilotti (*ibid.*, para. 14 *in fine*). Whenever an internationally wrongful act was committed, it could be said that legal injury was inflicted on one or more States. It could not be said that the injured State was entitled to claim satisfaction, unless satisfaction was given the very broad meaning of reparation. To redress the legal situation and wipe out the legal injury, the remedies available to a State were cessation and restitution in kind. For the purposes of the draft articles, satisfaction should be reserved for cases of moral damage or moral injury, in the narrow sense of "injury to the State's dignity, honour or prestige."

40. The words "dignity, honour or prestige" were a little high-sounding and might be open to criticism, but they were commonly used by the classic authors and no adequate alternatives had yet been proposed. They did give an approximate idea of those attributes of a State

which could suffer "moral damage". It would be a good idea to include those words in paragraph 1 of article 10, which stated that satisfaction was due only "in the measure in which an internationally wrongful act has caused to the injured State a moral or legal injury". The word "legal" should be deleted and the expression "moral injury" should be given greater precision, by saying, for instance, that it was an injury to the State's dignity, honour or prestige. If the reference to "legal" injury were eliminated, the words "not susceptible of remedy by restitution in kind or pecuniary compensation" could also be deleted.

41. There were abundant examples of cases of moral injury, but the Special Rapporteur had wisely refrained from giving any in the text of article 10: they should be given in the commentary. In any case, the question of moral injury was highly subjective, especially where States were concerned. One State might feel morally injured by a certain act, while another State might consider itself only legally injured by the same act. The former would claim satisfaction, the latter restitution. Any decision should, of course, be based on the elements of the situation and on the interpretation to be given to the concepts of dignity, honour and prestige.

42. So much for the cause, the "moral injury". As far as the consequences were concerned, paragraph 1 of article 10 stated not only that satisfaction must be "adequate", but also that it might take the form of "apologies, nominal or punitive damages, punishment of the responsible individuals or assurances or safeguards against repetition, or any combination thereof". It was not very clear whether that was an exhaustive or an illustrative list. In his report, the Special Rapporteur, citing various authors, mentioned other possible forms of satisfaction, such as saluting the flag or expiatory missions, which could probably be included in the concept of apologies.

43. The Special Rapporteur also stated that a declaration of the wrongfulness of an act by an international body could be regarded as a form of satisfaction, and that concept was incorporated in paragraph 3 of article 10. It was doubtful, however, whether recognition of the wrongfulness of an act by an international body could constitute a form of satisfaction. The Special Rapporteur did not seem to have adduced any arguments in support of that idea. He referred to two writers, Morelli and Gray (*ibid.*, footnote 255), two arbitral awards, in the "*Carthage*" and "*Manouba*" cases (*ibid.*, paras. 113 *in fine* and 117), and the *Corfu Channel* case (Merits) (*ibid.*, para. 117). In the "*Manouba*" and "*Carthage*" cases, recognition of the fact that the State in question had violated an international obligation had been regarded as a serious sanction; and, in the *Corfu Channel* case, the ICJ had recognized that the United Kingdom had violated the sovereignty of Albania and had said that that declaration by the Court constituted in itself appropriate satisfaction. In the first two cases, it seemed that the recognition by an international tribunal that a wrongful act had been committed did in fact constitute an appropriate "sanction" for the "legal injury", since there had been no question of "moral injury". In the *Corfu Channel* case, however, the ICJ might have over-

looked the distinction between “legal injury” and “moral injury”: a violation of sovereignty should indeed be considered an injury to the State’s dignity, honour or prestige and, in such a case, recognition of the wrongdoing by a court would be enough to atone for the legal injury, but not to wipe out the moral injury.

44. Paragraph 4 of article 10 was a kind of warning: no claim for satisfaction could include humiliating demands or result in a violation of a State’s sovereign equality or domestic jurisdiction. Such a provision was amply justified by historical examples, including those cited in the report (*ibid.*, footnotes 312 and 313). Satisfaction, a perfectly reasonable legal remedy, should not be distorted to become the expression of the power of the strong over the weak.

45. Paragraph 2 was slightly more complex. The two elements it indicated should be taken into account not only in choosing the form of satisfaction, but also in determining the degree of satisfaction. Those two elements were the importance of the obligation breached, and the existence and degree of wilful intent or negligence of the State which had committed the wrongful act. The reference to the “importance of the obligation breached” could be presumed to mean that account must be taken of the extent to which the wrongful act had caused moral injury or, in other words, had affected the injured State’s dignity, honour or prestige. If that was the interpretation adopted and if an explanation was given in the commentary, he would have no objection to that part of article 10.

46. The second element, “the existence and degree of wilful intent or negligence”, came within the realm of fault. The whole of chapter V of the report was devoted to “tentative remarks” on fault as a factor in the qualitative and quantitative determination of reparation. According to the Special Rapporteur, the Commission would have to face that issue during the elaboration of part 2 of the draft articles. He found that part of the report both interesting and intellectually stimulating, but it raised many issues which, although they were of considerable theoretical importance, had only limited value for the Commission’s immediate purpose. The Special Rapporteur began by considering whether the articles of part 1 excluded fault from the constituent elements of an internationally wrongful act or whether, on the contrary, the Commission believed that fault was a *sine qua non* for wrongfulness and responsibility. In his own view, now was not the right time to consider that problem and he hoped that the Commission would not get bogged down by it even when it came to the second reading of part 1.

47. The Special Rapporteur then made a thorough and brilliant analysis of the “objective responsibility” approach of Anzilotti and Kelsen to the question of attribution, and of the differing view of Ago (*ibid.*, paras. 167 *et seq.*). He concluded that the attribution of an act to a State did not seem to be “an operation carried out by legal rules, notably by national or international law” (*ibid.*, para. 173) and maintained that the attribution of fault to a State was essentially a question

of fact (*ibid.*, paras. 177-178). However, he then seemed to admit that the analyses presented thus far were irrelevant for the purposes of part 2 of the draft, stating: “Another matter, however, is the relevance of fault with respect to the legal consequences of an internationally wrongful act.” (*ibid.*, para. 180.)

48. Section C of chapter V of the report dealt with that “other matter”, under the heading “The impact of fault on the forms and degrees of reparation”. Where compensation was concerned, fault was dismissed as an element in the calculation. In the Special Rapporteur’s words, “the doctrine is perhaps right in upholding the view that the absence, the presence and the degree of the so-called ‘intentional element’ should in no way affect the computation of compensation” (*ibid.*, para. 185). And, indeed, there was no reference to fault in draft article 8.

49. Finally, in section C.2 of chapter V, on “Fault and satisfaction (and guarantees of non-repetition)”, the Special Rapporteur came to the only point which actually had a bearing on one of the draft articles. However, that part of the report was short and not very conclusive. The Special Rapporteur said he had the “impression” that fault “in a minor or major degree” had played a significant role with regard to the coming into play of the obligation of satisfaction and with regard to “the quality and number of the forms of satisfaction claimed and in most cases obtained” (*ibid.*, para. 188). Unfortunately, he found that disappointing. He would have expected that the Special Rapporteur, who had done so with such competence in other parts of the report, would have assisted the Commission in deciding on the text he was proposing for the second part of paragraph 2 of article 10.

50. The Special Rapporteur had entitled chapter V “Tentative remarks” and his own remarks on it would also be tentative. Although there was no mention of fault in part 1 of the draft articles, and even admitting that fault had no role to play in reparation by equivalent, he was inclined to recognize that fault on the part of the State which had committed the wrongful act should be taken into account in the assessment of satisfaction, as suggested in paragraph 2 of draft article 10. On the other hand, he could see some merit in Mr. Graefrath’s suggestion (2168th meeting) that article 10 should not be limited to a reference to fault, but should also indicate the other factors or elements to be taken into account in determining the forms and degrees of satisfaction. In his own view, those factors should be mentioned in addition to the importance of the obligation breached.

51. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur’s second report (A/CN.4/425 and Add.1) was the result of in-depth research and a scholarly study of the abundant literature on the topic. Unfortunately, the jurisprudence and practice of the nineteenth century and the early part of the twentieth century, as reflected in the available literature on the topic, illustrated to a large extent the intervention and gunboat diplomacy practised by the then major Powers—the same ones as now—under the cloak of diplomatic protection for

their citizens abroad. In fact, as a discipline, State responsibility and diplomatic protection of citizens abroad were practically one and the same thing in traditional international law.

52. As the Special Rapporteur noted with regard to satisfaction, "practice shows that powerful States tend to make requests not compatible with the dignity of the wrongdoing State or with the principle of equality" (*ibid.*, para. 110). The Special Rapporteur cited a number of writers who considered that satisfaction had often been used by the European Powers as a pretext for intervention and that the misuse of satisfaction for suppression and humiliation of whole peoples had been typical of the period of imperialism (*ibid.*, footnote 276). That state of affairs was not confined to satisfaction, however: the forms of reparation, and particularly reparation by equivalent, were of the same nature. Indeed, during the period of imperialism, might had been right, and that had resulted in a completely distorted view of things. The nationals of certain Powers, who had disregarded and wantonly trampled on the laws and culture of their host countries and had exploited, oppressed and humiliated the peoples of those countries, had often been regarded as victims, while the local population, which had reacted in self-defence against the abhorrent behaviour of foreign nationals, had been regarded as culprits who had violated the rights of those foreigners. The countries of origin of those foreigners had espoused the claims of their citizens and had made humiliating demands on the so-called wrongdoing States, against which they had threatened to use force. It was precisely in reaction to that law of the jungle that eminent Latin American jurists and statesmen had put forward the "Drago Doctrine", the "Calvo Doctrine" and other more or less similar doctrines, which were a remarkable contribution on the part of the peoples of Latin America to the modern law of nations, but which the defenders of traditional international law, in other words the public law of Europe, had never recognized as part of general international law.

53. The Special Rapporteur dealt with the Boxer Rebellion case (*ibid.*, para. 124) from the traditional standpoint of the law of State responsibility, that was to say, as a case that illustrated the legal consequences of a wrongful act, satisfaction in that case being a form of reparation. The Special Rapporteur, however, showed a degree of sympathy for the Chinese people, since he recognized that what he called the "injured States" had "taken not little advantage, in dealing with the matter and claiming severe measures of satisfaction, of their military, political and/or economic superiority" (*ibid.*, para. 124 *in fine*). In the Special Rapporteur's view, satisfaction as a form of reparation was punitive in nature, and that was logically tantamount to saying that China should be punished for the wrongful act, no matter how disproportionate the punishment might be to the wrong suffered.

54. He did not blame the Special Rapporteur, for whom he had the greatest respect as a lawyer, for that approach. One could not expect legal scholars nurtured in the Western tradition to have a full understanding of the history of the Chinese revolutionary movement.

For the Chinese people, however, the case of the Boxer Rebellion had not been a case of State responsibility, but, rather, a typical example of armed intervention and aggression by eight imperialist Powers. The Boxer Movement had been a reaction against the gangsterism of imperialist opium traders, ruthless exploitation of Chinese labour, destruction of Chinese culture under the cloak of religion, compulsory appropriation from Chinese peasants by foreign traders and missionaries of vast areas of farming lands, often at a nominal price, the killing of Chinese persons by foreigners under the protection of extraterritorial consular jurisdiction, and medical experiments on many Chinese persons in hospitals run by imperialists. According to the imperialist logic, the interests and property of those Western nationals had to be protected and the Boxers' rebellion suppressed. As the imperialist Government had been unable to suppress the revolutionary movement, the combined armed forces of eight Powers, small and large, had intervened to put down the movement and had imposed on the Chinese people a humiliating treaty, which was quoted in detail in the Special Rapporteur's report. The Boxer Movement had been an integral part of the revolutionary movement of the Chinese people against feudal rule and imperialist aggression which dated back to the first opium war of 1840 and which had lasted for over 100 years, culminating in the establishment of the People's Republic in 1949.

55. He wished to make it quite clear that, in his view, the codification of the part of the law of State responsibility under consideration could not be based on the jurisprudence and the practice of imperialist Powers of a bygone era. The Commission must look to the future, while learning the lessons of the past, and engage in the task of progressive development, with due regard for the rule of law in international relations, the sovereign equality and peaceful coexistence of States, as well as the right to development, particularly of the developing countries, in the context of the new international economic order.

56. In his report, the Special Rapporteur dealt in detail with reparation by equivalent and satisfaction, including guarantees of non-repetition, as forms of reparation for an internationally wrongful act. He had no difficulty in accepting reparation by equivalent and satisfaction as forms of reparation as such. There were, however, a number of concepts underlying those forms of reparation which should be reassessed in the light of the principles he had just mentioned.

57. To take the example of so-called "full compensation", which the Special Rapporteur had not defined, it was apparent from the Special Rapporteur's treatment of reparation by equivalent that he assimilated it to full compensation. The elements of which reparation by equivalent consisted, apart from restitution in kind, included pecuniary compensation for moral and material damage assessed in accordance with strict criteria such as direct and indirect damage, *lucrum cessans*, including unlawful expropriation of a going concern, interest rates calculated from the date of the damage caused and payment of compound interest. When applied to relations between developed States,

the concept of full compensation or reparation by equivalent might not create any problems. When it was demanded of a developing country by a developed country, however, full compensation might prove to be excessively onerous and might deprive the developing country of its right to development. There was no such thing as unlawfulness when it came to the nationalization or expropriation of a foreign enterprise, other than in the case of non-payment of compensation. If, in the event of nationalization, a small developing country had to pay compensation according to the criteria conceived by the Special Rapporteur, that country might become bankrupt, for often the market value of a transnational corporation and its annual profits exceeded the country's gross national product. That was why the instruments on the new international economic order spoke of "appropriate compensation" in accordance with the legislation of the nationalizing State. It should be remembered that the idea of full, prompt, adequate and effective compensation for nationalization had first been mooted by a great Power during the 1938 Mexican expropriations. Full compensation as conceived by the Special Rapporteur and when demanded of a small country by a big Power was not compensatory, but essentially of a punitive nature. In that connection, the principle of preferential treatment for developing countries should prevail in relations between developed and developing countries. Only thus could reparation by equivalent reflect the principle of the sovereign equality of States—in other words, equality through inequality.

58. He also stressed that neither reparation by equivalent nor satisfaction should be of a punitive nature. He agreed with Mr. Tomuschat, who, in a recent article, had written:

... In their mutual relationships, which are characterized by sovereign equality, States are not entitled to sit as criminal judges, the victim State acquiring a right to "try" the author State. Thus, financial compensation is acceptable only as a form of reparation for the loss incurred by the injured State.¹⁴

That was also true of satisfaction.

59. Finally, referring to paragraph 97 of the second report, he pointed out that, since 1980, the World Bank's interest rate had been laid down not on an annual, but on a quarterly basis.

60. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would like to provide an explanation on a point raised by Mr. Shi concerning the reference in his second report to the Boxer Rebellion (A/CN.4/425 and Add.1, para. 124). He had mentioned the case with the sole intention of underlining the arrogance and violence with which the Western Powers had behaved towards China. He had felt bound to do so, however, and would continue to do so with the same objective. Moreover, he had the greatest respect for the Chinese people. In drafting his reports he was always careful to blame his own country whenever he deemed it necessary and warranted, whatever Government was responsible for the facts he used as examples. He had,

for instance, referred to the *Tellini case* (*ibid.*, para. 124 and footnotes 314 and 439 *in fine*), making it quite clear that a fascist country had acted arrogantly towards Greece: it had even gone so far as to bomb the island of Corfu. He drafted his reports in an objective spirit without taking account of his own nationality, since, for him, mankind came before his country.

61. Mr. MAHIQU said that the thought which had gone into the Special Rapporteur's second report (A/CN.4/425 and Add.1) and the quality of the analysis, research, information and conclusions it contained made it truly comprehensive. The historical and theoretical approach also introduced clarity and certainty into a topic replete with difficult concepts, such as satisfaction, material and moral damage, direct and indirect damage, proven and potential damage, and the idea of causality. The wealth of information and the depth of the analysis nevertheless called for two comments.

62. First, the Special Rapporteur had focused on a somewhat distant period: the end of the nineteenth century and the beginning of the twentieth century. That was understandable from the point of view of arbitral practice, which had been abundant at that time and was worth studying for the lessons it could provide. He was not entirely satisfied with regard to the State practice referred to. It would be even more valuable to look at recent practice. The Special Rapporteur himself pointed out that some cases were slightly outdated, including the one to which Mr. Shi had just referred and which reflected a particular approach to international law in which the balance of power had perhaps been the dominant factor.

63. Secondly, in his research, the Special Rapporteur had given pride of place to an aspect which was admittedly very important, but which was only one part of international law, namely the treatment of foreigners. Of course, that question had frequently been dealt with in arbitral practice and should therefore be taken into account; but were all the rules that had been formulated so broad in scope that they could be applied to any area of international law? Other international-law topics should perhaps be taken into consideration, such as inter-State relations and international disputes.

64. The Special Rapporteur had dwelt at some length on the possibility of there being rules of international law relating to reparation by equivalent and on the importance to be attached to progressive development, so much so that the reader might be somewhat puzzled. For example, the Special Rapporteur said at one point that there were no very detailed rules in the matter, yet admitted that there might be "more articulate rules" (*ibid.*, para. 28). He also said that it would be inadvisable to produce any such rules as a matter of progressive development, while recognizing the possibility of reasonably developing such rules. He personally did not think that there was any need to develop precise and detailed rules in that regard and would show why when dealing with the draft articles one by one.

65. With regard to draft article 8, paragraph 1, on the principle of reparation by equivalent, he preferred

¹⁴ C. Tomuschat, "Some reflections on the consequences of a breach of an obligation under international law", *Im Dienst an der Gemeinschaft: Festschrift für Dietrich Schindler* (Basel/Frankfurt, Helbing and Lichtenhahn, 1989), p. 162.

alternative A, which seemed more concise, subject, of course, to possible drafting amendments. In paragraph 2, which was intended to identify the damage, whether material or moral, to be compensated for, the Special Rapporteur laid down the condition that the damage should be economically assessable, and that was understandable from a practical point of view. He was not sure, however, whether the condition should be stated as a rule, because its interpretation and implementation might give rise to serious differences of opinion. He recalled that compensation for moral injury was sometimes refused under the internal law of certain countries, since no sum of money could compensate for moral suffering. It was a fact, however, that moral damage was increasingly being taken into account for the purpose of compensation, even though the grounds for compensation were still uncertain. He therefore did not think that any rigid rule could be laid down in that regard, even if it meant that the codification would be incomplete.

66. Referring to paragraph 3, on loss of profits, he noted that the Special Rapporteur showed that the study of the concept was sometimes hampered by confusion with the question of how to distinguish between direct and indirect damage. The Special Rapporteur provided the necessary explanations to define the concept and find solutions. He shared the Special Rapporteur's view that the answer lay in two presumptions: that of the existence of profits and that of a causal link with the wrongful act. In the light of those two presumptions, however, the wording of paragraph 3 was not satisfactory. The obligation to compensate was stated in very broad terms, whereas, in the report, the Special Rapporteur was more guarded in referring to the "indemnifiability in principle of *lucrum cessans*" (*ibid.*, para. 66). Loss of profits should therefore be qualified by one means or another. It should also not be forgotten that the assessment of damage sometimes raised formidable problems, as in the case of the Chilean nationalizations.

67. Paragraph 4 dealt with the distinction between direct and indirect damage. With regard to causality, there was both logic and rigour in the formula proposed by Bollecker-Stern (*ibid.*, para. 43) and it was a good illustration of the problem, but it would not resolve the Commission's dilemma, since the chain of causality could not be pursued *ad infinitum*. The role of a rule of law was not to be scientifically rigorous, but rather to decide issues and find solutions. A choice had to be made among the three traditional approaches to causality referred to by the Special Rapporteur, who had opted for that of equivalent conditions, whereby any act without which the damage would not have occurred was a cause of the damage. A bolder and more radical approach would be that of proximity, whereby only the last event which had made the damage possible was its cause. Personally, he would prefer the intermediate solution of adequate causality, according to which only an act which could reasonably have made the damage possible was the cause of the damage. He therefore did not think that it was necessary to enunciate the uninterrupted causal link in a rule: it would be preferable to adopt a more flexible

solution without any such stipulation, the content of the rule being left to practice to define.

68. Paragraph 5 dealt with concomitant causes. In his explanations, the Special Rapporteur admitted that it would be pointless to try to find any rigid criteria in that regard and even noted that it would be absurd to think in terms of laying down a "universally applicable formula" (*ibid.*, para. 46). While agreeing with that view, he wondered whether concomitant causes should be covered at all in article 8. Like Mr. Tomuschat (2170th meeting), he thought that they should perhaps be covered in a separate provision, especially as they raised the problem of the sharing of responsibility and, indeed, that of diminished responsibility or exoneration from responsibility. The conduct of the injured State could thus have an influence on the amount of compensation. It was a well-established principle of international law that losses should be minimized and that point was mentioned briefly by the Special Rapporteur in his report. A separate provision should therefore deal with that aspect, together with the questions of the sharing of responsibility and, possibly, diminished responsibility and exoneration from responsibility.

69. With regard to draft article 9, although he agreed with the principle of awarding interest, he had some difficulty in following all the proposed solutions, especially concerning the *dies a quo* and compound interest. The Special Rapporteur examined the various possibilities for the date from which interest should run. The choice was between the date of the damage, the date on which the amount of compensation was fixed and the date of the claim. The Special Rapporteur had opted for the first solution, but he himself doubted whether it was necessary to lay down so rigid a rule. Practice in that area tended to vary, even in international commercial relations, where the concept of interest was particularly prominent. No precise solution emerged from the arbitration cases dealt with by the International Chamber of Commerce: the date varied from one award to another. If it was absolutely necessary to establish a rule, he would prefer the date on which compensation was claimed, for reasons which the Special Rapporteur explained very well: the date of the claim served as a kind of notice to the debtor State, which was thereby officially informed that it was under an obligation. If no satisfaction was obtained, that was the date from which interest would run. Moreover, the claimant must not be guilty of negligence by allowing time to elapse before filing the claim, which would cover the interim period.

70. The Special Rapporteur also invited the Commission to decide on the interest rate to be chosen (A/CN.4/425 and Add.1, para. 97). There again, he wondered whether it was wise to go so far, especially since international exchange rates tended to fluctuate. The rates set by international financial institutions could of course be used, but no binding rule could be laid down. The bodies responsible for calculating compensation must be given some room for manoeuvre to decide on the interest rate in the light of the circumstances.

71. He had reached a different conclusion from the Special Rapporteur with regard to compound interest: he did not think that it was essential and it might even lead to unfair results. He therefore doubted whether it was wise to deal with that question in the draft articles.

72. With regard to satisfaction, dealt with in chapter III of the report and in draft article 10, he basically agreed with the Special Rapporteur's approach and with his analysis and conclusions. Satisfaction must be regarded as a specific form of reparation, along with other forms of reparation, cessation, restitution in kind and reparation by equivalent. The fact that the broad and technical meanings of satisfaction had sometimes been confused should prompt the Commission to define the concept more clearly. Once the concept had been identified, its manifestations must, of course, be defined as well, as the Special Rapporteur had done in paragraph 1 of article 10.

73. The Commission had rightly paid particular attention to punitive damages, because the afflictive and punitive aspect was controversial. If he correctly understood the explanations given by the Special Rapporteur, especially in section D of chapter III, the afflictive aspect applied only to satisfaction and was thus an element which made satisfaction autonomous *vis-à-vis* other modes of reparation. Other members of the Commission challenged that view and thought it unwise to introduce any punitive connotation. He thought that both views were correct to some extent, for the reasons he would explain. On the one hand, the basis of the rules of reparation should be as objective as possible, since responsibility in international law must be concerned essentially with reparation for damage and must not seek to introduce the idea of sanctions, with all the subjective aspects it involved and the complications it might cause in the codification and application of the relevant rules. On the other hand, however, any judgment of any kind involving an order for reparation was necessarily punitive in nature, just as the wrongful act hinged on the concept of fault. Responsibility could arise from a wrongful act which was an international crime (art. 19 of part 1 of the draft), and it was obvious that such a crime would have a bearing on the régime of reparation to be applied. It was therefore a moot point whether it was useful for the topic, and at the stage of draft article 10, to introduce the afflictive aspect or whether it would not be better to come back to that aspect when the time came to deal with the consequences of an international crime. He inclined to the latter view and thought that damages could be dealt with in paragraph 1 of article 10 without reference to their afflictive or punitive nature.

74. As for guarantees of non-repetition, he was once more broadly in agreement with the Special Rapporteur's explanations and illustrations, which, like the arguments of the previous Special Rapporteur, demonstrated the relevance of such a rule.

75. Lastly, with regard to the limits which could or should be placed on satisfaction, the Special Rapporteur was right to draw attention to some historical examples of the abuses and dangers connected with some forms of satisfaction. It was therefore appropriate to set limits on satisfaction, as had been done in

paragraph 4 of article 10. Some members of the Commission had questioned whether humiliating demands should be referred to in that paragraph. His own view was that, even if such demands were rare in the modern world, care must be taken to ensure that reparation would not extend to them in future and that certain types of conduct which were thought to belong to the past were not engaged in again through certain forms of satisfaction. The problem that arose was how such a provision was to be drafted.

76. In conclusion, he said that draft articles 8 to 10 should be referred to the Drafting Committee.

The meeting rose at 1 p.m.

2172nd MEETING

Tuesday, 12 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (continued) (A/CN.4/416 and Add.1,¹ A/CN.4/425 and Add.1,² A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles³

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

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

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

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook* . . . 1989, vol. II (Part Two), pp. 72-73, paras. 229-230.

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 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*ARTICLE 10 (Satisfaction and guarantees of non-repetition)⁴ (*continued*)

1. Mr. BENNOUNA congratulated the Special Rapporteur on a richly documented second report (A/CN.4/425 and Add.1), which would provide the Commission with the necessary elements to complete its work on the draft articles.

2. He accepted the distinction made in the report between reparation by equivalent and satisfaction, although he was aware of certain ambiguities to which the Special Rapporteur had drawn attention (*ibid.*, para.4). He could also accept that compensation should apply as a matter of priority to material damage but that it could go further and apply to moral damage caused to a State's national. Again, he would agree that satisfaction could apply almost exclusively to moral or legal damage caused to the State. As to the impact of fault on the forms and degrees of reparation, despite the learned attention it had attracted, he did not, *a priori*, see the interest of such theoretical analysis at the present stage in the Commission's work.

3. Chapter II of the report, which dealt with reparation by equivalent, was the most important part. It was based on the following postulate advanced by the Special Rapporteur:

... Normally one is ... not confronted—as is the case when one deals mainly or exclusively with the codification and development of the so-called “primary” rules—with given actual or foreseeable conflicting interests and positions, such as those that inevitably emerge when one deals (*de lege lata* or *ferenda*) with the régime of international watercourses, the régime of the sea, the régime of international economic relations or the law of the environment. ... In so far, however, as the purely substantive consequences of a wrongful act are concerned, and particularly with regard to the rules that obtain or should obtain in the field of pecuniary compensation, all States would seem roughly to share the same “prospective” or “hypothetical” interests. ... (*Ibid.*, para. 33.)

According to the Special Rapporteur, therefore, the field of reparation would—*mirabile dictu*—be excluded from the conflicting relations and the inequalities that generally marked relations between States. That postulate, no matter how attractive it might seem, was highly arguable, for it did not withstand an analysis of inter-State relations or of diplomatic practice. Indeed, the arbitral awards and judicial decisions cited in the report dated back to a bygone era and could not be viewed in isolation from their historical context. What was needed was an analysis of agreements on compensation concluded between States at different stages of development and agreements concluded between former colonies and the metropolitan Power. Such an analysis would produce the following findings.

4. First, the possibilities for violations of international law were not equal. Secondly, there were wide differences so far as the willingness of States to enter into a settlement in accordance with the law was concerned. Thirdly, reparation for an unlawful act fell within a particular context which characterized the relations between two or more States, for example between a

metropolitan Power and a former colony, between a capital-exporting State and a capital-importing State, or between a creditor State and a debtor State. Fourthly, it followed that the relationship was not always reciprocal. In that connection, he quoted a remark made by William Bishop in a course given at The Hague Academy of International Law in 1965 to the effect that one of the reasons why the United States of America had found the legal institutions of State responsibility reasonably satisfactory was that it had been both a sending State and a receiving State in the matter of aliens and so had had to look at such questions as both a potential defendant and a potential plaintiff. A State whose nationals seldom lived abroad but which had many aliens on its territory was, however, much more likely to become familiar with the defendant's side of an international claim.⁵

5. It was apparent, therefore, that opposing interests could arise, depending on the particular situation of each party, and that an abstract principle in regard to reparation could often prove inadequate in dealing with those interests. Moreover, despite the traditional formula whereby a State, by espousing the claims of its nationals, was exercising its own right, and notwithstanding the explanation by Reuter cited in the report (*ibid.*, footnote 110), the interests of the State did not always coincide with those of its nationals.

6. Fifthly, States were not equal in terms of financial and economic capacity. Consequently, unless the end result was to be an absurdity, compensation must necessarily take account of the financial capacity of States. For example, in the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war* (*ibid.*, para. 25), the tribunal had referred to article 232, paragraph 1, of the Treaty of Versailles, in which the Allied Powers had recognized that the mere reparation of the losses caused by Germany would exceed Germany's financial capacity. Also, Ignaz Seidl-Hohenveldern had concluded in a recent article⁶ that the concern of arbitrators was often to reconcile an investor's legitimate expectations and the host country's capacity to pay.

7. Sixthly, reparation should take account of all the relevant circumstances, including the structure of the States concerned, which differed considerably from one country to another and could have an influence on reparation. Assuming, for example, that a country surrendered its natural resources for 50 years for a paltry sum or concluded contracts that were manifestly contrary to its national interest, should that inevitably give rise to total reparation, including reparation for loss of profits, for the next 50 years?

8. He would examine the proposed articles in the light of those general considerations. With regard, first, to draft article 8, he agreed that the notion of economi-

⁵ W. W. Bishop, “General course of public international law, 1965”, *Recueil des cours de l'Académie de droit international de La Haye, 1965-II* (Leyden, Sijthoff, 1965), vol. 115, pp. 419-420.

⁶ I. Seidl-Hohenveldern, “L'évaluation des dommages dans les arbitrages transnationaux”, *Annuaire français de droit international*, 1987, vol. XXXIII, p. 7.

⁴ For the texts, see 2168th meeting, para. 2.

cally assessable damage (para. 2) lacked precision and considered that the Commission could not be content with the general and abstract terms in which paragraphs 2 and 3 were couched, since those provisions dealt with two essential aspects of reparation.

9. As worded, paragraph 4 would not be much help in practice unless the uninterrupted causal link was qualified more precisely, failing which the link might be so tenuous and distant as to give rise to inequitable results. To that end, the two elements referred to by the Special Rapporteur—the objective requirement of normality and the subjective requirement of predictability (*ibid.*, para. 37)—should be included in paragraph 4. That might make it possible to mitigate the effects of an unbroken chain and provide the arbitrator or judge with some more concrete elements. The two requirements in question were also confirmed by the judicial decisions cited in the report (*ibid.*, paras. 38 *et seq.*).

10. The wording of paragraph 3, concerning *lucrum cessans*, was unduly general and seemed to cover all kinds of loss of profit. The question of causal link was, of course, connected with the determination of *lucrum cessans*, since compensation would depend on the causal link between the unlawful act and the loss of profits. Theoretically, *lucrum cessans* was merely a notional profit and should normally be awarded only when there was some minimum of certainty. Thus the requirement of certainty had to be reconciled with the aim of providing for a notional profit yet to be realized. In his view, therefore, the general rule laid down in paragraph 3 should be tempered by a reference to equity and to the circumstances of the case, equity now being cited in international jurisprudence as a basis for a rule of law. He noted in that connection that the Special Rapporteur referred in the report to the *Shufeldt* case, in which the arbitrator had held that “the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative” (*ibid.*, para. 66). In the *Chorzów Factory* case (Merits) (*ibid.*), the PCIJ had awarded *lucrum cessans* only for the period running from the date of the expropriation to that of the judgment. In regard to the latter case, Derek Bowett had concluded in a recent article⁷ that, even in the case of unlawful expropriation, profits could be recovered only for a short period. The same author had also referred to a number of modern cases on both lawful and unlawful expropriation in which *lucrum cessans* had not always been awarded.

11. In one case of expropriation, *AMCO Asia Corporation v. Indonesia* (*ibid.*, para. 75), the tribunal had referred to “direct and foreseeable prejudice” in connection with *lucrum cessans*. That notion of foreseeability occurred constantly and should be incorporated in the draft articles. The idea of justifiable anticipation of the licensee, introduced in certain cases such as *AMINOIL v. Kuwait* (*ibid.*), could also be adopted in order to arrive at appropriate and equitable

compensation—the formula used in *LIAMCO v. Government of Libya* (*ibid.*).

12. He agreed with Mr. Shi (2171st meeting) about the notion of appropriate compensation, which had undergone considerable development over the past 10 to 15 years. In that connection, Canada’s claim against the Soviet Union following the disintegration of the *Cosmos 954* Soviet nuclear satellite had stated:

... Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty. (A/CN.4/425 and Add.1, para. 40.)

That passage, too, contained elements which he would like to see incorporated in the draft. He would, however, leave it to the Special Rapporteur to find an appropriate form of wording.

13. With regard to draft article 9, he fully agreed with Mr. Mahiou (2171st meeting) that interest should accrue from the date of the claim and run until the date of payment. Also, he saw no need for paragraph 2, on compound interest, and he gathered from paragraph 98 of the report that the Special Rapporteur himself was not really convinced of the need for it.

14. The diplomatic practice referred to by the Special Rapporteur in regard to draft article 10, on satisfaction and guarantees of non-repetition, reflected a bygone era and should not be used as a basis for contemporary international law. It could, at most, serve as a source of reference for those who wished to write the history of colonization. On the other hand, he fully agreed that, as in the “*Rainbow Warrior*” case,⁸ recognition of the wrongfulness of a State’s conduct could sometimes be equivalent to satisfaction, and he was quite prepared to envisage the case of non-repetition. Other cases of satisfaction, such as satisfaction in the form of apologies, should be relegated elsewhere. Paragraph 4 of article 10 should be retained, as satisfaction should not take the form of humiliating demands on a State: the punitive element, which, as many members of the Commission had remarked, operated in one direction only—from the strongest to the weakest—must be removed.

15. The question of fault posed a problem. In the report, the Special Rapporteur stated that “doctrine is perhaps right in upholding the view that the absence, the presence and the degree of the so-called ‘intentional element’ should in no way affect the computation of compensation” (A/CN.4/425 and Add.1, para. 185). The Special Rapporteur also raised the question whether the fault of a low-ranking State agent could be assimilated to that of the State, concluding, somewhat naively, that the State would be exempt from fault if it gave adequate instructions to its agents, particularly the police (*ibid.*, para. 190).

16. His own view was that fault, though not a condition of responsibility, should be a factor when it came to the consequences of a wrongful act. The Special Rapporteur had in effect proposed a half measure.

⁷ D. W. Bowett, “State contracts with aliens: Contemporary developments on compensation for termination or breach”, *The British Year Book of International Law*, 1988, vol. 59, p. 49.

⁸ See 2168th meeting, footnote 4.

Such an approach might perhaps upset the logical and theoretical balance of the draft as a whole.

17. Lastly, he suggested that draft articles 8 to 10 be referred to the Drafting Committee, which could then draw on the report to flesh them out. He trusted that the Special Rapporteur would continue along the same lines and bring one of the Commission's major undertakings to a successful conclusion.

18. Mr. BARSEGOV paid tribute to the personal qualities and eminent scholarship of the late Paul Reuter and congratulated Mr. Pellet on his election to the Commission.

19. The Special Rapporteur's second report (A/CN.4/425 and Add.1) was very interesting, both from a theoretical and from a practical point of view. With all due respect for Roman law and the Special Rapporteur's thorough knowledge of private law, he wished to warn against introducing too many concepts and rules of private law—particularly Roman law—into political and public-law relations between States. The report raised a large number of issues, which could not possibly be discussed systematically in view of the limited time available.

20. First of all, the question arose whether it was justified to introduce the concept of moral damage and corresponding moral responsibility. In the Soviet Union, Grigory I. Tunkin had spoken against the expression "moral responsibility", because it could be understood as referring to responsibility of a non-legal character; he believed that the expression "political responsibility" might therefore be more appropriate in that context, since moral satisfaction actually involved political actions. Other Soviet writers considering the expression "moral responsibility" to be inaccurate felt that the expression "political responsibility" was also inadequate. They did not view it as a distinct form of responsibility, although they did not entirely deny its political character, which stemmed from the fact that the responsibility involved was that of a political body. A distinction should therefore be drawn between material and non-material responsibility, by analogy with the distinction between material and non-material damage. Indeed, the Special Rapporteur himself often qualified "moral damage" as "non-material" damage.

21. Another question was whether it was possible in practice to translate so-called "moral damage" into a pecuniary form of reparation. It would not be easy to establish why and how moral damage should or could be expressed materially. For example, could an insult to the flag be compensated for in a pecuniary way? Pecuniary compensation for purely moral damage would be tantamount to punishment or a fine. However, a genuinely moral issue did arise inasmuch as assessing national dignity in financial terms might be considered an insult to a country. Indeed, the situation was not even clear as far as the material expression of personal damage was concerned. The cases of material assessment by courts of "personal damage" cited in the report did not provide any clear basis for the delimitation of material and non-material, i.e. moral, damage and consequent responsibility.

22. Yet another question was that of the validity of an extremely broad interpretation of the term "satisfaction", implying pecuniary expression of satisfaction for moral damage. More specific issues arising in that connection were whether it was suitable to regard lack of protection or denial of justice as moral damage. In any event, the significance of lack of protection on the part of a State, or denial of justice, would obviously increase or even assume a different character when it came to international crimes where the victims of such a denial were not individuals but entire peoples and ethnic groups. That applied to genocide, *apartheid* and colonialism, in respect of which denial of justice or lack of protection on the part of the State would often be an element of the crime itself and thereby extend beyond the limits of so-called moral damage and moral responsibility.

23. Thus the examination of major issues associated with the law of international responsibility, such as reparation by equivalent, within the narrow framework of simple offences—delicts excluding international crimes—was bound to be incomplete and even one-sided.

24. Considering that the proportions and character of the legal and material consequences of a wrongful act varied greatly, depending on whether it was a delict or a crime, the nature of, and procedure for, restitution in kind or any other form of reparation were bound to vary accordingly. Of course, the need to afford legal protection against so-called delicts must not be underestimated, yet there was a risk that conclusions based on such delicts might lead to the temptation to extend such minimum criteria and standards to entirely different legal relationships connected with responsibility for international crimes. That fear was not unfounded, since the Special Rapporteur himself, in the draft articles he had submitted, referred not to simple offences, as had been agreed, but to "internationally wrongful acts", which, according to article 19 of part 1 of the draft, included not only delicts, but international crimes as well. In that connection, he hoped that the Special Rapporteur would dispel his apprehension and confirm that the rules and standards under discussion would not be automatically extended to crimes.

25. As to chapter II of the report, on reparation by equivalent, he agreed that the purpose of reparation in a general sense should be the elimination of all the legal and material consequences of a wrongful act and the re-establishment, in favour of the injured party, of the situation that would have existed if the wrongful act had not been committed. That view was shared by a number of Soviet writers. However, in view of the wide variety of cases and specific circumstances that arose, the Commission's task would probably have to be limited by upholding the principle of removal of all the legal and material consequences of the wrongful act without going too deeply into specifics and excessive details in determining the size of pecuniary compensation for damage, including compound interest, etc. Furthermore, practical application of that principle would leave courts and arbitrators sufficient room for manoeuvre, depending on the specific cases they were dealing with.

26. The Commission should therefore adopt a more flexible approach to the matter. He supported the views expressed by the Special Rapporteur (*ibid.*, para. 28) concerning the practical impossibility of working out detailed and comprehensive rules covering all situations. However, if the Special Rapporteur succeeded in proving the existence of standard rules or in deriving from practice more specific rules to elaborate on, supplement and develop the so-called *Chorzów* principle, and if the Special Rapporteur could establish that such rules were acceptable to the international community, he (Mr. Barsegov) would welcome them. What was important in the final analysis was not the theoretical issue of the origin of such rules and principles; the main point was to establish whether they were now an integral part of general international law or whether progressive development of the law was involved. In that respect it was important to take realistic account of States' readiness to accept such new rules.

27. If the formula "all the damage and only the damage caused by the unlawful act" was to be adopted as a basis for reparation by equivalent, it would be necessary to define the scope of such damage in relation to the overall damage resulting from the wrongful act. Since compensation should be awarded only for damage related to the wrongful act by a causal link, diplomatic and judicial practice made a distinction between direct damage caused to the subjects of international law and indirect damage stemming from undesirable consequences not directly related to the internationally wrongful act but affecting the interests of subjects of international law and their citizens. It seemed that one could speak of a rule, upheld in many arbitral awards, in State practice and in doctrine, whereby only direct damage should be taken into account and serve as a basis for determining the extent of responsibility. The only criterion that could serve to distinguish direct damage from indirect damage, which was not normally indemnifiable, was the nature of the causal link between the adverse consequences giving rise to damage and the internationally wrongful act that caused them. Identifying direct damage through the establishment of an appropriate causal link between the adverse consequences and the internationally wrongful act would set limits within which the specific extent of damage should be determined. The formula "positive damage" was commonly used to calculate material damage reflected in real losses which could not be compensated for in kind and consequently called for pecuniary assessment. Soviet literature on the subject stressed the importance of interpreting accurately the various elements of positive damage, namely losses, injury and expense, if that formula was to be applied properly.

28. For the reason given in the report (*ibid.*, para. 62), the Special Rapporteur had paid special attention to issues relating to the loss of profits that could have accrued had the internationally wrongful act not been committed, i.e. *lucrum cessans*. It could be said that international practice and doctrine lacked a consistent approach to the concept of *lucrum cessans* as a means of determining the extent of damage caused by breaches of international law. Although some decisions by international courts took account of loss of profits

in determining the scope of indemnifiable damage, others ruled out the very possibility of applying the *lucrum cessans* formula. Similar divergences could be observed in the positions of legal scholars. Those divergences could probably be explained by the broad interpretation of loss of profits as relating to any loss sustained by a State because of the inability to secure benefits that might have accrued to it had the wrongful act not been committed. On the basis of that interpretation, loss of profits was bound to include both direct and indirect damage. It must be borne in mind that, while the desire to take account of all the elements of direct damage led to the use and recognition of the "loss of profits" formula, the fear of introducing elements of indirect damage into direct damage created a situation in which the formula was often either rejected or considered negatively. It might therefore be more appropriate to use the formula "real loss of profits", as opposed to loss of profits in the very broad sense of potential loss. That approach would be in keeping with the tribunal's decision in *AMCO Asia Corporation v. Indonesia* (*ibid.*, para. 75) to the effect that *lucrum cessans* should not exceed the "direct and foreseeable prejudice".

29. One of the parameters essential in establishing the scope of material damage was the determination of the time at which it should be assessed. The significance of the time factor stemmed from the fact that the adverse material consequences of an internationally wrongful act, which served as the basis for the assessment of material damage, could be perceived differently at different times. The extent of the damage could indeed vary in time, yet under international law there were no specific rules stipulating the time at which the assessment of such damage should start, the duration of the period for which material damage should be assessed and, consequently, the time for the submission of a claim against the wrongdoer.

30. In Soviet literature the opinion had been expressed that general rules could usefully be worked out to establish a reasonable procedural time-limit within which a State could submit a claim for compensation and all the adverse consequences of the violation would presumably be known, and within which the injured State could freely choose a time for assessment of the material damage it had suffered. The suggestion that the rule on a procedural time-limit for submitting a claim should be of a dispositive nature was based on the fact that the adverse consequences of some kinds of breaches—for instance, radioactive contamination—became apparent only after a lengthy period, whereas others might be more immediately noticeable.

31. However, account would have to be taken of the procedural time-limits for the submission of claims laid down in general and specific international instruments, such as the 1972 Convention on International Liability for Damage Caused by Space Objects, which set the limit at one year after the full extent of the damage was known. Account should also be taken of the situation of States, which might be unable to reveal the damage and submit a claim in time on account of their status or level of development.

32. At the same time, Soviet doctrine, in accordance with rules of international law, stemmed from the fact that cases of determination of damage arising from international crimes were unconditionally excluded from the scope of rules establishing time-limits for the submission of restitution claims and thus limiting the time-frame for calculating the amount of damages. In view of the particularly grievous and, in many cases, prolonged nature of international crimes and their harmful consequences, it was necessary to elaborate a general peremptory rule to the effect that the submission of claims for damage arising from such crimes should not be subject to any procedural limitation as to time.

33. In the report (*ibid.*, paras. 82 *et seq.*), the time factor was considered from a different angle, namely as the date from which interest should be calculated. Three possibilities were offered, that of calculating interest from the day on which the damage had occurred, that of calculating it from the day on which the *quantum* decision had been rendered, and that of computing interest from the date on which the claim for damages had been filed at national or international level. In his view, *dies a quo* could also be any date determined by the arbitral tribunal. While recognizing the cogency of the arguments advanced by the Special Rapporteur in favour of adopting the date on which the damage had occurred as *dies a quo*, which was the solution chosen in the majority of court decisions, he agreed with Mr. Mahiou (2171st meeting) about the need for sufficient flexibility to enable the specific circumstances of each case, including the financial situation of the respondent State, to be taken into consideration.

34. Although satisfaction, the subject of chapter III of the report and of draft article 10, was often viewed as a means of legal remedy for moral, political and/or legal wrong, its purpose in the strict and most widely accepted sense was to remedy damage of a generally non-material kind and, in particular, injury to a State's honour, prestige or dignity. Since all internationally wrongful acts involved some measure of such injury, ordinary satisfaction was an essential practical reflection of the offending State's responsibility. In cases where an internationally wrongful act did not give rise to material damage, the offending State's responsibility manifested itself exclusively through satisfaction.

35. The Special Rapporteur pointed out in the report (A/CN.4/425 and Add.1, para. 107) that satisfaction was not defined only on the basis of the type of injury with regard to which it operated as a specific remedy but was also identified by the typical forms it assumed, which differed from *restitutio in integrum* or compensation. He agreed with the Special Rapporteur that the question whether satisfaction was punitive or afflictive, or compensatory in nature, was crucial (*ibid.*, para. 108). Opinions on that score differed, but the idea of satisfaction being proportional to the seriousness of the offence or to the degree of fault of the responsible State (*ibid.*, para. 109) was, in his view, extremely important.

36. Guarantees of non-repetition of the wrongful act, discussed in chapter IV of the report, were, as the Special Rapporteur pointed out (*ibid.*, para. 148), a remedy generally dealt with only marginally and within the framework of satisfaction. The Special Rapporteur concluded (*ibid.*, para. 163) that guarantees against repetition constituted a form of satisfaction performing a relatively distinct and autonomous remedial function. Without wishing to minimize the importance of appropriate guarantees of non-repetition as a remedy in the case of delicts, for his own part he wished to stress the incomparably greater significance they assumed in the context of international crimes such as annexation, genocide, and so forth. The point at issue was not only the emergence of new forms of guarantees, but also the purpose of guarantees. The question of the political and legal evaluation given to measures described as guarantees of non-repetition had given rise to lively discussion within the Commission. Obviously, political and legal assertion of guarantees of non-repetition would depend on the view taken of the act whose repetition was to be prevented. The measures adopted could be extremely reactionary if they were directed, for example, against a national liberation movement; the case of the Boxer Rebellion, mentioned in the report (*ibid.*, para. 159), was one example. The report abounded in similar examples drawn from the colonial practice of the era of imperialism.

37. In considering guarantees of non-repetition of crimes, it would be necessary to address the practice of settlement after the First World War and the Second World War which involved, in relation to States having committed genocide, such guarantees as taking away their sovereignty over the people against whom that crime had been committed or, in the case of a State having committed aggression, setting its borders in such a way as to prevent it from using territory as a springboard for the repetition of aggression. True, those examples related to crimes rather than to delicts, but then so did some of the examples cited in the report. He hoped that the Special Rapporteur would give some consideration to the comment in further work on that theme.

38. Lastly, on the question of fault, including wilful intent and negligence, dealt with in chapter V of the report, he agreed with the Special Rapporteur (*ibid.*, para. 164) that the issue was of fundamental importance and that the Commission would have to face it in the course of the elaboration of part 2 of the draft articles. The mystical view of the State and efforts to elude the question of fault resulting from that approach would, sooner or later, have to yield to the need to consider the place of fault in State responsibility. The problem would take on particular importance when the Commission went on to consider responsibility for crimes such as genocide or aggression committed by a State, but it was already essential at the present stage in connection with delicts or internationally wrongful acts. In the past, the Commission had tended to circumvent the issue, although, according to the Special Rapporteur's understanding (*ibid.*, para. 165), it had appeared to believe that fault was a *sine qua non* of wrongfulness and responsibility. Now, however, the Commission's work had reached a stage where consideration of the

fault issue had become indispensable for the specific determination of the consequences of an internationally wrongful act.

39. If breach of an obligation was considered as the basis for State responsibility, some questions arose that should be answered in the interests of strengthening legality and the rule of law. In any case, the issues raised in the report were of such serious nature and had such far-reaching implications that one could not close one's eyes to them. He therefore wished to stress the need for an in-depth discussion of the problem of fault at a future session.

40. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to clarify two points. First, with regard to satisfaction, his second report (A/CN.4/425 and Add.1) distinguished between three periods, the one preceding the First World War, the inter-war period and the period since the Second World War. It condemned most cases of satisfaction relating to the first period as instances of arrogant treatment of smaller or weaker countries by more powerful countries. The situation in the two later periods, where satisfaction had been employed as a remedy between equals, was, of course, altogether different.

41. His second point related to the issues of equity and fault. He had omitted express references to equity from the report because, as experience showed, such references were apt to be unhelpful. Needless to say, however, equity was implied in all legal rules and formed an essential and integral part of law. As for the concept of fault, he failed to see how it would be possible to invoke equity and, at the same time, not mention the role of fault, wilful intent or negligence in the commission of internationally wrongful acts.

42. Mr. FRANCIS said that critical comments in no way detracted from the excellent quality of the Special Rapporteur's second report (A/CN.4/425 and Add.1) or from the signal contribution it made towards advancing the Commission's work. He would none the less associate himself with Mr. Njenga's remarks (2171st meeting) concerning the large number of quotations in French in the English mimeographed version, more particularly in the footnotes. Not all members of the Commission were accomplished linguists, and all wished to read and understand every word of the documents placed before them.

43. With regard to draft article 8, he supported alternative A of paragraph 1: it was the more economically worded and, at the same time, conveyed the basic concept underlying the provision. The words "in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed" were particularly important in conjunction with paragraph 2, where the reference to moral damage was, in his view, superfluous, being subsumed under that stipulation in paragraph 1 (alternative A). The reference to moral damage in paragraph 2 should be deleted and the reason duly explained in the commentary. He fully agreed with members who had raised doubts about the phrase "economically assessable damage" in paragraph 2.

44. As to paragraph 3, Mr. Calero Rodrigues (2169th meeting) had commented that the definition of compensation referred only to profits but not to losses deriving from the internationally wrongful act. In that connection, paragraph 4 did specifically refer to "any loss connected with such act", and he would suggest that the two paragraphs might be merged into one, covering both profits and losses.

45. The expression "contributory negligence" in paragraph 5 was rather too technical and should be replaced by a form of words making it quite clear that if the injured State had in any way contributed to the occurrence of the internationally wrongful act, the compensation it could claim would be reduced accordingly.

46. With regard to draft article 9, he agreed with Mr. Barsegov's view that the question of the date from which interest should be calculated could be left to the arbitral tribunal or, as the case might be, to the parties to a bilateral settlement. The question of dates was out of place in the context of the article. On the subject of the interest rate, Mr. Razafindralambo (*ibid.*) and other members were right to point to the importance of adopting a flexible approach and of not imposing interest rates which might in some cases prove too burdensome. Except in very special circumstances, compound interest should not be awarded.

47. Draft article 10 stood in need of more precision. In particular, the damage should be expressed in terms of its effect on the honour and dignity of the State concerned. Paragraph 1 rightly described satisfaction and guarantees of non-repetition as a form of compensation for injury "not susceptible of remedy by restitution in kind or pecuniary compensation", but in the qualification of the injury as "moral or legal" the reference to "moral" should be removed. He was in favour of article 10 as a "shock absorber", to cover injury that could not be covered by means of monetary compensation under article 8. There was no place for the concept of "wilful intent or negligence", in paragraph 2, for those issues were matters for adjudication by the arbitrator or legal adviser concerned, with due regard for the circumstances.

48. Paragraph 3 met with his approval, as did paragraph 4, on the question of humiliating demands, since it took into account the fact that some States were strong and others weak. It was therefore appropriate to lay down the standards set forth in paragraph 4.

49. The articles under discussion dealt with reparation in the context of the application of articles 8 to 15 of part 1 of the draft. He referred in particular to article 8, on the attribution to the State of the conduct of persons acting in fact on behalf of the State, article 9, on the attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization, and article 10, on the attribution to the State of the conduct of organs acting outside their competence or contrary to instructions concerning their activity.

50. With regard to the attribution to the State of the acts of its officials, and with special reference to crimes, it was appropriate to recall the ruling by the Nürnberg

International Military Tribunal to the effect that crimes against international law were committed by men and not by abstract entities; that only by punishing individuals who committed such crimes could the provisions of international law be enforced. The present draft was actually intended to cover both torts and war crimes. It would be noted that the second report stated:

If in the case of juridical persons of national law a legal attribution or imputation of will or acts is a practical terminological expedient, in the case of States as international persons a legal attribution seems actually to be an error and a redundancy. . . . (A/CN.4/425 and Add.1, para. 175.)

The Special Rapporteur then went on to say that that attribution would be effected by the "foreign ministry legal adviser or the arbitrator called to make the finding" in the light of the appropriate criteria, standards and principles (*ibid.*, para. 176). For his own part, he was firmly convinced that, if attribution were to be left to be effected in that manner, the result would be an array of conflicting and disparate decisions.

51. In that connection, he wished to draw attention to the following statement by Mr. Ago, a former Special Rapporteur:

. . . The attribution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf or at its instigation (though without having acquired the status of organs, either of the State itself or of a separate official institution providing a public service or performing a public function) is unanimously upheld by the writers on international law who have dealt with this question.⁹

Mr. Ago had cited a number of learned authors in support of that view. In his opinion, the Special Rapporteur should revise the views he had expressed in paragraphs 175 and 176 of his second report in the light of those remarks.

52. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Francis had referred to the question of attribution of responsibility, which was of course a legal question. The passages cited by Mr. Francis from the second report (A/CN.4/425 and Add.1, paras. 175-176), however, referred to the attribution of acts by an arbitrator or by a foreign ministry legal adviser. On that last point, there might be some difference of opinion between himself and Mr. Ago; but there was none on the issue of attribution of responsibility, which was a question of law and not of fact.

53. Mr. HAYES said that, in regard to reparation by equivalent, one should start from the principle, identified in the *Chorzów Factory* case (Merits),¹⁰ that all legal and material consequences of the unlawful act should be wiped out so as to establish or re-establish the situation that would exist if the wrongful act had not been committed. In his second report, the Special Rapporteur cited a number of concrete cases which provided material for developing rules going beyond the *Chorzów* principle (A/CN.4/425 and Add.1, para. 28), though not rules on detailed questions. For his part, he generally favoured progressive development and, in the present instance, was reinforced in that

tendency by paragraph 32 of the report and the Special Rapporteur's oral introduction (2168th meeting).

54. The Special Rapporteur cited persuasive authority indicating that, in the sphere of pecuniary compensation, international law had been influenced by municipal law to the extent that international legal principles modelled on municipal-law principles or rules had been applied (A/CN.4/425 and Add.1, para. 27). As pointed out in the oral introduction, however, the question of the actual payment of pecuniary compensation depended on the assessment of facts, regardless of whether the issue was settled by arbitration or through diplomatic effort. In that connection, the question arose as to what matters were appropriate for development. A line had to be drawn between material prompting general rules and material that was the result of assessment, in the circumstances of particular cases, by negotiators or arbitrators. Such a division was not very accurately observed in the draft articles. Thus, while there was a strong case for providing that *lucrum cessans* was a factor calling for compensation, it was inadvisable to seek to regulate such details as rates of interest and the methods for calculating interest, or the period in respect of which interest should be paid.

55. He found no difference in substance between alternatives A and B of paragraph 1 of draft article 8. Alternative A was preferable as it was more direct and concise and identified reparation by equivalent as secondary and supplementary to restitution in kind. It would be better, however, if the wording indicated more clearly that the situation to be established was that which would exist if the wrongful act had not been committed, rather than the *status quo ante*. Actually, that appeared to be the Special Rapporteur's intention, judging from the trend of both of his reports and the use of some language from the *Chorzów Factory* case in the draft.

56. He had hesitations about the expression "economically assessable" in paragraph 2. It was not clear how that criterion of identification would be applied, or indeed what it meant, particularly if there was an implication that moral damage to a national was "economically assessable" whereas moral damage to a State was not. The content of paragraph 2 of draft article 10, as well as the relevant passages of the second report (*ibid.*, paras. 13-17), showed that paragraph 2 of article 8 was partly intended to exclude moral damage to the State from reparation by means of pecuniary compensation. Paragraph 2 of article 8 should therefore be drafted to say that directly. Again, if redrafting along those lines was undertaken, he questioned the need to maintain the reference to moral damage to nationals, it being axiomatic that unlawful infliction of harm on nationals comprised damage to their State, without distinction as to the nature of the harm.

57. He had no difficulty with the substance of paragraph 3 and found the Special Rapporteur's treatment of *lucrum cessans* extremely lucid. The question was shown to be one of causation. Of course, it was, from a different angle, a factor in the function of reparation to establish the situation that would exist if the wrongful act had not been committed, rather than

⁹ *Yearbook* . . . 1971, vol. II (Part One), p. 266, document A/CN.4/246 and Add.1-3, para. 194 *in fine*.

¹⁰ See 2168th meeting, footnote 6.

the *status quo ante*, as the Special Rapporteur recalled by mentioning the *Chorzów Factory* case (Merits) (*ibid.*, para. 66 *in fine*).

58. On the subject of “direct” and “indirect” damage, the quotation in the report from the *South Porto Rico Sugar Company* case (*ibid.*, para. 36), to the effect that the distinction between “direct” and “indirect” damage was “frequently illusory and fanciful and should have no place in international law”, was convincing. He accordingly endorsed the Special Rapporteur’s approach to the problem on the basis of causation, the test being the existence of a clear and unbroken causal link between the wrongful act and the damage. Fortunately, the Special Rapporteur had avoided incorporating the elements of “normality” and “predictability” as factors in the determination of causality. They should be left to the negotiators or the arbitrators, since they related to the assessment of what constituted an “uninterrupted causal link”.

59. He accepted the Special Rapporteur’s summary (*ibid.*, para. 42) to the effect that damages must be fully paid in respect of harm caused exclusively by the wrongful act, whether immediately or not, and thus supported paragraph 4 of article 8 in substance, but urged that it be more tightly worded.

60. In his oral introduction, the Special Rapporteur had said that, if the wrongful act was only one of many causes of the damage, the amount payable in compensation had to be reduced accordingly, and in the report had proved the case for a rule along those lines, adding (*ibid.*, para. 46) that no attempt should be made to provide for criteria for apportioning liability between multiple causes and assessing the partial damages. Likewise, the conclusion was reached that contributory negligence on the part of the injured State, as a justification for reducing the compensation for damage, fell within the situation of multiplicity of causes (*ibid.*, para. 51). Hence he supported paragraph 5 of article 8.

61. Lastly, it was to be hoped that the Special Rapporteur would consider introducing in article 8 an express provision to the effect that full payment was required in respect of damage caused exclusively by the wrongful act.

62. Draft article 9 should be deleted. There was a certain link between that article and paragraph 3 of article 8, on loss of profits, since interest was the most frequently used method for compensating for such loss. As he saw it, the question whether interest should be included in compensation and, if so, between which dates, at what rate and whether it should be calculated as simple or compound interest were all matters for appraisal by arbitrators or negotiators seeking to establish terms of compensation in the light of all relevant circumstances. Consequently, it was not advisable to attempt to devise rules in that regard. Actually, the rule laid down in paragraph 1 of article 9 was much too rigid and other provisions of the article were so general as not to be of any significance. Paragraph 2 merely stated that compensation must be adequate, an element already comprised in article 8. It would of course be clearer in article 8 if, as he had suggested, a provision on full compensation were added.

63. With regard to draft article 10, the existence of satisfaction as a mode of reparation in international law was supported by the Special Rapporteur’s exhaustive examination of writings, decisions and State practice in chapter III of the report. Satisfaction constituted a non-compensatory form of reparation for a moral, political or juridical wrong to a State. The Special Rapporteur listed a number of forms of satisfaction (*ibid.*, para. 139) and, with one exception, they were clearly directed towards reparation of injury to the State’s dignity, honour or prestige. The exception was payment of money in excess of what was required to compensate for material damage. That should be omitted as not being appropriate to the injury and also as tending towards punitive damages.

64. He approved of the descriptive clause “not susceptible of remedy by restitution in kind or pecuniary compensation” in paragraph 1 of article 10, but “adequate” should be replaced by “appropriate” as the word to qualify “satisfaction”. The word “punitive” should also be removed. Indeed, it might be preferable to delete the entire reference to “nominal or punitive damages”. It should also be made clear that the list of forms of satisfaction was not exhaustive. At the same time, he believed that flag-saluting ceremonies or expiatory missions, for example, did not constitute viable forms of satisfaction in the present day and age.

65. He was hesitant about including the element of wilful intent or negligence in paragraph 2, notwithstanding the Special Rapporteur’s conclusion that fault and wilful intent or negligence influenced the forms and degrees of reparation (*ibid.*, para. 180) and that fault had influenced the forms and degrees of satisfaction (*ibid.*, para. 187). The Commission should perhaps revert to the question after it had considered the provisions on the consequences of crimes.

66. Paragraph 4 should be deleted. Apart from the fact that it proposed to limit the content of claims rather than of conclusions, it related to humiliating demands, which were a late and unlamented feature of State practice. They should be mentioned in the commentary and not be dignified by a reference in the text of the article, even for the purpose of rejecting them.

The meeting rose at 1.05 p.m.

2173rd MEETING

Wednesday, 13 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo,

Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (continued) (A/CN.4/416 and Add.1,¹ A/CN.4/425 and Add.1,² A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles³

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) and

ARTICLE 10 (Satisfaction and guarantees of non-repetition)⁴ (continued)

1. Mr. AL-KHASAWNEH said that the Special Rapporteur's second report (A/CN.4/425 and Add.1) was not only theoretically brilliant, but also contained a good deal of realism and common sense. The Special Rapporteur deserved congratulations.

2. Before turning to the substance of the report, he drew attention to two relatively minor defects which could easily be rectified to make the report more readable. First, the corrigenda which had been issued had not eliminated the many typing mistakes that disfigured the English mimeographed version. Secondly, the Special Rapporteur had quoted relatively long passages from works in the original Italian, thereby preventing those who were not familiar with that language from understanding important points in the report.

3. Another general comment was that, during the debate on the topic, the Special Rapporteur had been criticized for quoting cases from the nineteenth and early twentieth centuries, especially relating to satisfaction. He nevertheless considered that the Special Rapporteur was fully justified in that approach. To refer to a case in which abusive measures had been imposed

against a small or weak State in order to obtain satisfaction did not imply approval of that practice. On the contrary, no proper appraisal of satisfaction or of the ways in which it could be abused was possible without a close and dispassionate examination of the past. Power disparities among States remained a constant factor in international relations and, at the previous meeting, Mr. Bennouna had rightly stated that, even in respect of the elaboration of secondary rules, which, according to the Special Rapporteur, were more amenable to progressive development than primary rules, the existence of disparities between creditors and debtors, large and small, weak and strong, would continue to make itself felt in legal relations between States. It was therefore necessary now, as it had been in the nineteenth century, to be aware of the impact of power relations; but, as long as they did not have a more direct effect, they did not invalidate legal relations.

4. In his preliminary report (A/CN.4/416 and Add.1, para. 66), the Special Rapporteur cited the well-known dictum of the PCIJ in the *Chorzów Factory* case (Merits) to the effect that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". The words "in all probability" were not without significance, for they left no room for doubt that what was meant was some theoretical situation which had never existed, but which would have existed had it not been for the intervention of the wrongful act. That definition, which had been endorsed by the Special Rapporteur, contrasted with the definition stated in the *Bryan-Chamorro Treaty* case (*ibid.*), in which reparation had been regarded as the restoration of the *status quo ante*. In the preliminary report (*ibid.*, para. 67), the Special Rapporteur recognized that those two definitions had different impacts on the scope of pecuniary compensation, which was the subject of draft article 8 submitted in the second report. In view of that impact and of the absence of a definition of *restitutio in integrum* in draft article 7 as submitted in the preliminary report, he shared the misgivings expressed by Mr. Graefrath (2168th meeting) about the two alternatives proposed by the Special Rapporteur for paragraph 1 of article 8. At any rate, he would welcome explanations on the subject from the Special Rapporteur.

5. A somewhat different point related to the equation of reparation by equivalent with pecuniary compensation. In the *British Claims in the Spanish Zone of Morocco* case (see (A/CN.4/425 and Add.1, footnote 234), the arbitrator had decided that the Spanish Government should provide premises for the British Consul at Tetuan to replace those for whose unlawful destruction it had been responsible. Christine Gray had listed that case as one of material restitution, but he himself thought that it was rather a case of reparation by equivalent, albeit not of a pecuniary nature. If that proposition were accepted, it would follow that giving reparation by equivalent an exclusively pecuniary nature might be too restrictive.

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

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

³ 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

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.

⁴ For the texts, see 2168th meeting, para. 2.

6. A third point related to the possible impact on reparation by equivalent of the concept of the excessively onerous burden on the "author" State. If read together, draft articles 7 and 8 gave the impression that the exception of the excessive onerousness of the burden imposed on the author State applied only to restitution in kind, or at least that its relationship to reparation by equivalent was tenuous. It was obvious, however, that the reasons that had led the Special Rapporteur to introduce the concept of excessive onerousness as an exception to the duty to make restitution in kind applied with equal force to reparation by equivalent. The complete ruin of a State could be brought about by onerous demands of a pecuniary nature, especially if it was considered that the draft did not limit indemnifiable damage by means of the proximate-cause test and provided for the possibility of awarding compound interest to ensure full compensation. It therefore seemed to him that, if it was the Special Rapporteur's intention that the operation of the exception of excessive onerousness should apply to reparation by equivalent, that point should be made clear.

7. In draft article 8, paragraphs 2 to 5, and in draft article 9, the Special Rapporteur enunciated, on the basis of the progressive development of the law, a number of detailed rules relating to the scope and determination of reparation by equivalent. Ironically, progressive development was warranted in the present case not because of a lack of jurisprudence, but because, despite its abundance, it was difficult to draw any uniform standards of indemnification from it. The Special Rapporteur's treatment of the possibility and wisdom of drawing up rules that went beyond the so-called *Chorzów* principle was well-balanced and he himself fully endorsed that part of the second report (*ibid.*, paras. 26-33). He recalled that, during the debate, Mr. Graefrath had advised against going into detail in that regard. He was, however, even more convinced by what Mr. Graefrath had said in a 1984 lecture at The Hague Academy of International Law, namely that the definition of reparation in the *Chorzów Factory* case was "such a general, abstract and far-reaching one that it might be quoted by everybody",⁵ as well as by Mr. Graefrath's further comment:

... it is necessary that the obligation is sufficiently specific and precise. Wide social spheres, under present conditions of quick extension, development and changes in international relations, cannot be regulated simply through general legal principles, as important as they are. Precise rules are necessary...⁶

On the other hand, the question of how precise the rules to be developed should be was ultimately more a question of art than of science. He believed that the legislator should leave the judge some latitude and therefore considered that the expression "economically assessable damage", in paragraph 2 of article 8, was reasonably precise.

8. In paragraph 3 of article 8, the Special Rapporteur dealt with the question of *lucrum cessans*. Although there was strong support in legal literature and in prac-

tice for compensation of *lucrum cessans*, there was no uniformity in that regard. In two cases cited by the Special Rapporteur, the "*Canada*" case and the *Lacaze* case (*ibid.*, para. 64), the courts had refused to compensate for lost profits because, in the first case, such profits had been considered uncertain and, in the second, the damage had been considered indirect. In the *Shufeldt* case (*ibid.*, para. 66), the arbitrator had stated that, to be recoverable, *lucrum cessans* had to be the direct fruit of the contract and not be too remote or speculative. He himself believed that that was the most equitable solution to the problem of providing compensation for lost profits. The wording used in paragraph 3 was therefore much too broad in so far as it referred to compensation for "any profits".

9. In paragraph 4, the Special Rapporteur introduced the idea of an "uninterrupted causal link" and it was apparently Bollecker-Stern's algebraic formula (*ibid.*, para. 43) that had made him adopt that metaphor rather than the proximate-cause approach. He did not intend to embark on an analysis of the idea of causation in law. Suffice it to stress that what was needed was a provision of principle which kept indemnifiable damage within reasonable bounds rather than a philosophical concept which was at best unsatisfactory. While the Special Rapporteur was absolutely right in saying (*ibid.*, para. 41) that the use of the adjective "proximate" was not without a certain degree of ambiguity, the term should nevertheless provide enough specificity in a rule which surely would be interpreted by the courts and adapted by them to each individual case.

10. With regard to paragraph 5, he saw no need for including, as Mr. Hayes had suggested at the previous meeting, a provision to the effect that, in the absence of concomitant causes, including possibly contributory negligence by the injured State, compensation should be paid in full. In his own view, such a rule could be derived from either alternative A or alternative B of paragraph 1, or, *a contrario*, from paragraph 5. The rule on partial reduction of compensation due to contributory causes appeared to be well established: it had been applied in the *S.S. "Wimbledon"* case decided by the PCIJ (*ibid.*, para. 50), as well as in the "*Costa Rica Packet*" and *Delagoa Bay Railway* cases (*ibid.*, para. 48) and the *John Cowper* case (*ibid.*, para. 49), and it was significant that, although publicists did not all agree on its origin, they did agree on the existence of the rule.

11. In draft article 9, paragraph 2 seemed to run counter to the trend surveyed by the Special Rapporteur. Its exceptional imposition and the iniquitous results to which it could lead were such that it should be deleted. In fact, he was in favour of the deletion of article 9 as a whole because the calculation of interest was so much a matter of circumstances that it should be decided on a case-by-case basis.

12. With regard to satisfaction, the general proposition that justice had a punitive aspect could not be completely overlooked. It had often been said that punitive damages were incompatible with the concept of the sovereign equality of States and could easily be

⁵ B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses of The Hague Academy of International Law, 1984-II* (The Hague, Nijhoff, 1985), vol. 185, p. 69.

⁶ *Ibid.*, p. 37.

abused as a result of the actual inequality of States in size and power, but he thought that such fears, though not unfounded, were exaggerated. Proper safeguards in the draft should eliminate, or at least reduce, abuses and, as far as sovereign equality was concerned, it should not be forgotten that the codification and progressive development of international law should aim at the establishment of the rule of law in international relations. He was not much persuaded by the argument that posited sovereignty against justice and he believed that there was much that deserved support in the comment by Lauterpacht cited in the report (*ibid.*, footnote 264). Eagleton, also cited in the report (*ibid.*, footnote 263), had summed up the matter very eloquently in stating:

... international law is badly in need of such sanctions. It can no longer be argued that the sovereign State is above the law; and there seems to be no reason why it should not be penalized for its misconduct, under proper rules and restrictions.

13. Much had been made of the statement by the umpire, Edwin B. Parker, in the "*Lusitania*" case that "as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal" (*ibid.*, para. 114). He himself agreed with the way the Special Rapporteur interpreted that case: what the arbitrator had meant was that the matter was one for States to settle at the ordinary diplomatic level, not that the whole concept of satisfaction was beyond legal regulation. That interpretation seemed to be supported by other cases cited in the report. Thus, in the *Miliani* case, the umpire had stated that "unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomatists might well do so" (*ibid.*, footnote 278).

14. For all those reasons, he believed that satisfaction should have a place in the draft. He had no difficulty in principle either with draft article 10 or with the introduction of the concept of negligence or wilful intent into the text. On the whole, however, he thought that it would be advisable to give those issues further thought and to wait until the question of particularly serious delicts and crimes had been discussed.

15. Mr. BARBOZA sincerely congratulated the Special Rapporteur on his excellent second report (A/CN.4/425 and Add.1), which dealt exhaustively with a complex and fascinating topic.

16. With regard to paragraph 1 of draft article 8, he said that, like most members of the Commission, he preferred alternative A. The Special Rapporteur had apparently accepted the principle regarding reparation laid down in the *Chorzów Factory* case (Merits),⁷ something he had not done explicitly in his preliminary report (A/CN.4/416 and Add.1). Perhaps he had wanted to avoid stating his position before the Commission had discussed the matter. In any event, he personally was glad that article 8 stated the *Chorzów* principle, which he preferred to the *status quo ante* rule adopted by the previous Special Rapporteur.

17. He also thought that alternative A partially duplicated paragraph 4 of draft article 7 as submitted

in the preliminary report, which read: "The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind...". The two provisions could either be merged or paragraph 4 of article 7 could be incorporated into article 8 to produce the following text:

"The injured State may, in a timely manner, claim from the State which has committed an internationally wrongful act pecuniary compensation to substitute for restitution in kind, in the measure necessary to establish the situation that would exist if the wrongful act had not been committed, provided that such a choice would not result in an unjust advantage to the State which committed the internationally wrongful act or involve a breach of an obligation arising from a peremptory norm of general international law."

He pointed out that he had eliminated the words "totally or in part" in paragraph 4 of article 7 because, if the *Chorzów* principle was accepted, restitution in kind was equivalent to full restitution, which, by definition, could not be partial. Moreover, since the point was not, as Mr. Graefrath (2168th meeting) had noted, to re-establish an earlier situation, but rather to establish a situation which had never existed, the word "re-establish" had been replaced by "establish".

18. He had no difficulty with paragraph 2 of article 8: the expression "economically assessable" reflected international case-law and practice. Although economic assessments differed from one case to another, in each of the cases cited an effort had been made to assess the damage in economic terms and it had been found that the damage was "economically assessable".

19. As to paragraph 3, which dealt with *lucrum cessans*, he thought that the expression "any profits the loss of which" was too vague, even though its scope was restricted to some extent by paragraph 4, which provided that the damage must be connected with the internationally wrongful act by an uninterrupted causal link.

20. In paragraph 4, which made the uninterrupted causal link the criterion for limiting the scope of the assessment of damage and *lucrum cessans*, the Special Rapporteur seemed to have followed the rule applied in administrative decision No. II of the United States-German Mixed Claims Commission of 1 November 1923 (A/CN.4/425 and Add.1, para. 39), and thus, rather strangely, had not taken account of the favourable opinion he had expressed (*ibid.*) on the criterion of predictability. The idea of predictability was very important and it should be included in the text.

21. He welcomed the fact that the Special Rapporteur had not retained the *in abstracto* or *in concreto* alternative methods for determining *lucrum cessans* or the "going concern" reasoning. The *Chorzów* principle was an adequate guideline.

22. He fully agreed with paragraph 5 of article 8.

23. Draft article 9, on interest, which the Special Rapporteur described as being a part of *lucrum cessans* (*ibid.*, para. 78), could be deleted and it could simply be indicated, perhaps at the end of paragraph 3 of article 8, that interest must be paid whenever compensa-

⁷ See 2168th meeting, footnote 6.

tion was due for the loss of a sum of money. Courts must be free to interpret the full-compensation rule in each particular case and to determine how interest was to be calculated.

24. Draft article 10, on satisfaction, was very important. He particularly supported the wording of the beginning of paragraph 1, believing as he did that moral injury to a State was different from material or moral damage to the nationals of that State. Otherwise, there would be no need for an article dealing with satisfaction. When the dignity of a State was injured, reference was made to “moral” or “political” damage to the State. That was a key concept and, as both case-law and diplomatic practice showed, moral damage to a State was not economically assessable.

25. Commenting generally on satisfaction, he questioned whether it was punitive or compensatory in nature. In fact, the two aspects were closely linked in international law. Satisfaction always involved a punitive aspect, because it was by no means easy for a State which had committed a wrongful act to fulfil certain obligations which it had not at first recognized as being binding on it. But it also had a compensatory aspect, since what was afflictive for the author State was compensatory for the injured State. For pragmatic reasons, however, he would prefer not to place too much emphasis on the punitive aspect.

26. With regard to the second part of paragraph 1, listing various forms of satisfaction, he noted that, although apologies existed in diplomatic practice, there had not been many examples of them in international case-law. Generally speaking, States did not claim “satisfaction”. There had been some interesting recent decisions in that regard. For instance, the United States of America had not called for apologies in the case of the American hostages in Iran. Even going further back, the ICJ, in the *Corfu Channel* case, had found that the Court’s declaration that the United Kingdom had violated the sovereignty of the People’s Republic of Albania constituted in itself appropriate satisfaction for the injured State.⁸ It was therefore perhaps not very advisable to include the concept of apologies in a draft intended as a contribution to the progressive development of international law. One possible solution might be to soften the term and refer instead to “an expression of regrets”. In general, however, it did not seem necessary to provide for different degrees of satisfaction. He was also opposed to the idea of punitive damages.

27. Paragraph 2 of article 10 was the most original and boldest of all the proposed provisions. However, the Special Rapporteur’s decision to include the concept of “wilful intent” in that paragraph carried weighty implications. It was clear from the second report (*ibid.*, footnote 399) that part 1 of the draft articles would have to be amended. It had, however, already been difficult to arrive at a consensus on part 1 and, if the idea of fault was to be introduced, it would be necessary to begin again on a different basis.

28. Paragraph 3 appeared to lay down a rule intended for an international court, and he thought that the provision should be included at the end of paragraph 1.

29. Finally, with regard to paragraph 4, he agreed with other members that the concept of “humiliating demands” was too subjective and should be eliminated.

30. Mr. PELLET, speaking for the first time in the Commission, thanked the members for their warm welcome and paid tribute to the memory of Paul Reuter, whom he had the great honour of succeeding.

31. Leaving aside for the moment the question of interest, dealt with in draft article 9, he said that he wished to comment on draft articles 8 and 10 and would make some general observations on the concept of reparation itself.

32. Without going into detail in the far-reaching theoretical debate on the nature of international responsibility, he could not help pointing out that the approach adopted by the Special Rapporteur, both in his preliminary report (A/CN.4/416 and Add.1) and in his second report (A/CN.4/425 and Add.1), seemed rather ambiguous. The entire logic of part 1 of the draft articles that had served as the foundation for the approach which the former Special Rapporteur, Mr. Ago, had taken and which he fully endorsed had been based on the idea that reparation was one of the consequences of responsibility, which was incurred by the sole fact that an internationally wrongful act existed. In other words, responsibility existed from the time a breach of international law could be attributed to a State and no circumstance precluding wrongfulness could be found. That was the first stage and it was also the subject-matter of part 1 of the draft.

33. In the second stage—the subject-matter of part 2 of the draft articles—it had to be asked what the consequences of such responsibility were. One was reparation, which, as the Special Rapporteur had lucidly explained in his preliminary report, must be distinguished from another consequence of responsibility, namely the cessation of the wrongful act, which, in his own view, must also be distinguished from guarantees of non-repetition. Guarantees of non-repetition should be the subject of a separate article, perhaps even a separate subdivision, as the Special Rapporteur had himself suggested in the tentative outline submitted in his preliminary report in 1988 (A/CN.4/416 and Add.1, para. 20). The purpose of such guarantees was not to make reparation, but to prevent other internationally wrongful acts from occurring or to prevent them from continuing. It would therefore be useful to deal with the question of guarantees of non-repetition separately and to determine whether they were in fact always a consequence of responsibility for an internationally wrongful act. The various types of guarantee should perhaps also be given more detailed treatment.

34. Once reparation had been rid of the “impurities” of cessation, guarantees of non-repetition and sanctions—to which he would come back later—it turned out to be nothing more than the “wiping out” of the harmful consequences of the internationally wrongful act, and that was obviously the purpose of all the forms of reparation listed, namely restitution in kind, compensa-

⁸ *Corfu Channel, Merits*, Judgment of 9 April 1949, *I.C.J. Reports* 1949, p. 4, at p. 36.

tion and satisfaction. However, the ambiguity to which he had referred was that, in some cases, the Special Rapporteur seemed to be treating reparation less as a consequence of responsibility than as its key element. It was obvious that, in the Special Rapporteur's view, reparation not only was designed to "wipe out" the consequences of the internationally wrongful act, but was also something of a sanction, in the "punitive" sense of the term. The Special Rapporteur also made a distinction between the different types of reparation, not only according to the form of reparation, but also according to its purpose, in other words according to the nature of the injury suffered. In his own opinion, compensation and satisfaction were actually two forms of reparation by equivalent, both being intended to wipe out the harmful consequences of the internationally wrongful act when restitution in kind was impossible or inadequate. Compensation corresponded to the pecuniary form of reparation by equivalent and satisfaction to the other forms of non-pecuniary reparation. If his analysis was correct, there would be several practical consequences.

35. First, the title of article 8 should not be "Reparation by equivalent", since article 10 also dealt with a form of reparation by equivalent, but, rather, "Compensation": that would be fully in keeping with the content of article 8, since it was the term used in the two alternatives of paragraph 1 and in paragraphs 2 and 3. Secondly, damages should be associated in every instance with compensation, in other words with article 8, and not with article 10 on satisfaction, since the main consideration would be the form of reparation.

36. He admitted that that approach, despite its undoubted simplicity, had one disadvantage. Although compensation might sometimes be determined "objectively", when it corresponded, for example, to the value of an item of property, it could also depend on much more "subjective" considerations when compensation was due for an injury to the honour of a State or to the feelings of an individual. If compensation was paid, however, that must mean that in both cases it was considered that the damage was "economically assessable": for Grotius, money was the measure of all things. In that connection, he did not think that the wording proposed in article 8, paragraph 2, should relate only to compensation for material damage and he could not quite see why moral damage suffered by nationals should be more—or indeed less—economically assessable than that suffered by the State itself.

37. In any event, even in the light of the Special Rapporteur's reasoning, it seemed clear from his second report that compensation was the form of reparation for material damage and satisfaction the form of reparation for moral injury. Article 8 and particularly article 10 might therefore be amended to include wording more along those lines.

38. Those articles also called for two other important comments. First, he did not believe it was possible to speak of "legal" injury. Any injury arising from an internationally wrongful act must, assuming that there was responsibility, have a "legal" element. However, as soon as reparation had been made, in whatever form, the injury had *ipso facto* been made good. Hence the

"legal" injury which was ultimately a part of every international injury could not in any sense be separated from it and, in any case, there was no need to refer to it specifically in draft article 10, rather than in draft article 8 or draft article 7 (Restitution in kind).

39. Secondly, he agreed with what was apparently a majority of the members of the Commission that the idea of "punitive" damages was not very appropriate. Admittedly, any form of satisfaction and even, indeed, any form of reparation was "afflictive" in nature, but that was no reason to use wording with criminal-law connotations. Although Anglo-Saxon doctrine and a few arbitral awards referred to "punitive damages", French doctrine was much more circumspect in that regard for a variety of reasons, including the old saying that "the king [the State] can do no wrong". A State probably could be required to make good the harmful consequences of an internationally wrongful act, but that was an objective act which met a social need and was not based on any value judgment. For psychological, political and diplomatic reasons, moreover, he did not think that it was reasonable to slip such a radical change into traditional international-law concepts. He nevertheless explained that, unlike some other members of the Commission, he did not in principle object to the idea that, in some cases, a State might be subject to criminal sanctions. That had nothing to do with reparation, however. The idea of sanctions should probably be dealt with elsewhere in the draft articles, perhaps in the part relating to crimes, because such a consequence of the international responsibility of the State would obviously be of an exceptional nature and would occur only in certain cases that would have to be carefully defined.

40. That did not mean that he was indifferent to the reasoning of the Special Rapporteur, who had demonstrated, by giving many examples, that the damages paid as reparation for moral injury varied widely, ranging from one symbolic franc to very large sums. However, he did not think that it was necessary to resort to the concepts of fault or criminal sanctions to explain those variations, which rather depended, in his view, on the seriousness of the injury suffered: a mild infringement of a mild rule would obviously not cause such serious damage as a serious breach of a rule of essential importance. In such a case, there was certainly a difference of degree, but it was not due to the extent of the fault; it was due to the extent of the damage suffered by the injured State. Furthermore, if one accepted the otherwise attractive idea that there was a continuum, as it were, in the seriousness of the offence, ranging from a very minor breach to a crime, one of the key ideas in the Special Rapporteur's preliminary report which had apparently been endorsed by all members of the Commission would necessarily have to be abandoned, for there would no longer be any reason for separating the consideration of the consequences of an international delict from that of the consequences of an international crime.

41. Turning next to the measure of reparation by pecuniary compensation, he said that, of the two alternatives proposed for paragraph 1 of article 8, and contrary to the majority of members, he was firmly in

favour of alternative B, since the idea expressed in alternative A that such compensation could be calculated on the basis of what was necessary “to re-establish the situation that would exist if the wrongful act had not been committed” seemed to him to be incompatible with the distinction made between “restitution”, which had the effect of re-establishing the pre-existing situation, and “pecuniary compensation”, which became due precisely when the re-establishment of the pre-existing situation was impossible. That was a contradiction in terms.

42. On the other hand, he did not disagree with the idea reflected in paragraph 4, according to which the only thing that mattered was an uninterrupted causal link between the wrongful act and the loss. Any damage which had a direct or, better still, a “transitional” link with the internationally wrongful act should in principle be compensated for. As the Special Rapporteur demonstrated, that was in keeping with international practice, even though he (Mr. Pellet) agreed with other speakers that it would probably be advisable to introduce the concept of predictability at that point in addition to the concept of causality.

43. Moreover, certain examples more recent than those cited by the Special Rapporteur and of a somewhat different kind confirmed that *lucrum cessans* could also be compensated for if there was a causal link, as referred to in paragraphs 3 and 4 of article 8, with the wrongful act. In that connection, he regretted that the second report dealt mainly with the traditional problems involving offences against the property of private individuals. Care should be taken to avoid an unduly restrictive view of the concept of *lucrum cessans*. To take the case of the raids which South Africa had perpetrated against its neighbours in the past and which had been condemned by the Security Council and the General Assembly of the United Nations, South Africa had been legally bound to make reparation for the harmful consequences of those incursions and to pay compensation to the neighbouring countries, not only for loss of human life, but also for lost harvests and damage—even long-term damage—to their economies. That indeed was also a case of *lucrum cessans*. *Lucrum cessans* also seemed to be covered by the terms of paragraph 292 (13) and (14) of the judgment delivered by the ICJ on 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.⁹

44. In general, however, he agreed with the Special Rapporteur’s analyses concerning the problem of causality and *lucrum cessans* and, subject to minor drafting changes, would support paragraphs 3 and 4 of article 8. The reference to equity which Mr. Bennouna (2172nd meeting) had proposed introducing was perhaps not altogether appropriate, as it was a concept that had proved somewhat ineffective in the case of the law of the sea.

45. He was nevertheless still puzzled about one point, which concerned damage to individuals. While he

would not dwell on questions of terminology—although, instead of referring to “indirect” damage, it would perhaps have been better to speak of “mediate” damage as contrasted with immediate damage to the State itself—he regretted that no mention of the mechanism of diplomatic protection was made either in article 8—which was normal—or in the report—which was less so. Even if the question was apparently a procedural one and should be dealt with in the context of part 3 of the draft, that mechanism none the less had a direct effect on the problems under consideration. As everyone knew, to cite the famous dictum of the PCIJ in the case concerning the *Mavrommatis Palestine Concessions*:

... By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.¹⁰

That dictum was based on a legal fiction which already was questionable in itself, but was also unacceptable so far as one aspect at least of the questions under discussion was concerned. In practice, the amount of compensation due to the State for damage caused to individuals was always calculated on the basis of the injury suffered by such individuals. Paragraph 2 of article 8 as proposed by the Special Rapporteur made a very indirect reference to damage suffered by individuals. He wondered, however, whether it would not be essential to tackle the question head on and to take a clear position on the question of the compensation due in the event of “mediate” injury to individuals. Should such compensation be calculated on the basis of the damage suffered by the individual or on the basis of the damage suffered by the injured State itself? The two things were not always the same and a choice would have to be made. That could not be done if one ignored the question of diplomatic protection, which was, moreover, to a large extent symmetrical with the question of attribution dealt with in part 1 of the draft.

46. Furthermore, he had difficulty in understanding why, in the two alternatives for paragraph 1 of article 8, the Special Rapporteur had chosen what might be termed an “active” form of words: “The injured State is entitled to claim...” and “has the right to claim...”. That appeared to encroach on the procedural issues which should be the subject of part 3. It would be preferable, in his view, to adopt a passive form of words along the following lines: “The State which has committed an internationally wrongful act shall be required to pay compensation...”. That turn of phrase had been used in draft article 10 and was in keeping with the position which the Special Rapporteur had himself taken at the previous session during the consideration of draft article 6 (Cessation of an internationally wrongful act of a continuing character) as submitted in his preliminary report.

47. Finally, he fully agreed with the idea expressed in paragraph 4 of draft article 10, which seemed to be a necessary guarantee—though perhaps an inadequate one—for weak States against the excessive demands of

⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986, p. 14, at p. 149.*

¹⁰ *Mavrommatis Palestine Concessions, Judgment No. 2 of 30 August 1924, P.C.I.J., Series A, No. 2, p. 12.*

strong States. Perhaps the paragraph should be strengthened and separated from the rest of the article.

48. Mr. THIAM thanked the Special Rapporteur for his second report (A/CN.4/425 and Add.1), which dealt in masterly fashion with the facts, events, judicial decisions and disputes in legal literature regarding State responsibility.

49. Expressing his agreement with the broad lines of the report, he noted that the solutions which it proposed and which were distilled in draft articles 8, 9 and 10 were the expression of general principles of international law, as repeatedly formulated by international tribunals. The first of those principles was that any internationally wrongful act entailed an obligation to make reparation; the second, that the reparation must be designed to redress all the consequences of the wrongful act so as to re-establish the situation that would have existed if the wrongful act had not been committed; and the third, that, if it was not possible to re-establish that situation, recourse should be had to compensation or, more specifically, indemnification. He would not dwell on the subsidiary method of reparation known as indemnification, though it was the most common and was based on the principle of full or partial reparation of the injury according to whether the wrongful act was or was not the exclusive cause of the damage.

50. The Special Rapporteur had analysed the requirements for reparation, including the fact that there must be a causal link between the wrongful act and the damage, and had drawn attention in particular to the case in which the causal link formed part of a chain of events among which the wrongful act might or might not appear to be the sole cause of the harmful result. He had then considered the concept of reparation itself—in other words, the elements of which it was composed—and had pointed out that, as reparation was supposed to cover the full extent of the injury suffered, account must be taken not only of *damnum emergens*, but also of *lucrum cessans*. He had gone on to discuss the question of interest, including compound interest. In that connection, he (Mr. Thiam) had to confess to doubts about the need to award compound interest in all cases. The award of compound interest was based on the optimistic presumption that the beneficiary of the reparation would have administered the capital sum paid to him with due diligence. That did not go without saying. The society of States, like the society of men, had its prodigals. Such considerations would not detain him.

51. He wished, however, to dwell on the question of moral injury suffered directly by the State, to the exclusion of injury suffered by individuals, and on the specific method of reparation known as satisfaction. Satisfaction was undoubtedly one of the most original institutions in the law of international responsibility and, above all, one of the best suited to the nature of the subjects of law concerned, namely States. Throughout the ages, reparation for moral injury had given rise to much controversy, which had focused on criticism of those who had sought to alleviate their moral suffering in the quest for a sum of money. Even-

tually, there had been a move away from symbolic damages to the award of ever larger sums of money as compensation for moral suffering.

52. Reparation for moral injury suffered by the State posed even more complex problems than reparation for moral injury suffered by individuals. A feeling of affection was, of course, unknown to States; they were cold entities which were moved solely by the wish for power and whose action was motivated by the *raison d'Etat* alone. But there was one kind of feeling peculiar to the nature of the State to which the Special Rapporteur referred on several occasions, namely the feeling of the honour, dignity and prestige of the State.

53. Those three concepts were not, however, situated at the same level in the scale of values. Prestige was linked to the idea of greatness, which was less important than the concept of honour and, above all, the concept of dignity. Prestige was linked to the power of the State and, in bygone times, had been measured in terms of conquest. Of course, in the modern day and age, that was no longer so. A State's sphere of influence was no longer based on power, but on its attachment to such values as justice, peace and the principles of the Charter of the United Nations. The more a State upheld those values, the more influence it had throughout the world. Yet that did not mean that the concept of prestige in its old meaning had been completely eclipsed. It still retained its original meaning.

54. The position was different in the case of dignity and honour, however. Every State, small or large, rich or poor, needed dignity and honour. Those values were sacrosanct and formed part of the nature of the State, whatever trials and tribulations it might have to endure along the path of history. Consequently, the problem of reparation for moral injury suffered by the State as a result of an offence against its dignity or honour was extremely delicate. There had been a time, happily now gone by, when reparation for an offence against those values had been sought in war: that had been the time when the State had merged into the person of the sovereign and when the concepts in question had involved values of chivalry. In a sense, they still did, since every State regarded any infringement of those values as an offence. And that was where reparation for such an offence came into play. Despite an evolution in customs and a certain tendency to bargain which was a feature of the modern day and age, reparation for moral injury suffered by the State could not undergo the same evolution as reparation for moral injury suffered by individuals, which tended increasingly to be compensated for by the payment of ever more substantial damages. It was more complex. In that connection, he did not really think that the adage of Grotius cited by Mr. Pellet was valid in that area as well. There was no certainty that reparation for an injury to the honour or dignity of a State could be reduced to the mere payment of a sum of money. That was where satisfaction came in.

55. Internal law was well equipped when it came to compensating for moral injury, and particularly for moral injury resulting from an offence against the

honour of, and respect due to, individuals. Two actions were available in law for dealing with libel and slander: a civil action for reparation and a criminal action. The two could in fact go hand in hand at the procedural level, so that the perpetrator could have an obligation to make reparation and at the same time a criminal sanction imposed upon him. That was what normally occurred in the case of offences by the press. International law was far less well equipped to deal with such offences. It was impossible to transpose to States a criminal sanction applied to individuals. That was why the Special Rapporteur, who was well aware of the point, used the expression “punitive damages”, which had been criticized by some in connection with satisfaction. Satisfaction was, however, the most suitable solution in that particular case. In view of its hybrid nature, it had the characteristics both of reparation and of punishment: it had the characteristics of reparation when it consisted in the award of a symbolic sum of money or of a limited amount; and it had the characteristics of a criminal or afflictive sanction, as it were, when it served, as an additional element, to compensate for material damage. However, when it involved substantial damages exceeding the capacities and means of States, it no longer served the purpose for which it was intended.

56. On the other hand, he did not think that satisfaction, as a criminal sanction, could go beyond, for instance, apologies or regrets. Apologies were not outmoded: even if they were not common in judicial or arbitral practice with regard to the peaceful settlement of disputes, they were in diplomatic practice. In recent times, Israel had presented its apologies—specifying that a form of reparation was involved—when it had seized Eichmann; and France had also presented its apologies in the “*Rainbow Warrior*” case (see (A/CN.4/425 and Add.1, para. 134). He agreed with the Special Rapporteur that, in so far as satisfaction served to remedy the deficiencies of reparation, it was a form of sanction which, though not a traditional criminal sanction, was none the less a form of penitence which the State imposed on itself or which was imposed on it by the courts. Satisfaction could not, however, be assimilated to “punitive damages”.

57. Furthermore, satisfaction seemed to be the method of reparation that was indicated in the case of an international delict, but certainly not in the case of an international crime, which was of particular seriousness and called for a special sanction. Notwithstanding article 19 of part 1 of the draft articles, which dealt with international crimes committed by States, he did not think that an attempt should be made to attribute criminal responsibility to the State. In the case of international crimes of the kind listed in that article, it was no longer possible to speak of satisfaction. It was necessary to look beyond the responsibility of the State to the criminal responsibility of the individual. It was clear that criminal responsibility could attach only to an individual, and not to a State, and that, if an individual used the means given to him by the State because he was acting on its behalf as a representative or agent, it was the criminal responsibility of that

individual that had to be established, not that of the State.

58. The concept of fault could not be dissociated from that of the crime of a State and of State responsibility. In referring to the matter, the Special Rapporteur took the view that it was covered only implicitly in part 1 of the draft. For his own part, he did not think that was correct. Fault was an element of an internationally wrongful act: it was impossible to distinguish the internationally wrongful act, on the one hand, and fault, on the other. Any fault necessarily involved a breach of an international obligation. It could be more or less serious but, in any event, had an influence on the mode of reparation.

59. With regard to the proposed draft articles, he said that he agreed with many of the objections formulated by some members of the Commission. He had been struck by a certain imbalance between the tenor of the report itself and that of the draft articles. That did not mean that he wished to introduce a great many concepts into the wording of the articles. When it came to codification, particularly in the case of State responsibility, the Commission should confine itself to laying down general principles in the form of maxims—of brief, synthetic formulas. The rest should be left to doctrine and jurisprudence. He therefore did not think that it was absolutely necessary to specify in draft article 8 that, for responsibility to be incurred, there had to be a causal link between the wrongful act and the damage: that was all too obvious. The same applied to the concept of predictability. It also applied to the concept of *lucrum cessans*, for it would suffice to lay down the principle of full reparation, which covered both *damnum emergens* and *lucrum cessans*. If necessary, each concept could be analysed in detail in the commentary, since that was what the commentary was for. He therefore preferred alternative A to alternative B for paragraph 1 of article 8 and agreed with Mr. Pellet that it would be preferable to invert the proposal by using a passive form of wording.

60. As for draft article 9, on interest, he was in favour of its deletion.

61. A provision on satisfaction was absolutely essential. He therefore approved of draft article 10, although he considered that any reference to the concept of “punitive damages” should be avoided. He agreed, however, that it should be made clear that satisfaction should not involve humiliating demands. Satisfaction would no longer act as a pacifying element in international conflicts if it was combined with excessive financial or moral conditions.

62. Mr. BEESLEY said that the Special Rapporteur had very aptly chosen the precedents cited in his extensive second report (A/CN.4/425 and Add.1) and had made a clear distinction between State practice prior to the First World War, between the two World Wars and since the Second World War. Although he had also referred to the very old case of the Boxer Rebellion, he had not done so as an example of what to follow; he had clearly dissociated himself from the circumstances giving rise to that case.

63. That clearly reflected the basic problem the Commission faced: it was difficult to conduct a survey of current State practice, especially if it was not systematically recorded in arbitral awards and since many cases were settled amicably. The Commission risked getting bogged down in past case-law, whereas its mandate was to codify rules for the future, not necessarily in an idealistic sense, but in keeping with actual developments in the modern-day world.

64. With regard to draft articles 8 to 10 submitted by the Special Rapporteur, he said that he agreed with their general thrust. In article 8, however, alternative A proposed for paragraph 1 was not very satisfactory, at least in English. There was an internal contradiction, since it stated that there might be "damage not covered by restitution in kind" and, then, that compensation could "re-establish the situation that would exist if the wrongful act had not been committed". Alternative B was much better, despite the phrase "the situation . . . is not re-established by restitution in kind", which gave rise to misgivings for the same reasons. It was closer to common sense and reflected a practical approach that the other alternative lacked. Whether it was worded in a passive or active form would ultimately not make much difference. The Commission should be careful not to use pecuniary compensation as tantamount to a substitute for something that did not, perhaps, lend itself to purely pecuniary reparation.

65. Many comments had been made on the expression "any economically assessable damage" in paragraph 2 of article 8. However, as much as it could be criticized, there appeared to be no alternative for the time being. Furthermore, the expression "moral damage" was also rather vague and the way in which it was used in that provision could refer to just about anything. Yet, in that particular context, moral damage was no doubt to be understood as any damage that could not be covered by pecuniary compensation.

66. Paragraph 3 dealt with the loss of profits as a result of an internationally wrongful act. There seemed to be no point in including a separate provision for that specific case and it would be preferable to provide for that contingency in paragraph 4 in a passage reading: "... damage, including loss of profits and other benefits, deriving from an internationally wrongful act . . .". The reference to "benefits" would further broaden the concept of loss of profits, for the profits derived from a given activity were not necessarily pecuniary.

67. Paragraph 4 raised the issue of causality. The Commission would no doubt have to give the matter further consideration, even if it meant redrafting the provision entirely. The meaning of the term "uninterrupted" must be spelled out, possibly in the commentary. There might, for example, be cases involving a temporary interruption in which the causal link would unquestionably remain unimpaired. At any rate, the approach based on the "causal link" was most certainly preferable to that based on the distinction between direct damage and indirect damage.

68. Paragraph 5 raised the issue of "negligence" and thus, indirectly, that of fault and responsibility. Those

issues appeared to fall within the scope of tort, which was more closely related to the topic of international liability for injurious consequences arising out of acts not prohibited by international law. In any event, the need for precision was all the greater since the situations to be covered could vary enormously. For example, could a charge of negligence be brought against a State that had been raided, on the ground that its border guards had not prevented the raiders from crossing the border?

69. Draft article 9, on interest, did not give rise to any particular problem. The question of compound interest might, however, best be dealt with in the commentary. Yet the Special Rapporteur had been wise to draw the Commission's attention to those technical points, thereby forcing it to consider them.

70. Some members of the Commission had spoken against the concept of "punitive damages" referred to in paragraph 1 of draft article 10, on satisfaction and guarantees of non-repetition. Provision should none the less be made for that form of damages, even if they verged on the field of criminal law, for article 10 was intended to cover cases that could be extremely serious and morally indefensible. In a very recent case involving loss of life, the "*Rainbow Warrior*" (*ibid.*, para. 134), that type of reparation had been imposed and had seemed entirely appropriate.

71. Forms of satisfaction should perhaps not depend on the importance of the damage, as provided for in paragraph 2. However, the Special Rapporteur would no doubt have observations to make on that point, which had given rise to many comments. Furthermore, the "degree of wilful intent", mentioned in the same paragraph, referred once again to the concept of fault and State responsibility. Extreme caution must therefore be exercised.

72. As stated in paragraph 3, a declaration of the wrongfulness of the act by a competent international tribunal might constitute a form of satisfaction. Although there were admittedly few relevant cases, that point remained valid. Was it really necessary to make it a separate provision? Such specific cases could also very well be covered in the commentary.

73. No one was in favour of "humiliating demands on the State which has committed the wrongful act", as stated in paragraph 4. The latter referred to the concept of apologies already mentioned in paragraph 1. He illustrated that point by giving a number of examples showing that that form of satisfaction was not entirely outdated in the modern world and that it should not be ruled out completely. He referred to several recent cases, in Asia and in eastern Europe, in which apologies had been deemed entirely appropriate. He also referred to a number of cases in the Middle East, in which apologies had been demanded but not given, and which clearly showed that apologies retained their full significance in relations between States. For example, it could be said that, through its present attitude, South Africa was expressing qualified apologies, as if it were acknowledging its wrongs. Reference could also be made to the official apologies presented by a State for the destruction of an airliner over the Persian Gulf.

Lastly, he referred to a case which, although minor, provided a good example: during a visit by the head of Government of the USSR to Canada, a mentally disturbed bystander had rushed at the official guest and, in the shuffle, had torn his raincoat. The Canadian Government had deemed it appropriate to present apologies, which had been accepted. In addition to that form of satisfaction, it had, of course, provided restitution in kind, namely a new raincoat.

74. In conclusion, he advised the Commission against rashness in rejecting examples from the past on the pretext that it had to make provision for the future. Unlike other members, he did not think that there was any imbalance between the extensiveness and erudition of the Special Rapporteur's analyses and the draft articles he had submitted. On the contrary, the Special Rapporteur had managed to focus sharply on the issues raised by State responsibility and had drawn the Commission's attention to the crux of the matter.

75. Mr. ROUCOUNAS said that, in his view, reparation was the focus of the application of international responsibility in practical terms. It showed, much more so than the attribution of responsibility, how effective the system was and how States intended to wipe out the consequences of an internationally wrongful act. A major political factor had long confused the issue and, to some extent, kept reparation, together with international responsibility itself, within the scope of a conception of international law which was now outdated. The draft the Commission was working on concerned the present and the future and that was precisely how the Special Rapporteur and the Commission regarded it.

76. Despite the considerations put forward by the Special Rapporteur in paragraph 140 of his second report (A/CN.4/425 and Add.1), a distinction still had to be made between reparation and satisfaction, on the one hand, and measures of a punitive and pseudo-punitive nature, on the other. The latter had no place in the international legal mechanisms with which the Commission was dealing. For example, the *Tellini* case (*ibid.*, para. 124) could be understood only as an example of the arrogance that certain powerful countries had demonstrated at the expense of smaller ones.

77. The documentation assembled by the Special Rapporteur called for a comment. According to the arbitral practice surveyed, the range of applications of the law of reparation obviously tended, depending on the period, towards a particular aspect of international responsibility such as physical damage to the nationals of a State, investments, etc. In generalizing, as it must, with the aim of acquiring an overview of international practice, the Commission had to rely on the material submitted to it by the Special Rapporteur, who must therefore be careful not to give too much weight to the solutions adopted in a particular area, for others which might not have led to the development of an actual body of case-law also had to be taken into account by the Commission.

78. The draft articles submitted by the Special Rapporteur settled the question of damage in the sphere of State responsibility. The link between parts 1 and 2 of the draft, the first being concerned with the "origin of

international responsibility" and the second with the "content, forms and degrees of international responsibility", was probably as strong as it looked, but the fact that a breach of an international rule automatically entailed State responsibility, coupled with the fact that several States could come forward and claim injury, meant that the Commission had to consider the respective positions of those States in relation to the mechanism of reparation. As Mr. Graefrath (2168th meeting) had shown, quite apart from a request for cessation and even in the event of restitution, proof of damage had to be provided in respect of each and every one of the injured States. A provision dealing specifically with that issue might help to avoid inconsistencies.

79. With regard to draft article 8, he preferred alternative A of paragraph 1. It would provide a sound basis for the work of the Drafting Committee. In paragraph 2, there seemed to be no need for the expression "any economically assessable damage", especially since that paragraph appropriately provided for moral damage.

80. Paragraph 3 was worded very rigidly and should be made more flexible, along the lines suggested by Mr. Mahiou (2171st meeting). The same applied to paragraph 4, which might contain wording striking a balance between the requirements of "normality" and "predictability", which the Special Rapporteur analysed in the report (A/CN.4/425 and Add.1, paras. 37 *et seq.*).

81. From a more general point of view, consideration had been given, in the course of the discussion on reparation, to the significance of equity. On that point, the Commission should go along with the Special Rapporteur, who considered that any rule of law expressed and embodied equity. However, it must also be noted that, outside the rules of law, equity was entirely a matter of chance. In a draft such as the one the Commission was working on, it would not be enough simply to refer the judge to the principle of equity. Those who would have to apply the future provisions should be given guidance and told how to bring the mechanisms of reparation into play. If the Commission merely referred to the principle of equity, it might as well dispense with the entire section of the draft concerned with reparation.

82. With regard to draft article 9, the date from which interest was to run should be set as the day the corresponding claim was filed with the competent body. Paragraph 2, on compound interest, went into details which were not appropriate to all possible situations.

83. Draft article 10 dealt with satisfaction and guarantees of non-repetition. As far as the latter were concerned, a more elaborate text would have to be considered. With reference to satisfaction in general, was it really appropriate to state in paragraph 1 that satisfaction was due "in the measure in which an internationally wrongful act has caused . . . injury not susceptible of . . . compensation"? It would appear that satisfaction could be demanded even if reparation by equivalent had been provided, in other words in addition to reparation. Of course, satisfaction presupposed

consent on the part of the injured State, at least when it took the form of apologies or punishment of the responsible individuals. Yet the draft must not suggest that such punishment was merely a matter of satisfaction and not a separate obligation incumbent on the State of which the perpetrator of the internationally wrongful act was a national.

84. Lastly, paragraph 4 of article 10, which was intended to prohibit claims including humiliating demands, was not absolutely necessary because it might cast doubt on the relevance of the principle of satisfaction, even at the present time.

The meeting rose at 1 p.m.

2174th MEETING

Thursday, 14 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (continued) (A/CN.4/416 and Add.1,¹ A/CN.4/425 and Add.1,² A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles³

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

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

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

³ 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

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 8 (Reparation by equivalent)

ARTICLE 9 (Interest) *and*

ARTICLE 10 (Satisfaction and guarantees of non-repetition)⁴ (continued)

1. Mr. PAWLAK said that the material presented in the Special Rapporteur's second report (A/CN.4/425 and Add.1) brought the Commission closer to completing the important task of preparing a draft legal instrument, probably a future convention, on what was one of the most difficult and important topics in international law.

2. As he had said in the course of the debate on draft articles 6 and 7 at the previous session, every State had a duty to respect the rights of other States and a corresponding right to demand that other States should respect its own rights. In that connection, the 1949 advisory opinion of the ICJ to the effect that the breach of an engagement involved an obligation to make reparation in an adequate form⁵ was particularly noteworthy. That opinion derived from the 1927 judgment of the PCIJ in the *Chorzów Factory* case (Jurisdiction),⁶ but the principle it enunciated went back a good deal further. A fifteenth-century Polish lawyer and author, Stanislaw of Skarbimierz, had already written that a sovereign who waged an unjust war was responsible not only for damage inflicted upon the adversary by his subjects, but also for injury suffered by his own people from the adversary; whoever had created the opportunity to inflict damage should be deemed to have caused the damage, and hence all wrongful situations should be corrected and the damage unjustly committed should be repaired. For many centuries, the fundamental purpose of the reparation process had thus been to achieve full compensation for the unlawful act, the best way of doing so being through *restitutio in integrum*. However, since that was impossible in many instances, pecuniary compensation, as the Special Rapporteur rightly pointed out (*ibid.*, para. 20), was called upon to fill the gap.

3. He agreed with Mr. Hayes (2172nd meeting) that the idea of achieving full compensation for internationally wrongful acts should be explicitly reflected in the body of draft article 8, which had real meaning only if it was realized that pecuniary compensation was a supplementary form of reparation. On that understanding, he could support alternative A of paragraph 1, which indicated that pecuniary compensation was to be paid for "any damage not covered by restitution in kind". That type of compensation could be used where it was impossible to re-establish the situation which had existed before the commission of the internationally wrongful act, for example when the objects of restitution had been destroyed or when people had been killed or injured. It was also important to add that pecuniary compensation, wholly in keeping with the principle laid down in the *Chorzów Factory* case (Merits),⁷ allowed

⁴ For the texts, see 2168th meeting, para. 2.

⁵ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, *I.C.J. Reports 1949*, p. 174, at p. 184.

⁶ See 2168th meeting, footnote 5.

⁷ *Ibid.*, footnote 6.

re-establishment of the situation that would exist if the wrongful act had not been committed.

4. Paragraph 2 of article 8 posed some problems. Mr. Mahiou (2171st meeting) had drawn attention to the question of assessability. Was it really possible to assess in economic terms all damage suffered by the injured State, especially if the provision was to include damage of a non-material kind? The *Chorzów Factory* ruling was the only existing internationally accepted rule in general international law on the subject of assessment of damage, for other rules or standards used in arbitral awards or judicial decisions were too diverse. The comments by Eagleton and Graefrath cited in the report (A/CN.4/425 and Add.1, para. 26) were highly pertinent in that connection.

5. He was greatly in favour not only of codification, but also of progressive development of international law in the field of State responsibility, but the Commission should not go too far in the latter direction: it was essential to ensure protection of the legitimate interests of the injured State in keeping with the real value of its material losses. The assessed value of damage suffered, whether material or non-material, should be equivalent to the real value or, at least, to the probable value from the standpoint of the injured, rather than the offending, State. That rule stemmed from the arbitration settlement of 1922 in a dispute between the United States of America and Norway concerning arrested ships. On the other hand, the injured party ought not to use pecuniary compensation for unjust enrichment. It was difficult, in that light, to accept unreservedly the Special Rapporteur's statement that "all States should . . . share a high degree of common interest with regard to leniency or generosity *vis-à-vis* the offending or the injured State respectively" (*ibid.*, para. 33 *in fine*).

6. The idea of pecuniary compensation for "any moral damage sustained by the injured State's nationals", contained in paragraph 2 of article 8, was also difficult to accept, as it did not include non-material damage sustained by the State itself. Draft article 10, on satisfaction, also failed fully to cover that type of loss. The reference to moral damage should be omitted from paragraph 2 and the matter should be dealt with in article 10; alternatively, it might be necessary to draft a new paragraph covering all non-material injuries inflicted by the offending State on the injured State and its nationals. The present wording, referring only to moral damage sustained by the injured State's nationals, was not adequate. Incidentally, as a general point, it would be preferable to eliminate from the draft the division between material (economically assessable) and moral damage and to speak simply of material and non-material damage.

7. The idea underlying paragraph 3 of article 8 was a good one, but like Mr. Mahiou, Mr. Barboza (2173rd meeting) and other members, he would prefer the language of the paragraph to be brought more closely into line with the observations on "direct" and "indirect" damage in relation to *lucrum cessans* contained in the report (A/CN.4/425 and Add.1, paras. 64-66), with the statement made in the "*Cape Horn Pigeon*" case (*ibid.*, para. 66) and the decisions in

the *Chorzów Factory* and *Shufeldt* cases (*ibid.*) being fully reflected in the new formulation.

8. Again, paragraph 4 introduced the criterion of an uninterrupted causal link, but the formulation called for further improvement. As Mr. Beesley (2173rd meeting) had suggested, the paragraph might be combined with paragraph 3. In any case, some reference to a causal link was definitely needed and, in particular, the ideas expressed in paragraph 42 of the report might serve as guidelines for judges and arbitrators. Mr. Barboza's remarks on human nature in that connection should also be taken into consideration.

9. The subject of contributory negligence, dealt with in paragraph 5 of article 8, was highly complex. The Special Rapporteur was right in saying that "application of the principles and criteria . . . can only be made on the basis of the factual elements and circumstances of each case" (A/CN.4/425 and Add.1, para. 46); however, the interests of the injured State had to be borne in mind because, in most instances, that State was the weaker one and it would be unjust to limit its access to compensation. He was not opposed to retaining paragraph 5, yet shared the view of Mr. Tomuschat (2170th meeting) and Mr. Mahiou that it would be better if the idea were reformulated in a new article.

10. As for the title of article 8, Mr. Pellet's proposal (2173rd meeting, para. 35) was a valid one.

11. Draft article 9 was necessary. Interest was one of the forms of full compensation and should be treated as an integral part of the international obligation. In that connection, he referred to the decision in the *Russian Indemnity* case in 1912 (see (A/CN.4/425 and Add.1, footnote 208)). He none the less had serious doubts about the dates proposed in paragraph 1 of the article: it would be more realistic to adopt the date of the claim as the day from which interest should run. The concept of compound interest was too rigid, and paragraph 2 should therefore be either deleted or redrafted. Case-law was not uniform and did not permit the formulation of a strict rule: in that regard, he disagreed with the views expressed by the Special Rapporteur in paragraph 105 (a) of the report.

12. He endorsed the general tenor of draft article 10 and the analysis in the report concerning the various forms of satisfaction (*ibid.*, paras. 136-138). Nevertheless, the concept of punitive damages incorporated in paragraph 1 should be omitted. As Mr. Pellet had pointed out, sanctions for breaches of international law by States fell within the scope of international crimes rather than of State responsibility, and, as Mr. Thiam (2173rd meeting) had said, criminal responsibility should apply to individuals and not to States. Sanctions for international crimes committed by States could be imposed not by courts or arbitrators, but by the Security Council on the basis of Articles 41 and 42 of the Charter of the United Nations. The Security Council had, for example, imposed such sanctions on States which had exported arms and military equipment to South Africa.

13. With regard to paragraph 2, he endorsed the arguments advanced by Mr. Francis (2172nd meeting) in favour of deleting the reference to wilful intent.

Paragraph 3 could either be kept in its present position or be transferred to article 8, as proposed by Mr. Barboza. Lastly, the "humiliating demands" clause in paragraph 4 must be spelt out in greater detail.

14. In his opinion, draft articles 8 to 10 could be referred to the Drafting Committee for further refinement.

15. Mr. McCaffrey, after congratulating the Special Rapporteur on a stimulating second report (A/CN.4/425 and Add.1) containing admirably lucid analyses backed by a wealth of quotations, associated himself with the point raised by some other English-speaking members of the Commission about the difficulty of following the Special Rapporteur's reasoning in the absence of English translations for much of the material quoted in the mimeographed version.

16. The approach adopted to the subject of reparation, both in the report and in the proposed articles, was somewhat limited. Without wishing in any way to belittle the importance of the aspect of reparation that was connected with injuries to aliens, a field in which international legal practice was probably the richest, he considered that other categories of problems which were assuming increasing importance, such as cases involving the environment, including marine pollution, cases involving sovereign immunity and cases involving international trade law, also deserved more attention.

17. He agreed with Mr. Pellet (2173rd meeting) that the title of draft article 8, "Reparation by equivalent", was not entirely satisfactory and should be replaced, particularly as the expression was not used in the body of the article. In view of the comments made in that connection by Mr. Al-Khasawneh and Mr. Beesley (*ibid.*), he would prefer the title to read simply "Compensation", rather than "Pecuniary compensation".

18. As a general point, he, too, would voice the hope already expressed by Mr. Thiam (*ibid.*) and other members that, in future, the Special Rapporteur would include comments briefly explaining his reasons for using certain formulations. For example—and the point also applied to draft article 7 (Restitution in kind) submitted in the preliminary report (A/CN.4/416 and Add.1)—it was not clear why, in paragraph 1 of article 8, the simpler formulation "A State which has committed an internationally wrongful act shall pay pecuniary compensation..." had not been used, instead of "The injured State is entitled to claim from the State which has committed...". In that respect, the expression "breach of an obligation" was, in his view, better than "internationally wrongful act". He concurred with Mr. Pellet that re-establishment of the situation that would exist if the internationally wrongful act had not been committed was in most cases impossible, and he tended to prefer alternative B of paragraph 1, because it introduced the concept of "making good" any damage not covered by restitution in kind.

19. The concept underlying paragraph 2 was generally acceptable, but the expression "economically assessable" could be improved on. As for the reference to "moral damage", he agreed with Mr. Beesley that it had an unfamiliar ring. It would be best replaced by a

phrase that conveyed the idea of non-material harm suffered by nationals of the injured State. The Special Rapporteur was right to say that the entitlement referred to in the article could be viewed as reparation rather than as satisfaction.

20. Paragraph 3 had a place in article 8, but the text did not adequately reflect the abundant material and authorities cited in the second report in support of its content. The paragraph should expressly state that lost profits, to be recoverable, must not be merely speculative. Accordingly, he suggested inserting, after the words "any profits", the words "that are not too remote or speculative"—language taken from the *Shufeldt* case cited by the Special Rapporteur (A/CN.4/425 and Add.1, para. 66).

21. Again, in regard to paragraph 4 he fully agreed with the Special Rapporteur's analysis but could not find it adequately reflected in the formulation of the paragraph itself. In particular, he had doubts about the use of the formula "uninterrupted causal link", which could result in virtually unlimited liability for a State. In that connection, it was interesting to note some passages in the chapter on "proximate cause" in the *Handbook of the Law of Torts* by William Prosser:

"Proximate cause" . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of his conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. . . . But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts . . . Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.⁸

Since the expression "proximate cause" was perhaps an unfortunate one, Prosser concluded that "legal cause" or even "responsible cause" would be more appropriate.⁹ Since there was an analogy with the issues now under discussion, he felt that those passages could clarify the Commission's thinking on paragraph 4. Actually, in his report, the Special Rapporteur was quite clear on the question of proximate cause. The issue whether a State's act ultimately led to the injury could not be a simple question of fact; there had to be some policy-based control over the responsibility.

22. Paragraph 5 also had its place in article 8, but the word "possibly" should be deleted, since it had the effect of unduly weakening the provision. Moreover, the expression "contributory negligence" should be avoided, since it had a special meaning in the common-law system, one in which contributory negligence on the part of the injured party had the effect of ruling out all compensation. As he saw it, the Special Rapporteur's purpose was to try to apportion the damages under the different causes. Paragraph 5 should reflect that idea.

23. Draft article 9, on interest, had been criticized as entering into far too much detail and it had been suggested that the article should be deleted. In his view, an article on interest was necessary to express the idea that interest was essential in order to ensure complete

⁸ W. L. Prosser, *Handbook of the Law of Torts*, 4th ed. (St. Paul (Minn.), West Publishing Co., 1971), pp. 236-237.

⁹ *Ibid.*, p. 244.

reparation. Perhaps the provision on the subject need not form a separate article; it could conveniently be incorporated into article 8. The question had been raised whether interest was a form of lost profits. Interest and lost profits were in fact two totally different concepts, although interest represented lost profits in some cases. He believed it should be possible to recover lost profits, provided they were not too remote or speculative. It would be going into great detail to deal with the matter of compound interest in the article itself, yet the problem could not be excluded and should perhaps be handled in the commentary.

24. Draft article 10 dealt with satisfaction, which had a very important role, for it was a form of reparation that served to protect weaker States. For example, in a case of pollution in which the author State was rich and thought that it could afford to pay compensation, it would proceed to inflict pollution on the weaker State and, in effect, expropriate an easement allowing it to pollute against payment. Satisfaction could help to deter that type of conduct by requiring the stronger State to make appropriate amends. Satisfaction was a remedy against moral damage, but its most important purpose was to reaffirm respect for the rule of law which had been breached. It should be remembered that such a breach could be constitutive of practice. In the absence of protest, it could ripen into permission or ultimately even into a custom. It was therefore essential for it to be challenged by another State. In that situation, satisfaction reaffirmed the existence of the obligation which had been breached and ruled out acquiescence. He could not agree with the idea, expressed in the report (*ibid.*, para. 136 and footnote 346), that the role of satisfaction was primarily "afflictive". Some forms of satisfaction inevitably had an afflictive effect because of the obligation to remedy non-material harm, but that did not constitute the purpose of satisfaction.

25. With regard to paragraph 1 of article 10, he had some sympathy for the suggestion by Mr. Calero Rodrigues (2171st meeting) to delete the reference to "legal injury", as well as the phrase "not susceptible of remedy by restitution in kind or pecuniary compensation", and he endorsed Mr. Barboza's proposal (2173rd meeting) for the word "apologies" to be replaced by the words "expressions of regret", a formula which was more in line with State practice. The expression "punitive damages" should be avoided. Admittedly, there was some support in State practice for that concept, as illustrated by the "*Rainbow Warrior*" case (see A/CN.4/425 and Add.1, para. 134), but the word "punitive" was unfortunate; the notion of penalties belonged more to the topic of the draft Code of Crimes against the Peace and Security of Mankind.

26. The opening part of paragraph 2, "The choice of the form or forms of satisfaction . . .", was not suitable, and the paragraph should be reformulated so as to state that the form of satisfaction would be determined by taking into account the elements specified in the last part of the paragraph. In that connection, the degree of culpability should be taken into account for the purpose not only of increasing the compensation, but also, in some cases, decreasing it. A State might possibly be

held responsible for something it had done its best to prevent. If it had an obligation of result, the fact that it had been unable to prevent the damage would constitute a breach of its obligation. In situations of that kind, it was important to avoid the award of unduly large compensation.

27. He endorsed paragraph 3, concerning a declaration of the wrongfulness of the act: such a declaration constituted a most important form of satisfaction.

28. Lastly, like other members, he did not disagree in substance with paragraph 4, but it might be better to delete it, for the reasons adduced by Mr. Hayes (2172nd meeting).

29. Mr. SOLARI TUDELA said that the Special Rapporteur's second report (A/CN.4/425 and Add.1), with its great wealth of material on the relevant case-law and legal writings, would prove a valuable source for scholars on the present topic.

30. His first general comment on the draft articles before the Commission related to the punitive character of satisfaction, which had been criticized by several members. It had been said in reply that the measures envisaged in Chapter VII of the Charter of the United Nations were punitive in nature. On that point, it should be noted that those measures under the Charter were intended to maintain or restore international peace and security. The position was altogether different with respect to State responsibility, which operated in the event of the breach of an international obligation: there was no element of prevention or of restoration of international peace and security. Accordingly, the punitive concept had no place in inter-State relations so far as forms of reparation, including satisfaction, were concerned.

31. His second general comment pertained to the position of developing countries. The equality of States was a fundamental principle of inter-State relations, yet it operated only within, and did not go beyond, the legal sphere. The economic inequality of States was, unfortunately, a reality. Hence the law should endeavour to redress or at least reduce the economic imbalance between States. Such a purpose was apparent in the 1982 United Nations Convention on the Law of the Sea and also in many of the drafts the Commission was engaged in preparing. Conversely, the law should not be used—as it had been in the past—to support unjust situations.

32. The Special Rapporteur had adopted the proper approach in his preliminary report (A/CN.4/416 and Add.1) with the inclusion in draft article 7 (Restitution in kind) of paragraph 1 (c), which specified that restitution in kind should "not be excessively onerous for the State which has committed the internationally wrongful act". He would venture to ask the Special Rapporteur why such a provision had not also been included in draft article 8, on reparation by equivalent.

33. Two alternatives were proposed for paragraph 1 of article 8, but he saw no material difference between them. The other paragraphs covered the questions of moral damage, *lucrum cessans*, and an uninterrupted causal link, in which connection he shared Mr. Ben-

nouna's view (2172nd meeting) that the idea of proximity should be taken into account. The same was true of the idea of a reasonable period for entering a claim, a matter which had been raised by Mr. Barsegov (*ibid.*).

34. Draft article 9 dealt with the question of interest, for which there was abundant support in case-law. Legal literature also endorsed the allocation of interest for the purpose of arriving at full compensation. With regard to the *dies a quo* and the *dies ad quem*, he believed that interest should run from the date the claim was filed until the date of the award, provided the intervening period was a reasonable one. The actual rate of interest should take into consideration the degree of development of the countries concerned: it should be the commercial rate as between two countries at an equal level of development, and a differential rate in the case of countries not at the same level of development. A provision to that effect should be incorporated in the article. It was interesting to note that the World Bank applied differential rates of interest, depending on the degree of economic development of the countries concerned. The adoption of differential rates of interest should be regarded not as a concession but simply as a token measure intended to redress in part the imbalance created by an unjust international economic order.

35. He agreed with the formulation of draft article 10, on satisfaction and guarantees of non-repetition, except for the reference in paragraph 1 to the "punitive" character of satisfaction, for the reasons which he had given earlier.

36. Mr. AL-BAHARNA said that the practical importance of the topic under consideration, namely remedies to which injured States were entitled under international law when they suffered international wrongs, could not be over-emphasized. The ultimate acceptance of the draft as a whole would largely depend upon the remedies that would be provided. Every care should therefore be taken in formulating their nature and scope.

37. The main purpose of draft article 8 appeared to be to provide for reparation in the form of pecuniary compensation. Although he was not opposed to "the incorporation of elements of progressive development into the draft articles", as the Special Rapporteur himself put it in his second report (A/CN.4/425 and Add.1, para. 33), he had some misgivings as to whether, at the present stage in international law, the Commission could go beyond the principles formulated in the *Chorzów Factory* case (Merits) (*ibid.*, para. 21). He therefore urged caution in developing and codifying rules on the payment of pecuniary compensation for international delicts. In that regard, the Commission should be wary of developing international law in the light of private-law sources and analogies. He had occasionally noticed in the Commission's deliberations a tendency to look to the law of torts for guidance in developing the international rules of State responsibility and he was somewhat sceptical about the value of that tendency. The law of torts, as it had developed, was for the most part a Western contribution, and even in the West it differed

from country to country, depending on the state of the economy, industrial growth, trade unionism, group action, judicial review, etc. In developing countries, the law was still in its primitive stage and it would therefore be injudicious to develop international rules on State responsibility by analogy with the present principles of tort law. Such development would run counter to the interests of the developing countries, which formed the overwhelming majority of nations. That point of view could be illustrated by reference to article 8, on reparation.

38. The best formulation for paragraph 1 of article 8 was alternative A. The scope of pecuniary compensation, as defined in paragraph 2, appeared to afford the possibility of imposing an onerous obligation on the offending State. The criterion of "any economically assessable damage" was excessive, and "moral damage sustained by the injured State's nationals" was questionable, as it was a subjective element. In that respect, he shared the misgivings expressed by Mr. Roucouas (2173rd meeting) about the tendency towards generalizing the question of reparation on the basis of fragmentary decisions in municipal law. Accordingly, the Commission should consider whether "economically assessable damage" should include "moral damage", as proposed in paragraph 2.

39. Considering that the Special Rapporteur himself admitted that compensation for *lucrum cessans* could give rise to problems both in jurisprudence and in doctrine, and in the light of the "*Canada*" and *Lacaze* cases mentioned in the report (A/CN.4/425 and Add.1, para. 64), more caution was required in providing for compensation in the case of *lucrum cessans*, and paragraph 3 of article 8 should be amended so as to allow only reasonable and equitable compensation.

40. Although he agreed in principle with paragraph 4, the need for the adjective "uninterrupted", qualifying "causal link", should be reconsidered. The underlying idea might be better expressed by stating simply that the damage must be "attributable to the international wrong in question".

41. The two exceptions dealt with in paragraph 5, namely "causes other than the internationally wrongful act" and "contributory negligence", might be more appropriately taken up in separate paragraphs specifying their respective effects on the rule of compensation. However, he approved of the thrust of the paragraph.

42. Draft article 9 raised two controversial issues: the date from which interest was due and the rate of interest. He disagreed with the Special Rapporteur's view that the date should be that of the injury, and would prefer interest to run from the date on which judgment was handed down in the case, because it was a date that took account of the factual situation and was more likely to lead to a just result. The Commission should avoid the temptation of fixing a specific rate of interest, which would be arbitrary and surely opposed by one group of States or another in view of the many conflicting opinions on the subject. Instead, it should lay down a simple rule to the effect that the rate of interest should normally be the one for public loans. Judging from the Special Rapporteur's survey of case-law, com-

pound interest was obviously a controversial issue and had been rejected in many arbitral decisions. In the circumstances, it might not be desirable to prescribe compound interest, and paragraph 2 of article 9 should therefore be deleted.

43. He had reservations about the title of draft article 10, because “satisfaction” and “guarantees of non-repetition” were two distinct remedies, one dealing with past conduct and the other with future behaviour. Hence they should be covered in separate articles. Admittedly, “satisfaction” raised complex issues, not only because the juridical meaning of the term was unclear, but also because of the doubt and controversy surrounding its relation to pecuniary compensation. Furthermore, the terminological difficulties reflected in the relevant literature were compounded by a political factor which greatly influenced the remedy of “satisfaction”. Indeed, State practice showed that the forms of satisfaction had varied, depending on the political relations between the States involved in a dispute. The development and codification of international rules on the topic of State responsibility were, accordingly, intricate and controversial. However, the Commission’s draft should provide for satisfaction, defining the remedy’s meaning, nature and scope precisely, in order to make it juridical, in other words to overcome the lack of objective standards.

44. However, he had some objections to including “punitive” damages in the remedy, because that concept was inconsistent with the principle of the sovereignty and sovereign equality of States. Again, although humiliating demands could not be made against a State, paragraph 4 of article 10 should be redrafted so as to omit the word “humiliating”. In paragraph 1, the opening phrase “In the measure in which . . . pecuniary compensation” should be replaced by a more simple formulation. Paragraph 2 was too vague, and the impact of fault on satisfaction should be spelt out more specifically. The matter of “guarantees of non-repetition” should be set out in a separate article, especially since they were intended to be preventive.

45. Lastly, with regard to the effect of fault on reparation, he shared the Special Rapporteur’s view that fault might be a factor in the determination of the consequences of an internationally wrongful act, but could not subscribe to the idea that fault by State agents could be imputed indiscriminately to the State. In any event, the Commission should be particularly cautious in specifying the reparation for internationally wrongful acts.

46. Mr. DÍAZ GONZÁLEZ congratulated the Special Rapporteur on his clear and concise second report (A/CN.4/425 and Add.1), which referred to many specific cases, some of them still highly topical, including cases in which the injured State had simply not been strong enough to claim compensation. For example, the Boxer Rebellion case (*ibid.*, para. 124), mentioned earlier by Mr. Shi (2171st meeting), could perhaps provide a basis for drafting articles on compensation, but his personal conclusions on the case would no doubt differ from the Special Rapporteur’s.

Indeed, the basic aim should be to work out rules to prevent the recurrence of events such as those that had resulted from invasion and unfair treaties imposed on the Chinese people. His own country had confronted similar situations and all such cases should serve as an example for improved protection of developing countries, in particular against wrongful acts carried out on various pretexts.

47. Much had already been said, including some very interesting comments by Mr. Pellet (2173rd meeting), on the three draft articles under consideration. The title of draft article 8, “Reparation by equivalent”, should perhaps be amended to reflect the content more accurately, because, as Mr. Pellet had pointed out, the article focused on compensation, and more specifically pecuniary compensation. “Reparation by complement” might therefore be more appropriate, since the article provided for something that was more in the nature of a supplement to restitution.

48. Alternative A of paragraph 1 was preferable because it was clearer, more precise and more concise than alternative B. Paragraph 2 was basically acceptable, although it could be improved, notably in the light of Mr. Pawlak’s comments on methods of calculating economically assessable damage. Paragraph 3 should perhaps be reconsidered so as to determine the scope of *lucrum cessans* more clearly, without attempting to list all possible losses of profits. For example, were speculative profits to be included as well? The implications of the expression “uninterrupted causal link” in paragraph 4 were too far-reaching. The principle of *proxima causa*, mentioned in the report (A/CN.4/425 and Add.1, para. 40), would be preferable in that respect. Regarding paragraph 5, the question of the concomitant fault of a number of States, which had already been discussed by other members of the Commission, must be given further consideration. Indeed, the report itself contained elements that could be used to improve the formulation of that paragraph.

49. He had not yet reached any definite conclusion on draft article 9. Interest was obviously an element in *lucrum cessans*, yet the Commission should perhaps aim for a more flexible formulation providing for a case-by-case approach, instead of trying to draft a very detailed article. He agreed with those who considered that the date of the judgment should serve as the date from which interest was to run. As to the rate of interest, a system must be worked out to protect developing countries against the possibility that they might be required to pay compensation which was beyond their financial means. The World Bank rates, as Mr. Shi had suggested, could perhaps be applied on the basis of a stipulation in article 8 or in a separate article, provided that provision was made for special treatment to be accorded to developing countries which could not afford to comply with a court decision. He did not agree with the concept of “compound interest” underlying paragraph 2 of article 9, and considered that the paragraph should be deleted.

50. The term “injury”, in draft article 10, paragraph 1, should be left unqualified by deleting the words “moral or legal”, together with the phrase “not suscep-

tible of remedy by restitution in kind or pecuniary compensation". The form satisfaction should take should also be left unspecified, as the expression "adequate satisfaction" was sufficient. At any rate, the express reference to punitive damages should be omitted.

51. As pointed out by Mr. Pellet, paragraph 2 of article 10 should centre on the relationship between the extent of the fault and consequent damage, on the one hand, and the amount of compensation, on the other, without any emphasis on wilful intent or negligence. The wording of paragraph 3 was acceptable.

52. The appropriateness of using the word "humiliating" in paragraph 4 was questionable, not least because such a provision would be enforced not against a powerful State, but only against the weak. A positive formulation should therefore be worked out so as to prohibit humiliating demands entirely.

53. Lastly, the Commission should give further consideration to the substance of the draft articles under discussion before a final wording could be arrived at.

54. Mr. KOROMA expressed appreciation to the Special Rapporteur for a masterly second report (A/CN.4/425 and Add.1) which contained a rigorous analysis of international and comparative jurisprudence on a complex topic. He also welcomed the Special Rapporteur's comments during the debate, which had helped to put the Commission back on the right track. He agreed with other members of the Commission that it would be helpful if the Italian and French quotations in the English mimeographed version of the report could be translated, and considered that attention should be paid to certain terms. As one member had pointed out, the expression "moral injury" had little meaning for someone from the legal system with which he himself was acquainted. It would also have been advisable to refer in the report to remedies for an internationally wrongful act rather than to the substantive consequences of an internationally wrongful act.

55. The report, which was highly topical and of practical utility in contemporary international relations, sought to lay down firm and clear rules to regulate the consequences of unlawful conduct in breach of international law. It also attempted to provide a full range of legal remedies for such wrongful conduct, and proposed solutions on the basis of the principle of the peaceful settlement of disputes as set forth in the Charter of the United Nations. The expectation was that those remedies would make it possible to eliminate resort to self-help or the use of force as remedies in international relations. Hence there was nothing futuristic, as one member had suggested, about the topic.

56. The Special Rapporteur had relied heavily on decided cases and arbitral awards and, while the Commission should admittedly be circumspect in using cases to establish principles—especially when most, if not all, of the decisions tended to go in one direction—it seemed that, provided those cases were the subject of rigorous and objective analysis, they would be of considerable relevance to the present topic.

57. International law did not, of course, make the same sharp distinction between private-law and public-

law remedies as did municipal law. In international law, claims for reparation could cover compensation for loss of property and damage suffered, in lieu of *restitutio in integrum* where the latter was impossible. Thus a State could sue by itself for injury it suffered directly and could also sue on behalf of its nationals for wrongful conduct committed against them. In either case, the claim for damages was founded on the unlawful action of the State that had committed the wrongful act. While in theory a State could claim only for injury it had suffered itself, and individuals had to seek redress in the forum of the author State, in practice States acted on behalf of their nationals, while seemingly asserting their right in the name of those nationals to ensure that the rules of international law were respected. Indeed, as the PCIJ had stated in 1924: "Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is the sole claimant."¹⁰ Nor did international law make any firm distinction between contractual and tortious obligations, although the forms of reparation might vary. A breach of a treaty provision might also involve an obligation to make reparation, although the injured State could decide to waive the breach or ask for declaratory relief, which could itself have certain consequences.

58. Draft article 8 attempted to encapsulate the principle of international law, as laid down in the *Chorzów Factory* case, that "any breach of an engagement involves an obligation to make reparation".¹¹ Reparation could take the form of restitution in kind or, where that was not possible, of payment of a sum corresponding to the value the restitution in kind would bear. However, it was one thing to state a principle and another to elevate it into a legal rule: in the case of article 8 more precise drafting was required.

59. Unfortunately, alternative A of paragraph 1 was couched in ambiguous terms, for it attempted to say that a State was entitled to claim pecuniary compensation for damage if the damage was not covered by restitution in kind. Was it the Special Rapporteur's intention to restrict the article to pecuniary compensation, having regard to the fact that it was not the only form of compensation? Depending on the answer to that question, the title of the article might have to be amended to ensure that it matched the content. Furthermore, alternative A, and in particular the words "damage not covered by restitution in kind", did not make it clear that the intention was that restitution should be the primary form of reparation for damage and, where that was not possible and depending on the circumstances, reparation by equivalent might be claimed. It also failed to clarify the circumstances that would allow pecuniary compensation instead of restitution in kind, and did not bring out the link between restitution and pecuniary compensation. In the interests of clarity, therefore, the terms of draft article 7 (Restitution in kind), as submitted in the preliminary

¹⁰ *Mavrommatis Palestine Concessions*, Judgment No. 2 of 30 August 1924, P.C.I.J., Series A, No. 2, p. 12.

¹¹ *Factory at Chorzów, Merits*, Judgment No. 13 of 13 September 1928, P.C.I.J., Series A, No. 17, p. 29.

report (A/CN.4/416 and Add.1), should be referred to, if not spelt out, in the body of alternative A.

60. Alternative B did attempt to establish the link with restitution in kind and also contained the necessary ingredients to justify a claim by equivalent. The provision would none the less be more self-contained and tenable if it were reworded along the following lines:

“If, and in accordance with the provisions of article 7, the situation that would exist if the internationally wrongful act had not been committed has not been re-established, an injured State shall be entitled to claim from the State which has committed the wrongful act pecuniary compensation in the measure necessary to make good any damage not covered by restitution in kind.”

All in all, he would nevertheless prefer it if the two alternatives were combined, and that would presumably have to be done in the Drafting Committee. He had no strong feelings about the words “in the measure necessary”, which implied an evaluation of the wrongful act in monetary terms, although the words “to the extent necessary”, proposed by a number of members, could equally well be considered.

61. In paragraph 2 of article 8, which had aroused much comment, he took the words “economically assessable damage” to refer to measurement of the damage, where possible in money terms, or financial quantification of the wrongful act. Indeed, in assessing damages for wrongful conduct, international tribunals had been guided by municipal-law systems. Under those systems, damage was assessed, in the case of property, on the basis of the market value at the time of the damage or loss, or, if that was not possible, on the basis of the intrinsic value, and, in the case of personal injury, on the basis of the age and family and financial position of the injured person or the person killed. Presumably, that was the sense in which the words “economically assessable damage” were used. On the other hand, it was true that international tribunals used such indices merely as signposts to facilitate assessment of the loss and that much depended on the individual facts of the case and on the actual *compromis* in the case in point. He also recognized that jurisprudence in the matter varied from State to State. That did not, however, vitiate the principle, the statement of which was an acknowledgement of current practice.

62. With regard to nationalization and expropriation as they related to paragraph 2, what mattered in the final analysis was not the exact wording used but the fact that the compensation must be appropriate. In that connection, he would point out that certain kinds of nationalization were deemed to be illegal, such as that involving seizure of the assets of an international organization, seizure of assets in pursuance of crimes against humanity, or nationalization directed against one racial group.

63. On a further point, he would like to ask the Special Rapporteur whether the reference to economically assessable damage excluded damage such as violation

of diplomatic premises or breach of a treaty, which were not economically assessable.

64. The Commission should not enter into undue detail as far as paragraph 3 of draft article 8, and also draft article 9, were concerned. International tribunals did take account of profits and interest in quantifying pecuniary compensation, but there was no settled case-law on the matter. So far as interest was concerned, various rates had been suggested—the national rate, the average rate, the World Bank rate—but there was no ready answer to the question. If the Commission finally decided to codify the matter, it should merely seek to lay down certain legal principles for the guidance of States and international tribunals.

65. Under the terms of paragraph 4 of article 8, damage would in general be compensated for if the wrongful act caused the damage in question. Compensation was not paid for damage that was too remote, of course, and the question whether damage was too remote was a question of law. International tribunals had adopted various criteria, including the requirement of an adequate causal connection between the unlawful act and the damage, the proximate and natural consequences of the wrongful act, and the test of foreseeability, all of which could provide the basis for a provision on causation. He did not see the reason for including the word “uninterrupted” in a provision on causation. Provided that word was deleted, he could support the inclusion of paragraph 4.

66. Furthermore, he agreed with the terms of paragraph 5, on contributory negligence, but wondered whether there should not also be a provision to deal with circumstances in which the injured State might have benefited from taxation—a factor that was normally also taken into account in assessing the quantum of damages.

67. Satisfaction, dealt with in draft article 10, was a remedy available to an injured State and was still relevant in contemporary inter-State relations. Its purpose was to acknowledge the wrongful conduct, express apologies and pay an indemnity, as distinguished from monetary compensation. While the article was on the whole appropriately worded, he would prefer, in paragraph 1, to replace the words “responsible individuals”, which could have many meanings, by “individuals concerned”. Since the effects of the various elements of satisfaction—such as apologies, damages, assurances and safeguards—were cumulative, those elements should not form the subject of separate provisions. Again, the words “punitive damages”, a concept which found little, if any, support in modern international law, should be replaced by “indemnity” so as to cover cases where the damage was not nominal. When it came to assessing damages, however, punitive damages would still have to be taken into account. He also agreed on the inclusion of a provision to the effect that satisfaction should not include humiliating demands on the author State, since such demands were still made, even in the present day and age.

68. As to the impact of fault on the forms and degrees of reparation, although fault was not generally a condi-

tion for State responsibility, the fact and extent of fault might affect the quantification of damages and also satisfaction. As the Special Rapporteur had pointed out, fault had a role to play in the case of counter-measures, reprisals and sanctions adopted *vis-à-vis* the author State. He looked forward to the development of those particular issues in the Special Rapporteur's next report.

The meeting rose at 1.10 p.m.

2175th MEETING

Friday, 15 June 1990, at 11.10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (continued) (A/CN.4/416 and Add.1,¹ A/CN.4/425 and Add.1,² A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles³

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLE 8 (Reparation by equivalent)

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

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

³ 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 72-73, paras. 229-230.

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 9 (Interest) *and*

ARTICLE 10 (Satisfaction and guarantees of non-repetition)⁴ (continued)

1. Mr. Sreenivasa RAO said that he had the impression from the second report (A/CN.4/425 and Add.1) that it placed more emphasis than necessary on the materials and awards in cases involving private individuals or agents of the State acting in their private capacity in order to bear out the Special Rapporteur's thesis concerning remedies for breaches of international obligations. In the present state of international relations, it was open to question whether the age-old theory of a State suffering injury through its nationals or agents while they were in a foreign State was still as relevant as it had been in the nineteenth century. Even in that century, claims of that kind by some States had been regarded as unfriendly or unacceptable. Several recent developments contradicted that theory.

2. First of all, cases of nationalization by States of foreign corporations or other agencies had given rise to many controversies, since large sectors of the population of the States concerned aspired to economic independence following their liberation from the yoke of colonialism. There was no need to go into such matters in detail to show that past cases of diplomatic espousal of claims concerning nationalization and the resulting awards could no longer serve as valid precedents.

3. Secondly, there was the attitude of States—certainly of Western States—that they had nothing to do with their multinational corporations, for whose activities they would assume no responsibility, since such corporations were said to have independent legal personality. That was the doctrine that governed the questions of the immunity, civil liability and control of the assets and operations of corporations, especially where transnational activities were involved.

4. The movement of peoples across international boundaries had also assumed phenomenal proportions. States were no longer in a position to control and regulate such movements. Moreover, migrants had become more aware of their rights and duties and the remedies available to them when they were abroad. They did, of course, seek help when necessary from the embassy of their country of origin, but such help was usually confined to giving them advice or suggesting local lawyers who could assist them in obtaining redress where appropriate. At present, States had neither the time nor the resources to espouse private claims by their nationals.

5. As Mr. Graefrath (2168th meeting) had pointed out, a clear statement was therefore needed that the injured State was entitled to claim compensation not covered by restitution only for damage it had suffered itself, either directly or through its nationals. That being the case, he was not sure whether it was necessary to go into so much detail in the articles dealing with compensation, interest rates and the rules on satisfaction. In that regard, he supported the suggestion that rates of interest should be treated as part of compensation and that the question of compound interest

⁴ For the texts, see 2168th meeting, para. 2.

should be left aside. He also shared the concern of the members of the Commission who had said that flexible rates of interest should be adopted so as to take account of the needs of developing countries.

6. As a matter of principle, he would prefer that all questions of reparation, including restitution, pecuniary compensation and satisfaction, be subject to amicable settlement through bilateral negotiations among the States concerned. The draft articles should be used only to guide such negotiations and to solve the attendant problems. They should thus be as flexible as possible, as in the case of the draft articles on the law of the non-navigational uses of international watercourses. After all, there were no uniform standards for fixing the quantum of damages, to say nothing of the difficulty of interpreting the expression “economically assessable damage” (art. 8, para. 2). Too rigid a formulation would endanger the entire draft by making it less acceptable to States.

7. As Mr. Pellet (2173rd meeting) and other members had noted, the Commission should, with the help of the Special Rapporteur, take as its main theme the question of the breach of an obligation giving rise to responsibility and deal with the various forms of reparation only as a component of that theme, not as the primary objective of its work. Furthermore, the concept of State responsibility should, as Mr. Graefrath and Mr. McCaffrey (2174th meeting) had pointed out, be extended to other areas, such as the environment, marine pollution, the Antarctic and the ozone layer, in which there could be more than one injured State and more than one author State. If those new areas were opened up, it would become pertinent to question the validity of the well-known principle laid down in the *Chorzów Factory* case (Merits)⁵ that reparation must “wipe out” the legal and material consequences of the wrongful act.

8. The Special Rapporteur’s approach should also be less oriented towards punishment. Concepts such as punitive damages and fault were outside the scope of the doctrine of State responsibility. Moreover, the introduction of such ideas might make the draft less acceptable to States.

9. Turning to the draft articles submitted by the Special Rapporteur, he said that he would not comment on the drafting points raised by other members in connection with articles 8 and 9. In draft article 10, the important question of satisfaction was reduced to a few unacceptable details. The matter of apologies and expressions of regret should be left to the discretion of the States concerned and should not be dealt with in the draft articles as a rigid rule.

10. The Special Rapporteur had tried to extend the scope of damages which could be claimed on account of personal or psychological injury by using the uninterrupted causal chain as the test. Several members had objected, and he agreed with their arguments. Mr. McCaffrey, for example, had rightly proposed that, as a matter of policy, there should be a limit to the amount of reparation which could be claimed.

11. Mr. ARANGIO-RUIZ (Special Rapporteur), summing up the discussion, said that he had learned a great deal from the comments of members of the Commission on his second report (A/CN.4/425 and Add.1). He would do his best to provide the explanations they had requested.

12. To begin with, many members had regretted the fact that some quotations appeared in the English mimeographed version of the report in Italian, French or German. In future, he would see to it that passages quoted in languages other than that of his reports were always translated.⁶

13. As to terminology, he had noted the comments made by Mr. Calero Rodrigues (2169th meeting) concerning the methodological distinction made in the report between the “substantive” consequences of an internationally wrongful act—including cessation, restitution and the various forms of reparation—and its “instrumental” consequences, namely the measures, countermeasures, reprisals and sanctions which States might use in order to obtain cessation, restitution, etc. He agreed with Mr. Calero Rodrigues that such consequences were always legal, since they derived from the application of a rule of law, but he could not understand the distinction Mr. Calero Rodrigues had drawn between substantive, i.e. material, consequences and legal consequences. In his own view, the distinction related not so much to the legal consequences of the internationally wrongful act as to the effects of the wrongful act, which were either material—or, to use Mr. Calero Rodrigues’s term, substantive—or moral/legal. He could therefore not agree with Mr. Calero Rodrigues that cessation was a legal consequence of a wrongful act. The obligation of cessation was a legal consequence, while cessation itself was a type of conduct: an act or an omission. That was also true of restitution. There could be cases of legal restitution, for example where restitution involved the amendment of a constitutional or legislative provision or the annulment of a judgment, but usually it involved restoring something to its original condition. Although governed by a legal rule, that was also a material act. He hoped to discuss that question of terminology with Mr. Calero Rodrigues; it was an important issue because it could mask conceptual differences. Lastly, although he endorsed the suggestion by Mr. Calero Rodrigues that the word “damage” should be used only for material damage, he was not so sure that the word “injury” should be used only for legal damage; in the definition of the “injured State”,⁷ for example, the word “injured” also referred to material injury.

14. Ultimately, of course, it was for the Commission to decide such matters of terminology and he would naturally comply with any decision it might take.

15. During the discussion, there had been many comments on points to be dealt with later, such as crimes and countermeasures, for which texts had already been drafted. For example, Mr. Ogiso (2171st meeting) had

⁶ The passages in question are translated in the final printed version of the report appearing in *Yearbook . . . 1989*, vol. II (Part One).

⁷ See article 5 of part 2 of the draft as provisionally adopted by the Commission (see footnote 3 above).

⁵ See 2168th meeting, footnote 6.

recalled the ideas he had put forward in 1985 with regard to the various methods of dispute settlement between the "presumed" author State and the "presumed" injured State—rightly regarding the adjective "presumed" as being necessary as long as the case had not been settled either by agreement or through a third-party settlement procedure—and was apparently afraid that the texts proposed would not cover *ex gratia* or agreed settlements between the parties, noting that reference should be made to them in one of the draft articles. He wished to make it clear that, in all the draft articles he had submitted, it was assumed that requests for reparation, or for negotiations or third-party settlement where an agreement to that effect existed, and requests for other forms of negotiated settlement had to precede countermeasures in all but exceptional cases, for instance in emergencies. In that connection, Mr. Ogiso had proposed that paragraph 2 of draft article 8 should provide that, if no agreement was reached between the parties on the assessment of the damage, the question should immediately be referred to a third party for settlement. That question related to the settlement of disputes, which would be dealt with in his next report.

16. He had not tackled the question of crimes because he had kept to the tentative outline submitted in his preliminary report in 1988 (A/CN.4/416 and Add.1, para. 20), not because he believed there was no clear dividing line between the most serious delicts and the least serious crimes. Chapter III of his second report (A/CN.4/425 and Add.1), on satisfaction, was closer in some respects to the consequences of crimes than to the question of pecuniary compensation.

17. Mr. Pellet (2173rd meeting) had made some comments on the relationship between reparation and satisfaction, the idea of reparation in general and the different forms and purposes of reparation, depending on the nature of the injury. Reparation and satisfaction would both be compensatory and would come into play whenever *restitutio in integrum* was not enough to wipe out all the consequences of the wrongful act. Apart from the fact that the distinction which Mr. Pellet was driving out the door was coming back in through the window—represented in that case by the purpose, which, in his own view, differed depending on whether the injury was a material one or a "moral" or "political" one—the proposed simplification was unacceptable for a number of reasons. First, it had no apparent usefulness either *de lege lata* or *de lege ferenda* and it was not in keeping with actual practice, which drew a distinction between satisfaction and guarantees of non-repetition, and pecuniary compensation. Secondly, it did not square with the different kinds of injury to which the two remedies applied. Thirdly, it was incompatible with the nature—if not punitive or afflictive, since many members of the Commission did not want those two words to be used, then at least of a sanction—that characterized satisfaction much more than pecuniary compensation. There was a very clear-cut difference between satisfaction, on the one hand, and restitution and compensation, on the other. Fourthly, it was contradicted by much of the doctrine. Fifthly, it was ruled out by the obvious fact that wrongful acts

could not be placed in two separate, hermetically sealed compartments. In that connection, he pointed out that he was bound by article 19 (International crimes and international delicts) of part I of the draft, which had been wanted by the General Assembly, largely owing to the combined efforts of the developing countries and the countries of what had then been the socialist bloc, and had also been wanted by Mr. Ago, the Special Rapporteur at the time, and hence by the Commission itself. Article 19 existed and had to be taken into account. The proposed simplification also ignored the fact that the most serious delicts calling for such forms of satisfaction included delicts in which there was a significant element of wilful intent or negligence, and both were even more typical of crimes.

18. Mr. Pellet also seemed to believe that the position taken in the second report differed both from that adopted in the preliminary report, as far as the difference between delicts and crimes was concerned, and from the position taken by Mr. Ago. On the first point, he admitted that he had made such a distinction, but it was purely methodological and certainly did not mean that the consequences of delicts and of crimes had nothing in common. On the second point, although he did not regard himself as being necessarily bound by Mr. Ago's views in the matter, Mr. Ago's position was actually similar to his own. In the course on "Le délit international" he had given at The Hague Academy of International Law in 1939,⁸ Mr. Ago had expressed the opinion that the various forms of reparation presented both elements of "compensation" and elements of "sanction".

19. In another area, he had noted Mr. Bennouna's criticism (2172nd meeting) of a passage in his second report on the specific nature of the topic from the point of view of the progressive development and codification of international law. In his view, considerable differences existed between the secondary rules which the Commission was working on and primary rules. In the case of primary rules, for example the law of the sea, outer-space law, trade law and the law of international economic relations, conflicts of interest between groups of States were clear, obvious and well-defined. That was not the case in the area of secondary rules: any country might one day be an author State or an injured State. Clearly, it was important to bear in mind the particularities of certain States, especially the developing countries, for example in cases where they were confronted by excessive reparation claims. That must, however, be taken into account primarily, though not exclusively, in respect of primary rules; that was in the interests of the developing countries themselves. He had consistently spoken out in the competent bodies in favour of a shift from soft law to hard law in the area of international economic relations in order to promote the establishment of a new international economic order. The developed countries had so far done very little for the developing world. Yet, however desirable it might be for the Commission to incorporate in its draft

⁸ R. Ago, "Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II* (Paris, Recueil Sirey), vol. 68, p. 419.

articles elements designed to allow for differences in the level of development of countries, it must also take care not to go too far because that might hinder the development of primary rules or make the developed countries more reluctant to accept a transition from soft law to hard law in the area of development.

20. To conclude his introductory comments, he referred to a number of questions that had been omitted in the second report, in addition to those that he intended to consider at a later stage of his work. In particular, he had been criticized for not having dealt with the law of the environment, for having concentrated too heavily on damage caused to the nationals of States and not enough on direct damage caused to States themselves, and for not having addressed the question of treaties. He pointed out, first of all, that he had referred in the report to the *Cosmos 954* case (A/CN.4/425 and Add.1, para. 40). Secondly, the question of direct damage to States had been considered primarily in chapter III, on satisfaction, which contained many examples of violations of diplomatic premises or immunity, which were, in a sense, direct attacks against States. Lastly, in what had been called the second "*Rainbow Warrior*" case,⁹ decided on 30 April 1990, the two parties concerned and the arbitral tribunal had presumably taken his reports into account. In that case, the question had been not only whether material damage had been caused to persons or property, but also whether the terms of an agreement reached earlier had been respected. He had not neglected treaties, but, in his view, there was no difference in international law between contractual and non-contractual responsibility.

21. Turning to the draft articles themselves, he noted, first, with regard to the title of draft article 8 (Reparation by equivalent), that Mr. Koroma (2174th meeting) and Mr. Al-Khasawneh (2173rd meeting) had questioned whether reparation by equivalent could not be considered as being more or less synonymous with pecuniary compensation. Referring to the *British Claims in the Spanish Zone of Morocco* case (see A/CN.4/425 and Add.1, footnote 234), Mr. Al-Khasawneh had pointed out that the Spanish Government had offered the British Government other premises as reparation for the damage caused to the latter's consular premises. That could be considered as a sort of restitution in kind that served as compensation. It was also his impression that, under Islamic law, there were three forms of *restitutio in integrum*: first, restitution in kind; secondly, pecuniary compensation; and, thirdly, the provision of an equivalent object that might satisfy the injured State. Thus one might just as easily accept a rather broad concept of restitution *in integrum* as the idea that pecuniary compensation meant more or less reparation by equivalent. In any event, the expression "reparation by equivalent" was perhaps ambiguous and should be eliminated from article 8.

22. He had considered whether there were, in fact, any rules of international law in the area that might be codified and to what extent it would be desirable to go

into that subject in detail. Mr. Graefrath (2168th meeting) had said that he (the Special Rapporteur) had been too optimistic in thinking that such rules existed. In addition to the views expressed by Mr. Al-Khasawneh, he would refer members to the relevant part of the second report (A/CN.4/425 and Add.1, paras. 26-33), which should dispel their doubts on that question. As to the suggestion by some members, including Mr. Graefrath and Mr. Thiam (2173rd meeting), that the Commission should restrict itself to "maxims" in the area, he regarded that as an indirect reference to draft article 6 as submitted by his predecessor, Mr. Riphagen, in 1984 and 1985,¹⁰ in which Mr. Riphagen had attempted to condense into 8 or 10 lines the entire contents of the new draft articles 6 to 10 which he (the Special Rapporteur) had himself submitted to the Commission in his preliminary and second reports. Those draft articles were not without shortcomings, but one thing was certain: the Commission had adopted 35 articles for part 1 of the draft in order to define a wrongful act and to deal with its characteristics and the circumstances precluding wrongfulness. It would therefore not be reasonable to condense into a single article the entire question of the substantive consequences of wrongful acts. Moreover, owing to its excessively compact form, article 6 as proposed by Mr. Riphagen had posed a number of problems for the Drafting Committee.

23. With regard to the expression "injured State" in paragraph 1 of draft article 8, a number of members had said that, whereas the definition of that expression in article 5 of part 2 as provisionally adopted on first reading¹¹ extended the characterization of "injured State" well beyond the State directly affected (an extreme example being the injury *erga omnes* sustained by States bound by multilateral rules relating to the protection of human rights), the wording proposed in paragraph 1 of draft article 8 would not solve the problem and no State could be identified as having a right to compensation. He had the impression that a misunderstanding concerning the term "damage" had arisen because he had not included comments for each draft article. Admittedly, in the event of a violation of a multilateral rule protecting human rights, no State sustained damage in the sense in which that term was used in paragraph 1 of article 8. Thus no State had a right to pecuniary compensation. It would, in fact, be odd for State A to claim such compensation from State B because of human rights violations committed against nationals of State B by the latter. In his view, however, that question was dealt with in draft article 10. The provisions of that article, particularly paragraph 1, provided a remedy for any State directly concerned by a legal situation arising, for example, out of the violation of a multilateral rule relating to human rights. The damage sustained in such a case by the State was, in fact, the type of moral or legal injury referred to in paragraph 1 of article 10. He had provided for various forms and different degrees of satisfaction in article 10 in order to take account of a situation of that kind.

⁹ See 2168th meeting, footnote 4.

¹⁰ See *Yearbook . . . 1985*, vol. II (Part Two), p. 20, footnote 66.

¹¹ See footnote 3 above.

24. Mr. Ogiso seemed to think that a problem of a similar nature arose with regard to the declaratory judgment of an international tribunal under paragraph 3 of draft article 10, and had referred in that context to the judgments of the ICJ in the *South West Africa*¹² and *Barcelona Traction*¹³ cases. He failed to see how paragraph 3 of article 10, or, for that matter, article 10 as a whole, could cause problems in connection with article 5. Any injured State as defined in article 5 had a right to satisfaction in one of the forms provided for.

25. The suggestion that article 10 should state more clearly that the forms of satisfaction it referred to did not constitute an exhaustive list was, however, well taken.

26. As to the question of the link between paragraph 1 of draft article 8 and paragraph 4 of draft article 7 (Restitution in kind) as submitted in the preliminary report (A/CN.4/416 and Add.1), to which a number of members had referred, he acknowledged that, in the preliminary report, he had been uncertain whether to take *restitutio in integrum* in the broad sense or in the narrower sense of the expression and had wondered whether, when taken to mean restitution in kind, it would really make it possible to re-establish the situation that would exist if the wrongful act had not been committed. It was very difficult to achieve such a result through restitution alone and it was almost always necessary to add pecuniary compensation. For example, in the case of the theft of an object, *restitutio in integrum* was not possible for deprivation of enjoyment or loss of profits suffered between the time the object had been stolen and the time it was returned.

27. Members of the Commission seemed to have been generally in agreement on the principle that reparation should be integral, even though some reservations had been expressed on that point. He had proposed two alternatives for paragraph 1 of article 8 because he had been unable to decide in favour of one or the other and had preferred to leave it to the Drafting Committee to choose one of the two texts, which he regarded as equivalent.

28. Mr. Ogiso had voiced reservations with regard to the expression "the situation that would exist" in paragraph 1 of article 8 and had questioned whether the expression "the situation which would... have existed" used in the *Chorzów Factory* case (Merits) (see A/CN.4/425 and Add.1, para. 21) might not be preferable. Mr. Ogiso had given the following example: State A mistakenly bombed a dam located in State B and an agreement was reached between the two States. Before completion of the reconstruction work, torrential rains caused flooding that ravaged the shore of State B. The question was whether State A must repair the damage caused by that flooding. In his own view, everything depended on the agreement reached. State B had to draw on the best possible legal and technical advice in order to determine with care the specifics of the agreement.

29. Since the criterion of "economically assessable damage" in paragraph 2 of article 8 had given rise to many reservations, he pointed out that that paragraph should not be interpreted as meaning that all economically assessable damage was automatically subject to compensation simply by virtue of the fact that it existed. For the purpose of compensation, it must above all be established that the damage resulted from the internationally wrongful act—i.e. that there was an uninterrupted causal link (para. 4)—and that it was not due, wholly or in part, to the negligence of the injured State or to other circumstances unrelated to the said act. Needless to say, such a criterion in no way affected the assessment made by the parties or the arbitrator. It had its place, perhaps in another formulation, in an article or a commentary, for the very purpose of avoiding any arbitrary assessment.

30. The expression "moral damage" in paragraph 2 meant the moral damage sustained by the injured State's nationals privately and not as representatives or agents of that State. The quantification of such damage was admittedly difficult, but not impossible, assuming the help of experts, such as psychologists, despite the doubts expressed by Mr. Graefrath. In any event, the principle of compensation for moral damage should be expressly stated in international law in one form or another precisely because it did not exist or was vague in a number of legal systems.

31. The concept of "equity" had been mentioned, but it might be dangerous to refer expressly to it, since it was part and parcel of law and of any legal decision.

32. With regard to paragraph 3 of article 8 and the concept of *lucrum cessans*, which encompassed the problem of nationalization, he pointed out, to dispel any misunderstanding, that the topic under consideration related only to the consequences of an internationally wrongful act and that the case of legal nationalization was therefore excluded. Admittedly, *lucrum cessans* raised a difficult problem. Replying to Mr. Bennouna and Mr. Mahiou (2171st meeting), he said that the arbitrator was expected to take account in such cases of the different levels of economic development and economic means of States and to proceed on the basis of equity.

33. As for the criterion of an "uninterrupted causal link" in paragraph 4, and to return to the example Mr. Ogiso had given (see para. 28 above), he said that no such link existed between the events that had occurred before the flooding or the beginning of repair work—or, at any rate, before the conclusion of the agreement—and the subsequent events. Everything depended on the terms of the agreement. In reply to Mr. Koroma, he said that he did not take an uninterrupted causal link to mean an *ad infinitum* link, but one which existed and continued to exist independently of the fact that other events had been introduced into the chain. In any event, he noted that some members had expressed their agreement with that criterion.

34. Concerning the criteria of normality and predictability, he said that, if the Commission so decided, the Drafting Committee might retain them.

35. Replying to Mr. Al-Khasawneh, he said that the criterion of the excessive nature of the burden imposed

¹² See 2171st meeting, footnote 6.

¹³ *Ibid.*, footnote 7.

on the author State was likely to temper quantitatively and qualitatively the obligation of *restitutio in integrum*, but it could not be easily applied to compensation. Retaining the criterion in the latter case would certainly be tantamount to giving a State, even a prosperous one, complete latitude in claiming that the compensation to which it was bound was excessively heavy. There again, equity must enter into play.

36. With regard to draft article 9, on interest, he noted that most members of the Commission who had spoken on the subject regarded it as essential. He did not himself have strong feelings on the question but, if article 9 were deleted, it would be necessary to incorporate a provision on interest in article 8 to avoid creating the impression that the award of interest was excluded.

37. Concerning satisfaction, which was dealt with in draft article 10, he was quite prepared to delete the reference to “punitive” damages (para. 1). Clearly, he had not intended to provide for States the type of physical punishment that might be imposed on individuals, but it did sometimes happen that arbitral tribunals awarded punitive damages as satisfaction.

38. The fact of the matter was that satisfaction existed and had a role to play. That role had been contested by Mr. Graefrath (2168th meeting), who had argued that satisfaction was primarily a diplomatic practice and rhetorical and that it was therefore open to question whether it reflected a rule of law or simply diplomatic practice. He himself could not, for a number of reasons, accept the idea that diplomatic practice was not an element from which the existence of rules of international law could be deduced. Where else did general international law come from if not from diplomatic practice? The number of disputes settled by judicial or arbitral means was negligible compared to the number of conflicts settled by diplomatic means. After all, United Nations practice was itself diplomatic, the Organization being a system of multilateral diplomacy. Diplomatic practice was, in fact, much more abundant than that referred to in the second report.

39. In paragraph 1 of article 10, he suggested that the words “moral or legal injury” be retained for the time being for lack of a better solution. He was convinced that the very purpose of satisfaction was to repair that type of injury. All internationally wrongful acts entailed legal injury. Paragraph 1 aimed to take account of the fact that cases occurred in which compensation covered satisfaction. That had been so in the first “*Rainbow Warrior*” case (see A/CN.4/425 and Add.1, para. 134), in which the Secretary-General of the United Nations had set an amount for compensation which, in the opinion of most commentators, far exceeded the damage sustained.

40. Lastly, the fault, wilful intent or negligence of the State committing the wrongful act was an essential point, as a number of members had stressed. The Commission must examine the question of fault independently of part 1 of the draft articles. The term lent itself to a number of interpretations in the case of “interna-

tional delicts” and even more so in that of “international crimes”.

41. He thanked members of the Commission for their observations and apologized for perhaps not having replied to all the questions raised.

42. The CHAIRMAN thanked the Special Rapporteur for his clear and detailed summing-up. He asked the Commission whether it wished to refer draft articles 8 to 10 to the Drafting Committee, it being understood that the Committee would take fully into account the comments made and opinions expressed during the discussion.

43. Mr. McCaffrey said that, while he would not oppose referral of the draft articles to the Drafting Committee, like some other members of the Commission he had certain reservations about the approach taken in the articles. He regretted that the Commission did not have time to discuss that approach in the light of the Special Rapporteur’s summing-up.

44. Mr. DÍAZ GONZÁLEZ said that he agreed with Mr. McCaffrey. There were substantial differences of opinion among the members of the Commission. In his view, it would be premature to refer the articles to the Drafting Committee, but he would not oppose such referral if that were the decision of the majority of the Commission, in accordance with its usual practice.

45. Following a procedural discussion in which Mr. ARANGIO-RUIZ (Special Rapporteur), Mr. MAHIU (Chairman of the Drafting Committee), Mr. KOROMA and Mr. BEESLEY took part, Mr. CALERO RODRIGUES, speaking on a point of order, requested that the discussion be postponed.

46. The CHAIRMAN, noting that the Commission had not completed its discussion of agenda item 3, suggested that it resume its consideration of the topic when the Special Rapporteur’s presence made it possible to do so.

It was so agreed.

The meeting rose at 1.25 p.m.

2176th MEETING

Tuesday, 19 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (A/CN.4/401,¹ A/CN.4/424,² A/CN.4/L.383 and Add.1-3,³ A/CN.4/L.443, sect. G, ST/LEG/17)

[Agenda item 8]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 11

1. The CHAIRMAN recalled that the Special Rapporteur had introduced his fourth report on the topic (A/CN.4/424) at the previous session,⁴ but that it had not been discussed by the Commission due to lack of time. The Special Rapporteur's fifth report (A/CN.4/432) was now also before the Commission, but it would not be considered at the present session due to lack of time. He invited the Commission to consider the fourth report, as well as draft articles 1 to 11 contained therein, which read:

PART I. INTRODUCTION

Article 1. Terms used

1. For the purposes of the present articles:

(a) "international organization" means an intergovernmental organization of a universal character;

(b) "relevant rules of the organization" means, in particular, the constituent instruments of the organization, its decisions and resolutions adopted in accordance therewith and its established practice;

(c) "organization of a universal character" means the United Nations, the specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are of a world-wide character;

(d) "organization" means the international organization in question;

(e) "host State" means the State in whose territory:

(i) the organization has its seat or an office; or

(ii) a meeting of one of its organs or a conference convened by it is held.

2. The provisions of paragraph 1 of this 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 2. Scope of the present articles

1. The present articles apply to international organizations of a universal character in their relations with States when the latter have accepted them.

2. The fact that the present articles do not apply to other international organizations is without prejudice to the application of any of the rules set forth in the articles which would be applicable under international law independently of the present articles [Convention].

3. Nothing in the present articles [Convention] shall preclude the conclusion of agreements between States or between international organizations making the articles [Convention] applicable in whole or in part to international organizations other than those referred to in paragraph 1 of this article.

Article 3. Relationship between the present articles [Convention] and the relevant rules of international organizations

The provisions of the present articles [Convention] are without prejudice to any relevant rules of the organization.

¹ Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

³ Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

⁴ For a summary of the Special Rapporteur's introduction, see *Yearbook* . . . 1989, vol. II (Part Two), pp. 133 *et seq.*, paras. 708-726; see also *Yearbook* . . . 1989, vol. I, pp. 282-283, 2133rd meeting, paras. 2-19.

Article 4. Relationship between the present articles [Convention] and other international agreements

The provisions of the present articles [Convention]:

(a) are without prejudice to other international agreements in force between States or between States and international organizations of a universal character; and

(b) shall not preclude the conclusion of other international agreements regarding the privileges and immunities of international organizations of a universal character.

PART II. LEGAL PERSONALITY

Article 5

International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

(a) contract;

(b) acquire and dispose of movable and immovable property; and

(c) institute legal proceedings.

Article 6

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization and by international law.

PART III. PROPERTY, FUNDS AND ASSETS

Article 7

International organizations, their property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or coercion.

Article 8

1. The premises of international organizations used solely for the performance of their official functions shall be inviolable. The property, funds and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference or coercion, whether by executive, administrative, judicial or legislative action.

2. International organizations shall notify the host State of the location and description of the premises and the date on which occupation begins. They shall also notify the host State of the vacation of premises and the date of such vacation.

3. The dates of the notification provided for in paragraph 2 of this article, except where otherwise agreed by the parties concerned, shall determine when the enjoyment of the inviolability of the premises, as provided for in paragraph 1 of this article, begins and ends.

Article 9

Without prejudice to the provisions of the present articles [Convention], international organizations shall not allow their headquarters to serve as a refuge for persons trying to evade arrest under the legal provisions of the host country, or sought by the authorities of that country with a view to the execution of a judicial decision, or wanted on account of *flagrans crimen*, or against whom a court order or deportation order has been issued by the authorities of the host country.

Article 10

Without being restricted by controls, inspections, regulations or moratoria of any kind:

(a) International organizations may hold funds, gold or currency of any kind and operate bank accounts in any currency;

(b) International organizations may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency;

(c) International organizations shall, in exercising their rights under subparagraphs (a) and (b) of this article, pay due regard to any representations made by the Government of any member State party to the present articles [Convention] in so far as it is considered that effect can be given to such representations without detriment to their own interests.

Article 11

Notwithstanding the provisions of article 10, subparagraphs (a) and (b), the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question, by mutual agreement of the parties concerned.

2. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that he would invite the Commission, in considering his fourth report (A/CN.4/424), also to refer to his second report,⁵ which contained a draft article on which the Commission had not yet taken a decision. It had in fact been agreed to defer consideration of the matter pending his submission of a schematic outline of the subject-matter to be covered by the various draft articles.⁶ He had accordingly submitted that schematic outline in his third report (A/CN.4/401, para. 34) and it had been approved by the Commission at its thirty-ninth session, and by the General Assembly at its forty-second session, in 1987. Furthermore, in resolutions 42/156 and 43/169, of 7 December 1987 and 9 December 1988 respectively, the General Assembly had recommended that the Commission should continue its work on the topic. In the debate held in the Sixth Committee at the Assembly's forty-second session, a large number of representatives had stressed the role of international organizations and the importance of the topic. They had welcomed the Commission's work and endorsed its request that he continue his study of the topic in accordance with the schematic outline and in the light of the exchange of views that had taken place in the Commission.⁷ Those considerations had provided the basis for his further work on the topic and for his fourth report.

3. He also wished to place before the Commission his fifth report (A/CN.4/432), which consisted of two parts, one dealing with the archives of international organizations, which was intended to supplement part III of the draft articles, and the other with publication and communications facilities, which were the subject of part IV of the draft. The corresponding draft articles would be set forth in an addendum to the fifth report which he would be submitting in due course.⁸ He would introduce the fifth report when the Commission began discussing it, which he trusted would be at the next session. In the meantime, he would continue his work along the lines approved by the Commission and the General Assembly.

4. Mr. HAYES thanked the Special Rapporteur for his thought-provoking fourth report (A/CN.4/424) and said that, although the early work on the second part of the topic had covered regional as well as universal organizations, the Commission had decided at its thirty-ninth session, in 1987, that the topic should be confined to intergovernmental organizations of a

universal character, the final decision in the matter to be left until later. That approach was reflected in the fourth report and was justified by the outcome of the work thus far. At its thirty-ninth session, the Commission had also agreed, with respect to methodology, that it should endeavour to combine the codification of existing rules and practice with the identification of lacunae.⁹ As noted by the Special Rapporteur, such a course had been endorsed in the Sixth Committee of the General Assembly, thus providing the Commission with a clear direction for its work. The schematic outline submitted in the third report (A/CN.4/401, para. 34) furnished the necessary framework on the basis of which the Special Rapporteur had proceeded in preparing his fourth report.

5. There were, in his view, two theoretical questions that had to be faced, since they would inevitably influence future work on the topic. The first concerned the legal personality and legal capacity of an international organization, which he believed derived from the constituent instrument of the organization. It was none the less difficult to imagine how an international organization could be established without being vested with legal personality. Accordingly, he had no objection to the general thrust of draft article 5. It followed therefrom that States not parties to the constituent instrument could decide for themselves whether to recognize the legal personality of an international organization; and it also followed, of course, that such legal personality was independent of that recognition.

6. The second question concerned legal rights, and in particular privileges and immunities, which he believed did not derive from the fact of international personality but rather depended on the powers and functions of the organization as set forth in its constituent instrument. Thus he endorsed the view of Dominicé cited in the report (A/CN.4/424, para. 32), a view that also found support in the jurisprudence of the ICJ, particularly in such advisory opinions as those handed down in the cases concerning *Reparation for Injuries Suffered in the Service of the United Nations* (1949), the *International Status of South West Africa* (1950) and *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (1962). The first of those advisory opinions, for instance, stated that "the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice".¹⁰

7. Accordingly, he favoured the functional approach to the drafting of provisions and agreed with the Special Rapporteur's statement in the first sentence of paragraph 27 of the report. More broadly, it was his opinion that the Commission's efforts should be directed at preparing a general framework of provisions that would be common to all international organizations of a universal character but would leave other areas to be developed according to the specific purpose and functions of the organization concerned. Again, that

⁵ *Yearbook* ... 1985, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1.

⁶ *Yearbook* ... 1985, vol. II (Part Two), p. 67, para. 267 (d) and (e).

⁷ See "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" (A/CN.4/L.420), para. 223.

⁸ Since it was not considered by the Commission at the present session, the fifth report will be reproduced in consolidated form in *Yearbook* ... 1991, vol. II (Part One), as document A/CN.4/438.

⁹ See *Yearbook* ... 1987, vol. II (Part Two), p. 52, para. 219.

¹⁰ *I.C.J. Reports* 1949, p. 180.

seemed to be in keeping with the Special Rapporteur's suggestions (A/CN.4/424, paras. 51-52).

8. Draft article 1, on the use of terms, was necessarily of a more provisional nature than the other articles, as it would have to be reviewed in the light of the substantive provisions. So far as article 1 was concerned, therefore, at the present stage he would only discuss the definition of an international organization. Since the articles were concerned not with international organizations as such but with the relations between those organizations and States, it was necessary only to say what was meant by the expression "international organization", rather than to define what an international organization was, thus following the pragmatic approach of earlier treaties. It should, however, be possible to do so more concisely than in three subparagraphs, namely paragraph 1 (a), (c) and (d) of article 1. Those provisions could well be merged into a definition of one single term, bearing in mind article 2, on the scope of the draft.

9. He would welcome clarification both of the phrase "when the latter have accepted them", in paragraph 1 of draft article 2, and of paragraph 3 of the article.

10. Legal personality, as dealt with in draft article 5, signified, of course, primarily legal personality under international law. The reference to internal law in the first sentence of the article might therefore require adjustment. While the areas of legal capacity covered in subparagraphs (a), (b) and (c) were the ones most frequently provided for in legal instruments and acknowledged in practice—and hence were appropriate for inclusion in the article—the reference in the introductory clause to the instrument by which international organizations were established might stand in need of modification.

11. Draft article 6, which contained a practical provision dealing with treaty-making capacity, steered a sensible course between conflicting views.

12. He agreed with the statement by the Special Rapporteur (*ibid.*, para. 24) that the autonomy, independence and functional effectiveness of an international organization required some degree of immunity from legal process. The first sentence of draft article 7, which appeared in many relevant agreements, appeared to have stood the test of time, and such immunity properly covered not only the international organization, but also its property, funds and assets. The second sentence of the article, however, should be so drafted as to make it quite clear that, as in the case of diplomatic immunity, a separate waiver was required in respect of measures of execution.

13. Inviolability of premises was a *sine qua non* for the fulfilment by an international organization of its functions and, as noted in the report (*ibid.*, para. 100), such inviolability was firmly supported by both the literature and practice. The provisions of many agreements were amalgamated in paragraph 1 of draft article 8, whereby the limitation of inviolability to premises used solely for official purposes was maintained, while paragraphs 2 and 3 represented a desirable development of the law. He would none the less urge a further effort in that direction by means of a carefully worded provision

under which a State would be required to afford protection of premises—a question convincingly addressed by the Special Rapporteur in the report. It was gratifying to note that article 8 did not provide for an exception with regard to expropriation, a subject mentioned in paragraph 112 of the report.

14. He endorsed draft article 9, on the non-availability of the premises of an international organization as a refuge.

15. Draft article 10 followed the provisions of other relevant agreements which had apparently operated satisfactorily. However, subparagraph (c) could perhaps be adapted to cover the situation of a host country that was not a member of the international organization. Also, the article did not deal with such matters as taxes and customs duties, which would presumably be dealt with in a later draft.

16. He wondered whether the point dealt with in draft article 11 was not already covered by article 4, on the relationship between the present articles and other international agreements.

17. The topic had been somewhat neglected during the term of office of the Commission's current members, possibly for reasons that had more to do with other topics than with any lack of concern. In view of the interest of a large number of States in the matter, however, every effort should be made to move ahead with greater expedition. He was pleased to note that the Special Rapporteur's fifth report (A/CN.4/432) was now before the Commission and looked forward to a debate on it at the next session.

18. Mr. TOMUSCHAT commended the Special Rapporteur on the clarity and precision of his fourth report (A/CN.4/424). Although the topic might at first appear straightforward, the very purpose of the draft articles and their future place within the existing framework of relevant instruments were far from being settled. All the issues involved were already covered by the two general conventions on the privileges and immunities of the United Nations and the specialized agencies¹¹ and in the headquarters agreements concluded between the organizations and the host countries. The draft articles under consideration should therefore ultimately be aimed at overcoming the variety of legal régimes established by the many instruments in force and introduce improvements, fill in gaps and correct discrepancies, provided, of course, that the States and organizations concerned were willing to give precedence to the new legal régime that would eventually emerge. Indeed, the Commission had not been very successful in meeting a similar challenge posed by the drafting of unified rules on the status of the diplomatic courier and the diplomatic bag: the artificial distinction between a diplomatic bag and a consular bag had been maintained because it had been felt that existing treaty law could not be modified. The Commission's consideration of relations between States and international organizations would be justified only if it eventually led

¹¹ 1946 Convention on the Privileges and Immunities of the United Nations (United Nations, *Treaty Series*, vol. 1, p. 15); and 1947 Convention on the Privileges and Immunities of the Specialized Agencies (*ibid.*, vol. 33, p. 261).

to the modification of existing rules in the interest of the international community and was not a purely academic exercise.

19. In the light of those considerations, he disagreed with the content of draft article 4 (a). Indeed, the relationship between existing agreements and the present articles must be more clearly defined if the latter were to amend or supplement existing rules. However, in view of the scope and magnitude of the problems involved, it might be advisable to reconsider that issue at a later stage, just before the entire draft was completed.

20. He agreed with the Special Rapporteur that the draft should be confined to world-wide international organizations, namely those open to all States. Nevertheless, despite the view expressed by the Special Rapporteur (*ibid.*, para. 38), he believed that the commodity organizations set up under UNCTAD should not be excluded from the scope of the draft, provided they were open to all States, either as consumers or as producers, a condition that OPEC, for example, did not meet.

21. Draft article 5 was likely to be confusing, because it covered two types of legal personality, namely domestic and international. In that connection, he endorsed the comments made by Mr. Hayes and proposed that the Commission should follow the example of the EEC Treaty,¹² which, in article 210, provided that the Community enjoyed legal personality under international law, and then went on to grant it legal personality under the internal law of the member States. However, a single article could provide for the legal personality of international organizations under international law and for their treaty-making powers, which clearly derived from such personality. A second article could then provide for their legal personality under internal law and illustrate its scope by reference to contracts, the acquisition and disposal of property and the institution of legal proceedings.

22. The principle of the jurisdictional immunity of international organizations should not be open to challenge, for as a person under international law, and placed on the same level as the host State, they could not be regarded as being generally subordinate to the jurisdiction of local courts. However, a question did arise as to whether or not they should be subject to the same exceptions to and limitations on immunity as those applicable to States now that the doctrine of restricted immunity, as opposed to absolute immunity, had become widely accepted. The concept of absolute immunity had prevailed at the time the two general conventions on the privileges and immunities of the United Nations and the specialized agencies had been elaborated. Granting international organizations a better status than that enjoyed by States might at first glance seem questionable, but he tended to agree with the Special Rapporteur that the existing rule should not be changed, because subjecting international organizations to the jurisdiction of domestic courts, which

would automatically be the outcome of a restriction analogous to that imposed on States, would seriously impair the independence of international organizations. Accordingly, he did not agree with the exceptions enumerated by the European Committee on Legal Co-operation (*ibid.*, para. 111). Nevertheless, procedures and mechanisms must be established to enable private citizens involved in disputes with international organizations to assert their rights. Assuming that such cases lay outside the jurisdiction of domestic courts, they could perhaps be referred to arbitral bodies. At any rate, a rule must be laid down to provide for alternative remedies, because it could not be assumed that international organizations could do no wrong.

23. The general relationship between an international organization and the host country could be considered in two different ways: either an international organization enjoying legal personality under international law was generally exempt from the jurisdiction of the host country, or it enjoyed only the immunities specifically granted to it, as was the case under the existing conventions on privileges and immunities. The possibility that an international organization might claim a general exemption from national jurisdiction must be expressly ruled out in the draft articles.

24. Articles 8, 9 and 10 were acceptable, subject to minor drafting changes. The Special Rapporteur was none the less likely to run into serious difficulty at a later stage, especially in drafting general rules on taxation.

25. Mr. AL-BAHARNA thanked the Special Rapporteur for his fourth report (A/CN.4/424) and said that he supported the approach mentioned in the first sentence of paragraph 7 thereof. Nevertheless, the Commission must be very cautious in laying down general norms applicable to all international organizations, first because each organization had its own particular régime, which called for special treatment, and, secondly, because of the question of relations between the organization and the host country.

26. Draft article 3, no doubt a replica of article 3 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, was inconsistent with the Special Rapporteur's general approach, since it seemed to imply that the proposed convention would be without effect on the law applicable to an organization. If so, the future convention would be pointless. The Commission should therefore reconsider draft article 3, which could perhaps be strengthened by a provision to the effect that the proposed convention supplemented the relevant rules of the organization. The same comments applied, *mutatis mutandis*, to draft article 4 (a), which was a replica of article 4 (a) of the 1975 Vienna Convention.

27. Except for the words "and by international law", draft article 6 was the same as article 6 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. However, the addition was welcome, because it strengthened the formulation contained in the 1986 Convention.

¹² See *Treaties establishing the European Communities* (Luxembourg, Office for Official Publications of the European Communities, 1987), p. 207.

28. Under international law, it was broadly accepted that the immunities and privileges of international organizations were governed by the doctrine of functional necessity. Yet the practical application of that doctrine varied from one organization to another, depending essentially on the organization's character and functions. Although the property and assets of all international organizations were immune from every form of attachment, enforcement or execution, some organizations, unlike the United Nations, enjoyed only limited immunity from suit, as was evident from their constituent instruments in the case of the International Bank for Reconstruction and Development, the International Finance Corporation and the International Development Association, for example. In that respect, he had misgivings about the formulation of draft article 7, which appeared to go against the constituent instruments of those international financial institutions. On the other hand, he had no substantive objection to the way in which the article covered immunity of property. Article 7 should therefore be divided into two parts, the first providing for immunity from suit in accordance with the relevant rules of the constituent instrument, and the second providing for immunity of property from legal process. As for the operation of the doctrine of waiver, the provision should be further strengthened by replacing the second sentence of article 7 by the following clause: "Waiver of immunity from legal process shall not be held to imply waiver of immunity in respect of the execution of the judgment or order, for which separate waiver shall be necessary."

29. With regard to draft article 8, he agreed with the Special Rapporteur that the inviolability of the premises of international organizations was not based on extraterritoriality, but was a right inherent in personality. In the legal literature, it was recognized that all the principles on diplomatic inviolability applied to the premises of international organizations. According to State practice, inviolability of such premises meant that States must not only refrain from entering them, but also protect them from any threat or disturbance. However, the wording proposed by the Special Rapporteur for the first sentence of paragraph 1 differed from the stipulation in article 22, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations that "The premises of the mission shall be inviolable". He preferred the latter formulation, because the phrase "used solely for the performance of their official functions" might restrict the inviolability of international organizations. The Special Rapporteur himself acknowledged in the report that "all the principles on diplomatic inviolability are applicable to the premises of international organizations" (*ibid.*, para. 100). The Commission should therefore reconsider paragraph 1 of article 8. It should also incorporate in the article the rule that no agent of the host State could enter the premises of an international organization without its consent. A provision to that effect would underscore the principle of inviolability, and would be in accord with the 1961 Vienna Convention.

30. He agreed with the principle underlying draft article 9, namely that international organizations should not become a safe haven for fugitives from

justice or for criminal offenders. He was unsure, however, whether the provision should be so detailed and, in particular, thought it better to remove the reference to persons "wanted on account of *flagrans crimen*". The concept of *flagrans crimen* did not necessarily prevail in all countries; moreover, such persons might be included among those "trying to evade arrest under the legal provisions of the host country". The last phrase, "or against whom a court order or deportation order has been issued by the authorities of the host country", was slightly obscure and could be replaced by the formula "or against whom a deportation order has been issued by the courts of the host State", which would fully meet the needs of the host State.

31. He had no objection to draft article 10, but draft article 11 was unnecessary. The effect of article 11 would be to introduce an element of uncertainty as to the scope of article 10, and make it difficult in some cases to determine which "functional requirements" should be taken into consideration for the purpose of limiting the provisions of article 10 (a) and (b). The fiscal autonomy and independence enjoyed by international organizations made it pointless to include a provision such as article 11.

32. The CHAIRMAN, speaking as a member of the Commission, said that he welcomed the Special Rapporteur's pragmatic approach, which reflected the Commission's decision to concentrate on the formulation of specific draft articles and to avoid protracted discussion of a doctrinaire, theoretical nature. He agreed with the view referred to in paragraph 7 of the fourth report (A/CN.4/424) that the draft articles should not be confined to the consolidation and codification of the existing legal régime—which was already embodied in a number of legal instruments—but should also endeavour to remedy the shortcomings of that régime, as experienced over the years by international organizations in their relations with host countries. If international organizations were to function effectively and fulfil the purposes for which they had been established, it was essential to make good the existing deficiencies.

33. The Special Rapporteur wisely avoided any precise definition of international organizations in paragraph 1 (a) of draft article 1, for no two organizations had identical purposes and functions. It was enough to equate them with intergovernmental organizations within the meaning of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. However, the words "of a universal character" in paragraph 1 (a), and also in paragraph 1 of article 2, should be placed in square brackets, for as the Special Rapporteur pointed out (*ibid.*, para. 20) the Commission had concluded that the study of the topic should include regional organizations. The adjective "relevant" in paragraph 1 (b) was unnecessary, since the meaning of the expression "rules of the organization" was the same as in the 1986 Vienna Convention. Deleting that

word would ensure consistency in the use of terms. As to the definition of the “host State” in paragraph 1 (e), the Special Rapporteur might consider including a reference to States visited by officials of international organizations on official missions or business.

34. The provision in paragraph 3 of draft article 2 that States or international organizations might agree to make the present articles applicable to international organizations other than those referred to in paragraph 1 was unlikely to be acceptable to most States.

35. With regard to the legal personality of international organizations, he endorsed the Special Rapporteur’s treatment of the subject-matter in two separate articles. He could accept the principle set out in draft article 5 that internal legal personality of international organizations was operative only within the limits of the territorial sovereignty of States, since it was now well established that organizations of a universal character did have legal capacity under internal law. Similarly, he could readily accept the principle enunciated in draft article 6 that the treaty-making capacity of an international organization was governed by the rules of the organization and by international law. That capacity had already been established in the 1986 Vienna Convention.

36. Part II of the draft articles did not delimit the international personality of international organizations in any other way, nor did it enumerate the resulting legal powers. In that area, doctrine and practice remained inconclusive, despite the general recognition of international organizations as subjects of international law. The Special Rapporteur had wisely avoided entering into the controversial aspects of the matter. However, the Special Rapporteur should perhaps seek to identify certain other specific legal powers at the international level which were accepted by States in general in their relations with international organizations. Such powers could be incorporated in the draft either in the form of an expanded article 6 or otherwise. It was already clear that those legal powers were limited by the functional competence conferred by the constituent instrument of the organization, and the words “International organizations shall enjoy legal personality under international law” in article 5 should be understood in that sense.

37. In part III of the draft, on the privileges and immunities of international organizations in respect of their property, funds and assets, the Special Rapporteur had rightly pursued a functional approach, in line with modern doctrine and practice. The report rightly stated (*ibid.*, para. 88) that the privilege of inviolability of an organization’s premises was essential to the proper functioning of the organization. He disagreed, however, with the statement (*ibid.*, para. 89) that that inviolability derived from the fact that a national, subordinate legal order could not demand submission of or coerce an international, higher legal order. An explanation in those terms would merely invite doctrinal dispute, and it would be better to explain the inviolability in terms of the functional necessity of international organizations. He concurred with the Special Rapporteur’s affirmation that “Inviolability of the premises

obliges the State not only to abstain from certain acts but also to afford active protection of the premises” (*ibid.*, para. 105). In the same paragraph, it was pointed out that that principle had been recognized in many headquarters agreements or had been considered obligatory by States. Consequently, it might be desirable to make specific provision for it in draft article 8.

38. As the Special Rapporteur explained in the report (*ibid.*, para. 107), the important principle stated in draft article 9 drew on certain provisions in the headquarters agreements between the United Nations and the United States of America and between UNESCO and France. The article was justified by the functional approach to privileges and immunities and also offered a safeguard against abuses of the inviolability of premises. It also confirmed that, in general international law, international organizations did not recognize a right of asylum.

39. He had no difficulty in accepting draft articles 9 to 11 as submitted by the Special Rapporteur.

40. Mr. KOROMA queried the statement in draft article 5 that “International organizations shall enjoy legal personality under international law and under the internal law of their member States”. It suggested that international organizations enjoyed international legal personality under both systems of law, whereas, in fact, two separate issues were involved. Problems could arise if any system of internal law denied that an international organization had legal personality. Moreover, the ambiguity of the wording could lead to breaches of the terms of the article. He hoped that the Special Rapporteur would either explain the interpretation to be given to the statement, or keep the two issues separate in the draft. He also wondered how draft articles 5 and 6 were to be reconciled, since the former included a reference to internal law and the latter did not.

41. Furthermore, the Special Rapporteur asserted in his fourth report that “Expropriation is . . . allowed as an exception to the principle of immunity, should it be necessary for purposes of public utility” (A/CN.4/424, para. 112). Yet the report had already made clear that, since international organizations represented all States, the host country was not to derive financial or other benefits from them. On that line of reasoning, expropriation of any kind would be illegal according to the principle of unjust enrichment, since the assets of international organizations belonged to the member States. He would welcome the Special Rapporteur’s comments on that point.

The meeting rose at 11.25 a.m.

2177th MEETING

Wednesday, 20 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley,

Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (continued)
(A/CN.4/401,¹ A/CN.4/424,² A/CN.4/L.383 and Add.1-3,³ A/CN.4/L.443, sect. G, ST/LEG/17)

[Agenda item 8]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLES 1 TO 11⁴ (continued)

1. Mr. MAHIOU said that the Commission should have more time as from its current session to devote to consideration of the topic and to the preparation of the draft articles. He first wished to make a general comment on the Special Rapporteur's fourth report (A/CN.4/424). While he was grateful to the Special Rapporteur for placing before the Commission the elements necessary for its consideration and for analysis of the topic and the draft articles, it was unfortunate that certain information, which would have served to enrich the debate and the Special Rapporteur's work itself, was lacking or inadequate. It was likewise unfortunate that, in the mimeographed version of the report, the footnotes did not refer to certain treaty provisions and judicial decisions which, although sometimes mentioned by the Special Rapporteur, were mentioned too elliptically. The supplementary study prepared by the Secretariat on "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" (A/CN.4/L.383 and Add.1-3) did contain quite a few texts and made it possible to understand the references cited by the Special Rapporteur, but it was difficult to refer to.

2. A number of interesting ideas and conclusions had been put forward in the fourth report which pinpointed the main problems at issue. For example, the Special Rapporteur referred (A/CN.4/424, para. 28) to the scope of the principle of the equality of an organization's member States, in particular in certain areas such as fiscal matters. With regard to the last sentence of the paragraph in question, the State in whose territory the headquarters of the organization was located was actually favoured in one way or another by comparison with other States inasmuch as it could levy certain

taxes, particularly indirect taxes, which could be imposed on goods used in international organizations, fiscal immunity not being applicable to certain kinds of taxes, including consumer taxes. Such a State could, furthermore, levy taxes on the emoluments or salaries of certain officials who were its nationals and who, in principle, did not enjoy certain immunities, including exemption from taxes. It was therefore necessary to lay down precise provisions with a view to introducing a relative conception of the equality of States, a strict application of which might prove to be too complicated.

3. The same was true of the privileges and immunities granted to officials of international organizations (*ibid.*, para. 31). In that connection, the Special Rapporteur spoke of the assimilation of officials of international organizations to diplomatic personnel. That concept, which was useful in understanding certain matters, could also stand in the way of a proper analysis of privileges and immunities. What was meant by "assimilation"? Were there any differences between the two categories of persons in question and what were those differences? He would have liked some clarifications in that regard.

4. It would also have been helpful if the judicial decisions mentioned in paragraph 69 of the report could have been quoted so as to show their exact content, scope and possible interpretation, particularly since the position of the Italian courts referred to was far from uniform: the differences related not only to the existence, extent and scope of the privileges and immunities of the organization in question, but also to the view taken of its jurisdictional immunity. The jurisprudence of other States should also have been taken into account.

5. He had some doubts about certain other points and difficulty in following all of the Special Rapporteur's conclusions, perhaps because the line of reasoning was not well enough developed. Referring to paragraphs 32 and 33 of the report, which condensed in a remarkable manner a whole series of important points concerning the basis and extent of the immunities of international organizations—in particular by comparison with those of States—and highlighted the difficulties that remained in the international sphere, he noted that, in the Special Rapporteur's view, those privileges and immunities were granted to international organizations "in conventions... or possibly by custom, in their capacity as international legal persons". Did privileges and immunities have any legal source other than treaties? The Special Rapporteur cautiously referred to custom, but did not explain what he had in mind. It would be interesting to know what that possibility involved.

6. Another problem concerned the link between international legal personality and the privileges and immunities that could derive therefrom. Certain consequences could be inferred from the establishment of a clear and distinct link between those two elements. There again, however, the Special Rapporteur raised a question which was admittedly interesting, but without suggesting a solution. If reference were had to State

¹ Reproduced in *Yearbook*... 1986, vol. II (Part One).

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

³ Reproduced in *Yearbook*... 1985, vol. II (Part One)/Add.1.

⁴ For the texts, see 2176th meeting, para. 1.

practice, it would be seen that there was at least one agreement in which that link was clearly established, namely the 1946 Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council,⁵ article I of which read:

The Swiss Federal Council recognizes the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the Organization cannot be sued before the Swiss Courts without its express consent.

Under the terms of that article, jurisdictional immunity was a consequence of legal personality. As pointed out by certain commentators, including Christian Dominicé, however, the headquarters agreements subsequently concluded by Switzerland did not contain such a clause.

7. According to paragraphs 32 and 57 of the report, international organizations could “require” of States the privileges and immunities they needed. Yet the first sentence of paragraph 33 contradicted that statement somewhat because it referred to “the immunities granted”. Could privileges and immunities be required of States or were they granted by States? It was necessary to be clear about the conclusions to be drawn from those two contrary statements.

8. Paragraphs 32 and 33, which were intensely thought-provoking, prompted a further comment. The comparison with States was inevitable and also enlightening, provided, however, that the similarities and differences of situation were identified and the special characteristics of the situation of one group as compared with that of the other were noted. In the Special Rapporteur’s view, the immunities granted to international organizations would be wider than those recognized for States owing to the tendency to restrict the immunities enjoyed by States and because States could be said to represent selfish interests, unlike international organizations whose objectives were regarded as much broader. He had doubts about the Special Rapporteur’s conclusion and explanation. In the first place, only a minority of States were now in favour of a restrictive approach to State immunity. The conclusion therefore had to be toned down. Secondly, the doctrine of the absolute immunity of international organizations—which was supposedly connected with their purposes, such purposes being common to several States and sometimes even to all States—was no longer accepted either without reservation, inasmuch as international organizations of a universal character sometimes had very sectoral, functional and specific interests that it was difficult to compare with those of States: the latter interests, though perhaps peculiar to one State, concerned the life of a national group in all its political, economic, social and cultural dimensions, past, present and future. It was therefore difficult to see how the objective pursued by a State could be reduced, with a view to decreasing the immunities it enjoyed, while at the same time expanding the objectives of international organizations with a view to promoting a broadened conception of their immunities as compared with those of States.

9. The entirely plausible view which the Special Rapporteur gave of international organizations, and perhaps even of international law and the international order, could create problems if it was taken as the starting-point for defining privileges and immunities. He was thinking in particular of the last sentence of paragraph 89 of the report, which read: “The basis must be sought in the fact that a national, subordinate legal order cannot demand submission of or coerce an international, higher legal order”, and which reflected a certain conception of international law even if the Special Rapporteur prudently used the verb form “must be”. It was open to question whether that monist conception of international law could serve as the basis for a codification endeavour and for the preparation of draft articles, since many States might deem it unacceptable to introduce such ranking as between the international legal order and the internal legal order. He therefore drew attention to the need for caution with regard to certain statements, which might simply be in the nature of a slip of the pen on the Special Rapporteur’s part rather than settled conclusions that would certainly give rise to debate.

10. Another example of a question likely to cause controversy was the enjoyment of “absolute” immunity by international organizations (A/CN.4/424, para. 80). That again was perhaps an overstatement which generalized upon the special situation of the relations between an international organization and its members. The word “absolute”, however, went much further and could be invoked against third States, and that raised more complex problems regarding the scope of privileges and immunities *vis-à-vis* third States.

11. In the light of those considerations, he thought that, while the Special Rapporteur’s fourth report contained all the necessary background information for an understanding of the elements of the problem, certain clarifications were required.

12. Turning to the draft articles, which had begun to give form to the topic, he said that, on the whole, he agreed with the Special Rapporteur’s approach. He wondered whether the content of draft article 1, on the use of terms, should be agreed forthwith or whether it was necessary to wait until a later stage in the study of the topic before identifying all the concepts to be defined. He had in mind in particular the premises, property, assets and personnel of international organizations. Should the article contain definitions of all those concepts?

13. With regard to draft article 2, should the scope of the draft be limited to international organizations of a universal character or should it be extended to regional organizations? Like the Special Rapporteur, he considered that, initially, it would be better to deal solely with the former and to decide at a later stage to what extent the draft could apply to organizations of more limited scope.

14. Should draft article 5 be confined to subparagraphs (a), (b) and (c) or should the words “in particular” be added in view of developments in the international community?

⁵ United Nations, *Treaty Series*, vol. 1, p. 163.

15. He wondered whether it should be made clear that draft articles 7 and 8 referred to property, funds, assets and premises intended exclusively for the exercise of the official functions of international organizations—since that was done only in connection with premises in paragraph 1 of article 8—or whether it would be preferable to deal with the question in the article on definitions. Also, should a single article be devoted to jurisdictional immunity or should there be another article dealing with immunity from execution? Even if an international organization waived jurisdictional immunity, it did not on that account waive immunity from execution.

16. The wording of draft article 10, and of subparagraph (b) in particular, should probably be reviewed and improved. If an international organization was established in a State whose currency was not convertible, could it transfer “funds” in local currency? Subparagraph (b) did not seem to solve that kind of problem. The wording of subparagraph (c), which might pose more problems than it solved, also seemed to require clarification. For example, what was meant by the phrase “pay due regard to any representations”? What kind of obligations did that entail for the parties concerned?

17. Mr. Sreenivasa RAO said that he agreed with the approach adopted by the Special Rapporteur in his fourth report (A/CN.4/424), which was clear and concise. His conclusions showed that the topic had already given rise to considerable doctrinal debate and that it would always be controversial.

18. In defining international organizations, the Special Rapporteur had rightly decided to be pragmatic and give a simple definition providing that an international organization was an intergovernmental or inter-State organization. He had also correctly decided not to list the various types of international organizations. As he had shown, a classification would be not only impossible, but also irrelevant from the Commission’s legal perspective, especially in respect of privileges and immunities.

19. The Special Rapporteur had therefore taken the principle of the functional needs of international organizations as the basis for their privileges and immunities. That solution had the advantage of avoiding the many problems which would arise if it were assumed that such privileges and immunities derived directly from legal personality. As the Special Rapporteur had also said, caution would require that any text on privileges and immunities should contain only general provisions which could be supplemented or modified according to the characteristics of each individual case so as to meet the functional needs of the organization concerned.

20. In his analysis, the Special Rapporteur set out a few other basic principles which were generally accepted: international organizations must not abuse their privileges and immunities, which were granted to them for the exercise of their official functions; they could not be sued, unless they waived their immunity, and, even in that case, a separate waiver was necessary for measures of execution; they had to establish procedures for the settlement of disputes, such as arbitra-

tion, advisory opinions or an administrative tribunal; their premises were inviolable, so that the host State must not only refrain from entering them, but must also protect them from any outside disturbance that might affect the exercise of the functions of the organizations; and such premises must not become places of asylum or refuge for persons who were trying to avoid arrest under the law of the host State, who were being sought for extradition or who were attempting to avoid service of legal process.

21. However, those principles called for two comments. In the report (*ibid.*, para. 112), the Special Rapporteur referred to one exception to the principle of immunity, where expropriation was deemed necessary in the public interest. He was not sure how well that exception was accepted in current doctrine and practice and would welcome clarifications on that point. Secondly, the Special Rapporteur noted (*ibid.*, para. 115) that, according to the legal literature and State practice, international organizations were free to hold and transfer funds and currencies. That privilege was, however, subject to the special requirements of the organization concerned, to the financial situation of the host State and hence to the provisions of the headquarters agreement they had concluded. On that point as well, the Special Rapporteur should make his position clear.

22. Turning to the draft articles, he said that, in article 1 on the use of terms, the words “of a universal character” in paragraph 1 (a) were acceptable on the understanding that, if the Commission decided to include international organizations of a regional or other character in its study, appropriate provision would be made for them in the definition. The words “its established practice” in paragraph 1 (b) seemed unnecessary in a definitional article. Such practice was constantly changing and was subject to interpretation and could therefore not be stated in the form of a rule. The words “of a world-wide character” in paragraph 1 (c) were much too vague and might cause confusion. Further thought should be given to the difference between the terms “universal” and “world-wide”. The saving clause in paragraph 2 should be deleted, since it added nothing and could create doubts about the scope of the draft articles.

23. Draft article 2 was well thought out, although the words “when the latter have accepted them” in paragraph 1 could be deleted, since they stated the obvious.

24. Draft article 3 was brief, but none the less deceptive: saying that the present articles were without prejudice to the rules of the organization implied that the organization was wholly exempt from the basic principles, which were, however, as had been seen, always subordinate to its functional needs. The article should therefore be redrafted. In that connection, he broadly agreed with Mr. Tomuschat (2176th meeting) that the articles should be worded and presented more clearly and not only reflect, but also fill the gaps in, existing practice.

25. Draft article 7, in which the second sentence could be redrafted along the lines suggested by Mr. Al-

Baharna (*ibid.*, para. 28), and draft article 8 were acceptable. Draft article 9 was also acceptable, subject to minor drafting changes in the part referring to *flagrans crimen*.

26. With regard to draft article 10, on financial and fiscal immunities, it must be remembered that, at that level as well, the relationship between the international organization and the host State was governed by the headquarters agreement and that point should be mentioned. Moreover, as Mr. Hayes (2176th meeting) had recommended, subparagraph (c) should specify that every international organization had to pay due regard to representations made to it not only by any State party to the future convention, but also by the host State and by any State which entered into a relationship with it as a result of a transfer of funds, gold or currency, whether or not those States were members of the organization.

27. Draft article 11 did not seem to add much, but a decision on what should be done with it could not be taken until it had been agreed what would happen to the articles that preceded it.

28. In conclusion, he said he was not sure that any purpose was served by the work the Commission was now doing. Was it really necessary to formulate draft articles that reproduced standard treaty provisions without elaborating on them? The General Assembly should have thought about that problem, but, if the Special Rapporteur decided that the existing law on the subject could not be improved on, he was fully entitled to tell the Commission so. The Commission could, in turn, advise the General Assembly accordingly, with all due respect and caution. Before arriving at any such conclusion, however, there was still a great deal of work to be done and a long way to go before deciding that there was no point in continuing.

29. Mr. PAWLAK congratulated the Special Rapporteur on the clarity and concision of his fourth report (A/CN.4/424), an important document that provided some answers to questions raised during the debates on the topic both in the Commission and in the Sixth Committee of the General Assembly. He fully supported the Special Rapporteur's criterion that privileges and immunities should reflect the functional requirements of international organizations.

30. Before commenting on the draft articles, he had two general comments to make. First, the international community was showing greater interest in the progress the Commission was making in its study of the topic because of the increasingly important role being played by international organizations in international relations. In order to meet those expectations, the Commission must therefore complete the draft articles as rapidly as possible. Secondly, the Commission must not limit itself to reproducing the existing rules contained in treaties and agreements; it must also take account of judicial opinions and decisions and of State practice. Its main concern must be to prepare articles which would enable international organizations properly to perform the functions assigned to them in their constituent instruments. In that connection, he agreed with the Special Rapporteur's conclusion (*ibid.*, para. 14) that

the Commission should continue to follow the pragmatic approach it had adopted during the discussion of other drafts, such as that on the law of treaties. It should be borne in mind, however, that some States, and especially host States, were not in favour of any increase in the immunities of international organizations. A balance therefore had to be struck between their interests and the interests of the organizations themselves.

31. Turning to the proposed articles, he said that he understood the word "universal" in draft article 1, paragraph 1 (a), to mean both that an international organization was global in character and that it was open to all States. If that was true, it should be explained in the commentary. In paragraph 1 (c), the word "similar" was vague and redundant, since it was unclear what it referred to, and it would be better to delete it. The words "responsibilities" and "world-wide" in that subparagraph should be replaced by "functions" and "global", respectively. Moreover, the list of terms in article 1 was not exhaustive and other definitions should be included.

32. In draft article 2, he supported Mr. Al-Baharna's proposal (2176th meeting) that the phrase "when the latter have accepted them" in paragraph 1 should be deleted. He also doubted whether paragraph 2 was really needed: it was not necessary to confirm in the draft articles that the rules of international law were applicable.

33. The reservations expressed by some members of the Commission with regard to draft article 3 were readily understandable. The draft articles would not enter into force automatically, but when States had acceded to them, and those States would decide on the rules of international organizations. That question required further consideration.

34. He had no comment to make on draft article 4. Draft article 5, however, should be reworded to reflect the primacy of international law over internal law. It might be enough to say that "International organizations shall enjoy legal personality" and to delete any reference to either international or internal law. In that connection, he supported Mr. Tomuschat's proposal (*ibid.*) for combining articles 5 and 6, both of which dealt with the capacity of international organizations as subjects of law.

35. In draft article 7, he thought that the words "every form of legal process" should be replaced by the word "jurisdiction" and that it should be spelt out what kinds of jurisdiction, civil or administrative, international organizations were immune from. The Special Rapporteur dealt with that very important question in the report (A/CN.4/424, paras. 24-33 and 57-59), but his conclusions were not very clear and were not reflected in the article. As Mr. Al-Baharna had suggested, the article should probably also deal with waiver of immunity from execution.

36. Draft article 8 required some rewording, especially in paragraph 3, but that could be left to the Drafting Committee. Draft article 9 raised few problems, but its scope was confined to the "headquarters" of organizations and could be extended to cover their "offices" or

“premises” in general. The question was discussed in the report (*ibid.*, para. 107), but the conclusions reached were not fully reflected in the proposed text.

37. Draft article 10 did not give rise to any major problems, but it did raise the question of absolute rights in connection with financial operations. It was understood that States might or, indeed, must monitor financial operations by international organizations in accordance with their constituent instruments. The point would be clearer if article 10 referred to those instruments.

38. Draft article 11 was a useful provision, but it should be revised. In the Sixth Committee, there had been some surprise at the proviso that “the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question”. Those words gave the impression that the proposed common régime was not based solely on those functional requirements.

39. Mr. SEPÚLVEDA GUTIÉRREZ said that he had read the Special Rapporteur’s very precise and detailed fourth report (A/CN.4/424) with great interest. The report, which was the result of an enormous amount of work, was particularly convincing as it took account, in a highly pragmatic manner, of the realities of international life. The 11 draft articles submitted provided a good basis for the discussion on the topic and the Special Rapporteur was to be congratulated on them.

40. Referring to the doubts expressed by some members of the Commission as to the usefulness of a new instrument, he said that, in his view, the draft met a special need. The international community had expressed a clear wish, through the General Assembly, that a régime should be drawn up for relations between States and international organizations. Also, there were lacunae in existing treaties and headquarters agreements that had sometimes given rise to disputes. The draft under preparation was a contribution to the progressive development and codification of international law which, no matter how modest it might be, was sufficient justification for the undertaking.

41. The definition of the expression “international organization” in paragraph 1 of draft article 1, though not perfect, was acceptable for the time being; in any event, it was clear from the report (*ibid.*, paras. 42-48) that it would be difficult to arrive at a precise definition. The last part of paragraph 1 (c) of the article, starting with the words “any similar organization”, should be reformulated, and the meaning of the words “world-wide character”, for instance, should be defined. The Special Rapporteur would probably be able to find more suitable wording.

42. Draft article 3 could be more explicit, and the words “are without prejudice”, which had an unfortunate connotation, should be replaced.

43. Greater clarity and precision were required in draft article 5, which concerned legal personality under international law and under internal law. Draft article 6, which repeated the provisions of existing instruments, was superfluous.

44. Draft article 11 appeared to duplicate other provisions, such as article 4. It could probably be improved.

45. Lastly, the draft articles should, in his view, be referred to the Drafting Committee.

46. Mr. CALERO RODRIGUES said that the Special Rapporteur’s fourth report (A/CN.4/424) attested to his complete mastery of the difficult topic with which he had to deal. He was working with the caution the Commission had recommended, but was making steady progress in a very constructive manner. He therefore deserved to be congratulated.

47. In his view, the title of the topic, which was misleading, should read: “Privileges and immunities of international organizations and their officials”. The Commission did not choose its topics, however: they were referred to it by the General Assembly. Some of those topics were more interesting in that they inspired greater creativity. Some, like the law of the non-navigational uses of international watercourses, involved the elaboration of a legal instrument. Others raised issues which did not lend themselves to an immediate solution, but opened up wide perspectives in international law; that applied, for example, to the draft Code of Crimes against the Peace and Security of Mankind. In yet other cases—and he had in mind the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law—it was necessary not only to draw up a legal instrument, but also to study in detail certain basic concepts of international law. In the case of the present topic, however, there was no need for any new instrument, since the 1946 Convention on the Privileges and Immunities of the United Nations, conventions on the specialized agencies and various headquarters and other agreements already existed and, as was apparent from the supplementary study prepared by the Secretariat on “The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities” (A/CN.4/L.383 and Add.1-3), had not given rise to any problems in their application; it was a matter not of resolving conceptual problems, but of carrying out a task of codification, and a purely repetitive one at that. International organizations would certainly not accept any limitation on the privileges and immunities granted to them under existing instruments, while States for their part would not accept any extension of those privileges and immunities. So the situation was blocked, and, no matter how effective the work of the Commission and of the Special Rapporteur might be, it could be of only limited value. That was clearly illustrated by the comments made with regard to draft article 10. Several members of the Commission had criticized the language used in that article, but the Special Rapporteur had simply repeated the corresponding provisions of the Convention on the Privileges and Immunities of the United Nations (art. II, sects. 5 and 6), which was still in force and which could not be changed. In considering the draft articles, therefore, it was necessary to bear in mind that the instruments in force left the Special Rapporteur and the Commission very little room for manoeuvre.

48. That was true, for instance, of draft article 7, whose scope, incidentally, was wider than suggested by the title of part III of the draft (Property, funds and assets), of which article 7 was the opening provision. In the English text, where it would appear to be justified to refer to “immunity from jurisdiction”—that was in fact the expression used in the draft articles on jurisdictional immunities of States and their property—the expression “every form of legal process” had to be used on account of existing treaties. The same problem did not, however, arise in Spanish and French.

49. Furthermore, with regard to substance, while article 7 rendered exactly the idea that had to be conveyed, he was not convinced by the Special Rapporteur’s analysis of the basis for immunity (A/CN.4/424, paras. 24-33). The statement that the granting of privileges and immunities was justified by the principle of equality among an organization’s member States (*ibid.*, para. 28) raised doubts in his mind. Also, he failed to see why lack of territorial sovereignty should be a justification for the granting of immunities to international organizations, since States, which did have territorial sovereignty, also enjoyed immunities. Again, it was not really necessary to attempt, as the Special Rapporteur had done, to embark on a classification of international organizations on the basis of their composition, the purpose of their activities and their powers, only to conclude in the final analysis that no classification could provide general criteria for determining the extent of the privileges and immunities to be granted to organizations.

50. He could accept without difficulty the three principles set out by the Special Rapporteur in paragraph 57 of the report in respect of privileges and immunities.

51. With regard to waiver of immunity, the Special Rapporteur was right to recall (*ibid.*, para. 58) what the existing law was. Once again, in his view, that law could not be changed. In that connection, international organizations could not even waive immunity from execution, even in relation to commercial transactions, and, although the proposals of the European Committee on Legal Co-operation referred to in the report (*ibid.*, para. 111) were very interesting, they were unlikely to be adopted. Moreover, in practice, the very wide immunity enjoyed by international organizations had never posed any problems. The United Nations, for instance, generally included in the commercial contracts it signed an arbitration clause which removed any disputes from the courts, and therefore, in practice, the question of jurisdictional immunity never arose.

52. The Special Rapporteur had also rightly based the intangibility and inalienability of the assets of international organizations on the principle of the inalienability of the public domain. The assets of international organizations fell outside the scope of ordinary property law, since they benefited from the régime of public law whereby they were immune from any alienation or attachment. Personally, he considered that that immunity was too wide, since only property used by an organization in the exercise of its official functions should be protected and there was no reason for removing assets unconnected with those functions

from any possible creditors of the organization. There again, however, the Commission was bound by existing law.

53. As to inviolability of the premises of international organizations, which, according to the Special Rapporteur (*ibid.*, para. 89), was virtually identical to that of diplomatic premises, he would rather compare it with the inviolability of consular premises, which, under the 1963 Vienna Convention on Consular Relations, was confined to “that part of the consular premises which is used exclusively for the purpose of the work of the consular post” (art. 31, para. 2). Under draft article 8, immunity was confined to the premises of international organizations “used solely for the performance of their official functions”.

54. With regard to draft article 10, he agreed with those members who considered that the privileges granted to international organizations in financial matters were too wide. Once again, however, that was the existing law.

55. The Special Rapporteur had put the Commission on the right track: even if the undertaking was not very exciting intellectually, the Commission had a duty to fulfil its mandate.

56. Mr. GRAEFRATH said that he was grateful to the Special Rapporteur for having endeavoured to respond, in his fourth report (A/CN.4/424), to the suggestions made both in the Commission and in the Sixth Committee of the General Assembly with a view to promoting a consensus among States.

57. It was true that most of the questions covered by the draft articles were already regulated by agreements on privileges and immunities and by specific headquarters agreements. It was therefore not a matter of codifying rules which existed only as customary law, but of determining the relationship that existed between the draft articles and the treaty law in force. A similar problem had arisen in the case of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. In his view, however, an article dealing with the question of that relationship should come at the end when there would be a clearer picture of the draft articles as a whole. The codification of those rules of law would, nevertheless, certainly help to determine and strengthen the position of international organizations as subjects of international law and would be very helpful for organizations yet to be established, although he considered that, for the time being, it would be preferable to confine the draft to international organizations of a universal character and appreciated the fact that the Special Rapporteur had drafted articles 1 to 6 along those lines.

58. The Commission would certainly have to return to article 1, on the use of terms, when the draft as a whole was before it, but it was important for it to agree now not to become involved in academic disputes concerning a general definition and to confine itself to explaining that the expression “international organization” meant an intergovernmental organization of a universal character. The words “whose membership and responsibilities are of a world-wide character” in

paragraph 1 (c) did not, however, make for a very felicitous definition of that universal character. He would have preferred some expression such as "aiming at world-wide membership", which would be more accurate, since it could be a long time before an international organization actually achieved world-wide membership.

59. Like other members of the Commission, he would have preferred a clear separation between the legal personality of an international organization under international law, which included the capacity to conclude treaties and to enjoy certain privileges and immunities, and its legal personality under the internal law of member States. In his view, draft article 5 should be confined to the international personality of the organization and perhaps also to its capacity to maintain official relations with States and other international organizations. Draft article 6 could then deal with its legal personality under the internal law of member States whereby it could conclude contracts, acquire property, and institute legal proceedings.

60. He agreed with the Special Rapporteur concerning the idea of a possible classification of international organizations according to their functions. That approach would reflect the fact that international organizations were not original subjects of international law, but derived their international personality from their constituent instrument, a treaty between States which determined their functions and purposes. As for the legal bases of the privileges and immunities of international organizations, he also agreed with the Special Rapporteur that, in that regard, two aspects had to be distinguished: on the one hand, functional requirements, determined by reference to the functions and purposes for which the organization had been set up (*ibid.*, para. 27), and, on the other, the principle of equality among the member States of the organization (*ibid.*, para. 28). Those two aspects were equally important, since, with the establishment of an international organization, a new subject of international law came into being, thereby imposing obligations on the member States and, in particular, an obligation on the host State to respect the immunity of the organization. That did not, of course, free the international organization of its duty to respect the laws and regulations of the host State. Draft article 7 might be better balanced if it referred to that duty, as did article 41 of the 1961 Vienna Convention on Diplomatic Relations.

61. Exceptions to the immunity of an international organization should never be presumed and should be accepted only if expressly laid down in the headquarters agreement.

62. Like the Special Rapporteur, he considered that the inviolability of the premises of an international organization did not mean only that the host State must refrain from any interference, but also that it had an obligation to protect such premises against any disturbance. He would appreciate it if that could be spelt out in draft article 8 as it had been in article 22 of the 1961 Vienna Convention. In that connection, he did not share the Special Rapporteur's view that the basis of the inviolability of the premises of international

organizations must be sought in the fact that international law had to be regarded as a higher legal order (*ibid.*, para. 89). For his own part, he would rather find it in the principle of the sovereign equality of States, which had to be assured despite the fact that an international organization could have its headquarters in only one State.

63. Draft article 11 seemed superfluous since it dealt with a matter already covered by draft article 4. Like other members, he considered that the wording of article 4 (a) was not entirely satisfactory. He would, however, prefer the Commission to leave that question aside for the time being and revert to it when the draft as a whole was before it.

64. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), replying to Mr. Koroma's request (2176th meeting) for clarifications concerning the legal personality and capacity of international organizations, as dealt with in draft articles 5 and 6, and also concerning expropriation, said that, with regard to the first of those points, he would draw attention to the fact that, in his second report, he had proposed two alternative texts in that connection.⁶ In response to the wishes of the majority of the members of the Commission and of representatives in the Sixth Committee of the General Assembly, who had preferred alternative B, he had dealt separately with the legal personality of international organizations and with their capacity to conclude treaties. As for the legal capacity of international organizations under internal law, he would refer Mr. Koroma to Article 104 of the Charter of the United Nations, which stipulated that the United Nations "shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". Similar provisions appeared in other agreements, such as the Constitution of UNESCO (art. XII), the headquarters agreement between Switzerland and the United Nations Office at Geneva (1946 Interim Arrangement) (art. I) and the Treaty establishing EEC (art. 211). The question had also been dealt with at length in his second report, submitted in 1985.⁷

65. With regard to expropriation, on which matter Mr. Koroma considered that the fourth report (A/CN.4/424) was not sufficiently explicit, the general view was that the property of an international organization could be expropriated only on the grounds of public interest. Such expropriation would have the effect of divesting the organization of its property for the benefit of a public authority. That result was unacceptable, first, because an international organization could not have fewer rights than the host State and, secondly, because it enjoyed, at the very least, rights equal to those of the State. The situation was clear: *vis-à-vis* the international organization, and within its sphere of competence, the member State was in a position of inferiority, as it were, and a "lesser" authority could not have greater rights than a "higher" authority. In many legal systems, the régime governing

⁶ *Yearbook* . . . 1985, vol. II (Part One), pp. 112-113, document A/CN.4/391 and Add.1, para. 74.

⁷ *Ibid.*, pp. 107 *et seq.*, paras. 31-73.

the immovable property of international organizations was modelled on the régime applicable to property in the public domain and, just as the latter was regarded as inalienable under internal law and thus exempt from any possibility of expropriation, the immovable property of international organizations was not subject to expropriation. Penalties could not be imposed on international organizations, first of all because they were legal persons, but also because their particular position in relation to the State prevented the latter from taking any kind of enforcement measures against them. In short, public property was inalienable under international law just as it was under internal law.

The meeting rose at 12.10 p.m. to enable the Working Group on the long-term programme of work to meet.

2178th MEETING

Thursday, 21 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouñas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (continued) (A/CN.4/401,¹ A/CN.4/424,² A/CN.4/L.383 and Add.1-3,³ A/CN.4/L.443, sect. G, ST/LEG/17)

[Agenda item 8]

FOURTH REPORT OF THE SPECIAL RAPPOORTEUR
(continued)

ARTICLES 1 TO 11⁴ (continued)

1. Mr. OGISO said that it was his usual practice to avoid duplication with the statements made by other members of the Commission, but he shared the grave doubts already expressed about the utility or urgent necessity of the study of the present topic, in view of the many workable instruments that were in force and were helping to solve problems between host States and international organizations concerning the status, legal

personality or privileges and immunities of the organizations. He was thinking in particular of the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies and the various headquarters agreements between host countries and the international organizations concerned. Nevertheless, he agreed that the Commission had no alternative but to complete its work on the topic, because of the mandate assigned to it by the General Assembly.

2. Another general comment related to the issue of the privileges and immunities of international organizations, on which he agreed with the view expressed by the Special Rapporteur in his fourth report that "functional requirements must be one of the main criteria . . . used in determining the extent and range of the privileges and immunities that are to be accorded to a given organization" (A/CN.4/424, para. 27).

3. With regard to draft article 1, on the use of terms, he would like some clarification concerning the expression "international organization" in paragraph 1 (a), as well as the term "office" in paragraph 1 (e) (i), notwithstanding the fact that those terms were used in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Clarification was needed because the present draft dealt with international organizations that were rather different in character from those covered by the 1975 Vienna Convention. For example, draft article 5 provided for the legal capacity of "international organizations" in the host State and the member States. Draft article 8 provided for the inviolability of the premises of "international organizations". What, therefore, was the exact meaning of that expression, and also of the expression "international organizations of a universal character"? Were they intended to cover only those international organizations which had an independent legal personality or had the capacity to conclude international agreements? The question arose in respect of the United Nations: could the United Nations alone be described as an international organization of a universal character or could certain subsidiary organs, such as UNDP and UNHCR, or such bodies as ESCAP, which included some States outside the area of Asia and the Far East, be held to constitute international organizations of a universal character?

4. Again, what was the meaning of the term "office" in paragraph 1 (e) (i) of draft article 1? Did it refer solely to the headquarters of the organization or did it also cover the offices of subsidiary organs, particularly in the case of the United Nations, including offices of a temporary nature? He had in mind, for example, the field offices of UNHCR famine-relief operations and the field operations of United Nations peace-keeping forces. The Special Rapporteur appeared to intend to give different treatment to different types of organizations so far as the privileges and immunities to be extended to them on the basis of functional necessity were concerned.

¹ Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

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

³ Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

⁴ For the texts, see 2176th meeting, para. 1.

5. A similar issue arose with regard to the inviolability of premises under draft article 8. Did the term "premises" cover only the headquarters of the organization or other "offices" as well? Article 8 could possibly be interpreted as allowing for different privileges and immunities to be extended to the premises of different kinds of offices maintained by the United Nations family of organizations. That question posed many practical problems, on which he would like more information from the Special Rapporteur, since he had not had the time to study the numerous headquarters agreements which could have shed some light on matters.

6. As for the other articles, he wished at the present stage to raise only one point arising out of draft article 10. The introductory clause stated: "Without being restricted by controls, inspections, regulations or moratoria of any kind" and was followed by the provision in subparagraph (a) reading: "International organizations may hold funds, gold or currency of any kind and operate bank accounts in any currency". That was followed by a provision in subparagraph (b) on the free transfer of funds, which would allow international organizations freely to "convert any currency held by them into any other currency". Those provisions would exempt an international organization from all foreign-exchange regulations in the host country. He did not know whether the text of article 10 was based on some standard provision in many headquarters agreements, but such broad exemption from exchange control by the host State could surely create certain practical problems. He would therefore welcome some guidance and enlightenment from the Special Rapporteur on the practical treatment of that question in the United Nations and the specialized agencies.

7. Mr. ROUCOUNAS said that, in conformity with the tentative outline set out in his third report (A/CN.4/401, para. 31), the Special Rapporteur dealt in his fourth report (A/CN.4/424) with the privileges and immunities of international organizations. Later, the Special Rapporteur would be dealing with the privileges and immunities of officials and with those of "experts on mission for, and of persons having official business with" international organizations. Actually, the problem of experts on mission for the United Nations had been the subject of a very recent advisory opinion of the ICJ, handed down on 15 December 1989.⁵

8. The problem of the privileges and immunities of international organizations, because of its rapid development and diversification, was of particular interest to the Commission. Inevitably, many legal questions arose in connection with the relations between international organizations and their member States, as well as relations with non-member States. In the case of the present topic, the Commission was not called upon to engage in a discussion of theoretical issues or in consolidating the rules contained in the numerous instruments at present in force. The latter task would serve little purpose, and the Commission

should instead endeavour to detect those elements of the law of international organizations that called for expert examination. When the representatives of a Government and an international organization met to discuss and sign a headquarters agreement, both sides knew what they wanted. The position of the Commission was quite different. It should seek to analyse the real problems that had emerged in the past few decades in the matter of the privileges and immunities of international organizations, with a view to suggesting possible solutions.

9. He fully endorsed the observation by the Special Rapporteur in his third report (A/CN.4/401, para. 29) attaching particular importance to headquarters agreements. For one and the same organization there were sometimes several generations of agreements, concluded to deal with real problems as they had emerged in practice. For the United Nations, it could thus be said that there were three generations: first for New York and Geneva, secondly for Nairobi, and thirdly for Vienna.

10. While matters could be said to work smoothly for the United Nations, certain other intergovernmental organizations had run into difficulties, and even experienced serious crisis. For example, some four years earlier, the International Tin Council had exhausted its financial reserves and had had to suspend the operation of its buffer stock; as a result, a large number of legal problems had arisen, despite the existence of an article on privileges and immunities in the Sixth International Tin Agreement and of detailed provisions in the 1972 headquarters agreement between the Council and the United Kingdom. The disputes between the Council and its creditors had come before domestic courts in the United Kingdom, and the organization had invoked immunity. The courts had also gone into the question of the scope of the rights of the member States. The Court of Appeal's extensive decision merited thorough examination. For his part, he would draw attention to two elements. First, the judges had not been attracted at all by the notion of a customary international rule conferring immunity from jurisdiction on international organizations; and, secondly, they did not appear to have considered the earlier work of the International Law Commission.

11. The Special Rapporteur's observations in his fourth report with regard to the basis for the jurisdictional immunity of international organizations, namely functional requirements (A/CN.4/424, paras. 24 *et seq.*), were interesting, but one should not underestimate a trend that was gradually emerging, namely the fact that the doctrine of the absolute immunity of States from jurisdiction was losing ground. It was reflected in a passage cited by the Special Rapporteur (*ibid.*, para. 61) from the summary of practice relating to the United Nations contained in the supplementary study prepared by the Secretariat on "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their Status, privileges and immunities" (A/CN.4/L.383 and Add.1-3). The Special Rapporteur, with the intention of avoiding generalizations, also cited the examples of ILO, FAO, IBRD and certain other organizations

⁵ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, I.C.J. Reports 1989, p. 177.*

(A/CN.4/424, paras. 69 *et seq.*), and the sections of the report on the inviolability of the property and premises of international organizations adopted a general approach which largely reflected the existing situation.

12. Draft articles 1 to 4 presented a degree of unity. Article 1 reproduced the language of the various codification conventions on the subject of international organizations; for instance, the words “its established practice”, in paragraph 1 (*b*), echoed a similar phrase in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and were now accepted. Article 2, however, was merely stating the obvious by making the present articles dependent on acceptance by States. As for international organizations themselves, it was not clear whether it was necessary for them, too, to accept the articles, yet the Commission’s aim in the draft was precisely to reinforce their international legal personality. The provision in paragraph 3 of article 2 was really an invitation to other international organizations to accept the articles. Article 3 made a prediction which could not be verified until the work was completed.

13. As to part II of the draft, on legal personality, he expressed some doubt whether the reference in article 5 to international law was appropriate.

14. Draft article 7, in part III, reproduced the wording of article II, section 2, of the 1946 Convention on the Privileges and Immunities of the United Nations. Again, draft article 10 reproduced article II, sections 5 and 6. Although he appreciated that the Special Rapporteur, as a matter of caution, was reluctant to depart from so fundamental a text, he noted that the 1946 Convention was still in force and that the Commission had not been asked to amend it. Accordingly, he hesitated to comment on it, and would welcome some clarification of the Commission’s task in that regard.

15. Mr. PELLET said that, as a newcomer to the Commission, he could not conceal his surprise at the custom whereby members voiced extravagant praise of a report before proceeding to make criticisms which were often quite severe. Special Rapporteur’s reports could not but be excellent. The report now before the Commission (A/CN.4/424) was no exception, and the comments on its excellence were, he felt, merely statements of the obvious. He preferred to refrain from general value judgments.

16. On several occasions, the Special Rapporteur mentioned the need to adopt a “pragmatic” approach to the subject-matter and to avoid protracted theoretical discussion. It was a troubling remark because, as both a teacher and a practitioner of international law, he personally found the interaction of theory and practice to be a source of mutual enrichment. Fortunately, the Special Rapporteur did not always adhere to the guidelines he had set himself. On several occasions he sought to develop a theory, for instance when considering the classification of international organizations or examining the fundamental rules applicable to them. Those were welcome digressions although Mr. Mahiou (2177th meeting) had rightly said that the Spe-

cial Rapporteur sometimes neglected to draw the necessary conclusions from his own theories.

17. On the whole, the Special Rapporteur adhered to the functional theory of international organizations, according to which such organizations had legal personality under international law, but their legal capacity was circumscribed by the aims set out in their constituent instruments. As a consequence, they had all the powers necessary to achieve those aims, but no others. It was therefore to be expected that, in defining the powers of international organizations, the Special Rapporteur would reach the conclusions which followed logically from the functional approach. However, the provisions of articles 5 and 6, in part II of the draft, and of articles 7 *et seq.*, in part III, were drawn from existing texts and were mainly suited to the larger organizations. Moreover, if the functional theory were followed, the capacity of an international organization would be governed not by the “relevant rules” of the organization, as draft article 6 put it, but by the aims of the organization, from which it derived all necessary powers. That was perhaps a drafting problem; but the same could not be said of draft articles 7, 8 and 10, which reflected a very broad approach to the immunities enjoyed by international organizations. Their immunity from legal process was treated as absolute, except where voluntarily waived, and no waiver could extend to any measure of execution or coercion.

18. The same principle applied to the inviolability of the premises of international organizations, and to their financial assets. Admittedly, under draft article 11 the immunity could be limited “in the light of the functional requirements of the organization in question”, but that was a purely voluntary restriction which did not tally with the functional theory. In his partiality for his subject, the Special Rapporteur had verged on granting virtual sovereignty to international organizations. For instance, in the fourth report, the Special Rapporteur quoted with approval the finding of the New York County Supreme Court in the *Matter of Menon* that the United Nations “holds sovereign status” (A/CN.4/424, para 62). That was quite unacceptable: States had sovereignty, but international organizations certainly did not. The Special Rapporteur went even further in paragraph 89 of the report, apparently suggesting that international organizations belonged to a higher legal order than States, and thereby raising the problems of monism and dualism. For his own part, he subscribed to the view that international organizations were no more than instruments at the service of their member States and of the aims jointly pursued by those States. For that purpose, they enjoyed a large measure of legal personality, but it did not amount to sovereignty; that was clear from the famous 1949 advisory opinion of the I.C.J.⁶

19. His conclusion was that the legal personality of international organizations must be of a functional order, in other words it must be such as to justify,

⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949, p. 174.

wholly but exclusively, the powers they needed in order to fulfil the purposes set out in their constituent instruments. Draft articles 6 and 7 should be modified accordingly. As for draft article 5, he agreed with other members of the Commission that it would be advisable to draw a distinction between the legal personality enjoyed under international law and that enjoyed under internal law. The two types of personality, and their consequences, should be dealt with in separate articles. Secondly, in the light of the functional theory he wondered why the only capacity mentioned in article 6 was the capacity to conclude treaties. Mention should also be made of the capacity to contract and to acquire property, the right of legation and the capacity to act in legal proceedings, such as arbitration proceedings. The same remarks applied to draft articles 7 to 10. Undoubtedly, it would be necessary in some respects to discard or adapt traditional solutions to certain problems. Mr. Calero Rodrigues (2177th meeting) had argued that draft articles which differed markedly from existing instruments were unlikely to be accepted. Personally, he did not wholly agree and, like Mr. Tomuschat (2176th meeting), thought that a coherent draft which filled the existing gaps and solved real problems would be welcomed.

20. If international organizations were to have sweeping powers that could be limited only by an express waiver on their part, he wondered who would determine the privileges and immunities of any particular organization. The organizations themselves were prone to seek considerable extensions of their privileges and immunities. The Commission should provide for a procedure whereby such questions could be resolved, for example "binding advisory opinions" similar to those resulting from the review proceedings of international administrative tribunals.

21. On the question of immunity from jurisdiction, he feared that serious denials of justice could occur if, for example, an international organization was able to resist the submission of a dispute to a national court and there was no international tribunal competent to resolve it. As the Special Rapporteur had pointed out, organizations sometimes referred disputes arising from contracts to arbitration. The boldest solution would be to establish an international tribunal or to institute a procedure for binding advisory opinions. Whatever the solution chosen, some form of binding dispute-settlement machinery must be set up.

22. Mr. FRANCIS, referring to a remark made by Mr. Calero Rodrigues at the previous meeting, said that the first part of the topic could not have been designated differently since it had dealt with a variety of situations arising in the relations between States and international organizations. As to the second part of the topic, it would not be an injustice to the original intention if the Drafting Committee, subject to the agreement of the General Assembly, included the wording suggested by Mr. Calero Rodrigues (2177th meeting, para. 47).

23. Commenting on the amount of theoretical discussion in the fourth report (A/CN.4/424), he said that he welcomed the analytical treatment of international

organizations and thought it was the Special Rapporteur's right to include in his report whatever subject-matter he deemed appropriate. It was important, however, to avoid extending the scope of topics; otherwise States might be reluctant to accept any convention which emerged. Significant changes in State practice should, of course, be mentioned in the Special Rapporteur's study.

24. Mr. Calero Rodrigues had referred to the scope of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. In the 15 years that had elapsed since 1975, there had been in all 24 ratifications of the Convention, 17 in the 1970s and 7 in the 1980s—not a very encouraging record. Moreover, only two Western European States, the Holy See and Turkey, had signed the Convention, and neither had ratified it. In those circumstances, the Commission should be wary of extending the scope of the draft articles except on the basis of State practice, which should include the practice of developing countries.

25. The immunity of international organizations in their relations with States was, in his opinion, virtually absolute. The Special Rapporteur had distinguished between immunity for *acta jure imperii* and for *acta jure gestionis*; but he had not mentioned that the United Nations was not, apparently, taxed on rental income from private enterprises operating in its premises, such as Lloyds Bank and Chemical Bank. That was a good example of a type of immunity which was enjoyed by international organizations but would not be available to States.

26. With reference to Mr. Pellet's remarks on the *Matter of Menon* case (*ibid.*, para. 62), he was delighted with the finding of the New York County Supreme Court and did not agree that it was tantamount to treating the United Nations as a sovereign entity. What it meant was that the United Nations, and other international organizations, enjoyed very considerable immunity.

27. In paragraph 1 (b) of draft article 1, the word "relevant" should be deleted in order to ensure uniformity of language with both 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. He did not particularly favour the reference to "membership and responsibilities" in paragraph 1 (c), but had found that the same concept appeared, albeit in a different formulation, in the two Conventions he had just mentioned.

28. In draft article 2, paragraph 1, the words "when the latter have accepted them" could well be deleted. It was important to note that, in Geneva, the host country to the United Nations Office was not a Member of the Organization.

29. With regard to part III of the draft, on property, funds and assets, he agreed with Mr. Al-Baharna (2176th meeting) that article 7 should deal with real estate separately from funds and assets. Similarly, in article 8 there should be a reference to the inviolability of the property, and not only the premises, of interna-

tional organizations. Property could be dealt with in a separate paragraph of the article.

30. In conclusion, he considered that the draft articles could be referred to the Drafting Committee.

31. Mr. McCAFFREY thanked the Special Rapporteur for a helpful fourth report (A/CN.4/424), which identified the relevant issues, and for persevering in a virtually thankless task, at least in terms of the interest shown in the topic. In future, however, the Special Rapporteur might also wish to survey some of the relevant doctrine, treaty practice and judicial decisions in the matter.

32. He agreed entirely with Mr. Calero Rodrigues (2177th meeting) about the nature of the Commission's work in the present instance. The fact that the Commission was more or less saddled with the topic did not, however, mean that it had to give short shrift to other topics in order to pay some attention to it. His suggestion, therefore, was that a decision should be taken to suspend further work on the topic until the Commission had completed the second reading of at least two of the other topics on its agenda. One of the Commission's problems was that it was expected to make progress on each topic on its agenda at every session. As a result, the quality of its work suffered, and it ended up trying to consider in the Drafting Committee articles that had been discussed in the plenary Commission one, two or even three years before. If the topic were shelved, work on other topics could move forward in a somewhat more orderly fashion.

33. The Commission was faced with the dilemma of having to steer a course between Scylla and Charybdis—between the 1946 Convention on the Privileges and Immunities of the United Nations, from which it could not deviate in any way, and other "lesser" international organizations of a universal character for which the privileges and immunities of the United Nations were simply not appropriate. He saw no way out of the predicament unless the Commission abandoned ship or changed its tack radically—and he was not even sure that the latter course would be of much help.

34. He agreed that the title of the topic might appropriately be changed to "Privileges and immunities of international organizations and their officials", in order for it to reflect the subject of the draft more closely. As to specific draft articles, it would have been helpful for the Special Rapporteur to add comments giving some explanation of why certain terms had been used. It was necessary, in his view, to explore in greater depth which existing international organizations should be contemplated by draft article 1 and to have a clearer understanding of the categories of as yet non-existent international organizations that should also be covered. Paragraph 1 (c), in particular, required clarification in that regard, especially in the light of the suggestion that the expression "international organization" be defined, in paragraph 1 (a), as an organization that was "open" to membership by any State. While he experienced no difficulty with that suggestion in the abstract, he was not certain that functional necessity dictated that organizations consisting of 10 or fewer States, to which

reference had also been made, should have the same kind of sweeping privileges and immunities as did the United Nations.

35. It had been suggested that the words "when the latter have accepted them", in paragraph 1 of draft article 2, should be deleted, on the ground that they would imply that the draft set forth some kind of overriding rules that could affect the interpretation of existing instruments. In his opinion, however, those words were essential for the acceptability of the draft articles as a whole.

36. Articles 5 and 6 of part II of the draft, on legal personality, could be combined. In the first sentence of article 5, he wondered what the significance was of the word "shall". Did it reflect an intention that "henceforth" international organizations would enjoy legal personality? The word "shall" was a little out of place and could be deleted. Again, he was not clear about the precise significance of the reference in the same sentence to the enjoyment by international organizations of "legal personality under international law", which was a matter that should be governed by the criterion of functional necessity. Possibly that provision could be qualified by adding the words "to the extent provided by their constituent instruments". Also, he wondered whether subparagraph (c) did not in effect call into question Article 34, paragraph 1, of the Statute of the ICJ. Was it being suggested that international organizations should have the right to sue and be sued before that Court? If so, that would indeed be going very far.

37. He would further suggest that the title of part III of the draft, "Property, funds and assets", should be amended to reflect the subject-matter more clearly, namely jurisdictional immunities, the status of premises, and freedom to transfer funds and other assets. It might in fact be advisable to divide part III into two, or even three, chapters, with article 10 forming a chapter on its own.

38. Draft article 7 should indeed be aligned with the draft articles on jurisdictional immunities of States and their property, at least in so far as the basic methodology and terminology were concerned. He was not, however, entirely convinced by the Special Rapporteur's arguments in the report (A/CN.4/424, paras. 24-33) concerning the basis for immunity from legal process, which was an extremely restrictive concept, at least under English law. In the first place, he did not see why it was "undeniable" that some degree of immunity from legal process "must" be granted, as the Special Rapporteur maintained (*ibid.*, para. 24). He could conceive of international organizations of a universal character that might, for functional reasons, require no jurisdictional immunity. Even if "some" degree of immunity "must" be granted, it was a *non sequitur* to argue that international organizations should enjoy greater immunity than the States that formed them. Admittedly, jurisdictional immunities of an extraordinary nature might have to be conferred upon a certain special class of international organizations—"super" international organizations, as it were—but the functional approach itself seemed to dictate that the Commission should try not to generalize something

that was uniquely necessary in the case of those "super" organizations.

39. He would therefore concur that the whole concept of functional necessity was in essence a relative and not an absolute one. In other words, what was necessary for one international organization was not necessary for another. In that connection, he also agreed that the sweeping dictum of the New York County Supreme Court in the *Matter of Menon* (*ibid.*, para. 62) was rather alarming. He would, however, point out that that had been a decision of a lower trial court, whose jurisdiction was limited to family matters. Moreover, had the decision in question been delivered after the United States *Foreign Sovereign Immunities Act of 1976*, the court might have moderated its terms. In his view, the rule with regard to jurisdictional immunities had more aptly been stated by the European Committee on Legal Co-operation, as set forth in the report (*ibid.*, para. 111), than in draft article 7, and his conclusion was reinforced by Mr. Roucounas's account of the experience of the International Tin Council. The fact that certain agreements, such as the 1946 Convention on the Privileges and Immunities of the United Nations, went beyond that restrictive approach should not give rise to any problem, since there was obviously no peremptory norm of international law, and a saving clause, such as that set forth in draft article 4, would preserve such régimes.

40. The concept and meaning of inviolability as used in paragraph 1 of draft article 8 should be spelt out in greater detail. Once again, he doubted that there was the same functional need for inviolability in the case of the premises of an international organization as there was in the case of the premises of an embassy or other mission of a State.

41. He agreed that draft article 9 should be extended to cover other offices or premises of international organizations. Draft article 10 seemed to go beyond functional necessity, at least for some international organizations.

42. Obviously, it was not possible to call into question the provisions of the Convention on the Privileges and Immunities of the United Nations, but draft article 4 appeared adequate to preserve that régime as well as the régime established under other agreements which might go further than, or not as far as, the present articles. He therefore thought that draft article 11 was unnecessary, in view of the terms of article 4.

43. Mr. BARSEGOV thanked the Special Rapporteur for his fourth report (A/CN.4/424), which reflected a deep understanding of the problems inherent in the topic. Considering the wide variety of international organizations already in existence, the fulfilment of the task at hand required a synthesis of the diverse practice in the field. The Special Rapporteur had succeeded in taking account of the comments made in the Commission and in the Sixth Committee of the General Assembly. Current changes in the world were opening up new prospects for the development of international organizations and the strengthening of their role, notably in economic and political affairs. There were also new perspectives for the development of interna-

tional organizations which were difficult to anticipate. During the discussion, concern had been expressed that the aim of the work on the topic was not quite clear. The task of progressive development and codification of international law did not exclude a review of existing rules, where necessary. However, he could not agree to the one-sided approach whereby existing rules would be reviewed only in such a way as to weaken the rights, immunities and privileges which international organizations enjoyed, particularly at a time when their importance was growing.

44. At the outset, the Commission had decided to avoid theoretical discussions as far as possible and the Special Rapporteur had been successful in that respect, since the definition of an international organization in draft article 1, paragraph 1 (a), confined itself to saying that the expression "international organization" meant an intergovernmental organization of a universal character. However, as Mr. Hayes (2176th meeting) had rightly pointed out, theoretical issues could not be avoided and would have to be faced later. In fact, the Commission was already confronted by such issues as the nature of the privileges and immunities of international organizations. Further theoretical issues arose in regard to the specific nature of the legal personality and capacity of an international organization as a subject of international law.

45. As to the draft articles themselves, paragraph 1 (c) of article 1 should be made more precise. First, since the membership of an international organization could hardly be anything other than international, it was of little use as a criterion in defining such an organization. Secondly, the word "responsibilities" was inappropriate and should perhaps be replaced by another term, possibly "functions", as had been suggested by other members of the Commission. Thirdly, the reason for making specific reference to IAEA was not sufficiently clear. He assumed that the Special Rapporteur's intention had been to refer to different types of international organizations, but, in his view, the expression "international organization" could be defined in a descriptive way rather than in an illustrative manner through specific examples.

46. Draft articles 3 and 4 also lacked precision, notably in regard to the relationship between the present articles and the constituent instruments of existing organizations and international agreements already in force.

47. The subject-matter of draft articles 5 and 6 would, more than other provisions, require further research. He could not agree to the proposal that the references to international law and internal law in article 5 be omitted, lest the article should become completely meaningless. Furthermore, in the report, the correlation between the concept of an international organization as a legal person and that of an international organization as a subject of international law was somewhat difficult to grasp. The difference between the concept of legal personality under international law and that of legal personality under internal law was not clear. At any rate, the reference in article 5 to the internal law of member States, on an equal footing with international

law, was inappropriate. The legal personality of an international organization should be regarded as a reflection of the legal capacity conferred upon it under international law and international agreements: hence the crucial significance of the constituent instruments of individual organizations. Stronger emphasis must accordingly be given to that point in the draft articles. Indeed, States establishing an international organization conferred legal capacity, i.e. capacity to have rights and duties and to participate in the elaboration, adoption and application of rules of international law, but also specific functions for the protection of the law. By adopting constituent instruments of international organizations, States established new subjects of international law which, together with them, performed legislative functions and functions relating to law enforcement and the protection of the law in the sphere of intergovernmental relations. Consequently, the subsequent existence of international organizations no longer depended on the positions of individual States, but on the agreement of all the member States. The question of the internal law of an individual State in relation to the establishment of the legal personality of an international organization therefore called for further consideration.

48. Although the justification for the immunities of international organizations given in paragraph 33 of the report was not exhaustive, the Special Rapporteur's arguments on the subject were convincing. In particular, international organizations did not possess means of defence inherent in States as sovereign entities. The rationale for the immunity enjoyed by international organizations was that they, unlike States which pursued their own interests, acted in the interests and on behalf of all States. As pointed out by the Special Rapporteur, the extent of an international organization's privileges and immunities should primarily depend on its objectives and functions. In that respect, the classification of international organizations would be important in settling the issues covered by articles 7 to 11 of part III of the draft, whose title, "Property, funds and assets", was inappropriate, as had already been pointed out.

49. There were no valid grounds for juxtaposing the immunities of international organizations and those of States, and fears that international organizations would enjoy greater immunities than individual States were unfounded. Yet that did not imply that the interests of individual States could be violated through the granting of absolute immunity to international organizations. It was equally obvious, however, that the interests of a community of States should not be violated either. Actually, recognition of the immunities of international organizations in accordance with their respective functions would ultimately be in the interest of States themselves, as members of the international community.

50. Furthermore, the emergence of new types of international organizations dealing directly with productive activities such as mining, processing and distribution of minerals from the sea-bed, as part of the common heritage of mankind, and other organizations vested with certain features of supranationality called for more extensive immunities and privileges, in accord-

ance with their duties and functions. International organizations such as the International Sea-Bed Authority were bound to be in possession of confidential commercial information, a fact which must obviously be taken into account in dealing, for example, with the question of the inviolability of premises, the subject of draft article 8. In that connection, although he had no doubts in principle about the substance of draft article 9, since international organizations must obviously not be used for purposes incompatible with their functions, it did raise certain issues with regard to the way in which the principle of inviolability should be applied, the extent of application and the meaning of the concept itself.

51. The text of draft article 10 might not need to be changed, yet the nature of the controls referred to must be clarified. The reference was presumably to controls exercised by the host country, not the member States, on the basis of the relevant constituent instrument.

52. In his opinion, the proposed texts could serve as a starting-point for further work on the draft articles.

53. Mr. SOLARI TUDELA congratulated the Special Rapporteur on a clear fourth report (A/CN.4/424) which reflected a detailed study of both practice and doctrine, while demonstrating the importance of the topic.

54. It had been said that all that was involved was an exercise in codification: the relevant norms already existed, there was nothing to add to them, and States would not accept anything new. A comparison had also been made between the present topic and the topic concerning the status of the diplomatic bag, in which it had proved necessary to refer back to existing norms after it had been decided that no distinction could be made between the diplomatic bag and the consular bag. He could not agree with that view, as there were situations for which the Commission must legislate. Only recently, the Security Council had had to move from New York to Geneva, with all that that had entailed in terms of the transfer of staff and documentation, because the headquarters agreement between the United Nations and the host country had not been interpreted by that country in such a way as to allow the normal operation of the Security Council when Yasser Arafat had wished to address the Council. It was perhaps a function of the draft articles under consideration to solve that kind of problem.

55. In addition, the comparison with the topic concerning the diplomatic bag did not seem to be relevant. He was not disputing the fact that a régime covering the diplomatic bag and consular bag was necessary, for there was a whole series of disparate norms to be codified. None the less, it had to be recognized that, with developments in means of communication, the diplomatic bag had lost some of its importance in recent years and would inevitably continue to do so. The position with regard to international organizations was different: those organizations had assumed considerable importance, and would do so increasingly in the future. A convention of the kind under discussion was therefore of the utmost importance.

56. Turning to the draft articles, he agreed that an international organization should be defined, as in article 1, paragraph 1 (a), as "an intergovernmental organization of a universal character". To his mind, universality did not mean that all countries, or even a majority of countries, would become members of a particular organization. It meant that the constitution or statutes of the organization allowed it to open its doors to any country that wished to become a member. In that connection, the Special Rapporteur had pointed out that certain international organizations, such as those of commodity exporters, could not be of a universal character. The question of regional organizations, which also had to be settled, could be dealt with either by means of an optional clause incorporated in the body of the future convention, whereby States could recognize the provisions of the convention with respect to regional organizations, or by means of an optional protocol to the convention.

57. He agreed that article 4 somewhat stultified the draft convention, in that norms should be capable of modification and, to a certain extent, the article denied that possibility.

58. Immunity in the specific case of an international organization, as dealt with in draft article 7, needed to be more wide-ranging because of the very nature of an international organization. Whereas State immunity existed to protect the interests and assets of a State, the immunity of an international organization existed to defend the interests of all the member States of the organization. It was therefore in the interest of all States for an international organization to have wider immunity.

59. He differed slightly with the Special Rapporteur on the question of inviolability of premises. In the report (*ibid.*, para. 89), the Special Rapporteur based such inviolability on article 22 of the 1961 Vienna Convention on Diplomatic Relations, while opting for criteria that were perhaps not quite as wide-ranging as those laid down in that provision. On the other hand, his own impression was that the inviolability in question was not as restricted as that of consular premises.

60. His main point of difference with the Special Rapporteur, however, concerned the consequences of inviolability, in which connection he noted that draft article 9 provided for an exemption in the case of the use of the headquarters of an international organization as a refuge. In his opinion, article 9 was unnecessary and the effect of including it in the draft would be that refuge would no longer be granted as it now was—pursuant to a human right or on the basis of the application of humanitarian law—but would be the result of a right relating to the inviolability of a diplomatic mission. Persons such as those referred to in article 9 should not be granted refuge either in diplomatic missions or in the headquarters of international organizations, although he would not exclude the possibility of the headquarters of an international organization being used as a refuge in extremely serious cases, for example to save the life of a person wanted for political reasons.

61. Draft articles 10 and 11 were acceptable.

62. Mr. BENNOUNA thanked the Special Rapporteur for the additional information contained in his fourth report (A/CN.4/424), but he thought that the deeper the Commission delved into the present topic, the more perplexing it became. The basic problem confronting the Commission centred on methodology, an issue which would have to be settled sooner or later if any definite progress was to be made on the draft articles. Indeed, the exercise would remain pointless unless the ultimate objective was clearly defined first. In that connection, he did not share Mr. Pellet's optimism regarding prospects for breaking new ground. On the contrary, any attempt to work out general rules on the basis of the principles put forward by Mr. Pellet would surely lead to a dead end, because the Commission was, in effect, caught between the provisions of draft article 4, whereby the proposed convention was to be without prejudice to existing instruments, and those of draft article 11, whereby "the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question, by mutual agreement of the parties concerned". Those two constraints made it difficult to imagine how general rules concerned primarily with the immunities of international organizations and their staff could possibly be codified.

63. Alternatively, the Commission could of course draft a framework agreement, merely setting forth broad principles that could be used to interpret or supplement existing instruments, provided that they were consistent with them. In that case, it might suffice to generalize the rules applicable to the United Nations and some of the specialized agencies, as had already been done in some of the draft articles. However, not only would that approach go against the functional theory advocated by Mr. Pellet, but it would also call into question the very purpose of the entire exercise, since the matters in question were already covered and the organizations concerned were not complaining, although they might do so if an attempt were made to change the current system. Even the practice that had developed following the adoption of the relevant conventions and constituent instruments could hardly serve as a basis for general rules, because it tended to vary from one organization to another, depending on specific circumstances and the conduct of the States members of each individual organization. In the light of those considerations, it might be advisable to establish a small working group to define more clearly what it was that the Commission sought to achieve.

64. Lastly, given the intractability of the topic under consideration, the efforts made by the Special Rapporteur in dealing with it were commendable, although further progress now depended on clarification of the basic issues mentioned above.

The meeting rose at 1.05 p.m.

2179th MEETING

Friday, 22 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Visit by a former member of the Commission

1. The CHAIRMAN, speaking on behalf of the Commission, welcomed Sir Francis Vallat, a former member of the Commission, who had made an invaluable contribution to its work in the past.
2. Sir Francis VALLAT congratulated the members of the Bureau on their election, and especially the Chairman, Mr. Shi. He noted that, since being appointed Special Rapporteur, Mr. Barboza had made considerable progress in his study of the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Because he had himself devoted his entire life to teaching, he had special pleasure in noting the presence at the current meeting of the participants in the International Law Seminar. He shared the deep regret of the members of the Commission at the death of Mr. Paul Reuter and was sure that Mr. Pellet would prove a worthy successor.

Relations between States and international organizations (second part of the topic) (continued)
(A/CN.4/401,¹ A/CN.4/424,² A/CN.4/L.383 and Add.1-3,³ A/CN.4/L.443, sect. G, ST/LEG/17)

[Agenda item 8]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLES 1 TO 11⁴ (continued)

3. Mr. BEESLEY said that he would make only a few general observations on the broad outlines of the draft articles under consideration. Although members of the Commission had agreed to avoid theoretical discussions, they had to give the Special Rapporteur some idea of the basic approach they would like him to adopt. Otherwise, they would simply be making drafting points and would not, in his view, be fulfilling their mandate.
4. It had been asked whether the Commission should simply codify the existing law, as contained, for

instance, in headquarters agreements and in the 1946 Convention on the Privileges and Immunities of the United Nations, or try to develop international law by improving the rules in force, or do both. In his view, the question should not be put in those terms. Since an established law in the form of conventions already existed and could almost be called a "contractual" law, he thought that the Commission should confine itself to enunciating residual rules. In that connection, he referred to the formula used by the Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses in draft article 24 as submitted in his fifth report:⁵ "In the absence of agreement to the contrary . . ." He suggested that the Commission should draft rules which would be applicable except where the parties had agreed otherwise. That approach might seem timid, in view of the possibility that might exist to engage in the progressive development of international law, but any attempt at development along those lines was bound to create more problems than it would solve. Like other speakers before him, he therefore suggested that the Commission should confine itself to "filling the gaps".

5. Explaining his position, he noted, for instance, that the concept of the "legal personality" of international organizations was still relatively new in international law and, for some people, still a controversial matter. Even if it was now generally agreed that certain international organizations, such as those of the United Nations system, had or should have international personality, that did not answer the question as to the nature and extent of that personality. It must be understood that international organizations were in fact the "creatures" of sovereign States.

6. It might well be that international organizations had a life of their own, but their existence ultimately depended on the will of the States which had established them and that was a fact which must not be forgotten. It was particularly true in the case of host States, which would not be willing to grant international organizations more extensive privileges and immunities than those provided for in headquarters agreements. It must also not be forgotten that, in the mind of courts and perhaps in the mind of Governments as well, there was a link between the privileges and immunities enjoyed by representatives to international organizations and the privileges and immunities granted to the officials of those organizations and to the organizations themselves. He noted that States were tending to adopt an increasingly conservative attitude towards the privileges and immunities granted to representatives.

7. There seemed to be no basic disagreement on the idea that international organizations of a universal character should be attributed autonomous legal personality. The functional approach, which had very properly been suggested by the Special Rapporteur, also seemed to be acceptable to everyone. He therefore suggested that the draft should refer simply to the

¹ Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

³ Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

⁴ For the texts, see 2176th meeting, para. 1.

⁵ *Yearbook* . . . 1989, vol. II (Part One), p. 123, document A/CN.4/421 and Add.1 and 2.

privileges and immunities required by an organization in order to discharge specific functions. In his view, however, it would not be desirable to draw any conclusions as to the existence of some sort of "supranational" body. He would be the first to endorse the purposes and objectives of the United Nations, but, as a realist, he had to admit that international organizations could do only what States allowed them to do. Instead of trying to attribute a particular power to them it would be better simply to take account of their "functional needs".

8. Referring to Mr. Barsegov's comment (2178th meeting) on the "supranational" entities which might be set up, he said that Mr. Barsegov might have been thinking of a body established in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea. However, no institution of that kind had yet come into being. The attempt to set up a supranational body for environmental matters by means of a joint declaration had not been successful because States had not been ready to take such a step. The Commission should therefore avoid endorsing a "supranational" approach and should be careful not to refer to supranationality either in the draft articles or in the commentaries; if it did so, it would be going beyond the current thinking of the international community. Moreover, with regard to the functional approach, the Commission should not try to be exhaustive. That would be tackling the problem the wrong way round and it would then be better to opt for the sectoral approach suggested by Mr. Mahiou (2177th meeting).

9. In conclusion, he did not think that the Commission had to prepare a draft which would tend to give international organizations some kind of sovereignty. Rather, it should try to draft a useful text which would propose, in addition to the treaty law in force, residual rules based on common sense. With particular reference to draft article 5, he would prefer that, instead of referring to the legal personality of international organizations, the Commission should simply draw up a list of the legal capacities which should be attributed to such organizations to enable them to discharge their functions, taking due account of the provisions of draft articles 4 and 11. It was that functional aspect which should be emphasized, with a maximum of precision, for the benefit of the Sixth Committee of the General Assembly.

10. Mr. THIAM said that the Special Rapporteur had been right to adopt a pragmatic approach in his fourth report (A/CN.4/424) and to follow the facts closely. International organizations were working tools which States required to achieve specific objectives. Although the States that created them thought they could give them a "soul", they were above all instruments. International organizations maintained ambiguous relations with States, which, while needing their services, were wary of their dynamism and tried to keep them in check. Most international organizations were under very close surveillance. Thus, leaving aside the United Nations, most of the functions exercised by the heads of the secretariats of international organizations were administrative. Concretely speaking, such close surveillance was reflected in the fact that States themselves

sat in international organizations and monitored and limited their functioning. That régime was very strict. If the head of the secretariat of an international organization exceeded his authority, he soon found out that it could have painful consequences.

11. With regard to the functional needs of international organizations, matters were equally clear: if an international organization needed greater powers, it was up to States to define them, and the Special Rapporteur had done well in the draft to limit the legal capacity of international organizations to contracting, acquiring property and instituting legal proceedings (art. 5). The Special Rapporteur had also devoted an article to capacity to conclude treaties (art. 6), but he (Mr. Thiam) was not sure whether international organizations could or should have such capacity. The head of the secretariat of one organization, having signed a simple co-operation agreement, had been forced to resign in the face of the reactions which that initiative had provoked. States delegated to international organizations only strictly defined subjects that did not affect their sovereignty.

12. He recognized that it was normal for international organizations to have privileges and immunities in keeping with the requirements of their functions. However, although immunity from legal process seemed to be accepted, he wondered whether that meant allowing it in all cases to lead to a denial of justice. The question was worth asking. He agreed on that point with those members of the Commission who had stressed the danger that immunity from legal process would represent if it led to a kind of impunity for international organizations. In the event of legal proceedings between an individual and an international organization, if the latter claimed immunity, it did not mean that the person concerned was deprived of a remedy. He could lodge a complaint with the authorities of the country, in particular the Minister for Foreign Affairs, who would attempt to reconcile the parties concerned.

13. He asked the Special Rapporteur to provide clarification concerning immunity in respect of measures of execution. It was stated in the report (A/CN.4/424, para. 58) that international organizations could not waive that immunity. If an international organization wished to do so, he did not see why it should be refused that right. In that connection, he referred members to article 32, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, which provided that the accrediting State might, in a separate waiver, waive immunity in respect of measures of execution of a judgment.

14. Mr. AL-QAYSI said that, in considering the present topic, a number of basic points had to be borne in mind, as the Special Rapporteur had done in a clear and succinct fourth report (A/CN.4/424) which attested to his mastery of the subject-matter.

15. First, the establishment of an international organization required a constituent instrument which determined the legal personality of the organization as an entity distinct from the States that established it. Secondly, in order to function in an autonomous, inde-

pendent and efficient manner, international organizations must have a set of privileges, immunities and facilities, the scope of which must, however, be defined by the application of a sole criterion, namely functional need. Thirdly, a variety of international organizations meant a variety of functional needs, and it was therefore difficult to draft a general régime for privileges, immunities and facilities that automatically applied to all organizations. That was why, in practice, those questions were settled case by case, in the organizations' constituent instruments, in conventions or in headquarters agreements.

16. If those premises were accepted, as they appeared to be, it then had to be determined what the objective of the work being done on the topic could or should be. The Commission's task was the progressive development and codification of international law. In the case under consideration, however, it must be noted that, from the point of view of codification, the conventions and agreements that governed the functioning of international organizations were very numerous and that, on the whole, international organizations seemed to be satisfied with them. For there to be a reason to develop the law, there must, in practice, be lacunae; but those had not been identified. He agreed with Mr. Beesley concerning the "contractual" law that governed international organizations. Perhaps the Commission should simply confine itself to establishing a régime focusing on the aspects of relations between States and international organizations which, from the point of view of the latter, gave rise to problems in practice. It must avoid the excessive generalizations that would occur if it set out to define a régime that was common to all international organizations of a universal character.

17. Although international organizations had on occasion experienced problems, in the vast majority of cases they had succeeded in solving them with their member States or the host Governments pragmatically and realistically. Those problems that had not been solved were not necessarily of the kind that could be dealt with in a convention such as the one the Commission was contemplating. In that connection, Mr. Solari Tudela (2178th meeting) had referred to the example of the Security Council moving from New York to Geneva to enable Yasser Arafat to speak in that body. At issue in that case had been the way in which the host country interpreted its obligations under the headquarters agreement with the United Nations. Before attempting to settle that type of problem in a convention, it was important to consider to what extent it was possible to impose upon a host Government an obligation which it considered contrary to its political interests.

18. He differed perhaps with some members in believing that the Commission should not give the General Assembly the impression that it wished to discontinue its consideration of the topic: if it did so, it might also give the impression that it had not fulfilled its mandate, and that would be damaging to its credibility. Nevertheless, the Commission was bound to indicate to the General Assembly how the majority of its members viewed the work on the topic. In his opinion, such

work must be realistic, it must be based on what international organizations regarded as their needs and it must consist of drafting a régime relating to problems that had not yet been regulated, perhaps in the form of residual rules, as suggested by Mr. Beesley, or, as proposed by other members, in the form of a framework agreement. In other words, it was important to accept a realistic limitation of the scope of the topic on the basis of the actual needs of international organizations and to avoid generalizing too much.

19. Mr. EIRIKSSON said that he could adopt, virtually word for word, as his own the general comments made at the previous meeting by Mr. McCaffrey and Mr. Bennouna and, except for two points, all the comments made by Mr. McCaffrey on individual articles. He, too, wondered where the work on the subject would take the Commission. It appeared that the Commission would recommend that the régime for existing organizations should remain intact; it was also probable that the status of future organizations would be tailored to their functions and purposes and he therefore doubted whether it would be possible in the abstract to provide guidance in the draft articles.

20. With regard to the draft articles themselves, he said that he accepted the general definitions contained in article 1, which should be entitled "Use of terms".

21. Regarding paragraph 1 of draft article 2, he was not opposed to confining the Commission's work for the time being to international organizations of a universal character. Unlike Mr. McCaffrey, however, he believed that the phrase "when the latter have accepted them" must be deleted. To retain those words would call into question the status of articles adopted without such a phrase. As for paragraph 2, he repeated his standard opposition to that type of non-prejudicial clause, even though, in respect of that particular one, he was perhaps 20 years too late. He was convinced that paragraph 3 should be deleted.

22. With regard to draft article 3, the Commission should come back to the relationship between the present articles and the rules of international organizations after it had completed its work.

23. Although the relationship between the present articles and other existing agreements—dealt with in subparagraph (a) of draft article 4—was clear, the Commission should likewise come back to that question at the conclusion of its work. The relationship with future agreements (subpara. (b)) should be left to treaty law. In that connection, he recalled the discussion which had taken place in the Commission at its previous session on article 32 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier⁶ and article 41 of the 1969 Vienna Convention on the Law of Treaties.

24. Turning to the articles on legal personality and privileges and immunities of international organizations, he referred to Mr. Pellet's analysis at the previous meeting and said that he belonged to the "func-

⁶ For the text of article 32 adopted by the Commission on second reading at its forty-first session, and the commentary thereto, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 46-47.

tional school". He had recently been involved in the establishment of a large, although not universal, international organization and in efforts within the Council of Europe to standardize questions of that nature. He had concluded that the term "functional" meant different things to different people, and that there was a complex interrelationship between the interests of States setting up an organization, the often independent interests of the organization itself and the interests of existing or potential host States. He was therefore not very optimistic that the Commission could break new ground in that area.

25. With regard to draft article 5, he had no objection to providing that international organizations enjoyed legal personality, but the references to international law and internal law should be deleted. The consequences of that normative provision should be determined by the needs of the organizations concerned, as stated in their constituent instruments. An organization might or might not have the capacity set out in subparagraphs (a), (b) and (c), or its capacity could comprise other elements. As worded, the article gave the impression that the list was exhaustive, but that was not the case. The current text of draft article 6, which was a revision of the provision submitted by the Special Rapporteur in his second report,⁷ seemed to state the obvious and raised the question of its relationship with article 5. He was not completely in agreement with Mr. McCaffrey on those two articles and would propose the following wording:

"International organizations shall have legal personality and shall enjoy in the territories of their member States and in their relations with other international organizations such legal capacity as may be necessary to perform their functions and achieve their ends."

26. As for draft articles 7 to 11, he had nothing to add to what Mr. McCaffrey had said at the previous meeting, apart from suggesting that subparagraph (c) of article 10 should be relocated. He also did not quite see what the effect of article 11 was.

27. In conclusion, he echoed Mr. Calero Rodrigues (2177th meeting) in recognizing the difficult nature of the Special Rapporteur's task, but remained confident that the Special Rapporteur would be able to draw upon the views expressed in the Commission to find the right approach for further work on the topic.

28. Mr. BARSEGOV said that he had not wanted to speak earlier so as not to hold up the discussion, but he wished to point out that, contrary to what had been implied, he had not said in his statement (2178th meeting) that supranational organizations or bodies existed. He had simply noted that certain organizations had elements of supranationality. Soviet doctrine had always been behind Western doctrine with regard to supranationality and it was the developing countries that deserved credit for emerging new elements.

⁷ *Yearbook . . . 1985*, vol. II (Part One), p. 113, document A/CN.4/391 and Add. 1, para. 74.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,⁸ A/CN.4/423,⁹ A/CN.4/428 and Add.1,¹⁰ A/CN.4/L.443, sect. D)¹¹

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 33

29. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on the topic (A/CN.4/428 and Add.1), as well as draft articles 1 to 33 contained therein, which read:¹²

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles shall apply with respect to activities carried on in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create a risk of causing, transboundary harm throughout the process.

Article 2. Use of terms

For the purposes of the present articles:

(a) "Activities involving risk" means activities referred to in article 1, including those carried on directly by the State, which:

- (i) involve the handling, storage, production, carriage, discharge or other similar operation of one or more dangerous substances;
- (ii) use technologies that produce hazardous radiation; or
- (iii) introduce into the environment dangerous genetically altered organisms and dangerous micro-organisms;

(b) "Dangerous substances" means substances which present a [an appreciable] [significant] risk of harm to persons, property [, the use or enjoyment of areas] or the environment, for example flammable and corrosive materials, explosives, oxidants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances such as those indicated in annex . . . A substance may be considered dangerous only if it occurs in certain quantities or concentrations, or in relation to certain risks or situations in which it may occur, without prejudice to the provisions of subparagraph (a);

(c) "Dangerous genetically altered organisms" means organisms whose genetic material has been altered in a manner that does not occur naturally, by coupling or natural recombination, creating a risk to persons, property [, the use or enjoyment of areas] or the environment, such as those indicated in annex . . . ;

(d) "Dangerous micro-organisms" means micro-organisms which create a risk to persons, property [, the use or enjoyment of areas] or the environment, such as pathogens or organisms which produce toxins;

(e) "[Appreciable] [Significant] risk" means risk which presents either the low probability of causing very considerable [disastrous] harm or the higher than normal probability of causing minor, though [appreciable] [significant], transboundary harm;

(f) "Activities with harmful effects" means activities referred to in article 1 which cause transboundary harm in the course of their normal operation;

(g) "Transboundary harm" means the harm which arises as a physical consequence of the activities referred to in article 1 and which, in

⁸ Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

⁹ Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

¹⁰ Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

¹¹ 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.

¹² The footnotes to some of the first nine articles, in which the Special Rapporteur suggested possible alternative texts for the benefit of the Drafting Committee, are omitted.

the territory or in [places] [areas] under the jurisdiction or control of another State, is [appreciably] [significantly] detrimental to persons, [objects] [property] [, the use or enjoyment of areas] or the environment. In the present articles, the expression always refers to [appreciable] [significant] harm. It includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise;

(h) “[Appreciable] [Significant] harm” means harm which is greater than the mere nuisance or insignificant harm which is normally tolerated;

(i) “State of origin” means the State which exercises jurisdiction or control over an activity referred to in article 1;

(j) “Affected State” means the State under whose jurisdiction or control the transboundary harm arises;

(k) “Incident” means any sudden event or continuous process, or series of events having the same origin, which causes, or creates the risk of causing, transboundary harm;

(l) “Restorative measures” means appropriate and reasonable measures to restore or replace the natural resources which have been damaged or destroyed;

(m) “Preventive measures” means the measures referred to in article 8 and includes both measures to prevent the occurrence of an incident or harm and measures intended to contain or minimize the harmful effects of an incident once it has occurred;

(n) “States concerned” means the State or States of origin and the affected State or States.

Article 3. Assignment of obligations

1. The State of origin shall have the obligations established by the present articles provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control.

2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in paragraph 1.

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 referred to in article 1, in relations between such States the present articles shall apply subject to that other international agreement.

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

The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act.

CHAPTER II. PRINCIPLES

Article 6. Freedom of action and the limits thereto

The sovereign freedom of States to carry on or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

Article 7. Co-operation

States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their jurisdiction or control from causing transboundary harm. If such harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places [areas] under its jurisdiction or control.

Article 8. Prevention

States of origin shall take appropriate measures to prevent or minimize the risk of transboundary harm or, where necessary, to contain or minimize the harmful transboundary effects of the activities in question. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

Article 9. Reparation

To the extent compatible with the present articles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in the present articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm.

Article 10. Non-discrimination

States Parties shall treat the effects of an activity arising in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of the present articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by activities referred to in article 1.

CHAPTER III. PREVENTION

Article 11. Assessment, notification and information

1. If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on under its jurisdiction or control, it shall review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary harm, it shall notify the State or States likely to be affected as soon as possible, providing them with available technical information in support of its finding. It may also inform them of the measures which it is attempting to take to prevent or minimize the risk of transboundary harm.

2. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected as a result of the activity, an international organization with competence in that area shall also be notified, on the terms stated in paragraph 1.

Article 12. Participation by the international organization

Any international organization which intervenes shall participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter is regulated therein. If it is not, the organization shall use its good offices to foster co-operation between the parties, arrange joint or separate meetings with the State of origin and the affected States and respond to any requests which the parties may make of it to facilitate a solution of the issues that may arise. If it is in a position to do so, it shall provide technical assistance to any State which requests such assistance in relation to the matter which prompted its intervention.

Article 13. Initiative by the presumed affected State

If a State has serious reason to believe that an activity under the jurisdiction or control of another State is causing it harm within the meaning of article 2, subparagraph (g), or creating a[n appreciable] [significant] risk of causing it such harm, it may ask that State to comply with the provisions of article 11. The request shall be accompanied by a technical, documented explanation setting forth the reasons for such belief. If the activity is indeed found to be one of those referred to in article 1, the State of origin shall bear the costs incurred by the affected State.

Article 14. Consultations

The States concerned shall consult among themselves, in good faith and in a spirit of co-operation, in an attempt to establish a régime for the activity in question which takes into account the interests of all parties. At the initiative of any of those States, consultations may be held by means of joint meetings among all the States concerned.

Article 15. Protection of national security or industrial secrets

The State of origin shall not be bound by the provisions of article 11 to provide data and information which are vital to its national security or to the protection of its industrial secrets. Nevertheless, the State of origin shall co-operate in good faith with the other States concerned in providing any information which it is able to provide, depending on the circumstances.

Article 16. Unilateral preventive measures

If the activity in question proves to be an activity referred to in article 1, and until such time as agreement is reached on a legal régime for that activity among the States concerned, the State of origin shall take appropriate preventive measures as indicated in article 8, in particular appropriate legislative and administrative measures, including requiring prior authorization for the conduct of the activity and

encouraging the adoption of compulsory insurance or other financial safeguards to cover transboundary harm, as well as the application of the best available technology to ensure that the activity is conducted safely. If necessary, it shall take government action to counteract the effects of an incident which has already occurred and which presents an imminent and grave risk of causing transboundary harm.

Article 17. Balance of interests

In order to achieve an equitable balance of interests among the States concerned in relation to an activity referred to in article 1, those States may, in their consultations or negotiations, take into account the following factors:

(a) the degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;

(b) the existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

(c) the possibility of carrying on the activity in other places or by other means, or the availability of alternative activities;

(d) the importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

(e) the economic viability of the activity in relation to possible means of prevention;

(f) the physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

(g) the standards of protection which the affected State applies to the same or comparable activities, and the standards applied in regional or international practice;

(h) the benefits which the State of origin or the affected State derive from the activity;

(i) the extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(j) the willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(k) the extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(l) the extent to which assistance from international organizations is available to the State of origin;

(m) the applicability of relevant principles and norms of international law.

Article 18. Failure to comply with the foregoing obligations

Failure on the part of the State of origin to comply with the foregoing obligations shall not constitute grounds for affected States to institute proceedings unless that is provided for in other international agreements in effect between the parties. If, in those circumstances, the activity causes [appreciable] [significant] transboundary harm which can be causally attributed to it, the State of origin may not invoke in its favour the provisions of article 23.

Article 19. Absence of reply to the notification under article 11

In the cases referred to in article 11, if the notifying State has provided information concerning the measures referred to therein, any State that does not reply to the notification within a period of six months shall be presumed to consider the measures satisfactory. This period may be extended, at the request of the State concerned, [for a reasonable period] [for a further six months]. States likely to be affected may ask for advice from any international organization that is able to give it.

Article 20. Prohibition of the activity

If an assessment of the activity shows that transboundary harm cannot be avoided or cannot be adequately compensated for, the State of origin shall refuse authorization for the activity unless the operator proposes less harmful alternatives.

CHAPTER IV. LIABILITY

Article 21. Obligation to negotiate

If transboundary harm arises as a consequence of an activity referred to in article 1, the State or States of origin shall be bound to negotiate

with the affected State or States to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for.

Article 22. Plurality of affected States

Where more than one State is affected, an international organization with competence in the matter may intervene, if requested to do so by any of the States concerned, for the sole purpose of assisting the parties and fostering their co-operation. If the consultations referred to in article 14 have been held and if an international organization has participated in them, the same organization shall also participate in the present instance, if the harm occurs before agreement has been reached on a régime for the activity that caused the harm.

Article 23. Reduction of compensation payable by the State of origin

For claims made through the diplomatic channel, the affected State may agree, if that is reasonable, to a reduction in the payments for which the State of origin is liable if, owing to the nature of the activity and the circumstances of the case, it appears equitable to share certain costs among the States concerned [, for example if the State of origin has taken precautionary measures solely for the purpose of preventing transboundary harm and the activity is being carried on in both States, or if the State of origin can demonstrate that the affected State is benefiting without charge from the activity that caused the harm].

Article 24. Harm to the environment and resulting harm to persons or property

1. If the transboundary harm proves detrimental to the environment of the affected State, the State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore those conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered.

2. If, as a consequence of the harm to the environment referred to in paragraph 1, there is also harm to persons or property in the affected State, payments by the State of origin shall also include compensation for such harm.

3. In the cases referred to in paragraphs 1 and 2, the provisions of article 23 may apply, provided that the claim is made through the diplomatic channel. In the case of claims brought through the domestic channel, the national law shall apply.

Article 25. Plurality of States of origin

In the cases referred to in articles 23 and 24, if there is more than one State of origin,

ALTERNATIVE A

they shall be jointly and severally liable for the resulting harm, without prejudice to any claims which they may bring among themselves for their proportionate share of liability.

ALTERNATIVE B

they shall be liable *vis-à-vis* the affected State in proportion to the harm which each one of them caused.

Article 26. Exceptions

1. There shall be no liability on the part of the State of origin or the operator, as the case may be:

(a) if the harm was directly due to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(b) if the harm was caused wholly by an act or omission of a third party done with intent to cause harm.

2. If the State of origin or the operator, as the case may be, prove that the harm resulted wholly or partially either from an act or omission done with intent to cause harm by the person who suffered the harm or from the negligence of that person, they may be exonerated wholly or partially from their liability to such person.

Article 27. Limitation

Proceedings in respect of liability under the present articles shall lapse after a period of [three] [five] years from the date on which the affected party learned, or could reasonably be expected to have learned, of the harm and of the identity of the State of origin or the operator, as the case may be. In no event shall proceedings be instituted once thirty years have elapsed since the date of the accident that caused the

harm. If the accident consisted of a series of occurrences, the thirty years shall start from the date of the last occurrence.

CHAPTER V. CIVIL LIABILITY

Article 28. Domestic channel

1. It is not necessary for all local legal remedies available to the affected State or to individuals or legal entities represented by that State to be exhausted prior to submitting a claim under the present articles to the State of origin for liability in the event of transboundary harm.

2. There is nothing in the present articles to prevent a State, or any individual or legal entity represented by that State that considers that it has been injured as a consequence of an activity referred to in article 1, from submitting a claim to the courts of the State of origin [and, in the case of article 29, paragraph 3, of the affected State]. In that case, however, the affected State may not use the diplomatic channel to claim for the same harm for which such claim has been made.

Article 29. Jurisdiction of national courts

1. States parties to the present articles shall, through their national legislation, give their courts jurisdiction to deal with the claims referred to in article 28 and shall also give affected States or individuals or legal entities access to their courts.

2. States Parties shall make provision in their domestic legal systems for remedies which permit prompt and adequate compensation or other reparation for transboundary harm caused by activities referred to in article 1 carried on under their jurisdiction or control.

[3. Except for the affected State, the other persons referred to in article 28 who consider that they have been injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin.]

Article 30. Application of national law

The court shall apply its national law in all matters of substance or procedure not specifically regulated by the present articles. The present articles and also the national law and legislation shall be applied without any discrimination whatsoever based on nationality, domicile or residence.

Article 31. Immunity from jurisdiction

States may not claim immunity from jurisdiction under national legislation or international law in respect of proceedings instituted under the preceding articles, except in respect of enforcement measures.

Article 32. Enforceability of the judgment

1. When a final judgment made by the competent court is enforceable under the laws applied by that court, it shall be recognized in the territory of any other Contracting Party, unless:

- (a) the judgment has been obtained fraudulently;
- (b) the respondent has not been given reasonable advance notice and an opportunity to present his case in fair conditions;
- (c) the judgment is contrary to the public policy of the State in which recognition is being sought, or is not in keeping with the basic norms of justice.

2. A judgment which is recognized to be in accordance with paragraph 1 shall be enforceable in any of the States Parties as soon as the formalities required by the Contracting Party in which enforcement is being sought have been met. No further review of the substance of the matter shall be permitted.

Article 33. Remittances

States Parties shall take the steps necessary to ensure that any monies due to the applicant in connection with proceedings in their courts arising from the preceding articles, and any monies he may receive in respect of insurance or reinsurance or other funds designed to cover the harm in question, may be freely remitted to him in the currency of the affected State or in that of the State of his habitual residence.

30. Mr. BARBOZA (Special Rapporteur) said that section A of the introduction to his sixth report (A/CN.4/428 and Add.1) summarized the situation regarding the first 10 articles of the draft submitted in

his fourth report,¹³ which had been referred to the Drafting Committee at the Commission's fortieth session, in 1988.¹⁴ In his fifth report (A/CN.4/423), he had submitted revised draft articles 1 to 9 to replace those original 10 articles, as well as new draft articles 10 to 17.¹⁵ The revised articles 1 to 9 had been referred to the Drafting Committee at the forty-first session, in 1989.

31. In the sixth report, he was proposing some new ideas with respect to the first 10 articles, in particular the concept of "dangerous substances" in subparagraphs (a) to (d) of draft article 2, on the use of terms. If that concept was not accepted, subparagraphs (a) to (d) would be deleted and subparagraph (e) (formerly subparagraph (a) (ii)) would be given its previous wording. Other new ideas were the *ex post facto* preventive measures referred to in subparagraphs (g) (*in fine*) and (m) of draft article 2 and in draft article 8; and the definitions in article 2 of "appreciable" or "significant" harm (subpara. (h)), "incident" (subpara. (k)), "restorative measures" (subpara. (l)) and "States concerned" (subpara. (n)). He was also introducing a new principle, that of non-discrimination, which would be the subject of article 10 in the event of the concept of "participation" as dealt with in article 8 of the 1988 draft not being adopted as an independent principle.

32. Section B of the introduction dealt with another preliminary question: whether activities involving risk and activities with harmful effects should be treated in the same way in the same set of articles or whether they should be dealt with separately. That section was designed to meet the concerns expressed by some members of the Commission at the previous session.

33. Chapter I of the report dealt with activities involving risk. Some very important changes had been made in the provisions relating to such activities. For instance, section A of chapter I referred to a matter which the Commission had not yet discussed, namely the inclusion of a list of dangerous substances which would give some insight into the true nature of the risk of transboundary harm involved in an "activity involving risk". That was only a very tentative suggestion; it was introduced in response to objections raised on a number of occasions by members of the Commission and representatives in the Sixth Committee of the General Assembly with regard to the need for States to know the scope of the obligations they would be assuming under the future convention to which they might become parties. Their view was that the mere concept of "appreciable" or even "significant" risk was not enough to determine *a priori* the obligations incumbent on States of origin.

34. The objections to the idea of a list of activities were still valid. Such a list would be too specific for a framework agreement. However, if the general concept of "appreciable" or "significant" risk of harm involved

¹³ *Yearbook* ... 1988, vol. II (Part One), p. 251, document A/CN.4/413.

¹⁴ For the texts, see *Yearbook* ... 1988, vol. II (Part Two), p. 9, para. 22.

¹⁵ For the texts, see *Yearbook* ... 1989, vol. II (Part Two), pp. 84 *et seq.*, paras. 311 and 322.

in an activity were based on the substances or technologies used during that activity, there would be some room for an assessment of the activity itself, as well as greater flexibility than with a mere list of activities. The new subparagraphs (a) to (d) of draft article 2 were no more than an initial sketch, an attempt to express the idea in legal terms. They would certainly require further elaboration, and the substances to be included in the list would have to be decided by experts.

35. Section B of chapter I dealt with the specific amendments that would be necessary in article 2 should the Commission decide to adopt the "list" method. During the Commission's debates, it had often been said that article 2 could lend itself to any additions or changes that the development of the topic might make necessary. For instance, the previous subparagraph (a) (ii) would become subparagraph (e), defining "appreciable" or "significant" risk.

36. Section C of chapter I contained some new material in the form of changes which, as a result of further consideration, should be made in the first 10 articles. The provisions in question had been incorporated in some recent conventions and reflected the latest trends in international treaty law. The concept of "harm" had been expanded by including the cost of measures taken in order to contain or minimize the harmful effects of activities involving risk or to prevent further harm, and by giving preference to restoration in the event of damage to the environment and allowing for monetary compensation only when restoration was impossible (art. 2 (f) and art. 24, para. 1).

37. Chapter II of the report dealt with the principles in chapter II of the draft, which were little affected by the introduction of the concept of dangerous substances and the list of substances. One of those principles was prevention (art. 8) and, as he had already pointed out, the concept of *ex post facto* preventive measures had been introduced. A new article 10 took the place of the article in the 1988 draft dealing with "participation", which the Commission had almost unanimously decided was already covered by the principle of "co-operation" (art. 7). The new draft article 10 introduced the principle of non-discrimination, which should, in his view, have a place in the draft.

38. Chapter III of the report related primarily to prevention. It referred in particular to the revised procedure (arts. 11-15); the preventive measures to be taken unilaterally by the State of origin pending the conclusion of an agreement (art. 16); the possible prohibition of an activity (art. 20); and the absence of any right of action in the event of failure to comply with the obligations laid down in chapter III of the draft (art. 18).

39. The new procedure followed, in simplified form, the main lines of the procedure proposed in the fifth report (A/CN.4/423). It could, of course, be rejected altogether, with the possible exception of paragraph 2 of draft article 11, on transboundary effects which might extend to more than one State. If the procedure were omitted altogether, however, the draft articles would cover only liability and would no longer cover

prevention, except perhaps through the principle laid down in draft article 8. The new procedure would foster agreement by States on régimes of responsibility for specific activities, include certain obligations which were well established in treaty law and encourage participation by affected States, thus making for better prevention through the co-operation of all parties concerned. The case of harm which might extend to more than one State was covered by draft article 12, which provided for intervention by an international organization with competence in the matter. In fact, that was already international practice, as he had illustrated in the fifth report. The former obligation to negotiate an agreement had been considerably softened; it was now merely an obligation to consult (art. 14).

40. With regard to unilateral preventive measures, he explained that, regardless of the stage reached in consultations, the State of origin must, if it knew or had the means of knowing that an activity referred to in article 1 was under way or about to start, take certain measures to prevent or minimize the risk of transboundary harm. Draft article 16 therefore expanded on the principle of prevention laid down in draft article 8.

41. Draft article 17 had been inspired by the concept of a "balance of interests". Because that concept served as the foundation for many other provisions, he had decided to bring together some of the interests which had a bearing on the activities referred to in article 1. The factors listed provided guidelines for consultations or negotiations among the States concerned. However, the placing of article 17 remained problematic.

42. Article 18 would perhaps be better placed at the end of chapter III of the draft, but the important point was that a breach by the State of origin of any of the obligations laid down in the chapter, which were on the whole obligations of prevention, did not give rise to any right of action for an affected State. That was in keeping with the schematic outline: there were no hard obligations until damage had occurred. In earlier debates, some members of the Commission had spoken in favour of that idea and he would very much like to know the views of the Commission on that important point. In fact, if the obligations in the matter of prevention were to give rise to a right of action for other States, the draft would also cover responsibility for wrongful acts, and that might be beyond the Commission's mandate.

43. The prohibition of an activity (art. 20) was a completely new concept, but it could not be ruled out as the possible outcome of the consultations proposed in the new procedure. The original Spanish text used the formula *debería rehusar*, while the English used the words "shall refuse", which were more compulsory. At any rate, the existence of article 18 made the matter somewhat academic.

44. Chapter IV of the draft, on liability, gave more specific content to the principle of reparation embodied in draft article 9. The obligation to negotiate (art. 21) was perhaps the most important feature of the entire chapter and he recalled the discussion of that question in the fifth report (A/CN.4/423, paras. 126-147). When the State of origin incurred costs from which other

States derived some benefit, the ideal solution was to share the costs. In other words, the criterion of equity in the matter of reparation for transboundary harm could be the restoration of the balance of interests. Since it was difficult to determine the exact amount of compensation, draft article 21 provided for the duty of the State of origin to negotiate the amount to be paid—or, in general, “the legal consequences of the harm”—with the affected State.

45. Draft article 23, on reduction of compensation payable by the State of origin, was intended to govern a particular case, which should likewise be a matter for negotiation.

46. Draft article 24 developed the idea of harm to the environment, distinguishing between damage caused to the environment of a State and damage caused indirectly to persons or property. The latter was to be compensated for in the usual way, while the former called for the restoration of the previous situation or, if that was not possible, for compensation in monetary or other terms.

47. The case of a plurality of States of origin was dealt with in draft article 25. Two alternative texts were proposed, according to whether liability was to be joint and several or proportionate.

48. Draft article 26 provided for exceptions to liability in certain cases involving, for instance, *force majeure* or an intentional act or omission by a third party. Draft article 27 dealt with limitation. Those were common clauses in conventions.

49. Chapter V of the draft regulated certain aspects of civil liability. It had been considered convenient to include such provisions because private-law remedies had always been available: an affected person and even an affected State could choose to resort to the courts of the State of origin to obtain redress. The affected State might, for many reasons, choose not to endorse the claims of its subjects, since there was no obligation for it to do so. Draft article 28 seemed necessary in that it guaranteed a solution in all cases.

50. Several degrees of regulation could be provided for, article 28 being the minimum. Taking matters further, certain obligations could be imposed on the States parties, such as the obligation to provide foreign residents with access to their courts (art. 29, para. 1). As no local remedies might be available, however, paragraph 2 of article 29 required States parties to establish such remedies. Naturally, the local State could not claim immunity from jurisdiction (art. 31); that applied particularly in the case covered by paragraph 3 of article 29, under which affected persons could institute proceedings before the courts of the State of origin. The courts would apply their national law (art. 30) and would respect the principle of non-discrimination (art. 10).

51. Chapter VI of the sixth report dealt with liability for harm to the so-called “global commons”, namely areas beyond national jurisdictions. In order to determine whether it was possible to extend the scope of the topic to liability for such harm, as he had undertaken to do at the previous session, he had decided to explore

three issues: the concept of harm to the global commons, the concept of “affected State” and the question whether responsibility for wrongfulness or “causal” liability should be established with regard to such damage. Once those three issues had been explored, there was also the question whether, under existing international law, any consequences flowed from harm done by an individual or a State to the global commons.

52. In section B of chapter VI, a distinction was drawn according to whether the harm affected persons or property—either private or State property—in such places or whether it affected the environment exclusively. The second alternative was the only one that should be explored, since the first was covered by the draft articles. There was apparently scant precedent, however, for liability for that type of harm. Furthermore, the international decisions concerning transboundary harm on which he had based his reasoning, such as those in the *Corfu Channel* and *Trail Smelter* cases (see (A/CN.4/384, annex III), referred to harm caused directly or indirectly to certain States. Even the applicability of the *sic utere tuo* principle was doubtful, since it might be asked to whom the global commons belonged. To which legal person was the damage done? And what was the relevance in law of damage which could not be measured, but was only suspected or presumed, or which was only a part of the total effect necessary to affect persons or property? The existing concept of harm did not readily lend itself to application to the global commons. What would be the threshold at which the harm became “appreciable” or “significant”? What compensation should be awarded for such intangible harm, and to whom?

53. He had encountered some difficulties with regard to the affected State, which was dealt with in section E of chapter VI. He would suggest, on the basis of paragraph 2 (f) of article 5 of part 2 of the draft articles on State responsibility provisionally adopted by the Commission at its thirty-seventh session,¹⁶ that the possibility should be explored of treating as an “injured State” any State party to a multilateral treaty under which the right infringed arose, when that right had been established for the protection of the collective interests of the States parties.

54. Before considering whether responsibility for wrongfulness or “causal” liability should apply, another question had to be answered: if it was true that, at present, no consequence arose out of harm to the environment in the global commons, could that situation be allowed to continue if it was certain that catastrophic and irreparable damage to that environment might occur? The answer to that question was obviously in the negative.

55. In order to put an end to that situation by means of legal instruments, a distinction should perhaps be drawn between activities involving risk and activities with harmful effects. In the case of activities involving risk, there was no other solution than to apply causal liability wherever possible. It should be relatively easy to identify the accidents likely to cause harm to the

¹⁶ *Yearbook* . . . 1985, vol. II (Part Two), p. 25.

global commons because of their intrinsic magnitude, the consequence of which could be, whenever possible, the restoration of the *status quo ante*. As for activities with harmful effects, the conventions on environmental protection either simply prohibited causing harm to the environment, or banned the emission of certain substances or the emission of such substances above a certain level. The last solution seemed to be a workable one, since it was possible to verify levels of emission in one way or another and thus to establish a breach of the obligation in question.

56. The question then arose of the sanction to be applied in the event of a breach. Compensation seemed to be out of the question in most cases. Whatever sanction might be imposed, any penal character it might have would not be easily accepted by States. He would therefore suggest that thresholds should be established, on the basis of the emission levels for certain substances laid down in existing conventions and protocols, above which the mechanisms of consultation provided for in the draft articles would come into play. The purpose of such consultations would be to enforce the régime of emissions through co-operation or some other method that did not amount to a penalty. He recognized, however, that the principle of consultations was also not easily accepted by States that did not fulfil their obligations. The publication of a report on a State which did not abide by the commitments it had entered into, for example with respect to human rights, was sometimes enough to make that State take the necessary measures.

57. In the report (A/CN.4/428 and Add.1, para. 84), he suggested that the concept of harm, as referred to in draft article 2, subparagraph (g), should be extended to provide that the harm affected the collective interests of the States parties to the future convention and occurred whenever quantities above certain stipulated levels were introduced into the environment of the global commons.

58. Lastly, he would point out, by way of a preliminary conclusion, that the principles governing the topic could apply, *mutatis mutandis*, to the global commons in most cases just by adding a reference to damage caused in areas beyond national jurisdictions, as provided for in certain conventions such as the 1982 United Nations Convention on the Law of the Sea and in Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).¹⁷ In that connection, the situation of the developing countries should not be forgotten. However the principles were interpreted, the special situation of those countries should be taken into account because they were not the ones that had contributed to the pollution of the atmosphere and to the greenhouse effect from which the Earth was now suffering.

59. He had some other ideas and preliminary conclusions concerning the application of no-fault liability in the case of harm to the global commons, but would

first like to compare them with the arguments that would be put forward in the coming debate. He would therefore make them known to the Commission at a later stage.

60. Mr. BEESLEY said that he would be grateful if the Special Rapporteur could in due course explain in more detail why he had undertaken a radical restructuring of his approach. For his own part, he preferred the earlier approach.

61. Mr. FRANCIS said that he was a little perturbed at the prospect of the Commission having to cover the range of issues that would arise in the context of the topic in the limited time available. In view of the importance of the topic, the Commission would not be able to do justice to the whole of the Special Rapporteur's sixth report (A/CN.4/428 and Add.1). He trusted that it would be possible to give due consideration to the first three chapters and that the Commission would not try to do too much in the time allotted.

Closure of the International Law Seminar

62. The CHAIRMAN, speaking on behalf of the Commission, said he hoped that the experience gained by the participants in the twenty-sixth session of the International Law Seminar would be of practical value to them in their future study or work and, in particular, that their three weeks' attendance at the Commission's plenary meetings would have given them some idea of the work and working of the Commission. He also hoped that, as had already occurred, some of the participants might one day be elected members of the Commission, a prestigious body with lofty ideals and noble functions that contributed to the rule of law in the international community.

63. No matter from which professional walk of life they came, the participants all worked in their own different ways for the common cause of promoting the rule of law in international relations. The Seminar would have provided participants from different countries and continents with an opportunity to form ties of friendship and the exchange of ideas would have promoted mutual understanding of and respect for the civilizations and cultures to which they belonged.

64. All in all, he hoped that, as a result of their experience, the participants would come to understand that the promotion of the rule of law in international relations, understanding of different value systems and respect for all peoples would contribute to greater fraternity throughout the world.

65. Mr. MARTENSON (Director-General of the United Nations Office at Geneva) said that, every year, the International Law Seminar, organized by the United Nations Office at Geneva in the framework of the International Law Commission, enabled young professors of international law, students and jurists at the start of their careers to further their knowledge, exchange points of view and become acquainted with developments in public international law.

66. Whether it was a matter of the quest for world peace, environmental protection, assistance to the millions of refugees fleeing war and famine, combating

¹⁷ 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.

diseases having a world-wide impact or, indeed, the action taken to ensure greater protection for human rights, there was one self-evident fact: if the efforts were to bear fruit, they must be world-wide. The only conceivable perspective was that of a world organization whose potential must be harnessed in the most effective way.

67. To borrow the words of an eminent internationalist, as long as the international community was composed of States, it was only through the exercise of their will, as expressed in treaties and agreements or formulated by an international authority deriving its powers from States, that a rule of law could become binding on individuals. As Professor Jessup had stated, there was one inescapable fact, namely that the whole organization of the modern world rested on the coexistence of States and there could be no major change other than through the action, positive or negative, of States.

68. Despite the slow changes now taking place in that area in terms of an increased role for individuals in international life, the fact remained that public international law continued to govern primarily relations between States: the topics dealt with by the Commission provided a good illustration of that fact.

69. The twenty-sixth session of the International Law Seminar which was drawing to a close had also enabled participants to become acquainted with the activities of UNHCR, ICRC and GATT, as well as with certain procedures established for the protection of human rights and with the provisions of the 1989 Convention on the Rights of the Child, all areas vital in the closing years of the century at a time when the upheavals in the world gave a new dimension to the perspective and potential of the United Nations.

70. Mrs. BLAKE, speaking on behalf of the participants in the twenty-sixth session of the International Law Seminar, said that the Seminar had enabled them to observe closely the work of the Commission and, through their attendance at the Commission's morning meetings and at afternoon workshops, had provided them with a perception of the process of elaborating international law. The participants had been impressed by the breadth of knowledge and range of experience of those who had addressed them. They had also broadened their own knowledge by discussing different approaches to various issues and by gaining an appreciation of the fact that their role as Government official, researcher, practitioner or teacher could affect the way in which they focused on any one issue.

71. The participants, who were convinced of the inestimable value of the Seminar, wished to thank the Commission for its continued emphasis on the Seminar's importance, the Governments without whose generosity the Seminar could not be held, the Director-General of the United Nations Office at Geneva, the staff of the Legal Liaison Office for their assistance, the Gilberto Amado Fund which had welcomed them on the opening day and, lastly, the Canton of Geneva for its hospitality.

The Director-General presented the participants with certificates attesting to their participation in the twenty-sixth session of the International Law Seminar.

The meeting rose at 12.25 p.m. to enable the Enlarged Bureau to meet.

2180th MEETING

Tuesday, 26 June 1990, at 10.00 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (concluded) (A/CN.4/401,¹ A/CN.4/424,² A/CN.4/L.383 and Add.1-3,³ A/CN.4/L.443, sect. G, ST/LEG/17)

[Agenda item 8]

FOURTH REPORT OF THE SPECIAL RAPPOREUR
(concluded)

ARTICLES 1 TO 11⁴ (concluded)

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), summing up the discussion, said that he was well satisfied with the debate that had taken place on his fourth report (A/CN.4/424) and welcomed the constructive proposals and ideas that had been put forward. All members of the Commission who had spoken in the debate, apart from one, were in general agreement with the fourth report, as well as with his second report,⁵ and with the approach he had adopted, which had been approved by the Commission at its thirty-ninth session, and by the General Assembly at its forty-second session, in 1987.

2. He wished first to make some general remarks with a view to clarifying certain points made during the debate. In the first place, the topics considered by the Commission were not invented by special rapporteurs, nor, in the majority of cases, by the Commission itself:

¹ Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

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

³ Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

⁴ For the texts, see 2176th meeting, para. 1.

⁵ *Yearbook* . . . 1985, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1.

they were placed before the Commission at the express request of the General Assembly. Moreover, a report by a special rapporteur was not a piece of school homework submitted to a teacher for correction, but a working document of the Commission—just as the special rapporteur was its working tool—designed to facilitate its work. Nor was the special rapporteur alone responsible for the topic: the Commission as a whole was accountable to the General Assembly and what was submitted to the General Assembly were the results achieved by the Commission, not the reports of the special rapporteur. Each and every member of the Commission therefore had a right and a duty to express his views on a special rapporteur's proposals and to amend, supplement or improve them, thus enabling the Commission to secure the benefit of his wisdom and knowledge.

3. It had been said that his reasoning was elliptical. Fortunately, every human being had his own way of reasoning; were it otherwise, human relations would be very monotonous and there would be no need for such bodies as the Commission. Not even the harshest dictatorship had succeeded in controlling men's minds. No special rapporteur would wish to impose his approach to a particular problem, and still less his way of reasoning and his conclusions, on the other members of the Commission. The work of the Commission was, by its very nature, teamwork, and it was for each member to make his own contribution to the joint effort.

4. Notwithstanding certain doubts concerning the usefulness of continued work on the topic, the majority of members who had spoken in the discussion believed that it was both useful and important. As had rightly been said, it was not a question of whether study of the topic was of any use but a question of completing work which had been assigned to the Commission by the General Assembly and had been started several years earlier. The Commission could not simply tell the General Assembly it had failed in its task, without even attempting to fulfil its mandate. In that connection, he noted that Mr. Beesley (2179th meeting) had made some valuable suggestions concerning the kinds of norms that should be taken into account.

5. It had been suggested that a working group should be set up to determine the scope of the topic. That had in fact already been done in the initial stages, and on the basis of the group's conclusions the Commission had proceeded, with the General Assembly's approval, to consider the topic.

6. It had also been said that States would not adopt the Commission's proposals on the topic. It was a valid remark, for obviously nothing could be achieved without the political will of States. That applied, however, not only to the present topic but to all the topics before the Commission. One member, to underline his doubts, had referred to the importance States might attach to a framework agreement on the law of the non-navigational uses of international water-courses. While it was highly probable that such an agreement would encounter opposition, as, for instance, the draft articles on most-favoured-nation clauses and the draft articles on the status of the diplomatic courier

and the diplomatic bag not accompanied by diplomatic courier had done, he would not himself go so far as to say that work on the topic of international water-courses was pointless. The wealth of material prepared by the present and previous special rapporteurs for that topic could be of great use in preparing a more realistic draft, should it be decided to incorporate all matters pertaining to the legal aspects of the environment in one topic and to call it by its real name. Any topic was useful in so far as States had an interest in it and the political will to accept the rules proposed.

7. He had been charged with using somewhat exaggerated language, but would point out that the formulations proposed were embodied in many international instruments. Furthermore, he saw no contradiction between the concession or granting of privileges and immunities and the fact that international organizations could demand them. Indeed, once privileges and immunities had been granted under an appropriate legal instrument, any right could be demanded. It was inconceivable that a right should be granted yet not be exercisable.

8. There had been some comment to the effect that account had perhaps not been taken of his second report, in which the legal personality and legal capacity of international organizations had been discussed in more detail and reference had been made to headquarters agreements, particularly those concluded with the Swiss Government. He had, however, pointed out at the outset of the debate (2176th meeting) that, in considering the fourth report, the Commission should also bear the second report in mind.

9. The majority of members who had spoken had expressed general agreement with the draft articles submitted, subject to certain changes. He had no objection to those proposals, which, together with the comments made during the discussion, would be very useful when the Drafting Committee came to finalize the articles.

10. The word "universal" had been used in reference to international organizations in order to draw a distinction between intergovernmental organizations—which should perhaps more appropriately be referred to as organizations with a universal vocation—and regional organizations or organizations set up by specific groups of States, such as OPEC. The word "office" (art. 1, para. 1 (e) (i)), to which one member had referred, meant any premises used by an international organization to perform its functions and was used in the sense in which the term "premises" was defined in article 1 (i) of the 1961 Vienna Convention on Diplomatic Relations. The same was to be inferred, in the case of the United Nations and other international organizations, from Articles 104 and 105 of the Charter of the United Nations, as well as from the relevant provisions of the headquarters agreements or constituent instruments of various intergovernmental organizations.

11. The topic was growing in importance. In that connection, the reference made to the recent Security Council meeting held in Geneva, though perhaps falling more within the context of other legal instruments, was none the less valid inasmuch as it demonstrated

that, even in cases covered by conventions or headquarters agreements, some States might fail to comply with their obligations.

12. He would suggest that the draft articles be referred, together with members' comments and proposals, to the Drafting Committee for further consideration. He wished to assure members that their comments had been greatly appreciated and would serve as a guide in his further work on the topic.

13. Mr. CALERO RODRIGUES said that he had no objection to the Special Rapporteur's proposal, but felt bound to place on record his view that it was not the proper course at the present stage. A question that had wider implications was involved and it did not concern the topic under consideration alone. The question was: should the Commission refer draft articles to the Drafting Committee when it knew that the articles would not be examined by the Committee during the term of office of the Commission's current members? In view of the fact that the new members would not have had an opportunity to study the draft articles, it would be preferable for the Commission in its new membership to take the decision to refer the articles to the Drafting Committee.

14. Mr. THIAM said that, while he understood Mr. Calero Rodrigues's concern, it would not, in his opinion, be a good idea to divide the Commission's term of office into two periods, as it were, one during which draft articles could be referred to the Drafting Committee and one during which they could not. It was not a method of which he could approve.

15. After a procedural discussion in which Mr. DÍAZ GONZÁLEZ (Special Rapporteur), Mr. AL-QAYSI, Mr. FRANCIS, Mr. BARBOZA, Mr. EIRIKSSON, Mr. BEESLEY, Mr. McCAFFREY, Mr. TOMUSCHAT, Mr. GRAEFRATH, Mr. PAWLAK, Mr. ILLUECA, Mr. MAHIOU and Mr. SOLARI TUDELA took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 1 to 11 to the Drafting Committee.

It was so agreed.

The meeting rose at 11.10 a.m. to enable the Planning Group to meet.

2181st MEETING

Wednesday, 27 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo,

Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

ARTICLES 1 TO 33⁵ (*continued*)

1. Mr. CALERO RODRIGUES said that his comments would be of a preliminary nature, even though he was well aware that he would have no opportunity at the current session to come back to the topic. Because of its complexity and density, the Special Rapporteur's excellent sixth report (A/CN.4/428 and Add.1) was one of those which could not be considered in their entirety the year they were submitted. He regretted not having had the time to give it the detailed consideration it required.

2. The Special Rapporteur had adopted a constructive and very flexible method of work which enabled him to amend the draft articles in the light of the comments made in the Commission. That flexibility nevertheless had one drawback: the introduction of new concepts and amendments seemed to call into question the purpose of the draft, which had often been discussed in the Commission, most recently at the thirty-ninth session, in 1987. On that occasion, he himself had stated:

... The main purpose of the draft articles should therefore be to delimit the legal consequences of harm caused in the absence of wrongfulness. It would also be useful to include in the draft rules of prevention, which ... would be based on the principle of co-operation. Nevertheless, the essence of the articles should be to establish the legal consequences of transboundary damage.⁶

He was no longer sure, however, that the draft articles were still being developed from that angle, especially when he considered section B of the introduction to the sixth report, entitled "Activities involving risk and activities with harmful effects."

3. Although the Special Rapporteur stated in the report that "the question whether activities involving risk and activities with harmful effects should be considered separately has already been dealt with" (*ibid.*,

* Resumed from the 2179th meeting.

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

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

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

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

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

⁶ *Yearbook* ... 1987, vol. I, p. 156, 2019th meeting, para. 8.

para. 3), he discussed it again in no fewer than 12 paragraphs. The very fact that the question was reconsidered at such length was in itself an indication of uncertainty on the part of the Commission. As long as there was any uncertainty, the whole exercise would, despite the progress suggested by the formulation of 33 articles, be on shaky ground. After an extensive analysis, the Special Rapporteur appeared to conclude that, as far as liability proper was concerned, there should be no difference of treatment between the two types of activity. He could not but agree with that view: if harm had occurred, an activity involving risk had become an activity with harmful effects. On the other hand, he found it difficult to see how activities which were classified as activities with harmful effects could be subject to measures of prevention. According to the definition proposed by the Special Rapporteur, activities with harmful effects were "activities . . . which cause transboundary harm in the course of their normal operation" (art. 2, subpara. (f)). If they caused harm—and that was their main characteristic—the harm could not be prevented from having been caused. The harm could be prevented only before it had actually occurred; but, in that case, the activity in question was one which might produce harm and such an activity, at that particular moment, had to be regarded as an activity involving risk, not as an activity with harmful effects.

4. In his view, the Commission should not go into that question any more deeply, even though it could do so, theoretically and semantically. Instead, it should be pragmatic and simply try to formulate rules of prevention to be applied to activities involving risk—risk of harm, of course—as well as rules of liability to compensate for harm caused by activities with harmful effects, whether or not such activities might have been regarded, before the harm had occurred, as activities involving risk.

5. With regard to activities involving risk, he recalled that, in 1987, when the Commission had discussed whether a list of such activities should be drawn up, he had said that it should not. In his opinion: (a) in order to be meaningful, the articles had to be general in nature, and a list could only be contrary to that aim; (b) the activities most likely to be included in such a list, such as nuclear activities, marine pollution, accidents at sea and space activities, should be, or already were, covered in specific instruments; (c) in any event, it would be necessary to define the relationship between the present articles and those specific instruments, as the Special Rapporteur had done in draft article 4.

6. He had thought that the idea of a list had been set aside, but it had come up again now that the Special Rapporteur had introduced the new concept of "dangerous substances". That concept came from the Council of Europe's draft rules on compensation for damage caused to the environment (see A/CN.4/428 and Add.1, footnote 8), although it had already been used in other instruments. The Special Rapporteur had defined the expression in draft article 2, subparagraph (b), "in order to visualize more clearly how the system of a list of dangerous substances would operate" (*ibid.*,

para. 18). He (Mr. Calero Rodrigues) assumed that such a list was intended to contribute to the definition of activities involving risk, but he did not think that it would be of much help, for two reasons. First, it would make it more difficult to classify an activity which did not use a substance included in the list as an activity involving risk; and, secondly, as the Special Rapporteur himself recognized, "if substances are included that cast suspicion on the activities in which they are used, it remains to be seen whether the risk of *transboundary* harm is real" (*ibid.*, para. 17). In fact, an activity which used a dangerous substance was not necessarily an activity involving risk. He therefore believed that the preparation, with the assistance of experts, of a list of "dangerous substances" accompanied by annexes would not be advisable. Such an exercise would involve considerable effort and the resulting list would serve little if any purpose.

7. The concept of "dangerous substances" was already playing havoc with the balance of the proposed articles, particularly article 2, which now included 14 definitions and might cause the Drafting Committee and the Commission a number of thorny problems.

8. The definition of the expression "activities involving risk" in draft article 2, subparagraph (a), was not based on any independent, self-contained concept in describing the activities in question. It relied entirely on three separate concepts: "dangerous substances", "technologies that produce hazardous radiation" and "dangerous genetically altered organisms and dangerous micro-organisms". Any activity which was not related to one of those three elements, even if, objectively speaking, it might be the cause of transboundary harm—for instance, the construction or operation of a dam—would apparently be excluded from the definition and would therefore not be considered an activity involving risk. Moreover, the expressions "dangerous substances", "dangerous genetically altered organisms" and "dangerous micro-organisms" used in subparagraph (a) had to be defined separately, in subparagraphs (b), (c) and (d), respectively; and subparagraphs (b) and (c) had to be expanded on in annexes.

9. The use in a definition of expressions which had to be defined separately did not stop there. Subparagraph (f), which defined the expression "activities with harmful effects", used the expression "transboundary harm", which was defined in subparagraph (g), which contained the expression "[appreciable] [significant] harm", which in turn was defined in subparagraph (h). It was easy to imagine the problems the Drafting Committee would face when it considered the proposed definitions, especially the last sentence of subparagraph (g), subparagraph (k), according to which a "continuous process" could be an "incident", and subparagraph (l), which provided that "restorative measures" were measures to replace "natural resources" and was far too restrictive. The fact that subparagraphs (g) and (l) were based on the Council of Europe's draft rules (see para. 6 above) did not make them any more acceptable. As to subparagraph (k), the Council of Europe's text, quoted in the report (A/CN.4/428 and Add.1, para. 24 *in fine*), was better,

since it referred to “any sudden or continuous occurrence”.

10. Lastly, subparagraph (*m*), on preventive measures, which must be read in conjunction with subparagraph (*l*) on restorative measures, called for a number of comments. According to subparagraph (*m*), “preventive measures” meant measures to prevent the occurrence of an incident or harm and measures intended to contain or minimize the harmful effects of an incident once it had occurred. He had never cared for the concept of prevention after the event, first introduced by the previous Special Rapporteur, Mr. Quentin-Baxter, and now used by the current Special Rapporteur. It seemed to be a contradiction in terms: prevention, which by definition preceded the event, was not possible after the event had occurred. That appeared, however, to be a question of semantics because both Special Rapporteurs had included in the idea of prevention two different concepts, which could be seen in subparagraph (*m*), namely measures to prevent an occurrence and measures to prevent the harmful effects of the occurrence. If that was the case, the distinction should be made clear. For the first type of measures, the provision should not speak of “measures to prevent the occurrence of an incident or harm”, but only of “measures to prevent an incident”; as to the second type of measures, the text should read: “measures to avoid, contain or minimize the harmful effects of an incident once it has occurred”. He was deliberately using the terms employed in subparagraph (*m*), but the text could also be reworded. To make the distinction even clearer, the provision might contain two separate terms to designate the two sets of measures. The question was not purely one of semantics: agreement on precise terminology would be most useful in clarifying the concepts embodied in draft article 8 (Prevention) and in the whole of chapter III of the draft.

11. With regard to chapter II of the draft, devoted to principles and consisting of articles 6 to 10, the only changes made in the sixth report to the texts submitted in the fifth report (A/CN.4/423) were of a drafting nature and the only real innovation was the introduction, in a new article 10, of the principle of non-discrimination. In annex I of the draft articles on the law of the non-navigational uses of international watercourses, submitted in his sixth report on that topic,⁷ Mr. McCaffrey had also proposed provisions on non-discrimination, drawing inspiration from the 1982 United Nations Convention on the Law of the Sea and the 1974 Convention between Denmark, Finland, Norway and Sweden on the protection of the environment (see A/CN.4/384, annex I). In the present case, Mr. Barboza had drawn on texts prepared by the Experts Group on Environmental Law of the World Commission on Environment and Development (see A/CN.4/428 and Add.1, paras. 29-30).

12. The two Special Rapporteurs had produced texts that were similar in content, but quite different in form. Draft article 10 submitted by Mr. Barboza contained two sentences, each of which aimed to prevent a form

of discrimination. Mr. McCaffrey had also provided for those two aspects, but in several provisions, which, as he (Mr. Calero Rodrigues) pointed out during their consideration, could be grouped. The text proposed by Mr. Barboza was thus more in keeping with his expectations, since he was in favour, first, of a provision stating that harmful effects arising in the territory of another State must be treated in the same way as those arising in the territory of the State of origin and, secondly, of extending to foreign victims the same access to the courts and the same remedies as those enjoyed by the nationals of the State of origin. Although article 10 was not entirely satisfactory and must be substantially amended, the general ideas on which it was based and which were also contained in the provisions proposed by Mr. McCaffrey were entirely valid.

13. Turning to chapter III of the draft, devoted to prevention and consisting of articles 11 to 20, he noted with satisfaction that the Special Rapporteur had chosen to simplify the procedure for co-operation and prevention in a number of ways. The principle had also been introduced that failure on the part of the State of origin to comply with the obligations enunciated did not constitute grounds for an affected State to institute proceedings (art. 18). He fully supported the idea that failure to comply with procedural obligations did not constitute grounds for instituting proceedings, but he wondered whether the Special Rapporteur had not gone a little too far, since the obligations referred to in draft article 18 were the “foregoing” obligations. In the articles preceding that provision, the distinction between procedural obligations and substantive obligations had not been made clear. He welcomed the simplification of procedures, but, unfortunately, they had also been so diluted as to make them indistinguishable from substantive obligations. That was the case in draft article 11 (Assessment, notification and information): notification was a procedural obligation, but information might be regarded as a substantive obligation. The same applied to draft article 14 (Consultations): an obligation to consult in order to establish a régime for a given activity and the obligation to hold joint meetings for that purpose might be regarded as procedural obligations, whereas a general obligation to consult might be considered a substantive obligation.

14. He therefore took the view that obligations that were clearly procedural should be clearly identified, because failure to comply with them would not have legal consequences. On the other hand, substantive obligations would give rise to the right to institute proceedings. Thus, if the system envisaged was to be viable, the obligations should not be too stringent: failure to comply with them would have legal consequences. For example, draft article 16 should be entirely redrafted so as to indicate only the essentials of the obligation to take unilateral preventive measures.

15. With regard to the role that the relevant international organizations might be called upon to play, he was not satisfied with the wording of paragraph 2 of draft article 11 or of draft article 12. Article 11, paragraph 2, provided that, if the State of origin was unable to determine precisely which States would be

⁷ *Yearbook . . . 1990*, vol. II (Part One), pp. 58 *et seq.*, document A/CN.4/427 and Add.1.

affected by transboundary harm, an international organization with competence in that area was also to be notified; but he doubted that that was an obligation. Article 12 stated that any international organization that intervened was to participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter was regulated therein, and, if it was not, the organization was to use its good offices to foster co-operation between the parties. There again, he was not sure about the possible role being attributed to international organizations.

16. He had considerable doubts about the need for draft article 17 and also about the justification for the very concept of a "balance of interests", which, although it might prove useful from the theoretical point of view, did not deserve a place in the draft articles from the practical point of view. Furthermore, in the sixth report, the Special Rapporteur himself confessed to "a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms, and because the factors involved in this kind of negotiation are too varied to be forced into a narrow conceptual framework" (A/CN.4/428 and Add.1, para. 39).

17. Lastly, the Special Rapporteur had been too cautious with the wording of draft article 20. Prohibiting an activity was a serious matter, but, when it was obvious that an activity was about to cause or was causing considerable harm, the activity became wrongful by that very fact and its prohibition should unquestionably be stated in the form of a rule. It might even be possible to define harmful effects by choosing a ceiling that was not too low. However, the only prohibition provided for in article 20 was the refusal to authorize the activity in question, leaving the operator complete discretion for proposing less harmful alternatives.

18. Mr. BEESLEY said that, although he was not yet prepared to take the floor, he fully endorsed the comments made by Mr. Calero Rodrigues.

19. It seemed to him that the new articles proposed by the Special Rapporteur, despite being based on a variety of opinions, reflected a retreat on a number of points and a departure on others at a time when the Commission was making definite progress in its pioneering work. The approach appeared to be so narrow as to run counter to the objective sought. He was particularly troubled by the emphasis placed on dangerous substances, some of which were already the subject of instruments in force, and above all by the shifting away from harm to *ex post facto* risk as the basis for liability.

The meeting rose at 10.45 a.m. to enable the Planning Group to meet.

2182nd MEETING

Thursday, 28 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 33⁵ (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he wished to clarify certain points raised in the statements made at the previous meeting. In the first place, he wished to reassure Mr. Beesley that the introduction of the concept of "dangerous substances" did not mean any radical departure from the earlier approach. In fact, the approach was still the same: provision was being made for activities which had harmful effects.

2. The concept of "dangerous substances" helped to make the key notion of "appreciable" or "significant" risk more precise. It was in the nature of an alarm signal for any operator using such substances, and for his Government: both knew that certain obligations were incumbent upon them and that certain precautions were in order. The introduction of that concept thus eliminated the uncertainties involved in one of the two aspects of "appreciable" risk: that of its being "foreseeable" or "appreciable at first sight" after a simple examination.

3. Mr. Calero Rodrigues had said that the concept of "dangerous substances" was unduly narrow, citing the example of a dam: water was in itself not a dangerous substance but could cause transboundary harm. Water could thus be considered dangerous in certain quantities or concentrations or in certain situations, "without prejudice to the provisions of subparagraph

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

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

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

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

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

(a)", as stated in draft article 2, subparagraph (b). In his sixth report (A/CN.4/428 and Add.1, footnote 34), a somewhat similar example was mentioned: crude oil was not normally a dangerous substance, but it became so if 200,000 tons of it were carried in a ship. That point should perhaps be made clearer in the text of article 2.

4. The most important issue touched on by Mr. Calero Rodrigues was, however, prevention. The text of subparagraph (m) of article 2 did not exactly reflect the intention of the draft, which was to refer to measures to prevent the occurrence of an incident and measures to contain or minimize the harmful effects of an incident once it had occurred. Both types of measures were preventive: the first to prevent the incident and the second to prevent the harm from occurring, totally or partly. Containing, minimizing or mitigating were equivalent to preventing a certain amount of harm which would have occurred without those measures. The word "prevention" had its etymological origin in the Latin *praevenire*, namely "to come before" the incident, or before the harm. It should be remembered that there might be a lapse of time between the incident and the transboundary harm. The adoption of certain precautions made the effects of the activity less harmful. Another example was that of a national river becoming heavily polluted as a result of activities with harmful effects, i.e. activities which caused harm in the course of their normal operation. That pollution threatened to contaminate ground water shared with a neighbouring country. Measures to prevent the pollution from extending to the ground water thus constituted preventive measures designed to avoid transboundary harm. That aspect of prevention was indispensable and was included in all recent conventions on specific activities.

5. Consequently, the concept of harm needed to be broadened so as to include the cost of such preventive measures, whether taken by the affected State or by a third party. Some conventions included any further harm caused by such measures, and the present draft had followed suit (art. 2 (g)). Such further damage did arise, for instance when a State was obliged to clear part of a forest in its territory so as to avoid the spread of a fire produced by an activity which created a risk of causing transboundary harm in a neighbouring country. The damage in question should be compensated for, since it had been caused by a preventive measure.

6. Another very important point raised by Mr. Calero Rodrigues was that substantive (i.e. non-procedural) obligations of prevention should give rise to a right of action in favour of the affected State. In reply, he wished to make it clear that there was no intention in the draft articles of attaching a right of action to any obligation of prevention. He might perhaps have misinterpreted the wish of the majority of the Commission, but had done so for a very good reason: he had counted Mr. Calero Rodrigues as one of the members who did not wish any right of action to arise from the obligation to take preventive measures. As Mr. Calero Rodrigues had said at the thirty-ninth session, in 1987, and repeated at the present session (2181st meeting, para. 2), it would be useful to include rules of preven-

tion in the draft and they could be based on the principle of co-operation. Co-operation could hardly be said to give rise to any "hard" obligations. That position regarding the right of action was expressed in section 2, paragraph 8, of the schematic outline submitted by the previous Special Rapporteur, Mr. Quentin-Baxter.

7. In the report he pointed out that "the affected State will be entitled to institute proceedings only if harm arises" and that "the mechanisms of liability are activated only if the harm can be causally attributed to the activity in question" (A/CN.4/428 and Add.1, para. 40). As Special Rapporteur, he was prepared to follow the opinion of the majority of members on that capital issue, but the question whether a right of action arose from the obligation to take preventive measures had to be clearly stated. That question had led to lengthy discussion in the Commission; the main obstacle was the risk of invading the area of responsibility for internationally wrongful acts and thereby going outside the scope of the present topic.

8. Mr. FRANCIS said that he welcomed the Special Rapporteur's sixth report (A/CN.4/428 and Add.1), which contained valuable suggestions. Paragraph 1 provided the key to the contents of the report, which brought up to date the draft articles submitted at the previous session in the light of the discussion and the Special Rapporteur's own reflections. The Special Rapporteur had introduced the concept of "dangerous substances" and dangerous activities in draft article 2, on the use of terms, as well as the principle of non-discrimination in the new draft article 10.

9. The important question had been raised whether the notion of dangerous activities and that of dangerous substances should be made the subject of mandatory provisions. It was a difficult issue and he tended to agree with the explanation given by the Special Rapporteur in terms of scope and the degree of risk. In any event, the question properly fell within the purview of the topic and, taking the matter somewhat further, he would suggest that the Commission would have to produce a more detailed formulation for the subject of prevention, with special reference to dangerous activities.

10. The Special Rapporteur had spoken of water as a harmless liquid but one which could be destructive and lethal in large quantities or concentrations, or when it was polluted. Preventive measures were thus called for in appropriate circumstances. In that connection, he recalled that article 23 (Water-related dangers and emergency situations) of the draft articles on the law of the non-navigational uses of international watercourses had been referred to the Drafting Committee at the Commission's previous session.⁶ The Special Rapporteur had been criticized for leaning too heavily on the draft articles concerning international watercourses. For his part, he felt that, on the issue of dangerous activities and dangerous substances, the Special Rapporteur and the Commission might well have to fall back on the prevention provisions in those very articles.

⁶ For the text, see *Yearbook . . . 1989*, vol. II (Part Two), p. 125, para. 641.

At the same time, there would be a consequential need for a protection régime, both for the affected State and for the State of origin.

11. It had been asked whether the provisions relating to dangerous activities and dangerous substances should be mandatory in character. In order to reply to the question, he thought that a distinction had to be drawn between two types of situations: bilateral situations and broader situations, the latter being the subject of chapter VI of the report, dealing with liability for harm caused to the "global commons". The answer with regard to bilateral situations depended on what was meant by "mandatory". The obligations and régime of prevention established should be no less obligatory than the other duties imposed by the draft articles. The obligation of prevention should entail norms no higher than the other obligations, so that the situations which arose could be settled by such means as conciliation and negotiation. In the broader context of the environment, however, there was no choice other than to make the provisions mandatory, for article 19 of part 1 of the draft articles on State responsibility⁷ was quite specific: serious breaches would be designated as crimes and other breaches as delicts.

12. As for the draft articles themselves, he agreed, by and large, with the formulation of subparagraph (a) of article 2, but a definition of the term "risk" could be inserted to precede that of "activities involving risk". It would be possible to draw on the language used in the sixth report and "risk" could be defined in terms of the inherent danger of the substance or the activity concerned, combined with the foreseeability of harm eventually occurring. An operator, in weighing the costs involved, might find it more economical to pay reparation rather than keep to an elaborate prevention régime. That aspect of the matter underlined the advisability of including the idea of foreseeability in the draft.

13. The term "incident" was defined in subparagraph (k) of article 2, but did that term also cover a "situation"? He was not quite sure. He had on several occasions urged that a definition of the term "situation" should be included in the article on the use of terms, and he would welcome the Special Rapporteur's views on the matter.

14. The Special Rapporteur's explanations regarding the expression "preventive measures", in subparagraph (m), were acceptable, for preventive measures were those intended to avoid harm or to lessen or minimize the probability of an extension of the injury. Therefore it was right to take account of preventive measures both before and after the event, so as to cover the idea of avoiding further harm. There was really no legal objection to that drafting technique.

15. He agreed with those members of the Commission who had suggested that the provisions on prevention in draft article 8 should be strengthened. In addition, the second sentence of the article should be redrafted and made into a separate paragraph.

16. The proviso "To the extent compatible with the present articles", in draft article 9, made for some weakness and offered far too much latitude for the State of origin. Hence it should be deleted and perhaps replaced by a formula such as: "In accordance with the present articles". The words "in principle", in the second sentence, should be deleted. He welcomed the introduction of the new draft article 10, on non-discrimination.

17. Article 17 definitely had a place in the draft, considering that the Commission was legislating for developing as well as developed States. The type of information mentioned in the article would be of use to legal advisers in their respective ministries. However, the words "those States may", in the introductory clause, could be qualified by an expression such as: "subject to the requirements of individual situations".

18. Mr. Calero Rodrigues (2181st meeting) had been right to say that draft article 18 should be amended, for in its present formulation it detracted from the force of article 8. Again, Mr. Calero Rodrigues had properly pointed out that, in the situation covered by draft article 20, a project should not go ahead. That should be reflected in the wording of the article, especially since the draft now included the idea of dangerous substances.

19. Mr. RAZAFINDRALAMBO said that he welcomed the efforts by the Special Rapporteur, in his sixth report (A/CN.4/428 and Add.1), to reflect the views expressed in the Commission and in the Sixth Committee of the General Assembly. Because of the extreme complexity of the topic, the Commission must act speedily to fulfil its mandate from the General Assembly, and complete its work on the subject in advance of other bodies with similar objectives. He had some reservations about the Special Rapporteur's approach, but would confine his remarks to the first three chapters of the report, leaving aside the question of liability.

20. The Special Rapporteur now proposed a reformulation of some of the first 10 draft articles, which had been referred to the Drafting Committee in 1988.⁸ Since the Committee had not yet considered them, there was no objection to the Commission resuming its discussion of those articles within the confines of the substantive changes suggested. The Commission had regularly adopted such a practice and, indeed, special rapporteurs had often revised texts already referred to the Drafting Committee. Although the practice risked reopening the debate in the Commission, it did facilitate the drafting of texts widely acceptable both to the Commission and to the Sixth Committee.

21. The Special Rapporteur had made substantive changes in draft article 2, on the use of terms, and had also introduced a new article 10, on non-discrimination. An attempt was also made in the introduction to the report to elucidate the concepts of "activities involving risk" and "activities with harmful effects". Personally, he supported the proposal to treat the consequences of the two kinds of activities in the same way, and to cover them by the same legal régime. He

⁷ *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

⁸ See *Yearbook* . . . 1988, vol. II (Part Two), p. 9, para. 22.

also agreed with the comment in the report (*ibid.*, para. 12) that the main difference between the two types of activities lay in the sphere of prevention: there were two types of preventive measures, those intended to prevent an incident from occurring, and those intended to contain or minimize the effects of an incident once it had occurred. However, it was difficult to envisage preventive measures *ex post facto*, and it might be better to speak simply of “measures intended to contain or minimize the effects of an incident”. It was when an incident occurred that the two types of activities did not seem to differ markedly.

22. He endorsed the general duty to co-operate imposed on States in both instances, a duty which should be acceptable both to the State of origin and to the affected State. In draft articles 11, 12, 17 (*l*), 19 and 22, international organizations were given a dominant role in fulfilling that obligation. It was a welcome move, for the technical assistance of international organizations was particularly desirable for developing countries so that they could negotiate on an equal footing with States of origin, which were usually industrialized countries. The draft should perhaps include a special article, based on article 202 of the 1982 United Nations Convention on the Law of the Sea, dealing with assistance to developing States in the areas of science and technology. Similarly, the balance of interests would best be served by including a further provision, based on article 203 of that Convention, for preferential treatment for developing countries in the allocation of funds and technical assistance by international organizations, and in the use of their specialized services.

23. In response to the suggestions made, the Special Rapporteur had included a list of activities in article 2. It was not confined, however, to technical operations, for an indicative list of dangerous substances and organisms was also incorporated. If the Special Rapporteur's intention was to supply a more complete list in the form of annexes, it was difficult to understand the purpose of the list in article 2. The best course would be to retain the definition of “activities involving risk”, in subparagraph (*a*), and to add, as a subparagraph (*a*) (*iv*), the legal criterion of appreciable risk of harm to persons found in subparagraph (*b*), along with the definition of the term “dangerous” given at the end of subparagraph (*b*). The remainder of subparagraph (*b*), together with subparagraphs (*c*) and (*d*), should be presented in the form of detailed annexes prepared, with expert advice, either by the Special Rapporteur himself or by an international codification conference.

24. The “cost of preventive measures” should indeed be included in subparagraph (*g*), but it should perhaps be qualified as “reasonable”, as had been done in recent conventions, such as those mentioned in the report (*ibid.*, para. 22). The meaning of the phrase “any further harm to which such measures may give rise” was not clear and he would be grateful for some explanation from the Special Rapporteur.

25. The very broad definition of the term “incident” in subparagraph (*k*) did not square with the language

used in the report (*ibid.*, para. 12), where the word “incident” was used in the context of prevention and the word “accident” to denote the event which had caused the harm. The term “incident” was used in the 1954 *Atomic Energy Act* of the United States of America, in connection with nuclear reactors, and similar usage was found in Council of Europe documents. However, in multilateral treaties such as the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships (*ibid.*, footnote 20), the term *accident* was preferred in French. It would perhaps be best to reserve the term “incident” for the event involving the risk of harm, and the word “accident” for the event which actually caused it. Subparagraph (*m*) could be amended accordingly.

26. He would prefer the emphasis in draft article 7 to be placed on the need for technical assistance to developing countries from the relevant international organizations. The principle of non-discrimination, enunciated in the new draft article 10, was entirely acceptable and was already recognized in practice, for instance in the judgment of the United States Supreme Court in *Kansas v. Colorado* (1907) (see A/CN.4/384, para. 226 *in fine*).

27. Chapter III of the draft, which set out the obligations imposed on States, should be entitled “Preventive measures” rather than “Prevention”, to distinguish it from the principle of prevention covered by draft article 8. The procedures listed in chapter III constituted the minimum régime acceptable to States in the context of a duty to co-operate, and he could not fail to endorse the principle that international organizations should be involved, subject to the inclusion of a separate provision for preferential treatment to developing countries.

28. Draft article 13 should be placed immediately after draft article 11. In addition, it should perhaps allow for the affected State to request postponement of the activity in question until a final decision was taken. The various unilateral preventive measures proposed in draft article 16 were too complex, and it would be better to set them out in separate paragraphs.

29. He had no objection to the principle contained in draft article 17, and indeed State practice now reflected the notion of a balance of interests in matters relating to liability. In the report (A/CN.4/428 and Add.1, para. 39), the Special Rapporteur referred to the usefulness of providing some guidelines for States concerning the factors to be taken into consideration when negotiating a régime. Assistance from international organizations, referred to in subparagraph (*l*), should be afforded not only to the State of origin, but also to the affected State, for under article 13 the latter could take the initiative in requiring the State of origin to take preventive measures against transboundary harm, or to reduce the risk of such harm.

30. The wording of draft article 18 was unclear and only from the report (*ibid.*, para. 40) was it plain that the words “foregoing obligations” referred to the procedural obligations set out in chapter III of the draft. If liability was incurred only when a causal link

was established between the harm and the activity, no special provision was needed to that effect.

31. Draft article 19 should be placed immediately after article 11, and draft article 15, on protection of national security or industrial secrets, should appear at the end of chapter III.

32. Lastly, the problems covered in the report were not new, yet the Special Rapporteur had made significant progress in the preparation of draft articles on the topic.

33. Mr. HAYES said that the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) was very stimulating, but he ventured to disagree with a number of the proposals contained therein. The respective roles of risk and harm as indicated in the Special Rapporteur's fourth report⁹ had been discussed by the Commission at its fortieth session, in 1988, and by the Sixth Committee of the General Assembly the same year, and the trend of opinion in both had indicated that the role given to harm was too narrow. The understanding during the debate in 1989 on the fifth report (A/CN.4/423), which had responded to that trend, was that the topic should encompass activities involving risk of harm and activities actually causing harm. The former called for measures of prevention and, if such measures were not taken or proved to be inadequate, the activity became an activity causing harm. The same category of activities also included activities which resulted in harm where no risk of harm had been apparent. In all cases, the remedy for activities causing harm would be reparation.

34. The sixth report seemed to take a different approach. Activity causing harm appeared to have a different meaning, i.e. an activity in which harm was seen as an inevitable or virtually inevitable consequence from the beginning and which could be undertaken and continued on the basis that measures would be taken to reduce the harm and compensation would be paid for such harm as did occur. That was the meaning which emerged from paragraphs 12 and 13 of the sixth report (A/CN.4/428 and Add.1), and from the definition of the expression "activities with harmful effects" in subparagraph (f) of draft article 2. In that provision, the words "in the course of their normal operation" had been substituted for the previous unsatisfactory expression "throughout the process",¹⁰ giving the expression an entirely different meaning. If the definition of activities with harmful effects failed to include activities which caused harm even though the risk of harm had not been anticipated, the scope of the topic would be at least as narrow as that rejected by the Commission and the Sixth Committee in 1988.

35. Another narrowing element was the revision of the definition of activities involving risk (art. 2, subpara. (a)). The Commission had previously dismissed the idea of a list of activities involving risk, believing it would be too restrictive for a general convention. Yet the Special Rapporteur now proposed to add to the

definition of activities involving risk categories of hazardous entities, as well as what was, in effect, a non-exhaustive list of dangerous substances.

36. The overall effect was to reduce the scope of the topic drastically, through an excessively restrictive definition of the two kinds of activities it covered. The narrowing of the definition of activities causing harm was so disastrous that he could not believe it was deliberate, and he would welcome the Special Rapporteur's assurances on that point. Such treatment of the topic would be a poor response to the principle *sic utere tuo ut alienum non laedas* from which it sprang, or indeed to the principle, previously approved, that the innocent victim of injurious transboundary effects should not be left to bear his loss.

37. Accordingly, he could not accept the definitions given in subparagraphs (a) to (d) and (f) of the new draft article 2. Subparagraph (h), defining "appreciable" or "significant" harm, omitted the element of perceptibility. In the report (A/CN.4/428 and Add.1, para. 16), the Special Rapporteur explained that that was justified by the list of dangerous substances. If the perceptibility element were restored, "appreciable" would be a more appropriate adjective in subparagraph (h) than "significant". He reserved his position on the definition of an "incident" (subpara. (k)), a word which he could not find in the draft articles.

38. He agreed with the Special Rapporteur (*ibid.*, para. 22) that the cost of measures taken to minimize the harmful effects of an activity should be included in the definition of "transboundary harm" (art. 2, subpara. (g)). Such measures should not be referred to as "preventive measures", an expression that should be reserved for measures intended to prevent an activity involving risk from actually causing harm. For the same reason, he was opposed to the introduction in draft article 8 (Prevention) of measures to minimize harmful effects, and to the corresponding part of the definition of "preventive measures" in subparagraph (m) of article 2. In the report (A/CN.4/428 and Add.1, para. 27), measures to mitigate existing harm were defined as reparation, an approach he could agree with.

39. He also agreed with the Special Rapporteur that provision should be made for harm to the environment and that the most appropriate remedy was restoration of the *status quo ante*. He therefore welcomed the definition of "restorative measures" in subparagraph (l) of article 2. Some adjustment might also be needed in draft article 9, on reparation, or in the definition of "transboundary harm".

40. The simplified formulation of preventive measures in chapter III of the draft was welcome, and the simplification should perhaps be taken further, especially in articles 16 and 17. While he supported the provisions relating to assessment, notification, information and consultation, he did not agree entirely with the terms of draft articles 11, 13, 14 and 16. The obligations defined in those articles were not such that failure to comply with them should give grounds for the institution of proceedings, and he therefore supported draft article 18. Draft article 19, however, tipped the balance too far in the other direction with its implication that, if the

⁹ *Yearbook... 1988*, vol. II (Part One), p. 251, document A/CN.4/413.

¹⁰ See draft article 2, subparagraph (b), as submitted in the Special Rapporteur's fifth report (A/CN.4/423, sect. II).

notified State failed to reply, such failure would ultimately be to its disadvantage. Since failure on either score would inevitably arise in the context of reparation, neither should be over-emphasized. An exception for national security and industrial secrets, as in draft article 15, was appropriate.

41. He could not understand the references in draft article 11, paragraph 2, and draft article 12 to an "international organization", which appeared to assume that international organizations "with competence in that area" existed. Care should be taken, in article 12, not to confer on an organization functions that were not defined in its constituent instrument.

42. Draft article 16 was too detailed: there was no need to spell out examples of appropriate preventive measures, which ought properly to be included in the commentary. The same was true of draft article 17. Lastly, draft article 20 should be couched in stronger terms, since a qualified prohibition would merely undermine the efficacy of prevention.

43. Mr. EIRIKSSON said he shared the widely held view in the Commission that the topic should be divided as between harm caused by hazardous activities, and harm caused otherwise. The Special Rapporteur had now submitted a complete set of draft articles. In general, he would prefer less detailed treatment, because of the considerable amount of time required for the Commission to deal with each article. He had been struck by the large number of safeguard clauses, necessary though they might be to render the articles acceptable.

44. The new articles contained in chapters III and IV of the draft were welcome, although he would question the position of draft article 17, on the balance of interests. Equally welcome were the new chapter V, on civil liability, and the new draft article 10, on non-discrimination; the latter provision was, in his opinion, an essential part of the treatment of civil liability. The present topic differed from that of the law of the non-navigational uses of international watercourses in that it was not necessary for the Commission to restrict its treatment of liability. As to the revised articles in chapters I and II of the draft, he would point out that the Drafting Committee already had before it two sets of articles, and some confusion was bound to arise from the presentation of a new set.

45. He welcomed the Special Rapporteur's discussion, in section B of the introduction to his sixth report (A/CN.4/428 and Add.1), of the main questions of principle, as well as the analysis in chapter VI of the concept of harm to the "global commons". Less satisfying were the Special Rapporteur's definition of activities involving risk and the list of dangerous substances in draft article 2. Subparagraphs (a) to (d) of article 2 gave a misleading impression of the articles, which were supposed to be more general in nature. The terms used were highly technical and would raise the expectation of equally detailed provisions in the chapters on prevention and liability. Details of that kind should be left to agreements covering specific subjects to be governed by specific régimes.

46. He agreed with Mr. Razafindralambo that the Commission must proceed with dispatch in dealing with the topic, so as not to be overtaken by events. The Drafting Committee should be given the opportunity to complete its consideration of the first two chapters of the draft. Once the later chapters had been discussed, the Special Rapporteur might decide to present revised articles, reflecting the discussion in the Sixth Committee of the General Assembly. Alternatively, he might propose further discussion of the present articles. Either approach would be acceptable. His own opinion was that the Special Rapporteur, in giving final form to such a complicated topic, had made a major contribution to the development of international law.

The meeting rose at 11.40 a.m.

2183rd MEETING

Friday, 29 June 1990, at 10.45 a.m.

Chairman: Mr. Jiuyong SHI

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

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

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

ARTICLES 1 TO 33⁵ (*continued*)

1. Mr. BARBOZA (Special Rapporteur) said that he wished to reply to the comments made at the previous meeting by Mr. Hayes, who had expressed concern in particular about the new approach which he (the Spe-

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

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

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

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

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

cial Rapporteur) had adopted and which was, in Mr. Hayes's view, too restrictive. There was in fact no new approach to the topic as a whole: two types of activities still had to be distinguished, activities involving risk and activities with harmful effects. In the case of the former, he had considered that he should clarify the concept of risk and that was why he had added a reference to such matters as dangerous substances and technologies and damage to the environment. Those elements called for special precautions on the part of the operator.

2. The concept of an accident was linked to that of risk. It was an essential concept, particularly where substances and technologies which were both complex and dangerous were concerned. A typical example was that of nuclear power stations, which might very well never cause damage, but none the less presented risks. In contrast, one could refer to an industrial plant which presented no special danger, but which, day after day, polluted a nearby watercourse: in that case, there were harmful effects without there being any accident. There could obviously also be situations in which the two possibilities were combined.

3. Mr. AL-BAHARNA said that his comments on the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) would follow the structure of the report. He would thus start with the Special Rapporteur's suggested additions to chapters I and II of the draft and then deal with the procedural provisions (chap. III) and, finally, with the new chapters IV and V submitted for the Commission's consideration.

4. Draft article 1 (Scope of the present articles) dealt in a single provision with the factors of "risk" and "harm". That had attracted the criticism of some representatives in the Sixth Committee of the General Assembly, where it had been suggested that the draft should be "rationalized by separating the two concepts of risk and harm, with each régime covered in separate chapters" (A/CN.4/L.443, para. 172). The Special Rapporteur's reply was that "the two kinds of activity have more features in common than they have distinguishing features" (A/CN.4/428 and Add.1, para. 3) and, in support of his position, he relied on the Council of Europe's draft rules on compensation for damage caused to the environment (*ibid.*, footnote 8), which brought dangerous activities and activities causing harm as a result of continuous pollution under a single régime. However, the Experts Group on Environmental Law of the World Commission on Environment and Development had recommended a model which made a distinction between activities which created a risk of "substantial" transboundary harm and those which actually caused such harm (*ibid.*, para. 4). It was therefore for the Commission to choose between the Council of Europe's model and that of the Experts Group. Although clarity dictated that separation would be better, the subject-matter was such that a single legal régime might none the less be preferable. Moreover, a single régime would have the advantage of covering borderline cases as well. He had an open mind on the issue, however.

5. The Special Rapporteur then considered whether the draft articles should include a list of activities covered by article 1, referring again (*ibid.*, para. 15) to the Council of Europe's draft rules on compensation for damage caused to the environment, which defined activities in relation to dangerous substances and the operations for which they were used. The Special Rapporteur appeared to be satisfied with that model, since he described it as "interesting" (*ibid.*, para. 16). Indeed, that solution had the advantage of delimiting the field of application of the articles and the Commission should give serious consideration to whether, and to what extent, it should adopt it. In the Special Rapporteur's view, that would involve the addition of subparagraphs (a) to (d) to draft article 2 (Use of terms) to define "activities involving risk", "dangerous substances", "dangerous genetically altered organisms" and "dangerous micro-organisms". That method was open to question, however, for the matter was too important to be dealt with in a general article on definitions. The Commission should consider incorporating those subparagraphs into a separate article, to come immediately after article 1. Save for that reservation, he was in agreement with the idea of delimiting the scope of article 1 by indicating the activities covered by it.

6. In subparagraph (g) of article 2, the Special Rapporteur extended the definition of "transboundary harm" to include the "cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred in article 1", as well as any further harm to which such measures might give rise. Personally, he wondered whether that addition did not rather belong in article 9, on reparation. Also, the Special Rapporteur invited suggestions from members of the Commission with regard to the definition of "appreciable harm", the subject of subparagraph (h) (*ibid.*, para. 24). The latter provision defined such harm as that which was greater than the mere nuisance or insignificant harm that was normally tolerated. That definition was open to question, and he wondered whether it was necessary to have one at all.

7. In the footnote to draft article 3 in the annex to his sixth report, the Special Rapporteur pointed out that the title of the article, "Assignment of obligations", had given rise to objections, but he had not changed it. He himself had already said that he found that title misleading and he maintained his position.

8. He also still had reservations with regard to draft article 4 (Relationship between the present articles and other international agreements), which was, in his view, not compatible with article 30, paragraph 3, of the 1969 Vienna Convention on the Law of Treaties, which stipulated that, in the case of successive treaties, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty". Should the Commission decide to embody the draft articles in a multilateral convention, article 4 would have to be amended to bring it into line with that provision of the 1969 Vienna Convention. If the draft articles took some other form, article 4 could remain as it was.

9. Draft article 5 dealt with the absence of effect upon other rules of international law, but he would have

preferred that question to be left open. If the Commission considered it expedient to have a provision on the matter, however, the proposed text was acceptable.

10. In the report, in the footnote to draft article 6 (Freedom of action and the limits thereto), the Special Rapporteur suggested the deletion in that article of the words "in their territory", since all activities within the territory of a State were conducted under its jurisdiction. For his own part, he favoured the retention of those words, as they had a far more specific meaning in international law than the word "jurisdiction". In the footnotes to draft articles 7 (Co-operation) and 8 (Prevention), the Special Rapporteur also suggested possible alternative texts, which were acceptable subject to the inclusion, for the same reason, of the words "in their territory".

11. In the footnote to draft article 9 (Reparation), the Special Rapporteur suggested replacing the title of the article by "Compensation by the State of origin" and deleting the idea of restoring the "balance of interests affected by the harm". While he could accept the second suggestion, he could not accept the first, since the concept of reparation, which was wider than compensation, was more appropriate to the topic.

12. The new draft article 10 (Non-discrimination) appeared to mean that transboundary harm had the same legal effects as harm within a State's own territory, and that would facilitate the application of national law in the former case. Although such a provision might be desirable, was it feasible at the present stage of international law? Even the Experts Group on Environmental Law, with which the idea had originated, admitted that an "emerging principle" of international environmental law was involved, as the Special Rapporteur pointed out in the report (*ibid.*, para. 29). Before accepting such a principle, the Commission should examine all its implications for national law and procedures with regard to remedies for tortious acts.

13. In chapter III of the draft, the Special Rapporteur presented the revised texts of the procedural articles that had been the subject of criticism in the Commission and in the Sixth Committee. Article 11 (Assessment, notification and information) was welcome, as was article 12 (Participation by the international organization) because of the role it conferred on competent international organizations, although the word "intervenes" was not entirely felicitous. Article 13 (Initiative by the presumed affected State) prompted some reservations because of its hypothetical nature. Article 14 (Consultations) and article 15 (Protection of national security or industrial secrets) were acceptable.

14. Was draft article 16 (Unilateral preventive measures) really necessary? If the Commission considered it essential, the respective functions and purposes of articles 8 and 16, both of which dealt with preventive measures, would have to be spelt out. In any event, article 16 was a little too detailed and the Commission should examine critically the various elements it contained, since some of those elements—the "best available technology", for instance—did not seem applicable to developing countries.

15. The new draft article 17 (Balance of interests) set forth a number of factors which States might take into consideration in their consultations or negotiations. In the report, the Special Rapporteur confessed to "a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms" (*ibid.*, para. 39). While that might be true, there was no harm in including them in article 17 as they would assist States in controlling the effects of transboundary harm. In principle, therefore, he supported the article, provided that its title was amended.

16. He also supported the text of draft article 18 (Failure to comply with the foregoing obligations), provided that the right of the parties under general international law to institute proceedings was not diminished; that right appeared to be somewhat modified under the present text.

17. Draft article 19 (Absence of reply to the notification under article 11) called for two comments: first, he was sceptical about the presumption of acquiescence that would flow from failure to reply; and, secondly, it would be preferable to speak of a "reasonable time" rather than of a "period of six months".

18. Draft article 20 (Prohibition of the activity) appeared to go too far. Such prohibition might be either too late or too costly and the obligation should be less stringent.

19. The Special Rapporteur was proposing two new chapters of the draft: chapter IV on liability and chapter V on civil liability. So far as the first of those concepts was concerned, liability and reparation were well known in both national and international law. The Special Rapporteur considered that it might be possible to introduce into the chapter on liability "a concept of reparation which, as opposed to the classical one involved in liability for wrongfulness, did not entail total restitution to eliminate all the consequences of the act which caused the harm" (*ibid.*, para. 44). In that connection, the wording of draft article 23 (Reduction of compensation payable by the State of origin) was open to question. While it might be true that, following diplomatic negotiations, a State might accept compensation in an amount that differed from the actual loss suffered, it was doubtful whether States would accept that as part of international law. The fact that the rules set forth in chapter IV were of a residual nature did not give the Commission licence to depart from the accepted meaning of concepts of law. It should therefore re-examine article 23.

20. With regard to draft article 24 (Harm to the environment and resulting harm to persons or property), paragraph 3 added a reservation to paragraphs 1 and 2 which was unfounded, because a legal right did not depend on the means by which it was claimed. Similarly, the statement that "In the case of claims brought through the domestic channel, the national law shall apply" was of doubtful validity. He therefore proposed the deletion of paragraph 3.

21. Chapter V of the draft was probably the most controversial, since it gave victims of transboundary harm unrestricted access to the courts of the State of

origin. That principle was embodied in draft article 29 (Jurisdiction of national courts), which widened the rule of "non-discrimination" laid down in article 10. Under article 29, the State of origin could even be required to change its procedural laws; such a provision would not really be practicable. As the Special Rapporteur stated in the report, "this is a progressive provision and might not be acceptable in a global instrument such as the one now under consideration" (*ibid.*, para. 66). The same comment applied, *mutatis mutandis*, to draft article 30 (Application of national law). He suggested that the Commission tone down those two articles.

22. Mr. AL-QAYSI recalled that, during the consideration of the topic at the Commission's previous session, he had made two preliminary comments: first, that the frontiers of the topic had gone somewhat beyond those originally conceived for it, thus further compounding its complexity; and, secondly, that the Commission should therefore accept some measure of uncertainty and ambiguity until its work had proceeded further and it had a clearer picture of the subject. Fortunately, the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) served to a great extent to bring the picture into sharper focus, and the Special Rapporteur was to be congratulated on the report, which showed what painstaking efforts he had made to take account of differing views that were often hard to reconcile. The report was striking in its clarity and proved that the Special Rapporteur had striven to be realistic. Like Mr. Calero Rodrigues (2181st meeting), however, he thought that the richness of the report would require more time than the members of the Commission had available at the current session for it to be studied in-depth. He had thus been unable to examine it fully, although the statement he had made at the previous session had helped him to consider the proposed changes to the draft articles. He would therefore comment only on what appeared to be the essential points in chapters I to III of the draft.

23. The Commission now had a solid foundation on which it could progress in its work at a reasonable pace. It must not lose sight of the fact that its work on the topic had already been overtaken by other institutions or of the fact that it had spent a number of years questioning the viability of the topic, only to reach the stage of drawing on the work of those other institutions.

24. With regard to the points on which some members of the Commission had expressed misgivings, his first reaction was that it could not be said that the Special Rapporteur had departed radically from his earlier approach. Paragraphs 3 and 11 of the report made it clear that the Special Rapporteur had maintained the conclusion he had reached earlier, namely that the consequences of the two kinds of activities, those involving risk and those with harmful effects, should be brought together under a single legal régime. Between those two paragraphs, the Special Rapporteur discussed another model which would accord different legal treatment to the two types of activities and drew attention to the two major difficulties to which that model would give rise for the Commission's work. On that point, the Spe-

cial Rapporteur concluded that he was open to whatever preference the Commission might express.

25. Moreover, he could not see any attempt in the report to narrow down the concept of harm to mean that an activity causing harm must be one which had involved harm from the beginning. The Special Rapporteur, having pointed out that the main difference between the two types of activity lay in the field of prevention (A/CN.4/428 and Add.1, para. 12), went on to illustrate that difference. Thus, for the first type of activities—those involving risk—the cardinal point was the prevention of incidents: no harm or incident had yet occurred. For the second type of activities—those with harmful effects—there were two sources of harm: first, an incident or accident in the course of an activity involving risk which triggered harm; and, secondly—and it was there, with reference to Mr. Hayes's comment (2182nd meeting), that he thought the misunderstanding had arisen—the harmful effects caused by the normal operation of an activity or, as Mr. Tomuschat stated in an article soon to be published on the subject, the harm arising from the normal activities of an industrialized society inasmuch as they are likely to produce significant transboundary effects. The latter activities caused harm which was regarded as tolerable, but its cumulative impact could have significant transboundary effects. Subparagraph (f) of draft article 2 should be seen in that light, not as signifying that harm had been present from the beginning of the activity.

26. Referring to the method of drawing up a list of activities involving risk, which some members had said might be too restrictive, he said that, from a theoretical point of view and aside from the problem of how to draft article 2, such a list could serve as a criterion for the determination of risk. The drafting of the concept was, however, quite a different matter. In that connection, since the Commission was seeking to establish a global model, a general definition comprising two elements, namely a higher probability than normal of causing transboundary harm and the perceptibility or foreseeability of the harm, would be useful as an umbrella clause, and an indicative list of dangerous substances would give greater precision to the central concept of "appreciable" or "significant" risk. In that way, it should be possible to dispel the doubts which had been expressed thus far and to do justice to the Special Rapporteur's sound reasoning, which was motivated by a desire to achieve precision and flexibility. In his own view, it was not impossible to express the concept of risk in a specific provision. Subparagraphs (a) to (d) of article 2 could be recast in a shorter form, with cross-references to detailed annexes, and the Special Rapporteur could perhaps be authorized to consult experts before finalizing the text. He (Mr. Al-Qaysi) had advocated that solution at the previous session.

27. As far as prevention was concerned, the explanation given by the Special Rapporteur at the previous meeting in reply to the doubts expressed by Mr. Calero Rodrigues—namely that subparagraph (m) of article 2 would be amended by deleting the words "or harm"—helped to clarify the meaning of the concept of prevention in the context of the draft articles.

28. In subparagraph (g) of article 2, he would prefer the term “significant” to the term “appreciable”. He approved of the specific reference to harm to the environment.

29. As to subparagraph (k) and the choice between the terms “incident” and “accident”, he would prefer “incident”. He nevertheless wondered why the Special Rapporteur, in the definition of the term “incident”, had not used the word “occurrence”, which was found in the source material from which he had drawn (see A/CN.4/428 and Add.1, para. 24 *in fine*). It should also be noted that one of those sources, namely the 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (*ibid.*, footnote 39), referred in its definition of the term “incident” to the “grave and imminent threat” of damage (art. 1, para. 12). The Special Rapporteur had not used those two adjectives in subparagraph (k) although he stated in the report that the definition used in the 1989 Convention might be the “most appropriate” one for the Commission’s draft (A/CN.4/428 and Add.1, para. 24 *in fine*).

30. For draft article 8 he preferred the alternative text suggested by the Special Rapporteur in the annex to the report, in the footnote to that provision.

31. With regard to draft article 9, he was surprised that harm was characterized as “appreciable”; other provisions, such as subparagraphs (e), (g) and (h) of article 2, referred to “[appreciable] [significant]” harm. The same wording should be used in article 9. In any event, the alternative text suggested in the report, in the footnote to article 9, was better because it used the term “compensation” rather than “reparation”, in accordance with a decision which, if his memory served him correctly, the Commission had taken after lengthy discussion at the previous session.

32. He welcomed draft article 10, but was surprised that the second sentence differed somewhat from the corresponding provision of the text on which the Special Rapporteur had relied, namely article 20 of the “Principles specifically concerning transboundary natural resources and environmental interferences” formulated by the Experts Group on Environmental Law of the World Commission on Environment and Development (*ibid.*, para. 30). It was not clear why the Special Rapporteur had referred to “the nationality, domicile or residence of persons injured”, which might involve a question of conflict of laws and of the choice of the applicable law.

33. Turning to chapter III of the draft, on prevention, he welcomed the simplified procedure proposed by the Special Rapporteur. Draft article 11 was reasonable and, in any case, better than the previous article 10 (see A/CN.4/423, para. 72). The arguments contained in paragraphs 32 and 33 of the sixth report (A/CN.4/428 and Add.1) were relevant, but he would like some clarifications. What was meant by the expression “public interest”? Did it mean the interest of the international community or the interest of more than one State? If the latter, could it mean the interest of two States only?

34. Draft article 12 was quite satisfactory. He wondered, especially in the light of article 10 on non-discrimination, whether membership of the international organization was a condition for its intervention. If not, how would the relationship be regulated, especially in respect of costs and expenditure not authorized by the statute or rules of the organization? There was a further problem: what would happen if intervention by the organization involved an activity which the organization was not supposed to carry out in a non-member State? Those aspects of the matter called for further consideration.

35. Draft article 14 introduced the idea of consultation to replace the concept of the obligation to negotiate, as provided for in the previous article 16 (see A/CN.4/423, para. 107), which had, however, offered two alternatives: negotiations or consultations. The question that now arose was what would happen if consultations broke down; the sixth report was not clear on that point. He supported draft article 15 and was glad that its wording had been simplified by comparison with the previous article 11 (*ibid.*, para. 72).

36. Draft article 16 seemed to relate only to the case covered by article 13, where the presumed affected State took the initiative in approaching the State of origin. If the affected State did not act, the State of origin would in any case still have an obligation of prevention under article 8. In any event, that interpretation seemed to be supported in the sixth report (A/CN.4/428 and Add.1, para. 38).

37. He had taken note of Mr. Calero Rodrigues’s doubts as to whether draft article 17 was really necessary in view of the realities of inter-State relations. In his own opinion, however, the article was necessary, because the principle was not new and was to be found in other topics dealt with by the Commission and because such a provision might be essential in the present case, especially in the context of consultations among the States concerned. Its wording was, however, very soft, providing as it did that States “may” take the factors listed into account in their consultations or negotiations, and perhaps it should be made stronger so that it would not be meaningless. He also noted that article 17 referred to “consultations or negotiations”, whereas article 14 dealt only with consultations.

38. With regard to draft article 18 and the crucial point whether non-compliance with the obligations of prevention would give rise to a right of action, he shared the Special Rapporteur’s view that “The mechanisms of liability are activated only if the harm can be causally attributed to the activity in question” (*ibid.*, para. 40).

39. As to what should be done with the draft articles, he considered that the new articles submitted, i.e. those which were not new versions of articles already referred to the Drafting Committee, should not be referred to the Drafting Committee; they required more thorough discussion by the Commission.

40. Mr. GRAEFRATH commended the Special Rapporteur on his sixth report (A/CN.4/428 and Add.1), which represented a major step forward in the progressive development and codification of the law relating to international liability and in efforts to

produce an instrument with good chances of being accepted by States. He noted with satisfaction that the Special Rapporteur had presented a complete set of draft articles that lent themselves to overall consideration. Although they did not solve all problems, they at least made them more visible.

41. The report raised a number of questions and he would confine himself to a few general comments, essentially concerning the scope of the draft articles, the type of activities covered, the harm to be compensated for, the subjects involved and the function of preventive measures.

42. At the previous session, he had expressed regret that the Special Rapporteur had decided not to apply the criterion of risk in determining the scope of the draft articles, for that made it doubtful that they would be acceptable to many States. As he had also pointed out, State practice showed that the so-called "list" approach was by far the most commonly used, the Economic Commission for Europe and the Council of Europe having drawn on it in a number of instruments. One of the advantages of the sixth report was that it duly reflected the latest developments on the subject in the practice of States. The report and the draft articles incorporated ideas and formulations originating from recent multilateral instruments that set the legal standards to be applied by States in the 1990s, including the ECE draft framework agreement on environmental impact assessment in a transboundary context (*ibid.*, footnote 35), the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,⁶ the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (*ibid.*, footnote 37) and, to a lesser extent, the draft instruments which had been prepared by non-governmental organizations and which looked at the problem of liability from a different perspective.

43. The major substantive changes in the sixth report were the introduction of a list of dangerous substances and the presentation of more elaborate provisions on prevention and liability. The result was that the extent of the liability States would incur under the future instrument had become clearer. That was a strong wish expressed by a number of representatives in the Sixth Committee of the General Assembly. For example, despite the imprecision inherent in the expression, the representative of one country had accepted the principle of responsibility for "appreciable harm" in the context of international watercourses because of the limited nature of the liability involved, but had refused to accept general State liability for appreciable harm because "It would be another matter to admit imprecision with regard to potentially enormous liability".⁷ That meant that the terms of the liability incurred, no matter how broad, would have to be clearly defined to be acceptable to States. A statement of general principles, although reasonable, was not enough. Seen from

that point of view, the introduction of a list of dangerous substances, in which activities involving risk were defined, was an important step forward. Based on widespread State practice, such a list was intended to apprise States of the substances and activities which would engage their liability and the areas in which special preventive efforts were needed. For that reason, the list would have to be exhaustive. A list that was only illustrative would not limit the scope of the draft and would not meet the requirement of clarity which was absolutely necessary in an instrument involving claims amounting to millions of dollars. On the other hand, in order to make for flexibility, the list would have to be reviewed regularly by experts and, if necessary, amended in accordance with a procedure set out in the future instrument itself. That was the approach adopted by most of the relevant instruments. In that context, it emerged from the report (*ibid.*, para. 17) that the Special Rapporteur was still hesitating on the question of a list of dangerous substances: in the Special Rapporteur's opinion, the list should not be exhaustive and activities not listed, but having the same effects, i.e. causing significant transboundary harm, should be considered as coming under article 1. Such a partial list would serve no meaningful purpose: far from providing for flexibility, it would introduce imprecision and thus defeat its very purpose.

44. If the draft articles relied solely on harm caused, States would be forced to control all types of activity within their jurisdiction to such an extent that scientific and industrial progress would be seriously hampered. On the other hand, if the Commission tried to avoid that drawback by introducing a high threshold of compensable harm, environmental protection would suffer. It was no accident that States had in general chosen to establish a high degree of liability for harm caused in the case of certain activities or as a result of the use or transport of so-called dangerous substances. He did not see how the Commission could depart from that established State practice if it wanted progressively to develop international law.

45. The need for clear and precise legal solutions was not confined to the question of the activities covered: States must not only know which activities and which kinds of harm might engage their liability, but also which methods of compensation might be envisaged.

46. On the question of compensable harm, the Special Rapporteur had adopted a comprehensive approach including material loss and damage to property and personal injury, as well as harm to the environment as such. Compensation was provided for preventive and containment measures, clean-up operations and restorative measures aimed at rehabilitating the damaged ecosystem. He fully understood that approach, which was aimed at establishing the principle of full compensation in order to minimize the growing impact of human activities on the environment. While agreeing in principle with that approach, he drew the Commission's attention to certain problems concerning the definition of harm that still needed to be solved.

47. In regard to liability, the definition of harm played such an important role that all relevant

⁶ See document UNEP/IG.80/3 (22 March 1989); reproduced in *International Legal Materials* (Washington, D.C.), vol. XXVIII (1989), p. 657.

⁷ *Official Records of the General Assembly, Forty-fourth Session, Sixth Committee, 33rd meeting, para. 69.*

instruments contained a separate and very elaborate article on the definition of compensable harm. It was not enough to deal with that problem in the article on the use of terms. He agreed with Mr. Calero Rodrigues (2181st meeting) that the long list of terms in draft article 2 must be revised and that many of the definitions proposed might need improvement. Although the long list of definitions was useful for the formulation of the draft articles, that did not mean that all the definitions would be retained or that other definitions could not be added once the draft had been completed.

48. Returning to the question of compensable harm, he pointed out that article 8 of the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities contained very precise provisions on the subject, notwithstanding the definition of "damage" already appearing in article 1 (15). Obviously, for the purposes of liability, the definition of the term "damage" and the setting of parameters for compensable damage under that instrument were not the same as in the draft under consideration. It was his understanding that the Special Rapporteur wished to establish the obligation for States to pay compensation irrespective of the activity that had caused the transboundary harm; that meant any activity, whether it had caused an accident or significant harm through pollution and whether it was a State or a private activity. That was a very broad approach that made him wonder why a list of dangerous substances had been introduced.

49. The draft should contain a separate and well-structured article on compensable harm which would cover: (a) loss of life and personal injury; (b) loss of and harm to property and the enjoyment of areas; (c) the cost of reasonable preventive and clean-up operations; (d) harm to the environment.

50. The provision on harm to the environment might incorporate the text of draft article 24. Such a provision should be retained in the draft articles. Recognition of the autonomous value of the environment, which could not be expressed in terms of material harm to property or personal injury, must be achieved by progressively developing the law on the subject. In so doing, it must be borne in mind that payment of compensation for non-material harm to the environment was a relatively new demand and raised a number of legal and political problems, such as the evaluation of such harm, the identification of the subjects entitled to compensation, etc. The political will of States to accept and pay compensation for such harm was still in its early stages. Most international instruments did not recognize harm to the environment and those that did placed limitations on compensation. It would therefore be advisable for the Special Rapporteur and the Commission to analyse the limitations that recent conventions placed on compensation for harm to the environment.

51. For example, the 1969 International Convention on Civil Liability for Oil Pollution Damage (see A/CN.4/384, annex I) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (*ibid.*),

both as amended by their 1984 Protocols,⁸ as well as the 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (see A/CN.4/428 and Add.1, footnote 39), recognized only the cost of reasonable measures of reinstatement actually undertaken or to be undertaken. Similarly, a 1989 proposal for a directive of the Council of the European Communities on civil liability for damage caused by waste recognized as reasonable only such measures of restoration the cost of which did not exceed the benefit arising for the environment from such measures and, furthermore, required that the plaintiff must prove the overwhelming probability of the causal relationship between the waste and the damage to the environment. A more cautious approach was thus advisable. That applied above all to the Special Rapporteur's proposal to introduce payments for harm to the environment in cases where the *status quo ante* was not or could not be re-established. Virtually no existing convention contained such a provision. Even the Convention on the Regulation of Antarctic Mineral Resource Activities, from which the Special Rapporteur had taken his idea, provided that the amount corresponding to the compensation determined by an international commission should be paid into a special international fund. The payment of compensation by one State to another for impairment of the environment, as provided for in paragraph 1 of draft article 24, did not find support in international practice.

52. Another question related to the definition of harm was whether to qualify it as "appreciable" or "significant". Referring to subparagraph (h) of draft article 2, he said that he was in favour of the word "significant", which was the accepted term in many international instruments. However, the first element of the new definition of the concept of harm ("harm which is greater than . . . mere nuisance") introduced the common-law concept of "nuisance", which was not sufficiently clear in other legal systems; the second element ("harm which is greater than . . . insignificant harm") appeared to be tautological; and the third element ("harm which is greater than . . . normally tolerated") was problematic, because many countries had long tolerated unacceptable quantities of transboundary pollution. It would be better to define "significant harm" as being situated between serious and minor harm, an approach often used in the law relating to international watercourses.

53. Having dealt with two sensitive areas that required greater precision to facilitate the acceptance of the draft, namely the type of activities covered and the definition of harm, he turned to another difficult problem, that of possible methods of compensation. In his previous reports, the Special Rapporteur had simply stated the general principle of compensation on a negotiated basis. However, none of the many questions that arose in that regard had yet been solved. For example, who were the subjects of the liability envisaged, what was the relationship between a private operator and the territorial State, must the State bear

⁸ See the IMO publication, Sales No. 456 85.15.E.

responsibility for all transboundary harm and should the Commission envisage the type of liability provided for in article 139 of the 1982 United Nations Convention on the Law of the Sea or draw instead on the 1972 Convention on International Liability for Damage Caused by Space Objects? In the final analysis, the answers to those questions would determine the structure, scope and subjects of the obligations set forth in a convention on liability.

54. In his sixth report, the Special Rapporteur devoted two chapters to methods of compensation: chapter IV on liability and chapter V on civil liability. He welcomed that progress because the Commission could now embark on the study of the specific legal problems connected with liability and compensation and clarify for States the extent of their liability. The central issue in that connection was to determine the subjects of the legal relationship and to decide who was entitled to claim compensation and who was obliged to pay. In international conventions, the person or entity liable for compensation for damage was normally designated as the operator. The advantage was that the subject of liability was known in advance, and that facilitated legal action by the victim and the adoption of preventive measures by the responsible subject. The method proposed by the Special Rapporteur in chapters IV and V was that of engaging the liability of the State in whose territory the activity took place. The State would thus be the main legal subject to which all States and natural and legal persons that had suffered harm from any of the activities referred to in article 1 would present their claims for compensation. According to draft article 21, claims and compensation would be dealt with through negotiations; in the system proposed in chapter V, they would be handled through the domestic courts, the State of origin being, in both cases, the sole and principal defendant. The questionable philosophy underlying that approach was that the State benefited from all activities within its jurisdiction and was therefore liable for any transboundary harm they might cause. That was confirmed by the Special Rapporteur in the report (*ibid.*, para. 62), where he also argued that private-law remedies failed to guarantee prompt and effective compensation. Even if true, that was not a legal argument in favour of State liability.

55. The Commission currently had under consideration two reports on similar topics, namely international watercourses and international liability, with one offering exclusively private-law remedies in the implementation part⁹ and the other relying solely on the liability of States. It was therefore reasonable to ask towards which concept State practice was leaning.

56. A review, even a cursory one, of conventions on liability showed that, with the exception of the 1972 Convention on International Liability for Damage Caused by Space Objects, no other instrument provided for the exclusive liability of the State. The Special Rap-

porteur rightly noted in the report that, in the drafting of that Convention, "strategic and security considerations prevailed over other considerations, especially economic considerations" (*ibid.*, para. 63). All the other conventions channelled liability to the operator—or owner or carrier, as the case might be—of the dangerous installation, and provided for compulsory insurance schemes and/or compensation funds. A few rare treaties provided for the civil liability of the operator combined with subsidiary or supplementary liability of the State of origin or flag-State. Only if the insurance or other financial securities provided by the operator proved insufficient did the State have to intervene. That was the system that applied in the field of the peaceful uses of nuclear energy. The overwhelming majority of treaties dealing with civil liability, from which the Special Rapporteur had borrowed many provisions, did not even provide for supplementary State liability. They set a maximum limit for claims and relied on compulsory insurance of the operator and on compensation funds. For instance, the International Convention on Civil Liability for Oil Pollution Damage (see para. 51 above) did not provide for State liability; nor did the 1984 IMO draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea (see A/CN.4/384, annex I) or the 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels. Also, the diplomatic conference at which the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities had been adopted had rejected the idea of supplementary State liability and it was not sure that the protocol to that Convention concerning liability, which was still under consideration, would provide for a compensation fund, one third of which would be financed by States.

57. In the circumstances, he believed that it would be difficult, if not impossible, to provide for full compensation by the State of origin when that State was not itself the operator. That would mean that any State would be expected to pay compensation up to an unlimited amount for damage arising out of any of the activities falling within the very broad scope of the draft articles. Moreover, to make the State the sole subject of each and every claim for compensation would raise all cases of pollution to the inter-State level, regardless of their magnitude and particular circumstances.

58. Given the alarming state of the environment, however, and the growing threats to ecosystems and indeed to life on the planet, the Commission must find a way of resolving the contradiction between the private character of most hazardous activities and public responsibility for the environment.

59. The solution might be to define clearly the obligations of States and, where necessary, develop a method of compensation combining operator and State liability. The draft articles could, like article 139 of the 1982 United Nations Convention on the Law of the Sea, impose an obligation on the State to ensure that the operator complied with the safeguards established by the State in conformity with international standards and provided financial guarantees. Should it fail to do

⁹ See chapter III of Mr. McCaffrey's sixth report on the law of the non-navigational uses of international watercourses (*Yearbook... 1990*, vol. II (Part One), pp. 57 *et seq.*, document A/CN.4/427 and Add.1).

so, the State would run the risk of having to pay compensation itself if damage occurred. The draft could even go further than the United Nations Convention on the Law of the Sea and impose a duty on the State in which the harm or pollution had originated to bear such costs as were beyond the operator's financial capacity.

60. A system of mixed liability of that kind would require some changes in the draft, for example in article 28, but would not modify its general structure and thrust. The duties of the State of origin should also not give rise to any dispute. It would, of course, be necessary to add a definition of the term "operator" in article 2, of the kind embodied in all conventions on liability, and to define the liability of the operator in chapters IV and V of the draft. At present, the operator was a "ghostlike" entity in the draft. He was not mentioned in article 2 on the use of terms, or in chapter II on principles, but made his appearance by chance, as it were, in article 20 and in articles 26 and 27, followed by the words "as the case may be". His liability would therefore have to be defined. A system of mixed liability would also have to be implemented.

61. In addition to inter-State claims for compensation, the draft articles would have to impose a duty on the State of origin to ensure that its courts had jurisdiction to receive, on a non-discriminatory basis, claims against the operator or the State by foreign citizens who had suffered damage. In that connection, the Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses had presented a text¹⁰ which the Commission might wish to use *mutatis mutandis* for the present draft, and it could also use the new draft article 10, on non-discrimination. To provide for a general duty on the part of States to ensure an equal right of access to domestic courts would be a significant step forward because, contrary to what was stated in the report (A/CN.4/428 and Add.1, para. 62), there were at present many obstacles which prevented private individuals who had suffered damage from instituting proceedings directly before the courts of a foreign State, even where States with very similar legal systems were concerned. Differences in national law, difficulties in presenting evidence and possible obstacles to access by foreign litigants meant that national courts were still an imperfect forum in which to resolve such disputes. The Chernobyl and Basel disasters had highlighted the existing gaps in the system, and that was an added reason for modifying and improving it.

62. In view of the extremely broad range of activities covered by the draft and of its universal character, the establishment of general and universal subsidiary State liability would be an almost revolutionary development. It would be a major contribution by the Commission to the progressive development of the law of State liability.

63. He was not convinced that it would be sound legal policy to deal with all transboundary harm at the level of inter-State relations. It would be more advisable to settle that kind of case, in so far as

possible, at the level of civil law and in accordance with agreed rules of private international law, reserving inter-State relations for disputes that could not be settled in that way. In order to implement such a system, States must ensure that their legal systems provided persons who had suffered damage with remedies that would enable them to obtain adequate compensation from the operator for any significant damage caused by the operator's activities. The liability of the State would come into play when adequate compensation could not be ensured through the civil-law channel and would be met by means of a guarantee, insurance or fund system or by means of an agreement reached between the States concerned for the payment of a lump sum.

64. With regard to prevention, he welcomed the simplified procedure envisaged in chapter III of the draft, but doubted that articles 11 to 20 were sufficiently precise to cover the different aspects of prevention in the context of State liability. The Commission was faced with various kinds of phenomena, which were quite different from each other. There was, first of all, prevention of accidents and harmful effects caused in the course of normal operations, such as chronic pollution of water or the air as a result of normal human activities; there were measures designed to prevent, in so far as possible, accidents caused by hazardous activities; and there were the reasonable preventive measures that were taken after an incident had occurred to minimize damage or prevent further damage, including measures to minimize harm by reducing pollution. He agreed in principle with the definition of preventive measures contained in subparagraph (*m*) of article 2, but considered that it should be improved so as to cover, in clear terms, measures taken against damage caused by chronic pollution.

65. Furthermore, draft article 11 contained a reference to article 1, but still focused on planned activities and related to potential transboundary harm. The procedure provided for in chapter III would therefore be meaningless when it came to minimizing harm or reducing pollution. Even in the case of potential transboundary harm, it had no relation to activities involving risk as defined in article 2. He appreciated the Special Rapporteur's attempt to delimit the scope of the draft by defining hazardous activities by reference to dangerous substances, but that attempt would be ineffectual if there were no consequences with regard to the obligation to take preventive measures. He did not hesitate to conclude that damage caused by an accident which resulted from non-compliance with the provisions on prevention should give rise to responsibility and might justify a claim to stop the activity in question.

66. In his view, chapter III should distinguish between measures to prevent an accident caused by activities involving risk, measures to minimize harm after an incident had occurred and measures to combat the harmful effects of pollution. Such a distinction would allow for a further differentiation in relation to procedures and consequences in the case of violation.

67. Finally, unilateral preventive measures, which were the subject of draft article 16, should come at the

¹⁰ See footnote 9 above.

beginning of chapter III: they were not just intermediate obligations. He favoured the retention of the examples given in article 16 because they demonstrated what should be understood by the liability of States before questions of compensation for damage arose. There again, however, it was doubtful whether a reference to article 1 was sufficient. The Special Rapporteur had not drawn any legal consequences from the list of dangerous activities, but that should be an essential element of the draft.

68. Mr. BEESLEY said that the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) had been the subject of three differing interpretations. According to one, he had shifted the basis for liability from harm to risk; according to another, he had not done so; and according to yet another, he had followed a middle course. What was the Special Rapporteur's view on the matter?

Organization of work of the session (concluded)*

[Agenda item 1]

69. The CHAIRMAN, introducing the recommendations of the Enlarged Bureau, said that, as was apparent from document A/CN.4/L.444, the Drafting Committee had at the present session dealt with 16 of the 28 draft articles on jurisdictional immunities of States and their property provisionally adopted by the Commission on first reading in 1986. Since the Commission would not be in a position to conclude the second reading of the draft articles before the end of the session, the question had arisen of the way in which the partial, though substantial, results achieved by the Drafting Committee should be reported to the plenary Commission and to the General Assembly.

70. Accordingly, the Enlarged Bureau proposed that the Chairman of the Drafting Committee should, as was customary, make an oral presentation of the articles prepared under his chairmanship and indicate that, as the second reading of the draft articles had not been concluded and important provisions were still pending, a detailed discussion of the articles adopted so far by the Drafting Committee on second reading would not serve any useful purpose. It was, however, understood that those members of the Commission who considered that it would be useful for statements of a general nature to be made on the orientation of the work would be able to do so. At the present session the Commission would not adopt any of the articles proposed by the Drafting Committee, and would simply take note of the oral report of the Chairman of the Committee.

71. If those arrangements met with the Commission's approval, he understood that it was the intention of the Rapporteur to include in the relevant section of the Commission's report on the present session a passage informing the General Assembly of the stage reached by the Drafting Committee and explaining that the Commission had considered it preferable to postpone a decision on individual articles until the entire set of articles proposed on second reading was before it. The

report would add that, for that reason, the Commission was not submitting any articles to the General Assembly at the current stage, but that it expected to present a complete set of draft articles to the General Assembly at its forty-sixth session.

72. Mr. KOROMA said that he had no objections to the proposed arrangements. However, since the composition of the Commission was to be renewed at the forty-sixth session of the General Assembly, he wondered how the Commission could accommodate the suggestions and comments that would certainly be made by representatives in the Sixth Committee of the General Assembly when the draft articles as a whole were referred to it.

73. The CHAIRMAN said that the Enlarged Bureau had considered that question but had none the less decided that it would be preferable to refer the draft articles as a whole to the General Assembly. If there were no objections, he would take it that the Commission agreed to adopt the arrangements proposed by the Enlarged Bureau.

It was so agreed.

74. The CHAIRMAN said that, as a result of those arrangements, a number of meetings originally reserved for consideration of the draft articles on jurisdictional immunities were available for other purposes. The Enlarged Bureau therefore recommended that the Commission should adopt the timetable for the next two weeks that had been circulated to members. If there were no objections, he would take it that the Commission agreed to adopt the proposed timetable.

It was so agreed.

The meeting rose at 1.05 p.m.

2184th MEETING

Monday, 2 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

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

* Resumed from the 2151st meeting.

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

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLES 1 TO 33⁵ (continued)

1. Mr. McCaffrey said that the Special Rapporteur's sixth report (A/CN.4/428 and Add.1) was an extremely helpful document on a topic that was a rapidly developing field of international law for which a different approach was needed. The question was whether some special régime might be elaborated to deal with the kinds of transboundary harm that might be caused by new technologies and substances, a problem that had not existed when State responsibility had been developed. Thus the topic was unlike others on which the Commission had worked, with the possible exception of the conventions on the law of the sea. The Commission had availed itself of expert advice in preparing the draft articles on which those conventions had been based, and it could profitably do so for the present topic. He had been rather puzzled to hear some members of the Commission say that the Special Rapporteur had changed his approach. On the contrary, the Special Rapporteur had further elaborated one aspect of the draft articles, namely activities involving risk, but had not eliminated the other aspect, as could be seen from paragraphs 11 to 14 of the report, the wording of draft article 1 and the alternative text suggested in the footnote to that article in the annex to the report.

2. The alternative formulation suggested for article 1 was better and he welcomed the elimination of the words "throughout the process". The Special Rapporteur had found a better way to say the same thing in draft article 2, subparagraph (f): "in the course of their normal operation".

3. A number of questions had been raised as to whether the definition of "activities involving risk" in article 2 was sufficiently broad to cover such matters as dams, since the definition relied on three different categories of activities, none of which seemed to be connected with water or dams. The Special Rapporteur had pointed out that anything containing a sufficient quantity of an otherwise harmless substance to make it pose a threat would be covered by the expression "dangerous substance", as indicated in the phrase "A substance may be considered dangerous only if it

occurs in certain quantities or concentrations" in subparagraph (b) of article 2. That solution was rather artificial, and perhaps the best course would be to set out the idea in subparagraph (a) as an activity involving risk, rather than overwork the concept of a "dangerous substance" so as to include water.

4. He welcomed the list of dangerous substances in article 2, which informed States of their obligations. That was crucial to the acceptability of the draft and gave the article more precision. He agreed with Mr. Graefrath (2183rd meeting) that the list must be exhaustive. As other members had already suggested, flexibility could be achieved by adding a procedure for easy and rapid updating or amendment of the draft articles.

5. The definition of "transboundary harm" in subparagraph (g) of article 2 was acceptable, but the concept of harm to the environment should also be included. It would be something challenging to define, but was a matter of increasing importance. It was perfectly possible to conceive of examples of harm being sustained by the environment, but not by States. Despite an interesting discussion of the importance of restoration, the Special Rapporteur had not incorporated that concept in subparagraph (g), and a reference to "the cost of restorative measures" might well be included in the last sentence.

6. He had no preference for either the word "appreciable" or the word "significant" in subparagraph (h) and welcomed the attempt to set a threshold for harm. It might be possible to refine that concept further and he agreed with Mr. Graefrath that the concept of damage should be defined; many precedents already existed in that regard. The phrase "or may arise" could be added at the end of subparagraph (j) in order to cover situations involving risk. So far as subparagraph (k) was concerned, he had reservations about defining an "incident" as a continuous process, for the term usually referred to an isolated event. The definition of "restorative measures" in subparagraph (l) was welcome, but he wondered where the expression came into play. Perhaps it should be included in the provisions on the obligations of the State of origin in the affected State. In fact, the alternative text suggested in the footnote to subparagraph (g) might also include the concept of restorative measures. The two aspects of the definition of "preventive measures" in subparagraph (m) posed no difficulty, but it might be more appropriate to say "mitigate" instead of "contain or minimize".

7. With regard to chapter II of the draft, he did not oppose the concept of prevention set out in article 8 for the purpose both of preventing harmful effects and of containing or minimizing the risk of harm, for example by implementing appropriate safety measures or using standard design and construction and ensuring maintenance. If some members objected to the word "prevention" applying in both contexts, another word could be found for the second case; but the Commission should go further in providing for the obligation of prevention, especially for activities involving risk. It should at least require, as did the 1982 United Nations

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

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

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

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

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

Convention on the Law of the Sea, that the State of origin must comply with generally accepted rules and standards concerning activities involving risk. The point was that no internationally agreed set of safety standards prohibited the construction of a nuclear power plant or a chemical plant simply because the plant did not comply with certain standards. Article 8 must be more stringent. To that end, the phrase "in so far as they are able" must be deleted, because otherwise it would allow States to undertake extremely dangerous activities that entailed the risk of enormous harm.

8. For draft article 9, he preferred the title of the alternative text suggested by the Special Rapporteur in the footnote to the provision, i.e. "Compensation by the State of origin", which would avoid confusion with the field of State responsibility. Once again, he was in favour of incorporating the concept of "restorative measures", at least where the affected State so permitted: obviously, if a State did not wish to be helped with restorative measures, that was its prerogative. The words "in principle" in the second sentence of the alternative text only weakened the provision and should be deleted, for it was important to hold the parties more closely to the criteria set forth in the draft articles.

9. With regard to chapter III of the draft, he agreed with Mr. Graefrath that the approach should be modified so that the articles dealt separately with new or planned measures, activities involving risk and the problem of chronic pollution or continual harm.

10. Whereas draft article 11, paragraph 2, was a positive provision, he was not sure that the wording "Any international organization which intervenes", in draft article 12, was well chosen. The provisions in question might be more understandable if they were placed in a separate article or in a longer paragraph 2 of article 11.

11. Draft article 16 was a specific application of the general obligation of due diligence and of article 8. Once again, the real problem was that no internationally agreed safety standards existed, and it was therefore necessary to fall back on due diligence or to establish a régime on an *ad hoc* basis to take their place. But the Special Rapporteur recognized in the report (A/CN.4/428 and Add.1, para. 9) that it would be unrealistic to ask the States concerned to formulate a régime for every activity. The purpose of article 16 was to obligate States, in the absence of an agreed régime, to exercise due diligence by taking the appropriate preventive measures. However, those measures, as listed in article 16, were not worded strongly enough. In particular, the word "encouraging" could be taken to refer not only to "the adoption of compulsory insurance..." but also to "the application of the best available technology"—two different kinds of requirements that should be treated separately. More attention should be devoted to the formulation of those measures in the articles so as to stress their importance.

12. Draft article 17 was a commendable effort to produce a list of interests to be taken into account. There was solid support in State practice for the use of the balance-of-interests approach. In the report (*ibid.*, para. 39), the Special Rapporteur explained that the

point of article 17 was to provide criteria for the States concerned in negotiating a régime. But it was important to make more explicit how those factors were to be utilized and how the balance of interests fitted into the other obligations in the preceding and subsequent articles.

13. Draft article 18 was extremely important. The Commission should not hesitate to provide for the consequences of failure to comply with procedural obligations. At issue were activities involving nuclear power plants, chemical plants or ongoing pollution from factories. The point was not to prohibit such activities but to prevent harm from being caused. The Commission must create a régime containing obligations that gave rise to international liability in the event of a breach. The obligation of notification, consultation and the like must be just as strict in the present case as it was under the terms of the United Nations Convention on the Law of the Sea and in agreements on international watercourses. The Commission was perhaps hesitating because of the lack of clarity with regard to consequences. But as Mr. Arangio-Ruiz had clearly shown in his second report on State responsibility,⁶ not every breach of an international obligation entailed pecuniary compensation; perhaps only nominal compensation or a form of satisfaction might apply if the obligation to provide notification were breached. Yet there must be some consequences, because otherwise the State of origin would not feel compelled to comply. It was essential to give teeth to the obligations, because the environment was at stake. If a State failed to provide notification, damage might occur—for example through hazardous or toxic substances—that could not be wiped out, and it might be impossible to restore the *status quo ante*. The Commission might make it clear in the commentary that, if the obligation to provide notification were breached, the State was responsible. It was also important to clarify the concept of "causation", and Mr. Graefrath's definition might be of help in that connection.

14. With regard to draft article 19, on absence of reply to notification, he was concerned about the explanation in the report that "if harm then occurs, [the affected State] will not be able to allege that the State of origin had not taken sufficient precautions" (*ibid.*, para. 41). He was against preventing the affected State from making such an allegation, which should simply be a rebuttable assumption. Clearly, it was important to encourage States to reply to notification, but not to go so far as to prevent a State from alleging that the measures taken had been unsatisfactory. Some States did not have the resources to reply or even the time to request an extension.

15. Lastly, he agreed with the general principle embodied in draft article 20 and with the logic of the Special Rapporteur's comments (*ibid.*, para. 42). If an activity was going to cause harm, the State of origin must not allow the operator to proceed.

16. Mr. BENNOUNA congratulated the Special Rapporteur on a rich report (A/CN.4/428 and Add.1)

⁶ *Yearbook* ... 1989, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1.

which reflected the progress he had made in his analysis of a difficult topic. Regrettably the topic was still characterized by vague concepts and it also seemed that the Commission was entering still further into the area of environmental law. Indeed, he even wondered whether it was not in fact codifying the basic principles of that law. Uncertainty in the matter was dangerous and could lead the Commission beyond the task assigned to it by the General Assembly. It was therefore essential to spell out the precise objective of the draft articles.

17. There had, of course, been some progress in conceptual terms, but much remained to be done. In the first place, with regard to the distinction between activities involving risk and activities with harmful effects, the main difference, as the Special Rapporteur stated in the report (*ibid.*, para. 12), was in the sphere of prevention. As the Special Rapporteur further pointed out, the two types of activity were very similar, which meant that there could be no major difference between them in terms of legal régime. Such a distinction would therefore be of interest from the point of view of the definition of the activities concerned and of the scope of the topic.

18. A related question concerned the list of activities, in which connection the Commission was faced with two options: first, to establish a list of activities with a view to delimiting the topic more precisely, and, secondly, to establish a procedure whereby the parties themselves could specify the range of activities to be covered in the light of their needs and of technological developments. The first option had the advantage of security and precision—precision that would *a priori* enable States to accede to the future convention in full knowledge of all the facts—but it also had the drawback of being rigid, which meant that it would be difficult to adapt it in line with developments in technology. Mr. Graefrath (2183rd meeting) had advocated a procedure for the amendment and revision of the articles, but that again would be going beyond the framework agreement the Commission was preparing. Another drawback was that some countries might be afraid to commit themselves to a framework agreement containing a precise list of activities, since that could limit their room for manoeuvre and *a priori* expose them to disputes without providing them with guarantees in terms of the régime applicable to each particular activity.

19. The second option had the advantage of allowing States to negotiate on a case-by-case basis the content of their future obligations as well as any limitations on their jurisdiction, in which respect they could have recourse to expert opinion and, if necessary, could also adapt any measures of prevention to the means available. At a recent conference held in London, a number of countries had reached agreement to eliminate substances dangerous to the ozone layer by the year 2000. Under the terms of that agreement, a fund was to be set up to enable certain developing countries to apply the agreement. That example showed that, when measures were taken to curtail certain hazardous activities, the means of fulfilling the relevant obligations also had to be provided. The drawback of

the second option was that it would leave the object of the future convention in the air, and would not enable States wishing to accede to the convention to make an accurate assessment of the content of their future obligations.

20. Since the future convention would be in the nature of a framework agreement, he tended to favour the second option. The Special Rapporteur, for his part, favoured the first, something which might take the Commission far beyond a framework agreement. It should not be forgotten that, in principle, the Commission was dealing with secondary norms of international law, as attested to by the fact that the topic was new, it having been decided at the outset to distinguish between two kinds of international responsibility and to deal with them separately—a decision he personally regretted, for more elements linked the two types of responsibility than separated them. Even though the Commission was at first sight concerned with secondary norms, however, it none the less had a tendency to enter into the sphere of primary norms. That was particularly true since the Special Rapporteur had invited the Commission to draft an annex to deal in even greater detail with the activities concerned. Furthermore, it was apparent from paragraph 17 of the report under consideration that what was involved were half measures, so that in effect the Commission would be dealing neither with a framework agreement nor with specific primary norms.

21. According to the Special Rapporteur, the annex would be drafted with the assistance of experts at a codification conference. It was not just a matter of expertise, however. Delicate compromises between highly conflicting interests, as represented by the major producers and consumers of dangerous substances, would have to be reached. The complex issues involved were best avoided, in his opinion. Thus, rather than laying down a specific definition of hazardous and harmful activities, the Commission should confine itself to a definition couched in general terms, leaving it to States to give more specific content to the definition in the light of their requirements and of any consultations they might hold on the scope of application of the future convention.

22. Draft article 10, which laid down the principle of non-discrimination, was a new article, and a similar provision appeared in the draft articles on the law of the non-navigational uses of international water-courses. He wondered, however, whether States were ready to accept such an obligation in a framework convention of a universal character. It would perhaps be preferable to leave it to the negotiators to decide whether to provide for internal remedies in the light of the development of the legal régime itself. If that régime was too vague and general, it would simply be left to the courts and to case-law to specify the content of the régime. In his view, the Commission should not base itself *a priori* on the European system, as did the Special Rapporteur, who referred in the report to the 1968 Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters (A/CN.4/428 and Add.1, para. 66) and to the case-law of the European Community. The European Com-

munity had a highly integrated system under which such a provision was authorized. The Commission was not in the same situation. States could perhaps be authorized to incorporate a model clause into agreements concluded between them, but such clauses could not be imposed upon them in a global convention.

23. In the report (*ibid.*, paras. 29-30), the Special Rapporteur spoke of two aspects of the principle of non-discrimination, which were incorporated in draft article 10. The first aspect, which involved placing foreigners and nationals on the same footing for the purposes of the application of the law, concerned only primary norms: that would therefore be going beyond the scope of the draft articles. In short, it seemed that what was needed was a somewhat less bold, yet more realistic, approach.

24. Another vague concept which had caused him considerable difficulty was that of a balance of interests, which was found not only in draft article 17 but also in draft article 9. It was thus central to the draft in that it would apply with respect both to prevention and to reparation. The Special Rapporteur had noted that the technique of listing factors or activities had already been used for the régimes of international watercourses in connection with the determination of the equitable use of a watercourse. Once again, however, the sphere of primary rules was involved, because what was at issue in that case was the elaboration of a régime to govern a specific activity that was known in advance, whereas in the case of the present topic the point was to draft a framework agreement. A list of activities which was vague enough in the case of international watercourses would be even vaguer in the case of the present topic. He therefore did not favour such a list. Although the concept of a balance of interests might conceivably be acceptable in the case of prevention, provided that the relevant factors were spelt out in a little more detail, it would create real difficulties in the case of reparation because the relationship between the author of the damage and the victim was different.

25. With regard to draft article 20, on prohibition of the activity, he assumed that the prohibition would occur prior to the damage, for otherwise the rules of cessation would apply. The question was whether an activity should be prohibited unilaterally by each State or whether it should be prohibited on a reciprocal basis in the context of an agreement between the States concerned. For his own part, he would prefer the latter approach, whereby a treaty-type relationship would arise under international law. In the case of article 20, however, he had the impression that the prohibition would be of a unilateral character.

26. Chapter IV of the draft, on liability, lay at the very heart of the topic, and he agreed with Mr. Graefrath about the definition of the operator and the relationship between the State and the operator. There was a fairly serious lacuna in that reference was made solely to the State, when it was operators which caused harm. Such elements as due diligence, the relationship between the operator and the State, diplomatic protec-

tion and exhaustion of local remedies, therefore, all required further development.

27. He noted that, whereas draft article 9 spoke of the "balance of interests" affected by the harm, draft article 21 provided that "the State or States of origin shall be bound to negotiate . . . to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for". That prompted the question: what was the basic concept that determined the consequences of harm, and hence responsibility and compensation? Was it full compensation or the balance of interests? If it was full compensation, there was no difference between the consequences of responsibility for a wrongful act and the consequences of responsibility for activities not prohibited by international law. If, however, there was some other special concept, it should be spelt out. In his view, it was difficult to uphold the principle of full compensation in the case of no-fault liability, for there was no State practice to that effect. As Alexandre Kiss had noted, apart from the 1972 Convention on International Liability for Damage Caused by Space Objects, there was no precedent for the application of the rule of no-fault liability among States.⁷ Thus, when the *Cosmos 954* Soviet nuclear satellite had disintegrated over Canadian territory in 1978, there had been no question of full compensation. Canada had simply asked for a sum in respect of the costs it had incurred in recovering the hazardous radioactive debris of the satellite. Indeed, in environmental matters, practice actually went against full compensation, first, because the damage was very difficult to assess in monetary terms, and, secondly, because in most cases affecting the environment it was also very difficult to restore matters to the original situation. That had also been the effect of the decision of 11 January 1988 by a court in the United States of America in the "*Amoco Cadiz*" case, in which compensation had not been awarded for environmental damage.

28. He had no objection to draft article 23. For draft article 25, he preferred alternative B. As for draft article 26, he wondered what purpose it served, since it merely laid down the same principles as in the case of State responsibility.

29. With regard to chapter V of the draft, on civil liability, all the conventions cited in the report—including the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, the 1963 Vienna Convention on Civil Liability for Nuclear Damage and the 1969 International Convention on Civil Liability for Oil Pollution Damage (see A/CN.4/384, annex I)—set a ceiling for liability and provided for a compensation fund. Indeed, that was the very purpose of those conventions. Thus, where there was liability without fault, there could not be full compensation. What troubled him in the present case, however, was that a general system was being proposed which would permit liability outside a specific legal régime. Such a system would not be acceptable to States. Of course, a State which ran the risk of serious environmental damage

⁷ A. Kiss, *Droit international de l'environnement* (Études internationales, No. 3) (Paris, Pedone, 1989), p. 111.

from a major oil spill and which looked to the 1969 Convention for compensation would not be fully covered, but that was the state of existing international law. The only solution was through international co-operation as provided for under various conventions on regional seas, such as the 1976 Convention for the Protection of the Mediterranean Sea against Pollution (*ibid.*). It was necessary to be realistic and he agreed entirely with the Special Rapporteur when he recognized (A/CN.4/428 and Add.1, para.46) that there were certain objections to such a system. However, the Special Rapporteur sought to reassure the Commission by saying that the draft articles were basically of a residual nature, adding that the idea was “rather to provide a kind of safety net” (*ibid.*, para. 48). For his own part, he wondered whether States might not see the system not as a safety net but as a trap. In any event, his doubts were not dispelled.

30. With regard to draft article 29, on jurisdiction of national courts, he noted that, in Europe, a party which suffered damage could take its case before its own courts rather than before the courts of the State of origin. It would, however, be difficult to transpose that procedure, no matter how attractive it might seem, into a framework convention of a universal character—a fact recognized by the Special Rapporteur himself in the report (*ibid.*, para. 66 *in fine*). Consequently, he was opposed to such a provision, which would not make for progress.

31. Lastly, he trusted that, in his summing-up, the Special Rapporteur would be able to remove some of his doubts about the draft articles. In particular, he felt that the time had come to lay down firmly the main concepts on which the topic should be founded.

32. Mr. ILLUECA, after congratulating the Special Rapporteur on his excellent sixth report (A/CN.4/428 and Add.1), recalled that, in introducing the Commission's report on its thirty-fourth session in the Sixth Committee of the General Assembly in 1982, Mr. Reuter, the then Chairman of the Commission, had said that some members of the Commission had taken the view that the present topic should not be discussed further for want of any basis in general international law or because of existing difficulties. He had said that most members, however, had taken the opposite view, i.e. that the draft articles could be limited to transboundary problems pertaining to the physical environment and that questions involving the most delicate problems that might arise in the economic sector could be set aside.

33. The then Special Rapporteur, Mr. Quentin-Baxter, had noted in his fourth report that there was in the Sixth Committee

strong and broadly based support for the central aim of the topic, namely to analyse the growing volume and variety of State practice relating to uses made of land, sea, air and outer space, and to identify rules and procedures which can safeguard national interests against losses or injuries arising from activities and situations that are in principle legitimate, but that may entail adverse transboundary effects. . . .⁸

⁸ *Yearbook . . . 1983*, vol. II (Part One), pp. 204-205, document A/CN.4/373, para. 12.

34. The high priority now enjoyed by the topic could be judged from the fact that the General Assembly, in the Environmental Perspective to the Year 2000 and Beyond,⁹ had urged that:

. . . The present momentum should be maintained of concluding conventions on questions such as hazards relating to chemicals, treatment and international transport of hazardous wastes, industrial accidents, climate change, protection of the ozone layer, protection of the marine environment from pollution from land-based sources and protection of biological diversity, in which the United Nations Environment Programme has been playing an active part. (Para. 101.)

35. The draft articles submitted by the present Special Rapporteur had been framed in a realistic and constructive spirit and set forth machinery or procedures for the effective exercise of a “compound primary obligation” which included the duties relating to prevention, information, negotiation and reparation.

36. The articles on prevention—and particularly draft article 16 as it related to the situation after the occurrence of transboundary harm—had given rise to concern on the part of some members. As the previous Special Rapporteur, Mr. Quentin-Baxter, had pointed out in his fourth report, however, the purpose of reparation was always to restore as fully as possible the pre-existing situation and, in the context of the present topic, it could often amount to prevention after the event. He had pointed out that, in the *Trail Smelter* case, the assessment of compensation for proven losses had been a minor phase of the arbitral tribunal's work, adding that “The lion's share of the tribunal's attention was devoted to discussing the means by which future loss or injury could be avoided, consistently with the continued economic viability of the smelting enterprise”.¹⁰ He had also cited the *Colorado River* case, in which the United States of America had been obliged to incur heavy costs to eliminate the problem of high salt levels in the river, which were causing transboundary harm to Mexico. In that case, the two States concerned had stressed the duties of prevention rather than of compensation.¹¹

37. No significance should be attached to the fact that prevention and reparation were dealt with in separate draft articles: they were two successive stages of a continuing process in which the States concerned first saw the need for a régime of prevention and reparation and, when transboundary harm occurred, took the necessary steps if the duties of the State of origin had not been previously determined.

38. The criterion of prevention with regard to the operation of the Panama Canal and the Suez Canal was embodied in the joint declaration which, as Minister for Foreign Affairs of Panama, he had had the occasion to sign together with Mr. Boutros-Ghali, Minister of State for Foreign Affairs of Egypt, at Panama city on 29 July 1981. That declaration had stressed the significance of the effective application of the 1967 Treaty for the Prohibition of Nuclear Weapons in

⁹ General Assembly resolution 42/186 of 11 December 1987, annex.

¹⁰ *Yearbook . . . 1983*, vol. II (Part One), pp. 214-215, document A/CN.4/373, para. 47.

¹¹ *Ibid.*, p. 215, para. 48.

Latin America (Treaty of Tlatelolco), and the declaration's two signatories had stressed the direct and indirect relationship of that instrument with the régimes of neutrality of the Panama and Suez Canals and the desirability of establishing measures of protection against the potential danger of accidents and pollution from nuclear-powered vessels, as well as providing for insurance and for adequate measures to guarantee appropriate compensation.

39. With regard to chapter VI of the sixth report, on liability for harm to the environment in areas beyond national jurisdictions, which included the high seas, the moon and celestial bodies and outer space, a better expression could be found than "global commons" to highlight the common character of such areas rather than their public nature. He would therefore suggest an expression such as "common areas of mankind" (*áreas comunes de la humanidad*).

40. He fully agreed with the Special Rapporteur on the need to regulate in some way activities that were bound to have harmful effects for humanity. The undoubted importance of that question had been stressed with remarkable vision by the Brazilian jurist G. E. do Nascimento e Sylva in his Gilberto Amado Memorial Lecture on "The influence of science and technology on international law" at Geneva in 1983. Mr. Quentin-Baxter had taken up that point in his fourth report, stating:

This report has not addressed directly the urgent question, evoked in this year's Gilberto Amado Memorial Lecture, of mobilizing the means of protecting from degradation the areas of the world beyond the territorial jurisdiction of any State. That question is larger than the present topic; and one of the leads into it [is] that of obligations *erga omnes* . . .¹²

The Special Rapporteur recalled that "According to part 1 of the draft articles on State responsibility for internationally wrongful acts, responsibility derives from the breach of an international obligation and not from harm done" (A/CN.4/428 and Add.1, para. 78) and quoted the view expressed by Mr. Ago in his third report on State responsibility that:

Most of the members of the Commission agreed with the Special Rapporteur . . . in particular, they recognized that the economic element of damage referred to by certain writers was not inherent in the definition of an internationally wrongful act as a source of responsibility, but might be part of the rule which lays upon States the obligation not to cause certain injuries to aliens. . . . (*Ibid.*, footnote 104.)

41. The view that harm should not be regarded as one of the constituent elements of State responsibility had been disputed by Eduardo Jiménez de Aréchaga, who had pointed out that it was the result of an approach to State responsibility which considered only cases in which responsibility arose from injury to aliens—an area in which a breach related precisely to the obligation not to cause harm. It had to be remembered, however, that State responsibility arose in contemporary practice not only in respect of the treatment of aliens, but also, and more importantly, with regard to direct inter-State claims arising from the pollution of the environment, the utilization of watercourses and nuclear tests. In that connection, one could cite the

Nuclear Tests cases.¹³ It had been held that Australia and New Zealand had to demonstrate that the French nuclear tests had caused harm to their populations and their territory. France had argued, on the basis of scientific reports, that no such damage had been caused. Conduct that was wrongful because it was capable of causing injury only gave rise to responsibility if injury resulted for another State. The breach of an international obligation was a necessary element of international responsibility but it was not the only one; the additional element of harm or injury to the claimant State was also required.

42. Chapter VI of the sixth report was a commendable effort to seek positive solutions for extremely serious problems which affected the very survival of mankind. The analysis by the Special Rapporteur of the interrelationship between the scope of part 1 of the draft articles on State responsibility¹⁴ and that of the present draft articles, as well as his examination of the questions of the affected State, applicable liability, and other matters such as harm to the environment in the common areas of mankind, challenged the Commission to make a thorough study during the term of office of its current members of the salient points raised by the Special Rapporteur, with a view to extending the scope of the topic to harm to the environment in areas beyond national jurisdictions.

43. Mr. CALERO RODRIGUES said that, following the Special Rapporteur's explanations during the discussion, the difference between their views had narrowed considerably. Difficulties stemmed from the fact that each member of the Commission looked at the topic from his own standpoint and, so far, no generally accepted approach had emerged.

44. Chapter IV of the sixth report (A/CN.4/428 and Add.1), on liability, took up the issue of harm. The basic element of the whole set of draft articles was that of transboundary harm caused by lawful activities carried on under the jurisdiction of the State of origin. All the articles revolved around that concept of harm and set out norms of conduct which prescribed the exercise of due diligence to prevent activities from causing harm or, in the event of harm having occurred, to wipe out as far as possible the harmful consequences resulting from the activities in question. The articles on prevention in chapter III of the draft contained provisions regulating due diligence to avoid harm being caused. The articles on liability in chapter IV, for their part, set forth provisions regulating the conduct required of the State under whose jurisdiction the activity which had caused harm had taken place.

45. In the alternative text for draft article 9 suggested by the Special Rapporteur in the footnote to that article in the annex to the report, the words "the State of origin shall ensure that [compensation] [reparation] is made for harm" had been substituted for "the State of origin shall make reparation for appreciable harm". For his part, he welcomed the fact that the Special

¹² *Ibid.*, p. 222, para. 74.

¹³ *Nuclear Tests (Australia v. France) (New Zealand v. France)*, Judgments of 20 December 1974, *I.C.J. Reports* 1974, pp. 253 and 457.

¹⁴ *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

Rapporteur had now suggested “compensation” as the alternative to “reparation”. The concept of compensation was more precise and indicated a form of reparation which had a compensatory function; he believed it was precisely that function which it was intended to attribute to the proposed obligation in the draft. Another difference between the two texts was the far-reaching change of replacing the formula “shall make reparation” (i.e. compensation) by “shall ensure that reparation” (i.e. compensation) “is made”. That change of wording allowed for the introduction of the concept of civil liability and of the possibility of harm being compensated for without the direct intervention of the State of origin. During the discussion, Mr. Graefrath (2183rd meeting) had tried to demonstrate the advantages of the technique of channelling said to have been widely accepted in international instruments. Specific reference had been made by Mr. Graefrath to article 139 of the 1982 United Nations Convention on the Law of the Sea, which, with regard to the sea-bed and ocean floor beyond national jurisdictions, excluded State liability for damage if the State had “taken all necessary and appropriate measures to secure effective compliance” with the relevant provisions of the Convention by persons under its jurisdiction. Personally, he was not convinced that the prominent place given to civil liability in other instruments offered the best model for resolving the question of compensation in the present draft. Those other instruments dealt with very well-defined fields and none of them had the broad scope of the present draft articles, in which the “operator” would be a very elusive element.

46. The main point, however, was that Mr. Graefrath had given an incorrect interpretation to the provisions submitted by the Special Rapporteur, who had gone a long way to combine the possibilities of using both State liability and civil liability. The role of civil liability was not a minor one. Under draft article 28, any individual who had suffered harm could press a claim on the basis of civil liability either in the courts of the affected State or in those of the State of origin (art. 29, para. 3). Paragraph 1 of draft article 29 specified that courts would be given the necessary jurisdiction to deal with such claims and that access to the courts was guaranteed. Hence civil liability was far from being ignored; it was recognized and guaranteed as a channel for seeking redress for harm, and the injured individual—and even the injured State—was free to use that channel. Use of that channel did not, and should not, exclude the liability of the State, which could be invoked through what was being termed somewhat awkwardly the “diplomatic channel”.

47. Unfortunately, the obligation to make, or to ensure, reparation (compensation) stated in article 9 was not clearly spelled out in chapter IV of the draft and it would be preferable for the articles to leave no room for doubt. The obligation set out in draft article 21 was only an obligation “to negotiate . . . to determine the legal consequences of the harm”. He took that to mean that the purpose of negotiations was to determine the amount and conditions of compensation, on the understanding that the question of the existence of the harm and that of the establishment of a causal link

between the harm and certain activities had already been settled by agreement between the States concerned. It would be useful to refer to those two preliminary questions in the draft.

48. Again, under article 21 the negotiations had to be conducted “bearing in mind that the harm must, in principle, be fully compensated for”. In draft article 26, however, provision was made for exceptions, and in draft article 23, entitled “Reduction of compensation payable by the State of origin”, provision was made for what the Special Rapporteur called “guidelines for negotiations” (A/CN.4/428 and Add.1, para. 51). Article 23 was unsatisfactory, but he had been unable to devise substantive changes to improve it. Perhaps some new ideas might emerge from the debate, but for the time being the text proposed by the Special Rapporteur would have to be retained.

49. As for draft article 24, he doubted whether there was any need for separate provisions on harm to the environment. It had always been his view that the importance of a given aspect of a question did not, *per se*, justify treating it separately. A separate article should be drafted only when separate legal treatment was necessary. Harm to the environment was not different from harm of any other kind, and he was not convinced by the Special Rapporteur’s arguments for treating it separately from harm to persons or property. The provisions of paragraph 1 regarding restoration would apply equally to both kinds of harm, as would those of paragraph 3. Where, then, was the specificity of harm to the environment which would warrant a separate provision? The Commission should be prompted solely by legal considerations, and if there was no legal justification for including a certain provision, it should not be included merely because the subject-matter was important or popular. Indeed, to draft a meaningless provision for the environment would be to belittle the importance of environmental problems. If it was felt that the environment justified separate treatment, the Commission could decide to devote an entire topic to the question, possibly updating the 1972 Stockholm Declaration,¹⁵ rather than including it within a draft of much more general scope.

50. Further consideration was also needed of the threshold of compensation. It was acknowledged that not all transboundary harm had to be compensated for. Draft article 2, subparagraph (h), referred to “appreciable” or “significant” harm which was “greater than the mere nuisance or insignificant harm which is normally tolerated”. But the Commission was aware, from its work on the law of the non-navigational uses of international watercourses, of the difficulty of qualifying harm, and it was doubtful whether any adjective could do so satisfactorily. Yet the draft articles should contain a clear indication of the circumstances which would justify a claim for compensation, whether through the diplomatic or the domestic channel. He would welcome any suggestion the Special Rapporteur could make in that respect.

51. Another problem concerned the obligations of the State of origin. What would happen if negotiations

¹⁵ See 2179th meeting, footnote 17.

under article 23 were unsuccessful? In the report (*ibid.*, para. 43), the Special Rapporteur explained that, if the State of origin did not fulfil its obligation to negotiate, it would be violating an international obligation and would thus incur responsibility for a wrongful act. He doubted, however, if the State of origin could be compelled to negotiate in good faith, and wondered what the outcome would be if negotiations did take place in good faith but did not result in agreement. In the latter case, the States concerned would presumably recognize that they were in dispute and would look to one of the methods of dispute settlement. But to attempt to resolve the dispute without recourse to a third party might well fail and, according to the draft articles, a refusal by the State of origin to accept third-party settlement, whether judicial or arbitral, would not be considered a wrongful act. He feared that the provisions on compensation were likely to prove ineffectual unless some mechanism was provided for settling disputes.

52. In chapter VI of the sixth report, the Special Rapporteur dealt with the question of liability for harm to the environment in areas beyond national jurisdictions—the “global commons”. The Special Rapporteur examined several options, but did not seem convinced that it was feasible to include the global commons within the scope of the draft. In his own view, some instrument to regulate harm to the global commons was certainly needed, but the present draft was bedevilled by so many problems that to attempt to include the question of the global commons would seriously disrupt progress. The existing draft would have to be reviewed in its entirety. He would therefore prefer to leave aside the question of the global commons for the time being, but was grateful to the Special Rapporteur for his very substantial analysis of the questions involved.

53. Mr. Sreenivasa RAO said that he welcomed the clarity and fluency of the sixth report (A/CN.4/428 and Add.1) and the open-minded manner in which the Special Rapporteur had invited the Commission and the Sixth Committee of the General Assembly to express their views. The present 33 draft articles needed further study before a proper response could be given. They covered a wide range of legal concepts and raised important issues for developing States; they also raised the problem of reconciling the needs of development with protection of the environment.

54. Mr. Graefrath (2183rd meeting) was right to say that the main emphasis should be on prevention and on devising a régime for transboundary harm confined strictly to cases of “substantial” harm, as opposed to “appreciable” harm. Responsibility should be placed with the operator, where it belonged, and the liability of the operator should be dealt with more directly than had been attempted so far. The Special Rapporteur’s approach implied that it was possible to devise a framework convention, consisting of general principles, while at the same time indicating what kinds of activities were covered by it. He would himself prefer a framework convention, which was probably all the Commission could achieve, but also thought that States would be prepared to accept such a convention only when they could see which activities under their

jurisdiction it would govern. It was perhaps not necessary for a framework convention to include a list of dangerous substances, as opposed to an illustrative list of activities involving risk or actual transboundary harm.

55. A list of activities was a primary task for the Commission. The emerging corpus of international environmental law covered a wide range of subjects: climatic change, systematic food-production failure, desertification, deforestation, long-range transboundary air pollution, the destruction of the ozone layer, ocean contamination and the endangerment of species. The Commission’s list might also cover marine pollution from land-based sources, the transport, handling and disposal of toxic and dangerous wastes, international trade in potentially harmful chemicals, hazards posed by large chemical and industrial plants, and the operation of nuclear reactors and nuclear ships.

56. Some members of the Commission had expressed concern lest the Commission’s efforts to develop a régime of liability for all those environmental concerns be overtaken by developments elsewhere. Their concern was unnecessary, since the Commission’s work could only benefit from the development of specific principles in certain fields, and indeed the Special Rapporteur had drawn inspiration from such sources. Liability régimes had yet to be devised in most areas, especially for nuclear incidents and the transboundary movement of hazardous wastes.

57. Where nuclear incidents were concerned, the preferred approach was to assign liability to the operator, up to a fixed financial limit, according to the principle of strict liability. There would be no exceptions, so that victims could claim compensation; the State would be required to meet any shortfall due to the operator’s inability to obtain complete insurance cover. Arguments had also been advanced in favour of setting up common funds, at the regional or global level, from contributions made either by the operators of nuclear facilities or by States, in order to meet compensation claims which exceeded the combined limits of the operator’s liability and State cover. The aim was to secure full compensation for innocent victims when it was impossible to restore the previous situation, obtaining funds from a variety of sources according to the apportionment of responsibility. That approach best met the common concern for viable régimes of environmental law of benefit to the entire international community. A régime of strict or absolute liability involving the State alone would be neither practical nor justifiable. The Bhopal and Chernobyl disasters had demonstrated the sheer scale of the damage which could be caused by environmental hazards. Such accidents could involve hundreds or thousands of claimants, entail enormous financial expenditure and require substantial scientific and technological resources, both in prevention and in restoration. To afford protection against such consequences over a 30-year period, as proposed by the Special Rapporteur, would be beyond the capacity of any single State, however wealthy; no developing State could possibly play such a role. Moreover, if the principle of strict liability were chosen and the ordinary requirement of causation were

dispensed with, to enable more victims to claim compensation more rapidly, there must, in the interest of fairness to the operator, be a ceiling on financial liability, which might vary according to the activity covered. Looking beyond the limitations of the traditional law of tort, he considered that the kind of approach he had outlined could best resolve the difficulty.

58. In adopting a broad concept of damage, to include damage to the environment, the Commission must not disregard the goals of restoration and of adequate and reasonable compensation, nor must it unduly burden the operator, the State or the international community. Prescriptions for bilateral or multilateral negotiations, or specific rules of procedure for notification, consultation and dispute settlement, could only be effective if there were generally accepted common standards and fairly shared benefits and burdens. All parties concerned must be willing to achieve a balance of interests by accommodating all legitimate competing interests. Otherwise, the procedural obligations would merely lead to disputes and jeopardize friendly relations. Hence he was not convinced that the draft articles should give priority to procedural obligations, which could be considered after an acceptable régime on liability had been developed.

59. Attention should be paid to the concerns of the developing countries, their present stage of economic development, and the need to share with them current knowledge on the conduct of dangerous activities. They stood in need of training, as well as technical and financial assistance, in order to develop the necessary infrastructure to achieve a safe environment and sustainable development. Multinational corporations operating in their territories must conform with international standards of accountability and liability. Developing States had difficulty in obtaining the transfer of appropriate technology under equitable terms and they were anxious to exercise control over the natural resources under their jurisdiction, and to remain competitive in world trade and international markets.

60. Turning to the draft articles, he would prefer to replace the word "places", in article 1, by "areas". He agreed with Mr. Graefrath that the proposed definitions of terms in article 2 could be regarded as guidelines and reviewed later. Article 3, however, required more careful consideration and a detailed commentary. If liability was to be established, the State of origin must be fully aware of the potential risk of an activity, not merely of its existence. The Bhopal disaster was a particularly relevant example in that regard. There must also be an element of control over the activity in question and it should be made clear in the commentary that an important factor in the attribution of responsibility would be the operator's profit from the activity.

61. He objected to the expression "sovereign freedom", in article 6, and would prefer the word "right". The language of article 7 was too complex. The intention was, apparently, to require States to reduce or contain the risks of an activity, without

preventing the activity itself; but the sense should be brought out more clearly.

62. With regard to article 12, he agreed with Mr. Al-Baharna (2183rd meeting) that the word "intervene" should be avoided in relation to international organizations. They were to be invited, on a consensual basis, to bring their skills and expertise to bear in the management of a crisis. As Mr. McCaffrey had pointed out, the various factors listed in article 17 should be weighted, either in the commentary or in additional paragraphs.

63. The obligation, in article 21, to negotiate full compensation was too far-reaching and would not be accepted by States. Because exonerating factors were allowed for in article 23, there would be problems in the negotiating process if the principle of full compensation was upheld. In the same article, the phrase "if the State of origin has taken precautionary measures . . . and the activity is being carried on in both States" was difficult to understand. The fact that an activity was conducted by both States, rather than by the State of origin alone, made no difference to the outcome. If both States were operating nuclear reactors, and one of the nuclear reactors was involved in an incident, the activity by the other State was irrelevant.

64. In article 24, the Special Rapporteur had attempted to bring within the compass of a single article both harm to the environment and harm to persons or property. In his opinion, the two types of harm should be treated separately, even if the requirement of reparation and compensation was the same. Again, the exoneration from liability in article 26, paragraph 1 (b), was not stated clearly. Was it the intention to extend liability to a person who caused harm and affected innocent persons in the process? Provision must also be made for acts by terrorists, for harm to innocent victims and for measures of relief and restoration.

65. Lastly, with regard to article 29, he pointed out that even the affected State might want to pursue a remedy in the courts of the other State, and that possibility should not be foreclosed. In other respects, he agreed with the Special Rapporteur's proposals.

The meeting rose at 6.15 p.m.

2185th MEETING

Tuesday, 3 July 1990, at 3 p.m.

Chairman: Mr. Jiuyong SHI

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

Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Thiam,
Mr. Tomuschat.

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

State responsibility (concluded)* (A/CN.4/416 and Add.1,¹ A/CN.4/425 and Add.1,² A/CN.4/L.443, sect. C)

[Agenda item 3]

Part 2 of the draft articles³

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

ARTICLE 8 (Reparation by equivalent)

ARTICLE 9 (Interest) and

ARTICLE 10 (Satisfaction and guarantees of non-repetition)⁴ (concluded)

1. The CHAIRMAN recalled that the Commission still had to take a decision concerning draft articles 8, 9 and 10. From the consultations he had held, he had the impression that the Commission wished to refer those articles to the Drafting Committee, on the understanding that the Committee would take full account of the comments and observations made during the debate.

It was so agreed.

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

* Resumed from the 2175th meeting.

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

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

³ 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. For the texts of the new articles 6 and 7 of part 2 referred to the Drafting Committee at the forty-first session, see *Yearbook* . . . 1989, vol. II (Part Two), pp. 72-73, paras. 229-230.

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.

⁴ For the texts, see 2168th meeting, para. 2.

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

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

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

⁸ Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook* . . . 1982, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook* . . . 1983, vol. II (Part Two), pp. 84-85, para. 294.

ARTICLES 1 TO 33⁹ (continued)

2. Mr. OGISO said that there was even more reason than at earlier sessions to be grateful to the Special Rapporteur, whose sixth report (A/CN.4/428 and Add.1) contained all the articles of chapters I to V of the draft, as well as an outline on liability for harm to the environment in areas beyond national jurisdictions—the "global commons". The Commission thus had a general picture of the topic and of the links between the respective chapters.

3. Most of his comments on the report would be of a preliminary nature and it was possible that, on reflection, he might change his position on certain points. There were three general points which were of basic importance for the consideration of the topic.

4. First, it appeared that the concept of transboundary harm, as defined in subparagraph (g) of draft article 2 (Use of terms), was confined to harm "which arises as a physical consequence of the activities . . ." and that economic harm was therefore excluded.

5. Secondly, with reference to the Special Rapporteur's own interpretation of the draft articles, he said that he was not sure whether there had been any formal agreement that the articles would constitute a framework convention in the sense in which the Commission understood that term as far as the topic of the law of the non-navigational uses of international watercourses was concerned. If there had been such an agreement, however, the articles would be binding on the parties only to the extent that they had concluded an international agreement in respect of certain dangerous activities or substances, and the convention would then serve only as guidelines for that agreement. In the absence of a special agreement, the convention would not be binding on the parties. That seemed to be the Special Rapporteur's intention in draft article 4 (Relationship between the present articles and other international agreements), which included the words "subject to that other international agreement". However, article 4 really meant that, if another agreement contained the same provisions as the future convention, those provisions would apply for States which were parties both to the agreement and to the convention and that, if there were no other agreement, the convention would be binding on the parties. That would certainly make the convention a framework convention within the meaning assigned by the Commission to the draft articles on international watercourses. He personally did not object to the present draft being treated in that way, but, if his interpretation was correct, it should be duly recorded as that of the Commission.

6. Thirdly, he would prefer activities involving risk and their legal consequences to be classified in the following way. The first group was that of activities which involved a high probability of accidents or

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

incidents causing considerable or disastrous transboundary harm. Activities of that kind should be covered by the prohibition provided for in draft article 20 (Prohibition of the activity). He cited the example of a nuclear reactor which had become so obsolete that its safe operation could not be guaranteed and which therefore involved a high probability of accidents, including transboundary harm. In that case, the State which exercised jurisdiction or control over the reactor had to prohibit continued operation; if it failed to do so and transboundary harm occurred, it would be under an obligation to pay full compensation to the affected States.

7. The second category of activities included those which normally involved a low probability of causing transboundary harm, but which, in the event of an accident, could have physical consequences constituting considerable or disastrous transboundary harm. That category would include “ultra-hazardous” activities. In accordance with emerging international practice, liability for the harm had to be borne by the operator in such a case. The same rule could apply to transboundary harm caused by an activity involving risk, in which case the operator’s liability could, in principle, be “causal” liability. The State in whose territory or under whose jurisdiction or control the activity was carried on would not bear primary liability for the damage, unless it was itself the operator. However, if the operator could not pay full compensation, the State of origin would be held subsidiarily liable. In that connection, it would be desirable to set up a special legal régime on prevention, negotiation and compensation among the States concerned, as provided for in draft article 14 (Consultations). Only in the context of such a special régime could he accept the idea of strict or causal liability advanced by the Special Rapporteur.

8. The third category consisted of activities which involved a high probability of causing transboundary harm, but whose physical consequences were much less significant or “appreciable” than those in the second category. Liability for damage resulting from activities of that kind could also be placed primarily on the operator, the State of origin becoming liable only if it had failed to fulfil the obligation of due diligence.

9. That classification of activities and their legal implications might differ from the approach adopted by the Special Rapporteur, but he hoped it would be taken into account in the consideration of the topic.

10. Turning to the draft articles, he said that, with regard to article 2, he doubted whether the “dangerous substances” listed in subparagraph (b) covered every category of dangerous materials or substances. For instance, chemical agents, which were to be listed in the convention on chemical weapons being prepared within the United Nations, were excluded. If the list was to be retained, it should not be left in article 2, but should be placed in an annex as an exhaustive list subject to periodic review. He did not think it would be useful to have a purely illustrative list.

11. As to the choice between the terms “appreciable” and “significant” in subparagraph (b) and other provisions of the draft, he would prefer the word “signifi-

cant”, because the word “appreciable” was too vague. In that connection, subparagraph (h) should be simplified to read: “‘Significant harm’ means harm which is greater than normally tolerated”. The expression “mere nuisance” was tautological and would require further explanation.

12. In subparagraph (k), the Special Rapporteur defined the word “incident”, which was used, for instance, in draft article 16; but he also used the word “accident” in draft articles 7 and 27. It appeared, *prima facie*, that the word “incident” was intended to mean any sudden event which caused transboundary harm or created the risk of causing it, whereas the word “accident” would mean any event which had actually caused harm. If so, was it not necessary to define the word “accident” as well? If not, and if the two words were interchangeable, why not use only one?

13. In the definition of the expression “preventive measures” in subparagraph (m) of article 2, reference should be made to “transboundary harm” and the words “an incident or harm” should be replaced by “an incident causing transboundary harm”, in line with subparagraph (k).

14. At the previous session, several members of the Commission had expressed doubts about the title of draft article 3 (Assignment of obligations) and had asked for clarifications. In his sixth report, the Special Rapporteur did explain the term “obligations”, but not the term “assignment”.

15. In draft article 7 (Co-operation), he welcomed the reference to assistance by international organizations, but he was not sure whether the constituent instruments of international organizations would allow them to provide such co-operation. For safety’s sake, article 7 should refer to the need to conclude co-operation agreements.

16. Subject to any drafting improvements to be made by the Drafting Committee, draft article 8 (Prevention) was acceptable, as was the alternative text suggested by the Special Rapporteur in the footnote to the article in the annex to the report.

17. He preferred the alternative text for draft article 9 (Reparation) suggested in the footnote to the article, on the assumption that the words “the State of origin shall ensure” meant that the State of origin had an obligation to take appropriate legislative or administrative measures to facilitate the payment of compensation by the operator and to establish a fund to supplement compensation paid by the State itself. In the text proposed in the annex itself, the words “appreciable harm” should be replaced by “significant transboundary harm” in order to take account of the definitions of the expressions “transboundary harm” and “significant harm” and to avoid the ambiguity of the present wording.

18. With regard to draft article 11 (Assessment, notification and information) and draft article 13 (Initiative by the presumed affected State), he would like some clarification concerning the following hypothetical situation: if a ship of State A noticed that a ship of State B was conducting on the high seas an

activity referred to in article 1, what should it do? Should it inform State A, State B or indeed the affected State, if the latter's identity was not in dispute? Or was it State A which should inform either State B or the affected State? He hoped that some explanations would be given in the Special Rapporteur's next report.

19. The title of draft article 14 (Consultations) was too weak compared to the measures of implementation to be taken. The article should, in fact, cover both consultation and negotiation among the countries of the region or among the States concerned by particular activities involving risk. For example, if a nuclear power station was built, the State which built it and the States which might suffer the consequences of an accident arising from it might consult and negotiate with a view to devising a legal régime for that activity.

20. Although he thought that draft article 15 (Protection of national security or industrial secrets) was necessary, he was concerned about its wording. Again taking the example of an obsolete nuclear reactor, where there was a danger of explosion or a leak, he asked whether a State could refuse to provide information on such a plant by advancing the argument of national security. Conceivably, a State might even refuse to disclose the existence of such a dangerous activity. In his view, the existence and location of a dangerous activity should not be concealed on the pretext of national security. Article 15 should therefore be reconsidered in that light.

21. He supported the concept of a "balance of interests" in draft article 17, but had doubts about the usefulness of including a detailed list of the factors involved. It would be enough to describe in general terms what was meant by a "balance of interests". He would, however, also have no objection if the explanation were included in the commentary.

22. As he had already explained, he took the view that the prohibition provided for in draft article 20 should apply to the first group of activities in the classification he had proposed, namely activities which involved a high probability of causing disastrous transboundary harm. The article would have to be reformulated along those lines. In particular, he wished to know whether, as it now stood, article 20 merely meant that the State of origin must refuse authorization for a planned activity or whether it was also obliged to withdraw authorization when an activity became so dangerous that transboundary harm might occur. Furthermore, the article referred to the obligation of the State of origin to refuse authorization if an assessment showed that transboundary harm was unavoidable or could not be adequately compensated for. He wondered whether the words "cannot be adequately compensated for" referred to the operator's capacity for compensation or to supplementary compensation by the State.

23. He agreed with the Special Rapporteur's idea to provide in draft article 22 (Plurality of affected States) for the intervention of an international organization where more than one State was affected, but pointed out that an international organization might not be competent to intervene, even at the request of one of

the affected States, if the State of origin was not a member of the organization. He would like to hear the Special Rapporteur's view on that point.

24. He endorsed the basic idea contained in draft article 23 (Reduction of compensation payable by the State of origin), but he wished to know why the words "precautionary measures" had been used instead of "preventive measures".

25. It was his understanding that, in draft article 25 (Plurality of States of origin), alternative A was based, *mutatis mutandis*, on article V of the 1972 Convention on International Liability for Damage Caused by Space Objects. However, he had doubts as to the applicability of that provision to the present topic. He was also not convinced that alternative B could solve the problems arising from a plurality of States of origin, because it would in practice be very difficult to attribute liability on a *pro rata* basis according to the harm incurred by each affected State. In any event, article 25 required further consideration.

26. If the word "Proceedings" used at the beginning of draft article 27 (Limitation) meant proceedings instituted before the courts of the State of origin or the affected State, the limitation of such proceedings should be determined in accordance with the domestic legislation or the code of civil procedure of the country concerned. It would be difficult to establish a uniform rule in the draft articles.

27. Draft article 28 (Domestic channel) drew on the idea contained in article XI of the Convention on International Liability for Damage Caused by Space Objects, and the Special Rapporteur stated in the report that "As a minimum, the present articles could establish a system based in part" on that Convention (A/CN.4/428 and Add.1, para. 63). He was not convinced, however, that it was justified to generalize or to apply automatically the rule or principle contained in article XI to all cases of transboundary harm.

28. Draft article 31 (Immunity from jurisdiction) and draft article 32 (Enforceability of the judgment) departed from the solutions proposed in the draft articles on jurisdictional immunities of States and their property. Although the Special Rapporteur was completely free to propose his own concept of State immunity, careful consideration was needed when that concept deviated from the one followed in the Commission's study on the topic of jurisdictional immunities as such.

29. With regard to the question of areas beyond national jurisdictions—the "global commons"—he took the view that, in the topic under consideration, it was premature to speak of liability for harm caused to such areas.

30. In the first place, the understanding reached on the scope of the topic had been to deal with transboundary harm which arose as a physical consequence of the activities referred to in article 1 and which, in the territory or in places under the jurisdiction or control of another State, was significantly detrimental to persons, objects, property, etc. (art. 2 (g)). The vague concept of "harm to the global commons" did not fit those conditions and would only cause confusion.

31. Secondly, the protection of the global commons could be ensured through international co-operation on preventive activities; there was no need to introduce a legal principle for compensation or to set up a régime of international liability. For example, to tackle the problem of the greenhouse effect, more scientific data should first be collected so as to determine with some accuracy what was causing the phenomenon of global warming and then to create international co-operation mechanisms to control the phenomenon on the basis of scientific knowledge. It was unnecessary to establish prematurely a régime of international liability for harm to the ozone layer: instead, effective mechanisms must be instituted for implementing or enforcing the principles and rules embodied in the 1985 Vienna Convention for the Protection of the Ozone Layer and its 1987 Montreal Protocol.

32. Mr. PELLET said that he would make a few general comments on the substance of the topic before turning to more specific points.

33. In considering the present topic, the Commission must start by giving some thought to the line of reasoning on which international liability was based. He had reservations in that regard about the distinction which the Special Rapporteur had drawn between "activities involving risk" and "activities with harmful effects". He wondered whether, in the first case, liability was meant to be based on risk and, in the second, on harm. In his view, risk gave rise to liability and harm gave rise to reparation in both cases. In the draft articles on State responsibility for internationally wrongful acts, it had been logical to distinguish between responsibility and reparation; but, in the topic under discussion, liability appeared to be a "digest" of sorts and was in fact largely synonymous with reparation. In other words, reparation became the key element. It was no longer one consequence of liability among others: where there was harm, there must be reparation. That was the reasoning on which the draft articles were based, especially draft article 9, and he wondered why the Special Rapporteur had not indicated more clearly that harm had been the focus of his thinking. Personally, he had no objection to the idea of harm serving as the foundation for the system of liability, because certain circumstances could be found in practice in which harm resulting from a lawful activity could give rise to reparation, for example the nationalization of foreign property, although in principle the nationalizing State did not incur any liability. On the contrary, in the context of the draft articles under consideration, the reason harm must be repaired was that it was caused by an activity involving risk, so that it could be said that risk gave rise to liability and harm gave rise to reparation.

34. In his view, however, the real question lay elsewhere: whether the harm caused by an activity involving risk must be repaired. Draft article 9 replied that it must: "the State of origin shall make reparation for appreciable harm". He was not convinced that that was a rule of positive law. Although there probably were international régimes of strict liability in certain areas that were part of positive law, those were conventional régimes in areas of very limited scope and there was no

reason to conclude that such rules could be generalized. The Commission could thus not consider that, in the present case, it was engaged in codification: its efforts were an attempt at progressive development and they were very ambitious, because the case under consideration could not be regarded as the crystallization of a custom that was in the process of taking shape. It was a question of establishing a new rule virtually from scratch—and that made him wonder about the important question of the purpose of the draft.

35. The Special Rapporteur appeared to regard the draft articles as a first step towards the conclusion of an international convention. He personally doubted whether such an approach was appropriate or realistic. Even if the development of international law to which the Special Rapporteur was leaning seemed desirable as such, it was important not to overlook a basic element: the accession of States, or at any rate of the main States concerned, would be essential if the future convention was to have a practical effect. He greatly feared, however, that States would be reluctant to accept liability in such a general form, even if it was imposed only in a rather "soft" way.

36. He also wondered whether the draft articles might not be out of date even before their completion. The draft was justified by the absence of relevant rules; it was necessary to turn to the idea of strict liability because positive international law did very little to regulate activities involving risk. However, he had been struck by the fact that those activities, most of which were new, had been increasingly codified: either the need for States to be vigilant in respect of such activities was stated in conventions, or certain activities were globally condemned, as in the case of the attempt to make massive pollution of the environment an international crime. That then led back to the more familiar area of liability for failure to comply, and in those conditions it was perhaps unnecessary to seek the basis of liability in "strict" or "causal" liability.

37. For those reasons, he suggested that the draft articles should be divided into two separate parts. The first part would contain a set of relatively detailed and stringent articles devoted exclusively to defining the obligation of States to be vigilant; it would include questions of both prevention and co-operation, and would more or less cover chapter III of the present draft. The second part would be composed of "model clauses" in respect of strict liability as such and would correspond to chapters IV and V of the present draft. Those clauses, which might be adjusted according to the types of activities envisaged, would serve as a reference for States during negotiations on specific activities.

38. That division would improve the draft's effectiveness. Furthermore, it would avoid having to decide on the justification of "causal" liability, a concept on which the Commission was divided. In the event of failure to comply with the obligation to be vigilant, the liability of the State of origin would be that dealt with in the draft articles on State responsibility.

39. In the draft articles submitted by the Special Rapporteur, he wondered whether, since "soft law" already

existed, the Commission was not in the process of creating "soft liability". Chapter III, for example, contained a number of expressions that watered down the obligation of prevention embodied in draft article 8: "in an attempt to establish" (art. 14); "encouraging the adoption of compulsory insurance" (art. 16); "may . . . take into account the following factors" (art. 17); and "the State of origin shall refuse [*devrait refuser*] authorization" (art. 20). Not only were no legal sanctions envisaged in the event of failure to comply with those "soft" obligations, but draft article 18, to the very principle of which he was strongly opposed, even excluded any ordinary-law penalties. The same soft approach could be found, to a lesser degree, in chapters IV and V of the draft. Those precautions were probably meant to reassure States, but he wondered whether that did not go too far and whether, by not laying down real obligations, the Commission was not confirming doubts as to whether the future convention was really necessary. Such caution was particularly excessive because it meant lagging behind existing general international law, for example the decision in the *Trail Smelter* case (see A/CN.4/384, annex III). Not only was no progress being made on prevention and on certain aspects of reparation, but there was even a tendency to regress. That did not contradict what he had already said about the absence of rules of positive law. It was in the area of vigilance and of the consequences of failure to comply with the obligation to be vigilant that the draft did not go as far as it should. On the other hand, with regard to reparation without failure to comply with that obligation, it seemed to go too far and to depart rather dangerously from positive law, particularly as far as the question of that liability was concerned.

40. On that point, he agreed with Mr. Graefrath (2183rd meeting): in the case of the activities under consideration, primary liability lay not with the State, but with the operator. That was generally the case in existing conventions, which virtually all embodied the principle of supplementary compensation by the State, under which the operator paid compensation up to a previously set threshold and the State paid the remainder. States might also be obligated more strictly than under draft article 16 to see to it that the operator was properly insured. Shifting primary liability from the operator to the State was another matter entirely, however, and that was probably one of the points on which the draft went the furthest.

41. Turning briefly to a number of specific points, he shared the surprise expressed by Mr. Hayes (2182nd meeting) at the rather sudden appearance of the concept of "an international organization with competence" in draft articles 11, 12 and 22. He wondered which organization was meant and on what basis it could intervene. Moreover, draft articles 11, 12 and 13 could be grouped with draft article 14, and draft article 16 should be the first article in chapter III.

42. He had reservations about the wording of draft article 21 and thought that it would be more logical to state the principle of compensation before referring to negotiations. In draft article 23, the passage in square brackets, which was purely illustrative, should be

placed in the commentary. He did not see why the fact that the affected State was benefiting without charge should have a bearing on the agreement reached. He also had doubts about draft article 24, because he was not sure that the draft should deal with harm to the environment. If it was believed that the question really raised a particular problem, it should be taken up in a separate convention. Article 24 also addressed the question of the exhaustion of local remedies. Although paragraph 3 provided that the claim for reparation could be made through the diplomatic channel, the diplomatic procedure was usually subordinated, at least in ordinary international law, to the exhaustion of local remedies. In draft articles 28 *et seq.*, however, the Special Rapporteur appeared to want to exclude that customary rule of international law, probably in order to ensure speed and efficiency. If that was his intention, it would have to be expressed clearly in the draft itself, and not just in the commentary.

43. He also objected to draft article 26, paragraph 1 (*a*), for it was not certain that an exception resulting from "a natural phenomenon of an exceptional, inevitable and irresistible character" really belonged in the draft in such a general form in view of the draft's objectives and the particular nature of the liability under consideration. While he was not opposed to draft article 30, he believed it would be useful to recall—even if it was obvious—that international law was applicable in addition to national law.

44. Chapter VI of the Special Rapporteur's sixth report (A/CN.4/428 and Add.1), to which the preceding speakers had hardly referred, was a useful basis for discussion. Throughout his reading of the first five chapters of the report and the draft articles contained in the annex, he had been concerned about the absence of any reference to areas beyond national jurisdictions and he therefore welcomed the Special Rapporteur's initiative. In that connection, however, he had reservations similar to those he had expressed with regard to draft article 24 as it related to harm to the environment, because, once again, the problem was a very special one. He wondered whether it might not be preferable to state in the draft articles that harm caused to or in areas beyond the national jurisdiction of States was not being taken into account and to consider that question separately. In any event, the problem was important and his reply to the question raised by the Special Rapporteur was that it should certainly be taken into consideration in one way or another.

45. Mr. KOROMA congratulated the Special Rapporteur on his very stimulating sixth report (A/CN.4/428 and Add.1) and on the patience with which he had responded to the various comments made by members of the Commission and by representatives in the Sixth Committee of the General Assembly.

46. He first wished to remind members that the Commission had decided to change the title of the topic in English. As that had still not been done, he formally proposed that the word "acts" should be replaced by "activities".

47. The Special Rapporteur had maintained the distinction between activities involving risk and activities

with harmful effects, even though he conceded in his report that the two kinds of activities had sufficient features in common to bring their consequences under a single régime. While he welcomed that approach, he considered, like Mr. Calero Rodrigues (2181st meeting) and Mr. Hayes (2182nd meeting), that it was not necessary to classify the activities in two separate categories. What was required, in his view, was to elaborate a régime for activities that caused serious injurious consequences whether or not such activities involved risk. If the State of origin was liable for certain activities, it was not because they were activities that involved risk, but because they had caused harm. The operation of a nuclear power station or of a fertilizer plant, for example, might be an activity involving risk, but the State of origin became liable only if such activity caused harm. He therefore concurred with the approach adopted in the Council of Europe's draft rules on compensation for damage caused to the environment (see A/CN.4/428 and Add.1, footnote 8) and, in particular, with the title of that draft, which emphasized "damage". Even the Experts Group on Environmental Law of the World Commission on Environment and Development, which had apparently taken another view, had not based liability on risk in article 11 of its legal principles and recommendations on environmental protection and sustainable development (*ibid.*, para. 5). Under the terms of that article, if one or more activities created a significant risk of substantial harm, the State which engaged in those activities or which authorized them must ensure that compensation was provided if significant harm occurred. The conclusion was not so clear, however, when the Experts Group attempted to treat risk and harm as two separate categories. In referring to damage resulting from the normal operation of an activity, it had stated: "Thus, in spite of the fact that the activity would cause substantial extraterritorial harm, it is not regarded either as clearly unlawful, or as clearly lawful. Instead a duty to negotiate on the equitable conditions under which the activity could take place has been provided for." (*Ibid.*, para. 8 *in fine.*) The Experts Group concluded, however, that even such a régime would have to establish compensation for the harm caused. In his view, it was clear, therefore, that the Commission should elaborate rules for liability for activities causing harm that might involve risk.

48. With regard to preventive measures, one could conceive of measures designed to mitigate harmful effects after an accident had occurred, but it would make for clarity if different terms were used for measures taken before and after the act occurred.

49. The Special Rapporteur had for the first time introduced a list of activities which, according to the report (*ibid.*, para. 15), would define the scope of the draft and thus make it more acceptable to States, which would then know the limits of their liability. There again, however, the list in draft article 2 was predicated on the risk involved in the use of certain dangerous substances or of technology that produced hazardous radiation. His concern was that such a list would limit the scope of the topic not only in terms of substance, but also from a geographical standpoint, particularly as

far as the more developed regions of the world were concerned. It would therefore not make for a global convention or for more precision, except obliquely, in respect of the nature of the activities referred to in draft article 1. He did not think the Special Rapporteur was saying that the topic related solely to ultra-hazardous activities, activities in which very harmful substances were used or activities involving risk alone, but the list did not address certain issues, such as that of the screwworm fly, which had escaped from one region of the globe following certain scientific manipulations and was now destroying livestock in other continents. More than \$16 million had already been spent on combating that scourge and both FAO and IFAD were currently working on its eradication. On the other hand, the list could conceivably have covered the Bhopal incident; but, in that case, even without the list, the cause of the accident had been established and liability was not contested except for the quantum of damages. The Commission must strive to make the future instrument as universal as possible. The Special Rapporteur had, of course, stated that the list was not exhaustive but, as Mr. Graefrath (2183rd meeting) had argued, a non-exhaustive list might not be so useful and would not make the basis of liability sufficiently precise. Furthermore, in his own view, it would unduly restrict the scope of the topic and the basis of liability. He therefore had yet to be convinced as to the usefulness of the list.

50. Draft article 1, as worded, succeeded, paradoxically, in enlarging and restricting the scope of the articles at the same time, by covering activities that created—although "involve" might perhaps be the better word—a risk of causing transboundary harm. In one sense, that was correct inasmuch as risk was associated with all human endeavours; interpreted in that way, however, the article could make the scope of the draft unduly wide. On the other hand, "activities creating a risk" could be interpreted to mean that, if the venture was not considered, in the view of the operator, risky in the first place, no liability would be incurred if harm were caused during the course of its operation. He realized that that was not the intention of article 1, but, as worded, it was open to such an interpretation. Perhaps it would be preferable to speak of "such activities including risk causing harm". He also favoured the deletion of the words "throughout the process", unless their limiting effect was justified for some particular reason which the Special Rapporteur had in mind.

51. The comments he had just made concerning the "list" approach applied directly to draft article 2. His concern was that, as worded, the article would restrict the scope of the topic and that its emphasis on dangerous substances might give the impression that the draft related only to the industrialized countries.

52. Draft article 3 could simply be entitled "Liability", as its present title was ambiguous. The word "assignment" had a technical meaning in law and certainly did not reflect the content of the article, the opening clause of paragraph 1 of which could be amended to read: "The State of origin shall be liable under the present articles provided that it knew or . . .".

He also agreed with the view that the operator, not the State, should be held directly responsible for damage caused by certain operations, so that States which imported technology with which they were not completely familiar were not encumbered with liability.

53. In the interests of clarity, the first part of draft article 6 could be amended to read: "The right of a State to carry on or permit human activities in its territory . . .".

54. Draft article 11 stipulated that a State in which an activity was being conducted that was likely to cause harm or to create a risk of causing harm must inform the State or States likely to be affected by providing them with the available technical information, but it did not state what the affected States were supposed to do when they received such notification and information. Could they call upon the State of origin not to undertake the activity? A potentially affected State could, of course, take measures to prevent the potential harm or to remedy the effects of harm if it did occur. In his view, however, if the State of origin had foreknowledge of such harm or if it had not been an accident, it should be the responsibility of that State to prevent such harm from occurring or to prohibit the activity.

55. He supported draft article 12, on participation by an international organization, but did not think it was necessary to specify that the organization must operate within its sphere of competence. International organizations were very much aware of the need to respect the terms of their constituent instruments and it was rare for them to act *ultra vires*. Unless the Special Rapporteur had a special reason for making that reference, it should be deleted.

56. He was in full agreement with the various requirements under draft article 16, particularly those pertaining to the adoption of a compulsory system of insurance, the utilization of the best technology to ensure that the activity was conducted safely and the possibility of prohibiting an activity which involved a high risk of causing harm.

57. In draft article 17, the Special Rapporteur had endeavoured to achieve an equitable balance between the interests of the States concerned by activities referred to in article 1. However, he noted that the Special Rapporteur was not very enthusiastic about the article. In his own view, article 17 should not be linked to article 1, since it was after harm had been caused and liability had been established that the balance of interests had to be weighed. That was what had happened in the *Trail Smelter* case (see A/CN.4/384, annex III): the operator had been held liable and it was only when reparation had come to be negotiated that some of the factors enumerated in draft article 17 had been taken into account. The reference to article 1 would have been justified if that article had related to harm caused to the environment of the "global commons". That was not so, however, since article 1 dealt only with activities undertaken in the territory or under the jurisdiction of States.

58. The six-month period provided for in draft article 19 was too short, in his view. The State receiving

the information in question might not have the technical capability to assess it and, if it sought the advice of an international organization, the latter might not be able, on account of its programme of work, to render assistance as expeditiously as the State concerned would like. He therefore agreed with Mr. Calero Rodrigues that it would be preferable to speak of a "reasonable period".

59. He was pleased to note that, in draft article 20, the Special Rapporteur had provided for the possibility of prohibiting an activity. That was entirely in keeping with the evolution of State practice. A number of developed and developing countries had already prohibited the export and dumping of toxic and hazardous wastes in the absence of adequate guarantees.

60. He was not sure why draft article 21 imposed an obligation to negotiate on the State of origin. Obviously, in the event of transboundary harm, the State of origin would want to enter into negotiations; if it did not do so, it would be up to the affected State to pursue its claims through different channels. He appreciated the Special Rapporteur's efforts to arrive at a compromise and perhaps even to exclude third-party settlement procedures from the draft, but in his view the article should be toned down and made less restrictive.

61. He agreed in principle with draft articles 23 and 24, subject to their reformulation by the Drafting Committee.

62. With regard to draft article 26, he considered that the Commission should guard against the new tendency to refer in its draft articles to acts of war, hostilities, civil war and insurrection. That was not in tune with the times or with contemporary international law, particularly the Charter of the United Nations. The only possible exception that could be contemplated was *force majeure*.

63. He was unable to discern any obligation in draft article 28. If it was a question of the obligation to exhaust local remedies, that was stating the obvious, but it was not apparent from the text. Perhaps the article was simply a prelude to draft article 29 on jurisdiction of national courts. It had been said that article 29 was to be seen in the context of the progressive development of international law; it was, however, over-ambitious and there would be many obstacles to its implementation. As worded, it would allow State B to sue State A in State A's courts. He was not sure that States were prepared to go that far. As for individuals, while one could conceive of a Norwegian citizen suing in the courts of the United Kingdom, it was difficult to imagine a national of Sierra Leone, for instance, suing before the Norwegian courts, for very obvious reasons, such as the prohibitive cost of the proceedings and the difficulties of collecting evidence. Article 29, though good in intent, could perhaps be applied in some, but not all parts of the world. For the time being, it would be necessary to rely on States to prosecute a claim on behalf of their nationals when harm occurred.

64. Referring to chapter VI of the sixth report, on liability for harm to the environment of the "global

commons”, he said that the Special Rapporteur had pinpointed the problems to be solved. For now, the Commission would have to determine the obligations of States with regard to the environment, as damage to the environment and environmental degradation, whose consequences affected the whole world, were the subject of universal disapproval. The Commission must decide whether the standard to be adopted in that connection should be strict liability or liability based on due diligence, as in the 1982 United Nations Convention on the Law of the Sea. He agreed that, in determining the obligations of States regarding the environment, account must be taken of the need to ensure a balance of interests, as, for instance, in the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (see A/CN.4/428 and Add.1, footnote 37). The Commission must also decide whether, in the matter of liability, the same standards should apply to activities conducted in the territory of States and to activities that caused harm to the global commons or to the environment.

65. Mr. BARBOZA (Special Rapporteur) said that he had three points to make at the current stage. First, the proposed list was a list of dangerous substances, not a list of activities. He had always said that he was opposed to the second type of list, which was too restrictive, while the first kind offered rather more flexibility. That was explained in his sixth report (A/CN.4/428 and Add.1, para. 16). Secondly, the liability in question was “causal” liability and, since it did not presuppose a breach of an obligation, it was within the realm of primary, not secondary rules (*ibid.*, para. 43). Thirdly, the term “nuisance” in draft article 2, subparagraph (h), was not to be understood according to its technical meaning in English and American law. Rather, it was the equivalent of the term “embarrassment” (*molestia* in Spanish; *inconvenient* in French).

66. Mr. TOMUSCHAT thanked the Special Rapporteur for a very rich sixth report (A/CN.4/428 and Add.1) on a fascinating topic which was also extremely difficult because there were few precedents to rely on. There were, of course, a number of agreements and instruments, but their scope was limited. Never before had such an ambitious attempt been made to bring together in a framework agreement all the legal aspects of human activities which caused or might cause transboundary harm. Even the 1972 Stockholm Declaration¹⁰ merely stated broad substantive principles, whereas the draft articles submitted by the Special Rapporteur rightly emphasized procedures, especially for the purpose of prevention, as a means of achieving the goal in view.

67. The ambitious nature of the task and the inherent problems it involved did, however, have one regrettable corollary: that neither the present Special Rapporteur nor his predecessor had been able to be “operational” from the start. The Commission and the Special Rapporteurs had had to use a trial-and-error approach to determine the general direction the future régime should take. What were the needs of the international

community? Where were the gaps that had to be filled? How far was it possible to go as matters now stood? Were Governments prepared to accept any limitation of their sovereign powers? All those questions had to be discussed in addition to the strictly legal problems involved.

68. He was not sure that the Commission had found all the answers to those basic questions, on which the success of its work depended. In any case, it had spent a great deal of time on them—inevitably so—and was now paying the price for its thoroughness and hesitations. Many other international bodies were actively pursuing their own codification work, and the Commission, which had been among the first to concern itself with the environment, the corner-stone of the topic, was now in danger of falling behind the others. The Special Rapporteur had mentioned that risk in introducing his report (2179th meeting). It was therefore essential to make rapid progress, for otherwise the topic might become moot. If every detail had already been regulated elsewhere, it would be extremely difficult to show the need for a general framework agreement in addition to other instruments.

69. Without going into details, he considered that there was room for improvement in the texts of the draft articles. In particular, he would have preferred it if the Special Rapporteur had drawn more heavily on existing instruments, *mutatis mutandis*, instead of opting to a large extent for his own drafting. He would not comment on individual articles, but would refer to the scope of the draft articles *ratione materiae*, prevention, the role which could be played by international organizations and the need to distinguish between substantive and procedural provisions.

70. He had to admit that he could not clearly identify the scope of the draft articles *ratione materiae*. He agreed with draft article 1, according to which the articles would apply to human activities to the extent that they caused, or created a risk of causing, physical transboundary harm. However, draft article 2 did not use the same wording as article 1. It introduced two new concepts: “activities involving risk” (subpara. (a)) and “activities with harmful effects” (subpara. (f)). What was its relationship with article 1? Was the expression “activities involving risk” a synonym for “activities [which] create a risk of causing transboundary harm”? Was the expression “activities with harmful effects” synonymous with “activities [which] cause . . . transboundary harm”? Unfortunately, the text was not clear, whereas it should be crystal clear.

71. At first sight, the Special Rapporteur seemed to be making a distinction between two kinds of activities. However, that distinction was not reflected in the articles that followed. He could not agree with the concept of “activities involving risk” as understood by the Special Rapporteur in article 2 because, as Mr. Koroma had said, it was too restrictive for a framework agreement. In reply to the Special Rapporteur, who had focused exclusively on the handling of dangerous substances, which were to be defined in a list, Mr. Calero Rodrigues (2181st meeting) had already drawn the Commission’s attention to dams and other

¹⁰ See 2179th meeting, footnote 17.

waterworks. Water was not in itself a dangerous substance, but, when a dam burst, the effects could be disastrous. The same was true of crude oil: as such, it did not affect human health, but it could contaminate the coastline or rivers following an accident or pollute groundwater in the event of a leak, etc. According to his own reading of article 2, it would not apply to damage caused by water or crude oil, even if the list of dangerous substances was not exhaustive, as the Special Rapporteur indicated (A/CN.4/428 and Add.1, para. 17).

72. That approach was far too narrow. What about air pollution, for instance? What about all those seemingly normal and innocuous activities which, through a slow, but frightening process of accumulation, contaminated the air, soil and water of the planet every day and every minute? Since the Commission had opted in principle for a framework agreement that was intended to be comprehensive in scope, such activities could not be disregarded. However, the draft articles said nothing about pollution by accumulation. It had been argued that it was not the Commission's task to draft a convention on the environment, since the liability under consideration was much broader in scope. That was true: but the environment was the core of the topic and the provisions being drafted were intended essentially as a set of rules to protect the environment and mankind within that environment. So far, that had not been achieved and the Commission was not living up to the expectations of the international community. To focus the articles on dangerous substances was a suitable approach when the aim was to determine reparation in the event of harm, but prevention had to be much broader in scope and extend to all the processes whereby material damage could be caused by accumulation.

73. In several of the proposed articles, a distinction should have been drawn between dangerous activities themselves and other activities. For instance, the procedure provided for in draft article 11 was supposed to apply to the activities referred to in article 1. That was, however, almost impossible. Any State could take special precautionary measures if it knew beforehand that a given activity involved certain risks, but an activity which simply "caused" transboundary harm—the other category of activities referred to in article 1—would not appear *ex ante* as hazardous. As in the draft articles on the law of the non-navigational uses of international watercourses, the procedure for assessment, notification and information was entirely suited to planned measures which might adversely affect neighbouring States, but, in the present draft articles, "dangerous substances" could not be the sole criterion. It was one thing to refer to activities and projects which could have harmful effects (power stations, the construction of motorways and airports, etc.), as in the directive of 27 June 1985 of the Council of the European Communities on environmental impact assessment and in the draft framework agreement of the Economic Commission for Europe on environmental impact assessment in a transboundary context (*ibid.*, footnote 35), but to speak globally of the "activities referred to in

article 1" was quite another thing and it made no real sense.

74. Similarly, in draft article 21, the Special Rapporteur should have drawn a distinction between activities involving risk which, by their nature, caused harm and activities which simply caused harm. It was already going quite far to say that full compensation was warranted if an inherent risk materialized, but to go beyond that and say that any kind of transboundary harm must in principle be fully compensated for was simply indefensible. The Special Rapporteur's proposals in that regard were technically, if not conceptually, wrong. Article 1 mentioned two different categories of activities which could not always be dealt with in the same manner. Prevention and compensation must be kept separate in each case.

75. He also disagreed with the Special Rapporteur's tendency to merge substantive and procedural rules, especially in draft article 21, but also in draft articles 14 and 16. He could not approve of that method, which had also been that of the previous Special Rapporteur. Article 21 as it now stood was rather confusing. Its title was "Obligation to negotiate", but what it actually said was that, in principle, transboundary harm must be fully compensated for. That was a substantive rule and, if the Commission adopted it, it would first have to be embodied in a separate provision; only after that could circumstances be defined in which less than full compensation was warranted. Negotiation did not offer any criterion: in general, it favoured the stronger party, which could simply reject any claim made, whereas the weaker State could never be so adamant in its refusal. The draft articles should contain objective rules applicable to large and small States alike.

76. Draft article 18, which had also been inherited from the previous Special Rapporteur, was particularly unfortunate. Why derogate from the general régime of State responsibility? Did the Commission not take the draft articles seriously and did it really intend to formulate rules of soft law, not of hard law? It was awkward to state that no proceedings could be instituted. Normally, in international law, when certain obligations had been breached, there were no formal proceedings which the injured State could set in motion. It was, however, quite another matter to deny such a State the benefit of the usual rights of reciprocity by prohibiting it from taking counter-measures or reprisals. Was that the intended meaning of article 18? Why did the Special Rapporteur consider that the draft articles on prevention did not deserve to be based on the general rules of international law? On that point, he agreed with the comments made by Mr. McCaffrey (2184th meeting) and Mr. Pellet. The Commission should confine itself to formulating the substantive and procedural rules it deemed necessary. Any breach of those rules would be covered by the draft articles on State responsibility. It should not establish a special régime simply for lack of courage.

77. In that connection, he emphasized a point just made by the Special Rapporteur: the fact that the draft articles were supposed to constitute a framework agreement did not mean that they were within the realm of

secondary rules. What was the difference between primary rules and secondary rules? Secondary rules were rules which governed chiefly, but not exclusively, State responsibility and hence the consequences of the breach of any substantive international obligation. In devising a régime on international liability for injurious consequences arising out of acts not prohibited by international law, however, the Commission must not forget its specific primary objective, which was to formulate provisions to govern a specific sector of international relations, namely the duties incumbent on States as a result of the basic principle of sovereign equality, which included territorial integrity. In particular, if it chose to enunciate a duty of compensation, as proposed by the Special Rapporteur in article 21, it would not merely be repeating an established secondary rule which was within the scope of the draft articles on State responsibility; it would be formulating a new rule for a specific field of international law. As he had already pointed out, the best course would be to leave aside anything which belonged to the realm of State responsibility. There was no need for the draft articles under consideration to state the consequences of the breach of an international obligation. The fewer derogations from the normal régime, the better. The rules on liability should not look like a monster with no parallel in international law.

78. He welcomed the fact that the Special Rapporteur had included specific provisions on the role of international organizations, but he could not agree with their substance. Like Mr. McCaffrey, he thought that there should be a rule stipulating that States must comply with generally accepted international rules and standards. At present, such rules and standards were elaborated within the framework of international organizations. There were still some gaps, however. In particular there was as yet no agency with responsibility for combating air pollution. For that very reason, however, acceptance of the formula “generally accepted international rules and standards”, which was used in many articles of the 1982 United Nations Convention on the Law of the Sea, would be a major step forward in the progressive development of the law. A qualitative leap of that kind, which would affirm that no State could persist in its polluting practices if the majority of States considered them a threat to the international community, was justified by the fact that States enjoyed full sovereignty only within their own territory. If their polluting practices had adverse effects on other States, they could not rely on the principle of sovereignty, whereas the affected States could, *a contrario*, invoke their territorial sovereignty. Thus, through the co-operation of all States within the framework of the competent international organizations, rules could be formulated that would apply to the various aspects of potential transboundary harm and States which infringed those generally accepted international rules and standards would then simply be committing an internationally wrongful act.

79. As to the wording of draft article 12, on participation by international organizations, he, like other members of the Commission, could not agree with the use of the word “intervene”, which smacked of unlawful

interference. The Special Rapporteur was, of course, correct in pointing out that international organizations could not perform just any kind of activity; they had only the powers and responsibilities conferred on them by their constituent instruments. With the possible exception of the United Nations, whose role was no longer the same as it had been originally, most international organizations were still subject to the limitations and constraints of their statutes. In the framework agreement, the Commission could propose procedures to be introduced by the competent international organizations. In particular, provision should be made for a reporting obligation under which States would have to report at regular intervals on the manner in which they were respecting and fulfilling their international obligations. Provision might even be made for on-site inspections, on the understanding that they would have to be expressly accepted. It would thus be possible to set up a whole system of confidence-building measures, which might now be as necessary in the environmental field as in the military field.

80. For all those reasons, he deplored the extreme caution that was evident in the articles of chapter III of the draft, on prevention. For example, article 14 said that the States concerned had an obligation to enter into consultations in an attempt to establish a régime for the activity in question. In his own view, the primary obligation should be to comply with generally accepted rules and standards; only in the absence of such rules and standards would it be necessary to establish a régime to govern the bilateral relationship between the States concerned. That was another case where substance and procedure must be kept separate. The same was true of article 16, which was just a more elaborate version of article 8: the obligations it enunciated, such as prior authorization, insurance coverage, etc., should be applicable in general, and not only in a specific procedural situation. On that point, he agreed with Mr. Pellet's conclusions.

81. For the sake of clarity, he thought that draft article 17 should simply be deleted. It was inconceivable that a flagrant violation of generally accepted rules or standards could be justified by any of the factors referred to in that long and confusing list.

82. In conclusion, he reserved the right to comment at the next session on chapters IV and V of the draft articles and on chapter VI of the sixth report. He welcomed the thought-provoking debate which had taken place on the topic. It was now time for the Commission to produce tangible results and he hoped that it would not be long in doing so.

83. Mr. BARBOZA (Special Rapporteur), replying to Mr. Tomuschat, said that the sixth report and the draft articles did deal with transboundary pollution, either in the form of accidental pollution caused by an activity involving risk or in the form of pollution which occurred during the normal operation of an activity. They even covered air pollution resulting from an activity carried on in an area within national jurisdiction.

The meeting rose at 6.05 p.m.

2186th MEETING

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

Chairman: Mr. Jiuyong SHI

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

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

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 33⁵ (*continued*)

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

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

3. The answer to the question whether the topic was being restricted or expanded lay in the series of definitions contained in the new texts of draft articles 1 and 2. A careful reading had confirmed his suspicion

of adjectives in a text like the draft under consideration. For example, he saw no need to qualify “risk” or “harm” in the context of articles 1 and 2. The issue of harm was clear and unambiguous. It was interesting to note that, apart from article 2, in none of the articles from 1 to 8 was the word “harm” qualified in any way. Not until article 9 did the expression “appreciable harm” figure in the text. The words “appreciable” and “significant” clouded the issue of the scope of the topic and should be deleted. One could say that they did more harm than good to the meaning of “harm”.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

reappraisal of risk in the concept as a positive development.

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

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

35. The Special Rapporteur espoused the view cited in the report that activities which caused transboundary harm in the course of their normal operation were neither "clearly unlawful" nor "clearly lawful" (*ibid.*, para. 8 *in fine*). In law, however, that was impossible: an act was either lawful or unlawful. Objective liability

arose as a result of harm caused by a lawful activity in which the operator had complied with all his obligations, including the rules of conduct. According to the doctrine, harm caused in such circumstances was the result of an event associated with an activity involving risk, but independent of the will of the operator. But, according to the Special Rapporteur, such ordinary lawful activities would apparently, at a certain point, become unlawful. He could not understand how the Special Rapporteur, having distinguished two types of activities, namely "activities involving risk" and "activities with harmful effects", could qualify them as "unlawful". In the report, he explained that, whereas "activities involving risk are lawful in so far and so long as the measures dictated by *due diligence* are taken, activities with harmful effects are not legal until a consensual régime is in effect between the parties" (*ibid.*, para. 10). Apart from the subjective difficulty of deciding when the transition had been made from one category to the other, that approach offended against the conceptual basis of objective liability. For such liability to arise, there must either be an unlawful activity or some transgression of the rules of conduct.

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

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

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

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

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

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

“innocent” party. That was only fair and reasonable and was in keeping with the very concept of objective liability. Although the Special Rapporteur referred to article 23 (Reduction of compensation payable by the State of origin) in his comments on article 21, the reference must be clearer and should be included in the text of article 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

61. His concern grew when he came to draft article 2, which contained what was in effect a list of activities involving risk. The 1982 United Nations Convention on the Law of the Sea, which referred to a whole range of activities giving rise to potential liability, was proof enough that it was not really possible to have even an

illustrative list of activities involving risk without the danger that States would be misled rather than reassured. He was not sure, therefore, that such a list would make for certainty, or encourage accession to the future convention. The real disadvantages of the list approach, however, became apparent when it came to the list of dangerous substances. Such lists were extremely useful in particular conventions designed to resolve particular problems, especially when they took the form of annexes that could be readily amended. He would not therefore jettison the idea of a list, especially if it was intended to be illustrative. However, the Special Rapporteur's intention would be more accurately reflected if, instead of including a long list of different types of substances at the very beginning, an annex were added at the end of the draft. He would therefore suggest that the subparagraphs of article 2 be rearranged and that those dealing with transboundary harm be placed at the beginning.

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

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

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

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

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

67. He regretted the lack of opportunity to comment at length on chapter VI of the sixth report (A/CN.4/428 and Add.1), concerning the "global commons", and trusted that at the Commission's next session the Special Rapporteur, who had outlined the difficulties involved, would also be able to suggest solutions. It was not, of course, the first time that the question of the global commons had been tackled. To cite but one example, a clear reference was made in article 1, paragraph 1 (*I*), of the United Nations Convention on the Law of the Sea to areas beyond national jurisdiction, which were also covered by a number of other provisions of that Convention. He was not pleading for the concept of the common heritage of mankind, which none the less had his strong support. Even the most vigorous opponents of that concept accepted that there

was an area of the sea-bed beyond national jurisdiction and had not hesitated to draft rules providing for obligations and potential liability in that regard. He therefore trusted that the Commission, as the official law-making body of the United Nations, could point the way in dealing with such matters. For instance, Principle 21 of the Stockholm Declaration applied specifically to areas beyond the limits of national jurisdiction, and thought could perhaps also be given to something in the nature of class actions, coupled with insurance schemes and funds. The Commission could not just say that it was possible to act with impunity with respect to areas beyond national jurisdiction. That was the most clear-cut conclusion to emerge from the analysis by the Special Rapporteur, who was to be congratulated on it.

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

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

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

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

⁷ See 2179th meeting, footnote 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 6.20 p.m.

2187th MEETING

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

Chairman: Mr. Jiuyong SHI

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

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

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 22 TO 27

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 22 to 27 as adopted by the Committee (A/CN.4/L.445).
2. Mr. MAHIOU (Chairman of the Drafting Committee) said that he first wished to thank the members of the Drafting Committee for their constructive spirit and hard work. He also thanked the members of the Commission who were not members of the Drafting Committee but had helped in its work, as well as the Special Rapporteur, whose assistance had been most valuable, and the secretariat.
3. In organizing its work, the Drafting Committee had borne in mind the Commission's stated intention to make every effort to complete the second reading of the draft articles on jurisdictional immunities of States and their property at the present session and to give priority, during its current members' term of office, to the topics of the draft Code of Crimes against the Peace and Security of Mankind and the law of the non-

navigational uses of international watercourses. The Committee had been unable to start with the topic of jurisdictional immunities because the third report of the Special Rapporteur, Mr. Ogiso, which incorporated suggestions on the articles referred to the Drafting Committee at the previous session, had not yet been distributed in all languages at the beginning of the present session. The Committee had therefore decided to devote its first two weeks' work to the topic of international watercourses, on which it had then spent two additional meetings.

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

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

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

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

* Resumed from the 2167th meeting.

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

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

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

protect watercourses should be stated before the duty to prevent or reduce pollution.

ARTICLE 22 (Protection and preservation of ecosystems)

8. The text proposed by the Drafting Committee for article 22 read:

PART IV

PROTECTION AND PRESERVATION

Article 22. Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourse[s] [systems].

9. The obligation to protect international watercourses had been stated in paragraph 1 of draft article 17 [18] and, in order to strengthen that obligation as formulated by the Special Rapporteur, the Drafting Committee had deleted the words “take all reasonable measures to”. Moreover, following the model of article 192 of the 1982 United Nations Convention on the Law of the Sea, it had made the content of the obligation clearer by adding the more active and dynamic idea of preservation to that of protection. In order to ensure consistency in the use of terms, it had replaced the expression “individually and in co-operation” by the expression used by the Special Rapporteur in paragraph 2 of the article, namely “individually or jointly”, which was taken from article 194, paragraph 1, of the United Nations Convention on the Law of the Sea. The obligation to act “jointly” was an application of certain general obligations contained in part II of the draft, in particular in articles 6 and 9.

10. For the rest, the Drafting Committee’s efforts had been aimed primarily at simplification. The Committee had decided that the words “the environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas” had two disadvantages. First, they were not clear enough because they referred to the vague idea of the environment of an international watercourse; secondly, they lent themselves to conflicting and undesirable interpretations, namely that the environment of the watercourse did not include the watercourse itself and that the environment included areas which had only a very distant connection with the watercourse. The Drafting Committee had therefore preferred to use the concept of an ecosystem, which had a relatively precise scientific meaning, since it referred to the natural systems necessary for the conservation of the river, and which was increasingly being recognized as a legal concept, as shown, for example, by the work of the Economic Commission for Europe on water management. That point would be explained in the commentary to the article.

11. The Drafting Committee had considered that the expression “impairment, degradation or destruction” was unnecessary, since the concepts of protection and preservation of the watercourse were general in scope, and even that it did not fully reflect the intention of the text, which was to impose an obligation on States not merely to refrain from degrading the watercourse, but also to improve its condition, if possible. The Committee had also deleted the words “or serious danger

thereof”, which it had found superfluous because the obligation stated in the text was worded very generally, as well as the words “due to activities within their territories”, which had also seemed unnecessary.

12. He would not comment at the current stage on paragraph 2 of draft article 17 [18] as originally submitted by the Special Rapporteur, because it had served as the basis for a separate article, namely article 25, which he would introduce later. The title originally proposed for article 17 [18] had, of course, been amended to take account of the changes made in the text.

13. Prince AJIBOLA said that he could support the proposed text, but thought that the word “[systems]” should be deleted, since the concept of an ecosystem had been introduced.

14. Mr. AL-QAYSI said that that problem depended on the choice the Commission would make between the expressions “international watercourse” and “international watercourse system”. The question had not yet been settled in connection with article 1 [Use of terms]. It would therefore be better to keep the text as it stood.

15. Mr. MAHIOU (Chairman of the Drafting Committee) said that the word “system” appeared in square brackets throughout the draft articles and not only in article 22: the Commission would decide at the appropriate time whether or not to retain it. He also noted that, in the present instance, the concept of a “watercourse system” was different from that of an “ecosystem”.

16. Mr. Sreenivasa RAO requested the Special Rapporteur to define the concept of an ecosystem in the commentary to article 22.

17. Mr. TOMUSCHAT noted that the expression “individually or jointly” was used in several of the articles proposed by the Drafting Committee. Linked as they were by the conjunction “or”, the two terms seemed altogether mutually exclusive. In the circumstances, it might be better to draw on the wording of Article 56 of the Charter of the United Nations, the key article in that regard, and use the expression “individually and jointly”.

18. Mr. McCAFFREY (Special Rapporteur) said that, in English at least, the expression “individually or jointly” was also understood to mean “individually and jointly”: the conjunction “or” was not strictly speaking disjunctive in that case. Moreover, as the Chairman of the Drafting Committee had pointed out, the expression was taken from article 194 of the 1982 United Nations Convention on the Law of the Sea, where it was followed by the words “as appropriate”, which the Drafting Committee had apparently considered superfluous. In any case, the commentary would explain that the two terms used in the expression were not mutually exclusive. He nevertheless thought that the Commission should take note of Mr. Tomuschat’s comment in order to come back to it when considering the draft articles as a whole. For the time being, he would leave it to the Chairman of the Drafting Committee to decide whether that change should be made at the current stage.

19. Mr. BENNOUNA said that the text should be kept as it was and that he shared the view of the Spe-

cial Rapporteur. The expression "individually or jointly" meant that the obligation was imposed on each of the States individually when they were not acting jointly by agreement. Actually, when they were acting jointly by agreement, they were also acting individually. If they could do more, they could do less. Acting jointly also meant that States could decide to take unilateral measures, each on its own account, but by agreement. The agreement went beyond unilateral action and included it. "Jointly" included and encompassed "individually", but the reverse was not true: States might well act individually because they had not arrived at an agreement.

20. However, if the expression "individually and jointly" were used, that would imply both individual and joint measures, and the two were not always necessary.

21. Mr. Sreenivasa RAO said he, too, thought that the text should be kept as it was. He was satisfied with the Special Rapporteur's explanation concerning the interpretation of the expression "individually or jointly". Taking measures "individually or jointly" allowed the adoption of individual or joint measures, as necessary. In the case of international watercourses, States were normally expected to take measures relating to the part of the watercourse under their jurisdiction. They thus acted individually in the first place and could act jointly later if there was a need for them to do so. Like Mr. Bennouna, he was afraid that use of the expression "individually and jointly" might make it an obligation for States to act jointly even when that was not necessary.

22. Mr. BARSEGOV said that he endorsed the text proposed by the Drafting Committee: it gave riparian States full freedom to act both individually and collectively and it was in keeping with the type of instrument envisaged, namely a framework agreement.

23. Prince AJIBOLA said that he was satisfied with the explanations given and accepted the text proposed by the Drafting Committee.

24. Mr. MAHIOU (Chairman of the Drafting Committee) said that he shared the views expressed by the Special Rapporteur and by Mr. Bennouna, Mr. Sreenivasa Rao and Mr. Barsegov.

25. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 22 as proposed by the Drafting Committee.

Article 22 was adopted.

ARTICLE 23 (Prevention, reduction and control of pollution)

26. Mr. MAHIOU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 23, which read:

Article 23. Prevention, reduction and control of pollution

1. For the purposes of the present articles, "pollution of an international watercourse [system]" means any detrimental alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse [system] that may

cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the international watercourse [system]. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances the introduction of which into the waters of an international watercourse [system] is to be prohibited, limited, investigated or monitored.

27. Article 23 had originally been submitted by the Special Rapporteur as draft article 16 [17]⁴ and its provisions dealt mainly with the definition of, and the obligation to prevent, pollution. While retaining most of the original text, the Drafting Committee had decided that it would be useful to focus more on the definition of pollution and to highlight the obligations relating expressly to prevention.

28. Paragraph 1, which was virtually the same as paragraph 1 of the original text, defined pollution of an international watercourse system as "any detrimental alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct". That wording made the paragraph closer to article IX of the Helsinki Rules on the Uses of the Waters of International Rivers adopted by the International Law Association in 1966 (see A/CN.4/412 and Add.1 and 2, para. 69). It did not mention any particular type of pollution or polluting agent. It also did not specify the degree as of which pollution had legal consequences. The definition was not intended to establish a link between pollution and the threshold of tolerance to be respected. It did not prejudice the question of wrongfulness. It thus encompassed all pollution, whether or not the extent of the harm met the criterion for "appreciable harm" referred to in article 8 of the draft. It did not specify how pollution was caused, except that it must result from "human conduct". The Drafting Committee had considered that it would be appropriate to have a general definition of pollution presented in that way and then, in other paragraphs, to establish the link between pollution and the degree as of which it had legal consequences and gave rise to certain obligations.

29. The definition in paragraph 1 did not call for any particular comments. In most instruments on the question, pollution was defined as the "introduction" of something into water, air, the environment, etc. That introduction caused the detrimental alteration. In the case of watercourses, however, the detrimental alteration could also be caused by the "withdrawal" of something or result from a natural cause. The Drafting Committee had considered that the cause of pollution must be human conduct, usually through the introduction of something into the watercourse, but, from a drafting point of view, it was difficult to include that idea in paragraph 1 as it now stood without making it less general in nature. How could reference be made to the introduction of something into a watercourse without saying what it was? That was precisely what the Drafting Committee had been trying to avoid. It had therefore considered it preferable to keep the para-

⁴ See footnote 3 above.

graph as it stood and to explain in the commentary that detrimental alterations were usually caused by the introduction of something into the watercourse.

30. The Drafting Committee had preferred to speak of a “detrimental” alteration rather than using other similar adjectives, such as “harmful”, in order to keep the definition of pollution general in nature. It had considered that it was better not to give any examples of detrimental alterations and to deal with that question in the commentary. Detrimental alterations included harm to living resources, to human health, to the use of the waters for any beneficial purpose, etc. The commentary would also give specific examples of alterations, such as changes in the physical and chemical properties of the waters. The term “composition” included the content of the waters in mineral substances and natural chemical substances, as would also be explained in the commentary.

31. In considering paragraph 1, the Drafting Committee had been of the opinion that “biological” changes in the waters were not really pollution in the sense in which it was usually understood. Biological changes were those resulting from the introduction of alien or new species and the Committee had decided to make changes of that kind, which could be extremely detrimental, the subject of a new article, article 24.

32. Finally, the Drafting Committee had considered that, since paragraph 1 dealt only with the definition of pollution, it might ultimately be better to include it in article 1 on the use of terms.

33. Paragraph 2 was a direct application of article 8, which enunciated the duty of watercourse States not to cause appreciable harm to other watercourse States. In order to give specific form to that idea, the Drafting Committee had drawn on article 194, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea. Paragraph 2 was based on four key elements: (a) the obligation of States to act individually or jointly, as appropriate; (b) the obligation to prevent, reduce and control pollution of the watercourse; (c) the obligation to prevent appreciable harm from being caused to other watercourse States—the transboundary effect; (d) the obligation of watercourse States to take steps to harmonize their policies.

34. Two of those elements were new. The Drafting Committee had considered that, in practice, the phenomenon of pollution could be broken down into two phases: the first step was when something happened to cause pollution and the obligation of “prevention” came into play; there then followed the detrimental situation created once the first step had been taken. In such a case, there were two possible courses: either to leave the pollution as it was and simply prevent it from getting worse, or to take steps to reduce the danger and to improve the detrimental situation that had been created. The Drafting Committee had chosen the second solution. That was also the point of view adopted in the United Nations Convention on the Law of the Sea. Consequently, the obligation to prevent pollution enunciated in paragraph 2 was supplemented by the obligation to reduce and control pollution.

35. The obligation of States to take steps to harmonize their policies was also new. Drawing on article 194, paragraph 1, of the United Nations Convention on the Law of the Sea, the Drafting Committee hoped to make it clear that watercourse States had to make untiring efforts to harmonize their policies.

36. The term “ecology”, which had appeared in the original paragraph 2, had been replaced by the term “environment”, which was, in the Drafting Committee’s opinion, broader in meaning and encompassed “ecology”. That interpretation would be indicated in the commentary.

37. Paragraph 3 reproduced the provisions of the original paragraph 3, to which some minor changes had been made to make the meaning clearer. The reference to “species” had thus been deleted, for, as he had explained in connection with the reference to “biological” changes in the original paragraph 1 (see para. 31 above), the Drafting Committee had decided to include a separate article on that subject.

38. The Drafting Committee had amended the title of the article to take account of its content, namely prevention, reduction and control of pollution.

39. Mr. Sreenivasa RAO said that, although he was not a member of the Drafting Committee, he would like to make some comments on article 23. He had no problem with paragraph 1, which contained a general definition. In paragraph 2, however, he was concerned about the use of the indicative mood in the second sentence, which read: “Watercourse States *shall* take steps . . .”. States should, of course, be invited to take gradual and regular steps to harmonize their policies, but they could not be ordered to do so because the harmonization of policies was a lengthy and complicated process. As the Chairman of the Drafting Committee had, moreover, rightly pointed out in introducing the article, it had to be made clear that watercourse States must make untiring efforts to harmonize their policies. He would therefore prefer the use of the word “should” in the conditional mood. He had no objection to the wording of paragraph 3.

40. Mr. BENNOUNA said that his comments would be mainly of a drafting nature. In paragraph 3, there seemed to be a decrescendo in the words “substances the introduction of which into the waters of an international watercourse [system] is to be prohibited, limited, investigated or monitored”, which went from the most restrictive to the least restrictive measures. In that case, should the word “monitored” not come before the word “investigated”? He was also not sure that the word *étudiée* in the French text was really the equivalent of the word “investigated”, for which *analysée* would be a better translation.

41. Mr. PELLET said that, in paragraph 2, the words “pollution . . . that may cause appreciable harm . . . to the use of the waters for any beneficial purpose” did not make sense, because harm could be caused to things or to persons but not to activities. In the case of the use of water, reference should have been made to obstacles or problems. The problem might be solved by introducing a new word in the list and placing the reference to the use of the waters at the end of the sentence, which might then read: “. . . that may cause

appreciable harm to other watercourse States or to their environment, including harm to human health or safety or to the living resources of the international watercourse [system], or problems in the use of the waters for any beneficial purpose.”

42. Prince AJIBOLA said he agreed with Mr. Sreenivasa Rao that the word “shall” made the second sentence of paragraph 2 too restrictive. In paragraph 3, the words “the introduction of which” did not fit into the text very well. He would like the Chairman of the Drafting Committee to provide some explanations in that regard.

43. Mr. KOROMA, referring to the comments made by Mr. Sreenivasa Rao and Prince Ajibola concerning the use of the word “shall” in the second sentence of paragraph 2, said that the word “should” would be just as mandatory.

44. Mr. Sreenivasa RAO said he thought that the Drafting Committee’s intention was to encourage States to harmonize their policies. If the words “shall” and “should” seemed too peremptory, it might be necessary to find other wording and provide explanations in the commentary.

45. Mr. MAHIOU (Chairman of the Drafting Committee), replying to the comments made, said he could agree with Mr. Bennouna’s proposal that the order of the words at the end of paragraph 3 should be changed and that the word “monitored” should come before the word “investigated”. The word *étudiée* in the French text had been chosen for lack of a better term and he did not see any reason why it should not be replaced if someone proposed a better solution.

46. With regard to the comment made by Mr. Pellet, he noted that the wording of paragraph 2 was based on the 1982 United Nations Convention on the Law of the Sea, which referred to “hindrance to marine activities” (art. 1, para. 1 (4)). The idea of “hindrance” might thus be used and the text could be rearranged accordingly, so as to read: “. . . that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety or to the living resources of the international watercourse [system], or hinder the use of the waters for any beneficial purpose.” However, the Commission’s plenary meetings did not seem to be the best place for such drafting work.

47. Replying to Mr. Sreenivasa Rao, he said that the use of the indicative in the second sentence of paragraph 2, namely “Watercourse States *shall* take steps . . .”, was the Drafting Committee’s choice. It was for the Commission to decide whether or not it wished to retain those words.

48. The comment made by Prince Ajibola did not seem to apply to the French text of paragraph 3, whose meaning was quite clear. There were regulations which prohibited the introduction of certain substances into rivers.

49. Mr. YANKOV said that, in his opinion, article 23 reflected the development of environmental law over the past 10 years or so, and particularly since the 1972 United Nations Conference on the Human Environ-

ment. Its provisions were fully in keeping with the Helsinki Rules on the Uses of the Waters of International Rivers adopted by the International Law Association in 1966 (see A/CN.4/412 and Add.1 and 2, footnote 30 (a) (ii)) and the 1982 United Nations Convention on the Law of the Sea. However, paragraph 2 did not refer to all the types of harm listed in article 1 of the 1982 Convention. He was thinking in particular of the reduction of amenities. Was that omission deliberate?

50. With regard to the harmonization of policies and the use of the word “shall” in the second sentence of paragraph 2, he pointed out that the question of the choice between the words “should” and “shall” had already arisen on other occasions. In the present case, however, what was involved was harmonization, in other words a process that presupposed some agreement between the parties concerned. The meaning of the word “shall” in that context could therefore not be very stringent. He suggested that the article should be based on the various conventions on the law of the sea and that the word “shall” should be retained. The word “should” was not so strict and did not belong in a legal instrument.

51. Mr. McCAFFREY (Special Rapporteur), replying to Prince Ajibola, said he realized that the wording of the last part of paragraph 3 was awkward, but the goal was to draft as precise a text as possible. Since Mr. Yankov had asked why paragraph 2 did not refer to amenities, he said that the Drafting Committee had probably wanted to give only a few examples and had therefore used the word “including” before the list and the word “or” in the list itself. Moreover, the idea of the environment included amenities. Perhaps amenities could be referred to in the commentary.

52. He agreed with Mr. Pellet that it was difficult to speak of harm to a use, but such wording was based on a number of precedents, including the definition of pollution contained in article 2, paragraph 1, of the Montreal Rules of International Law Applicable to Transfrontier Pollution adopted by the International Law Association in 1982 (see A/CN.4/412 and Add.1 and 2, para. 70), which read:

“Pollution” means any introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources, ecosystems and material property and impair amenities or interfere with other legitimate uses of the environment.

Although he would not insist on its adoption, his proposal was that the end of the first sentence of paragraph 2 should be amended to read: “. . . including harm to human health or safety or to the living resources of the international watercourse [system] or an interference with the use of the waters for any beneficial purpose.”

53. Mr. MAHIOU (Chairman of the Drafting Committee) suggested that the Special Rapporteur’s proposal might be amended slightly to read: “. . . including harm to human health or safety or to the living resources of the international watercourse [system] that may interfere with the use of the waters for any beneficial purpose.”

54. Mr. Sreenivasa RAO said that the plenary meetings were not the place for such drafting questions. He suggested that the Special Rapporteur should be asked to include additional explanations in the commentary to article 23 with a view to the second reading.

55. Mr. BENNOUNA said that it would be regrettable if the text of article 23 did not include the improvement proposed by Mr. Pellet and agreed to by the Special Rapporteur and the Chairman of the Drafting Committee.

56. Mr. MAHIOU (Chairman of the Drafting Committee) said that, following consultations with the members of the Commission concerned, he was proposing the following text for the first sentence of paragraph 2:

“Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse [system] that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety or to the living resources of the international watercourse [system] or an interference with the use of the waters for any beneficial purpose.”

57. Mr. Sreenivasa RAO said that he could not accept that text because the words “appreciable harm” were qualified by the idea of “interference”.

58. Mr. YANKOV said that it might be preferable to use the wording of the definition of marine pollution which was cited in annex III of the report of the 1972 United Nations Conference on the Human Environment⁵ and which was virtually universally accepted. To that end, the words “or an interference with the use of the waters for any beneficial purpose” at the end of the text proposed by the Chairman of the Drafting Committee (para. 56 above) could be replaced by the words “or an impairment of quality for use of the waters for any beneficial purpose and reduction of amenities”.

59. Mr. McCaffrey (Special Rapporteur) said that the Drafting Committee had not overlooked the many different definitions of pollution contained, for example, in the 1982 United Nations Convention on the Law of the Sea and in the International Law Association’s Helsinki Rules and Montreal Rules. The definition in article 23, paragraph 1, was close to the one contained in the Helsinki Rules, but ILA had departed from it in 1982 in its Montreal Rules. The definition embodied in the Convention on the Law of the Sea related to the marine environment and did not apply exactly to watercourses. A definition could not simply be moved unchanged from one area to another. The definition he had proposed was much more detailed than the one now before the Commission, but the Drafting Committee had considered, rightly, that it was too detailed and that it needed to be simplified. However, paragraph 2 of article 23 and article 24 supplemented it. He thought that a reference to amenities could indeed be added to the list in paragraph 2, but feared that members of the Commission might wish to

add other elements to be protected as well. An “alteration of quality” was the essence of pollution and was therefore implicitly present in the definition of pollution contained in paragraph 1. The idea of interference was indeed an aspect of appreciable harm and its inclusion in the new text proposed for the first sentence of paragraph 2 (para. 56 above) was the result of the grammatical comment made by Mr. Pellet. In his own view, interference was synonymous with harm. For lack of a better solution, he would prefer to use the term “interference”.

60. Mr. Sreenivasa RAO, supported by Mr. BARSEGOV, said that the debate confirmed his impression that the Commission could not act as a drafting committee because there was so little time available to it. It would be better to come back to the problem of wording on second reading.

61. Mr. DÍAZ GONZÁLEZ said that he had a general reservation about the Spanish version of the articles under consideration.

62. Mr. Sreenivasa RAO, recalling that he found the word “shall” in the second sentence of paragraph 2 too peremptory, said that the problem of the harmonization of policies might be dealt with in the commentary.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 23 as proposed by the Drafting Committee.

Article 23 was adopted.

ARTICLE 24 (Introduction of alien or new species)

64. Mr. MAHIOU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 24, which read:

Article 24. Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse [system] which may have effects detrimental to other watercourse States.

65. The Drafting Committee had reached the conclusion that that aspect of the preservation of international watercourses should be dealt with in a separate provision. Article 24 was based on article 196 of the 1982 United Nations Convention on the Law of the Sea, entitled “Use of technologies or introduction of alien or new species”, but the Drafting Committee had used only the second of those two concepts, since the first, which related primarily to technologies for the exploitation of the sea-bed, did not apply in the case of watercourses. The commentary would make it clear that the text referred to the introduction of alien or new species into the watercourse itself and did not concern fish-farming enterprises which might be established along the watercourse, although they were separate from it.

66. The expression “prevent the introduction of species” indicated that article 24 applied to activities by government authorities and private individuals, but not to what might happen as a result of the play of natural forces. The Drafting Committee had used the expression “take all measures necessary to prevent”, rather than the words “shall prevent”, in order to indicate that the obligation of watercourse States was to carry

⁵ *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), p. 73.

out the necessary studies and take the necessary precautions so that the introduction of alien or new species would not have detrimental effects for other watercourse States. A watercourse State would therefore not be regarded as having breached its obligation if the introduction of an alien or new species had, contrary to what might reasonably be foreseen, negative consequences for other watercourse States.

67. Mr. ARANGIO-RUIZ said that he was not sure how article 24 related to article 23, paragraph 2, on the one hand, and to article 25, on the other. With regard to the first point, he asked whether the words "or to their environment", which were used in article 23, paragraph 2, had deliberately been left out of article 24 and, if so, why. Perhaps the commentary might give some explanations in that regard. On the second point, since the introduction of alien or new species into a watercourse could have effects detrimental to the marine environment, he was surprised that no link had been established between article 24 and article 25, which related to the protection and preservation of that environment.

68. Mr. McCAFFREY (Special Rapporteur) said that the lack of a reference to the environment in article 24 was probably an omission. If members of the Commission so agreed, such a reference could be included. With regard to the second point, he noted that, because it was so general, article 25 applied to situations such as that referred to by Mr. Arangio-Ruiz, namely where the introduction of an alien or new species into a watercourse had effects detrimental to the marine environment. That could, however, be explained in the commentary to article 25.

69. Mr. YANKOV, noting that article 24 was the only article in which the words "individually or jointly" were not used in connection with the measures to be taken by States, asked whether that omission was deliberate. If it was not, those words should be added. With regard to the comment made by Mr. Arangio-Ruiz, he pointed out that a change in the biological balance of a watercourse could affect the marine environment, but that was not always the case. It was, moreover, quite obvious that article 25 applied to that type of situation, since it was a known fact, for example, that enclosed seas were, in most cases, polluted by rivers. He would therefore prefer the text of article 24 to be retained as it now stood.

70. Mr. AL-QAYSI asked whether the word "species" also meant plant species. He also did not see when article 24 would apply: what did the expression "have effects detrimental to other watercourse States" mean? Did it refer to effects detrimental to the uses of the watercourse or did it also refer, for example, to effects detrimental to the economies of other watercourse States? He would like clarification on that point.

71. Mr. BARSEGOV said that he was not in favour of adding the words "or to their environment" to article 24. It was quite clear that reference was being made to effects detrimental to the environment of other watercourse States and not, for example, to their government machinery. The addition of the words in

question would therefore change the meaning of the provision.

72. Mr. Sreenivasa RAO said that he agreed with Mr. Yankov and Mr. Al-Qaysi that the possibilities for the application of article 24 should be explained. He also agreed with Mr. Barsegov that the words "or to their environment" should not be added. He was, moreover, not sure which legal criterion would be applied to determine whether effects were "detrimental" and how that term differed—from a legal point of view, of course—from other expressions such as "appreciable harm", which was used in article 23, paragraph 2, and in article 8 as provisionally adopted.

73. Mr. NJENGA said that he agreed with the wording of article 24 and feared that, in trying to explain the context, the scope of the provision might be restricted. In reply to Mr. Al-Qaysi, he noted that the word "species" also meant plant species.

74. Mr. MAHIOU (Chairman of the Drafting Committee), replying to Mr. Yankov, said that the omission of the words "individually or jointly" in article 24 was not deliberate and that, if members of the Commission so agreed, those words would be added.

75. Mr. Barsegov had answered Mr. Arangio-Ruiz's first question: in view of the context, reference was being made to the environment within the jurisdiction of watercourse States.

76. With regard to the comments made by Mr. Sreenivasa Rao and Mr. Al-Qaysi concerning the words "effects detrimental", he said he thought that, although those words could also mean effects detrimental to the economy or health situation of other watercourse States, it was difficult to say so in the text of the article without making it less general. Explanations in that regard could be given in the commentary.

77. Mr. CALERO RODRIGUES said that, although he would have no objection if the words "individually or jointly" were added, he thought that their omission in article 24 was reasonable because articles 23, 25 and 26, in which they were included, related to very general obligations and very broad measures which could require joint action by States. Article 24, however, related to a very particular situation involving the introduction of alien or new species, which, in most cases, occurred in the territory of only one State and would only rarely require joint measures.

78. With regard to the fact that article 24 did not refer to the environment, he was of the opinion that, even in the articles where such a reference was included, it was not essential. It was even less essential in article 24, because the likelihood was that the effects of the introduction of alien or new species would be more limited. The problem could, however, be explained in the commentary.

79. On a general point, he was afraid that, if the Commission continued to discuss every word of the proposed articles, it would be repeating the in-depth discussion which had taken place in the Drafting Committee. It could, of course, do so, but it must not forget that it had a schedule to keep.

80. Mr. AL-QAYSI pointed out that article 24 was new, since it had been produced by the Drafting Committee, and that the Commission had never discussed it in a plenary meeting.

81. He asked whether the expression “effects detrimental to other watercourse States” meant effects detrimental “to uses of international watercourse[s] [systems] and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse[s] [systems] and their waters”, as provided in article 2, paragraph 1, on the scope of the present articles, or whether the Drafting Committee thought that the expression also referred to effects in other areas. He would have no objection if article 24 went beyond the scope of the present articles, but, if it did, it should be so stated in the commentary. If, however, the scope of article 24 was limited by article 2, paragraph 1, that should be indicated in the text of the article.

82. Mr. YANKOV said that, while it was clear that, in article 196, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, reference was being made to prevention of the detrimental effects which the introduction of alien or new species might have on the marine environment—in other words, the environment—the same was not true in article 24. The text of the article should therefore state clearly that it referred to effects detrimental “to the environment of other watercourse States”. He would not insist that the words “individually or jointly” be added to article 24, but he did believe that it should be explained in the commentary why those words were not included, so that it would not be thought that there had been an omission. He was, moreover, of the opinion that those words could be deleted in the other articles, since States could not act otherwise than “individually or jointly” and the words in question only made the texts heavier.

83. Mr. ARANGIO-RUIZ said he would insist that a reference to the environment be included in article 24, first, because that had been done in other articles and, secondly, because of the relationship between article 24 and article 25.

84. Mr. MAHIU (Chairman of the Drafting Committee) said that article 23, paragraph 2, referred explicitly to the environment because it related to pollution in general. Article 24 dealt with a very particular situation, namely the introduction of alien or new species whose possible effects on the environment could not be known. Moreover, harm to the environment was covered by the concept of “detrimental effects”. He would, however, not object if members of the Commission wished to include a reference to the environment in article 24.

85. As Mr. Al-Qaysi had said, article 24 was a new provision. The question with which it dealt had, however, been discussed by the Special Rapporteur in his fourth report (A/CN.4/412 and Add.1 and 2), as well as by the Commission itself, which had concluded at the time that it should be the subject of a separate article.

86. Mr. KOROMA asked Mr. Arangio-Ruiz not to insist that the environment be explicitly referred to in article 24.

87. He also thought that the present discussion proved that the Commission had to have the necessary time to consider the Drafting Committee’s reports. Members of the Commission could not be required to adopt articles in haste.

88. Mr. AL-QAYSI and Mr. MAHIU (Chairman of the Drafting Committee) proposed that the Commission should defer a decision on article 24 until the next meeting.

89. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to defer a decision on article 24 until the next meeting.

It was so agreed.

The meeting rose at 6.20 p.m.

2188th MEETING

Friday, 6 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

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

The law of the non-navigational uses of international watercourses (*concluded*) (A/CN.4/412 and Add.1 and 2,¹ A/CN.4/421 and Add.1 and 2,² A/CN.4/427 and Add.1,³ A/CN.4/L.443, sect. F, A/CN.4/L.445, ILC(XLII)/Conf.Room Doc. 3)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 24 (Introduction of alien or new species)⁴ (*concluded*)

1. Mr. McCaffrey (Special Rapporteur) said that the Drafting Committee proposed the following revised text for article 24:

“Article 24. Introduction of alien or new species.

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

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

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

⁴ For the text, see 2187th meeting, para. 64.

“Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse [system] which may have effects detrimental to the ecosystem of the international watercourse [system] resulting in appreciable harm to other watercourse States.”

2. The article had been redrafted in response to the point raised by some members of the Commission that the standard of “effects detrimental” to other watercourse States was not consistent with the reference in other articles to “appreciable harm” to those States. In the previous text, it had not been wholly clear which of the two standards was meant. It had also been remarked that there should be some reference to the ecosystem. The introduction of alien species of flora or fauna could have a highly detrimental impact on the ecosystems of watercourse States; for instance, the invasive water hyacinth was a particularly virulent species which killed off all life in the surrounding waters. Moreover, new species created through biotechnology could wreak havoc on the ecosystem: in the United States of America and Canada, a type of mussel which had been brought in on the hulls of ships arriving from other parts of the world was now reproducing itself in the Great Lakes, with serious effects on the ecosystem. By referring to “appreciable harm to other watercourse States”, the new text met such situations, yet complied with the fundamental principles of the draft. The revised article 24 also corresponded to the obligation in article 22 to protect and preserve the ecosystems of international watercourses and to the obligation in article 8 not to cause appreciable harm.

3. Mr. PAWLAK wondered whether the “appreciable harm” to other watercourse States could arise solely from the detrimental effects of alien or new species on the ecosystem. Could watercourse States be harmed in any other way?

4. Mr. McCAFFREY (Special Rapporteur) said that, as now drafted, article 24 would cover all the situations of which he was aware. He did not know of any case in which a watercourse State had been harmed other than in conjunction with, or as a result of, harm to the ecosystem.

5. Mr. MAHIU (Chairman of the Drafting Committee) suggested that Mr. Pawlak’s concern was to preserve a link between effects detrimental to the ecosystem and appreciable harm to a watercourse State.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the revised text of article 24 proposed by the Drafting Committee (para. 1 above).

It was so agreed.

Article 24 was adopted.

ARTICLE 25 (Protection and preservation of the marine environment)

7. Mr. MAHIU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 25, which read:

Article 25. Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures

with respect to an international watercourse [system] that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

8. In drafting article 25, which corresponded to paragraph 2 of draft article 17 [18] as originally submitted by the Special Rapporteur,⁵ the Drafting Committee had been careful not to exceed the limits of the topic. It had focused on the link between international watercourses and the marine environment and had therefore left aside the obligation with regard to the marine environment of States with non-international watercourses that flowed into the sea. It had appreciated, of course, that the obligations arising under the law of the sea could not be transposed automatically to international watercourses, since the latter fell within the sovereignty of States. The Committee had none the less considered that, in view of the fact that watercourses were the main source of pollution of the marine environment, it was essential to include a provision defining the obligations of watercourse States for protection of that environment.

9. The Drafting Committee had modified the Special Rapporteur’s proposed wording so as to place the main emphasis not on the marine environment but on the watercourse itself, from the point of view of its relationship with the marine environment. Thus the obligation laid down was no longer an obligation to protect the marine environment, but an obligation to take measures with respect to the watercourse that were necessary to protect the marine environment.

10. For the rest, the Drafting Committee’s task had been essentially one of simplification. It had decided that, since the phrase “all measures . . . that are necessary” was general in scope, the words “including preventive, corrective and control measures” could be eliminated without difficulty. The Committee had also deleted the words “and on an equitable basis”, since paragraph 2 of article 6 provided for the participation of watercourse States in the protection of an international watercourse “in an equitable and reasonable manner”. It would, however, be made clear in the commentary that the obligation set forth in article 25 would depend on the degree of responsibility of watercourse States for the damage caused to the marine environment as well as on their economic and technical capabilities.

11. The Drafting Committee had again incorporated the concept of protection and preservation that it had adopted in article 22, which was taken from article 192 of the 1982 United Nations Convention on the Law of the Sea. It had replaced the expression “estuarine areas” by the term “estuaries”, which was now commonly accepted, and had deleted the reference to marine life, which obviously formed part of the marine environment. It had also eliminated the last part of the original text in its entirety, for the reasons he had explained in connection with article 22 (see 2187th meeting, para. 11). It had added a clause reading “taking into account generally accepted international rules and standards”, which was borrowed from article 211,

⁵ See 2187th meeting, footnote 3.

paragraph 2, of the United Nations Convention on the Law of the Sea, and which took account of the existence of numerous regional and universal instruments on the marine environment.

12. Prince AJIBOLA said that some more suitable expression should be found to replace “marine environment”, in order to make it quite clear that the draft articles were concerned with international watercourses, not with the sea. He was also a little concerned about the words “including estuaries”, which might make it necessary to add other elements as well. It would be preferable to refer simply to the environment, a term which would cover all elements, including tributaries and estuaries.

13. Mr. McCaffrey (Special Rapporteur) said that the expression “marine environment” had been used to ensure that precautions were taken to prevent the increasingly serious problem of pollution of that environment through watercourses, whether or not international, which contained pollutants that could find their way into the marine environment and cause serious damage to it. A similar obligation was laid down in a number of regional seas conventions and also in the 1982 United Nations Convention on the Law of the Sea. For those reasons, he considered that the expression should be retained. Omission of the reference to estuaries could give the impression that article 25 did not apply to estuarine areas, which were, of course, a vital breeding ground for many marine species.

14. Mr. Beesley, endorsing the Special Rapporteur's remarks, said that, as a matter of developing conventional law and, he would suggest, customary law as well, it was no longer possible to view a particular part of the environment in isolation from the environment as a whole. It was essential to take account of the intricate interrelationship between river systems and the marine environment not only from the scientific and technical standpoint, but also from that of humanity as a whole. He therefore urged Prince Ajibola not to insist on his point.

15. The Chairman said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 25 as proposed by the Drafting Committee.

Article 25 was adopted.

16. Mr. Mahiou (Chairman of the Drafting Committee) said that articles 26 and 27 of part V of the draft, entitled “Harmful conditions and emergency situations”, corresponded to draft articles 22 and 23 submitted by the Special Rapporteur in his fifth report in 1989.⁶ The Drafting Committee had noted that, although most speakers in the Sixth Committee of the General Assembly had approved the general direction of those draft articles, some had considered that the distinction between their scopes of application had not been brought out clearly enough in their titles. In re-

sponse to that criticism, the Drafting Committee had amended the titles and reworded the two articles.

ARTICLE 26 (Prevention and mitigation of harmful conditions)

17. The text proposed by the Drafting Committee for article 26 read:

PART V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 26. Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

18. The Drafting Committee had adopted the same wording as that used in article 25 to introduce the obligation imposed on watercourse States, namely: “Watercourse States shall, individually or jointly, take all . . . measures”. It had not retained the words “on an equitable basis”, which had appeared in paragraph 1 of draft article 22 as originally submitted by the Special Rapporteur. As in the case of article 25, the Committee had noted that the concept of equitable participation underpinned the draft articles as a whole and that to refer to it in some articles but not in others could give rise to problems of interpretation. Furthermore, the word “jointly” implied a shared responsibility, while the phrase “take all appropriate measures” clearly indicated that States were not required to go beyond what was appropriate. Those points would be developed in the commentary.

19. The Drafting Committee had replaced the words “hazards, harmful conditions and other adverse effects”, which blurred the distinction between the subjects of articles 26 and 27, by the more neutral term “conditions”, which denoted a *de facto* situation and was general in scope. To meet the concern of some representatives in the Sixth Committee, the Drafting Committee had included, in addition to conditions resulting from natural causes, conditions resulting from human conduct. The phrase “whether resulting from natural causes or human conduct” indicated that the conditions referred to could arise as a result either of natural causes or of human conduct or of a combination of both. The list of conditions which followed was more or less the same as that proposed by the Special Rapporteur in paragraph 1 of draft article 22. The words “floods, ice conditions” had, however, been replaced by the expression “flood or ice conditions”, which was more general in scope. The reference to drainage problems and flow obstructions had been deleted, and a reference to water-borne diseases had been added.

20. The Drafting Committee was, of course, aware that the link between a watercourse and drought and desertification was less direct than in the case of the other conditions referred to in article 26. It had none the less retained the reference to those conditions, as the measures to combat drought and desertification could make a significant contribution to more effective watercourse conservation and management.

⁶ For the texts of draft articles 22 and 23 submitted by the Special Rapporteur in his fifth report and a summary of the Commission's discussion on them at its forty-first session, see *Yearbook . . . 1989*, vol. II (Part Two), pp. 124 *et seq.*, paras. 636-676.

21. There had been two more paragraphs in the text of draft article 22 submitted by the Special Rapporteur. Paragraph 2 had contained an illustrative list of measures that watercourse States should take in order to fulfil their obligations. Some members had felt that paragraph 2 provided watercourse States with useful indications as to the kind of measures they should take to comply with their obligations under the article, but the general view had been that those indications could be incorporated in the commentary and that the paragraph was therefore unnecessary.
22. The Drafting Committee had further noted that the object of paragraph 3 had been to remind watercourse States that the obligations set forth in the article extended to the prevention of activities having only an indirect link with the watercourse that might cause damage to downstream States. The Committee had, however, taken the view that the obligation of prevention as set out in article 26 was very general in scope and that there was no reason to focus on certain aspects of it. It had therefore deleted paragraph 3 as well.
23. The title of article 26 reflected the text and called for no further comment.
24. Mr. ARANGIO-RUIZ said that, although article 26 dealt with emergency situations, no link was established between the emergency and the watercourse, thus giving the impression that any kind of emergency would be covered. Yet an earthquake, for example, would have nothing to do with a watercourse. Some wording should therefore be added, in the first part of the article, to make it clear that the reference was to a specific kind of emergency which affected the watercourse.
25. Mr. CALERO RODRIGUES proposed, in order to meet that point, that the words "relating to an international watercourse" be inserted between the words "conditions" and "that may be harmful".
26. Prince AJIBOLA said that he would be grateful if the Chairman of the Drafting Committee could enlighten him as to the use, in the context of the reference to natural causes and human conduct, of the words "appropriate measures". They seemed to require re-examination.
27. Mr. MAHIU (Chairman of the Drafting Committee) said that, while the point made by Mr. Arangio-Ruiz was implicit in the terms of the article, it would perhaps be advisable to spell it out by incorporating the amendment proposed by Mr. Calero Rodrigues.
28. With regard to Prince Ajibola's point, the words in question were taken from the 1982 United Nations Convention on the Law of the Sea and were also standard in conventions on pollution.
29. Mr. McCAFFREY (Special Rapporteur) said that, from the substantive point of view, he had no difficulty with Mr. Calero Rodrigues's proposal, which would perhaps guard against any unnatural interpretation of the draft articles should they be viewed in isolation. If they were viewed in the context of the draft as a whole, of course, it was obvious that the emergency situations referred to related to watercourses. Many of the provisions of the United Nations Convention on the Law of the Sea, for example, made no specific reference to the sea, yet that had not given rise to any difficulty.
30. As to Prince Ajibola's point, the intention behind the words "appropriate measures" was to soften the obligation somewhat. For example, although a flood could not perhaps be prevented, reasonable measures should be taken in that connection.
31. Mr. Sreenivasa RAO said that his concern with respect to article 26 had been somewhat allayed by the Special Rapporteur's explanation that the intention was to soften the obligation. It might, however, sometimes be beyond the capacity of certain States to manage conditions such as those referred to in the article, particularly drought and desertification. To take account of that possibility, he would suggest that the word "appropriate" be replaced by "possible". If that created too much difficulty, an explanation could perhaps be included in the commentary.
32. Mr. PAWLAK said that he would not oppose the proposal by Mr. Calero Rodrigues but saw no need for that change, which would make it necessary to add a similar phrase to all the relevant articles. Article 26 already contained two references to watercourse States and that should be sufficient.
33. He understood Mr. Sreenivasa Rao's wish to soften the obligation, but disagreed with his proposal to replace the words "appropriate measures" by the words "possible measures", which were too subjective and concerned only the point of view of the State in question. He suggested the words "appropriate measures in existing conditions".
34. Mr. BARSEGOV said that there was no need to complicate a text that was perfectly clear as it stood. Obviously, watercourse States were not being asked to prevent an earthquake; but if an earthquake did occur, those States should assist each other in order to prevent loss of life, flooding and the like.
35. Mr. ARANGIO-RUIZ said that the addition of two or three words might clarify the texts of both article 26 and article 27 and would certainly not make them too cumbersome.
36. Prince AJIBOLA said that he had always had doubts about the use of the word "appropriate". Perhaps the Special Rapporteur would consider using the word "reasonable" in the commentary.
37. Mr. McCAFFREY (Special Rapporteur) said he could understand that the word "reasonable" might be preferable in a common-law context, but that was not the case in civil law. The word "possible" was ambiguous, because it might be interpreted to mean that a State must do everything possible, regardless of the cost, whereas the expression "appropriate measures" could be tailored to the circumstances. Since the word "appropriate" had already been used in other conventions, it should be retained, and the meaning should be explained in the commentary.
38. Mr. Sreenivasa RAO said that, despite his reservations regarding the use of the word "appropriate", he was prepared to withdraw his proposal. He would nevertheless point out that it was technically difficult

for a developing country to ensure preventive measures, which were often beyond its means; it could do what was possible for it and would then require the help of other States. But it was impossible for it to take all the preventive measures called for in article 26. The point was that States would do what they could.

39. Mr. MAHIU (Chairman of the Drafting Committee) said that the expression “appropriate measures” was less restrictive than the expression “necessary measures” as employed in the 1982 United Nations Convention on the Law of the Sea. The word “possible” was ambiguous. The Drafting Committee had also considered the word “reasonable”, but had decided in favour of “appropriate”. He was not opposed to the proposal by Mr. Calero Rodrigues (para. 25 above) but considered it unnecessary.

40. Referring to the French text, he said that the word *préjudiciables* should be replaced by *dommageables* so as to bring the wording of the article into line with the title.

41. Mr. BENNOUNA said he agreed with the Special Rapporteur that the addition proposed by Mr. Calero Rodrigues would make the text too cumbersome and was unnecessary. The articles of a convention were read in their context.

42. Prince AJIBOLA said that he agreed with Mr. Bennouna: a similar addition would otherwise have to be made throughout the draft.

43. Mr. MAHIU (Chairman of the Drafting Committee) said he took it that Mr. Calero Rodrigues withdrew his proposal.

44. Mr. PELLET, referring to the French text, expressed reservations about the first use of the word *conditions*. Furthermore, the same word was repeated in the sentence, which was awkward in French, and he therefore suggested replacing the second *conditions* by *celles*.

45. Mr. MAHIU (Chairman of the Drafting Committee) explained that the word *conditions* had been used twice because, although awkward, it avoided any ambiguity. If the second *conditions* were to be replaced by *celles*, that might be misconstrued as referring to *causes naturelles*.

46. Mr. Sreenivasa RAO pointed out that the legal standard for bringing the relationship between watercourse States into play was “appreciable harm”. He was not opposed to the phrase “harmful to other watercourse States”, on the understanding that the legal threshold was the same as that used throughout the draft, namely appreciable harm.

47. Mr. PELLET suggested replacing the first *conditions* in the French text by *effets*.

48. Mr. McCAFFREY (Special Rapporteur) said he feared that Mr. Pellet’s proposal might confuse article 26 and article 27. “Harmful conditions” was an expression commonly used in international watercourse management. The purpose of article 26 was precisely to deal with conditions. Watercourse States must be alert to such conditions, which did not arise suddenly, but often built up over time, for example siltation or salt-

water intrusion. That was why the phrase “may be harmful” had been chosen. It was, of course, the effect that was actually harmful, but the condition was itself an effect, so to speak.

49. Mr. BENNOUNA, referring to the French text, suggested replacing the words *resultant de* by *liées à des* and the words *telles que* by *concernant*.

50. Prince AJIBOLA said that that problem did not arise in the English text.

51. Mr. MAHIU (Chairman of the Drafting Committee) acknowledged that there had been a drafting problem with the French text in connection with the word *conditions*, which had been decided upon for lack of a better alternative. If that word were to be replaced by *effets*, the French text would no longer be identical with the English. He suggested leaving the text as it stood for the time being; the Drafting Committee would then attempt to find better wording on second reading.

52. Mr. ILLUECA pointed out that, whereas in the English original the term “conditions” was used in article 26 and the term “situations” in article 27, the Spanish text of both articles used the same term, namely *situaciones*. The Drafting Committee should correct that anomaly.

53. Mr. MAHIU (Chairman of the Drafting Committee) said that, as far as the English and French texts were concerned, the Drafting Committee had deemed the term “situations” appropriate in article 27 (Emergency situations). A somewhat different meaning was conveyed by the term “conditions” used in article 26 to refer to “harmful conditions” to be prevented or mitigated. Personally, he would have been inclined to prefer the term *facteurs* to *conditions* in French. On the whole, the best solution would be to retain the present wording, which could be improved on second reading.

54. Mr. PELLET said that the term *facteurs* would be helpful in French for the expression “flood or ice conditions”, but in that expression he could accept the existing term, *conditions*. His objection was to the use of the term *conditions* in the French version of the phrase “take all appropriate measures to prevent or mitigate conditions”, where he would recommend the term *effets*.

55. Mr. McCAFFREY (Special Rapporteur) said that the drafting of article 26 had proved very difficult because it sought to cover many different kinds of conditions and effects in a single provision. The aim was to avoid having to draw up a large number of articles, bearing in mind that the draft was intended to become a framework agreement. Article 26 required watercourse States to take all appropriate measures to stop harmful effects to other States—effects which could arise from a wide range of conditions. Actually, the article mentioned only some of those conditions by way of example. He did not favour replacing the term “conditions” by “effects”, which would result in a much too general provision. Accordingly, he recommended that the term “conditions” be retained.

56. Mr. FRANCIS pointed out that there was an interplay between conditions and effects. It was a fact

of life that human conduct could produce conditions—in addition to effects—harmful to other States which called for appropriate measures to be taken. He therefore suggested that there should be a reference to both conditions and effects in the phrase which now read: “take all appropriate measures to prevent or mitigate conditions”.

57. With regard to procedure, he urged that matters of drafting should be left to the Drafting Committee.

58. Mr. DÍAZ GONZÁLEZ said that the Spanish-speaking members of the Commission reserved the right, with regard to all of the articles, to submit to the Secretariat their suggestions for ensuring that the Spanish text was in line with the English and French texts, as well as all the necessary Spanish corrections.

59. The CHAIRMAN said that the articles would be adopted subject to that reservation regarding the Spanish text; the position would be the same with regard to the Arabic, Chinese and Russian texts.

60. If there were no objections, he would take it that the Commission agreed provisionally to adopt article 26 as proposed by the Drafting Committee, on the understanding that the Special Rapporteur would clarify in the commentary the points which had arisen during the discussion.

It was so agreed.

Article 26 was adopted.

ARTICLE 27 (Emergency situations)

61. Mr. MAHIU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 27, which read:

Article 27. Emergency situations

1. For the purposes of the present article, “emergency” means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, as in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in co-operation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies in co-operation, where appropriate, with other potentially affected States and competent international organizations.

62. Article 27 had originally been submitted by the Special Rapporteur as draft article 23 (Water-related dangers and emergency situations).⁷ In considering the article, the Drafting Committee had taken into account a number of observations, for example the comment that the obligations laid down in article 27 overlapped with those set out in article 26. It was therefore necessary to draw a clear distinction between them. Article 27 had to deal specifically and exclusively with the obligations of States in emergency situations. It had

also been proposed that the text of the article should be simplified. Accordingly, the Committee, while retaining the underlying idea, had formulated a new text whereby the article dealt only with sudden and unexpected accidents that called for immediate measures to prevent or mitigate harm to other States.

63. With regard to paragraph 1, it had been agreed that the expression “emergency situations” covered all “water-related dangers” as well, so that there was no reason to use two different expressions. The Drafting Committee had therefore opted for the expression “emergency situations” and defined the term “emergency” in paragraph 1. It would be noted that the article did not simply apply to emergency situations affecting watercourse States alone. Certain emergency situations, such as oil spills or the dumping of dangerous high-risk chemicals into a watercourse, could spread into the sea and affect coastal States. For that reason, paragraph 1 spoke of emergencies which affected watercourse States “or other States”. Emergencies could result from natural causes or from human conduct, and human conduct included both acts and omissions. The Drafting Committee had considered that it might perhaps be appropriate to transfer paragraph 1 to article 1 on the use of terms, but for the time being had kept it in article 27.

64. Under paragraph 2, a watercourse State was required to notify other potentially affected States and competent international organizations of an emergency, and the notification must be made “without delay and by the most expeditious means available”. That obligation was a particularly pressing one in emergency situations and was the first of a series of measures which a watercourse State had to take in such circumstances.

65. Paragraph 3 dealt with the measures a watercourse State had a duty to take in co-operation with potentially affected States to prevent, mitigate and eliminate the harmful effects of the emergency situation. The duty was subject to two requirements: first, that the measures should be “practicable”, i.e. feasible, reasonable and capable of being carried out; and secondly, that the measures should be “necessitated by the circumstances”, in other words justified by the real facts of an emergency situation. Again, the co-operation in question should also involve, where appropriate, competent international organizations.

66. Paragraph 4 covered a different obligation, i.e. contingency plans, which should be devised before an emergency situation occurred. In accordance with paragraph 4, watercourse States had jointly to develop contingency plans for measures to respond to emergency situations. In the light of the natural environment of a watercourse and the type of use made of the watercourse, watercourse States could forecast the possibility of certain emergency situations and should therefore be able to work out plans for appropriate ways of responding to those situations in order to prevent or control the harmful consequences. Obviously, the responsibility for formulating such plans lay primarily with the watercourse States. In certain circumstances, however, one could envisage types of emergency situations that might affect certain other

⁷ See footnote 6 above.

States. In such a case, those States should also cooperate with the watercourse States. One could also envisage certain kinds of international organizations being competent for certain kinds of emergency situations or for questions relating to particular watercourses. In such a case, those organizations should also cooperate in the formulation of contingency plans. The proviso "When necessary" limited the obligation set out in paragraph 4.

67. Finally, the title of the article had been modified in line with the content.

68. Mr. PELLET said that the last phrase of paragraph 1, "as in the case of industrial accidents", had been rendered in French by the awkward wording *comme dans le cas d'accidents industriels*. It would be better to say *par exemple, en cas d'accident industriel*.

69. Mr. McCAFFREY (Special Rapporteur) agreed and said that the English text should read: "as for example in the case of industrial accidents". A similar change would have to be made in the other language versions as well.

The amendments by Mr. Pellet and the Special Rapporteur were adopted.

70. Mr. AL-BAHARNA suggested deleting the word "that", before the words "results suddenly", in paragraph 1. It was unnecessary, since the same word already appeared before the verb "causes".

71. After a brief discussion in which Mr. McCAFFREY (Special Rapporteur), Mr. FRANCIS, Mr. BEESLEY and Mr. HAYES took part, Mr. AL-BAHARNA said that he would not press his proposal.

72. Mr. Sreenivasa RAO said that he had no objection to the text proposed for article 27 or to the drafting changes made. However, it was important to bear in mind that developing countries, in particular, needed to be able to rely on other more experienced States, as well as on international organizations, in devising contingency plans to deal with emergency situations. Such situations might include industrial accidents on an enormous scale, and the technical and financial resources available to most States in the world were very limited. Some countries, both developing and developed, had experience of such accidents, and even if they were not themselves watercourse States they could give valuable assistance to watercourse States in dealing with such catastrophes. The competent international organizations admittedly had relevant expertise and the ability to bring States together, but they did not necessarily have the financial and technical resources to enable developing countries to work out contingency plans. Watercourse States should be able to draw on the resources available in other States, and the commentary to article 27 should therefore refer to the need for that form of inter-State co-operation.

73. Mr. McCAFFREY (Special Rapporteur) said that it would be difficult to provide, in paragraph 4, for any legal obligation for non-watercourse States to cooperate in that way. In State practice, it was true that other States, often outside the drainage basin of the affected States, did render considerable practical

assistance. The Commission could certainly make clear that such assistance was not excluded.

74. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 27 with the amendments to paragraph 1 by Mr. Pellet and the Special Rapporteur (paras. 68-69 above).

It was so agreed.

Article 27 was adopted.

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)*

ANNEX II OF THE DRAFT ARTICLES (Fact-finding and settlement of disputes)

75. The CHAIRMAN invited the Special Rapporteur to introduce the last part of his sixth report (A/CN.4/427 and Add.1), namely chapter IV containing the five articles of annex II of the draft.

76. Mr. McCAFFREY (Special Rapporteur) said he hoped that the Commission would consider chapter IV of his sixth report (A/CN.4/427 and Add.1) fully at its next session. The chapter contained articles 1 to 5 of annex II of the draft (Fact-finding and settlement of disputes) and the Commission had to decide whether the draft should in fact include such provisions. When dealing with the draft articles on jurisdictional immunities of States and their property, the Commission had decided not to include any provisions on the settlement of disputes; but it had taken the view that the draft articles on the law of treaties between States and international organizations or between international organizations should provide for dispute-settlement machinery, either within the draft or in an annex or optional protocol.

77. The settlement of disputes was a uniquely important aspect of the topic of international watercourses, and fact-finding was an essential element of the dispute-settlement machinery. As explained in the introduction to chapter IV of his report, the obligations set forth in the draft articles were, of necessity, very general. Frequently, a watercourse State would have to ascertain the facts in order to comply with those obligations. The voluntary fact-finding machinery proposed in annex II was intended as an adjunct to the substantive obligations in the draft articles to lend assistance to watercourse States.

78. In sections B to E of chapter IV it was explained that, in the past, States had resorted to various methods akin to dispute settlement in the conduct of their relations with respect to international watercourses. Section B reviewed those methods, which ranged from negotiation to adjudication, and showed how States had used them in treaties and in practice. Section C consisted of case-studies illustrating the use of expert advice for the avoidance of disputes—often a more important objective than settling them. Disputed questions could be referred to experts for investigation and report, and there were provisions for such referral in certain international watercourse agreements, such as the 1960 Indus Waters Treaty between India and

* Resumed from the 2167th meeting.

Pakistan and the 1909 Boundary Waters Treaty between Great Britain and the United States of America. Section D dealt with the work of international organizations in the field of the settlement of watercourse disputes. Section E summarized the wealth of material already prepared by previous Special Rapporteurs and their individual approaches to the question.

79. Section F contained the articles proposed for annex II, together with comments thereon. Part A of the annex contained draft article 1 on fact-finding, which appeared in an annex in accordance with the outline of the topic presented in his fourth report (A/CN.4/412 and Add.1 and 2, para. 7). Draft articles 2 to 5 of part B of the annex covered the settlement of disputes, articles 3 to 5 defining the various methods to be used—consultations and negotiations, conciliation, and arbitration. Under draft article 4, a watercourse State would be bound to submit a dispute for conciliation to a conciliation commission. However, the report of the conciliation commission would not be binding on the States concerned unless they agreed otherwise. Finally, draft article 5 provided for submission of the dispute to binding arbitration by any permanent or *ad hoc* arbitral tribunal accepted by all the parties to the dispute.

80. He looked forward to a full discussion of those proposals at the Commission's next session.

81. The CHAIRMAN, thanking the Special Rapporteur, confirmed that the Commission would discuss the draft articles of annex II on fact-finding and settlement of disputes at its forty-third session.

The meeting rose at 12.55 p.m.

2189th MEETING

Monday, 9 July 1990, at 3 p.m.

Chairman: Mr. Jiuyong SHI

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued)* (A/CN.4/429 and Add.1-4,²

* Resumed from the 2159th meeting.

¹ 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.

² Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

A/CN.4/430 and Add.1,³ A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION

1. The CHAIRMAN recalled that, at the 2158th meeting (para. 71), the Commission had established a Working Group to draw up a draft response by the Commission to the request by the General Assembly in paragraph 1 of its resolution 44/39 of 4 December 1989 that the Commission consider the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which might be covered by the code. The Commission had decided that, once it had considered and adopted the response drafted by the Working Group, it would include it in its report to the General Assembly on the present session.

2. He invited Mr. Thiam, the Chairman-Rapporteur of the Working Group, to introduce the report of the Working Group (A/CN.4/L.454 and Corr.1).

3. Mr. THIAM (Special Rapporteur, Chairman-Rapporteur of the Working Group) said that chapters I and II (paras. 1-22) of the report of the Working Group (A/CN.4/L.454 and Corr.1) related the background to the question and he therefore proposed that paragraph-by-paragraph consideration of the text should start with paragraph 23.

4. After some brief general considerations, chapter III dealt with the question of the type of jurisdiction which might be conferred on the international criminal court. With regard to its jurisdiction *ratione materiae*, there were three possible options (para. 31): (i) the court would exercise jurisdiction over the crimes included in the code; (ii) it would exercise jurisdiction over only some of those crimes; (iii) the court would be established independently of the code and exercise jurisdiction over crimes in respect of which States would attribute competence to it.

5. With regard to jurisdiction *ratione personae*, the report referred to the possibility of extending the court's jurisdiction—which would in principle be confined to individuals—to legal entities other than States, at least for certain crimes.

6. As to the nature of the court's jurisdiction, there were three possibilities (para. 38): (i) the court would have exclusive jurisdiction; (ii) it would exercise jurisdiction concurrently with national courts; (iii) it would have jurisdiction only to hear appeals against decisions by national courts.

7. The various options for submitting cases to the court were listed in paragraph 43 of the report. The Working Group had considered whether access to the court should be confined to States parties to its statute or to States having an interest in the proceedings—for example, because the crime had been committed in their territory, because the victim was one of their

³ *Ibid.*

nationals or because the alleged perpetrator had been apprehended in their territory—or whether access should be extended to intergovernmental organizations of a universal or regional character and even to non-governmental organizations and individuals.

8. With regard to the structure of the court, a number of possibilities were considered in paragraphs 46 to 48. The court would be composed of a small number of judges, persons who would have recognized competence in international law—especially international criminal law—and who would be appointed according to one of the following three methods: election in the same manner as Judges of the International Court of Justice; election by a qualified majority of the General Assembly; or election by the parties to the statute of the court.

9. The report then dealt with the following questions: the organs responsible for criminal prosecution (para. 51); pre-trial examination (para. 52); the legal force of judgments (paras. 53-54); and penalties, enforcement of judgments and financing of the court (paras. 55-58). The Working Group concluded by proposing three possible models for an international criminal court which varied mainly in terms of the nature of the jurisdiction to be assigned to the court (paras. 62-65).

10. The CHAIRMAN said he believed that the Commission first wished quickly to consider chapters I and II of the Working Group's report and then to discuss chapter III paragraph by paragraph.

It was so agreed.

CHAPTER I (Terms of reference)

11. Mr. McCAFFREY, supported by Mr. AL-QAYSI, Mr. BARSEGOV and Mr. ARANGIO-RUIZ, said that, in paragraph 3, the wording of the end of the first sentence and the beginning of the second sentence was clumsy. Since it was stated that the question of the establishment of an international criminal jurisdiction had always been foremost among the Commission's concerns, one would expect to find an earlier date than 1983.

12. Mr. TOMUSCHAT, supported by Mr. THIAM (Chairman-Rapporteur of the Working Group), proposed that a new sentence should be added after the first sentence and that the beginning of the original second sentence should be amended. The text would then read:

“... The Commission pronounced itself in favour of such a trial mechanism for the first time in 1950. When it resumed its work on the topic at its thirty-fifth session, in 1983, it included in its report to the General Assembly on that session the following paragraph: ...”

It was so agreed.

13. Mr. FRANCIS said that paragraph 1 of General Assembly resolution 44/39, which contained the request which had led to the establishment of the Working Group, gave the Commission a mandate to address the question of establishing an international criminal court or other international criminal trial

mechanism with jurisdiction over persons alleged to have committed crimes which might be covered by the code, “including persons engaged in illicit trafficking in narcotic drugs across national frontiers”. The Working Group indicated in paragraph 2 of its report that two main reasons had led the Commission to examine the question of an international criminal court. However, the problem of illicit traffic in narcotic drugs was a third reason, especially since two draft articles had been submitted on the subject, one under crimes against peace and the other under crimes against humanity. The Working Group might have considered that question and decided not to refer to it in its report, but, if the report was to comply fully with the terms of paragraph 1 of resolution 44/39, it should reflect recent developments in that regard. Paragraph 2 of the report could therefore be amended slightly and a paragraph on the question of illicit drug trafficking across national frontiers could be added later in the text.

14. Following a discussion in which Mr. THIAM (Chairman-Rapporteur of the Working Group), Mr. GRAEFRATH, Mr. FRANCIS and Mr. CALERO RODRIGUES took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following text as a new paragraph 10 in chapter I:

“As to the question of ‘illicit trafficking in narcotic drugs across national frontiers’, mentioned in General Assembly resolution 44/39, it was considered by the Commission in the context of its discussion of the eighth report of the Special Rapporteur. As indicated in paragraph ... above, the Commission provisionally adopted an article to be included in the draft code which defines illicit traffic in narcotic drugs as a crime against humanity.”

It was so agreed.

Chapter I, as amended, was adopted.

CHAPTER II (Previous United Nations efforts in the field of an international criminal jurisdiction)

Chapter II was adopted.

CHAPTER III (The Commission's discussion of the question at the present session)

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

15. Mr. ARANGIO-RUIZ said that some passages in the report were open to question, especially the conclusions. For instance, the request made in the second alternative of paragraph 65 was premature. In addition, the statement in paragraph 64 and in the first alternative of paragraph 65 applied not only to the establishment of an international criminal court, but also to the draft code itself. The code and the court were inseparable: the full and effective implementation of the code would depend on the establishment of an international court. He could not agree that it should be claimed or even insinuated that it was more difficult to establish an international criminal court than to draft the code of crimes against the peace and security of mankind.

16. Following a discussion in which Mr. THIAM (Chairman-Rapporteur of the Working Group), Mr. AL-QAYSI, Mr. McCAFFREY, Mr. BARSEGOV, Mr. EIRIKSSON (Rapporteur), Mr. PAWLAK, Mr. BENNOUNA and Mr. TOMUSCHAT took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following text for paragraph 24:

“The Commission has noted that a number of developments in international relations and international law have contributed to making the establishment of an international criminal court more feasible than when the matter was studied earlier, although the Commission is aware that, in the view of some States, the time may not be ripe for the establishment of such a court. It has now emerged that international crime has achieved such wide dimensions that it can endanger the very existence of States and seriously disturb international peaceful relations. There have thus been increased calls for enhanced international co-operation to combat such crime. Of course, the final position of States would depend largely on the form that such a court was to take and therefore the Commission has set out below the various forms in which the court could be conceived.”

It was so agreed.

Paragraph 24, as amended, was adopted.

Paragraph 25

17. Mr. BARSEGOV, supported by Mr. GRAEFRATH, said that the second sentence did not reflect the opinion of all members of the Commission. There would be no point in studying the question of establishing a court if the court was going to destroy the existing system. The sentence should be drafted in more cautious terms. He even doubted whether it should be retained.

Paragraph 25 was adopted.

Paragraph 26

18. Mr. PELLET, supported by Mr. BARSEGOV, said that he did not agree with the expression *empiéter sur la souveraineté nationale* (“its possible impact on national sovereignty”; “infringe national sovereignty”), which appeared twice in the French text, or with the expression *impact sur la souveraineté nationale* (“impact on national sovereignty”). The Commission must not give the impression that an international agreement, the establishment of a court or the submission of States to the jurisdiction of a court could in any way detract from their sovereignty. He suggested that the first expression should be replaced by *concurrencer les compétences souveraines* (“that it might compete with sovereign jurisdiction”) or even by the expression *limiter les compétences nationales* (“that it might limit national jurisdiction”).

19. Mr. TOMUSCHAT said that he did not know who would undertake the efforts referred to in the last sentence. He therefore proposed that that sentence be deleted.

20. Mr. BENNOUNA said that, while he understood Mr. Pellet’s concern, he thought it would be better not to speak of “national jurisdiction” in view of the risk of confusion with the idea of “domestic jurisdiction” within the meaning of Article 2, paragraph 7, of the Charter of the United Nations. He would therefore prefer the expression *compétences souveraines des États* (“sovereign jurisdiction of States”). He also supported Mr. Tomuschat’s proposal to delete the last sentence, which was not clear.

21. Mr. PELLET said that the expression *limiter les compétences souveraines des États* (“limit the sovereign jurisdiction of States”) was acceptable to him. The word “impact” in the English text was certainly less objectionable in legal parlance than the French translation. Even though the English text was less of a problem, however, the same changes should be made to it, since what was at issue was a problem of jurisdiction rather than a problem of sovereignty.

22. Mr. DÍAZ GONZÁLEZ said that the Spanish text should be reworded along the same lines.

23. Mr. GRAEFRATH, referring to Mr. Pellet’s comments, said the fact that, in the event of a serious crime, a State could surrender the exercise of its jurisdiction to an international institution certainly did have an impact on its sovereignty. He would have no objection if no reference were made to the matter, but he believed that was why States had thus far not accepted a system of that kind.

24. Mr. PELLET said that he was opposed to retaining the idea of infringement of national sovereignty in the text.

25. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that, while he recognized that, in legal terminology, one “waived jurisdiction” (*renonce à une compétence*), writers also spoke of “abandoning sovereignty” (*abandon de souveraineté*). For instance, when States participating in international organizations waived some of their jurisdiction, jurists spoke of a surrender of sovereignty. He was, however, prepared to meet Mr. Pellet’s concern.

26. Mr. PAWLAK proposed that the first sentence of paragraph 26 should be amended to read: “A major concern with respect to the court is its possible limitation on sovereignty in the area of national jurisdiction, although it must be taken into account that existing régimes of universal jurisdiction already also have an impact on national sovereignty.”

27. Mr. Sreenivasa RAO said that, in his view, the word “impact” in the English text was used in two different senses in the same sentence: in the first case, it meant a possible limitation of national sovereignty, whereas, in the second, it meant that such national sovereignty was already limited. He therefore proposed the following wording: “A major concern with respect to the court is its possible limitation on national jurisdiction, although it must be taken into account that existing régimes of universal jurisdiction already have such an effect.”

28. Prince AJIBOLA said that, in his view, the substitution of the words “limitation of” for the words “impact on” would resolve the problem raised by Mr.

Pellet. It would, moreover, be preferable to use the word "effect" at the end of the first sentence.

29. Mr. EIRIKSSON (Rapporteur) suggested that the first sentence might simply read: "A major concern with respect to the court is that it would be an international institution." Mr. Pellet apparently took the view that, when a State accepted the jurisdiction of an international court, proceedings before that court did not necessarily amount to an infringement of its national sovereignty, since it was a choice made by the State itself. To reflect that idea, the Commission could say that, in that particular case, a major concern with respect to the court was its possible impact on national sovereignty, although, in fact, States had nothing to worry about. As to the last sentence, it was difficult to understand and should be deleted.

30. Mr. BENNOUNA said that, in his opinion, the views of Mr. Pellet and Mr. Graefrath were not so different. As Mr. Pellet saw the matter, it was not national sovereignty that was at issue, but the exercise of such sovereignty. A State which ratified an international convention was not, however, surrendering its sovereignty, but was exercising it. The progress of international law was not necessarily achieved by the surrender of sovereignty, but by its affirmation. There was no fundamental contradiction between jurisdiction and sovereignty in so far as the exercise of sovereignty, and not sovereignty itself, was involved. Mr. Graefrath had rightly argued that, when a people allowed its own rulers to be tried by an international court, it limited the exercise of its national sovereignty considerably.

31. Mr. PELLET said that if, in the first two sentences, the Commission wanted to say that States were worried about something, he would have no objection. He was, however, unable to agree with the Chairman-Rapporteur of the Working Group on the question of surrender of sovereignty, in which connection he referred members to the *S. S. "Wimbledon"* case (1923). The Commission should not give the impression that it was espousing the doctrine of surrender of sovereignty. He therefore proposed the following alternative. First, in order not to misrepresent matters with regard to the effect of acceptance of an international commitment, the first sentence of paragraph 26 should be replaced by the following text: "A major concern with respect to the court is its possible limitation of the sovereign jurisdiction of States, although it must be taken into account that existing régimes of universal jurisdiction have a certain impact on the exercise of the powers of the State." The second sentence would remain unchanged and the third would be deleted. The other solution would be to retain as drafted the first two sentences, which were meant to reflect the concern of States, and to clarify the last sentence by amending it to read: "Considered in this context, in the long term, acceptance of the jurisdiction of an effective international criminal court would certainly not amount to a limitation of sovereignty, but would, on the contrary, be one way in which States could exercise it." The Commission would thus be paraphrasing, as it were, the judgment handed down by the PCIJ in 1923 in the *S. S. "Wimbledon"* case.

32. Mr. EIRIKSSON (Rapporteur), noting that the second solution proposed by Mr. Pellet followed the same lines as his own proposal, suggested that the words "its possible impact on", in the first sentence, should be replaced by "the effect on the exercise of". In the second sentence, the words "As a matter of fact" should be replaced by the word "Indeed".

33. Mr. TOMUSCHAT suggested that, instead of being deleted, the last sentence should be amended to read: "Considered in this context, in the long term, an effective international criminal jurisdiction might indeed serve as a defence of national sovereignty." He also noted that the English and French texts of the first sentence differed. The French text spoke of the "creation" of a court, but not the English: the English text should therefore be brought into line with the French. Moreover, the French phrase *voir celle-ci empiéter sur la souveraineté nationale* was not fortuitous, as it suggested wrongful conduct on the part of the court. Emphasis should be placed on the fact that it was the actual establishment of the court that would have an impact on national sovereignty. In general, he could accept Mr. Pellet's proposals, but he would like to study them in writing.

34. The CHAIRMAN suggested that Mr. Thiam (Chairman-Rapporteur of the Working Group), Mr. Tomuschat, Mr. Eiriksson and Mr. Pellet should draft a text for submission to the Commission.

35. Prince AJIBOLA said that, in his view, the last sentence of paragraph 26, which explained the reason for the suggestion that an international criminal jurisdiction should be established, should be retained in the final text.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to set up a small working group on paragraph 26.

It was so agreed.

Paragraph 27

37. Mr. BENNOUNA said that the second sentence was ambiguous. Moreover, it had no logical link with the first sentence, which reflected an independent line of thought. He therefore proposed that the second sentence be deleted.

38. Mr. THIAM (Chairman-Rapporteur of the Working Group) supported that proposal.

39. Mr. EIRIKSSON (Rapporteur) said the second sentence meant that, if a case was brought against an individual, it became less of an inter-State dispute. It made a valid point and he would like to retain it.

40. Mr. McCAFFREY, agreeing with Mr. Eiriksson, said that he would not only retain the second sentence, but would strengthen its intent by stating that "referring to the court a case against an individual could even remove the inter-State aspects . . .".

41. Mr. GRAEFRATH said he also considered that the sentence in question should be retained. It had been seen, in the human rights field, for instance, that States more readily accepted international proceedings brought against individuals. The Commission might

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

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

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

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

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

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

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

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

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

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

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

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

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

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

53. The CHAIRMAN suggested the expression “administration of criminal justice”.

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

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

The meeting rose at 6.10 p.m.

2190th MEETING

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

Chairman: Mr. Jiuyong SHI

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

Tributes to the memory of Professor Paul Reuter

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

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

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

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

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

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

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

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

tional Organizations, ensures that he will always be remembered in the many international organizations which daily refer to the Commission's work on this topic.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

² *Ibid.*, p. 472.

³ *Ibid.*, p. 481.

⁴ *Ibid.*, p. 650.

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

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

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

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

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

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

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

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

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

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

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

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

38. To that message from the Prime Minister, he wished to add, in the name of all the members of the French Permanent Mission at Geneva, a message to

Madame Reuter, whose grief they shared: "Session after session of the Commission we have had the joy of seeing your husband return to us. We saw him as that modest but, at the same time, brilliant personality and source of high inspiration which his colleagues have just evoked. His memory will never leave us."

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

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

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

It was so agreed.

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

The Permanent Representative of France and Madame Reuter withdrew.

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

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

[Agenda item 7]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLES 1 TO 33⁹ (*concluded*)

* Resumed from the 2186th meeting.

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

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

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

⁸ Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.

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

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

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

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

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

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

48. Three opinions had emerged during the discussion: some members were opposed to the inclusion of any list; some were in favour of including a supposedly exhaustive list, flexibility being provided by periodical updating; and some supported a less stringent method,

in which the list would only play an illustrative part. The second suggestion seemed to be unworkable, if "exhaustive" was taken to mean that any activity in which a substance in the list was used would automatically be considered an activity referred to in article 1. His intention was not, however, to use the list merely to provide illustrations. If there was to be a list, it should be as extensive as possible for all substances that might cause transboundary harm. The term "exhaustive" was unclear, because it might be construed to mean that there were no other substances in the world that might be included in the list. Substances having the characteristics set out in subparagraph (b) *in fine* of article 2 could, however, also be considered dangerous, i.e. those which occurred only in certain quantities, concentrations or situations, for example water. He would like to give the matter further consideration in his next report.

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

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

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

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

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

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

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

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

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

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

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

59. A discussion had taken place on whether the obligation of prevention, particularly under draft articles 8, 16, 18 and 20, should be mandatory or "soft". Many members had favoured stringent obligations. He suspected, however, that there had been a misunderstanding. Article 18 was really redundant: its

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

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

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

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

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

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

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

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

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

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

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

concerned items paid by the State of origin that might well have been borne by the other side.

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

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

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

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

¹⁰ See 2183rd meeting, footnote 6.

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

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

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

The meeting rose at 12.50 p.m.

2191st MEETING

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

Chairman: Mr. Jiuyong SHI

Present: Prince Ajibola, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Co-operation with other bodies (concluded)*

[Agenda item 10]

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

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

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

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

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

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

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

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

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

* Resumed from the 2166th meeting.

three recommendations had since been adopted by the Committee of Ministers, and the fourth would be considered by the Committee of Ministers in September 1990.

9. As to the conventions, the first concerned insider trading in stock-market transactions. It had been published in the European Treaty Series (ETS 130) and had been opened for signature on 20 April 1989; a protocol (ETS 133) had been opened for signature on 11 September 1989. The convention was intended to help in the detection of stock-market transactions carried out by persons seeking to make profits or avoid losses by using the privileged information available to them, thus undermining equality of opportunity between investors and the credibility of the market. The convention provided for the exchange of information between those responsible at the national level for the monitoring of stock-market transactions in order to discover and identify as rapidly as possible the preparation of irregular, insider-trading operations. States parties to the convention would be able, by simple declaration, to extend that mutual-assistance machinery to the search for those responsible for other irregular operations which could adversely affect equal access to information for all stock-market traders or the quality of information supplied to investors.

10. The second convention (ETS 136), which dealt with certain international aspects of bankruptcy, had been opened for signature on 5 June 1990 at the Conference of European Ministers of Justice. It governed the international aspects of bankruptcy from the point of view of the debtor's assets and that of creditors in other States. When a debtor declared bankrupt in one State had assets in one or more other States, the convention allowed the liquidators in those countries to exercise certain powers conferred on them and organized the opening of secondary bankruptcies. Creditors in those other States could introduce their claims in the first State. The convention thus provided that creditors should be informed, and enabled them to lodge their claims in a simplified form.

11. The European Committee on Legal Co-operation had a number of committees of experts, of which she would mention four. The committee of experts on public international law had already held 13 meetings and its task was to exchange views and examine questions of public international law specifically indicated by the European Committee on Legal Co-operation. In the past two years, it had held exchanges of views on the work of the Sixth Committee of the General Assembly and the International Law Commission; on the use of opting-out clauses which could enable treaties to enter into force at an early date; on clauses which enabled certain States to exclude the application of conventions in their relations with other States ("disconnection" clauses); on new developments in international law, in particular with regard to relations between the Council of Europe and the central and eastern European countries; on the United Nations Decade of International Law; and on the peaceful settlement of disputes, with a view to the meeting of experts of the Conference on Security and Co-operation in Europe to be held in Valletta (Malta) in 1991.

12. The committee of experts on multiple nationality had provisionally adopted two texts for inclusion in a possible amending protocol to the 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality. One of those texts gave spouses of different nationalities the possibility also to acquire the nationality of the other spouse. The other text concerned second-generation migrants and provided that, subject to certain conditions, they could acquire the nationality of the host country without losing their nationality of origin.

13. In May 1990, the committee of experts on family law had been requested to consider the desirability of preparing a European convention on the rights of the child. It would discuss that matter at its next meeting in November 1990.

14. The committee of experts on compensation for damage caused to the environment had been requested in November 1989 to prepare a draft convention on damage resulting from activities dangerous to the environment. At its latest meeting, the committee of experts had examined the text of a draft convention and had provisionally adopted a number of texts. The draft convention was aimed at ensuring adequate compensation for damage resulting from dangerous activities and provided for means of prevention of damage and restoration of the environment. Particular attention was being paid to the definition of a dangerous activity. Definitions were also being prepared of dangerous substances, dangerous genetically modified organisms and dangerous micro-organisms. The "operator" was the person who exercised actual control over a dangerous activity. "Damage" meant loss of life or personal injury, loss or damage by impairment of the environment, loss of or damage to property, and the cost of preventive measures. The convention would not apply to damage resulting from the carriage of, or caused by, a nuclear substance. A chapter had been included to deal with the relationship between the convention and other instruments. The questions of limitation of liability and compulsory insurance were being considered and the text also dealt with access to information, action by organizations and the setting up of a standing committee.

15. In conclusion, she thanked the Commission for inviting her to describe some of the work being done in the legal field by the Council of Europe. She would be glad to reply to any questions members of the Commission might wish to ask.

16. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for her clear presentation of the Committee's work. That work was of interest not only to Europe, but also to the international community as a whole and thus to the Commission. The Committee and the Commission obviously pursued identical ends and had much to learn from one another. Their co-operation would be of great mutual benefit.

17. Mr. TOMUSCHAT also noted that the European Committee on Legal Co-operation and the Commission were working along the same lines, although the scope of the Commission's activities was narrower, since it

did not deal with private international law. Two of the questions with which the Council of Europe was dealing were of particular interest to the Commission: the protection of the environment, a subject on which the European Ministers of Justice had already adopted a resolution, and State immunity. The Commission's Special Rapporteur for the latter topic had derived great benefit from the 1972 European Convention on State Immunity, which he had cited as the first codification effort in the matter.

18. The opting-out clauses to which the Observer for the European Committee on Legal Co-operation had referred might be very relevant to the Commission's future work, since the régime of reservations and the matter of unacceptable reservations were sensitive problems that warranted in-depth consideration.

19. Mr. BARBOZA said that his work as Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law was a specific example of co-operation between the Council of Europe and the Commission. The draft European convention on the protection of the environment was of very great interest in that regard. It was, of course, a regional instrument, but for the time being it was the only international instrument applicable to all dangerous activities, since earlier instruments had all been more restricted in scope, confined to transport, nuclear energy, etc. The Commission was therefore paying close attention to what was being done by the Council of Europe in that regard. It was at the Council's disposal if its experience could be of any assistance.

20. Mr. PAWLAK said that the approach adopted by the Council of Europe was very encouraging to countries such as his own which were undergoing great changes and might one day become part of European structures. The work of the Council of Europe could not but stimulate that of the Commission, which paid tribute to the quality of the studies by the European Committee on Legal Co-operation.

21. Mr. NJENGA stressed the close links between the work of the Commission and that of the Council of Europe in the legal field. The two bodies could not but benefit from their co-operation, which should be further intensified. He welcomed the fact that the European Committee on Legal Co-operation was taking such a great interest in the problem of the protection of the environment. That was a very sensitive issue for African countries and they were paying a great deal of attention to it at the present time. They hoped to arrive at a common position in preparation for the session which the OAU would be devoting entirely to that question.

22. The Commission would like to know what the Council of Europe intended to do to mark the United Nations Decade of International Law.

Jurisdictional immunities of States and their property (concluded)* (A/CN.4/415,¹ A/CN.4/422 and Add.1,² A/CN.4/431,³ A/CN.4/L.444)

* Resumed from the 2162nd meeting.

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

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

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

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING⁴

ARTICLES 1 TO 10 AND 12 TO 16

23. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report on draft articles 1 to 10 and 12 to 16 adopted by the Drafting Committee on second reading (A/CN.4/L.444), which the Commission had decided not to consider at the present session (see para. 90 below).

24. Mr. MAHIOU (Chairman of the Drafting Committee) said that, at the present session, the Drafting Committee had dealt with 16 of the 28 articles provisionally adopted by the Commission on first reading and that, in all probability, the second reading of the draft would be completed at the next session. The Commission would thus be able, in accordance with the intention it had expressed at previous sessions, to submit the final text of the draft articles to the General Assembly before the end of the current five-year term of office of the Commission's members in 1991.

25. Article 1 (Scope of the present articles) defined the parameters for the entire set of articles and, since the text had been widely accepted, the Drafting Committee had not made any changes except in French, in which it had replaced the words *l'immunité d'un État et de ses biens de la juridiction des tribunaux* by *l'immunité de juridiction d'un État et de ses biens devant les tribunaux*. That wording was more elegant and was used in the 1972 European Convention on State Immunity. Consequential changes had been made in article 5 (formerly article 6) and article 9 (formerly article 10).

26. In their written comments and observations, some Governments had suggested that article 2 (Use of terms) should be combined with article 3 (Interpretative provisions), which stated the criteria for determining the entities or persons that could invoke immunity and provided guidelines for ascertaining whether a contract or a transaction was of a commercial nature. Since the Special Rapporteur had accepted that proposal and the Commission had endorsed it, the Drafting Committee had worked on the text of a new article 2 combining the two articles in question. The text proposed was therefore essentially the result of the combination of the two articles, with a few changes.

27. Paragraph 1 (a) defined the term "court" and reproduced the text of paragraph 1 (a) of former article 2. That definition had been considered generally acceptable and the Drafting Committee had therefore not changed it.

28. Paragraph 1 (b) defined the term "State" and contained five subparagraphs. Subparagraph (i) defined the term "State" as "the State and its various organs of government", reproducing the text of paragraph 1 (a) of former article 3. Since that part of the definition of

⁴ The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1986*, vol. II (Part Two), pp. 8 *et seq.* For the commentaries, *ibid.*, footnotes 7 to 35. See also 2158th meeting, para. 1.

a State had been deemed acceptable, the Drafting Committee had not changed it.

29. Subparagraph (ii) was new and he recalled that some members of the Commission and some Governments had pointed out that the particular case of the constituent units of a federal State had not been taken into account in the definition of a State. In fact, subparagraph (iii), which dealt with the political subdivisions of the State, had been intended to take account of federal States as well. However, that subparagraph contained a clause which made its provisions applicable only to political subdivisions that were entitled to perform acts in the exercise of the sovereign authority of the State and, in practice, that excluded the constituent units of federal States from the scope of the articles. In order to solve that problem, the Drafting Committee had decided to add a subparagraph relating specifically to federal States and reading: “(ii) constituent units of a federal State”.

30. Subparagraph (iii) reproduced the text of paragraph 1 (b) of former article 3 and, as he had explained in connection with subparagraph (ii), had been intended to cover both the constituent units of a federal State and the other political subdivisions of the State which were entitled to perform acts in the exercise of the sovereign authority of the State. Now that the new subparagraph (ii) dealt specifically with federal States, subparagraph (iii) applied only to the second category. The Drafting Committee had not made any changes in the text adopted on first reading. He nevertheless pointed out that there had been certain differences of opinion in the Committee on the question whether the correct English translation of the French expression *prérogatives de la puissance publique* was “sovereign authority”. He recalled that, when article 3 had been adopted on first reading, the Drafting Committee had discussed that question at length. It had wanted to explain the particular meaning of the French expression *la puissance publique* and the nuance associated with it. The commentary to article 3 reflected that intention, stating in paragraph (3) that “not every political subdivision of a State enjoys the immunity of the State, especially if it does not perform acts in the exercise of ‘sovereign authority’, which seems to be the nearest equivalent to the French expression *prérogatives de la puissance publique*”.⁵ On second reading, some members of the Drafting Committee had accepted that translation, on the grounds that the words “sovereign authority” expressed the characteristic attribute of the State which meant that it enjoyed immunity. Other members, however, had been of a different opinion. In their view, the expression “sovereign authority” was normally associated with the international personality of the State, in accordance with international law, and that was not the subject of subparagraph (iii). The problem was, rather, one of internal law, i.e. of determining how that law divided powers among the political subdivisions of the State. Consequently, “governmental authority” was a better English translation of the French expression *la puissance publique*. That translation had also been used

in articles 7 and 8 of part 1 of the draft articles on State responsibility.⁶ In addition, it had been pointed out that there was no equivalent of the French expression *la puissance publique* in some other languages, such as Russian, and that it might be better to use the expression “authority of the State”. In the absence of a consensus on any other English expression, the Drafting Committee had decided to retain the expression “sovereign authority”, which appeared in the text adopted on first reading.

31. With regard to subparagraph (iii *bis*), he recalled that, in paragraph 1 (c) of article 3 as adopted on first reading, the Commission had extended the definition of the term “State” to agencies or instrumentalities of the State entitled to perform acts in the exercise of the sovereign authority of the State. With a view to the second reading, the Special Rapporteur had stated at the previous session that, as a result of the introduction of the concept of “State enterprises” in draft article 11 *bis* (A/CN.4/415, para. 122), it would be necessary to make changes in the definition of the State contained in paragraph 1 (c).

32. The Drafting Committee had spent a great deal of time trying to reach agreement on wording to define State enterprises and their status for the purposes of the draft articles. Some members had proposed, for example, to exclude such enterprises from the definition of the State given in the new article 2 and to dispense with draft article 11 *bis*. Other members had not been entirely satisfied with that solution: in their view, the question was important and therefore had to be dealt with in a separate article. After a lengthy discussion, the Drafting Committee had concluded that, due to lack of time, it would be unable to reach agreement at the present session and recommend a text to the Commission. He himself thought that it would be advisable to consider the question again in the Drafting Committee at the next session. Since the question of State enterprises would have to be settled either in the framework of article 2, on the use of terms, or in a separate article, paragraph 1 (b) (iii *bis*) of the new article 2 and draft article 11 *bis* were still pending. The Drafting Committee would therefore revert to those provisions at the next session.

33. Subparagraph (iv) reproduced the text of paragraph 1 (d) of former article 3. That text had not given rise to any comments by Governments and seemed acceptable. The Drafting Committee had therefore not made any change in it.

34. With regard to paragraph 1 (c) of the new article 2, which corresponded to paragraph 1 (b) of the text adopted on first reading and dealt with the definition of a “commercial transaction”, he recalled that, on first reading, the Commission had adopted the expression “commercial contract”. Despite the lack of unanimity on that point, the Drafting Committee had considered that the term “transaction” had a technically less precise meaning than the term “contract” and therefore covered a wider range of operations. For the sake of consistency, the Committee had also replaced the word

⁵ Yearbook . . . 1986, vol. II (Part Two), p. 14.

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

accord by transaction in the French text of subparagraphs (i), (ii) and (iii).

35. In subparagraph (i), the Drafting Committee had deleted the words "or purchase", which had seemed unnecessary, since every sale necessarily involved a purchase.

36. In subparagraph (ii), the Drafting Committee had slightly reworded the text to take account of the fact that an obligation of guarantee could exist not only in the case of a loan, but also in that of other transactions of a financial nature. Similarly, an obligation of indemnity could exist not only in the case of a loan, but also in that of other transactions of a financial nature. That fact was, moreover, recognized in the commentary to the definition of the expression "commercial contract" adopted on first reading.⁷ The Committee had therefore combined the references to an obligation of guarantee and an obligation of indemnity so that they applied both to contracts for a loan and to other transactions of a financial nature.

37. As to subparagraph (iii), the Drafting Committee had carefully reviewed the text adopted on first reading. The Committee was aware that the terms used in different languages might not cover exactly the same ground. For example, the concepts of "contract for the supply of services" and "professional contract", as used in the common-law countries, were perhaps not, when taken singly, strictly identical in meaning to the concepts of *contrat de prestation de services* and *contrat de louage d'ouvrage ou d'industrie*. The Drafting Committee had nevertheless considered that, taken together, those concepts encompassed all of the ground to be covered and that the text adopted on first reading could therefore be retained. It had made a very slight drafting change in the French text, where the word *ou* after the word *commerciale* had been replaced by a comma, on the model of the English text.

38. Paragraph 2 of the new article 2 corresponded to paragraph 2 of former article 3. It dealt with the relationship between the so-called "nature" criterion and "purpose" criterion in determining whether a contract or transaction was of a commercial character. The criteria in question were primarily those put forward under the two theories of "restricted" and "absolute" State immunity. He recalled that, during the consideration of the question on first reading, there had been lengthy discussions in the Commission on the question of which of the two criteria should prevail and the Commission had finally agreed on compromise wording. That formula specified that, in determining whether a contract or a transaction was commercial, reference should be made primarily to the nature of the contract, but that the purpose of the contract should also be taken into account if, in the practice of the contracting State, that purpose was relevant to determining the non-commercial character of the contract.

39. A number of Governments had indicated in their comments and observations that the reference to the practice of the contracting State as a criterion for tak-

ing into account the purpose of the contract was not appropriate and that they would prefer it to be deleted. The Drafting Committee had considered other possible wordings. After much discussion, it had finally been unable to reach agreement on any other formulation and had therefore decided to retain the text adopted on first reading. A few drafting amendments had become necessary because of the new position of the paragraph. The beginning had thus been reformulated so as to refer to the definition of a "commercial transaction" under paragraph 1 (c). In addition, the words "of that State" in the last part of the paragraph had been replaced by "of the State which is a party to it", meaning, of course, the State party to the contract or transaction. The purpose of that change was to make the wording totally unambiguous.

40. Paragraph 3 corresponded to paragraph 2 of former article 2. It embodied a commonly used saving clause and the Drafting Committee did not recommend any change, apart from a slight drafting amendment made necessary by the new position of the paragraph. At the beginning, the words "of paragraph 1" had been replaced by "of paragraphs 1 and 2", since article 2 now contained two paragraphs on definitions.

41. As a result of the combination of articles 2 and 3, the subsequent articles had been renumbered.

42. Referring to article 3 (Privileges and immunities not affected by the present articles), which corresponded to article 4 as adopted on first reading, he said that, in paragraph 1, the Drafting Committee had added the words "under international law" after the words "enjoyed by a State" to make it clear that the privileges and immunities in question were those conferred by international law. That amendment also had the advantage of establishing the necessary parallel between paragraphs 1 and 2. As to paragraph 2, the Drafting Committee had noted that it related to the privileges and immunities accorded to heads of State *ratione personae* and not to those they enjoyed as State organs. Strictly speaking, the matter should therefore not be referred to in draft articles on State immunity. The Committee had, however, observed that no Government had proposed that paragraph 2 should be deleted and had therefore considered it inadvisable to eliminate it at the second-reading stage. Finally, the word "the" before the words "privileges and immunities" had been deleted in order to make the text more flexible.

43. Article 4 (Non-retroactivity of the present articles), adopted on first reading as article 5, had been very widely accepted, although a small number of Governments had suggested different wording. The Drafting Committee had therefore considered it unnecessary to make any changes. It was obvious from the text that the non-retroactivity clause applied only to proceedings instituted in a domestic court.

44. Turning to part II of the draft, whose title, "General principles", remained unchanged, he recalled that article 5 (State immunity) had given rise to some discussion on first reading. It was a key provision, for it stated the theoretical foundation of the draft articles. The text adopted on first reading (art. 6) contained a

⁷ See *Yearbook . . . 1983*, vol. II (Part Two), p. 35, para. (3) of the commentary to the then paragraph 1 (g) of article 2.

phrase in square brackets specifying that State immunity was also subject to “the relevant rules of general international law”. The purpose of the bracketed phrase had been to stress that the present articles did not prevent the development of international law and that, consequently, the immunities guaranteed to States were subject both to the present articles and to general international law. As expected, the phrase in square brackets had given rise to a number of comments, some members of the Commission favouring its deletion and others its retention. Equally divergent views had been expressed in the Drafting Committee. Finally, the Committee had decided to delete it: in the general view, any immunity or any exception to immunity accorded or denied to a State by the present articles would have no effect on general international law. If the articles became a convention, they would be applicable only as between the States which became parties to it. In that case, the deletion of the phrase in square brackets would have no effect on subject-matter not referred to in the convention or on the position of general international law on that question.

45. In the French text, the words *jouit . . . de l'immunité de juridiction des tribunaux* had been replaced by *jouit . . . de l'immunité de juridiction devant les tribunaux* for the reasons which he had explained in connection with article 1.

46. In article 6 (Modalities for giving effect to State immunity), the first part of paragraph 1 reproduced the text adopted on first reading (art. 7), except that the reference to article 6 had, of course, been changed to take account of the new numbering of the articles. That reference made it clear that the obligation to give effect to State immunity applied solely when the other State was entitled to benefit from immunity under the present articles. The second part of paragraph 1 had been added by the Drafting Committee at the Special Rapporteur's suggestion. Its purpose was to define and strengthen the obligation set forth in the first part of the provision. Respect for State immunity would be ensured all the more if the courts of the State of the forum, instead of simply acting on the basis of a declaration by the other State, took the initiative in determining whether the proceeding was really directed against that State. That was the idea reflected by the words “determine on their own initiative”. The Drafting Committee had used the expression “shall ensure that its courts” to make it quite clear that the obligation was incumbent on the State, which was responsible for giving effect to it in accordance with its internal procedures. There again, the reference to article 5 indicated that the provision did not prejudice the question whether the State was actually entitled to benefit from immunity under the present articles.

47. With regard to paragraph 2, the Drafting Committee had first observed that its purpose was to lay down a criterion whereby it would be possible to determine whether or not a proceeding should be regarded as having been instituted against a State and that it left open entirely the question whether the State concerned would or would not ultimately be recognized as benefiting from immunity. The Committee had noted that the wording adopted on first reading was too condensed

and seemed to allow the possibility—which was barely conceivable—that a State, although not named as a party to the proceeding, could be compelled to submit to the jurisdiction of the court. The Committee had therefore deemed it necessary to draw a clear distinction between the two cases covered by the provision, namely between the case in which the State was named as a party to the proceeding and the case in which it was not. The first of those cases was dealt with in subparagraph (a) and the second in subparagraph (b).

48. Subparagraph (a) called for no explanation. Subparagraph (b) applied to situations in which the State was not named as a party to the proceeding, but was indirectly involved, for example in the case of an action *in rem* concerning State property, such as a warship, or an action instituted against an entity other than the State itself that fell within the definition of the term “State” laid down in article 2, paragraph 1 (b). The Drafting Committee had simplified the wording adopted on first reading. It had first deleted the clause “so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court”, which, in the case under consideration, was meaningless. The Committee had considered that the words “to bear the consequences of a determination by the court which may affect” created too loose a relationship between the proceeding and the consequences to which it gave rise for the State in question and could thus result in unduly broad interpretations of the paragraph. To make the text more precise in that regard, it had therefore replaced those words by “to affect”.

49. Lastly, the Drafting Committee had deleted paragraph 3, which, given the very elaborate definition of the term “State” contained in article 2, no longer had any purpose.

50. Article 7 (Express consent to the exercise of jurisdiction) corresponded to article 8 as adopted on first reading, to which the Drafting Committee had, on the basis of the comments made both in the Commission and by Governments, made certain additions which called for an explanation.

51. In paragraph 1, which stipulated that a State could not invoke immunity from jurisdiction before a national court with regard to a matter in respect of which it had expressly consented to the exercise of jurisdiction by that court, the Drafting Committee had been of the view that the word “matter” would not cover all eventualities. A State could, for instance, consent to the exercise of jurisdiction with regard to a particular case. Furthermore, the consent of a State with regard to a matter could be confined to a particular case only and consequently would not affect the immunity of the State with regard to a similar matter in another case. The Committee had therefore slightly amended the end of the introductory clause of the paragraph to read: “with regard to the matter or case”.

52. Subparagraphs (a) and (b) remained unchanged. Subparagraph (c) had been amplified to take account of another possibility. As originally worded, the subparagraph had provided that the consent of the State could be expressed by a declaration before the court in

a specific case. It had, however, been pointed out that that wording would require a State wishing to make such a declaration to send a representative specially to appear before a national court, whereas it should be possible to make such a declaration in a written communication to the plaintiff or to the court. The last part of subparagraph (c) therefore provided that a State would have the possibility of consenting to the exercise of jurisdiction by means of such a written communication. The Drafting Committee had also replaced the words "in a specific case" by "in a specific proceeding", to ensure better co-ordination between subparagraph (c) and the introductory clause of the paragraph.

53. Paragraph 2 was new. It had been noted that agreement by a State for the application of the law of another State with regard to a case or a matter should not be interpreted as consent by the first State to the exercise of jurisdiction by the courts of the other State. The Drafting Committee, which had endorsed that view, had thus added paragraph 2. The title of the article remained unchanged.

54. Article 8 (Effect of participation in a proceeding before a court) corresponded to article 9 as adopted on first reading, to which there had been two substantive changes involving additions made as a result of the discussions on second reading and of comments by Governments.

55. As the title—which remained unchanged—indicated, the article dealt with the effect on a State's immunity from jurisdiction of its participation in a proceeding before a court. It thus provided for exceptions to that immunity. Those exceptions applied where the State had itself instituted the proceeding (para. 1 (a)) and where the State had intervened in the proceeding or taken any other step relating to it (para. 1 (b)). It had been pointed out that there might be circumstances in which a State would not be familiar with certain facts on the basis of which it could invoke immunity. It could happen that a State instituted proceedings or intervened in a case before it had acquired knowledge of such facts. In such cases, the State should be able to invoke immunity, on two conditions. First, the State must satisfy the court that it could have acquired knowledge of the facts justifying a claim of immunity only after it had intervened in the proceeding or taken steps relating to the merits of the case. Secondly, the State must furnish such proof at the earliest possible moment. The second part of paragraph 1 (b) dealt with that point.

56. Paragraph 2 was unchanged apart from certain drafting amendments in the introductory clause. The text adopted on first reading referred only to paragraph 1 (b), but, in view of the additions made to that subparagraph, it had been considered advisable to repeat the main idea set forth at the beginning of paragraph 1 (b). That change was purely one of drafting.

57. Paragraph 3 was new. It had been noted that a representative of a State might have to appear before a court as a witness, for instance to give evidence that a particular person was or was not a national of that State, or in connection with similar matters. Such

appearances should not imply that that State consented to the exercise of jurisdiction by a national court. Paragraph 3 therefore had to be read in the light of the first clause of paragraph 1 (b), according to which such appearances before a court did not normally constitute intervention by the State in the proceeding. The reference was, of course, to the appearance of a representative of a State in his official capacity. It went without saying that, if the same person appeared in his private capacity, his appearance could not involve the State.

58. Paragraph 4 corresponded to paragraph 3 of the former text, which remained unchanged except for a few drafting amendments. For instance, in the last part of the paragraph, the words "of that State" had been replaced by "by the former State", in order to make the text clearer. In English, the word "considered" had been replaced by "interpreted" to bring the text into line with that of paragraph 3.

59. In article 9 (Counter-claims), the Drafting Committee had made only slight drafting amendments to the text adopted on first reading (art. 10). It had noted that the parallelism as to substance between paragraphs 1 and 2 was not properly reflected in the wording. It had therefore amended the introductory phrase of paragraph 1 to bring it into line with the corresponding phrase in paragraph 2, so that it read: "A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction . . .". The Drafting Committee had also considered that the words "against the State" in paragraphs 1 and 2 of the former text were unnecessary and had deleted them.

60. Turning to part III of the draft, he noted that the title, "[Limitations on] [Exceptions to] State immunity", appeared between square brackets. The Commission would take a decision on the matter when it had concluded the second reading of all the draft articles.

61. With regard to article 10 (formerly article 11), the title adopted on first reading, "Commercial contracts", had been replaced by "Commercial transactions", the expression used in paragraph 1 (c) of article 2. The same change had been made at three points in paragraph 1 and in paragraph 2 (a) and (b).

62. A further change had been made in paragraph 1 with regard to the words "the State is considered to have consented to the exercise of that jurisdiction". The Drafting Committee had noted that, in the plenary Commission, the legal fiction reflected by those words had been regarded as artificial and devoid of any foundation in case-law. It had therefore replaced those words by the formula: "the State cannot invoke immunity from that jurisdiction". The purpose of the change was merely to simplify the text and should not be interpreted as implying any change in existing positions on the doctrine of the jurisdictional immunities of States. It would be explained in the commentary that, in the view of some members of the Commission, the non-applicability of immunity in the case covered by article 10 was based on the presumed consent of the State in question.

63. With regard to paragraph 2 and, more specifically, subparagraph (a), the Drafting Committee had noted that the purpose of article 10 was to exclude from the benefit of jurisdictional immunity transactions effected by a State with legal persons at private law and that it might not be altogether logical to present as an exception to the rule laid down in paragraph 1 transactions between legal persons at public law which, by definition, fell outside the scope of the article. It had, however, been considered preferable to retain subparagraph (a) to make it quite clear that the words "foreign natural or juridical person", in paragraph 1, should not be interpreted as encompassing any of the entities covered by the definition of the term "State" in article 2, paragraph 1 (b).

64. Still with regard to paragraph 2 (a), the Drafting Committee had questioned the usefulness of the expression "or on a Government-to-Government basis", which appeared in the text adopted on first reading. Most of its members had been of the opinion that, in view of the definition of the term "State" in article 2, paragraph 1 (b), which included the words "the State and its various organs of government", the words "or on a Government-to-Government basis" were no longer necessary. Accordingly, it had been agreed to delete those words and, as a result, it had been possible to simplify the wording. Subparagraph (a) therefore now read: "in the case of a commercial transaction between States". One member of the Drafting Committee had, however, expressed a reservation concerning the deletion of the words "or on a Government-to-Government basis". He had pointed out that article 2, paragraph 1 (b), referred to "organs of government" and not to the Government as such and that the juxtaposition of the expressions "between States" and "on a Government-to-Government basis" would mean that the whole range of possible commercial transactions could be covered, including, for instance, transactions between ministerial departments.

65. With regard to paragraph 2 (b), the Drafting Committee had merely introduced a slight change in the English text, placing the word "otherwise" at the end of the sentence.

66. Article 10 was followed by points of ellipsis, for, as he had explained in connection with article 2, paragraph 1 (b) (iii *bis*) (see para. 32 above), the Drafting Committee was planning to reconsider at the next session the possibility of including an article 11 on State enterprises corresponding to draft article 11 *bis* submitted by the Special Rapporteur. The purpose of the points of ellipsis was to draw attention to that possibility.

67. Article 12 (Contracts of employment) set forth the second exception to the principle of the jurisdictional immunity of States. Several Governments had recommended the deletion of the article, pointing out in particular that it lacked any strong support in case-law and State practice. Although the Drafting Committee was aware of those objections, it had taken the view that it would be going beyond its mandate to propose the deletion of an article adopted on first reading, and that its efforts should rather be directed at improving the wording. Some members had, however, reserved

their position with regard to the article, for the reason he had stated.

68. Article 12 covered the situation in which a contract of employment had been concluded between a State and an individual for work to be performed, in whole or in part, in the territory of another State. Since two sovereign States were involved, their respective interests had to be reconciled. The employer State had an interest in the application of its administrative law in respect of the selection, recruitment and appointment of an employee by the State itself or one of its organs acting in the exercise of governmental authority. On the other hand, the forum State had an interest in ensuring that matters of public policy relating to the protection to be afforded to persons working in its territory should be within its exclusive jurisdiction. The structure of article 12 showed that care had been taken to strike a proper balance between the interests involved. Paragraph 1 stated the rule of non-immunity in a judicial proceeding relating to a contract of employment between a State and an individual for work to be performed, in whole or in part, in the territory of another State. Paragraph 2 introduced limitations to the rule of non-immunity by indicating the cases in which the exception to immunity did not apply.

69. In paragraph 1, the Drafting Committee had replaced the words "the immunity of a State cannot be invoked" by "a State cannot invoke immunity" for the sake of terminological consistency, since the active voice was used in earlier articles, for example articles 8 and 9. The same change had been made in articles 13 to 16. As to substance, the Drafting Committee had noted that a number of Governments had found paragraph 1 too restrictive and it had therefore eliminated the two conditions to which the rule of non-immunity had been subordinated in the last part of the text adopted on first reading. In the case of the first condition, namely that the employee must have been recruited in the forum State, the Committee had noted that, according to the first part of the text, the rule of non-immunity came into play whenever work was performed or was to be performed in the territory of the forum State. In the Committee's opinion, that clause established a sufficient link between the contract and the forum State. In that connection, it should be recalled that the 1972 European Convention on State Immunity contained no reference to the place of recruitment. The Drafting Committee had therefore deleted the first condition. At the Special Rapporteur's suggestion, it had also deleted the second condition, requiring the employee to be covered by special security provisions. It had had two reasons for doing so. First, as several Governments had pointed out, some countries did not have social security systems in the strict sense of the term. Secondly, there were social security systems whose benefits did not cover persons employed for very short periods. If the reference to social security provisions were retained in article 12, such persons would be deprived of the protection of the courts of the forum State. However, it was precisely those persons who were in the most vulnerable position and who most needed effective judicial remedies. The Drafting

Committee had therefore deleted the end of paragraph 1, beginning with the words "if the employee . . .".

70. The Drafting Committee had brought the English text of paragraph 1 into line with the French by replacing the word "services" by "work", the term used in the corresponding provision of the 1972 European Convention. That change made it clear that reference was being made to contracts which gave rise to the payment of wages, not to transactions concluded between a State and an entrepreneur; such transactions were commercial transactions within the meaning of article 2, paragraph 1 (c), and were, under article 10, already outside the scope of the principle of immunity.

71. With regard to paragraph 2, the Drafting Committee had noted that several Governments had recommended the deletion of subparagraphs (a) and (b) of the text adopted on first reading. It had nevertheless found that those subparagraphs had been criticized mainly because their scope had been considered broad. The Committee had therefore tried to make the texts more precise in order to prevent unduly extensive interpretations which would reduce the rule stated in paragraph 1 to nothing. In subparagraph (a), the expression "services associated with the exercise of governmental authority" might lend itself to such an interpretation, since a contract of employment concluded by a State stood a good chance of being "associated with the exercise of governmental authority", even very indirectly. The Drafting Committee had noted that the commentary to the text adopted on first reading encouraged that type of interpretation by stating that persons performing services associated with the exercise of governmental authority could include librarians of an information service and security guards.⁸ In the Committee's opinion, the exception provided for in subparagraph (a) was justified only if there was a close link between the work to be performed and the exercise of governmental authority. The words "associated with" had therefore been replaced by "closely related to". In order to avoid any confusion with contracts for the performance of services which were dealt with in the definition of a "commercial transaction" and were therefore covered by article 10, the Drafting Committee had replaced the word "services" by "functions".

72. In subparagraph (b), the same concern for accuracy had prompted the Drafting Committee to replace the words "the proceeding relates to" by "the subject of the proceeding is". Even a proceeding concerning the performance of a contract of employment could be regarded as "relating to" the contract, and that would defeat the purpose of the exception stated in paragraph 1. The words "the subject of the proceeding is" made it clear that the scope of the exception was restricted to the specific acts which were referred to in subparagraph (b) and which were legitimately within the discretionary power of the employer State. Moreover, paragraph (12) of the commentary⁹ explained that the rule in subparagraph (b) was without

prejudice to the possible recourse which might still be available in the forum State for compensation for wrongful dismissal, for example.

73. The Drafting Committee had not made any changes in subparagraphs (c), (d) and (e) of the text adopted on first reading, but a mistake in the Russian translation of the expression "public policy" had been corrected.

74. He recalled that, when article 13 (Personal injuries and damage to property) had been discussed in the plenary Commission, differing views had been expressed as to its relevance. Some members would have preferred to delete it, while others wished to retain it. The Governments which had made observations on the article had also been divided. The article was basically intended to cover situations such as traffic accidents which involved a diplomat or a State official in the exercise of his functions and which caused injury to innocent persons in other States. It had been considered that compensation should be paid in such cases and that States should not be able to avoid their obligations by invoking immunity. That principle, namely the obligation to compensate innocent injured parties, had not been questioned. The point at issue was how the compensation should be provided. Some members had expressed the view that the kind of motor-vehicle insurance now commonly held by States automatically covered such situations and that whatever matter was not covered by the insurance should preferably be settled through diplomatic channels. Other members had taken the opposite view that, in such cases, States should not, in principle, be able to avoid their obligations by invoking immunity.

75. There had, of course, been the same differences of views in the Drafting Committee. Two points had, however, been taken into account by the members of the Committee: first, the members of the Commission who wanted to delete article 13 were fewer in number than those who wanted to retain it; and, secondly, in such circumstances, the Drafting Committee could not delete on second reading an article which had been referred to it by the Commission. The Drafting Committee had therefore redrafted the text of the article. Apart from the replacement of the passive voice by the active voice at the beginning of the text, only five lines in the middle of the article had been modified in order to make the text clearer. The text adopted on first reading had contained two references to death or injury to the person and the connection between death or injury to the person and the act or omission attributable to the State had not been established directly enough. In the present wording, the words "death or injury to the person" were used only once and were linked more directly to the act or omission attributable to the State.

76. Comments had also been made on the very broad scope of article 13 and on the consequences that might have for State responsibility. It had been stated, for example, that the word "compensation" might be misinterpreted as including non-pecuniary forms of compensation. The Drafting Committee had therefore added the word "pecuniary" before the word "compensation".

⁸ See *Yearbook . . . 1984*, vol. II (Part Two), p. 65, para. (11) of the commentary to the then article 13.

⁹ *Ibid.*

77. To make it clear that article 13 referred to acts performed by agents or officials of a State in the exercise of their official functions and not necessarily by the State itself as a legal person, the Drafting Committee had considered it necessary to explain in the commentary that the words “author of the act” referred to such persons. The expression “attributable to the State” was also intended to establish a distinction between acts by such persons which were not attributable to the State and those which were attributable to the State.

78. It had been pointed out that it must be made clear that the reference to an act or omission attributable to the State did not affect the rules of State responsibility. In the Drafting Committee’s view, the entire set of draft articles on the present topic dealt with the question of State immunity, i.e. whether a State should or should not appear before the courts of another State. The articles therefore did not deal with the substantive question whether a State was or was not responsible for the act attributed to it. That question could be settled only when the court had examined the merits of the case. To make that point clear, the Drafting Committee had taken the view that it should be explained in the commentary.

79. Whenever possible and whenever the text would not be less clear, the Drafting Committee had tried to avoid using the expression “the State of the forum”. It had not always succeeded. In article 13, however, it had been able to use the expression “that other State” rather than “the State of the forum”. The title of the article remained unchanged.

80. In the French text, it had been considered that the words *qui est présumé attribuable* were an incorrect translation of the words “which is alleged to be attributable”. The English wording did not establish a presumption, but merely indicated a statement or claim by one of the parties. The words *qui est présumé attribuable* had therefore been replaced by *prétendument attribuable*.

81. In Article 14 (Ownership, possession and use of property), the Drafting Committee had put the introductory clause in the active voice, for the reasons already explained. The words “otherwise competent” were particularly important. As they indicated, the provision was based on the assumption that the court before which the case had been brought actually had jurisdiction under the rules applicable to conflicts of jurisdiction; it was not intended to confer jurisdiction on a court when such jurisdiction did not exist.

82. As to the subparagraphs of the former paragraph 1, the Drafting Committee had noted that reservations had been expressed with regard to the concept of an “interest”, which was not known in some legal systems. However, it had taken the view that, if no reference were made to that concept, problems would arise in countries where the concept was in customary use, whereas the reverse would not be true. It had therefore decided to retain the formula “right or interest”.

83. The Drafting Committee had made no changes in subparagraphs (a) and (b). Subparagraphs (c), (d) and (e) had been replaced, in accordance with the Special

Rapporteur’s suggestion, by a single subparagraph (c), which read:

“(c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding-up.”

The new wording was less detailed than subparagraphs (c), (d) and (e) as adopted on first reading, but it kept the essence of those subparagraphs in more condensed form.

84. Paragraph 2 of the text adopted on first reading had given rise to some reservations. As indicated in the commentary, one member of the Commission had expressed the view that the paragraph was neither useful nor justified.¹⁰ Another had reserved his position, taking the view that the content and formulation of the paragraph were likely to give rise to serious difficulties, particularly in seeking to deprive a State of property as a result of a proceeding from which the State was absent. The Drafting Committee had taken account of the link between paragraph 2 of article 14 and paragraph 2 of article 6 (formerly article 7), under which a proceeding could be considered to have been instituted against a State even if the State was not named as a party. The Committee had nevertheless considered it self-evident that the presence of a State should not be an obstacle to a proceeding between two private individuals, since the State would be able to invoke immunity only if the proceeding had been instituted against it. The Drafting Committee had therefore deleted paragraph 2.

85. Article 15, now entitled “Intellectual and industrial property”, was unchanged except for certain drafting amendments. First, the introductory clause had been put into the active voice. In subparagraph (a), the word “similar” had been considered superfluous and had been deleted, so that the text now read: “. . . any other form of intellectual or industrial property . . .”. The Drafting Committee had taken the view that “intellectual or industrial property” was a generic expression covering a range of rights relating to new forms of property which enjoyed a measure of legal protection. New forms of property resulting from scientific, technical and industrial progress and from new genetic engineering techniques were constantly being recognized and accepted. It would therefore be impossible, and unwise, to try to list such forms of property in the text of the article. It would be better to have an article that was general in scope and to give examples in the commentary.

86. To make subparagraph (b) clearer, the Drafting Committee had added the words “of the nature” after the words “of a right”, so that the phrase now read: “of a right of the nature mentioned in subparagraph (a)”. It was thus understood that the rights in question were rights in a patent, an industrial design, a trade name, etc. The Drafting Committee had also deleted the word “above” after “subparagraph (a)”, since it was unnecessary.

¹⁰ See *Yearbook . . . 1983*, vol. II (Part Two), pp. 37-38, para. (10) of the commentary to the then article 15.

87. The title of the article had been shortened. Since the article dealt with various forms of intellectual and industrial property, the Drafting Committee had considered that it was enough to use those terms in the title.

88. It should be pointed out that some members of the Drafting Committee had said that article 15 had no place in the draft and that they would have preferred it to be deleted.

89. In article 16 (Fiscal matters), the Drafting Committee had made no change to the text adopted on first reading, except that it had replaced the passive voice by the active voice. One member of the Committee had expressed a reservation concerning the article.

90. The CHAIRMAN recalled that the Commission had decided that the draft articles adopted by the Drafting Committee on second reading would be introduced by the Chairman of the Drafting Committee, but not discussed or decided on in the plenary Commission at the current stage (see 2183rd meeting, paras. 69-73). Before deciding on individual articles, the Commission would wait until it had before it the entire set of articles proposed on second reading. However, members who had statements to make on the general orientation of the work on the topic were invited to take the floor.

91. Prince AJIBOLA said that the draft articles proposed by the Drafting Committee, which had been considerably slimmed down, were an improvement on the former texts. Nevertheless he had two general comments to make. First, the word "State", which appeared in many places in the text, required some qualification in order to avoid confusion. In article 8, paragraph 4, for example, the lack of an adjective had made it very difficult for the Drafting Committee to distinguish between the States concerned. In that connection, the draft articles on most-favoured-nation clauses¹¹ might be used as a model and reference could be made to the "granting" State or to the "beneficiary" State, as appropriate, in order to make it quite clear which State was meant. Secondly, article 5, which enunciated the general principle of State immunity that was subsequently worn down by a great many exceptions, should have been placed earlier in the text.

92. Mr. Sreenivasa RAO said that he agreed with Prince Ajibola on the need to qualify the State in question by means of an adjective. He would also like some clarifications as to the meaning of the following words used at the end of paragraph 1 of article 6: "and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected".

93. Mr. MAHIOU (Chairman of the Drafting Committee) recalled that the Commission had decided not to hold a debate on the articles. In reply to the question by Mr. Sreenivasa Rao, however, he explained, as he had already done in introducing his report (see para. 46 above), why the Drafting Committee had added the second part of paragraph 1 of article 6 at the suggestion of the Special Rapporteur.

94. Mr. Sreenivasa RAO said that his understanding was therefore that the courts must first determine whether a State was entitled to immunity before dealing with the merits of a case.

95. He also had some comments to make on other articles. In article 9, he could not see the difference between paragraph 1 and paragraph 2. In article 12, he thought that the scope *ratione personae* of paragraph 2 (b) could be explained in the commentary. With regard to article 14 (c), he wished to know whether "the estate of a bankrupt" was a standard expression.

96. Mr. BENNOUNA, supported by Mr. CALERO RODRIGUES, recalled that it had been decided to postpone consideration of the articles until the following session.

97. Mr. SEPÚLVEDA GUTIÉRREZ commended the Chairman of the Drafting Committee on his outstanding presentation and also congratulated the Special Rapporteur.

98. Mr. BEESLEY said that problems might be caused by using the word "State" to refer both to a sovereign State and to the constitutive units of a federal State, as, for example, in article 1 and article 5. He would like the Chairman of the Drafting Committee to provide some clarification on that point.

99. Mr. NJENGA asked whether the draft articles which had just been introduced would be referred to the Sixth Committee of the General Assembly. If they were, the Sixth Committee would discuss them before the Commission did.

100. Mr. MAHIOU (Chairman of the Drafting Committee) said that the draft articles proposed by the Drafting Committee would not be included in the Commission's report to the General Assembly because they were incomplete and might give the wrong idea of the draft as a whole. The texts would be referred to the General Assembly only after all the articles had been considered on second reading.

101. In reply to Mr. Beesley, he repeated the explanations on the particular case of federal States which he had given in introducing his report (see para. 29 above).

Date and place of the forty-third session

[Agenda item 11]

102. The CHAIRMAN announced that the Enlarged Bureau had decided to recommend that the Commission's forty-third session should take place from 29 April to 19 July 1991.

103. Mr. BENNOUNA, Mr. AL-QAYSI, Mr. MAHIOU, Mr. PELLET, Mr. BARSEGOV and Mr. TOMUSCHAT expressed reservations about those dates. If the Commission decided to begin its work as early as April, it might be depriving itself of the assistance of several of its members, who would be detained by other professional obligations.

104. Mr. NJENGA, supported by Prince AJIBOLA, said that the sooner the Commission began its work,

¹¹ Yearbook . . . 1978, vol. II (Part Two), pp. 16 *et seq.*

the sooner it would be able to complete its report to the General Assembly.

105. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved the recommendation by the Enlarged Bureau that the forty-third session should be held from 29 April to 19 July 1991.

It was so agreed.

The meeting rose at 6.10 p.m.

2192nd MEETING

Thursday, 12 July 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued)* (A/CN.4/429 and Add.1-4,² A/CN.4/430 and Add.1,³ A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

CHAPTER III (The Commission's discussion of the question at the present session) (continued)

Paragraph 28 (concluded)

1. Mr. GRAEFRATH proposed that paragraph 28 should be reworded as follows:

"Some States see the establishment of an international criminal court as a useful alternative to overcome their difficulties in implementing universal jurisdiction. It would, however, be illusory to believe that an international prosecuting mechanism could

relieve States of the problems associated with the national administration of [criminal] justice."

If the Commission did not agree, the paragraph could perhaps be deleted, because it was not really necessary.

2. Mr. SEPÚLVEDA GUTIÉRREZ said that Mr. Graefrath's proposal solved many problems and he would therefore withdraw his own objections to the paragraph.

3. Mr. AL-QAYSI said that Mr. Graefrath's proposal might help to overcome difficulties that had emerged in the discussion, but he wondered whether it was appropriate to speak of the "national administration of criminal justice" and proposed instead the phrase "national administration of justice in relation to criminal matters".

4. Mr. BENNOUNA said that the expression "criminal matters" proposed by Mr. Al-Qaysi was too broad. He would suggest the formula "the prosecution of international crimes".

5. Mr. McCAFFREY said that he agreed with Mr. Bennouna's suggestion, which also read well in English, and proposed replacing the words "relieve States of" by "alleviate" or "eliminate".

6. Mr. RAZAFINDRALAMBO said that he, too, agreed with the suggestion made by Mr. Bennouna and supported by Mr. McCaffrey, because he had reservations about the original paragraph 28 and about Mr. Graefrath's proposed rewording.

7. Mr. KOROMA suggested replacing the word "illusory", which was too negative, by the words "unduly optimistic".

8. Mr. NJENGA said that he supported Mr. Koroma's suggestion. As to Mr. McCaffrey's proposal, the word "eliminate" was preferable to "alleviate".

9. Mr. EIRIKSSON (Rapporteur) endorsed Mr. Koroma's suggestion and proposed that the end of the paragraph should be amended to read: "...could eliminate all problems associated with the prosecution of international crimes".

10. Mr. HAYES said that he had reservations about Mr. Bennouna's proposed amendment. The Commission was not simply attempting to cover the internal prosecution of international crimes, but also the internal prosecution of what technically would be national crimes. The phrase "prosecution of international crimes" was therefore too restrictive. Perhaps it would be better to say: "the national prosecution of similar crimes".

11. Mr. DÍAZ GONZÁLEZ said that he was in favour of deleting paragraph 28, because it was in contradiction with paragraph 29. Its deletion would not detract from the report.

12. Mr. AL-QAYSI said that he had no objection to deleting the paragraph, but if it was to be retained, it was important to bear in mind the context. Some States considered that they would encounter difficulties in implementing universal jurisdiction and they were therefore advocating the alternative of an international criminal court. The second sentence could thus be worded: "It would, however, be unduly optimistic to

* Resumed from the 2189th meeting.

¹ 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.

² Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

³ *Ibid.*

believe that an international prosecuting mechanism could eliminate all those difficulties." That would avoid the need to make reference to the national or international prosecution of international crimes. If that formulation was adopted, States might still ask why the belief referred to would be unduly optimistic, and the Commission would have to explain why, thus making the paragraph more cumbersome. If, however, it was the Commission's view that a special case was at issue, it must elaborate on the text, because then the wording he had proposed would not be sufficient.

13. Mr. PAWLAK said that paragraph 28 was designed for those States wishing to receive the assistance of an international criminal court in overcoming difficulties in implementing obligations associated with the prosecution of certain crimes. One example was drug trafficking in Central and South America. The second sentence of the paragraph could be deleted.

14. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that it would be best simply to delete paragraph 28. Obviously, the establishment of an international criminal court did not mean that States would not have problems associated with the implementation of their legal systems.

15. Mr. GRAEFRATH said that he was in favour of deleting paragraph 28 and moving on to more important paragraphs awaiting discussion.

16. Mr. FRANCIS said that paragraph 28 raised an important issue of direct concern to countries such as his own. He was strongly against deleting the paragraph and thought that it should be included in the form suggested earlier by Mr. Graefrath. Countries not currently affected by the problem might be at some later date.

17. Prince AJIBOLA said that he agreed with Mr. Pawlak: certain States wanted to receive assistance from an international criminal court and paragraph 28 should therefore be retained. Indeed, some States did not even know what to do about nationals of other States who had committed offences in their territory.

18. Mr. AL-QAYSI said that he supported the suggestion to replace the word "illusory" by the words "unduly optimistic". The phrase "relieve States of the problems associated with the national administration of [criminal] justice", in the text proposed by Mr. Graefrath (para. 1 above), could be replaced by "eliminate all those difficulties".

19. Mr. SEPÚLVEDA GUTIÉRREZ, supported by Mr. THIAM (Chairman-Rapporteur of the Working Group), said that, as the Commission was unable to agree on a text, paragraph 28 should be deleted.

20. Mr. BENNOUNA, speaking on a point of order, suggested that the Chairman should establish a small working group to make a last attempt to produce a draft for paragraph 28, failing which the paragraph should be deleted.

21. Mr. JACOVIDES, speaking on a point of order, asked the Chairman to rule on Mr. Bennouna's proposal.

22. The CHAIRMAN suggested that an informal working group, composed of Mr. Bennouna, Mr. Francis, Mr. Graefrath and Mr. Thiam (Chairman-Rapporteur of the Working Group), should be established with a view to agreeing on a compromise text.

It was so agreed.

23. Following a brief suspension of the meeting, the CHAIRMAN announced that the informal working group established to find a compromise text recommended the deletion of paragraph 28.

24. Prince AJIBOLA objected that it was no part of that group's mandate to propose the deletion of paragraph 28. The group had been set up for the purpose of endeavouring to find a text for the paragraph that would be acceptable to all. If more time was needed to arrive at that result, the Commission should consider requesting it to continue its work. Perhaps paragraph 28 could be referred to the Chairman-Rapporteur of the Working Group. In any case, it was for the Commission itself to decide whether or not to delete a paragraph.

25. Mr. THIAM (Chairman-Rapporteur of the Working Group) pointed out that the members of the informal working group had been unable to arrive at an agreed text and had accordingly recommended the deletion of paragraph 28. As far as he was concerned, he could do no more.

26. Mr. FRANCIS said that he shared the concern about the proposal to delete paragraph 28. The paragraph referred to the problems of small States in trying to implement existing systems of universal jurisdiction—a matter of great interest to such States.

27. The CHAIRMAN said that the objection raised by Prince Ajibola would be reflected in the summary record of the meeting. If there were no objections, he would take it that the Commission agreed to delete paragraph 28.

It was so agreed.

Paragraph 29

28. Mr. HAYES said that the word "for" should be inserted before the words "the protection" in the second sentence.

It was so agreed.

29. Mr. KOROMA said that he was not happy about the opening phrase, "Although the possibility of abusing an international court for political purposes cannot be excluded . . .", as it was in the nature of a value judgment. The first sentence should therefore be replaced by the following text: "In order to safeguard the integrity of the international criminal court as well as to protect the rights of accused persons, it will be necessary to devise an adequate structure for the court."

30. Prince AJIBOLA said that the first sentence should be deleted. It referred to a hypothetical situation and was not in keeping with the line of thought expressed in the next sentence.

31. Mr. EIRIKSSON (Rapporteur) said that the first sentence reflected a concern expressed in many circles.

To place that concern in the proper context, however, he would suggest that the sentence be reworded as follows: "Some concern has been expressed that an international court may be abused for political purposes, but the Commission is convinced that this could be avoided by devising an adequate structure for the court."

32. Mr. BEESLEY said that he had himself had some similar wording in mind. On reflection, however, he would prefer Mr. Koroma's proposal, as it addressed the central issue more appropriately by referring to the integrity of the court and to protection of the rights of the individual. He therefore urged the Commission to adopt that proposal.

33. Mr. NJENGA said that he, too, endorsed Mr. Koroma's proposal.

34. Mr. TOMUSCHAT proposed that the first sentence should be amended to read: "Although concerns have been expressed that an international court could not be totally insulated from political currents, the Commission is convinced that the court's independence and integrity may be safeguarded by devising an adequate structure." The second sentence would remain in its present form.

35. Mr. KOROMA said that he could accept that proposal, subject to deletion of the word "human" in the second sentence.

36. Mr. Sreenivasa RAO proposed that the words "safeguarded by devising an adequate structure", in Mr. Tomuschat's proposed amendment, should be replaced by "guaranteed by devising a structure with adequate safeguards".

37. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Tomuschat's amendment, as modified by Mr. Sreenivasa Rao, and to delete the word "human" in the second sentence as proposed by Mr. Koroma.

It was so agreed.

Paragraph 29, as amended, was adopted.

38. Prince AJIBOLA noted that at some points the report of the Working Group referred to an "international criminal court" and at others simply to a "court". For the sake of consistency, he would prefer to use the latter term throughout the report.

39. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that the corresponding word in the French text was *jurisdiction*, which had the advantage of being much broader. He had no preference in the matter, however.

40. Mr. PELLET, agreeing with the Chairman-Rapporteur of the Working Group, said that *jurisdiction* was also more suitable, as it was a neutral term. Moreover, the words "tribunal" or "court" would not be in conformity with the language used in the existing instruments on genocide and *apartheid*.

41. Mr. NJENGA, supported by Mr. PAWLAK, said that, in English, the word "jurisdiction" was not synonymous with "court". Prince Ajibola's unease could be allayed by adding the words "hereinafter referred to

as 'the court'" after the words "international criminal court" in paragraph 23.

42. Mr. MAHIU suggested that it be left to the Chairman-Rapporteur of the Working Group to find the most appropriate form of words.

43. Mr. HAYES said that, since the matter was purely one of editing, the text should remain as drafted.

It was so agreed.

Paragraph 30

44. Mr. KOROMA said that the words "more in" should be replaced by "in more".

It was so agreed.

Paragraph 30, as amended, was adopted.

Paragraph 31

45. Mr. CALERO RODRIGUES said that paragraph 31 set out three options for the exercise of jurisdiction, as an indication of which law should be applied by the court. The third option introduced an additional, and to his mind extraneous, element in that it said not simply that the court would exercise jurisdiction over any crimes in respect of which States would attribute competence to it, but that the court could be established independently of the code. That had nothing whatsoever to do with the question of the attribution of competence for certain crimes. The court could very well be established independently of the code yet have competence only for crimes included in the code. In his view, therefore, the element in question should be deleted.

46. Mr. McCAFFREY said that he agreed with Mr. Calero Rodrigues. He also proposed that the word "envisaged", in subparagraph (ii), should be replaced by "included", which was the word used in subparagraph (i). He further proposed that the phrase "attribute competence to it", in subparagraph (iii), should be replaced by "confer competence on it".

47. Mr. BARSEGOV pointed out that the authors of the report appeared to have overlooked in paragraph 31 the fact that there were international conventions in force which punished certain crimes and provided for the establishment of an international criminal court for the purpose. The problem was to some extent referred to in subparagraph (iii), which spoke of jurisdiction over the crimes "in respect of which States would attribute competence" to the court. He accordingly urged that specific reference be made to crimes which had already been defined by the international community and for which the need for an international criminal court was recognized.

48. He could be satisfied with the present text if he were assured that it covered all the crimes mentioned in existing international conventions and those that would be made punishable under future conventions. Otherwise, he would suggest that the matter be made clear by inserting, at the end of subparagraph (iii), an additional phrase along the following lines: "... in accordance with international conventions or other instruments".

49. Mr. KOROMA said that he agreed with Mr. McCaffrey's proposal to replace the words "attribute competence to" by "confer competence on". As to the point raised by Mr. Barsegov, the phrase "crimes in respect of which States would confer competence" should cover such crimes as genocide, in which connection the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contained provisions on jurisdiction.

50. Mr. THIAM (Chairman-Rapporteur of the Working Group) urged that the text of subparagraph (iii) be kept as it stood. In the case of crimes punishable under existing international conventions, the provisions regarding the competent court would be covered by the words "jurisdiction over crimes in respect of which States would confer competence". Consequently, the States parties conferred the competence in question under the terms of the convention itself.

51. Mr. PAWLAK said that, as a member of the Working Group, he supported the Chairman-Rapporteur in urging that the text remain unchanged, except for the useful drafting changes proposed by Mr. McCaffrey.

52. Mr. PELLET said that Mr. Barsegov's point, which was a valid one, could be met by inserting at the end of subparagraph (iii) an additional phrase along the following lines: "... and in particular under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*". He stressed the significance in that context of the words "and in particular".

53. Mr. BEESLEY said that he agreed with Mr. Barsegov. As to the drafting proposals made by Mr. McCaffrey, he agreed that the words "attribute competence to" should be replaced by "confer competence on", but he for one preferred the word "envisaged" for subparagraph (ii) and also for subparagraph (i). Not all the offences "included" in the code constituted crimes.

54. Mr. AL-QAYSI, referring to the point raised by Mr. Barsegov, said that he endorsed the idea of introducing wording which would cover the exercise of jurisdiction for other crimes, namely those under international conventions other than the code.

55. Prince AJIBOLA suggested that, in subparagraph (i), the word "all" should be inserted before "the crimes included in the code". In the interests of consistency, he agreed with Mr. Beesley's suggestion to replace the word "included" by "envisaged".

56. Mr. JACOVIDES said that he agreed with the suggestion to use the same term in both subparagraphs (i) and (ii), but felt that the appropriate term was "included", not "envisaged".

57. Mr. BEESLEY proposed that the term "defined" should be used in both subparagraphs.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed: (a) to insert the word "all" before the words "the crimes" in subparagraph (i); (b) to replace the words "included" in subparagraph (i) and "envisaged" in subparagraph (ii) by "defined"; (c) to amend the last part of subparagraph (iii) to read: "... would confer

competence on it"; (d) to insert at the end of subparagraph (iii) an additional phrase along the following lines: "... in particular under existing international conventions".

It was so agreed.

Paragraph 31, as amended, was adopted.

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

Paragraph 34

59. Mr. FRANCIS suggested that the word "practicality", in the first sentence, should be replaced by "practicability".

It was so agreed.

60. Mr. CALERO RODRIGUES said that the expression "crimes falling under the code", in the first sentence, was unsatisfactory, and the French and Spanish equivalents were no better. The best course would be to speak of crimes "defined in the code".

It was so agreed.

61. Mr. PELLET suggested that allowance should be made for a third approach by States. The simplest solution would be to add, at the end of paragraph 34, the phrase "a third group of States adopting an intermediate attitude".

62. Mr. BENNOUNA said that he failed to see how the two options envisaged in the paragraph for the prosecution of certain crimes would allow for a third group of States.

63. Mr. GRAEFRATH said that he agreed with Mr. Bennouna. Unlike paragraph 38, paragraph 34 did not refer to a possible concurrent jurisdiction between an international criminal court and national courts. Its subject was the scope of the crimes covered by the court's jurisdiction.

64. Mr. PELLET said that the question was slightly more complicated. Paragraph 34 did not specify whether, under the second option, States would be obliged to resort to the court for certain crimes, or would remain free either to do so or to continue to prosecute those crimes through their national courts. In the latter hypothesis, there could well be a third category of States. However, he would not press his proposal.

65. Mr. BENNOUNA suggested that, for the sake of precision, the words "from the jurisdiction of the court" should be added at the end of the second sentence.

66. Mr. EIRIKSSON (Rapporteur), pointing out that such an amendment would require a longer phrase in the English text, suggested that the end of the second sentence be amended to read: "... or through the provision of clauses allowing States to opt out of the court's jurisdiction". He agreed with Mr. Pellet that some States might continue to use their own courts, as well as the international court, for certain crimes.

67. Mr. TOMUSCHAT proposed that the words "opting-out clauses" should be replaced by "optional clauses". In the last sentence, he suggested that the

words “these States would resort to the international criminal court” should be replaced by “these States will resort to . . .”.

Mr. Bennouna's amendment was adopted for the French text.

The Rapporteur's amendment was adopted for the English text, on the understanding that the other languages would be amended accordingly.

68. Mr. KOROMA said that the word “attribute”, in the last sentence, should be replaced by “confer”.

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

69. Mr. CALERO RODRIGUES pointed out that, in paragraph 35, unlike paragraph 32, there was no mention of the advantages of the course proposed, except the avoidance of delay. The reasoning behind paragraph 35 was flawed, and the matter was wholly unrelated to the court's jurisdiction.

70. Mr. TOMUSCHAT said that the word “eventual” was a mistranslation and should be replaced by “possible”.

It was so agreed.

Paragraph 35, as amended, was adopted.

Paragraph 36

Paragraph 36 was adopted.

Paragraph 37

71. Mr. BENNOUNA said that paragraph 37 should make it plain that the Commission, and not merely its Working Group, had discussed the possibility of extending jurisdiction to legal entities other than States.

72. Mr. MAHIOU said that, if the Commission adopted the report of the Working Group, the views expressed in it were the Commission's.

73. Mr. KOROMA said that it had been decided not to emphasize the possibility mentioned in paragraph 37, which had been discussed only by certain members. The report should not give the impression that the Commission had itself discussed the matter.

74. Mr. CALERO RODRIGUES, supported by Mr. PELLET, said that he would prefer to delete paragraph 37. For the purposes of the General Assembly, there was no merit in mentioning a discussion without indicating what arguments had been advanced.

75. Mr. MAHIOU recalled that no final decision had been taken on the matter. It had merely been suggested, during the initial stage of the discussion of the question of an international criminal court, that groups of individuals such as terrorists and organized drug traffickers might be brought within the court's jurisdiction.

76. Mr. TOMUSCHAT said that paragraph 37 could be deleted, since it gave the General Assembly no indication of the Commission's own preference. Indeed, the whole of the report of the Working Group was no more than a review of the various options.

77. Mr. KOROMA said that he found some merit in the argument advanced by Mr. Calero Rodrigues. It

should be made clear, however, that the report on the question of establishing an international criminal jurisdiction was being submitted to the General Assembly in a very preliminary form and that the Commission had had no time for an exhaustive discussion of the various options.

78. Mr. FRANCIS suggested that the objection could be met by adding, at the end of paragraph 37, a sentence reading: “The general view was that jurisdiction should be so extended.”

79. Mr. PELLET suggested deleting paragraph 37 and amending the second sentence of paragraph 36 to read: “The question of extending the scope of the code to States or to other legal entities, although discussed, was left open for consideration at a later stage.”

80. Mr. FRANCIS said that it had been the strongly held view of some members of the Working Group that entities other than States and individuals could commit crimes covered by the code. That view should be reflected in the report, in accordance with the Commission's established practice.

The meeting rose at 12.50 p.m.

2193rd MEETING

Thursday, 12 July 1990, at 3.30 p.m.

Chairman: Mr. Jiuyong SHI

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/429 and Add.1-4,² A/CN.4/430 and Add.1,³ A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION
OF THE ESTABLISHMENT OF AN INTERNATIONAL
CRIMINAL JURISDICTION (continued)

¹ 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.

² Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

³ *Ibid.*

CHAPTER III (The Commission's discussion of the question at the present session) (*continued*)

Paragraph 37 (concluded)

1. Mr. GRAEFRATH said that he did not think it would be appropriate to combine paragraph 37 and paragraph 36, as had been suggested.

2. He would suggest adding, at the end of paragraph 37, the words "for example drug trafficking", so as to bring out the importance of that problem.

3. Mr. ILLUECA and Mr. MAHIU supported that proposal.

Mr. Graefrath's amendment was adopted.

Paragraph 37, as amended, was adopted.

Paragraph 38

4. Mr. McCAFFREY said that there was some inconsistency between paragraph 38 and paragraph 31, which had already been adopted and which stated that the court would exercise jurisdiction only in respect of some crimes.

5. Mr. EIRIKSSON (Rapporteur) said that the three options described in paragraph 38 were not dependent on paragraph 31.

Paragraph 38 was adopted.

Paragraph 39

Paragraph 39 was adopted.

Paragraph 40

6. Mr. RAZAFINDRALAMBO said that the word "differences", in the last sentence, was inappropriate. He suggested that it be replaced by "difficulties".

7. Mr. PELLET said that he had no objection to substituting the word "difficulties" for "differences", although what was really meant was probably "conflicting jurisdictions". However, one could not really "resolve" difficulties. The word "resolve" should therefore be replaced by "overcome".

8. Mr. THIAM (Chairman-Rapporteur of the Working Group) endorsed the proposed amendments.

The amendments by Mr. Razafindralambo and Mr. Pellet were adopted.

Paragraph 40, as amended, was adopted.

Paragraph 41

9. Mr. MAHIU said that the Commission should avoid speaking of "final decisions". The expression was inconsistent with paragraph 54, which related to channels of appeal. In most legal systems, the possibility of appeal meant that a decision was not "final". He therefore suggested that the word be deleted.

It was so agreed.

Paragraph 41, as amended, was adopted.

Paragraphs 42 to 44

Paragraphs 42 to 44 were adopted.

Paragraph 45

10. Mr. BENNOUNA said that there was some discrepancy between paragraph 44 and paragraph 45.

Paragraph 44 referred to the authorization "either of the General Assembly or the Security Council", whereas paragraph 45 mentioned only the authorization of the Security Council. He therefore proposed that the end of the second sentence should be amended to read: "... authorization by either the General Assembly or the Security Council".

11. Mr. THIAM (Chairman-Rapporteur of the Working Group) supported that proposal.

Mr. Bennouna's amendment was adopted.

Paragraph 45, as amended, was adopted.

Paragraph 46

Paragraph 46 was adopted.

Paragraph 47

12. Mr. PELLET said that paragraph 47 should perhaps refer to the possibility of conferring jurisdiction on the International Court of Justice, since that possibility was mentioned later, in paragraph 60.

13. Mr. BENNOUNA noted that paragraph 47 belonged to section 3 (Structure of the court), whereas paragraph 60 belonged to section 6 (Other jurisdictional mechanisms). The two issues were different, as was evident from General Assembly resolution 44/39.

14. Mr. GRAEFRATH pointed out that, if jurisdiction was to be conferred on the ICJ, the Charter of the United Nations would have to be amended.

15. Mr. EIRIKSSON (Rapporteur) said that the question raised by Mr. Pellet was adequately dealt with in paragraph 60.

16. Mr. ILLUECA said that the Commission's position on the question was already clear from paragraph 12 of the report.

Paragraph 47 was adopted.

Paragraph 48

Paragraph 48 was adopted.

Paragraph 49

17. Mr. PELLET said that there was a substantive mistake at the end of paragraph 49. It was not correct that the system of chambers in the ICJ allowed for the selection of judges by claimants. The most the system could do was to allow the Court to consult claimants on the matter.

18. Mr. EIRIKSSON (Rapporteur) said that he agreed with Mr. Pellet, and suggested that the last sentence should be amended to read: "The system of chambers in the International Court of Justice, allowing for some role for claimants in the selection of judges, was also considered."

It was so agreed.

Paragraph 49, as amended, was adopted.

Paragraph 50

19. Mr. McCAFFREY, Mr. KOROMA and Mr. JACOVIDES proposed that, for the sake of accuracy and style, the subsection heading should be amended to read: "Election of judges", and that the

word “election”, appearing three times in the paragraph, should be used only once at the beginning.

It was so agreed.

Paragraph 50, as amended, was adopted.

Paragraphs 51 and 52

Paragraphs 51 and 52 were adopted.

Paragraph 53

20. Mr. McCaffrey first queried the expression “it was agreed”, in the first sentence: was there really a consensus in the Commission on that point? Secondly, the expression “concurrent jurisdiction” would extend to too many hypothetical cases. All in all, too much had been packed into the sentence, which should be simplified. In the second sentence, the phrase “This conclusion was reflected in paragraph 1 of article 7” was unfortunate, since paragraph 1 of article 7 of the draft code was still between square brackets and had been adopted only on a very provisional basis.

21. Mr. Graefrath said that paragraph 53 was itself hypothetical. It merely described the situation that would arise if the international criminal court were established and had concurrent jurisdiction with national courts. It did not in any way prejudice actual establishment of the court.

22. Mr. Bennouna, Mr. Barsegov and Mr. Koroma said that they did not see how it could be “agreed” that a national court could not re-examine a case dealt with by an international court, since the point was self-evident.

23. Mr. Beesley proposed that the words “it was agreed”, in the first sentence, should be replaced by “it was envisaged”, and the words “This conclusion was reflected in paragraph 1 . . .”, in the second sentence, by “This conclusion was consistent with paragraph 1 . . .”.

24. Mr. Thiam (Chairman-Rapporteur of the Working Group) supported the proposed amendments.

Mr. Beesley’s amendments were adopted.

Paragraph 53, as amended, was adopted.

Paragraph 54

25. Mr. Bennouna said that he could not understand the structure of paragraph 54. Subparagraphs (i) and (ii) appeared to refer to two hypothetical situations; subparagraphs (a), (b) and (c) set out the grounds on which either the first or the second situation might arise, or both together, and there was no clear distinction between them.

26. Mr. Pellet said that he had the same impression. In his opinion, the situations described in subparagraphs (i) and (ii) should be regarded as alternatives, and the word “or” should therefore be inserted between them.

27. Mr. McCaffrey said that he, too, was unable to understand the structure of the paragraph. In any case, from the point of view of form, each of the subparagraphs (a), (b) and (c) ought to begin with the word “if”, and subparagraph (b), in which there was evidently something missing, should be redrafted.

28. Mr. Eiriksson (Rapporteur) also queried the logic of the link between the two parts of paragraph 54. The situation in subparagraph (i) was already covered by subparagraph (iii) of paragraph 38, and the ground stated in subparagraph (c) appeared in paragraph 62. The text could therefore be simplified. The reference in subparagraph (b) to paragraph 3 of article 7 of the draft code should also be explained.

29. Mr. Graefrath said that he supported the changes suggested by Mr. McCaffrey and the Rapporteur.

30. Mr. Calero Rodrigues, supported by Mr. Pellet, said that he was concerned about certain discrepancies—and he cited examples—between the English and the French texts of paragraph 54.

31. Mr. Thiam (Chairman-Rapporteur of the Working Group) said that the paragraph should be redrafted. Subparagraphs (i) and (ii) had no place in it and also seemed to be pleonastic. The substance of subparagraphs (a) and (b) had to be retained. Subparagraph (b) covered cases such as had actually occurred in the post-war period, when national courts had shown undue indulgence towards war criminals, who could not be retried because of the *non bis in idem* rule.

32. Mr. Pellet said it should be made clear that the condition “if a State concerned has grounds for believing” applied not only to the situation in subparagraph (a), but also to the situation in subparagraph (b). It should also be borne in mind that an erroneous characterization by a national court, referred to in subparagraph (b), could work both ways: the court might also err by characterizing as an international crime something which was only a crime under ordinary law.

33. The Chairman, supported by Mr. Koroma, said that consultations would be required among the members concerned in order to complete the drafting of paragraph 54.

The meeting rose at 4.40 p.m. to enable the Enlarged Bureau to meet.

2194th MEETING

Friday, 13 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/429 and Add.1-4,² A/CN.4/430 and Add.1,³ A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION
OF THE ESTABLISHMENT OF AN INTERNATIONAL
CRIMINAL JURISDICTION (continued)

CHAPTER III (The Commission's discussion of the question at the present session) (continued)

Paragraph 54 (continued) and new paragraph 54 bis

1. The CHAIRMAN recalled that, at the previous meeting, the Commission had decided to hold informal consultations on paragraph 54. A new text had been drafted by Mr. Pellet and Mr. Eiriksson (Rapporteur).

2. Mr. PELLET explained that the new text was intended to distinguish clearly between the two possibilities outlined in paragraph 54. The new paragraph 54 dealt with the second of those possibilities, namely that the court would be only partly a review court, or court of appeal. The new paragraph 54 bis dealt with the other possibility, namely that the court's competence would be limited to reviewing decisions by national courts, as under paragraph 38 (iii). The new text was intended to be more comprehensible, and read:

"54. As to the authority of judgments in cases where a national court has taken a decision, a re-examination by the international court could be contemplated, for instance: (a) if a State concerned has reason to believe that the decision was not based on a proper appraisal of the law or the facts; (b) if the national court erred by characterizing a crime covered by the code as an ordinary crime (paragraph 3 of article 7 of the draft code); (c) in the case of an appeal by the convicted person.

"54 bis. Of course, if the court were established only to consider appeals against judgments handed down by national courts, its decisions would take precedence over the judgments of national courts."

3. Mr. McCAFFREY said that he welcomed the proposed new text of paragraph 54, which he found clearer than the original text. He was not sure, however, whether subparagraph (b) had the same meaning as in the original text.

4. Mr. CALERO RODRIGUES expressed the same concern.

5. Mr. EIRIKSSON (Rapporteur) said that the wording of subparagraph (b) should be identical to that used in paragraph 3 of article 7 of the draft code: "... if the act which was the subject of a trial and judgment as an

ordinary crime corresponds to one of the crimes characterized in this Code".

6. Prince AJIBOLA pointed out that the words "appeal" and "review" had quite different meanings in English.

7. Mr. GRAEFRATH said that the Working Group had already discussed at length the difference between those two terms and had deliberately opted for the word "review", which was much broader in meaning. As for subparagraph (b), he supported the wording proposed earlier by Mr. McCaffrey: "(b) if the national court handed down a judgment characterizing the offence as an ordinary crime, whereas it should have been characterized as a crime under the code...".

8. Mr. RAZAFINDRALAMBO asked why the condition of prior attribution of review powers to the international court had not been retained in the new text of paragraph 54. The paragraph dealt with the case of concurrent jurisdiction, in which the court would have *ad hoc* jurisdiction to hear appeals but could also, as an appeal court, review judgments handed down by national courts.

9. Mr. BARSEGOV said that the content of subparagraph (b) should be closer to that of article 7 of the draft code, which had been the result of a lengthy drafting process. There should be no discrepancy between the two. He also had serious doubts about the proposed paragraph 54 bis, which did not appear to square with the remainder of the text.

10. Mr. CALERO RODRIGUES said that he was not happy with the text proposed for subparagraph (b). In both the English and the French texts, it should be clear that an appeal to the international court would be possible where an offence had been wrongly characterized.

11. Mr. PELLET, replying to Prince Ajibola's observation, said that, in French, the term *appel* had a more technical meaning than *réforme*, which corresponded to the term "review" in English. The problem could be avoided by using the word *saisine* (seisin), stating that a case could be brought before the court either by a State or by an individual. He suggested meeting Mr. Razafindralambo's objection by replacing the words "a re-examination by the international court could be contemplated" in the new paragraph 54 by "provision for a re-examination by the international court could be made in the court's statute".

12. Mr. AL-QAYSI said that he was anxious for the wording of subparagraph (b) to have exactly the same meaning as in the original text.

13. Mr. EIRIKSSON (Rapporteur) said that there was no need for the national court to have made an error. The international court could take up a case if the national court had treated as an ordinary crime an offence which corresponded to a crime covered by the code. The meaning of subparagraph (b) was intended to correspond with that of paragraph 3 of article 7 of the draft code.

14. The CHAIRMAN, at the suggestion of Mr. BEESLEY, proposed that an informal working group

¹ 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.

² Reproduced in *Yearbook ... 1990*, vol. II (Part One).

³ *Ibid.*

consisting of Mr. Thiam (Chairman-Rapporteur of the Working Group), Mr. Pellet, Mr. Graefrath, Mr. Bar-segov, Mr. Eiriksson (Rapporteur) and Mr. Beesley should complete the drafting of paragraph 54.

It was so agreed.

Paragraphs 55 and 56

15. Mr. KOROMA suggested that the order of the two sentences in paragraph 55 should be reversed, so that the paragraph would proceed from the general to the particular.

16. Mr. THIAM (Chairman-Rapporteur of the Working Group) endorsed that suggestion.

17. Mr. RAZAFINDRALAMBO suggested that paragraph 56, with its reference to the *nulla poena sine lege* rule, should be placed before paragraph 55, which referred to specific penalties.

18. Mr. KOROMA and Mr. THIAM (Chairman-Rapporteur of the Working Group) agreed with that suggestion.

The amendments by Mr. Koroma and Mr. Razafindralambo were adopted.

Paragraphs 55 and 56, as amended, were adopted.

Paragraph 57

19. Mr. McCAFFREY pointed out that the term “enforcement” was more appropriate for civil judgments than for the decisions in criminal matters referred to in paragraph 57. In the heading and in the first and last sentences, the term “enforcement” should therefore be replaced by “implementation”.

20. Mr. NJENGA said that the last part of the last sentence, with its reference to the “possible role of the claimant State”, was much too weak. It should be amended to read: “... the priority of the claimant State would need to be considered”. Another solution might be to omit the word “possible”, referring simply to the role of the claimant State.

21. Mr. THIAM (Chairman-Rapporteur of the Working Group) supported the suggestion to replace the word “enforcement” by “implementation” in the English text, but pointed out that the term *exécution* in the French text was correct. The term *jugements*, however, should be replaced by *décisions pénales*.

22. Mr. KOROMA said that the term “claimant” was more appropriate for civil than for criminal proceedings. He suggested that it be replaced by “complainant”.

23. Mr. TOMUSCHAT said that “complainant” was unsuitable as a legal term. It would be necessary to use a few more words to indicate the State which had initiated the proceedings.

24. Mr. EIRIKSSON (Rapporteur) suggested that Mr. Njenga’s proposal should be modified to read: “... the advantages and disadvantages of according priority to the complainant State would need to be considered”.

25. Mr. NJENGA agreed with that sub-amendment.

26. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that, as far as the idea of a

“complainant” State was concerned, it was possible in French to speak of *l’État qui a porté plainte* or *l’État auteur de la plainte*.

27. Mr. MAHIU drew attention to the connection between paragraph 57 and paragraph 43, which dealt with the various options as to who could submit a case to the court. He urged that the language of paragraph 57 be brought into line with the terminology used in paragraph 43.

28. Mr. EIRIKSSON (Rapporteur) proposed that the last sentence should be reworded along the following lines: “The other would provide for implementation under national systems, in which case the advantages and disadvantages of according priority to the State which initiated the case would need to be considered.”

29. Mr. PAWLAK suggested that the words “of judgments” should be inserted after the word “implementation” in that text.

30. Mr. HAYES pointed out that the words “of judgments” should be inserted at the end of the first sentence; there would then be no need for them in the last sentence.

31. The CHAIRMAN said that, if the heading preceding the paragraph was to be “Implementation of judgments”, there was no need to insert the words “of judgments” either in the first or in the last sentence.

32. If there were no objections, he would take it that the Commission agreed to replace the word “enforcement” by “implementation” in the heading and in the first and last sentences of paragraph 57, and to amend the last sentence along the lines proposed by the Rapporteur (para. 28 above).

It was so agreed.

Paragraph 57, as amended, was adopted.

Paragraph 58

33. Mr. JACOVIDES said that the reference in the second sentence to “most of the Members of the United Nations” was not clear. It would be better to speak of the “majority” of the Members of the United Nations.

34. Mr. BENNOUNA criticized the words “would ratify the court’s statute” from the standpoint of legal terminology. The reference should be to States becoming parties to the statute of the court.

35. Mr. PELLET said that he was not satisfied with the opening words of the second sentence: “There was a general preference for the latter option...”. The Commission should keep to its usual practice of not expressing preferences and use more neutral language.

36. Mr. THIAM (Chairman-Rapporteur of the Working Group) explained that the phrase referred to by Mr. Jacovides was intended to indicate that the second option, i.e. financing by the United Nations, presupposed that most Members of the United Nations would become parties to the statute of the court.

37. Mr. McCAFFREY proposed that the word “either”, in the first sentence, should be replaced by “i.e.” or a similar expression, such as “namely”.

38. The point raised by Mr. Pellet could be met by rewording the second sentence along the following lines: "In the case of the latter option, the assumption would be that the majority of States Members of the United Nations . . .". Clearly, if only two or three States became parties to the court's statute, financing by the United Nations could not be seriously envisaged.

39. Mr. BENNOUNA said that the question of financing by the United Nations had been discussed thoroughly both in the Commission itself and in the Working Group. Such financing would guarantee the continuity of the court. He drew attention to the great difficulties which had arisen in the case of bodies financed by the parties concerned and not by the United Nations. The second sentence of paragraph 58 should therefore be reworded along the following lines: "The latter option, which has the advantage of guaranteeing greater continuity in the financing of the court, presupposes that the majority of the Members of the United Nations would become parties to the statute of the court."

40. Mr. JACOVIDES said that the question had indeed been discussed at length in the Commission and in the Working Group and a clear trend—accurately reflected in the second sentence—had emerged. He could none the less accept Mr. Bennouna's rewording, on the understanding that it acknowledged the existence of such a trend.

41. Mr. TOMUSCHAT said that he endorsed Mr. Bennouna's reformulation. The experience of the Human Rights Committee, which was financed by the United Nations, provided a good illustration. The process of ratification was necessarily a long one and the financing of the body concerned had to be assured on a continuing basis.

42. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he agreed with the wording proposed by Mr. Bennouna, which correctly reflected the position in the Working Group.

43. Mr. PAWLAK said that he, too, agreed with Mr. Bennouna's proposal, but the reference to "greater continuity" placed undue emphasis on the financial aspects of the matter. He would prefer a reference to the "effectiveness" or "independence" of the court.

44. Mr. KOROMA agreed with Mr. Pawlak. It was undesirable to place too much emphasis on the financial aspects.

45. Mr. BENNOUNA said that he could accept a reference to "effectiveness", provided that the reference to greater continuity was maintained. The relevant passage could read: ". . . guaranteeing greater efficiency and greater continuity in the financing of the court . . .".

46. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the word "either", in the first sentence, by "i.e." or a similar expression, and to amend the second sentence along the lines proposed by Mr. Bennouna (paras. 39 and 45 above).

It was so agreed.

Paragraph 58, as amended, was adopted.

Paragraph 59

47. Mr. BARSEGOV said that paragraph 59 could be misunderstood as suggesting that the Commission was opposed to the idea of separate courts for different categories of crimes. Actually, there were international agreements in force which made provision for such separate international criminal courts. One example was the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Clearly, the Commission could not but fully endorse the content of existing treaties. He therefore suggested that paragraph 59 be reworded along the following lines: "The understanding was reached that, instead of separate courts for different categories of crimes, as is provided for in existing conventions, it would be preferable to have a single organ for international criminal justice."

48. Mr. KOROMA and Mr. BEESLEY supported that proposal.

49. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he accepted the proposal by Mr. Barsegov.

50. Mr. CALERO RODRIGUES, referring to Mr. Barsegov's proposed rewording, with its reference to "existing conventions", said that he did not recall any precise reference to a special criminal court in the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention did mention the concept of international criminal justice, but as far as he knew it did not provide for setting up a separate court.

51. Mr. BENNOUNA said that the reference to "existing conventions" should be retained. As far as the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* was concerned, work was actually being done in the United Nations on the problem of setting up a court and considerable progress had already been made.

52. Mr. CALERO RODRIGUES withdrew his objection.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend paragraph 59 along the lines proposed by Mr. Barsegov.

It was so agreed.

Paragraph 59, as amended, was adopted.

Paragraph 60

54. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that the words "against individuals", in the first sentence, were confusing and should be deleted.

55. Mr. NJENGA said that the words "against individuals" had to be retained. They were necessary to indicate that it was proposed to entrust the International Court of Justice with jurisdiction over individuals, as against its normal role of dealing with inter-State disputes. Out of respect for the ICJ, the following additional sentence could be added: "It

would be necessary to obtain the views of the ICJ on this option.”

56. Mr. PELLET said that he had some doubts about the reference in the second sentence to the effect that jurisdiction over individuals would require a restructuring of the ICJ. In fact, the term “restructuring” did not fully convey the changes that would be necessary. The sentence should be shortened by omitting the words “a restructuring of the Court, including”, thereby simply stating that “. . . such jurisdiction would require amendments” to the Statute of the Court.

57. Mr. GRAEFRATH said that the words “against individuals”, in the first sentence, were essential in order to make it clear that the reference was to a new form of jurisdiction over individuals; the ICJ so far dealt only with disputes between States. He supported the changes proposed by Mr. Njenga and Mr. Pellet.

58. Mr. BENNOUNA said that the first sentence made it clear that jurisdiction over individuals was involved. It should not be forgotten that the possibility of criminal proceedings against a State was envisaged in article 19 of part 1 of the draft articles on State responsibility.⁴

59. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to retain the words “against individuals” in the first sentence, to amend the second sentence as proposed by Mr. Pellet and to add the new third sentence proposed by Mr. Njenga.

It was so agreed.

Paragraph 60, as amended, was adopted.

Paragraph 61

60. Mr. THIAM (Chairman-Rapporteur of the Working Group) proposed that the words *affaires de crimes internationaux*, in the first sentence of the French text, should be replaced by *affaires criminelles*.

It was so agreed.

61. Mr. BENNOUNA proposed that the last part of the paragraph should be amended to read: “. . . overcome certain difficulties in the exercise of universal jurisdiction”.

62. Mr. CALERO RODRIGUES proposed that that amendment be modified to read: “. . . overcome certain difficulties in the application of the system of universal national jurisdiction”, which would be clearer.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Bennouna’s amendment, as modified by Mr. Calero Rodrigues.

It was so agreed.

Paragraph 61, as amended, was adopted.

Paragraph 62

64. Mr. McCAFFREY said that the first sentence of the introductory paragraph contained a statement which was not an accurate reflection of the discussion in the Commission. The Commission was in broad

agreement not that there should be some kind of monolithic institution, but rather that more work should be done to determine whether a court of some kind should be established. One way of dealing with the point might be to mention the other international criminal trial mechanism to which General Assembly resolution 44/39 referred. He therefore proposed that, after the words “international criminal court”, in the first sentence, the following words should be added: “or other international criminal trial mechanism”. Alternatively, the words “of the establishment of” should be replaced by “of exploring further the possibility of establishing”. If that too was not acceptable, the words “of the establishment of a permanent international criminal court” could perhaps be replaced by “of establishing some kind of permanent international criminal court or other international criminal trial mechanism”: that would make it clear that there was not necessarily broad agreement on one particular kind of permanent international criminal court.

65. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that, while he was prepared to accept a statement to the effect that the Commission had reached agreement on the desirability of establishing a court or some other international criminal trial mechanism, he could not agree that there was any need for a further study to consider the desirability of establishing such a court. The General Assembly had already asked the Commission to carry out a study, and the Commission had done so; some thought could, however, perhaps be given at a later stage to the technical aspects of the organization of the court. Moreover, throughout the discussion of part III of his eighth report (A/CN.4/430 and Add.1), he had not heard one single member of the Commission question the desirability of the actual establishment of the court, though views had differed as to the modalities of so doing. In his view, therefore, the desirability of establishing a court was not open to question.

66. Following a brief exchange of views in which Mr. EIRIKSSON (Rapporteur), Mr. FRANCIS, Mr. GRAEFRATH, Mr. KOROMA and Mr. McCAFFREY took part, Mr. TOMUSCHAT proposed that, in order to meet the point raised by Mr. McCaffrey, the words “in principle” should be added after “broad agreement”, in the first sentence of paragraph 62, and that the following phrase should be added at the end of the sentence: “although views differ as to the structure and scope of jurisdiction of such a court”.

67. Mr. BENNOUNA and Mr. GRAEFRATH supported that proposal.

68. Mr. KOROMA said that he, too, supported the proposal, but would suggest that the words “different views were expressed” be used instead of “views differ”.

69. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Tomuschat’s amendment, as modified by Mr. Koroma.

It was so agreed.

⁴ *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

70. Mr. FRANCIS, supported by Mr. McCAFFREY, suggested that, since General Assembly resolution 44/39, in which the Commission had been requested to consider the question of the establishment of a court, also referred to another international criminal trial mechanism, some reference to the Commission's brief consideration of such a mechanism should be incorporated in the report at an appropriate point.

71. The CHAIRMAN suggested that interested members should draft an appropriate form of wording to cover that point, for the Commission's consideration.

It was so agreed.

72. Mr. CALERO RODRIGUES, noting that the word "extradition" appeared in subparagraphs (a), (b) and (c), said that the concept of extradition, as established in international law, was concerned specifically with the relationship between two national systems and should not be used in the context of an international system of criminal jurisdiction. In that connection, he read out article 5 of the draft convention for the creation of an international criminal court prepared by the London International Assembly in 1943,⁵ according to which the handing over of an accused person to the prosecuting authority of the international criminal court was not an extradition. Accordingly, he proposed that the word "extradition", in all three subparagraphs, should be replaced by "handing over". In addition, the words "alleged perpetrator", in subparagraph (a), should be replaced by the word "accused".

It was so agreed.

73. Mr. KOROMA proposed that the word "concede", at the beginning of subparagraph (a), and the word "waive", at the beginning of subparagraphs (b) and (c), should be replaced by "cede".

It was so agreed.

74. Mr. McCAFFREY proposed that, further to the amendment made in paragraph 57 (see para. 32 above), the words "enforcing" and "enforcement", in subparagraphs (a) and (b), should be replaced by "implementing" and "implementation", respectively.

It was so agreed.

75. Mr. THIAM (Chairman-Rapporteur of the Working Group), referring to the French text, proposed that the word *abandonment*, at the beginning of subparagraph (a), and the word *abandonner*, at the beginning of subparagraphs (b) and (c), should be replaced by *renoncent à* and *renoncer à*, respectively.

It was so agreed.

76. Mr. EIRIKSSON (Rapporteur) proposed that, in order to bring out more clearly the point it sought to make, the third item in subparagraph (c), beginning with the words "There are different choices...", should be amended to read:

"In addition to those who could bring a case before the court under the other two models, namely other States concerned (territorial State, State whose

national has been tried, States against which the crime was directed) or all States parties to the court's statute, this model could allow for the possibility of the convicted individual bringing a case."

It was so agreed.

77. Mr. PELLET proposed that, further to the amendment made in paragraph 41 (see 2193rd meeting, para. 9), the word "final", in the second item in subparagraph (c), should be deleted. In the fifth item, the word "not" should be added before "require", and the words "neither a public prosecutor nor" should be deleted.

It was so agreed.

78. Mr. CALERO RODRIGUES said that, in his view, the first sentence of the fifth item in subparagraph (c) was unnecessary. Obviously, if a court was going to hear an appeal, the accused would presumably have to be present. He therefore proposed that the sentence be deleted.

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraph 63

79. Mr. GRAEFRATH said that the mention of illicit drug trafficking could be deleted. It was not an extension of, but was included in, the competence of the court. However, he would not object to retaining the reference.

80. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he would not object to deleting the reference to illicit drug trafficking; in view of its importance, however, it might be useful to cite it as an example.

81. Mr. EIRIKSSON (Rapporteur) proposed the following wording for the first sentence: "It is possible to choose from among the various elements discussed in sections 2 to 5 above for incorporation in each of the envisaged models." The second sentence could then be deleted, thus dispelling the reservations voiced by Mr. Graefrath.

It was so agreed.

Paragraph 63, as amended, was adopted.

Paragraphs 64 and 65

82. Mr. NJENGA, supported by Mr. JACOVIDES, suggested the following wording for paragraph 64: "Establishing an international criminal court would be a progressive step to develop international law, particularly if accepted by a broad majority of States."

83. Mr. KOROMA said that he agreed with Mr. Njenga's proposal, but wondered why the usual wording had not been used, namely "a progressive development of international law", instead of "a progressive step to develop international law".

84. Mr. EIRIKSSON (Rapporteur) said that paragraph 64 and the two alternatives for paragraph 65 went together and the Commission should attempt to produce one paragraph that incorporated all their elements. Perhaps attention should be centred on the first alternative for paragraph 65.

⁵ See United Nations, *Historical Survey of the Question of International Criminal Jurisdiction* (memorandum by the Secretary-General) (Sales No. 1949.V.8), pp. 18-19 and appendix 9.B.

85. Mr. GRAEFRATH said that the Commission should restrict itself to paragraph 64 for the moment and he supported Mr. Njenga's proposal for that paragraph.

86. Mr. CALERO RODRIGUES said that he agreed with the Rapporteur. The first alternative for paragraph 65 repeated paragraph 64, but paragraph 64 was preferable and should be adopted without change.

87. Mr. EIRIKSSON (Rapporteur) said that Mr. Njenga's proposal gave the impression that a court established by a few States would be a contribution to international law. Adding the word "particularly" placed emphasis on that. He would prefer a different wording, for the point was that, unless the court was accepted by a broad majority of States, it would not be a contribution to international law.

88. Mr. RAZAFINDRALAMBO suggested combining paragraph 64 and the first alternative for paragraph 65 so as to read: "Establishing an international criminal court would in the end be a progressive step to develop international law and be successful only if it were widely supported by the international community."

89. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he fully supported Mr. Razafindralambo's proposal.

90. Mr. KOROMA suggested that the first part of paragraph 64 should be amended to read: "Establishing an international criminal court would in the end enhance respect for the rule of law . . .". The point was not to develop international law, but to combat crime.

91. Mr. PAWLAK said that he saw no contradiction in combining references both to the development of international law and to respect for the rule of law.

92. Mr. ARANGIO-RUIZ said that, by stressing the difficulty of creating an international court and the need for broad support from States, the text was implying that the establishment of a court was more difficult than the drafting of a code, which was not the case.

93. Mr. TOMUSCHAT said that the word "would" in paragraph 64 should be replaced by "will" and that the last part of the paragraph should be amended to read: ". . . and for that purpose it needs the wide support of the international community". The form of language must be more positive.

94. Mr. PELLET said that he strongly disagreed with Mr. Tomuschat's proposal, which was premature.

95. Mr. FRANCIS said that he would not oppose Mr. Razafindralambo's proposal, but the rule of law was implied in the wide acceptance of an international court. He therefore preferred Mr. Njenga's proposal, which could be improved by deleting the word "particularly".

96. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following combined text for paragraph 64 and the first alternative for paragraph 65: "Establishing an international criminal court would in the end be a progressive step in developing international law and strengthening the rule of law, and be

successful, only if widely supported by the international community."

It was so agreed.

Paragraph 64 and the first alternative for paragraph 65, as amended, were adopted.

97. Mr. EIRIKSSON (Rapporteur), referring to the second alternative for paragraph 65, said that it must be linked to paragraph 64. The Commission should ask for advice on subject-matter jurisdiction and should use the formulation from General Assembly resolution 44/39 in doing so.

98. Mr. BENNOUNA, speaking on a point of order, said that the Commission should first decide whether it wished to retain the content of the second alternative for paragraph 65 at all. The Commission was a body of legal experts that must choose its own model; it should not ask the General Assembly to select one for it.

99. Mr. THIAM (Chairman-Rapporteur of the Working Group) and Mr. NJENGA said that they agreed with Mr. Bennouna.

100. Mr. KOROMA also agreed, but pointed out that the Commission had made it a practice to ask for such indications from the Sixth Committee of the General Assembly. Perhaps the Chairman could raise the point in introducing the Commission's report to the Sixth Committee.

101. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the second alternative for paragraph 65.

It was so agreed.

*Paragraph 26 (concluded)**

102. Mr. PELLET proposed the following wording for the first sentence of paragraph 26: "A major concern with respect to the establishment of a court is that it might restrict [national sovereignty] [the sovereign jurisdiction of States], although it must be taken into account that existing régimes of universal jurisdiction also have an impact on the exercise of State jurisdiction." The words "As a matter of fact", in the second sentence, should be deleted. He preferred the alternative "the sovereign jurisdiction of States", but would not object to the expression "national sovereignty". The last sentence should be amended to read: "Acceptance of the jurisdiction of an international criminal court constitutes, on the contrary, the exercise by States of their sovereign jurisdiction."

103. The CHAIRMAN, noting that Mr. Pellet did not object to the use of the expression "national sovereignty", said that, if there were no objections, he would take it that the Commission agreed to retain that formula and to amend paragraph 26 along the lines proposed by Mr. Pellet.

It was so agreed.

Paragraph 26, as amended, was adopted.

Paragraph 54 and new paragraph 54 bis (concluded)

* Resumed from the 2189th meeting, para. 36.

104. Mr. EIRIKSSON (Rapporteur) said that the informal working group (see para. 14 above) proposed the following new text for subparagraph (b) of paragraph 54: "(b) if the acts were tried as ordinary crimes although they corresponded to one of the crimes characterized in the code (paragraph 3 of article 7 of the draft code)".

105. Mr. Sreenivasa RAO suggested replacing the words "ordinary crimes" in that text by "common crimes".

106. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that a distinction was being made between crimes under ordinary law and political crimes. He supported the new text proposed for subparagraph (b).

107. Mr. BENNOUNA proposed the following wording: "(b) if the national court committed an error in characterizing an international crime as an ordinary crime (see paragraph 3 of article 7 of the draft code)".

108. Mr. KOROMA said that he supported the text proposed by the informal working group, but suggested replacing the words "characterized in" by the word "under".

109. Mr. EIRIKSSON (Rapporteur) pointed out that the words "characterized in" were used in paragraph 3 of article 7 of the draft code.

110. Mr. Sreenivasa RAO withdrew his suggestion.

111. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the new text of paragraph 54 and the new paragraph 54 bis presented at the beginning of the meeting (para. 2 above), but with paragraph 54 (b) being replaced by the text just proposed by the informal working group (para. 104 above).

It was so agreed.

Paragraph 54, as amended, and new paragraph 54 bis were adopted.⁶

112. Mr. FRANCIS said that the Commission should say something in its report on its attitude towards other international criminal trial mechanisms. Perhaps the Special Rapporteur could prepare an appropriate text.

113. The CHAIRMAN asked Mr. Thiam (Chairman-Rapporteur of the Working Group), Mr. Eiriksson (Rapporteur) and Mr. Pawlak to draft a text.

The meeting rose at 1.40 p.m.

⁶ See also 2196th meeting, paras. 23-42.

2195th MEETING

Monday, 16 July 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodriguez, Mr. Díaz González, Mr. Eiriksson,

Mr. Francis, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-second session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter III.

CHAPTER III. Jurisdictional immunities of States and their property (A/CN.4/L.448)

A. Introduction

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

2. Mr. EIRIKSSON (Rapporteur) proposed that, for the sake of accuracy, the words "for second reading", in the second sentence, should be deleted. It was the plenary Commission, rather than the Drafting Committee, which considered draft articles on second reading. Similar amendments should be made in paragraphs 8 and 9.

It was so agreed.

Paragraph 6, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 7

Paragraph 7 was adopted.

Paragraph 8

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the words "for second reading", in the last sentence.

It was so agreed.

Paragraph 8, as amended, was adopted.

Paragraph 9

4. Mr. OGISO (Special Rapporteur) said that a footnote should be added after the words "article 2 (Use of terms)", in the second sentence, reading: "The Drafting Committee deferred the adoption of paragraph 1 (b) (iii bis) of article 2 pending the adoption of article 11."

5. Mr. McCAFFREY proposed that, in view of the amendment to paragraphs 6 and 8, the words "undertake the second reading of", in the first sentence, should be replaced by the word "consider".

It was so agreed.

6. Mr. MAHIQU proposed, also in view of the above amendments, that the words "had not been concluded", in the third sentence, should be replaced by "could not be concluded".

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

7. Mr. OGISO (Special Rapporteur) said that the words “mainly because other members had already expressed their views at the previous session” should be added at the end of the second sentence.

8. Mr. MAHIU noted that there was sometimes a certain lack of balance in the way opinions expressed by members of the Commission were recorded in the draft report. That was particularly true of paragraph 10, which contained a long summary of the opinion of a single member of the Commission.

9. Mr. EIRIKSSON (Rapporteur) proposed the deletion of the fifth sentence “In his view . . . by a court of the forum State.”

10. That proposal was supported by Mr. BARSEGOV, Mr. MAHIU and Mr. AL-QAYSI.

The Rapporteur's amendment was adopted.

Paragraph 10, as amended, was adopted.

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

11. Mr. McCAFFREY suggested that paragraph 12 should perhaps be divided into two parts, since it dealt with both article 10 and article 11 *bis*.

12. Mr. OGISO (Special Rapporteur) said that he saw no reason why the paragraph should not be divided in the middle. The first four sentences would form the first paragraph, dealing with article 10, and the remainder, beginning with the words “As to article 11 *bis*”, would form the second paragraph, dealing with article 11 *bis*, although it also contained a further reference to article 10.

13. Mr. MAHIU said that, for the sake of clarity, it might be preferable to start a new paragraph with the seventh sentence, beginning with the words “Two members, however, supported the article as reformulated . . .”, since the article in question was in fact article 11 *bis*—a point which should be clarified by substituting the words “article 11 *bis*” for “the article”.

14. Mr. AL-QAYSI said he thought that the Special Rapporteur's suggestion would complicate matters unnecessarily, since the second paragraph, dealing with article 11 *bis*, would have to repeat the arguments of the member in question concerning article 10. It would be better to leave the paragraph as it stood, except for the amendment proposed by Mr. Mahiou.

15. Mr. KOROMA wondered whether the expression “segregated State property” adequately conveyed the idea intended. Perhaps the words “separate State property” could be used, following the model of the French and Spanish texts.

16. Mr. CALERO RODRIGUES said that the expression “segregated State property” was certainly not felicitous but it was taken from the title of article 11 *bis*.

17. He endorsed Mr. Al-Qaysi's remarks about the problems that would be raised by the division of

paragraph 12. The fact was that, when considering article 10, members of the Commission had also referred to article 11 *bis*. He supported Mr. Mahiou's proposal that the words “the article”, at the beginning of the seventh sentence, be replaced by “article 11 *bis*”.

18. Mr. BARSEGOV also endorsed Mr. Al-Qaysi's remarks. As to the expression “segregated State property”, which Mr. Koroma had criticized, the Commission could revert to it in due course, but it would be best to retain it for the time being, since it had been officially adopted.

19. Mr. Sreenivasa RAO said he also thought that splitting paragraph 12 into two parts would be awkward.

20. As for the expression “segregated State property”, he wondered whether it could be replaced at a later stage by “earmarked State property”.

21. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 12 with the amendment to the seventh sentence proposed by Mr. Mahiou, namely the replacement of the words “the article” by “article 11 *bis*”.

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 16

Paragraphs 13 to 16 were adopted.

Paragraph 17

22. Mr. TOMUSCHAT said that, in the fourth sentence, the words “juridical practice” should be replaced by “judicial practice”.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 26

Paragraphs 18 to 26 were adopted.

Paragraph 27

23. Mr. McCAFFREY said that he would like paragraph 27 to be recast. As it stood, it represented the views of the Special Rapporteur, while giving the impression that they were the views of the Commission.

24. After a discussion in which Mr. PAWLAK, Mr. OGISO (Special Rapporteur) and Mr. EIRIKSSON (Rapporteur) took part, Mr. CALERO RODRIGUES proposed that it be left to the Special Rapporteur to recast paragraph 27 along the lines indicated by Mr. McCaffrey.

It was so agreed.

25. Mr. TOMUSCHAT queried the antithesis between “international law” and “a national court” at the end of the fourth sentence. He thought that the text should refer either to “an international mechanism” and “a national court”, or to “international law” and “national law”.

26. Mr. BENNOUNA said that he agreed with Mr. Tomuschat.

27. Mr. KOROMA suggested that the end of the fourth sentence should read: "... the matter could be resolved only on the basis of international law."

Paragraph 27 was adopted subject to drafting changes on the basis of the comments made.

Paragraphs 28 to 30

Paragraphs 28 to 30 were adopted.

Paragraph 31

28. Mr. GRAEFRATH, noting that the second sentence was difficult to understand, suggested that the part following the reference to "article 31 of the Vienna Convention" be deleted.

It was so agreed.

Paragraph 31, as amended, was adopted.

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

Paragraph 34

29. Mr. McCAFFREY, comparing the text with paragraph 7, which had already been adopted, noted that paragraph 34 referred to the views of the Commission and the written comments of Governments, but not to the views expressed in the Sixth Committee of the General Assembly.

30. After an exchange of views in which Mr. OGISO (Special Rapporteur), Mr. CALERO RODRIGUES and Mr. PAWLAK took part, the CHAIRMAN proposed that the beginning of paragraph 34 should read as follows: "In the light of the views expressed at the Commission's previous session and the comments of Governments, the Special Rapporteur...".

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 45

Paragraphs 35 to 45 were adopted.

Paragraph 46

31. Mr. MAHIU said that he was surprised at the statement, in the penultimate sentence, that "the ship... would be subject... to the same... liabilities as were applicable to natural or juridical persons", as though the ship were itself a person. He proposed instead the following formula: "would be subject... to the same... liability régime as... natural or juridical persons".

It was so agreed.

Paragraph 46, as amended, was adopted.

Paragraphs 47 to 65

Paragraphs 47 to 65 were adopted.

Paragraph 66

32. Mr. TOMUSCHAT proposed the addition of the words "if not impossible" after the word "hard" in the last sentence.

It was so agreed.

Paragraph 66, as amended, was adopted.

Paragraph 67

33. Mr. MAHIU, noting that paragraph 67 was devoted entirely to legislation of the United States of

America, suggested reducing it to more reasonable proportions.

34. Mr. EIRIKSSON (Rapporteur), in response, proposed the deletion of the passage from the beginning of the second sentence: "If a judgment..." to the end of the fifth sentence: "... of the resulting judgment". The word "therefore", at the beginning of the sixth sentence, should also be deleted.

35. In response to a suggestion by Mr. CALERO RODRIGUES, he proposed that the phrase "Kinds of nuance contained in United States or other legislation", in the sixth sentence, be replaced by "distinctions contained in United States or other legislation with respect to State property".

The Rapporteur's amendments were adopted.

Paragraph 67, as amended, was adopted.

Paragraphs 68 and 69

Paragraphs 68 and 69 were adopted.

Paragraph 70

36. Mr. PAWLAK observed that the expression "segregated State property", regarding which he had reservations, quite rightly appeared in quotation marks in paragraph 70, but without them in paragraph 49.

37. Mr. KOROMA said that he saw no need to go beyond the distinction between State property and private property.

38. Mr. CALERO RODRIGUES said that the use of the term "segregated" in English raised terminological, rather than substantive, problems. He suggested attaching a footnote to the expression "segregated State property", explaining that some members of the Commission, although not objecting to the actual concept of "segregated State property", had doubts about the use of the adjective "segregated".

39. Mr. BARSEGOV said that the expression in question was of Chinese and Russian origin, since Mr. Shi and he had proposed its use in article 11 *bis*. The French text raised no problems, but a satisfactory English term still had to be found. It would be meaningless to refer simply to "State property". "Segregated State property" meant enterprises or independent legal persons which managed such enterprises and were answerable to the State for them.

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that the Drafting Committee should revert to that question at the next session and that the Rapporteur should draft a footnote along the lines suggested by Mr. Calero Rodrigues.

It was so agreed.

41. Mr. OGISO (Special Rapporteur) said that, in the first sentence, the word "fully" should be deleted and the words "some members" should be replaced by "one member". In the second sentence, the words "One member" should be replaced by "Another member".

42. Mr. RAZAFINDRALAMBO proposed that the words "Another member", in the third sentence, be replaced by "Yet another member".

It was so agreed.

Paragraph 70, as amended, was adopted.

Paragraphs 71 to 77

Paragraphs 71 to 77 were adopted.

Paragraph 78

43. Mr. TOMUSCHAT said that the word “enjoin”, in the second sentence, should be replaced by “prohibit”.

It was so agreed.

44. Mr. McCAFFREY proposed replacing the last sentence by the following text: “In the Special Rapporteur’s view, the foregoing comments could be taken into account by the Drafting Committee, which might also consider the possibility of recommending the deletion of the article.”

It was so agreed.

45. Mr. PAWLAK proposed that the words “A third member”, in the fourth sentence, be replaced by “Yet another member”.

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.

46. Mr. EIRIKSSON (Rapporteur) said that, in view of the advanced stage of the work on the topic, there was no need to put specific questions to the General Assembly, as the Commission was generally invited to do.

47. Mr. CALERO RODRIGUES said that he agreed with the Rapporteur, but thought that the point should be explained in an additional paragraph at the end of chapter III.

48. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that a new paragraph should be added at the end of chapter III along the lines suggested by Mr. Calero Rodrigues.

It was so agreed.

Chapter III of the draft report, as amended, was adopted.

CHAPTER IV. The law of the non-navigational uses of international watercourses (A/CN.4/L.449 and Add.1 and 2)

A. Introduction (A/CN.4/L.449)

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.449)

Paragraphs 8 to 12

Paragraphs 8 to 12 were adopted.

Paragraphs 13 and 14

49. Mr. CALERO RODRIGUES said that the latter part of paragraph 13, from the words “the remark was made”, might give the impression that the Commission could reconsider the approach it had decided to adopt,

namely that of a framework agreement. As far as he could remember, the remark referred to had been a purely rhetorical one made by Mr. Al-Khasawneh, who had had no intention of questioning the approach adopted. He therefore proposed that that part of paragraph 13, and the whole of paragraph 14, be deleted.

It was so agreed.

Paragraph 13, as amended, was adopted.

Paragraph 15

Paragraph 15 was adopted.

Paragraph 16

50. Mr. CALERO RODRIGUES said that, since paragraph 16 was in some sense a reply to what was said in the latter part of paragraph 13 and in paragraph 14, which had been deleted, it could perhaps be redrafted in more positive terms so that the Special Rapporteur would not appear to be on the defensive.

51. Mr. PAWLAK said that that would be an opportunity to use some of the material in paragraph 14, in particular the references to “existing international law” and the “elements of progressive development” of international law “that were acceptable to the majority of States”.

52. The CHAIRMAN suggested that the Rapporteur and the Special Rapporteur should redraft paragraph 16 in line with the proposals by Mr. Calero Rodrigues and Mr. Pawlak.

It was so agreed.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

53. Mr. BARSEGOV pointed out that, during the discussion, he had said that it was for States to decide what priority they would give to the various uses of watercourses. Paragraph 18 implied, however, that all members of the Commission agreed that navigation should no longer have priority over other uses. Yet it was quite conceivable that in some cases watercourse States might decide, in view of the importance of navigation for them, to give it priority over other uses. As it stood, paragraph 18 did not seem acceptable.

54. Mr. KOROMA said he recalled saying that the Commission should not appear to take sides on the question as to which uses of international watercourses should have priority. It was right to describe State practice, but the Commission should not pronounce in favour of any particular use rather than another, especially as some existing agreements gave priority to navigation.

55. Mr. EIRIKSSON (Rapporteur) said that the concern expressed by Mr. Barsegov and Mr. Koroma could perhaps be met by adding, after the word “underestimated” in the second sentence of paragraph 20, the words “—and those States have indeed given it priority—”.

56. Mr. McCAFFREY (Special Rapporteur) said that paragraph 18 was perhaps too categorical; but the fact remained that many members of the Commission had

said that, if priority had ever been assigned to navigation in State practice, as a general rule that was no longer the case today. He proposed that he and the Rapporteur should try to recast the paragraph in a form satisfactory to the Commission and submit a text in due course.

57. Mr. KOROMA suggested that the Rapporteur and the Special Rapporteur could consider wording such as: "There was general support for the article, which was said to reflect in a balanced way the fact that any priority which was once assigned to navigation was no longer considered automatic among modern uses."

58. Mr. CALERO RODRIGUES said that it might be stated in paragraph 18 that, if there had ever been a rule of international law giving priority to navigation, it no longer existed today, or could no longer be accepted as a rule of general international law.

59. Mr. MAHIU said that it should be left to the Rapporteur and the Special Rapporteur to find a satisfactory form of words. The solution might perhaps be to replace the words "no longer" by "not always".

60. Mr. BARSEGOV said that the revised text should indicate, in substance, that there was no rule of general international law giving priority to navigation, or to any other particular use.

61. Mr. RAZAFINDRALAMBO said that the revised text should specify that the article in question was article 24.

62. The CHAIRMAN said that, if there were no objections, he would take it that the Commission wished the Rapporteur and the Special Rapporteur to review paragraph 18 in the light of the comments made and to submit a revised text in due course.

It was so agreed.

The meeting rose at 1.05 p.m.

2196th MEETING

Monday, 16 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

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

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*)* (A/CN.4/429 and Add.1-4,² A/CN.4/430 and Add.1,³ A/CN.4/L.443, sect. B, A/CN.4/L.454 and Corr.1, A/CN.4/L.455)

[Agenda item 5]

REPORT OF THE WORKING GROUP ON THE QUESTION OF THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (*concluded*)

CHAPTER III (The Commission's discussion of the question at the present session) (*concluded*)

1. The CHAIRMAN pointed out that one question still pending in regard to the report of the Working Group was the possible addition of a reference to international criminal trial mechanisms other than an international court. A small working group had been formed to study that question, and he invited the Rapporteur to report on the results of its work.

*Paragraph 23 (concluded)***

2. Mr. EIRIKSSON (Rapporteur) said that paragraph 23, adopted at the 2189th meeting, had been redrafted to give a better idea of what followed. The new text read:

"Paragraphs 24 to 29 below contain a general discussion of the advantages and disadvantages, for the trial of crimes against the peace and security of mankind, of the possible establishment of an international criminal court as compared, in particular, to the system of universal jurisdiction based on prosecution before national tribunals. Paragraphs 31 to 58 contain an overview of possible options and the main trend evidenced in the Commission with regard to some very specific and significant areas related to the creation of an international criminal court. Paragraphs 59 to 61 deal with other possible international mechanisms for the trial of crimes against the peace and security of mankind."

3. It was also proposed that the title of section 6 of chapter III, "Other jurisdictional mechanisms", should be amended to read: "Other possible international trial mechanisms".

4. Mr. TOMUSCHAT said that the word "very" before the words "specific and significant areas", in the second sentence of the proposed new text of paragraph 23, was unnecessary.

5. Mr. BEESLEY asked whether the references to "crimes against the peace and security of mankind" covered crimes against humanity.

6. Mr. BENNOUNA said that he preferred the existing title of section 6. The words "other jurisdictional mechanisms" had been deliberately chosen to include

* Resumed from the 2194th meeting.

** Resumed from the 2189th meeting.

¹ 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.

² Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

³ *Ibid.*

other international courts, such as the International Court of Justice, referred to in paragraph 60, and national courts with judges from other legal systems (para. 61). If the new text of paragraph 23 were adopted, its last sentence should refer to “other jurisdictional or trial mechanisms”, to reflect the subject-matter of paragraphs 59 to 61.

7. Mr. EIRIKSSON (Rapporteur) explained that the working group had had in mind both an international criminal court and other mechanisms. A national court with judges from other legal systems would, it was thought, be an international mechanism. It had been decided to use the same wording as in General Assembly resolution 44/39, to show that the various options had been fully considered. What was actually in contemplation was a mixed international trial mechanism.

8. Mr. KOROMA suggested amending the second sentence of the new text to begin: “Paragraphs 31 to 58 contain an overview of the possible options and main trends . . .”.

It was so agreed.

9. Mr. THIAM (Chairman-Rapporteur of the Working Group), replying to Mr. Beesley’s question, said that the court was expected to try crimes against the peace and security of mankind, and not only crimes against humanity.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the new text of paragraph 23 proposed by the Rapporteur, as amended by Mr. Koroma, and to amend the title of section 6 of chapter III as further proposed by the Rapporteur.

It was so agreed.

Paragraph 23, as amended, was adopted.

*Paragraph 25 (concluded)**

11. Mr. ROUCOUNAS said that, in the last sentence of paragraph 25, adopted at the 2189th meeting, the word “objective” should be deleted, since it implied a value judgment concerning the decisions of national courts.

12. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he could accept the proposed amendment.

13. Mr. BARSEGOV observed that the application of the law in some national courts might not be objective, for instance where the State was itself a party to an international crime. An international court, however, would have jurisdiction in respect of all States, having different legal systems. It would be best to delete the word “objective”, but the court’s special status should be clear.

14. Mr. THIAM (Chairman-Rapporteur of the Working Group) suggested that Mr. Barsegov’s point could be met by substituting the word “impartial” for “objective”.

15. Mr. BEESLEY said he thought that the word “objective” should be deleted, but that it did not necessarily imply a value judgment concerning national courts.

16. Mr. ROUCOUNAS withdrew his proposal.

17. Mr. BENNOUNA said that the Commission was rehearsing the same arguments as 30 years before: the question of an international criminal court had, indeed, arisen as early as 1945. Inevitably, the idea of such a court touched upon national sovereignty, and might offend national sensibilities. The word “objective” could perhaps be misinterpreted, but he agreed with Mr. Barsegov that some reference to objectivity was necessary, since States or their leaders might be implicated in the commission of a crime. He suggested that the last sentence of paragraph 25 be amended to read: “A recognized advantage of an international court is the uniform application of the law with the best guarantees of objectivity to try these kinds of crimes.”

18. Mr. BARSEGOV suggested using the words “additional or better guarantees of objectivity”.

19. Mr. PAWLAK said that he preferred the Working Group’s formulation: the reference to uniformity was essential. The word “best” in Mr. Bennouna’s proposal should be deleted: guarantees could not be qualified.

20. Mr. THIAM (Chairman-Rapporteur of the Working Group), referring to the French text of Mr. Bennouna’s proposal, pointed out that there was a slight, but significant, difference in meaning between the words *juger* and *juger de* as applied to crimes. He preferred the former.

21. Mr. TOMUSCHAT said that the guarantees referred to should be defined as the “best possible”.

22. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the last sentence of paragraph 25 as proposed by Mr. Bennouna and Mr. Tomuschat, using the word *juger* rather than the words *juger de* in the French text.

It was so agreed.

Paragraph 25, as amended, was adopted.

*Paragraph 54 (concluded)**

23. Mr. EIRIKSSON (Rapporteur) said that the Working Group proposed that subparagraph (b) of paragraph 54, adopted at the 2194th meeting (para. 111), should be further amended to read: “(b) if the acts were tried as ordinary crimes although they corresponded to one of the crimes falling under the jurisdiction of the court [see, for example, paragraph 3 of article 7 of the draft code]”.

24. The new wording was based on Mr. Bennouna’s view that the question of ordinary crimes had a bearing not only on the code, but also on the jurisdiction of the court. Since that jurisdiction might extend to crimes other than those covered by the code, the structure of the court should be independent of the code.

* Resumed from the 2189th meeting.

* Resumed from the 2194th meeting, para. 111.

25. Mr. CALERO RODRIGUES suggested that the words in square brackets were unnecessary.
26. Mr. EIRIKSSON (Rapporteur) said that, in the original text, those words had appeared in parentheses. They should be retained, because paragraph 3 of article 7 of the draft code was the basis for subparagraph (b).
27. Mr. KOROMA said that he was not satisfied with the new wording, which implied that a judgment by a national court could be subject to appeal or review. That was not the same as saying that an international court would have jurisdiction in respect of acts corresponding to crimes under the code.
28. Mr. BARSEGOV said that he preferred the original text. The new wording tended to alter the meaning of the reference to paragraph 3 of article 7, which was about the erroneous characterization of a crime.
29. Mr. BENNOUNA withdrew his proposed amendment.
30. Mr. KOROMA suggested that the subparagraph would serve its purpose if amended to read: "(b) if the acts were tried as ordinary crimes although they were deemed to be crimes falling under the jurisdiction of the court". That text would provide a basis for review.
31. Mr. BENNOUNA said that the discussion turned on a question of substance. The danger was that subparagraph (b) would contradict what preceded it. Because of the link envisaged between the international court and the code, the impression was being given that only crimes covered by the code fell within the jurisdiction of the court. It had been pointed out, however, that the court could exist independently of the code and could try international crimes not covered by the code. The Working Group's proposal attempted to reflect that position. Mr. Koroma had raised a point of terminology which could be resolved provided there was no dissent on the substantive issue.
32. Mr. BEESLEY said that the problem turned on the characterization of the crime. He agreed, however, that the international court was not tied to the code. The issue seemed to be one of drafting.
33. Mr. CALERO RODRIGUES suggested that, in order to avoid describing the crimes as "corresponding" to the code, the phrase "although they are characterized as crimes falling under the code" should be used.
34. Mr. THIAM (Chairman-Rapporteur of the Working Group) said that he preferred the text proposed by the Working Group, which ensured that the code would not be referred to in an inappropriate context.
35. Mr. MAHIOU said that he agreed.
36. Mr. BARSEGOV said that the wording proposed by Mr. Calero Rodrigues was closer to the meaning of paragraph 3 of article 7 of the draft code, with its reference to the incorrect characterization of a crime. However, he would not object to the Working Group's proposal.
37. Mr. BEESLEY proposed the following text: "(b) if the acts were tried as ordinary crimes although they

are also characterized as one or more of the crimes falling under the jurisdiction of the court". He agreed that the term "corresponded" was too vague.

38. Mr. CALERO RODRIGUES supported Mr. Beesley's proposal, but suggested that the words "one or more of the" could be omitted.

39. Mr. BARSEGOV said that the word "also" should also be omitted, since the characterization of crimes must be either correct or incorrect.

40. Mr. CALERO RODRIGUES said that he agreed.

41. Mr. KOROMA suggested that, for clarity's sake, the word "they" should be replaced by the words "such acts".

42. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the following text for subparagraph (b) of paragraph 54: "(b) if the acts were tried as ordinary crimes although they are characterized as crimes falling under the jurisdiction of the court . . .".

It was so agreed.

Chapter III, as amended, was adopted.

The report of the Working Group as a whole, as amended, was adopted.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 16, 18 AND X

43. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 16, 18 and X as adopted by the Committee, and the text of draft article 17 discussed by the Committee (A/CN.4/L.455).

ARTICLE 16 (International terrorism)

44. Mr. MAHIOU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 16, which read:

Article 16. International terrorism

1. The undertaking, organizing, assisting, financing or encouraging or tolerating by the agents or representatives of a State of acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

2. The participation by individuals other than agents or representatives of a State in the commission of any of the acts referred to in paragraph 1.

45. He recalled that, in his sixth report, submitted in 1988, the Special Rapporteur had proposed two alternatives for a definition of the crime of intervention.⁴ The first had served as a basis for what had become article 14 (Intervention);⁵ the second had contained a definition of terrorist acts and a list of activities constituting terrorist acts. In elaborating article 16, the Drafting Committee had drawn on those texts, as well as on article 2, paragraph (6), of the 1954 draft code.

⁴ For the text (art. 11, para. 3) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 59 *et seq.*, footnote 276 and paras. 231-255.

⁵ *Yearbook . . . 1989*, vol. II (Part Two), p. 69.

46. Article 16 covered terrorist acts in which States were directly or indirectly involved, but not terrorist activities directed against a State by persons having no connection with the State authorities, or terrorist activities taking place entirely within one State and having no international aspect. Article 16 was not redundant, since article 14 mentioned terrorist activities only in passing, as a means that might be used to commit the crime of intervention defined in that article. Article 16 focused primarily on terrorist acts viewed independently of any links they might have with intervention, and highlighted the main characteristic of such acts, namely the state of terror they created in society. The Drafting Committee had concluded that terrorist acts in which States were involved and which were directed against other States had consequences so serious that they must be treated as crimes under the code.

47. Paragraph 1 of article 16 related to agents or representatives of a State, and paragraph 2 to individuals having no official connection with a State, but who were commissioned by agents or representatives of the State to commit acts of terrorism.

48. For paragraph 1, the Drafting Committee had drawn on article 2, paragraph (6), of the 1954 draft code, but the text under consideration was more explicit. The verbs “organizing”, “assisting” and “financing” identified forms of involvement in terrorist activities that had not been expressly mentioned in the 1954 draft.

49. The words “or tolerating” had been the subject of a long discussion in the Drafting Committee. Several members had pointed out that the concept of tolerance lent itself to unduly broad interpretations, which might, for example, include the failure by agents of a State to take action in regard to terrorist activities of which they were unaware. But the Drafting Committee had eventually decided in favour of including “tolerating”, a concept that appeared to be particularly pertinent in the context of terrorism, where the participation of State authorities probably consisted more often in looking the other way than in active intervention. The commentary would specify that the concept of tolerance implied knowledge of the criminal activities in question.

50. The scope of the text *ratione personae* was defined by the reference to “agents or representatives of a State”—wording that the Drafting Committee had adopted to replace the concept of “authorities of a State” used in the 1954 draft. Thus article 16 dealt with the question of attributing the crime to individuals. The Committee was aware that, on that particular point, the articles so far adopted in chapter II of the draft (Acts constituting crimes against the peace and security of mankind) were not completely consistent. Whereas articles 13, 14 and 15 made no mention of attribution, article 12 did, and draft article 16 referred to the “agents or representatives of a State”. As had been pointed out at the previous session, problems relating to the attribution of crimes would be dealt with later in the framework of a general provision. In article 16 it was hardly possible to avoid a reference to the “agents or representatives of a State”, because paragraph 2

extended the scope of the article *ratione personae* beyond such agents or representatives. The question would be reconsidered later to ensure the internal consistency of chapter II.

51. The Drafting Committee had added a reference to property, several members of the Commission having pointed out that terrorism could be directed against nuclear power plants, irrigation networks, reservoirs of drinking-water, weapons stores or any other vital location in the State.

52. The Drafting Committee had replaced the words “calculated to” by “of such a nature as to”, so as to bring the English text into line with the French: that phrase constituted a key element of the text.

53. As in articles 13, 14 and 15, the wording of article 16 presupposed the inclusion at the beginning of part I of chapter II of a phrase introducing the list of crimes; that explained the incomplete nature of paragraph 1 as it stood.

54. Paragraph 2 took into account the fact that the agents or representatives of a State might use the services of individuals to commit the acts referred to in paragraph 1. But the text was provisional in its principle and in its wording. There was no unanimity of views on the need to include such a provision in article 16. Some members considered that the persons in question might be covered by the provision on complicity, whereas others wondered whether the real perpetrator of an act of terrorism—for example, someone who placed explosives in a nuclear power plant—should not be considered the main author of the crime rather than a mere accomplice. In view of that difference of opinion, the Drafting Committee had decided to indicate in a footnote to paragraph 2 that the paragraph would be reviewed when the provision on complicity had been completed. Hence it had not dwelt on drafting problems.

55. He reminded the Commission that article 16 would contain a paragraph 3 listing terrorist acts. As the list could only be illustrative, the Drafting Committee had preferred to confine itself, for the time being, to the definition in paragraph 1.

56. Mr. BENNOUNA suggested that it might be necessary to insert the words “of another State” after the words “public figures” in paragraph 1, since it might not be clear that that was the meaning implied. He was also dissatisfied with the word “tolerating”—an ambiguous term not commonly used in legal instruments.

57. Mr. JACOVIDES suggested that perhaps a comma was missing in paragraph 1 after the word “financing”.

58. Mr. MAHIOU (Chairman of the Drafting Committee) agreed and said that the phrase should read: “financing, encouraging or tolerating”. The word “or” after “financing” should be deleted.

It was so agreed.

59. He did not think it was necessary to add the words “of another State”, as Mr. Bennouna had suggested. The expression “acts against another State”

made it clear that the rest of paragraph 1 referred to other States.

60. Mr. McCAFFREY said he was not sure that the uninformed reader would know that the provision on complicity referred to in the footnote to paragraph 2 had not yet been adopted. He therefore suggested adding the words "to be considered at the next session" or similar wording.

61. Mr. PELLET said he was concerned that the inclusion of such concepts as intervention, terrorism and mercenarism would weaken the code. He pointed out that, in its judgment in the *Nicaragua* case,⁶ the ICJ had considered that the United States of America had organized, assisted, financed, encouraged or tolerated acts that could be likened to terrorist acts against another State. If the code were taken literally, it would mean that public figures of the United States had violated that instrument. That was probably not the Commission's intention.

62. He shared Mr. Bennouna's dissatisfaction with the word "tolerating".

63. He did not understand the effect of paragraph 2. If officials of a transnational corporation or of a national liberation movement were responsible for an international terrorist act, had they violated the code only if they were accomplices in acts committed by agents or representatives of a State?

64. Mr. TOMUSCHAT raised the same point as the previous speaker in regard to the inconsistency between article 16 and article X. Paragraph 1 of article X spoke of "other individuals". Clearly, if a national liberation movement committed a terrorist act, that was just as abhorrent as when such acts were committed by the agents or representatives of a State and should have the same consequences; hence such a possibility should also come within the scope of article 16. He doubted whether that was covered in paragraph 2 of article 16, because that paragraph did not refer to private groups or individuals initiating terrorist acts themselves.

65. Mr. NJENGA said that he agreed with Mr. Pellet and Mr. Tomuschat. International terrorism could be committed not only by States, but also by individuals, groups of individuals, liberation movements, etc.

66. Mr. MAHIOU (Chairman of the Drafting Committee) said that the topic under discussion covered only crimes against peace and security. A terrorist act, though barbaric, was not necessarily a threat to peace; it was so only when committed by agents or representatives of a State. The question of terrorism by individuals could be taken up in other provisions.

67. Mr. KOROMA said that he, too, had reservations about the word "tolerating", but on balance he thought that it should be retained, since the crimes in question could occur as a result of omission.

68. He was somewhat unhappy about the tautological definition of terrorism as creating a "state of terror" and suggested the words "state of fear". He wondered,

however, whether it could be assumed that the intention was to create a state of fear and how it would be possible to prove it.

69. Lastly, he asked whether the bombing of military barracks would be an example of terrorism carried out against "groups of persons".

70. Mr. RAZAFINDRALAMBO suggested that, if the Commission decided that questions remained in regard to the word "tolerating", that word could be placed in square brackets.

71. For the sake of symmetry, he suggested that, in the French text of paragraph 2, commas should be inserted after the words *fait* and *État*, so as to bring it into line with paragraph 1.

It was so agreed.

72. Mr. THIAM (Special Rapporteur) said that he approved of the text of article 16. With regard to the word "tolerating", he pointed out that the 1954 draft code had used the term "toleration" (art. 2, para. (6)). The crime of omission was recognized in law. "Tolerating" meant that a State knowingly allowed terrorist activities to take place in its territory. Perhaps that should be stated clearly in the text.

73. Mr. CALERO RODRIGUES also supported the text of article 16, but shared some of the doubts expressed by other members. Many questions remained to be settled. Drawing a distinction between crimes against peace and crimes against humanity had posed problems for the Drafting Committee. It was difficult to imagine how an individual could commit a crime against peace, and it had therefore been assumed that two States must be involved.

74. Mr. NJENGA said that the peace and security of mankind could very well be endangered by groups of individuals, not only by States. Article 16 omitted cases of international terrorism not committed by States. He could support the idea of such cases being dealt with in other articles, but if article 16 was to cover international terrorism, perhaps it should refer to "international State terrorism" or "State terrorism", to show that other forms of terrorism were not covered.

75. Mr. MAHIOU (Chairman of the Drafting Committee) said that there must be some provision in the code concerning States that tolerated such serious acts as international terrorism. With regard to Mr. Koroma's remark, the problem of intention arose in other areas of law as well: a judge often had to decide whether there had been premeditation in the commission of a crime.

76. Mr. Sreenivasa RAO said that, as he saw it, article 16 was very clear. It identified the category of acts constituting international terrorism, and that was important both for the development of international law and for the prevention of acts of terrorism after the code was adopted.

77. Some doubts had been expressed about the reference in paragraph 1 to the "tolerating" of certain acts against another State. He felt strongly that tolerance had a place in article 16, for tolerance of certain acts was an important feature of international

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, p. 14.

terrorism and should not be underestimated or discounted. It was significant that the issue of tolerance had come very much to the fore in the discussions that had led to the adoption of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. A State whose territory was being used for the training and organization of bands of mercenaries might claim that the persons concerned were not committing any crime in its territory and were simply exercising their right to personal freedom.

78. He welcomed the suggestion that the words "state of terror" be replaced by "state of fear". The suggestion was a good one, not only because it avoided using the term "terror" to define "terrorism", but also because the expression "state of fear" was used in many international documents which attempted to define "terrorism".

79. Mr. BENNOUNA said that he had not been fully convinced by the explanations given by the Chairman of the Drafting Committee. The principle stated in article 16 was based on the distinction between crimes against peace and crimes against humanity, the former being crimes committed in inter-State relations. But he had serious doubts about such a distinction. A multinational company, or even a lobby, could destabilize a country, thereby committing a crime against international peace and security. The distinction was therefore unsatisfactory and, if article 16 were to be placed before the General Assembly, difficulties were bound to arise.

80. There were two possible ways of solving that problem. One was to insert the words "or by private individuals" in paragraph 1, after the words "agents or representatives of a State"; the other was to extend the scope of paragraph 1 to both commission and participation.

81. He proposed that the footnote to paragraph 2 be amended to read: "Paragraph 2 will be reviewed in the light of the provision on complicity and of the final adoption of the provisions relating to crimes against humanity." Article 16 as it stood was incomplete. If it was desired to establish a connection between that article and the Commission's later action on crimes against humanity, it should be made clear that the Commission would revert to the matter in the future. That was the purpose of his proposed amendment.

82. In conclusion, he stressed that the distinction between crimes against peace and crimes against humanity was artificial. He would have occasion to revert to that point in connection with article X on illicit traffic in narcotic drugs.

83. Mr. MAHIOU (Chairman of the Drafting Committee) said that the fact that certain acts were not characterized by the code as crimes against the peace and security of mankind did not prevent them from being punished as crimes, either under the terms of international conventions or under national law. It was undesirable to broaden unduly the concept of international terrorism. An unduly broad definition might cover an act of terrorism committed by only two persons, and the result would be to devalue the very concept of international terrorism. Several members of the

Commission had found article 16 much too broad as it was, and had urged a more restrictive approach.

84. It was also essential that the code should not invade the area of national jurisdiction of States. When a crime was committed in the territory of a State, it was normally for that State to try the alleged offenders and, if they were found guilty, to sentence and punish them. No other State was entitled to interfere in that process and any action in that direction would constitute unwarranted intervention in the internal affairs of the State concerned.

85. Clearly, an international element had to be present for crimes against peace, but not for crimes against humanity. The essential criterion was the role played by the agents or representatives of another State. If acts of terrorism took place without the participation of such agents or representatives, they would constitute ordinary crimes with which the State concerned would have to deal. It was the element of extraneousness which brought terrorism under the provisions of article 16.

86. With regard to the footnote to paragraph 2 proposed by Mr. Bennouna, he saw no reason to refer to crimes against humanity. There was no automatic connection between international terrorism and such crimes. It was quite possible that no provision on terrorism would be included in the part of the draft code on crimes against humanity, although a provision on international terrorism was included in the part on crimes against peace. The footnote should simply state that paragraph 2 would be reviewed in the light of the provision on complicity to be considered shortly by the Commission.

87. He strongly urged the Commission not to broaden the definition of international terrorism, as that would reduce the effect of the whole code. It should be remembered that the draft code covered only the most serious crimes. He knew of no example in history of international terrorism being carried on without its being backed in one way or another by a State.

88. Mr. TOMUSCHAT said that he had not been convinced by the explanations given by the Chairman of the Drafting Committee. The title "International terrorism" did not correspond to the substance of article 16. There could be no doubt that international terrorism included more than just inter-State terrorism. There were other forms of international terrorism. There were even organizations which dominated certain territories without any State supporting them; they could act independently and had even made attacks. He found the terms of article 16 much too narrow.

89. Mr. AL-QAYSI said that treating international terrorism as a crime against peace meant subsuming it under another title.

90. Mr. PELLET said that, in addition to his general reservations on article 16, he was opposed to the suggestion that the word "terror" should be replaced by "fear", which would extend the scope of the article beyond all reason.

91. On the fundamental problem raised by article 16, he had not been convinced by the arguments of the

Chairman of the Drafting Committee. He saw a clear contradiction between the desire of some members to restrict the scope of the article and the desire of others to go beyond the concept of inter-State terrorism. One example outside the limits of that concept was that of the activities of a multinational company in a small State, which were claimed to constitute acts of terrorism and breaches of the peace. It could be argued, from an economic or sociological standpoint, that there was a foreign State behind the company in question, but such a proposition would be untenable from the legal standpoint.

92. Article 16 should be confined to acts which constituted actual threats to peace or breaches of the peace, and acts of aggression. Two solutions were possible. One was to frame paragraph 1 so as to require that the act in question could constitute a threat to peace or breach of the peace on the part of the agents or representatives of a State. With such a formulation the reference to tolerance would be more acceptable. The other solution—which he preferred—would be for the Commission to formulate, at its next session, a general article to be placed at the beginning of the articles dealing with crimes against peace, specifying that the offences in question constituted crimes against peace only if they were a threat to peace or a breach of the peace.

93. He could not support article 16 as proposed.

94. Mr. THIAM (Special Rapporteur) stressed that article 16 was not confined to the concept of inter-State terrorism. It also covered terrorism committed by private individuals. There was, of course, the question whether those individuals should be treated as principal perpetrators or as accomplices. Judgments could be cited in support of both views.

95. There had been much discussion in the Commission on the question whether the code should cover the crimes of individuals. The prevailing view had been that the code should cover crimes committed by persons vested with State powers. It was significant that, in the 1954 draft code, paragraph (6) of article 2 referred to the undertaking or encouragement “by the authorities of a State” of terrorist activities in another State. The 1954 draft dealt differently with crimes against humanity, in respect of which paragraph (10) of article 2 referred to acts “by the authorities of a State or by private individuals”.

96. The division into three categories—war crimes, crimes against peace and crimes against humanity—went back to the Nürnberg Trial, but the Commission was not obliged to adhere to that division.

97. Mr. CALERO RODRIGUES said that on such a complex subject the Commission could only proceed by trial and error. It could not expect to prepare a complete and final text for article 16 at the present session. He therefore recommended that the article be accepted as a first effort, on the understanding that it would be improved later.

98. As to the scope of the definition of international terrorism, he agreed with those who had stressed that

the code should not cover acts of a purely national nature. At the same time, it was not easy to determine what acts by individuals should be covered by the code. The task was a difficult one, but he felt sure that the Commission would be able to carry it out.

99. Mr. BEESLEY said that he shared the doubts which had been expressed about the use of the word “tolerating”, but it would be difficult to find a better word. One possibility was to say “permitting”. He thought that article 16 should also refer to “harbouring” terrorists.

100. He agreed with those who believed that the Commission had concentrated unduly on State terrorism. Article 16 should go beyond that concept.

101. Mr. PAWLAK said that he accepted the explanations given by the Chairman of the Drafting Committee and the Special Rapporteur. It should be remembered that article 16 was now being discussed on first reading; there would be an opportunity to improve it later.

102. He supported Mr. Bennouna’s proposal for a footnote indicating the Commission’s thinking on a difficult problem.

103. A satisfactory definition of international terrorism would not be easy to frame. As he saw it, article 16 was a step in the right direction; the Commission could expect to improve on it later.

104. Mr. NJENGA also supported the proposed footnote.

105. Mr. KOROMA stressed that the acts envisaged in article 16 must be acts committed against another State.

106. Mr. MAHIOU (Chairman of the Drafting Committee) suggested that the footnote to paragraph 2 proposed by Mr. Bennouna should be modified to read: “Paragraph 2 will be reviewed in the light of the provisions on complicity and on crimes against humanity which will be examined by the Commission at a later stage.”

It was so agreed.

107. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 16 with the amendments by the Chairman of the Drafting Committee to paragraph 1 (para. 58 above) and to the footnote to paragraph 2 (para. 106 above), and with Mr. Razafindralambo’s amendment to the French text of paragraph 2 (para. 71 above).

It was so agreed.

Article 16 was adopted.

ARTICLE 17 (Breach of a treaty designed to ensure international peace and security)

108. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Drafting Committee intended to revert at a later stage to an article, provisionally numbered 17, which it had discussed at length, but on which it had been unable to reach agreement at the pre-

sent session.⁷ Paragraph 4 in particular was at a less advanced stage than the first three paragraphs.

109. It would be recalled that, in his sixth report, submitted in 1988, the Special Rapporteur had proposed two revised texts defining breaches of the obligations of a State under a treaty designed to ensure international peace and security as crimes against peace.⁸ The Special Rapporteur had taken the idea from the 1954 draft code, which contained a similar provision in article 2, paragraph (7).

110. In 1989, the Drafting Committee had discussed those texts at length but, due to lack of time, had not been able to complete its work. During the present session, the Committee had again discussed them at length, but despite all its efforts it had not been able to agree on a text. He was grateful to all the members of the Drafting Committee and to the other members of the Commission who had participated in its meetings for their co-operative attitude. Despite the serious reservations which many of them had expressed as soon as the Drafting Committee had begun consideration of draft article 17, all the members had participated in the work in a constructive spirit, helping to formulate the article and improve its wording and proposing safeguard clauses in order to obviate some of the problems of substance that arose.

111. The special efforts made by the Drafting Committee to render article 17 practicable could be explained by the conviction of members that, if a State violated the obligations incumbent on it under a treaty designed to ensure international peace and security, then peace and security would obviously suffer gravely. As a general rule, the purpose of treaties of that kind was to prohibit or restrict to the greatest possible extent the use of violence, and any breach of their provisions would indicate that violence was permissible or that it could be resorted to. It was therefore

⁷ The text, as it emerged from the discussion in the Drafting Committee, read as follows:

"Article 17. Breach of a treaty designed to ensure international peace and security

"1. A serious breach of an obligation of a State under a treaty designed to ensure international peace and security, in particular a treaty relating to:

"(a) disarmament, or the prohibition, restriction or limitation of armaments;

"(b) restrictions on military training or installations or any other restrictions of the same character;

"(c) the prohibition of emplacements or tests of weapons;

"(d) the military denuclearization of certain territories.

"2. For the purposes of paragraph 1, a breach shall be considered serious where it is of such a nature as to endanger international peace and security, in particular by giving a military advantage to the violator.

"3. A measure taken by a State to ensure its right of self-defence shall not be considered a serious breach of an obligation under a treaty for the purposes of paragraph 1.

"4. A breach of an obligation under a treaty referred to in paragraph 1 cannot be invoked under this Code by a State not bound by the treaty or to the advantage of a State not bound by it."

⁸ For the texts (art. 11, paras. 4 and 5) submitted by the Special Rapporteur and a summary of the Commission's discussion on them at its fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 62-63, footnote 289 and paras. 256-261.

necessary to envisage some means of discouraging breaches of such treaties. The difficulty for many members of the Drafting Committee had been to decide whether the best way of achieving that object was to include the offence in question among crimes against peace. He would therefore explain briefly why many members had found it difficult to accept a provision of that kind, while others were in favour of article 17 and wanted it to be included in the draft code.

112. The problems which many members of the Drafting Committee saw in article 17 concerned both its approach to treaty relations and the effect which it could have in discouraging States from concluding treaties or becoming parties to the code. With regard to the first problem, they believed that the draft code treated crimes from a universal viewpoint, considering that a crime remained a crime irrespective of its perpetrator. That viewpoint was in conformity with the penal philosophy of internal law and with that of the code itself. Besides, treaty relations between States were governed by the principle of reciprocity, and the validity of the rules laid down was in many respects confined to the treaty partners—in the relations between a limited number of parties, bilateral or trilateral, for example, the narrowness of the field of application was still more evident. In addition, the law of treaties, as laid down by the 1969 Vienna Convention on the Law of Treaties and by customary international law, was designed to settle cases of various types of violation of such treaties.

113. It was all the more obvious that it would not be advisable to apply the code to treaty relations, because signatories of a treaty and other States would have to be treated differently. There would then be no equality of treatment between States, since an act of a State party to a treaty could be treated as a crime under the code, whereas the same act committed by a non-party State could not. That inequality of treatment was fundamentally incompatible with the universal viewpoint adopted for the code.

114. With regard to the long-term consequences of the inclusion of a provision such as article 17 in the code, many members had been worried by the fact that it would place States that were parties to the treaties in question at a disadvantage and might therefore discourage other States from concluding such treaties or acceding to them—which was obviously undesirable. And States which had already concluded such treaties, finding themselves at a disadvantage, might not be inclined to become parties to the code—which was not desirable either.

115. There were also technical problems concerning the definition of breaches of a treaty which constituted crimes against peace. Even if one spoke of a "serious breach" the matter was still not sufficiently clear. In the case of some disarmament treaties in force, for example, the parties had accused each other of breaches, one party considering a particular breach to be of a technical character, the other seeing more in it. But as a result of renegotiation or interpretation by the parties, breaches of that kind had not threatened international peace and security.

116. Such were, basically, the reservations which many members had expressed concerning article 17.

117. For those members who, on the contrary, were in favour of the article and wished to retain it, the fact that it applied only to the signatories of the treaties in question raised no problem. In their view, the criterion for determining whether or not an act was a crime under the code was its consequences for international peace and security; and any breach of a treaty, even a bilateral treaty, which was liable to threaten international peace had to be regarded as a crime, since all other States and the world in general would suffer from its consequences. Those members, while not ignoring the consequences which the inclusion of article 17 in the code would have for the conclusion of the treaties it referred to, or the danger of discouraging States from acceding to the code, thought that the problem should not be exaggerated either. In their opinion, safeguard clauses would make it possible to correct any disadvantage for the States parties to those treaties as compared with third-party States.

118. Following the long discussion in the Drafting Committee, it had been decided to place the whole article between square brackets and to inform the Commission of the difficulties encountered.

119. Mr. NJENGA said that there appeared to be no agreed text for article 17. Hence it would serve no useful purpose to forward to the General Assembly the text set out in document A/CN.4/L.455. The Commission should explain in its report to the General Assembly that no decision had been reached on the article, and the matter could then be decided later.

120. Mr. BENNOUNA said he agreed entirely that article 17 should not be forwarded to the General Assembly. He was very surprised to find that a document entitled "Titles and texts of articles adopted by the Drafting Committee" (A/CN.4/L.455) contained an article which had not in fact been adopted.

121. Mr. McCAFFREY said he, too, agreed that article 17 should not be referred to the General Assembly, since that would only cause more confusion as to the purpose of an article that had been the subject of considerable discord in the Drafting Committee and even, in his view, of general rejection. In any event, since the article had not been adopted by the Drafting Committee and recommended to the plenary Commission, he was not sure what the purpose of discussing it was.

122. The CHAIRMAN explained that, in view of its difficulties in completing work on article 17, the Drafting Committee had decided to refer the matter to the plenary Commission. It was for the Commission to decide whether or not to retain the article.

123. Mr. BEESLEY, associating himself with previous speakers, said that, in his view, article 17 should not be referred to the General Assembly. The Commission had had the benefit of a very objective account by the Chairman of the Drafting Committee of what had taken place in the Committee, which he would like to see in writing. The text of document A/CN.4/L.455 gave him less cause for satisfaction, particularly the

reference in the footnote to article 17 to "The text, as it emerged from the discussion". He trusted that the Commission would reach a quick decision on whether or not to omit the article from its report to the General Assembly.

124. Mr. THIAM (Special Rapporteur) said that, contrary to what had been suggested, there had not been general rejection of article 17 in the Drafting Committee, although there had been disagreement on it. It was therefore for the plenary Commission to decide whether it wished the Drafting Committee to continue its work on the article or whether it wished to withdraw it. He favoured the latter course, since the Commission had discussed the text for two years without reaching agreement even on the principle, and the positions of members were still irreconcilable. The difficulties to which the Chairman of the Drafting Committee had referred were all points of substance, which that Committee could not decide. His personal view was that it would be wiser not to discuss the article any longer and to withdraw it from the Drafting Committee.

125. Mr. AL-QAYSI said that, in the light of the Special Rapporteur's remarks, the only solution would be to delete article 17 altogether.

126. Mr. KOROMA said that article 17 was admittedly a difficult provision, but it contained important elements. If the Commission rejected the article, it would not be doing itself justice. He therefore suggested that consideration of the matter be deferred, possibly for a further year, to see if a formulation could be found that would achieve the object of the article. In order not to waste any more time, however, he could agree to the postponement of further consideration of the matter.

127. Mr. Sreenivasa RAO agreed that the Commission should waste no more time on an article which was clearly not going to satisfy the majority of members. He therefore urged the Commission to adopt the Special Rapporteur's suggestion and delete article 17 entirely. The Drafting Committee could then move on to consider other articles of the draft code.

128. Mr. BARSEGOV said that any suggestion that article 17 as a whole had been rejected, either by the Drafting Committee or by the Commission itself, should be avoided, since it was not true. In fact there had been a time when the provisions in question had had the full support of the Commission, which was precisely why they had been referred to the Drafting Committee. What was more, the Drafting Committee's difficulties did not relate to the substance of the article, but were the normal kind that arose in such cases. Just when it had seemed that a possible solution was emerging, however, the climate of opinion had changed and many members now opposed the article.

129. He therefore wished it to be clearly reflected in the summary record of the meeting that, in his view, article 17 was an extremely important provision which concerned the fate of the world at a time when international relations were being restructured with a view to founding them not on force, but on the process of disarmament. Those who observed the work of the Com-

mission would no doubt find it difficult to understand why there had at first been virtually unanimous approval of the provisions in question, whereas there was now virtually unanimous rejection of article 17.

130. It had been said that, while the text of the article had not been adopted, the title had; in fact, however, the title still appeared in square brackets, which was the correct treatment as it would enable the Sixth Committee of the General Assembly to consider what issues were involved. If the article were deleted, it would not be known what had happened to such an important provision.

131. The issue was a political, not a legal, one. He would have no objection to ending the discussion on article 17, but would very much regret it if the Commission was unable to reach a decision on such an important provision.

132. Mr. PELLET said that the Special Rapporteur had made a reasonable and practical suggestion.

133. In response to Mr. Barsegov's remarks, he added that, of course, the violation of a treaty was always politically regrettable and legally blameworthy. Not every breach of an international obligation was a crime, however, still less a crime against peace. Hence he did not understand Mr. Barsegov's reasoning: he agreed with all his remarks but not the consequences that he inferred from them.

134. If the Commission maintained article 17 in the articles referred to the General Assembly—which he hoped it would not—he would suggest that the first sentence of the footnote to the article be reworded to read: "The Drafting Committee intends to revert to this article at a later stage if need be. It was unable to reach agreement on the content of the article or even on its principle at the present session."

135. Mr. ROUCOUNAS said that, from the very beginning of the consideration of article 17, he had been opposed to it. There had always been objections to the article because of problems of substance relating to the discrimination between parties and non-parties to disarmament treaties. He therefore agreed entirely with the proposal to delete the article, a solution which would better serve the cause of disarmament than seeking to criminalize a particular act and creating doubts about the universality of a crime covered by the code.

136. Mr. BARBOZA noted that the content of the footnote to article 17 differed entirely from what the Chairman of the Drafting Committee had said. According to him, the intention of the Drafting Committee had been to submit the text of article 17 for discussion with a view to bringing consideration of the article to an end. The gist of the footnote, however, was that the Drafting Committee intended to revert to the matter later. It was impossible to take a decision on such an important issue while that difference remained, and he was therefore not prepared to take part in a discussion on whether the article should be adopted. If the Drafting Committee had been unable to reach agreement it must say so, and refer the matter to the plenary Commission for a decision.

137. Mr. SOLARI TUDELA said that he had expressed certain doubts in the Drafting Committee concerning article 17, one of his difficulties being the universality of the crime contemplated. He had none the less supported the article and continued to do so, as he believed that a provision which condemned as a crime against peace breaches of treaties that were of great importance for the maintenance of peace could not be omitted from the code. That did not mean that the question of universality was not an important criterion: indeed, it was vital. A major effort to solve the problem had been made in the Drafting Committee but it had not been sufficient, and the Commission would now have to face up to that challenge.

138. Mr. GRAEFRATH said that he regretted the course the discussion had taken. There had been general agreement in the Drafting Committee on paragraphs 1 and 2 of article 17, but a problem had arisen with respect to paragraphs 3 and 4. There had been an impression that, under the terms of those paragraphs, States in breach of an obligation under one of the treaties in question would be punishable. He did not think that was so.

139. What was involved was a breach of a treaty of such a nature that it endangered international peace and security, and that was far too serious a matter to be dismissed lightly. If the Commission decided to take the major step of deleting article 17, it should be made clear in the commentary that a breach of the treaties in question would amount to "preparation of aggression" and perhaps also to "threat of aggression".

140. The text of article 17 set out in document A/CN.4/L.455 could not, of course, be submitted to the General Assembly together with articles that had been adopted. It could, however, be submitted together with the comments made by the Chairman of the Drafting Committee. The text on which the Drafting Committee could not agree should be reproduced in a footnote. There should also be an indication that consideration of the article had not been completed because of fundamental disagreement in the Commission, and the General Assembly should be informed of the problems involved with a view to obtaining its advice on how to proceed. He could not agree to the article simply being deleted on the ground that there were differing opinions as to whether it involved treaty law and whether there was reciprocity; that, to his mind, was not a convincing reason for deletion.

141. Mr. McCAFFREY said he agreed that the Commission should cease work on article 17, since it was clear, after two years' effort, that there was no change in members' conflicting positions. Contrary to what had been said, he did not believe that there had been agreement in the Drafting Committee on even one paragraph of the article. Indeed, some members, including himself, disagreed with the whole idea of having such an article. In his own case, it was because of the problems of reciprocity and universality: a crime under the code was universal by definition, yet a breach of a treaty of the type contemplated could not be universal, inasmuch as it would occur as between the parties to the treaty. Furthermore, the Commission would not, in fact, be deleting an article: it would be

deciding not to include an article on that particular subject and, in his view, should so report to the General Assembly. The text of article 17 set out in document A/CN.4/L.455 should not be included in the Commission's report to the General Assembly, since a number of members denied its very existence in the draft code.

142. Mr. JACOVIDES said that from the outset he had expressed reservations as to whether the Commission should deal with the idea embodied in article 17. His view was that, to be effective, the code must be as lean and defensible as possible and should not extend to the more controversial areas. Accordingly, he subscribed to the majority opinion in the Commission and did not favour referral of the matter to the General Assembly. Possibly, however, when the time came for the Commission to deal with aggression and the threat of aggression, an appropriate way could be found to accommodate the concerns expressed by certain members, including Mr. Graefrath.

143. Mr. PAWLAK said that he was in favour of article 17, though he was not very happy about its wording. If the crimes referred to in the article were not crimes against peace, then what were? It was not a question of punishing breaches of disarmament treaties, but serious breaches of treaties designed to ensure international peace and security. One only had to look back into history to see that the two world wars had started as a result of such breaches.

144. He therefore proposed, first, that the Commission's discussion should be fully reflected in the summary records and, secondly, that the Commission should seek the General Assembly's advice on how to proceed, explaining that difficulties had arisen because positions in the Commission differed. After all, there was no need to reject an important subject just because there was disagreement. There were many other subjects on which the Commission did not agree, but which it was still pursuing.

145. Mr. AL-QAYSI said it was abundantly clear from the discussion that a fundamental political issue was involved. It was therefore for the General Assembly to decide, on the basis of the summary records, whether it wished the Commission to revert to the matter. The Commission's prestige would only suffer if, notwithstanding the fundamental disagreement that would be apparent from the summary records, it told the General Assembly that it had decided to continue consideration of the matter. The only sensible decision would be to delete article 17 and set out the views of members in the summary records and in the report of the Commission. Then the General Assembly could, if it so wished, direct the Commission to reconsider the underlying principle of the article at its next session.

146. The CHAIRMAN asked whether members could agree not to refer draft article 17 to the General Assembly and to cease consideration of it.

147. Mr. KOROMA suggested that a decision on the article should be postponed. Otherwise, he would have to object to its deletion in the strongest terms.

148. Mr. BARSEGOV said that, if the decision suggested by the Chairman were adopted, he would like it to be recorded as having been taken by a majority.

149. The CHAIRMAN suggested that a meeting of the Bureau should be held forthwith to prepare a draft decision for consideration by the Commission at its next meeting.

It was so agreed.

The meeting rose at 6.20 p.m.

2197th MEETING

Tuesday, 17 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/430 and Add.1,² A/CN.4/L.455)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

1. The CHAIRMAN announced that the Enlarged Bureau had held consultations on the way in which draft article 17 (Breach of a treaty designed to ensure international peace and security) should be dealt with in the Commission's report to the General Assembly, and the Rapporteur would announce the result of the consultations later (see para. 53 below).

ARTICLE 18 (Recruitment, use, financing and training of mercenaries)

2. Mr. MAHIOU (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 18, which read:

Article 18. Recruitment, use, financing and training of mercenaries

1. The recruitment, use, financing or training of mercenaries by agents or representatives of a State for activities directed against another State or for the purpose of opposing the legitimate exercise of

¹ 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.

² Reproduced in *Yearbook . . . 1990*, vol. II (Part One).

the inalienable right of peoples to self-determination as recognized under international law.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) 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;

(c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) is not a member of the armed forces of a party to the conflict; and

(e) 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.

3. A mercenary is also any person who, in any other situation:

(a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) undermining the territorial integrity of a State;

(b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) is neither a national nor a resident of the State against which such an act is directed;

(d) has not been sent by a State on official duty; and

(e) is not a member of the armed forces of the State on whose territory the act is undertaken.

3. In his sixth report, submitted in 1988, the Special Rapporteur had proposed a text containing a definition of the term "mercenary" based, in part, on article 47 of Additional Protocol I³ to the 1949 Geneva Conventions.⁴ Since then, the General Assembly had adopted and opened for signature the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries⁵ and, on the basis of that new instrument, the Special Rapporteur had submitted a revised provision to the Drafting Committee. Unlike article 47 of Additional Protocol I, which applied only to mercenaries acting in the context of armed conflict, draft article 18 dealt, as did the 1989 Convention, with the recruitment, use, financing and training of mercenaries both in the case of armed conflict and for the purpose of destabilization operations carried out in the absence of armed conflict. From that standpoint, article 18 had the same scope of application as the 1989 Convention. On other matters, its scope was more restricted. It applied exclusively to acts in which agents or representatives of a State were involved and, contrary to the 1989 Convention, did not cover the recruitment, use, financing and training of mercenaries by private groups or individuals, or the activities of mercenaries themselves.

³ 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).

⁴ For the text (art. 11, para. 7) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 64-65, footnote 297 and paras. 268-274.

⁵ General Assembly resolution 44/34 of 4 December 1989, annex.

4. Paragraph 1 of article 18 defined the crime by using the terms of the 1989 Convention. The Drafting Committee, which had at first considered supplementing the list of crimes covered by that Convention by including the act of giving refuge to mercenaries, had decided that acts of that kind could come under the heading of complicity.

5. Article 18 dealt with the question of attribution in the same terms as did article 16 (International terrorism). The words "for activities directed against another State" should be read in the light of paragraphs 2 (a) and 3 (a), which defined the type of activities involved. The activities in question were of a degree of gravity which, in the opinion of the Drafting Committee, justified treating the acts covered by the first part of paragraph 1 as crimes.

6. The last part of paragraph 1 ("or for the purpose of opposing . . .") was based on paragraph 2 of article 5 of the 1989 Convention, whereby States parties undertook not to recruit, use, finance or train mercenaries "for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law". The Drafting Committee was mindful of the fact that articles 12, 14, 15 and 18 of the draft code referred to the right to self-determination in varying terms, and it planned to revert to the matter at a later stage with a view to giving the various provisions of the code the required consistency.

7. Paragraph 2 of article 18 defined a mercenary who acted in the context of an armed conflict, and paragraph 3 a mercenary who acted outside the context of such a conflict. The two definitions reproduced word for word the definitions laid down in article 1 of the 1989 Convention.

8. Mr. McCAFFREY said that he reserved his position on article 18 as proposed by the Drafting Committee. In his view, the article went too far, and some of its elements had no place in the draft code. Furthermore, the double negative in paragraph 2 (e) made the text virtually incomprehensible, at any rate in English.

9. Mr. BENNOUNA said it was unfortunate that the Drafting Committee had decided to follow the 1989 Convention, since that caused problems in article 18 as it did in other articles. Also, he understood that the various elements of the definition of the term "mercenary", as set out in paragraphs 2 and 3, had to be read cumulatively. If that was indeed so, it would be preferable to make it clear, perhaps by adding the word "and" at the end of each subparagraph. Lastly, it should be explained in the article why the definition of the term "mercenary" was divided into two parts.

10. Mr. KOROMA said that the word "locally", in paragraphs 2 (a) and 3 (a), created some ambiguity. Did it refer to the country in which the activities took place or to the country in which the person had been recruited?

11. Mr. NJENGA said that, like Mr. Bennouna, he considered that it should be made clear that the various elements of the definition of the term "mercenary" were cumulative. He also agreed that the double

negative in paragraph 2 (e) made the text incomprehensible.

12. Mr. MAHIU (Chairman of the Drafting Committee) explained that the Drafting Committee had merely repeated word for word the text of the 1989 Convention, which it had not felt it could modify. That was true, for instance, of the word "locally", which Mr. Koroma found ambiguous. The word "and", at the end of paragraphs 2 (d) and 3 (d), would, in his view, suffice to indicate that the elements listed in those paragraphs were cumulative.

13. Mr. PELLET said that he reserved his position on the principle of treating outright an activity such as mercenarism as a crime against the peace and security of mankind.

14. Mr. NJENGA said the fact that the definition of a mercenary had been taken from the 1989 Convention did not shield it from criticism. If that definition were retained, an explanation should at least be given in the commentary on the points that were not clear.

15. Mr. BENNOUNA said that the method whereby a provision was lifted from an existing convention and repeated, out of context, in another instrument was questionable from the standpoint of legal drafting. The Drafting Committee could certainly modify the provisions found in the 1989 Convention, since the object of the two instruments was not the same. Also, the Committee which had drawn up the 1989 Convention had consisted not of jurists, but of government representatives—in other words, politicians—whose concerns probably differed from those of the members of the Commission. For all those reasons, he would have preferred the Commission itself to examine the crime of mercenarism, so that a more coherent result from the legal standpoint could be achieved, and to display a little originality by not submitting to the Sixth Committee of the General Assembly a text which that Committee had already examined the previous year.

16. Mr. KOROMA said that, in drafting a new international instrument, it was quite common for existing texts to be adopted in their entirety. Like Mr. Njenga, however, he considered that, in such a case, the commentary should explain the various matters raised during the discussion. He was none the less prepared to accept article 18 as drafted.

17. Mr. JACOVIDES said he had always maintained that, if the code was to be widely accepted, it should not be too voluminous. Instead of repeating the provisions of the 1989 Convention, it should have been possible—and it was perhaps not too late to do so—simply to refer to the Convention. In reproducing the text of the relevant provision verbatim, the code seemed to be according a disproportionate place to the question of mercenarism.

18. Mr. THIAM (Special Rapporteur), in response to Mr. Bennouna and Mr. Jacovides, said that the Commission should decide once and for all whether provisions taken from other instruments should be reproduced word for word, or whether to be content with a mere reference. Moreover, where a text was repeated, any change, even the slightest, required an

explanation. For that reason, it was often preferable to reproduce the texts and to include an explanation in the commentary.

19. Mr. ARANGIO-RUIZ said that he shared the doubts expressed by Mr. McCaffrey, Mr. Pellet and Mr. Bennouna.

20. Mr. BEESLEY said that he endorsed the reservations expressed by Mr. Bennouna, Mr. McCaffrey and Mr. Njenga.

21. Mr. MAHIU (Chairman of the Drafting Committee), referring to Mr. Bennouna's remarks, said that, in his view, it seemed impossible that the same term—in the present case, the term "mercenary"—should be defined differently in two international legal instruments. Moreover, what mattered in article 18 was not so much the definition of the term "mercenary" as the activities that were characterized as crimes in paragraph 1. He agreed, however, that the commentary should reflect the remarks made about the article and give the necessary explanations.

22. Mr. CALERO RODRIGUES said that, under the 1989 Convention, two different acts were treated as crimes: first, the recruitment, use, financing and training of mercenaries; and, secondly, the activities of mercenaries. The draft code, which dealt with the first of those crimes, should therefore also include a definition of the term "mercenary", and the definition could not differ from the one in the 1989 Convention. If the proposed definition was a little long, it was precisely because several possibilities were contemplated: first, the use of mercenaries to fight in an armed conflict; and, secondly, the use of mercenaries to participate in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State, or at undermining the territorial integrity of a State. Those elements were necessary for the interpretation of the term "mercenary". For instance, the provision to the effect that a mercenary was any person who was specially recruited "locally or abroad" had been included to leave no room for doubt: the recruitment of mercenaries would come within the terms of the code whether it occurred in the country concerned or abroad.

23. Also, as Mr. McCaffrey had pointed out, the Commission might have to decide whether to treat mercenarism as a crime: that was another matter, although the Commission had apparently taken a majority decision to that effect when it had referred the provisions in question to the Drafting Committee.

24. Mr. TOMUSCHAT said he agreed that it would be unfortunate if two different definitions of mercenarism were laid down in two international instruments. In his opinion, however, the activities to be treated as crimes could have been characterized differently, on the basis of the method adopted for draft article 17 (Breach of a treaty designed to ensure international peace and security), paragraph 2 of which specified that, to be treated as a crime, the activity in question must be of such a nature as to endanger international peace and security. It was perhaps too late to amend article 18 along those lines, but the Commission could introduce a similar qualification in paragraph 1

on second reading. That would perhaps prove necessary, since the recruitment of mercenaries was only the first step in a long process and, in itself, did not necessarily endanger international peace and security, whereas the code was intended to cover cases in which international peace and security were endangered.

25. Mr. BENNOUNA said that he was not persuaded by the explanations given by the Chairman of the Drafting Committee.

26. As Mr. Tomuschat had suggested, the recruitment of mercenaries could be taken as the starting-point, if certain conditions were met, for a crime against the peace and security of mankind. The code was intended to deal only with the most serious crimes and it would be rendered meaningless if it were made to cover ordinary crimes. A petty mercenary or a petty drug trafficker had nothing in common with a person who committed a crime against the peace and security of mankind.

27. Mr. KOROMA said that, as he saw it, the essence of the definition of a mercenary was to be found in paragraph 3 (a) (i) and (ii) of article 18. Mercenaries usually chose only weak States as their targets: the developed countries were spared. If, therefore, the acts in question were to come under the code only if they endangered international peace and security, it was to be feared that no mercenary would ever be brought to justice. On the other hand, if the acts in question were included in the code, they would perhaps be subject to an international criminal jurisdiction, thereby resolving the difficulties involved in trying mercenaries in the countries where they were captured.

28. For all those reasons, it would not seem desirable to treat such acts as crimes only if they endangered international peace and security.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 18 as proposed by the Drafting Committee.

Article 18 was adopted.

ARTICLE X (Illicit traffic in narcotic drugs)

30. Mr. MAHIOU (chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article X, which read:

Article X. Illicit traffic in narcotic drugs

1. The undertaking, organizing, facilitating, financing or encouraging, by the agents or representatives of a State, or by other individuals, of illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context.

2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs shall include the acquisition, holding, conversion or transfer of property by a person who knows that such property is derived from the crime described in the present article in order to conceal or disguise the illicit origin of the property.

3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

31. He recalled that the Special Rapporteur, following the Commission's discussion of his eighth report

(A/CN.4/430 and Add.1) at the present session, had submitted revised texts of draft articles X and Y characterizing illicit traffic in narcotic drugs as a crime against peace, and as a crime against humanity, respectively (see 2159th meeting, para. 1). The Drafting Committee had examined at length the question whether illicit traffic in narcotic drugs could be characterized as a crime against peace. Some members had taken the view that it could; others, while recognizing that drug connections and proceeds from the drug traffic could be used in one State to destabilize another, felt that the crime of drug trafficking, properly speaking, could only have a very indirect effect on international peace. The latter seemed also to be the position of the Member States of the United Nations, as was apparent from the preamble to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, as well as from General Assembly resolution 44/39 of 4 December 1989. The Drafting Committee had not wished at the present stage to take a final decision on whether illicit traffic in narcotic drugs could, or could not, be characterized as a crime against peace. On the other hand, it had unanimously recognized that such traffic, which impaired the health and well-being of mankind and threatened human beings with degradation, should be treated as a crime under the code. It was from that standpoint that the Committee had elaborated article X, to which it had not given a final number, since the question of the general plan of the code was still pending.

32. The enumeration at the beginning of paragraph 1 of article X was taken from article 16 (International terrorism), except that the word "assisting" had been replaced by "facilitating". It was not so much by active, as by passive, behaviour—for example, by not applying the regulations—that the agents or representatives of a State, or of banking or other institutions, became involved in the drug traffic, and the verb "facilitate" conveyed much better the idea of connivance. Paragraph 2 explained the meaning of the terms "facilitating" and "encouraging".

33. The expression "illicit traffic in narcotic drugs" had to be read in the light of the definition appearing in paragraph 3, which indicated that "narcotic drugs" included psychotropic substances.

34. In addition to the agents or representatives of a State, paragraph 1 mentioned "other individuals" as possible perpetrators of the crime under consideration. It would be explained in the commentary that the term "individuals" covered not only cartels, gangs and other private groups engaging in the drug traffic, but also banks and other financial institutions which handled the proceeds from such traffic. The expression "on a large scale" was intended to make it clear that the article covered operations of great magnitude and not isolated acts on the part of small traffickers. The words "within the confines of a State or in a transboundary context" were taken from the text proposed by the Special Rapporteur.

35. Paragraph 2, which explained the meaning of the terms "facilitating" and "encouraging", drew on paragraph 1 (b) (i) of article 3 of the 1988 Convention.

The notions of conversion and transfer mentioned in paragraph 1 (b) (i) of that article had been combined with the notions of acquisition and holding mentioned in paragraph 1 (c) (i). The word "property" had to be interpreted in its widest sense as covering movables, immovables and other types of assets.

36. The Drafting Committee had not wanted persons who acted in good faith to fall within the provisions of article X if they unwittingly acquired, held, converted or transferred property derived from illicit traffic in narcotic drugs. For that reason, paragraph 2 contained two safeguard clauses: first, the person concerned had to be aware of the origin of the property in question; and, secondly, his actions had to have the effect of concealing or disguising the illicit origin of the property.

37. The Drafting Committee had observed that paragraph 1 (b) (i) of article 3 of the 1988 Convention covered the act of assisting any person who was involved in the conversion or transfer of property to evade the legal consequences of his actions, but had not deemed it advisable to mention such acts in paragraph 2 of article X, considering that they were more in the nature of complicity. The Committee had noted also that, in the 1988 Convention, the French term *détention* was rendered in English as "possession" but had preferred to replace it with the term "holding", which better expressed the idea of provisional custody of another person's property.

38. Paragraph 3, which defined the expression "illicit traffic in narcotic drugs", was largely taken from article 3, paragraph 1 (a) (i), of the 1988 Convention. With regard to the phrase "contrary to internal or international law", the Drafting Committee had not wished to mention the various existing conventions because the code was intended to apply to all States that became parties to it, regardless of whether or not they were parties to those conventions. It had therefore preferred to make a general reference to international law. The reference to internal law was intended to avoid treating as crimes acts that were lawful under national legislations, such as the production, sale, importation or exportation of narcotic drugs for medical or pharmaceutical purposes. The words "contrary to internal . . . law" were in fact intended to clarify the meaning of the word "illicit" in the expression "illicit traffic in narcotic drugs".

39. Mr. McCAFFREY asked whether, as appeared to be the case, article X would apply to entirely domestic traffic in narcotic drugs, i.e. that which did not affect any other State—although destabilization of a State from within risked endangering international peace and security.

40. He suggested that, in paragraph 2, the word "described" should be replaced by "defined".

41. Mr. FRANCIS expressed doubts as to whether the expression "on a large scale", in paragraph 1, was really appropriate in the case of illicit traffic in narcotic drugs. What was the difference between a drug trafficker who ran, within the territory of a State or abroad, 100 tons of cocaine and a trafficker who ran one ton? In all cases, the victims were the whole of humanity and not one or two persons alone. As he saw

it, illicit traffic in narcotic drugs should be characterized also as a crime against peace.

42. Mr. MAHIOU (Chairman of the Drafting Committee) pointed out that the Special Rapporteur had initially proposed two articles, one characterizing international traffic in narcotic drugs as a crime against peace and the other characterizing it as a crime against humanity, but that the views within the Drafting Committee had been divided. Some members had felt that it was possible to characterize such traffic as being also a crime against peace; others had considered that there were not enough elements for that purpose, and chiefly that there existed perhaps a connection between illicit traffic in narcotic drugs and other acts defined as crimes elsewhere in the code, such as aggression, intervention, etc. In the end, the Drafting Committee had chosen to characterize drug trafficking as a crime against humanity, on the understanding that the transboundary element was not indispensable. If, within a given country, drug trafficking was carried out on a large scale and affected many categories of the population, it could indeed be treated on a par with a form of genocide, coercion or grave violations of human rights, to such an extent as to be characterized as a crime against humanity.

43. Mr. FRANCIS said he was still convinced that there existed sufficient evidence to assert that international drug trafficking, in its present dimensions, was a grave obstacle to relations between States. It was a well-established fact and called for no further comment. It was in that context that drug trafficking had to be viewed. The Commission would inevitably have to revert to the matter.

44. Mr. McCAFFREY thanked the Chairman of the Drafting Committee for clarifying that article X also applied to illicit traffic in narcotic drugs entirely within the territory of a State, without participation from abroad, and that the characterization of illicit traffic in narcotic drugs as a crime against humanity did not necessarily require a transboundary element—even though that element obviously existed in most cases. It was a courageous approach and one of considerable importance, but the commentary would need to specify, for the purposes of interpretation, that such was the Commission's intention. As Mr. Francis had just pointed out, the problem was very serious: the whole future of human society was at stake. He would not in any way oppose adoption of the article.

45. Mr. BENNOUNA said he hoped that the commentary would underline the possible connections between the 1988 Convention and article X, since the article was simply an adaptation of the Convention.

46. As to the wording of the article, the commentary should also explain what was meant by the expression "within the confines of a State", in paragraph 1: did it refer simply to the territory of a State or did it include areas under a State's national jurisdiction or under its control? Did the expression also include ships and aircraft, as was the case with the 1988 Convention?

47. Lastly, he wished to know whether the opening words of paragraph 2, "For the purposes of para-

graph 1", had been deliberately omitted in the case of paragraph 3.

48. Mr. MAHIOU (Chairman of the Drafting Committee) pointed out, in reply to an earlier remark by Mr. McCaffrey (para. 40 above), that, in the French text of paragraph 2, the word used was *défini*. The English text should thus be brought into line with the French.

49. In response to Mr. Bennouna's comment, he explained that in paragraph 2 the Commission gave its own definition of the act of facilitating or encouraging illicit traffic in narcotic drugs, whereas paragraph 3 did no more than reproduce the definition contained in other relevant instruments.

50. Mr. BENNOUNA replied that that was precisely the problem, for the definition contained in paragraph 1 (a) (i) of article 3 of the 1988 Convention had been reproduced only in part. Paragraph 3 of article X should therefore have begun with the words "For the purposes of paragraph 1".

51. Mr. THIAM (Special Rapporteur), in reply to a request for clarification by Mr. FRANCIS, explained that illicit traffic in narcotic drugs, as mentioned in article X, was not confined to traffic within national boundaries: it was clearly indicated in paragraph 1 that the undertaking, organizing, facilitating, financing or encouraging of illicit traffic in narcotic drugs on a large scale, "whether within the confines of a State or in a transboundary context", constituted a crime against humanity.

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article X as proposed by the Drafting Committee, with the word "described", in paragraph 2, being replaced by "defined".

It was so agreed.

Article X was adopted.

ARTICLE 17 (Breach of a treaty designed to ensure international peace and security)⁶ (*continued*)

53. Mr. EIRIKSSON (Rapporteur) recalled that the Enlarged Bureau had been assigned the task of drafting the part of section B of chapter II of the Commission's report to the General Assembly dealing with draft article 17, mentioning the absence of agreement on the subject in the Drafting Committee, the debate at the Commission's 2196th meeting (paras. 108 *et seq.*) and the possibility of continuing consideration of the question at the next session if matters evolved. The text proposed by the Enlarged Bureau read:

"Breach of a treaty designed to ensure international peace and security

"1. When introducing the report of the Drafting Committee concerning its work on the draft articles of the code, the Chairman of the Drafting Committee informed the Commission that the Committee had held a long discussion on draft article 17, concerning the breach of a treaty designed to ensure

international peace and security, but had been unable to reach agreement.¹ The Committee had encountered once again the seemingly irreconcilable views which had prevented it from reaching agreement after long discussion at the Commission's forty-first session.²

"2. The Drafting Committee had concluded that it would be inappropriate to take up the question again in the absence of clear guidelines on the direction it should take.³

"3. The discussion in the Commission revealed a continuing difference of views on the advisability of including an article on the subject in the draft code. On the one hand, it was felt by some members that the importance of treaties dealing with such important contributions to international peace and security as disarmament could not be ignored in the code, particularly in the light of the inclusion of relatively less important questions.

"4. On the other hand, a number of views were expressed against dealing with the subject in the code. Some members believed that such an article would violate the principle of universality which must form part of provisions on criminal law. Others believed that such an article would discriminate against States which had entered into such treaties as compared to States which had not done so. The effect might be to discourage the conclusion of such agreements. Some members were concerned that such an article would raise fundamental questions of treaty law. A general point was made that an article of such a controversial nature would have an adverse impact on the acceptability of the code.

"5. The Commission was therefore not able to agree on guidelines for any future work of the Drafting Committee on this question. It furthermore noted that if, at its next session, it was able to give such advice, for example on the basis of the debate in the Sixth Committee of the General Assembly, the Drafting Committee should revert to the article after the completion of its consideration of the other draft articles on the topic.

¹ A text for this particular question was submitted by the Special Rapporteur in his sixth report at the Commission's fortieth session as paragraphs 4 and 5 of the revised draft article 11 (Acts constituting crimes against peace) (see *Yearbook . . . 1988*, vol. II (Part Two), p. 62, footnote 289). Those paragraphs read:

'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.'

² See the statement by the Chairman of the Drafting Committee at that session (*Yearbook . . . 1989*, vol. I, p. 304, 2136th meeting, paras. 43-50).

³ In the Drafting Committee, proposals centred on defining the crime as a serious breach of an obligation of a State under a treaty designed to ensure international peace and security, in particular a treaty relating to:

⁶ For the text discussed by the Drafting Committee, see 2196th meeting, footnote 7.

(Footnote 3 continued.)

“(a) disarmament, or the prohibition, restriction or limitation of armaments;

“(b) restrictions on military training or installations or any other restrictions of the same character;

“(c) the prohibition of emplacements or tests of weapons;

“(d) the military denuclearization of certain territories.

“For the purposes of this definition, some members would qualify a breach as serious where it was of such a nature as to endanger international peace and security, in particular by giving a military advantage to the violator. A further qualification was suggested to the effect that a measure taken by a State to ensure its right of self-defence should not be considered a serious breach of an obligation under a treaty for the purposes of the definition. Finally, it was the view of some members that a breach of an obligation under a treaty referred to in the definition could not be invoked under the code by a State not bound by the treaty or to the advantage of a State not bound by it.”

54. Mr. AL-QAYSI said that the text proposed by the Enlarged Bureau could form the basis of a compromise solution, but would require some changes. First, there was no need for footnote 1 to include the texts of paragraphs 4 and 5 of draft article 11, which had already appeared in the Commission's report on its previous session. The footnote should read: “A text for . . . (Acts constituting crimes against peace). See *Yearbook . . . 1989*, vol. II (Part Two), p. 68, footnote 149.” Secondly, footnote 3 should be deleted, for it seemed odd, to say the least, to report in detail to the General Assembly on the trends of opinion in the Drafting Committee. Thirdly, to reflect the variety of views on article 17 expressed at the previous meeting, the phrase “a number of views were expressed against”, in paragraph 4 of the proposed text, should be replaced by “many members said that they were against”.

55. Mr. Sreenivasa RAO said that he could accept Mr. Al-Qaysi's amendments to the text proposed by the Enlarged Bureau, as long as they did not become the subject of a protracted debate. Otherwise, he would prefer the text as it stood.

56. Mr. GRAEFRATH said that the proposed text should be improved in order to bring out more clearly the arguments advanced in favour of article 17. For that purpose, a sentence should be added at the end of paragraph 3, reading: “A serious breach of a treaty specially designed to ensure peace would necessarily be of universal concern and not simply a question of treaty law because, by definition, it would endanger peace.” He supported the amendment to paragraph 4 suggested by Mr. Al-Qaysi, but would prefer to retain the footnotes as they stood, since they were intended to make the text easier for the reader to understand.

57. Mr. KOROMA said that footnote 1 would be an aid to discussion in the Sixth Committee of the General Assembly. Since article 17 dealt not with disarmament as such—an area in which the Commission had no competence—but with international peace and security, he proposed that the words “as disarmament” and “particularly in the light of the inclusion of relatively less important questions”, in the second sentence of paragraph 3, should be deleted. He supported the idea of deleting footnote 3, which was controversial. Lastly, the penultimate sentence of paragraph 4 could be fleshed out to give an idea of the kind of questions the Commission was thinking of; otherwise, it could be deleted.

58. Mr. McCAFFREY said that it would be better, at the present stage in its work, for the Commission not to mention in its report the debate sparked off by article 17. It had not actually reached any conclusion yet, nor had it made a decision either way, and the text proposed for inclusion in the report would prompt the reader to ask why not. Paragraph 5 of that text was, in fact, a timid invitation to the Sixth Committee to advise the Commission. If the Commission was unable to agree on whether to include article 17 in the draft code, it should refrain from asking the advice of the Sixth Committee, because the Committee could only give a political answer. The Commission was in a blind alley, caused by purely legal problems. If it was none the less anxious to retain paragraph 5, it should not beat about the bush and should ask the Sixth Committee outright for instructions.

59. If the Commission did decide to include in its report a record of its debate on the matter, he thought that most of the amendments proposed by Mr. Al-Qaysi would be acceptable. In footnote 1, it would be sufficient to refer to the Commission's 1989 report. Footnote 3 should be deleted, for it would be misleading not to mention the majority view in the Drafting Committee, namely that article 17 had no part to play in the code. As to paragraph 2, he would suggest adding, after the words “the question again”, the words “at future sessions of the Commission”. He would have no objection to the sentence proposed by Mr. Graefrath if it was prefaced by the words “In the view of one member of the Commission”. Paragraph 4 should begin: “Many members, on the other hand, were opposed to dealing . . .”. The second sentence of the paragraph should begin with the words “These members believed”, and the third with the words “They also believed”. The second sentence of paragraph 5 might cause confusion and should be reworded as follows: “If, at its next session, it is able to agree on such guidelines, the Drafting Committee will revert to the article.”

60. Furthermore, if the Drafting Committee completed its consideration of the other draft articles on the topic at the beginning of the next session, was it expected to drop everything else in order to return to article 17? What would happen to the other items on the agenda? In his opinion, at the next session the Drafting Committee should revert to article 17 only when it had finished its work, if sufficient time remained. The Commission should not be reporting to the Sixth Committee on its methods of work: the Committee was not interested in them, and the Commission should not encourage it to comment on the matter. Lastly, he deplored the many hours the Drafting Committee had spent on the question, to the detriment of other topics.

61. Mr. EIRIKSSON (Rapporteur) said the fact that the subject was a difficult one and that members of the Drafting Committee had been unable to agree was the very reason why the General Assembly should be told about it. Nevertheless, the Commission had not lost hope of coming to some agreement on article 17 and was not leaving the outcome entirely to the General Assembly.

62. Mr. BEESLEY said that, by and large, he was in favour of the amendments proposed so far. As to the footnotes, the first could be considerably shortened: after the reference to paragraphs 4 and 5 of draft article 11, one could simply add “which have since been withdrawn because of the difficulties involved”. Footnote 3 should be eliminated altogether, because it merely reported the discussions in the Drafting Committee.

63. Mr. Graefrath’s proposal was acceptable in the sense that it drew attention to the complex relationship between the future article 17 and treaty law. Mr. Graefrath had spoken of “universal concern”, but he could equally have pointed to the connection with *jus cogens*; there were several ways of illustrating the complexity of the relationship. The real reason why the Commission could not come to a conclusion was that the actual content of article 17 would be discriminatory: some States would be in a treaty régime, something which would hold them to certain obligations and to a measure of reciprocity, whereas other States would remain free to act as they saw fit. As a result, the article would discourage States from signing disarmament treaties or acceding to existing ones, or even from accepting the code.

64. Lastly, he would like clarification of paragraph 5 of the proposed text, since it was not clear what the Commission wanted from the General Assembly.

65. Mr. PELLET said that he, too, thought that a report should be made to the General Assembly on the Drafting Committee’s quest for a compromise solution. In that regard, he considered the text proposed by the Enlarged Bureau well-balanced and quite acceptable. The wording of the last sentence, despite Mr. McCaffrey’s criticism, was especially shrewd. As to Mr. Graefrath’s amendment, minority opinions should certainly be included in the Commission’s report, as long as it was made quite clear that they were not shared by all members.

66. It had been proposed that the penultimate sentence of paragraph 4 should be amended, because it was self-evident that article 17 would raise “fundamental questions of treaty law”. That was correct. However, not all those questions were evident, and they might be very different in nature: problems of interpretation would arise, but also, for instance, the problem of defining a “serious breach”. But the most deep-seated problem was the one mentioned by Mr. Beesley, which had nothing to do with legal technique. The point was that the article viewed a breach from a formal standpoint—the treaty aspect—and not from a substantive standpoint. He therefore proposed that, at an appropriate place in paragraph 4, the following sentence should be added: “Moreover, some members of the Commission objected to the special emphasis which would thus be placed on treaty obligations.”

67. In conclusion, paragraph 2 added nothing and should be omitted.

68. Mr. AL-QAYSI said that paragraph 2 summed up the conclusion the Commission had reached at the present session. In his view, it should be included in the report.

69. Mr. BARSEGOV, reiterating that, in his view, article 17 was an essential part of the draft code, said that the text proposed by the Enlarged Bureau for inclusion in the Commission’s report was quite acceptable. It was a fact that the Commission had run into difficulty with article 17, and it would be wise to let the General Assembly know, especially when the subject-matter concerned was of such importance in view of the recent developments in Europe and the disarmament initiatives under way. The Commission must not allow itself to be overtaken by events.

70. Mr. MAHIOU (Chairman of the Drafting Committee), speaking as a member of the Commission, pointed out that he had never been in favour of draft article 17. However, he would prefer the General Assembly to be told of the difficulties encountered by the Commission, not only because it must be given a report of the work done, but also because the article in question was proving controversial and the resulting disagreement could hardly be concealed from the Sixth Committee.

71. The text proposed by the Enlarged Bureau was a compromise text which would be quite acceptable with a few minor changes. Paragraph 5 in particular, which stated the conclusion in a very subtle manner, ought to be retained. Admittedly the wording of paragraph 2 was not very clear, but it would be wise to point out that the difficulties encountered during the session now coming to an end would inevitably recur at the next session unless the Sixth Committee had some new ideas to put forward.

72. Mr. BARBOZA said that he did not find it unusual for the Commission to show the General Assembly that it was hesitant; some indecision was perhaps a virtue in a body of lawyers. Given the nature of the problem concerned, political positions were bound to cast their shadow on legal theory. That was one more reason why the Sixth Committee should be told of the situation.

73. From the point of view of the organization of work, the Drafting Committee should perhaps have informed the Commission that it was not making progress on draft article 17. The Commission should have done sooner what it was now about to do, and should do more often: state in plain terms that there was no agreement, polish the wording, and refer the matter to the General Assembly.

74. Mr. PAWLAK said that most of the proposed amendments would disturb the balance of a text which had already been much thought out. In his view, the proposed text should be kept as it was—including paragraph 5—with some minor changes: for instance, footnote 1 should be simplified, but not footnote 3, which was a faithful account of what had taken place in the Drafting Committee.

75. Mr. ARANGIO-RUIZ said that the questions raised by the relationship between article 17 and treaty law in general were at present insoluble. It was sufficient, in his view, to say so. Strictly speaking, that part of the Commission’s report should be confined to the first sentence of paragraph 1 of the proposed text.

76. The CHAIRMAN suggested that the Rapporteur should, in the light of the opinions expressed and the various amendments proposed, prepare a new text for consideration at a later meeting.

The meeting rose at 1.10 p.m.

2198th MEETING

Tuesday, 17 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/430 and Add.1,² A/CN.4/L.455)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 17 (Breach of a treaty designed to ensure international peace and security)³ (continued)

1. The CHAIRMAN invited further comments on the text proposed by the Enlarged Bureau for inclusion in the Commission's report to the General Assembly, concerning draft article 17 (see 2197th meeting, para. 53).

2. Mr. ROUCOUNAS said that he was prepared to agree to a text along the lines suggested by Mr. Al-Qaysi at the previous meeting (para. 54), but wished to clarify his position. The problem the Commission had faced for two years involved a matter that was basically one of discrimination and, in historical terms, had in fact been superseded. The Commission had not considered the fact that the primary rule went beyond treaty law. There were, of course, a number of things, such as genocide, racial discrimination, aggression and war crimes, which the international community had agreed to treat as crimes. The Commission, however, instead of also seeking to discern a rule of general

international law in the field of disarmament, had fallen back on the notion of the relativity of treaties. That was why he had opposed the whole exercise from the outset. Furthermore, there were a host of problems involving treaty law, such as the validity of a treaty in time, the interpretation of treaties, the effects of treaties with regard to third parties, and the legal relations between the parties to treaties, all of which fell within the framework not of international criminal law, but of the law of treaties.

3. Mr. TOMUSCHAT said that, so far as substance was concerned, he did not favour adoption of article 17. He did consider, however, that the two trends of opinion which had emerged in the debate should be reflected in a balanced way in the Commission's report: the differences within the Commission could not be concealed from the General Assembly, which must be informed of them.

4. The CHAIRMAN drew attention to a revised version of the text proposed by the Enlarged Bureau, prepared by the Rapporteur, which read:

"Breach of a treaty designed to ensure international peace and security"

"1. When introducing the report of the Drafting Committee concerning its work on the draft articles of the code, the Chairman of the Drafting Committee informed the Commission that the Committee had held a long discussion on draft article 17, concerning the breach of a treaty designed to ensure international peace and security, but had been unable to reach agreement. The Committee had encountered once again the seemingly irreconcilable views which had prevented it from reaching agreement after long discussion at the Commission's forty-first session.¹

"2. The Drafting Committee pointed out the difficulties it would have in taking up the question again at future sessions of the Commission in the absence of clear guidelines on the direction it should take.²

"3. The discussion in the Commission revealed a continuing difference of views on the advisability of including an article on the subject in the draft code. On the one hand, it was felt by some members that the importance of treaties designed to ensure international peace and security could not be ignored in the code, particularly—in the view of one member—in the light of the inclusion of relatively less important questions. The example of disarmament treaties was cited. In the view of those members, the breach of such a treaty, because by definition it endangered peace, would be of universal concern, not merely a matter for the parties to the treaty.

"4. Many members, on the other hand, were opposed to dealing with the subject in the code. The reasons adduced in that respect included concern that such an article would violate the principle of universality which must underlie criminal-law provisions. The view was furthermore expressed that such an article would discriminate against States which had entered into the treaties concerned as compared to States which had not done so. The effect might be to discourage the conclusion of such treaties. The article was also criticized on the ground that it

¹ 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.

² Reproduced in *Yearbook ... 1990*, vol. II (Part One).

³ For the text discussed by the Drafting Committee, see 2196th meeting, footnote 7.

unjustifiably focused on treaty obligations and concern was expressed that such an article would raise fundamental questions of treaty law. Finally, the general point was made that an article of such a controversial nature would have an adverse impact on the acceptability of the code.

“5. The Commission was therefore not able to agree on guidelines for any future work of the Drafting Committee on this question. It furthermore noted that if, at its next session, it was able to agree on such guidelines, for example on the basis of the debate in the Sixth Committee of the General Assembly, the Drafting Committee should revert to the article after the completion of its consideration of the other draft articles on the topic.

¹ See the statement by the Chairman of the Drafting Committee at that session (*Yearbook . . . 1989*, vol. I, p. 304, 2136th meeting, paras. 43-50)."

² For the statement by the Chairman of the Drafting Committee at the present session on draft article 17, see the summary record of the 2196th meeting (see *Yearbook . . . 1990*, vol. 1), paras. 108 *et seq.*"

5. Mr. EIRIKSSON (Rapporteur) said that the revised text would constitute subsection 3 of section B (Consideration of the topic at the present session) of chapter II of the Commission's report. No substantive changes had been made in paragraph 1, but footnote 1 in the earlier text, which had contained the provisions proposed by the Special Rapporteur, had been deleted. The reference in paragraph 2 to the Drafting Committee's view had been modified to reflect the Committee's position as reported by the Chairman of the Drafting Committee. The content of footnote 3 in the earlier text had been deleted. Instead, there was now a reference in footnote 2 to the statement made by the Chairman of the Drafting Committee. Paragraph 3 reflected the views of those members who favoured the inclusion in the draft code of an article on the subject, while paragraph 4 set forth the views of those who opposed the inclusion of such an article. Paragraph 4 also incorporated certain changes proposed by Mr. McCaffrey as well as a combined proposal by Mr. Pellet and Mr. Roucouinas with regard to treaty law. Paragraph 5 was basically unchanged.

6. The CHAIRMAN suggested that, to save time, consideration of the matter should be suspended until the Rapporteur had had an opportunity to consult members.

*It was so agreed.*⁴

7. Mr. GRAEFRATH said that he wished to make a general remark concerning the Commission's report. An important question raised several times in the Drafting Committee had not been reflected in the articles adopted, nor had it been adequately explained in the report by the Chairman of the Drafting Committee. That question was the attribution of crimes to individuals. In its report to the General Assembly on its forty-first session, the Commission had stated: ". . . The question of the attribution of . . . crimes to individuals will be dealt with later in the framework of a general

provision."⁵ No such provision had been formulated by the Drafting Committee at the present session. Articles 16, 18 and X did contain certain elements relating to the individuals who might commit the crimes in question, but that did not solve the general problem of determining who could commit a crime against peace, nor did it suffice to determine the subjective element which must involve a wilful act and exclude negligence.

8. He therefore suggested that a footnote should be included in the Commission's report on its present session explaining that the Commission would revert to the matter at a later session.

Draft report of the Commission on the work of its forty-second session (continued)*

CHAPTER IV. *The law of the non-navigational uses of international watercourses* (continued) (A/CN.4/L.449 and Add.1 and 2)

B. *Consideration of the topic at the present session (continued)* (A/CN.4/L.449)

Paragraph 18 (*concluded*)

9. Mr. EIRIKSSON (Rapporteur) read out the following revised text of paragraph 18, which he had prepared together with the Special Rapporteur:

"There was general support for article 24, which reflected in a well-balanced way the view that there was no universal standard giving priority to any particular use of an international watercourse, including navigation, in the light of the many different uses of watercourses in the modern world and, in particular, the scarcity of unpolluted fresh water resources."

10. Mr. KOROMA proposed that the words "which reflected" in that text should be replaced by "which was considered to reflect".

11. Mr. SOLARI TUDELA said that he would like to place on record that, in addition to the considerations set out in paragraph 18, there was also the fact that river navigation was now of lesser importance.

12. Mr. CALERO RODRIGUES said that, while he had no objection in principle to the new paragraph 18, it disturbed the balance of paragraphs 19 and 20. Also, the new paragraph 18, like paragraph 20, spoke of "general support", so there seemed to be some duplication.

13. Mr. AL-QAYSI said that he appreciated the reasons for formulating the new paragraph 18 but found the previous text easier to understand, since it sought to establish a contradistinction between navigation and other uses of international watercourses, such as uses for domestic purposes. The new text made no such contradistinction and was therefore a little ambiguous. It was particularly important to bring out the relationship between the scarcity of fresh water resources and the idea that priority must not be given to any particular use. That was not clear from the new text.

14. Mr. BARSEGOV, agreeing in general with Mr. Calero Rodrigues, said that, in his view, paragraph 19 was unnecessary and could be deleted. He also considered that paragraph 20 should simply underline that

* Resumed from the 2195th meeting.

⁵ *Yearbook . . . 1989*, vol. II (Part Two), p. 68, footnote 150.

⁴ See paras. 52 *et seq.* below.

States must have respect for the various uses of watercourses, whether for navigation, drinking-water, irrigation or other uses. There was no need to add anything, more particularly since the new paragraph 18 stated that there was "no universal standard giving priority". With that in mind, therefore, it might be possible to align the two paragraphs.

15. Mr. NJENGA said that there was a logical continuity in paragraphs 18, 19 and 20 which he, too, thought would be affected by the new text of paragraph 18. Instead, he would propose that the words "in a well-balanced way", in the previous text of paragraph 18, be replaced by "was well balanced and", and that the word "fresh" be inserted before the words "water resources".

16. Mr. PAWLAK said that he tended to prefer the previous text of paragraph 18 to the new text. He could accept Mr. Njenga's proposals, but would further propose that the word "any", before the word "priority", be omitted and that the words "no longer" be replaced by "not always". Again, the word "different" should be replaced by "other".

17. Mr. BEESLEY said that he would like the word "unpolluted", introduced in the new text of paragraph 18, to be retained.

18. The CHAIRMAN said that the original text of paragraph 18, as amended by Mr. Njenga and Mr. Pawlak and with the word "unpolluted" incorporated, would then read:

"There was general agreement that article 24 was well balanced and reflected the fact that the priority once assigned to navigation was not always justified in view of the many other uses of international watercourses in the modern world and, in particular, the scarcity of unpolluted fresh water resources."

19. Mr. KOROMA said that the phrase "was not always justified" did not seem appropriate.

20. Mr. McCAFFREY (Special Rapporteur) said that the text read out by the Chairman did not adequately reflect the discussion that had taken place. The word "any" had originally been included before the word "priority" to express the idea that priority might once have been assigned to navigation, as some authorities believed, but that such a rule was no longer warranted.

21. Mr. NJENGA said he thought that the Special Rapporteur was drawing a sharp distinction between the past and the present. Undeniably, until the early years of the twentieth century most countries had given priority to navigation, but that had been at a time when water had not been scarce.

22. Mr. AL-QAYSI said that priority might always have been assigned to navigation, but that position was indefensible now. The proper meaning could only be conveyed by using the words "any", "once" and "no longer".

23. Mr. GRAEFRATH said that there was no uniformity of views about the situation in the past, but that did not influence the present. The important point was that there was general support for the principle implicit in article 24.

24. Mr. BEESLEY said that the Commission's views on present and future priorities must be made clear. The agreed meaning was that such priority as might once have been assigned to navigation was no longer justified, in view of the many uses of watercourses in the modern world.

25. Mr. McCAFFREY (Special Rapporteur) proposed that, in order to reflect the comments of Mr. Al-Qaysi and Mr. Beesley, paragraph 18 should be amended to read:

"There was general agreement that article 24 was well balanced and reflected the fact that any priority that was once assigned to navigation was no longer justified in view of the many other uses of international watercourses in the modern world and, in particular, the scarcity of unpolluted fresh water resources."

26. Mr. BARSEGOV said that he could accept that text, on the understanding that there was no rule of general international law which established priority for any particular use.

27. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the text proposed by the Special Rapporteur for paragraph 18 (para. 25 above).

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

28. Mr. BARSEGOV said that the word "universal" should be added before the words "preferential régime", so as to distinguish between a general régime and possible regional arrangements.

29. Mr. NJENGA supported that proposal and added that there was no need to include the words "in fact".

30. Mr. KOROMA said that paragraph 19 implied that a preferential régime would be confined to the treaties cited in the Special Rapporteur's fifth report. He would prefer the sentence to read simply: "Some members doubted whether there had ever existed a universal preferential régime."

31. Mr. CALERO RODRIGUES asked what view had actually been expressed by the members referred to in paragraph 19. If they had spoken of a preferential régime deriving from treaties, the report should say so.

32. Mr. BARSEGOV said that the view expressed had been that there was no rule of general international law concerning such a preferential régime.

33. Mr. KOROMA proposed rewording the paragraph to read: "Some members doubted whether a universal rule of international law existed establishing such a preferential régime."

34. Mr. McCAFFREY (Special Rapporteur) said that paragraph 19 as worded did reflect the debate in the Commission, which had not dealt in the abstract with the question of a possible preferential régime, but rather with the treaties, especially the 1921 Barcelona Convention and Statute, cited in his fifth report.

35. Mr. TOMUSCHAT suggested that, to take account of the changes proposed by Mr. Barsegov and

Mr. Koroma, the paragraph should read: "Some members doubted whether, deriving from treaties cited in the Special Rapporteur's fifth report, there had ever existed a rule of universal international law establishing such a preferential régime."

36. Mr. EIRIKSSON (Rapporteur) said that the changes being proposed for paragraph 19 would also affect paragraph 18. The words "in fact" were linked to the word "any" in paragraph 18, reflecting the view that there had never been such a priority.

37. Mr. NJENGA said that the problem was simply one of drafting. The words "in fact" added nothing, and could logically be deleted if the word "any" were deleted in paragraph 18.

38. The CHAIRMAN suggested that paragraph 19 should be amended to read: "Some members doubted whether there had ever existed a universal preferential régime deriving from the treaties cited in the Special Rapporteur's fifth report."

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

39. Mr. KOROMA suggested adding the word "one" before "use" in the first sentence, which would then read: "General support was expressed for the underlying principle of article 24 that no one use should have priority over other uses."

It was so agreed.

40. Mr. BARSEGOV said that the text was unclear. There was no such principle; decisions on the use of watercourses were made by States.

41. Mr. CALERO RODRIGUES proposed that, to take account of Mr. Barsegov's objection, the phrase "in the absence of agreement to the contrary" should be inserted after the words "the underlying principle of article 24 that".

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraph 21

42. Mr. BARSEGOV suggested that the first sentence, if retained, should be amended to read: "Commenting specifically on *paragraph 1*, one member observed that, in his view, it would be inappropriate to lay down a rule establishing any priority, since it was for States to resolve those questions."

43. Mr. EIRIKSSON (Rapporteur) said that he preferred, for the sake of brevity, to delete the first sentence altogether.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 25

Paragraphs 22 to 25 were adopted.

Paragraph 26

44. Mr. NJENGA suggested amending the second sentence to read: "A question was raised concerning the application of the concept of equitable cost-sharing,

and whether it should be limited to the field of regulation."

45. Mr. CALERO RODRIGUES pointed out that the principle of cost-sharing itself had not been questioned—merely whether it applied only to regulation.

46. Mr. NJENGA withdrew his suggestion.

Paragraph 26 was adopted.

Paragraph 27

47. Mr. KOROMA suggested that the reference to "riparian States", in the first sentence, should be replaced by "watercourse States".

48. Mr. McCAFFREY (Special Rapporteur) said that both expressions were in common use; however, he preferred the expression "watercourse States", which would obviate difficulty in the Sixth Committee of the General Assembly.

Mr. Koroma's amendment was adopted.

Paragraph 27, as amended, was adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted with minor drafting changes.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

49. Mr. NJENGA, noting that paragraph 31 consisted of one particularly long sentence, suggested that it be broken up into three sentences.

50. Mr. EIRIKSSON (Rapporteur) said that the paragraph would then read awkwardly.

51. Mr. McCAFFREY (Special Rapporteur), noting that there was no substantive disagreement on paragraph 31, suggested that he collaborate with Mr. Njenga and the Rapporteur in seeking an appropriate formulation.

Paragraph 31 was adopted on that understanding.

Paragraph 32

Paragraph 32 was adopted.

Draft Code of Crimes against the Peace and Security of Mankind⁶ (concluded)* (A/CN.4/430 and Add.1,⁷ A/CN.4/L.455)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

ARTICLE 17 (Breach of a treaty designed to ensure international peace and security)⁸ (concluded)

* Resumed from para. 8 above.

⁶ 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.

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

⁸ For the text discussed by the Drafting Committee, see 2196th meeting, footnote 7.

52. Mr. EIRIKSSON (Rapporteur) said that, following consultations, a number of changes were suggested in paragraph 3 of the revised text proposed for inclusion in the Commission's report, concerning draft article 17 (see para. 4 above). A footnote was required in connection with the words "The discussion in the Commission", to indicate the meetings at which the discussion had taken place; the sentence "The example of disarmament treaties was cited" should be deleted; the words "such as arms-control and disarmament treaties" should be inserted after the words "to ensure international peace and security", in the second sentence; the words "in the view of one member", in the same sentence, should be deleted; the word "serious" should be inserted before "breach", in the last sentence; and, as suggested by Mr. McCaffrey, the last sentence should be amended to read: "... breach of such a treaty would, by definition, endanger peace and would be of universal concern ...".

Paragraphs 1 and 2

53. Mr. AL-QAYSI, supported by Mr. MAHIU (Chairman of the Drafting Committee), suggested combining paragraphs 1 and 2 of the revised text. The beginning of the second sentence of paragraph 1 should be amended to read: "He indicated that the Committee had once again encountered ...", and the beginning of paragraph 2, which would become the last sentence of paragraph 1, should be amended to read: "He further pointed out the difficulties the Drafting Committee would have ...".

It was so agreed.

Paragraphs 1 and 2, as amended, were adopted.

Paragraph 3

54. Mr. BEESLEY said that the text of paragraph 3, which would now become paragraph 2, was acceptable, but it overstated the situation somewhat. Even a serious breach of such a treaty would not necessarily be of universal concern, and he therefore suggested amending the last sentence to read: "... a serious breach of such a treaty could be of universal concern ...". He would not, however, object to the text as it stood.

55. Mr. GRAEFRATH said that he could not accept Mr. Beesley's suggestion; the only breaches concerned were those that fell under the definition set out in paragraph 2 of draft article 17, which read: "For the purposes of paragraph 1, a breach shall be considered serious where it is of such a nature as to endanger international peace and security ...".

56. Mr. KOROMA suggested replacing the word "difference", in the first sentence, by "divergence".

57. Mr. BEESLEY, replying to Mr. Graefrath, said that there were a number of arms-control treaties, all of them important, but even a serious breach of one of them might not necessarily be a threat to peace. There was a difference between seminal treaties and secondary treaties. However, he would not insist on his suggestion.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 3 with the amendments

proposed by the Rapporteur (para. 52 above) and Mr. Koroma.

It was so agreed.

Paragraph 3, as amended, was adopted.

Paragraph 4

59. Mr. BENNOUNA proposed replacing the words "criminal-law provisions", in the second sentence, by "the concept of crimes against the peace and security of mankind". The reference to "The article" in the penultimate sentence should be amended to read: "The draft article".

60. Mr. TOMUSCHAT said that the phrase "The view was furthermore expressed", at the beginning of the third sentence, implied that it was the opinion of only one member, and should therefore be amended to read: "They furthermore expressed the view".

61. Mr. KOROMA suggested replacing the words "criminal-law provisions", in the second sentence, by "provisions under the code". Amending the beginning of the third sentence to read: "Furthermore, the view was expressed ..." would respond to the remark made by Mr. Tomuschat. Lastly, the Commission should give some indication of what it meant by the expression "fundamental questions of treaty law", in the penultimate sentence, so as to help the General Assembly to reply.

62. Mr. AL-QAYSI said that he did not support Mr. Tomuschat's suggestion for rewording the beginning of the third sentence, because it was clear from the first sentence that the view of more than one member was involved. As to the proposal to replace the words "criminal-law provisions", he preferred Mr. Bennouna's proposal to Mr. Koroma's. Lastly, Mr. Koroma's remark concerning the expression "fundamental questions of treaty law" was well taken, and perhaps some examples could be given to show what was meant.

63. Mr. EIRIKSSON (Rapporteur) said that he supported the suggestion to replace the words "criminal-law provisions" by "the concept of crimes against the peace and security of mankind" and to amend the beginning of the third sentence to read: "Furthermore, the view was expressed ...". Agreement would still have to be reached on examples of fundamental questions of treaty law.

64. Mr. ROUCOUNAS suggested adding the following phrase after the expression "fundamental questions of treaty law" in the penultimate sentence: "for example, in the fields of validity, interpretation or effects in respect of parties or third parties".

65. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 4 with the amendments proposed by Mr. Bennouna, with the beginning of the third sentence amended to read: "Furthermore, the view was expressed ...", as proposed by Mr. Koroma, and with the addition of a phrase along the lines suggested by Mr. Roucounas.

It was so agreed.

Paragraph 4, as amended, was adopted.

Paragraph 5

66. Mr. KOROMA suggested replacing the word “any”, in the first sentence, by “the”.

It was so agreed.

Paragraph 5, as amended, was adopted.

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the revised text proposed (para. 4 above) for subsection 3 of section B of chapter II of its report, as amended.

It was so agreed.

68. Mr. BENNOUNA asked whether, in document A/CN.4/L.455 containing the draft articles adopted by the Drafting Committee, all reference to draft article 17 would be deleted.

69. Mr. GRAEFRATH said that he was against changing document A/CN.4/L.455, because otherwise it would not be clear what the whole discussion had been about. The document in question had been presented to the Commission and had formed the basis for discussion. The reference to draft article 17 therein should therefore be retained.

70. Mr. EIRIKSSON (Rapporteur) said that the next step would be a new document containing draft section D of chapter II of the Commission's report, setting out the articles adopted by the Drafting Committee, and subsequently adopted by the Commission, at the present session, together with draft commentaries thereto. Since draft article 17 had not been adopted, it would not appear in that document.

71. Mr. CALERO RODRIGUES agreed with the Rapporteur that there was no reason to include in the report a text that had not been adopted. But if no mention were made of draft article 17, should the other articles not be renumbered or an explanation be provided as to why an article was missing?

72. Mr. MAHIU (Chairman of the Drafting Committee) said that Mr. Bennouna might be confusing the document containing the draft report of the Commission and document A/CN.4/L.455. Perhaps article 18 should have no number for the time being. The Secretariat could propose later how to resolve what was basically a technical problem.

73. Mr. BENNOUNA said that a mistake had been made in presenting an article that had not been adopted by the Drafting Committee. It would be confusing for the reader to find references to draft article 17 in the summary records, but none in the Commission's report. He would have preferred to call article 17 article “[X]” and to renumber article 18 as article 17. A revised version of document A/CN.4/L.455, with article 17 deleted because it had not been adopted by the Drafting Committee, should be issued.

74. Mr. THIAM (Special Rapporteur) said that such matters could be left to the Secretariat, which was best qualified to deal with them.

75. Mr. BEESLEY said that Mr. Bennouna's point was perfectly correct both legally and procedurally. There was a missing link in the chain of causation: the

Commission would be giving the impression that the Special Rapporteur's withdrawal of his proposal for article 17 was unimportant.

76. Mr. BARSEGOV appealed to members not to prolong the discussion and complicate matters by debating procedural and editing questions. Such matters as the numbering and placing of articles could well be left to the Special Rapporteur and the Secretariat.

77. He wished to stress that everything in the statements made by the Chairman of the Drafting Committee accurately reflected the agreed views in that Committee, as indeed all members of the Drafting Committee could confirm.

78. Mr. KOROMA said that time was not on the Commission's side. He proposed that the Chairman should declare the discussion closed, on the understanding that the problems raised would be dealt with by the Secretariat and the Special Rapporteur.

79. Mr. MAHIU (Chairman of the Drafting Committee) explained that the text of draft article 17 appearing in document A/CN.4/L.455 had not been adopted by the Drafting Committee, but the same was not true of the title. It was perfectly appropriate to retain that title, placed as it was between square brackets, without the actual content of the article. Opinions could, of course, differ about the advisability of the procedure adopted by the Drafting Committee, yet the Committee had agreed on it in the present instance.

80. The CHAIRMAN declared the discussion closed, on the understanding that the points which had been raised would be settled by the Special Rapporteur and the Rapporteur, with the help of the Secretariat.

It was so agreed.

81. Mr. BENNOUNA said that the procedure adopted was most unusual: there was no precedent for a whole article being placed between square brackets. He trusted that the Rapporteur would find some solution for the presentation of the matter that would serve to explain to readers of the Commission's report, among other things, the gap between article 16 and article 18.

Draft report of the Commission on the work of its forty-second session (continued)*

CHAPTER IV. *The law of the non-navigational uses of international watercourses* (continued) (A/CN.4/L.449 and Add.1 and 2)

B. *Consideration of the topic at the present session (concluded)* (A/CN.4/L.449)

Paragraph 33

82. Mr. SOLARI TUDELA said that all the Spanish-speaking members of the Commission were agreed on the need to correct the term *ordenación* in the Spanish text of the draft report. The proper expression was *gestión administrativa*.

83. The CHAIRMAN said that the Secretariat would arrange for the correction to be made throughout the report.

84. Mr. KOROMA asked for clarification from the Special Rapporteur on the expression “system of waters”, used in the last sentence of paragraph 33.

* Resumed from para. 51 above.

85. Mr. McCAFFREY (Special Rapporteur) said that the expression had been used in connection with State practice and not with respect to the Commission's draft articles. Nevertheless, he could agree to the words "protection of the system of waters" being amended to read: "protection of international watercourse systems".

It was so agreed.

Paragraph 33, as amended, was adopted.

Paragraph 34

86. Mr. EIRIKSSON (Rapporteur) said that the word "exchanges", in the third sentence, should be placed in the singular and suggested that the end of the fourth sentence be amended to read: "... whether the article was absolutely necessary".

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted with a minor drafting change.

Paragraphs 36 to 61

Paragraphs 36 to 61 were adopted.

Paragraph 62

87. Mr. KOROMA suggested that the words "resolved on the private level", in the second sentence, should be amended to read: "resolved on the domestic level".

88. Mr. McCAFFREY (Special Rapporteur) proposed that the phrase in question be amended to read: "resolved through civil-law procedures".

It was so agreed.

89. Mr. Sreenivasa RAO drew attention to the statement in the last sentence that "the principles covered by the first six articles were summarized in paragraph 38 of the report". Since the report in question, i.e. the Special Rapporteur's sixth report, would not be before the Sixth Committee of the General Assembly, some elaboration was required.

90. Mr. TOMUSCHAT said that, if paragraph 38 of the sixth report was not unduly long, it could perhaps be reproduced in a footnote.

91. Mr. McCAFFREY (Special Rapporteur) proposed, as the simplest solution, that the last sentence of paragraph 62 be deleted.

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 69

Paragraphs 63 to 69 were adopted.

Paragraph 16 (concluded)*

92. Mr. EIRIKSSON (Rapporteur) submitted the following rewording for paragraph 16, which had been left in abeyance: "In his summing-up, the Special Rapporteur assured the Commission that, in submitting draft articles, it had always been his intention to remain within the framework-agreement approach."

93. Mr. PAWLAK said that he agreed to that reformulation.

The Rapporteur's amendment was adopted.

Paragraph 16, as amended, was adopted.

Section B, as amended, was adopted.

D. Points on which comments are invited (A/CN.4/L.449)

Paragraph 70

Paragraph 70 was adopted.

Section D was adopted.

94. Mr. EIRIKSSON (Rapporteur), further to a comment by Mr. RAZAFINDRALAMBO, said that in the final text of the report the footnotes would be in their proper places in all the language versions.

95. Mr. NJENGA, supported by Mr. KOROMA and Mr. Sreenivasa RAO, said that paragraph 70, just adopted, drew special attention to the draft articles contained in annex I, on implementation, submitted in the Special Rapporteur's sixth report. Actually, only some of those provisions had been referred to the Drafting Committee. Others had been withdrawn by the Special Rapporteur. It would be most unfortunate if the Sixth Committee were to be invited to discuss articles which had not been approved by the Commission.

96. Mr. McCAFFREY (Special Rapporteur) said that the text of paragraph 70 had been drafted in consultation with the Rapporteur. It was quite appropriate to ask the Sixth Committee for its comments on the draft articles in annex I, on implementation, because those articles would be considered by the Commission at its next session. As to the articles which the Commission had already adopted, comments by the Sixth Committee would not be useful at the current stage. Of course, when the first reading of the draft articles as a whole was completed, they would be referred to Governments for their comments and observations.

97. Mr. PAWLAK said that it was very appropriate to request the views of the Sixth Committee on the draft articles in question. After all, the General Assembly had repeatedly urged the Commission to request comments on specific points rather than general issues. What the Special Rapporteur had done was precisely to request comments on specific questions. He urged support for the Special Rapporteur and stressed that paragraph 70 should be retained as it stood.

98. Mr. CALERO RODRIGUES said that the General Assembly expected precisely requests for comments on specific issues. He could not understand the reluctance of some members of the Commission to act in accordance with the General Assembly's instructions. To the best of his knowledge, none of the draft articles in annex I had been withdrawn.

99. The CHAIRMAN pointed out that paragraph 70 had already been adopted without change. The views expressed by some members on its content would, of course, appear in the summary record of the meeting.

The meeting rose at 6.20 p.m.

* Resumed from the 2195th meeting, para. 52.

2199th MEETING

Wednesday, 18 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-second session (continued)

CHAPTER I. Organization of the session (A/CN.4/L.446)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

1. Mr. EIRIKSSON (Rapporteur) pointed out that a passage relating to draft article 17 would appear in another part of the report and proposed that an appropriate reference to it be added at the end of paragraph 11.

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraph 12

2. Mr. EIRIKSSON (Rapporteur) proposed that the reference to General Assembly resolution 44/39, at the end of the first sentence, be made more specific by adding the words "on the question of establishing an international criminal court or other international criminal trial mechanism".

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 18

Paragraphs 13 to 18 were adopted.

Chapter I of the draft report, as amended, was adopted.

CHAPTER VI. Relations between States and international organizations (second part of the topic) (A/CN.4/L.451)

A. Introduction

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

Paragraph 11

3. Mr. MAHIOU expressed surprise at a formulation which he found rather unusual. It was usual to begin

with the views of the Special Rapporteur, but in the present case, on the contrary, it was stated that the Special Rapporteur's fourth report had been "welcomed with satisfaction"—a judgment that was generally dispensed with—and paragraph 11 went on immediately to describe the views of members of the Commission. Furthermore, it was stated in the second sentence that "the report finally charted the right course for the topic". That was a peremptory, even exaggerated, assertion which it would be advisable to moderate.

4. Mr. EIRIKSSON (Rapporteur), replying to Mr. Mahiou, proposed that the first sentence of paragraph 11 be deleted. He would also try to make it clear that the opinion reported in the paragraph was that of a few members of the Commission or a small group of members, and not that of the whole Commission; that was all the more necessary because the following paragraphs stated contrary views.

5. Mr. SOLARI TUDELA said that, if paragraph 11 were redrafted in the manner indicated by the Rapporteur, he would like the idea of "right course" to be retained. Since it was the first time that the Commission had decided to refer draft articles on the topic to the Drafting Committee, that fact should not be omitted.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to revert to paragraph 11 when it had been redrafted.

It was so agreed.

Paragraphs 12 and 13

Paragraphs 12 and 13 were adopted.

Paragraph 14

7. Mr. MAHIOU pointed out that that long paragraph purported to describe, in succession, the opinion of "some members of the Commission and, in particular, the Special Rapporteur", then the views of the Commission itself and finally those of the General Assembly, with the result that one could not tell to whom the last four sentences should be attributed.

8. Mr. BENNOUNA said that he had the same doubts. As he saw it, paragraph 14 was intended to report the opinion of the Special Rapporteur. What troubled the reader was simply the reference in the first sentence to "some members of the Commission and, in particular, the Special Rapporteur".

9. Mr. BARBOZA said that he, too, had doubts about the content of paragraph 14, which was quite unusual.

10. Mr. EIRIKSSON (Rapporteur) said that all the arguments set out in paragraph 14 were homogeneous: they called for continued consideration of the topic. All the views mentioned had been put forward in the Commission's meetings and had contributed to the discussion. It would be inappropriate to say nothing of them. Perhaps the beginning of the paragraph could be reworded so as to introduce the text that followed.

11. The CHAIRMAN said that, if there were no objections, he would take it that the Commission

wished to take time for consideration and to revert to paragraph 14 when it had been redrafted.

It was so agreed.

Paragraphs 15 and 16

Paragraphs 15 and 16 were adopted.

Paragraph 17

12. After an exchange of views between Mr. EIRIKSSON (Rapporteur), Mr. BARBOZA and Mr. TOMUSCHAT on the use of the expression "with a universal vocation" to correspond to the French *à vocation universelle*, it was decided to ask the translation services to find a better formula.

Paragraph 17 was adopted subject to that reservation.

Paragraphs 18 to 23

Paragraphs 18 to 23 were adopted.

Paragraph 24

13. Mr. SOLARI TUDELA asked that the first sentence of the Spanish text be amended: the expression *miembro de frase* was not clear.

Paragraph 24 was adopted subject to that reservation.

Paragraphs 25 to 32

Paragraphs 25 to 32 were adopted.

Paragraph 33

14. Mr. TOMUSCHAT and Mr. GRAEFRATH pointed out that the second sentence ("In the report under consideration, he had submitted two separate articles . . .") was unclear and perhaps even incorrect, since it was not clear whether it referred to the Special Rapporteur's second or fourth report. That passage should be clarified.

Paragraph 33 was adopted subject to that reservation.

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

15. Mr. MAHIU said that the fifth sentence, which stated that "immunity from jurisdiction in the case of international organizations was granted to protect the interests of all the member States", appeared to confuse the interests of States members of international organizations with those of the organizations themselves, thereby disregarding the legal personality of the organizations.

16. Mr. RAZAFINDRALAMBO said that he interpreted that sentence to mean that, when the interests of an international organization were protected, those of its member States must necessarily be protected at the same time. He thought that the confusion arose from the phrase which followed the words "member States".

17. Mr. EIRIKSSON (Rapporteur) said that the sentence in question reflected a stand taken against any restriction of the immunity of international organizations. The intention was to draw a distinction between the restricted immunity granted to States and the absolute immunity enjoyed by international organizations.

18. Mr. TOMUSCHAT confirmed that that view had been expressed. The only problem was to whom it should be attributed.

19. Mr. FRANCIS said that there might perhaps be a problem of attribution, but the idea was clear, namely that the immunity accorded to international organizations was intended to protect wider interests than those of the member States taken individually.

20. Mr. SOLARI TUDELA said that he was one of the members who had made the observation in question.

21. Mr. MAHIU said that, if the intention was to defend the absolute immunity of international organizations, it seemed unwise to invoke the interests of the member States, which had only restricted immunity. The report should also indicate who had expressed the opinion recorded in the sixth sentence.

22. The CHAIRMAN said that the Rapporteur would amend the fifth and sixth sentences in consultation with the members concerned.

Paragraph 35 was adopted on that understanding.

Paragraphs 36 to 41

Paragraphs 36 to 41 were adopted.

Paragraph 42

23. Mr. MAHIU, supported by Mr. TOMUSCHAT, said that the last words of paragraph 42, "and could on no account be expropriated", were unnecessary and seemed to reflect some confusion about the concept of expropriation: by definition, public property could not be expropriated. He proposed that those words be deleted.

It was so agreed.

Paragraph 42, as amended, was adopted.

Paragraphs 43 and 44

Paragraphs 43 and 44 were adopted.

Paragraph 45

24. Mr. BENNOUNA asked that an effort be made to improve the drafting of the last sentence of the French text, which contained the phrases *d'accorder refuge à des cas justifiés* and *l'asile servait de garantie à un droit de l'homme fondamental*.

25. Mr. TOMUSCHAT proposed that the word "perhaps", in the last sentence, be deleted: if the draft articles were adopted by States, article 9 could certainly be so invoked.

It was so agreed.

26. The CHAIRMAN said that the Rapporteur would see that Mr. Bennouna's request was complied with.

Paragraph 45, as amended, was adopted on that understanding.

Paragraphs 46 to 51

Paragraphs 46 to 51 were adopted.

27. The CHAIRMAN thanked the Arabic-speaking and Russian-speaking members of the Commission for consenting to the Commission's considering document A/CN.4/L.451 although the Arabic and Russian versions had not yet been distributed.

CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/L.447 and Add.1 and 2 and Add.2/Corr.1 and Add.3)

28. The CHAIRMAN said that chapter II of the draft report would consist of sections A, B, C and D. With regard to section B, he pointed out that the text of subsection 3 contained in document A/CN.4/L.447/Add.3 corresponded to the text already adopted by the Commission on the question of draft article 17 (see 2198th meeting, paras. 1-6 and 52-67). As for section C, he pointed out that the text contained in document A/CN.4/L.447/Add.1 corresponded to the report of the Working Group on the question of the establishment of an international criminal jurisdiction adopted earlier by the Commission (see 2189th and 2192nd to 2194th meetings, and 2196th meeting, paras. 1-42).

29. He therefore invited the Commission to consider section A, section B, subsections 1 and 2, and section D of chapter II.

A. Introduction (A/CN.4/L.447)

Paragraphs 1 to 7

Paragraphs 1 to 7 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 8 to 70 (A/CN.4/L.447)

Paragraphs 8 to 15

Paragraphs 8 to 15 were adopted.

Paragraph 16

30. Mr. BARSEGOV proposed that, in the first sentence, the word "degrees" be replaced by "forms".

It was so agreed.

31. Mr. TOMUSCHAT said that the word "subsidiary", in the second sentence, was not an accurate translation of the French word *accessoire*. He proposed that it be replaced by the word "accessory".

It was so agreed.

Paragraph 16, as amended, was adopted.

Paragraph 17

32. Mr. McCAFFREY said that English legal usage required the deletion of the article "an" which appeared twice before the word "attempted" in the second sentence.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraphs 18 to 22

Paragraphs 18 to 22 were adopted.

Paragraph 23

33. Mr. MAHIOU said that the beginning of the French text would be more correct if amended to read: *Se posait aussi, comme l'avait dit le Rapporteur spécial...*

It was so agreed.

Paragraph 23, as amended in the French text, was adopted.

Paragraph 24

Paragraph 24 was adopted.

Paragraph 25

34. Mr. TOMUSCHAT said he was not sure that the laws of the Federal Republic of Germany recognized, as was stated in the last sentence of paragraph 25, that giving assistance after the commission of an offence could, in certain circumstances, constitute complicity. He suggested that he verify that point and inform the Rapporteur, who could amend the sentence if necessary.

Paragraph 25 was adopted subject to that reservation.

Paragraph 26

35. Mr. McCAFFREY said that he found paragraph 26 too short, considering the arguments advanced during the discussion, especially as the answer given in the following paragraphs was much more extensive. When speaking of a material definition of the perpetrator, he had not been thinking of a general definition, but of a definition for each of the crimes considered.

36. Mr. BENNOUNA said that he had taken the same position during the debate, stressing that, in the article on aggression, the Commission had tried to define the perpetrator for each act of aggression.

37. Mr. GRAEFRATH said that he, too, recalled having raised the question; but he was not certain that the problem could be solved simply by adding the words "for each crime considered" at the end of the first sentence of paragraph 26, since the Drafting Committee had considered including a general provision defining the perpetrator of crimes against peace. He therefore proposed the addition, at the end of the first sentence, of the following phrase: "taking into consideration specific elements of particular crimes".

It was so agreed.

Paragraph 26, as amended, was adopted.

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

38. Mr. McCAFFREY stressed that the draft code dealt with three different categories of crimes—war crimes, crimes against peace and crimes against humanity—and suggested that the last part of the first sentence be amended accordingly.

39. After a discussion in which Mr. BENNOUNA, Mr. MAHIOU, Mr. RAZAFINDRALAMBO, Mr. THIAM (Special Rapporteur) and Mr. EIRIKSSON (Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the last part of the first sentence of paragraph 28 to read: "... were easier to apply to war crimes than to crimes against peace or crimes against humanity".

It was so agreed.

Paragraph 28, as amended, was adopted.

Paragraphs 29 and 30

Paragraphs 29 and 30 were adopted.

Paragraph 31

40. After an exchange of views in which Mr. EIRIKSSON (Rapporteur) and Mr. McCAFFREY

took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the second sentence to read: "Other members expressed serious doubts on that point or requested clarification on particular points."

It was so agreed.

Paragraph 31, as amended, was adopted.

Paragraphs 32 to 34

Paragraphs 32 to 34 were adopted.

Paragraph 35

41. Mr. EIRIKSSON (Rapporteur) said that, at the end of the last sentence, the word "or" should be replaced by "and".

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 39

Paragraphs 36 to 39 were adopted.

Paragraph 40

42. Mr. BEESLEY proposed the addition, at the end of the paragraph, of the following sentence, summarizing what he had said on the matter during the discussion:

"One member suggested that the creation or institution of the crime of conspiracy in national penal systems seemed to have evolved as a matter of public policy, due to the seriousness or frequency of the underlying crime or the difficulty of taking criminal proceedings against individual perpetrators, and the same process might be envisaged on the international plane."

It was so agreed.

Paragraph 40, as amended, was adopted.

Paragraphs 41 to 45

Paragraphs 41 to 45 were adopted.

Paragraph 46

43. Mr. EIRIKSSON (Rapporteur) said that the words "intentionally, knowingly or unthinkingly", in the first sentence, seemed ambiguous. He suggested that he ascertain exactly what had been said by the member of the Commission concerned.

Paragraph 46 was adopted subject to that reservation.

Paragraphs 47 to 54

Paragraphs 47 to 54 were adopted.

Paragraph 55

44. Mr. EIRIKSSON (Rapporteur) proposed that the word "even", in the first sentence, be deleted.

It was so agreed.

Paragraph 55, as amended, was adopted.

Paragraph 56

45. Mr. McCAFFREY said that he did not understand the meaning of the second sentence.

46. Mr. EIRIKSSON (Rapporteur) proposed that the sentence be amended to read: "But it would also be unwise to specify as a general rule that attempt would be punishable in respect of all crimes against the peace and security of mankind."

It was so agreed.

Paragraph 56, as amended, was adopted.

Paragraphs 57 to 59

Paragraphs 57 to 59 were adopted.

Paragraph 60

47. Mr. MAHIU proposed that the last part of paragraph 60 be amended to read: "... and which, in their view, should certainly be included in the code".

It was so agreed.

Paragraph 60, as amended, was adopted.

Paragraph 61

Paragraph 61 was adopted.

Paragraph 62

48. Mr. EIRIKSSON (Rapporteur) suggested that the word "State" be deleted from the second and fifth sentences.

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraph 63

49. Mr. GRAEFRATH, supported by Mr. PAWLAK, proposed that paragraph 63 be deleted.

It was so agreed.

Paragraph 64

50. Mr. KOROMA proposed that, in the first sentence, the words "from them" after the words "it was not clear" be deleted.

It was so agreed.

Paragraph 64, as amended, was adopted.

Paragraph 65

51. Mr. MAHIU suggested that the adjective "conceivable" be deleted.

It was so agreed.

Paragraph 65, as amended, was adopted.

Paragraph 66

52. Mr. KOROMA suggested that the word "highest", at the end of the second sentence, be deleted.

It was so agreed.

Paragraph 66, as amended, was adopted.

Paragraphs 67 to 70

Paragraphs 67 to 70 were adopted.

53. Mr. FRANCIS said that he wished to express strong reservations on the idea of treating traffic in narcotic drugs as a crime under the draft code only when it was organized on a large scale.

CHAPTER IV. The law of the non-navigational uses of international watercourses (continued) (A/CN.4/L.449 and Add.1 and 2)

C. Draft articles on the law of the non-navigational uses of international watercourses (A/CN.4/L.449/Add.1 and 2)

SUBSECTION 1 (Texts of the draft articles provisionally adopted so far by the Commission) (A/CN.4/L.449/Add.1)

Section C.1 was adopted.

SUBSECTION 2 (Texts of draft articles 22 to 27, with commentaries thereto, provisionally adopted by the Commission at its forty-second session) (A/CN.4/L.449/Add.1 and 2)

Commentary to article 22 (Protection and preservation of ecosystems)
Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

54. Mr. McCAFFREY (Special Rapporteur) suggested that consideration of paragraph (3) be deferred until he was able to submit an amendment in response to an observation made to him by a member of the Commission.

It was so agreed.

Paragraph (4)

55. Mr. EIRIKSSON (Rapporteur) proposed that the words "of course", in the seventh sentence, be deleted.

Paragraph (4) was approved.

Paragraph (5)

56. Mr. BENNOUNA suggested that paragraphs (5) to (9), which only rehearsed State practice, should be deleted, especially as the sources cited there could be found in the relevant report of the Special Rapporteur.

57. Mr. MAHIOU, while recognizing the usefulness of the citations in question, doubted whether they should be retained.

58. Mr. McCAFFREY (Special Rapporteur) said that it was the Commission's tradition, going back to the early 1950s, to support its draft articles with authoritative sources; otherwise it would give the impression that it elaborated them starting from nothing. It was important that draft articles be firmly based on State practice. Moreover, he had only followed that practice in regard to article 22 and had drafted much less extensive commentaries to the other articles. He had also tried to condense, as much as possible, the citations reproduced in paragraphs (5) to (9), which in his report took up some 50 pages. In any case, it was a question of principle which involved the Commission's reputation.

59. The CHAIRMAN drew attention to article 20 of the Commission's statute, which provided that the commentaries to its articles must contain "adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine".

60. Mr. TOMUSCHAT said that he shared the views of the Special Rapporteur and the Chairman and believed that the commentaries to articles were not only useful, but indispensable for the agents of Governments and members of universities who had to consult them.

61. Mr. AL-QAYSI added that, if the citations in paragraphs (5) to (9) were deleted, the reader would have to await publication of the *Yearbook* containing the Special Rapporteur's report to find them again.

62. Mr. EIRIKSSON (Rapporteur) suggested that paragraphs (5) to (9) could be retained, but with some of the citations transferred to footnotes.

63. Mr. PAWLAK opposed the deletion of paragraphs (5) to (9), which would enable the Commission to convince the General Assembly that its work rested on solid foundations.

64. Mr. KOROMA said he, too, thought that the citations should be retained.

65. Mr. ROUCOUNAS observed that some reports were extremely rich, while others were rather meagre. Mr. McCaffrey's reports contained valuable elements, of which the Commission would be wrong to deprive itself, especially as, under Article 38 of the Statute of the ICJ, the Commission's work could serve as a subsidiary means for the determination of rules of law. The articles adopted by the Commission should therefore be accompanied by detailed commentaries.

66. Mr. JACOVIDES said that he was opposed to the deletion of paragraphs (5) to (9).

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to retain paragraphs (5) to (9) of the commentary to article 22.

It was so agreed.

The meeting rose at 1.15 p.m.

2200th MEETING

Wednesday, 18 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-second session (*continued*)

CHAPTER IV. *The law of the non-navigational uses of international watercourses* (*continued*) (A/CN.4/L.449 and Add.1 and 2)

C. *Draft articles on the law of the non-navigational uses of international watercourses* (*continued*) (A/CN.4/L.449/Add.1 and 2)

SUBSECTION 2 (Texts of draft articles 22 to 27, with commentaries thereto, provisionally adopted by the Commission at its forty-second session (*continued*)) (A/CN.4/L.449/Add.1 and 2)

Commentary to article 22 (Protection and preservation of ecosystems) (*continued*)

Paragraph (3) (*concluded*)

1. Mr. McCAFFREY (Special Rapporteur) recalled that a point made by a member of the Commission concerning paragraph (3) had been left in abeyance. To meet that point, he suggested that the words "the threat of harm", in the third sentence, be amended to read: "a significant threat of harm".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were approved.

Paragraph (8)

2. Mr. EIRIKSSON (Rapporteur) suggested that the passage dealing with the Act of Asunción should be compressed so as to eliminate some repetition.

3. Mr. McCAFFREY (Special Rapporteur) proposed that paragraph (8) be approved on the understanding that he would make the necessary changes in wording, in agreement with the Rapporteur, without altering the substance.

Paragraph (8) was approved on that understanding.

Paragraph (9)

4. Mr. EIRIKSSON (Rapporteur) suggested that some of the references in paragraph (9) could be conveniently moved to the footnotes.

5. The CHAIRMAN said that it could be left to the Secretariat to make such changes, if appropriate.

Paragraph (9) was approved.

The commentary to article 22, as amended, was approved.

Commentary to article 23 (Prevention, reduction and control of pollution)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were approved.

Paragraph (7)

6. Mr. BARSEGOV criticized the third sentence, which suggested approval for stringent measures and disapproval for less stringent measures, thus adopting a purely quantitative test. The proper test was that of adequacy—whether the measures adopted corresponded to the requirements. One State might adopt very stringent measures which were not in keeping with the real needs, while less stringent measures adopted by another State might be appropriate.

7. Mr. McCAFFREY (Special Rapporteur) pointed out that the sentence in question, which began with the words "For example", was not intended to make a categorical statement or to express any value judgment. It simply offered a hypothetical example to show that one State's efforts based on stringent standards could be frustrated by the fact that another watercourse State adopted lower standards.

8. Mr. BEESLEY proposed that the difficulty be overcome by inserting the words "if they prove inadequate" before the words "may frustrate".

It was so agreed.

9. Mr. Sreenivasa RAO said that the statement in the penultimate sentence that the entire process of harmonization "will necessarily involve consensus among watercourse States" did not adequately reflect the process of harmonization.

10. Mr. McCAFFREY (Special Rapporteur) proposed that that point be met by amending the words "necessarily involve consensus" to read: "necessarily depend on consensus".

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

11. Mr. TOMUSCHAT drew attention to the reference in footnote 61 to the Council of Europe's draft European convention for the protection of international watercourses against pollution. Actually, the Council of Europe had made two attempts to draft such a convention, the first in 1965 and the second in 1974. The reference in the footnote was to the 1974 draft, which had still not been adopted. In fact, since no action had been taken on it for 15 years, it might well be considered as rejected, and such a document could not be used as a source in support of article 23. He suggested that the reference to that draft convention be deleted.

12. Mr. BENNOUNA, referring to the concluding words of the third sentence of paragraph (8), "has been followed in a number of recent agreements", pointed out that footnote 61 listed a number of different texts including documents formulated by the Institute of International Law and the International Law Association. He would suggest that the words "recent agreements" be replaced by "agreements and international documents". The adjective "recent" was not really appropriate, since some of the documents mentioned dated back to 1972 and 1974.

13. Mr. SOLARI TUDELA opposed the deletion of the reference to the Council of Europe's draft European convention. He could not accept the idea that a draft convention should be regarded as rejected because it had been under consideration for a long time.

14. Mr. Sreenivasa RAO said that the term "agreements" should be used only for agreements between States.

15. Mr. NJENGA supported the inclusion of the reference to the Council of Europe's draft European convention. That reference was helpful as indicating one of several items which formed part of the work done on the subject. He suggested that footnote 61 be left unchanged and that the concluding words of the third sentence, "recent agreements", be replaced by "agreements and other instruments".

16. Mr. BARSEGOV said that an issue of principle was involved. It was essential for the Commission to be strict with regard to sources. A draft which was merely a second attempt to formulate a text for a convention could not be cited as a source in the same way as a convention signed by States. He would prefer the reference to the draft European convention to be dropped; otherwise, it should be explained that it had not been adopted.

17. Mr. McCAFFREY (Special Rapporteur) proposed that the concluding words of the third sentence of paragraph (8) be amended to read: "international agreements and other instruments".

18. He further proposed that footnote 61 be divided into three paragraphs. The first would consist of the first two references ending with the words "note 59". That paragraph would contain the references to two international treaties in force: the 1976 Agreement for

the Protection of the Rhine against Chemical Pollution and the 1978 Agreement between Canada and the United States of America on Great Lakes water quality.

19. The second paragraph would start with the words "See also", followed by the passage beginning with the reference to the Council of Europe's draft European convention and ending with the reference to ILA's 1982 Montreal Rules. That paragraph would contain the references to the material of learned societies concerned with international law, in addition to the Council of Europe's draft convention. The words "See also" which appeared after "para. 376" at the end of the first reference could perhaps be dropped.

20. The third paragraph, starting with the words "The same approach", would consist of the remainder of the present text, containing the references to instruments dealing with marine pollution.

The Special Rapporteur's amendments were adopted.

Paragraph (8), as amended, was approved.

Paragraph (9)

21. Mr. BENNOUNA proposed that, in the first sentence, the word "further" be replaced by the words "in detail".

22. Mr. PAWLAK proposed that the first sentence be deleted, and that to accommodate Mr. Bennouna's point the word "further" or the word "additional" be inserted before the word "survey" at the beginning of the second sentence. He further proposed that the words "supporting article 23" be added after the words "State practice" in the second sentence.

23. Mr. McCAFFREY (Special Rapporteur) said that he had no difficulty with the spirit of those amendments, but would suggest that the word to be added before the word "survey" should be "detailed".

Mr. Pawlak's amendments were adopted with the modification proposed by the Special Rapporteur.

24. Mr. Sreenivasa RAO said that he was not happy with the reference in the last sentence to the "minimum" necessary for the protection of watercourse States against pollution. In his view, it would be counter-productive to try to determine the minimum or maximum in that context. He therefore proposed that the sentence be deleted.

25. Mr. PAWLAK proposed that Mr. Sreenivasa Rao's point be met by deleting the words "the minimum".

It was so agreed.

26. Mr. EIRIKSSON (Rapporteur) suggested that, as a consequence of the deletion of the first sentence of paragraph (9) of the commentary to article 23, the third sentence of paragraph (9) of the commentary to article 22 should be amended to read: "A number of these authorities may be mentioned for the purpose of illustration."

It was so agreed.

27. Mr. BENNOUNA noted that the sentence to which footnote 65 related read: "The work of international organizations and groups of experts in this field

has been particularly rich." But that footnote did not refer to the work of international organizations, unless the Institute of International Law and the International Law Association could be classified as such.

28. Mr. McCAFFREY (Special Rapporteur) said that, in the terminology used by the United Nations—which he had followed—those two bodies were classified as international non-governmental organizations. Perhaps the reference to international organizations in the sentence in question could be replaced by a reference to international non-governmental organizations, although the latter expression was somewhat unwieldy.

29. Mr. TOMUSCHAT said that the organizations in question could perhaps be referred to as private international bodies or by some other suitable term showing that they were institutions that promoted international law.

30. Mr. BENNOUNA, supported by Mr. RAZAFINDRALAMBO, proposed the expression *organismes scientifiques internationaux*.

31. Mr. McCAFFREY (Special Rapporteur) pointed out that there was no suitable equivalent for that expression in English.

32. Following a brief exchange of views in which Mr. BEESLEY, Mr. KOROMA, Mr. NJENGA, Mr. PAWLAK and Mr. SOLARI TUDELA took part, the CHAIRMAN pointed out that the 1963 report by the Secretary-General on "Legal problems relating to the utilization and use of international rivers"¹ contained a part IV entitled "General Survey of studies made or being made by non-governmental organizations concerned with international law", in which the Institute of International Law and the International Law Association were listed. He therefore suggested that, in the fourth sentence of paragraph (9), those two organizations should be referred to as "international non-governmental organizations concerned with international law", rather than as "international organizations".

It was so agreed.

Paragraph (9), as amended, was approved.

The commentary to article 23, as amended, was approved.

CHAPTER VIII. Other decisions and conclusions of the Commission (A/CN.4/L.453)

33. Mr. EIRIKSSON (Rapporteur) explained that the Planning Group had decided to include, after paragraph 14, a short new paragraph on the proposals for the organization of the Commission's work of the Working Group on the long-term programme of work. The new paragraph, which was not yet ready, would mention the possibility of the Commission holding split sessions and meeting at regular intervals away from Geneva.

34. Mr. PELLET observed that the Working Group had also discussed whether the Commission should hold shorter sessions at different times.

¹ Yearbook . . . 1974, vol. II (Part Two), p. 33, document A/5409.

35. The CHAIRMAN said that, since the Planning Group had not discussed the possibility of reducing the length of the session, that possibility could not be mentioned in the Commission's report. In view of the financial difficulties of the Organization he urged members to be cautious. If the Commission's report to the General Assembly mentioned the possibility of shorter sessions, it might become impossible to revert to their former length.

36. Mr. AL-QAYSI said that the question of shorter sessions had indeed been mentioned in the Planning Group, in the context of the Commission's procedures and working methods.

37. The CHAIRMAN proposed that the Commission examine chapter VIII paragraph by paragraph.

It was so agreed.

A. Programme, procedures and working methods of the Commission, and its documentation

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

38. Mr. PAWLAK proposed that the beginning of paragraph 2 be amended to read: "The Commission decided. . .".

It was so agreed.

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 6

Paragraph 3 to 6 were adopted.

Paragraph 7

39. Mr. TOMUSCHAT drew attention to the statement in the first sentence that the Commission intended to complete the second reading of the draft articles on jurisdictional immunities of States and their property "at the current session". According to paragraph 732 of its report on its previous session,² the Commission's intention had been to complete the second reading "during the . . . term of office" of its current members, i.e. by 1991. That report went on to state (para. 733)³ that the Commission intended "to make every effort" to complete the second reading in 1990, not that it undertook to do so.

40. Mr. PAWLAK proposed amending the last sentence of paragraph 7 to begin: "The Commission plans to finalize the remaining 12 draft articles at its next session. . .".

41. Mr. EIRIKSSON (Rapporteur) said that, for the sake of consistency with the previous year's report, the Commission should refer to its intention of trying to complete the second reading at the current session.

42. The CHAIRMAN said that the Commission's intention had been to complete the second reading of the draft articles by the end of the five-year term of office of its current members. The first sentence of paragraph 7 should therefore end: ". . . during the term of office of its current members".

43. Mr. AL-QAYSI said that the first sentence of paragraph 7 merely reflected the statement in paragraph 733 of the previous year's report; there was no reason to alter it because the Commission had completed the second reading of only 16 of the draft articles during its current session. That would be inadvisable.

44. Mr. GRAEFRATH said he agreed with Mr. Tomuschat that the Commission's intention had been to complete the second reading of the draft articles during the term of office of its current members. He supported the amendments to the first and last sentences proposed by the Chairman and Mr. Pawlak.

45. Mr. TOMUSCHAT emphasized that the Commission had not fallen behind, since it was still adhering to its basic programme of work as described in paragraphs 732 and 733 of the previous year's report.

46. The CHAIRMAN suggested that paragraph 7 be redrafted by the Rapporteur and the members of the Commission concerned with the wording and that the Commission revert to it in due course.

It was so agreed.

Paragraph 8

47. Mr. PAWLAK said that it was out of the question for the Commission to complete by 1991 the first reading of the draft articles on both of the topics mentioned. It should state that it would do so "in 1991" or "at its forty-third session".

48. Mr. RAZAFINDRALAMBO said that paragraph 8 should begin with the words: "The Commission also expressed the intention . . .", the beginning of the sentence being deleted.

49. Mr. EIRIKSSON (Rapporteur) said that he could accept both of those amendments.

The amendments by Mr. Pawlak and Mr. Razafindralambo were adopted.

Paragraph 8, as amended, was adopted.

Paragraph 9

50. Mr. PAWLAK proposed the deletion of the last part of the first sentence, from the words "subject of course to the possibility . . .". The word "substantial", in the second sentence, should also be deleted.

51. Mr. PELLET said that, in the first sentence of the French text, the phrase *qui seront composées des chapitres* was incorrect and should be replaced by *qui constitueront les chapitres*.

The amendments by Mr. Pawlak and Mr. Pellet were adopted.

Paragraph 9, as amended, was adopted.

Paragraph 10

52. The CHAIRMAN suggested replacing the words "by 1991" by "at its forty-third session".

It was so agreed.

Paragraph 10, as amended, was adopted.

Paragraph 11

Paragraph 11 was adopted.

² Yearbook . . . 1989, vol. II (Part Two), p. 137.

³ Ibid.

Paragraph 12

53. Mr. TOMUSCHAT, referring to paragraph 5 of footnote 1, suggested that the words “legal aspects of disarmament” be replaced by the word “disarmament”, and that the quotation marks be deleted.

54. Mr. EIRIKSSON (Rapporteur) explained that the reference, at the end of paragraph 6 of footnote 1, to a paper “incorporated in the present report” meant the report of the Working Group on the question of the establishment of an international criminal jurisdiction, which was to appear in chapter II of the Commission’s report.

55. Mr. PELLET, referring to paragraph 8 of footnote 1, pointed out that the Commission was not a main organ, but a subsidiary organ, of the General Assembly.

56. Mr. GRAEFRATH said it had been suggested in the Planning Group that it would be better not to refer to the Commission’s role in fulfilling the objectives of the Decade of International Law.

57. Mr. EIRIKSSON (Rapporteur) explained that the purpose of including, in footnote 1, various proposals by the Working Group on the Commission’s long-term programme of work had been to enable the Commission to decide whether to include those proposals in its report.

58. Mr. TOMUSCHAT suggested that only the first sentence of paragraph 8 of footnote 1 be retained. The Commission should not give the impression of having no initiative.

59. Mr. BEESLEY asked whether it had been decided to include the entire report of the Working Group on the long-term programme of work in the Commission’s report.

60. Mr. NJENGA said he thought that footnote 1 should not be amended. The Working Group’s report had been submitted to the Planning Group, and the Commission should not foreclose the Planning Group’s decisions.

61. Mr. MAHIOU said that it had been decided to include the progress report of the Working Group as a footnote to the Commission’s report.

62. Mr. PAWLAK said that the Working Group would prefer the text of footnote 1 to remain unaltered.

63. Mr. AL-QAYSI asked the Rapporteur to explain the meaning of the expression “a new generation of human rights”, in paragraph 5 of footnote 1.

64. Mr. BARSEGOV said that that expression referred to the established concept of the rights of peoples, or collective rights. The meaning of the expression had not been discussed.

65. Mr. KOROMA said that the reference should be to “the fourth generation of human rights”. There should be no suggestion of a new category of human rights.

66. Mr. TOMUSCHAT said that the expression should read: “the third generation of human rights”, meaning the right to disarmament, the right to peace, etc. It was, of course, debatable whether the Commission should concern itself with that subject at all.

67. Mr. PAWLAK explained that he had coined the phrase “a new generation of human rights”, meaning the right to development, to peace, etc., and the rights of minorities. He could accept, instead, the expression “the third generation of human rights”.

68. Mr. MAHIOU said that he would prefer a standard formula such as *les nouveaux droits de l’homme* (“the new human rights”).

69. Mr. BARSEGOV said that he would prefer a reference to “collective rights”.

70. The CHAIRMAN proposed that the text of footnote 1 be left unaltered.

It was so agreed.

Paragraph 12 was adopted.

Paragraph 13

71. Mr. KOROMA proposed the addition of a new paragraph 13 *bis* to read as follows:

“One member proposed, for the consideration of the Commission at an appropriate stage, the topic ‘the international law of migration’”.

72. Mr. EIRIKSSON (Rapporteur) said that that suggestion should appear in the summary record of the meeting, but it would not be appropriate to include it in the Commission’s report.

73. Mr. BARBOZA said that Mr. Koroma’s proposal had not been taken up in the Commission and therefore could not be recorded in the report on the Commission’s work.

74. The CHAIRMAN suggested that Mr. Koroma introduce his proposal at the Commission’s next session.

75. Mr. AL-QAYSI said that, although he welcomed Mr. Koroma’s proposal, it could not be included in the report, because that would imply that the Commission had discussed the report of the Working Group on the long-term programme of work and taken decisions on it, whereas in paragraph 13 it was simply stated that the Commission had taken note of the report and that the Working Group would be given more time to formulate recommendations. He agreed with the Chairman that Mr. Koroma should put forward his proposal at the Commission’s forty-third session.

76. Mr. MAHIOU said that he agreed with Mr. Barboza and Mr. Al-Qaysi. The subject proposed by Mr. Koroma was an important one, however, and the proposal should be included in the summary record so that the Working Group could examine it in 1991.

77. Mr. KOROMA said he regretted that the Working Group on the long-term programme of work had not been expeditious in reporting to the plenary Commission. He had waited all through the forty-first session, in 1989, and through most of the current session, but when the report had finally arrived he had not been present. He was simply proposing a topic that he thought could be considered; he would not object if his proposal did not appear in the report, but he hoped that the Working Group would consider it at its next meeting.

78. Mr. MAHIU pointed out that the report of the Working Group had been ready on time, but the Planning Group had had no opportunity to examine it, owing to the full schedule of plenary and Drafting Committee meetings. When it had finally been discussed, Mr. Koroma had not been present.

79. The CHAIRMAN said that Mr. Koroma's views would be duly reported in the summary record of the meeting.

Paragraph 13 was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

80. Mr. GRAEFRATH, referring to footnote 2, said he had been under the impression that all of part 2 and part 3 of the draft articles on State responsibility were pending before the Drafting Committee.

81. Mr. EIRIKSSON (Rapporteur) said that footnote 2 could also refer to draft articles 1 to 5 and the annex of part 3 of the draft on State responsibility, which had been referred to the Drafting Committee during the term of the previous Special Rapporteur, in addition to draft articles 6 to 16 of part 2 and the new draft articles 6 to 10.

82. Mr. BARBOZA asked whether the Drafting Committee had before it draft articles 1 to 9 or 1 to 10 on international liability for injurious consequences arising out of acts not prohibited by international law.

83. The CHAIRMAN said he was under the impression that the first 10 articles on international liability had subsequently been revised and reduced to nine.

84. Mr. BARBOZA recalled that the Commission had referred the first 10 articles to the Drafting Committee in 1988, and the revised draft articles 1 to 9 in 1989.

85. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to revert to paragraph 15 after further consideration of footnote 2.

It was so agreed.

Paragraph 16

86. Mr. McCAFFREY suggested that the word "for" be inserted between the words "the goals it set" and "itself".

It was so agreed.

Paragraph 16, as amended, was adopted.

Paragraph 17

Paragraph 17 was adopted.

Paragraph 18

87. Mr. TOMUSCHAT said that the expression "with a view to", in the first sentence, was unclear and should be amended.

88. The CHAIRMAN suggested that it be left to the Rapporteur to adjust the text to take account of the point made by Mr. Tomuschat.

Paragraph 18 was adopted on that understanding.

Paragraphs 19 and 20

Paragraphs 19 and 20 were adopted.

B. Co-operation with other bodies

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Section B was adopted.

C. Date and place of the forty-third session

Paragraph 24

89. Mr. PELLET, supported by Mr. GRAEFRATH, suggested that paragraph 24 should indicate that the decision on the dates of the next session had been taken after difficult discussions.

90. Mr. AL-QAYSI suggested that either an expression such as "after long discussion" should be added after the words "The Commission agreed", or the reservations made should be recorded.

91. Mr. MAHIU said that he shared the reservations made, but did not think that they should be recorded in paragraph 24.

92. Mr. NJENGA said that he would prefer the reservations to appear in the summary record of the meeting. No dates could possibly meet with the approval of all members of the Commission.

93. Mr. SOLARI TUDELA said that he, too, had reservations on the dates of the session, which had constantly been moved forward from year to year. If the reservations were not recorded, the Secretariat would be unable to take the necessary measures to arrange later dates.

94. Mr. BEESLEY said that paragraph 24 should reflect the divergence of views. He suggested the wording: "The Commission agreed, subject to some reservations, that its next session . . .".

95. Mr. EIRIKSSON (Rapporteur) said that, unfortunately, expressing reservations would not have the slightest effect.

96. The CHAIRMAN suggested that paragraph 24 be adopted as it stood, and that the reservations of members be recorded in the summary record.

97. Mr. PELLET said that he was not attempting to reopen the discussion on the dates of the next session, but the report should describe the work of the Commission and should therefore contain a reference to the reservations made. Otherwise, there would be no way of knowing that such a problem had arisen.

98. Mr. BARSEGOV said that he agreed with Mr. Pellet. It was important to make clear that, after a long discussion, a decision had been taken on the dates despite the reservations expressed by many members of the Commission.

99. Mr. BARBOZA suggested leaving paragraph 24 as it stood and inserting a footnote to explain that several members of the Commission had been opposed to the dates selected, which they regarded as being too early.

100. Mr. NJENGA supported that suggestion. If a footnote were inserted, however, it must be well-balanced; for whatever dates were chosen, they would always be inconvenient to some members.

101. The CHAIRMAN said that he saw no point in amending paragraph 24. If members agreed, he could mention their reservations in his statement to the Sixth Committee of the General Assembly at its forty-fifth session. Perhaps the Sixth Committee could then find a way of solving the problem.

102. Mr. PELLET opposed the Chairman's proposal. He was not against the dates because they were inconvenient; he was opposed in principle to the way in which they were fixed. He agreed with Mr. Barboza's suggestion that a footnote be added, but thought that explaining why the particular dates chosen were objectionable might complicate matters considerably.

103. Mr. AL-QAYSI said that he agreed with Mr. Pellet. It was not just a question of convenience; more fundamental questions were at issue. Every year, the Commission was simply assigned an available slot. The same applied to the number of meetings.

104. Mr. EIRIKSSON (Rapporteur) said that a footnote would have to be quite long to cover all the points of view expressed. It would therefore be more appropriate for the Chairman to raise the issue in his statement to the Sixth Committee.

105. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 24, on the understanding that the reservations expressed would be recorded in the summary record of the meeting and that he would raise the matter in his statement to the Sixth Committee of the General Assembly.

Paragraph 24 was adopted on that understanding.

Section C was adopted.

The meeting rose at 6.15 p.m.

2201st MEETING

Thursday, 19 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-second session (continued)

CHAPTER VIII. *Other decisions and conclusions of the Commission* (continued) (A/CN.4/L.453)

D. Representation at the forty-fifth session of the General Assembly

Paragraph 25

Paragraph 25 was adopted.

Section D was adopted.

E. International Law Seminar

Paragraph 26

1. Mr. KOROMA, supported by Mr. JACOVIDES, Mr. TOMUSCHAT and Mr. BEESLEY, and by the CHAIRMAN speaking as a member of the Commission, said that the programme of the International Law Seminar should be drawn up in collaboration with the Commission's secretariat, so that the participants could derive maximum benefit from it. At its next session the Commission should consider the organization of the Seminar, with which it should be more closely associated. He also proposed that the words "young professors", in the second sentence, be replaced by "young academics".

2. Mr. EIRIKSSON (Rapporteur) said he understood that the Legal Counsel would consult members of the Commission by letter concerning the organization of the next Seminar.

3. Mr. PAWLAK said that he, too, was concerned about the organization of the Seminar and the subjects it covered. He thought that the Commission should be consulted in more detail on those two points and that the programme of the Seminar should reflect both the work of the Commission and current trends in international law.

4. Mr. RAZAFINDRALAMBO said that, when a member of the Commission was in Geneva at the time the committee selecting participants in the Seminar was sitting, he was invited to preside over that committee. That was how he had come to be its chairman in 1988. Thus there was already a link between the Commission and the Seminar.

Paragraph 26 was adopted.

Paragraphs 27 to 35

Paragraphs 27 to 35 were adopted.

Section E was adopted.

CHAPTER IV. *The law of the non-navigational uses of international watercourses* (continued) (A/CN.4/L.449 and Add.1 and 2)

C. *Draft articles on the law of the non-navigational uses of international watercourses* (continued) (A/CN.4/L.449/Add.1 and 2)

SUBSECTION 2 (Texts of draft articles 22 to 27, with commentaries thereto, provisionally adopted by the Commission at its forty-second session) (continued) (A/CN.4/L.449/Add.1 and 2)

Commentary to article 24 (Introduction of alien or new species)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

The commentary to article 24 was approved.

Commentary to article 25 (Protection and preservation of the marine environment)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

The commentary to article 25 was approved.

Commentary to article 26 (Prevention and mitigation of harmful conditions)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were approved.

The commentary to article 26 was approved.

Commentary to article 27 (Emergency situations)

Paragraph (1)

5. Mr. EIRIKSSON (Rapporteur) proposed that paragraph (1) be expanded by substituting the following text for the first sentence:

“Article 27 deals with the obligations of water-course States in responding to actual emergency situations that are related to international water-course[s] [systems]. It is to be contrasted with article 26, which concerns the prevention and mitigation of conditions that may be harmful to water-course States.”

6. Mr. McCAFFREY (Special Rapporteur) supported that amendment.

The Rapporteur’s amendment was adopted.

7. Mr. KOROMA, supported by Mr. BARSEGOV, said that the definition in paragraph 1 of article 27 concerned the whole of that article and should not be transferred to article 1, as suggested in the footnote.

8. Mr. NJENGA, agreeing, proposed that the footnote be deleted.

9. Mr. EIRIKSSON (Rapporteur) said that, since article 27 had been adopted as it stood, together with the footnote, when the texts proposed by the Drafting Committee had been considered, it would not be appropriate to make any changes.

10. Mr. McCAFFREY (Special Rapporteur) said that he had no strong views on the place for the definition of the term “emergency”; he thought that the matter should be decided later.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

11. Mr. NJENGA proposed that reference should also be made, at the end of paragraph (3), to the other international organizations concerned.

12. Mr. McCAFFREY (Special Rapporteur) said that he would finalize the text with Mr. Njenga.

Paragraph (3) was approved on that understanding.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were approved.

Paragraph (7)

13. Mr. PAWLAK proposed that the last two sentences be deleted.

14. After an exchange of views between Mr. McCAFFREY (Special Rapporteur), Mr. NJENGA, Mr. BARSEGOV, Mr. AL-QAYSI, Mr. FRANCIS and Mr. MAHIOU, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the last two sentences of paragraph (7).

It was so agreed.

Paragraph (7), as amended, was approved.

The commentary to article 27, as amended, was approved.

CHAPTER V. State responsibility (A/CN.4/L.450)

A. Introduction

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 7 and 8

Paragraphs 7 and 8 were adopted.

Paragraph 9

15. Mr. BENNOUNA proposed that the second sentence be amended to read: “He had examined three further consequences: reparation by equivalent, satisfaction and guarantees of non-repetition.”

16. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he agreed to that amendment.

Mr. Bennouna’s amendment was adopted.

17. Mr. BARSEGOV noted that there was a reference in the first sentence to “an internationally wrongful act”. Such acts could be either crimes or delicts, and in the present case the Commission was dealing only with delicts. The wording should be more precise.

18. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the whole chapter would refer to “internationally wrongful acts”. To meet Mr. Barsegov’s point it would suffice to introduce an explanation into the first sentence of paragraph 9 by referring to “an internationally wrongful act (delict)”, on the understanding that that explanation also applied to the remainder of the chapter.

It was so agreed.

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Paragraph 11

19. Mr. PELLET said it should be made clear that paragraph 11 summarized the views of the Special Rapporteur and not those of the Commission. He therefore proposed that it start with the words: “The Special Rapporteur stated that . . .”.

It was so agreed.

20. Mr. BENNOUNA, supported by Mr. BEESLEY and Mr. RAZAFINDRALAMBO, said that he was not satisfied with the expression “legal sphere”, as used at the end of the second sentence.

21. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that that expression be replaced by “subjective right”, an expression known to Italian, German and French law.

22. Mr. TOMUSCHAT, noting that that expression already appeared in paragraph 13, proposed that it appear in quotation marks in all languages.

The amendments by the Special Rapporteur and Mr. Tomuschat were adopted.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Paragraph 13

23. Mr. EIRIKSSON (Rapporteur) proposed that, in the penultimate sentence, the words “internationally wrongful act as a consequence of the”, “quality and quantity” and “(‘prejudice’)” be deleted.

It was so agreed.

Paragraph 13, as amended, was adopted.

Paragraph 14

24. Mr. PAWLAK said that he had difficulty in understanding why the words between brackets had been included in the first sentence. There seemed to be a contradiction.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the word “mostly” within those brackets be replaced by “frequently”.

It was so agreed.

26. Mr. EIRIKSSON (Rapporteur) proposed that the bracketed expression “in the broad sense explained”, in the second sentence, be deleted.

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraphs 15 and 16

Paragraphs 15 and 16 were adopted.

Paragraph 17

27. Mr. EIRIKSSON (Rapporteur) proposed a number of changes. The first sentence should be deleted. The beginning of the second sentence should be amended to read: “The Special Rapporteur stated that, in the area of primary rules . . .” and, at the end of that sentence, the words “obvious, relatively constant” should be deleted. In the third sentence, the words “and as frequently” should be deleted. In the fourth sentence, the word “either” should be inserted between the words “be” and “an”, and the words “as well as” should be replaced by the word “or”. Finally, in the last sentence, the words “in principle” and “ultimately” should be deleted, and the words “the rules” should be replaced by “any rules”.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraph 18

28. Mr. PELLET said that he was surprised to find the expression “metropolitan States” in the third sentence. He proposed that it be replaced by the words “former administering States”.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraphs 19 and 20

Paragraphs 19 and 20 were adopted.

Paragraph 21

29. Mr. PELLET, observing that he was among the members whose opinion was recorded in paragraph 21, said that he would prefer the words “To some extent”, at the beginning of the last sentence, to be deleted.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 22

30. Mr. RAZAFINDRALAMBO said he was surprised that the date of the decision in the “Rainbow Warrior” case was not mentioned. In other chapters of the report, the judgments and arbitral awards cited were given with the date on which they had been delivered.

31. Mr. PELLET, supported by Mr. MAHIOU, said that he was surprised by the use of the adjective “retributive”, in the first sentence. The word seemed to be appearing in the report for the first time, and it was difficult to see what it referred to.

32. Mr. ARANGIO-RUIZ (Special Rapporteur), agreeing that the decisions cited in the report should be accompanied by the dates on which they had been delivered, said that he was prepared to assist the Rapporteur in adding the necessary information. The word “retributive” had already been used, but he could agree to its being replaced by “punitive”.

Paragraph 22 was adopted subject to those amendments.

Paragraph 23

33. Mr. PELLET, referring to the French text, said that, in his view, the translation of the term “torts” by *responsabilité délictuelle* introduced a notion hitherto alien to the topic and might cause confusion. He proposed that the words *responsabilité délictuelle* be replaced by *responsabilité non contractuelle*.

34. Mr. TOMUSCHAT, noting that the expression *responsabilité non contractuelle* was used in article 215 of the Treaty of Rome, supported that proposal.

Mr. Pellet’s amendment was adopted.

35. Mr. BENNOUNA said that the word *ingérences*, in the sixth and seventh sentences of the French text, should be replaced by *atteintes*.

It was so agreed.

Paragraph 23, as amended in the French text, was adopted.

Paragraph 24

36. Mr. EIRIKSSON (Rapporteur) said that the word “concerns”, in the fourth sentence, should be replaced by “consequences”.

Paragraph 24, as amended, was adopted.

Paragraph 25

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the word “tribunals”, in the first sentence, should be replaced by “awards”.

Paragraph 25, as amended, was adopted.

Paragraphs 26 to 34

Paragraphs 26 to 34 were adopted.

Paragraph 35

38. Mr. EIRIKSSON (Rapporteur) proposed that, at the end of the fifth sentence, the word “all” should be inserted before the words “developing States”. In the French text, the expression *responsabilité délictuelle*

should, as in paragraph 23, be replaced by *responsabilité non contractuelle*.

It was so agreed.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 38

Paragraphs 36 to 38 were adopted.

Paragraph 39

39. Mr. EIRIKSSON (Rapporteur) proposed the following changes. In the first sentence, the words "as it was conceived" should be deleted. The second sentence should be deleted. In the third sentence, the words "he proposed" and "the provision of" should be deleted, and the words "any one or more or all such States" should be amended to read: "one or more of the injured States". Lastly, the end of the fourth sentence should be amended to read: "... affected a number of injured States in different ways."

It was so agreed.

Paragraph 39, as amended, was adopted.

Paragraph 40

Paragraph 40 was adopted.

Paragraph 41

40. Mr. EIRIKSSON (Rapporteur) proposed that the end of the first sentence, after the words "by article 8", the whole of the second sentence, and the end of the last sentence, after the words "Part Three", should be deleted.

It was so agreed.

Paragraph 41, as amended, was adopted.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

41. Mr. EIRIKSSON (Rapporteur) proposed that, after the first sentence, the rest of paragraph 44 should read as follows:

"In reply to the members who had made drafting suggestions, he stated that he was open to drafting improvements. That included the question whether the draft articles would be better formulated in terms of rights of the aggrieved State or of obligations of the offending State."

It was so agreed.

Paragraph 44, as amended, was adopted.

Paragraphs 45 to 48

Paragraphs 45 to 48 were adopted.

Paragraph 49

42. Mr. EIRIKSSON (Rapporteur) proposed the following changes. The fifth sentence should be amended to read: "In his view, equity was an implicit element of any rule or decision; and the same applied to reasonableness." In the eighth sentence, the words "under draft article 7" should be deleted.

It was so agreed.

Paragraph 49, as amended, was adopted.

Paragraph 49a

43. Mr. BENNOUNA said that he did not altogether understand the meaning of the third sentence.

44. Mr. ARANGIO-RUIZ (Special Rapporteur) explained that the members in question wished to say that, in the case of compensation for unlawful arrest or imprisonment, and for grief and indignity, arbitral awards were not uniform. To meet Mr. Bennouna's point, he proposed that the word "consistency" be replaced by "uniformity".

It was so agreed.

Paragraph 49a, as amended, was adopted.

Paragraph 49b

Paragraph 49b was adopted.

Paragraph 50

45. Mr. EIRIKSSON (Rapporteur) proposed the following changes. The first two sentences should be combined to read: "On the question of moral damage to private parties, the Special Rapporteur felt that the Commission should not neglect that important element of State responsibility, an element closely connected with respect for human rights." In the third sentence, the word "express" should be deleted. The last sentence should be amended to read: "As explained in the report, that would not be an appropriate object for satisfaction, a remedy which was appropriate only for moral/legal injury to the State."

It was so agreed.

Paragraph 50, as amended, was adopted.

Paragraph 51

46. Mr. ROUCOUNAS said that it would be advisable to verify the accuracy of the references given in footnote 18. The same applied to footnote 13 in paragraph 13.

47. The CHAIRMAN said that that would be done.

Paragraph 51 was adopted on that understanding.

Paragraph 52

48. Mr. EIRIKSSON (Rapporteur) proposed that the words "of the relevant problems", in the last sentence, be deleted.

It was so agreed.

Paragraph 52, as amended, was adopted.

Paragraph 53

49. After a brief exchange of views between Mr. PELLET and Mr. ARANGIO-RUIZ (Special Rapporteur), the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the last part of the last sentence, "where he believed the Court decided that compensation should be paid for *lucrum cessans*", but to retain footnote 20.

It was so agreed.

Paragraph 53, as amended, was adopted.

Paragraph 54

50. Mr. EIRIKSSON (Rapporteur) proposed that the words "for the reasons amply developed in the report", in the second sentence, be deleted.

It was so agreed.

Paragraph 54, as amended, was adopted.

Paragraph 55

Paragraph 55 was adopted.

Paragraph 56

51. After an exchange of views between Mr. BARSEGOV, Mr. GRAEFRATH, Mr. PELLET and Mr. ARANGIO-RUIZ (Special Rapporteur), the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the words "of injury to an unlawful act" after the word "proximity" in the ninth sentence.

It was so agreed.

Paragraph 56, as amended, was adopted.

Paragraph 57

52. Mr. GRAEFRATH, referring to the expression "uninterrupted causal link", said he believed that the doubts expressed during the discussion related not to the concept itself, but to the fact that the Special Rapporteur seemed to connect it with the words "however long". For the sake of accuracy, the words "however long" should be added, without quotation marks, after the words "uninterrupted causal link" in the second sentence.

It was so agreed.

Paragraph 57, as amended, was adopted.

Paragraphs 58 to 61

Paragraphs 58 to 61 were adopted.

Paragraph 62

53. Mr. EIRIKSSON (Rapporteur) proposed the following changes. The words "as a cause of exoneration or", in the first sentence, should be deleted. In the second sentence, the word "partly" should be deleted. The words "at the Drafting Committee stage", in the third sentence, should be deleted, and the third and fourth sentences should be combined to read: "He was ready, in any case, to consider different language and was equally open . . .".

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 71

Paragraphs 63 to 71 were adopted.

Paragraph 72

54. Mr. EIRIKSSON (Rapporteur) proposed that the second sentence be deleted.

It was so agreed.

Paragraph 72, as amended, was adopted.

The meeting rose at 1.05 p.m.

2202nd MEETING

Thursday, 19 July 1990, at 3.05 p.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr.

Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouнас, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-second session (*continued*)

CHAPTER V. *State responsibility* (concluded) (A/CN.4/L.450)

B. *Consideration of the topic at the present session* (*concluded*)

Paragraph 73

1. Mr. MCCAFFREY said that it was not clear from the first sentence whether satisfaction had been granted once, several times or often.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested inserting the word "frequently" between the words "had" and "been granted".

It was so agreed.

Paragraph 73, as amended, was adopted.

Paragraph 74

3. The CHAIRMAN said that the following changes were proposed. In the second sentence, the words "as amply explained in the report" should be deleted, and the end of the sentence should be amended to read: ". . . formulated (usually against weaker States) were offensive to the honour, dignity and prestige of the allegedly lawbreaking State." In the fourth sentence, the words "clearly" and "by way of reparation for internationally wrongful acts" should be deleted.

It was so agreed.

Paragraph 74, as amended, was adopted.

Paragraph 75

4. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the word "restitutive", in the first sentence, should be replaced by "retributive", a word with a negative connotation in English which was incorrectly translated in the French text by the word *rétributif*, which had a positive sense.

5. Mr. GRAEFRATH, referring to the last three sentences, asked whether reprisals were to be regarded as incompatible with sovereign equality.

6. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, unlike sanctions, reprisals or retortion, which were actions taken by the injured State *vis-à-vis* the offending State and which obviously implied the infliction of a sanction, none of the forms of satisfaction resorted to in the case under consideration involved direct action by an injured State *vis-à-vis* an offending State in the sense of inflicting direct punishment; instead, it was a matter of self-inflicted punishment at the request of the injured State. Perhaps new wording should be found to express that idea.

7. Mr. GRAEFRATH said that he was making another point: he was asking what incompatibility had to do with sovereign equality.

8. Mr. ARANGIO-RUIZ (Special Rapporteur) said that it might be clearer if the phrase "without involving a violation of the sovereign equality of States" were inserted at the end of paragraph 75. The point was that all forms of satisfaction were even less in violation of the sovereign equality of States than were reprisals and retaliation, which were themselves regarded as normal occurrences in international relations.

9. Mr. GRAEFRATH withdrew his remark and suggested leaving paragraph 75 as it stood.

Paragraph 75 was adopted.

Paragraph 76

10. Further to a comment by Mr. GRAEFRATH, Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that paragraph 76 should begin with the words "As to the choice of the form of satisfaction . . .".

It was so agreed.

Paragraph 76, as amended, was adopted.

Paragraph 77

11. Mr. GRAEFRATH wondered whether the phrase "the form of reparation in question" could be replaced by the word "satisfaction".

12. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would prefer to leave the phrase as it stood in order to remind the reader that, in a broad sense, satisfaction was only one form of reparation. As he had pointed out in his preliminary report, reparation could take the form of restitution, pecuniary compensation or satisfaction.

13. Mr. GRAEFRATH said that he was satisfied with that explanation.

Paragraph 77 was adopted.

Paragraphs 78 to 81

Paragraphs 78 to 81 were adopted.

Paragraph 82

14. Mr. PELLET said that the word *rétributive*, used in the second sentence of the French text and also in later paragraphs, must be changed, because it was too positive.

15. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that the original language of chapter V of the draft report was English, and it would therefore be necessary to find a more appropriate French equivalent of the word "retributive". The word *afflictif* in the French text was also incorrectly used.

16. Mr. MAHIU said that he agreed with the Special Rapporteur. It would be preferable to replace the word *rétributive* by *punitive* in the French text.

17. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in order to be perfectly clear, the reference to a "retributive function" in paragraph 82 and in preceding paragraphs could be changed to "retributive and punitive function".

18. Mr. MAHIU suggested placing the word *rétributive* in square brackets in the French text to indicate that it had caused a problem.

19. Mr. RAZAFINDRALAMBO said that he was opposed to the use of the term *afflictif*, because it had special connotations much stronger than the term *punitif*.

20. The CHAIRMAN suggested that the French-speaking members of the Commission should consult on the matter and inform the Secretariat of their conclusions regarding the best translation.

Paragraph 82 was adopted on that understanding.

Paragraph 83

21. Mr. PAWLAK said that the reference to the draft Code of Crimes against the Peace and Security of Mankind in the seventh sentence should be deleted, because the draft code had not yet been completed.

22. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he did not see why it was necessary to await the completion of the draft code before stating that it dealt with certain crimes that might be attributable to heads of State or Government. He did not understand why it was necessary to avoid the term "punitive" or why it should be considered offensive to sovereign States at a time when the Commission was codifying crimes by States, in article 19 of part I of the draft articles on State responsibility, and crimes by heads of State or Government. He was not maintaining that the draft code had been adopted.

Paragraph 83 was adopted.

Paragraph 84

23. Mr. PELLET said that the third sentence was somewhat ambiguous, for it stated that there was always a legal injury when a rule of international law was breached "and hence satisfaction would have to be granted for every single breach". He suggested that those words be replaced by the phrase "and it would result from that theory that satisfaction would have to be granted for every single breach".

It was so agreed.

Paragraph 84, as amended, was adopted.

Paragraph 85

Paragraph 85 was adopted with a minor drafting change.

Paragraph 86

Paragraph 86 was adopted.

Paragraph 87

24. Mr. PELLET, supported by Mr. BARSEGOV, proposed that the words "were two different types of remedy", in the last sentence, be replaced by "constituted two different consequences of failure to comply with an international obligation".

It was so agreed.

Paragraph 87, as amended, was adopted.

Paragraph 88

Paragraph 88 was adopted.

Paragraph 89

25. Mr. GRAEFRATH proposed that the last two sentences should form a separate paragraph.

It was so agreed.

Paragraph 89, as amended, was adopted.

Paragraph 90

Paragraph 90 was adopted.

Paragraph 91

Paragraph 91 was adopted with a minor drafting change.

Paragraphs 92 to 95

Paragraphs 92 to 95 were adopted.

Paragraph 96

26. Mr. PELLET said, by way of a general remark, that the Special Rapporteur gave fair coverage to his own position, but did not always reflect very fully the views of other members. More balanced reporting was essential on such a fundamental topic as State responsibility. The last sentence of paragraph 96 stated that a few members had expressed the hope that the issue of fault "would not be considered even on second reading of part 1 of the topic". One or two members might possibly have expressed such a hope, but the sentence did not reflect his own views.

27. Mr. ARANGIO-RUIZ (Special Rapporteur) explained that he had worked in co-operation with the Rapporteur in the task of summing up his own views and in doing justice to those of his colleagues. In no case had they unduly summarized the position of any member.

28. As to the last sentence of paragraph 96, he would point out that it reflected the views of several members, including, as he recalled, Mr. Barboza, Mr. Calero Rodrigues, Mr. Bennouna, Mr. Mahiou and Mr. Razafindralambo. He would, of course, be glad to incorporate an additional sentence to express Mr. Pellet's opinion.

29. Mr. MAHIOU said that the sentence in question was somewhat categorical in tone; the views expressed on the issue of fault had been less radical and it was therefore appropriate to qualify in some way the statement made in that sentence.

30. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he, too, had some reservations, since he was convinced that the issue of fault had not been treated adequately in part 1 of the draft articles. One possible solution might be to delete the last sentence.

31. Mr. PELLET said that the sentence in question should be retained, but a new one should be added, for he was sure that some members had expressed doubts as to the advisability of dealing with the issue of fault for the time being. He proposed a sentence along the following lines: "In any event, as far as part 2 of the draft is concerned, some members doubted the advisability of dealing with the issue of fault, at least until the Commission considers the consequences of international crimes."

32. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he could agree to the proposed sentence as an

expression of Mr. Pellet's views. He did not recall that other members had expressed the same opinion.

33. Mr. BARBOZA said that the last sentence of paragraph 96 accurately expressed his own views. He had, of course, no objection to the inclusion of a sentence to convey the views of Mr. Pellet.

34. Mr. PELLET agreed to amend the sentence he had proposed so as to replace the reference to "some members" by a reference to "one member".

35. Mr. ARANGIO-RUIZ (Special Rapporteur) expressed his concern at the fact that even one member should entertain doubts about whether a State which had committed a crime was to be regarded as being at fault or not.

36. Mr. BARSEGOV said that he shared the Special Rapporteur's opinion on the issue of fault. A different view was expressed in the last sentence of paragraph 96. Mr. Pellet's proposal embodied yet a third view, namely that the issue of fault should only be considered when the Commission came to examine the consequences of international crimes. With the insertion of that additional sentence, all three positions would be recorded in the report.

37. Mr. GRAEFRATH said that he, for one, was opposed to attributing criminal intent, fraud (*dolus*) or even negligence to a State.

38. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to add, at the end of paragraph 96, a new sentence along the lines proposed by Mr. Pellet.

It was so agreed.

Paragraph 96, as amended, was adopted.

Section B, as amended, was adopted.

C. Texts of the draft articles of part 2 provisionally adopted so far by the Commission

Paragraph 97

Paragraph 97 was adopted.

Section C was adopted.

Chapter V of the draft report, as amended, was adopted.

CHAPTER I. Organization of the session (concluded)* (A/CN.4/L.446)

39. Mr. EIRIKSSON (Rapporteur) recalled that the Commission had adopted chapter I of the draft report at the 2199th meeting. Following consultations, it was now proposed that the words "the very many complex", in the last sentence of paragraph 17, be replaced by the word "some". The sentence would then read: "At the conclusion of its discussion, the Commission decided to revert at its next session to some policy and technical issues raised in the sixth report."

It was so agreed.

CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (continued)* (A/CN.4/L.447 and Add.1 and 2 and Add.2/Corr.1 and Add.3)

* Resumed from the 2199th meeting.

B. Consideration of the topic at the present session (concluded)

Paragraphs 25, 46 and 62 (concluded) (A/CN.4/L.447)

40. Mr. EIRIKSSON (Rapporteur) proposed changes to three paragraphs adopted by the Commission at the 2199th meeting.

41. With regard to paragraph 25, Mr. Tomuschat (2199th meeting, para. 34) had questioned whether the statement in the last sentence concerning the legislation of the Federal Republic of Germany was correct. Following consultations, he proposed that the reference in that sentence to the German Democratic Republic and the Federal Republic of Germany be deleted.

42. With regard to paragraph 46, he recalled that the Commission had discussed the use of the word "unthinkingly" (*ibid.*, para. 43). Further to consultations with the member who had used that word, he proposed that the words "intentionally, knowingly or unthinkingly", in the first and second sentences, be deleted.

43. With regard to paragraph 62, it had been decided that the Commission's earlier decision (*ibid.*, para. 48) to delete the reference to the "State" aspect of the illicit traffic in narcotic drugs had been a mistake. He therefore proposed, following consultations with the member concerned, that the words "had both an internal and an international State aspect", in the second sentence, be replaced by "had a State aspect, either on an internal or an international plane". In the fifth sentence, the words "that internal or international State element was superfluous" should be replaced by "the State element was superfluous".

The Rapporteur's amendments were adopted.

Section B, as amended, was adopted.

CHAPTER IV. The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/L.449 and Add.1 and 2)**C. Draft articles on the law of the non-navigational uses of international watercourses (concluded) (A/CN.4/L.449/Add.1 and 2)**

SUBSECTION 2 (Texts of draft articles 22 to 27, with commentaries thereto, provisionally adopted by the Commission at its forty-second session) (concluded) (A/CN.4/L.449/Add.1 and 2)

*Commentary to article 22 (Protection and preservation of ecosystems) (concluded)**

Paragraph (8) (concluded)

44. Mr. EIRIKSSON (Rapporteur) recalled that it had been agreed that he should make certain changes to paragraph (8), approved at the 2200th meeting, in consultation with the Special Rapporteur. Accordingly, he proposed that the second and third sentences, and the beginning of the fourth sentence, be amended to read:

"The Act of Asunción, adopted by the Ministers of Foreign Affairs of the River Plate Basin States at their Fourth Meeting, in 1971, refers to the 'grave health problems arising from ecological relationships in the geographic area of the River Plate basin, which have an unfavourable impact on the social and economic development of the region', and notes that 'this health syndrome is related to the quality and quantity of the water resources'. The Act also mentions 'the need to control...'"

* Resumed from the 2200th meeting.

It was so agreed.

Commentary to article 27 (Emergency situations) (concluded)

Paragraph (7) (concluded)

45. Mr. EIRIKSSON (Rapporteur) proposed that the second sentence of paragraph (7), approved at the previous meeting, be replaced by the following text:

"For example, the establishment of effective warning systems may necessitate the involvement of other, non-watercourse States, as well as international organizations with competence in that particular field. In addition, the co-ordination of response efforts might be most effectively handled by a competent international organization set up by the States concerned."

It was so agreed.

Section C.2, as amended, was adopted.

Chapter IV of the draft report, as amended, was adopted.

CHAPTER VIII. Other decisions and conclusions of the Commission (concluded) (A/CN.4/L.453)**A. Programme, procedures and working methods of the Commission, and its documentation (concluded)***

Paragraph 7 (concluded)

46. Mr. EIRIKSSON (Rapporteur) drew attention to the following revised text of paragraph 7, which had been drafted in consultation with four members of the Commission:

"Under that programme of work, the Commission intended to complete, during the term of office if its current members, the second reading of the draft articles on jurisdictional immunities of States and their property. At its forty-first session, in 1989, the Commission expressed the intention to make every effort to complete the second reading at the current session. The Drafting Committee at the current session reviewed and provisionally adopted 16 of the draft articles provisionally adopted by the Commission on first reading. The Commission expects to submit to the General Assembly at its forty-sixth session the entire set of draft articles, thereby attaining its goal of concluding the second reading of the draft before the end of the term of office of its current members."

47. Mr. PAWLAK proposed that, in the third sentence of that text, the words "on second reading" should be inserted between "adopted" and "16".

It was so agreed.

48. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the revised text proposed for paragraph 7, as amended.

It was so agreed.

Paragraph 7, as amended, was adopted.

* Resumed from the 2200th meeting.

Paragraph 15 (*concluded*)

49. Mr. EIRIKSSON (Rapporteur) recalled that the Commission had discussed the possible inclusion in footnote 2 of a reference to all of the articles of parts 2 and 3 of the draft articles on State responsibility pending before the Drafting Committee. Mr. Graefrath, who had made the proposal concerned, agreed that such a reference was unnecessary. Accordingly, footnote 2 would remain unchanged.

Paragraph 15 was adopted.

New paragraph 14 *bis*

50. Mr. EIRIKSSON (Rapporteur) recalled that the Commission had discussed the inclusion of a new paragraph dealing with certain questions, including the possibility of holding split sessions (see 2200th meeting, para. 33). The proposed paragraph 14 *bis*, which would appear under the new heading "Methods of work", would read:

"The Commission continued to discuss various proposals for the most efficient organization of its annual sessions, including splitting the session into two sessions (to be convened alternately in New York and Geneva, for example) and holding special sessions outside its regular annual sessions (for instance for specific tasks such as meetings of the Drafting Committee). Further consideration of the suggestions for the next term of office of members would have to take into account the most efficient way to deal with the items on the Commission's agenda, as well as financial considerations."

51. Mr. JACOVIDES proposed that the word "sessions", before the words "(to be convened)" in the first sentence, should be deleted. He welcomed the ideas put forward in the new paragraph, which should be included in the report to pave the way for a fuller discussion in the Sixth Committee of the General Assembly.

52. Mr. AL-QAYSI said that he had no objection to the first sentence, but the second seemed to confuse the issues. The question of splitting sessions could not be seen in the context simply of financial considerations and of workload. Matters relating to the Commission's methods of work could not be decided by reference to two factors alone.

53. Mr. NJENGA said that it was unfair to introduce such a controversial issue at the end of the session, when many members of the Commission had already left Geneva. In saying that splitting the Commission's sessions would cause difficulties for members, he was speaking not for himself alone but also on behalf of some of his absent colleagues. He would therefore propose that, in order to show that the new paragraph did not reflect unanimous agreement, it should be amended by inserting the following sentence after the first sentence: "Some members referred to the difficulties that might arise in splitting the annual session and to the added financial implications."

54. Mr. EIRIKSSON (Rapporteur) pointed out that it had been agreed in the Planning Group to include such a paragraph in the Commission's report. Furthermore, he believed he had produced a balanced text. To meet Mr. Njenga's point, however, he thought that the

words "proposals by some members on" could be added after the word "including", in the first sentence.

55. Mr. ARANGIO-RUIZ said that he sympathized with Mr. Njenga's position, since split sessions would create considerable difficulty for him too; but Mr. Njenga's point was met by the Rapporteur's suggested addition, and particularly by the word "some", which automatically implied that other members did not like the idea. With regard to Mr. Jacovides's proposal, he considered that the words "into two sessions" should be replaced by "into two parts", which would obviate the need for different officers of the Bureau and different sets of conclusions.

56. Mr. AL-QAYSI said that the whole purpose of the new paragraph was to reflect a discussion that had actually taken place: as a matter of principle, the Sixth Committee could not be prevented from knowing the type of discussion in which the Commission and its Planning Group had become involved with regard to methods of work. In any event, the word "including" in the first sentence, made it clear that no unanimous decision was involved.

57. Mr. PELLET, agreeing with Mr. Arangio-Ruiz's proposal to replace the words "into two sessions" by "into two parts", further proposed that the words "organization of its annual sessions", in the first sentence, be replaced by "organization of its work". The text of the paragraph was balanced, and the Rapporteur's proposal was a reasonable one. If, however, Mr. Njenga wished to state the reasons why he opposed the idea of split sessions, then he (Mr. Pellet) would have to state the reasons why he supported it, and the discussion would be never-ending.

58. Mr. PAWLAK, agreeing with Mr. Pellet, said that he favoured split sessions. He proposed that, in the first sentence of the new paragraph, the words "by some members" should be added after "various proposals" and the words "devoted to fewer topics" after the words "into two parts" proposed by Mr. Arangio-Ruiz; and that, in the second sentence, the words "these suggestions" should be replaced by "these questions" and the words "and flexible" added after the word "efficient".

59. Mr. NJENGA said that he saw no reason for changing a system that had worked well for more than 40 years. The proposed paragraph was not balanced, in his view, and it gave the erroneous impression that there was a general trend in the Commission in favour of splitting the sessions. No such case had been made out. All he wanted was a short sentence, couched in neutral terms, that would accurately reflect the position of those members who opposed the idea.

60. The CHAIRMAN said that the matter was both delicate and complex. The Rapporteur had taken great pains to draft a suitable text. In his view, it was not biased, did not set out a firm conclusion and simply stated that some proposals had been made by members and would have to be discussed in the future. Mr. Pawlak had made some very reasonable proposals and the Commission might therefore wish to adopt the new paragraph 14 *bis* as amended by those proposals.

61. Mr. EIRIKSSON (Rapporteur) said that, while he agreed in general with the Chairman, he had one objection to Mr. Pawlak's proposals: he was unable to agree to the addition of the words "devoted to fewer topics", which were irrelevant. On the basis of the amendments suggested, he proposed that the new paragraph 14 *bis* should read as follows:

"The Commission continued to discuss various proposals for the most efficient organization of its work. These included proposals by some members to hold special sessions of the Commission outside its regular annual sessions (for instance for specific tasks such as meetings of the Drafting Committee) and to split the annual session into two parts (to be convened alternately in New York and Geneva, for example). Other members pointed to difficulties with respect to the various proposals made. Further consideration of these questions for the next term of office of members would have to take into account the most efficient and flexible way to deal with the items on the Commission's agenda, as well as financial considerations."

It was so agreed.

New paragraph 14 bis, as amended, was adopted.

Section A, as amended, was adopted.

Chapter VIII of the draft report, as amended, was adopted.

CHAPTER VII. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.452)

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 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

62. Mr. EIRIKSSON (Rapporteur) said that the words "very many", in the first sentence, should be replaced by "some".

Paragraph 8, as amended, was adopted.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

Paragraph 11

63. Mr. PELLET wondered if the phrase "A few members felt", in the first sentence, was correct. He thought that many members had expressed the point of view explained in paragraph 11.

64. Mr. BARBOZA (Special Rapporteur) said that the view in question had been expressed by not more than three members, including Mr. Beesley and Mr. Hayes.

Paragraph 11 was adopted.

Paragraph 12

65. Mr. BARSEGOV said it was unnecessary to mention that the same view had been expressed by members at previous sessions.

66. The CHAIRMAN agreed. The words "as they had already expressed at previous sessions", in the first sentence, should be deleted.

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraph 13

67. Mr. EIRIKSSON (Rapporteur) said that the words "Very few members" should be replaced by "A few members".

Paragraph 13, as amended, was adopted.

Paragraphs 14 to 18

Paragraphs 14 to 18 were adopted.

Paragraph 19

68. Mr. EIRIKSSON (Rapporteur) proposed that the first sentence be amended to begin: "In summarizing the debate, the Special Rapporteur noted that his intention in proposing a list of dangerous substances . . .". In the fourth sentence, the word "decide" should be replaced by "determine".

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

69. Mr. EIRIKSSON (Rapporteur) said that the word "very", in the first sentence, should be deleted.

70. Mr. McCAFFREY said that he was uncertain whether it was sufficiently clear, from the preceding paragraphs, that the reason why there had been few comments on article 1 was that it had already been amply commented on at previous sessions. If not, the first sentence could be amended to read: "There were few comments on article 1, in light of the fact that it had been discussed at previous sessions of the Commission." It was important to avoid giving the impression that the Commission was indifferent to article 1, which was a fundamental element of the draft.

71. Mr. BARBOZA (Special Rapporteur) pointed to the reference, at the end of paragraph 14, to articles 1 to 9, which were "now before the Drafting Committee". That made it sufficiently clear that the comments on article 1 had already been dealt with.

72. Mr. EIRIKSSON (Rapporteur) said that no substantive changes had been made to article 1.

73. Mr. McCAFFREY said that, in view of the Special Rapporteur's explanation, no further amendment was needed in the first sentence.

74. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete the word "very" in the first sentence of paragraph 21.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 28

Paragraphs 22 to 28 were adopted.

Paragraph 29

75. Mr. EIRIKSSON (Rapporteur) proposed that the word "feasibility", in the third sentence, be replaced by "acceptability".

It was so agreed.

Paragraph 29, as amended, was adopted.

Paragraphs 30 and 31

Paragraphs 30 and 31 were adopted.

Paragraph 32

76. Mr. PELLET said that the wording of the third sentence was too weak and should be tightened.

77. Mr. BARBOZA (Special Rapporteur) said that the questions about the possible role of international organizations had already been dealt with in at least two reports.

78. Mr. PELLET proposed that the following sentence be inserted after the second sentence: "Some speakers wondered about the existence of such competent international organizations."

79. The CHAIRMAN suggested that, subject to the replacement of the word "speakers" by "members", that amendment should be adopted.

It was so agreed.

Paragraph 32, as amended, was adopted.

Paragraph 33

80. Mr. BARBOZA (Special Rapporteur) pointed out that the last sentence should refer to article 1, not article 11.

81. Mr. PAWLAK asked who was the author of the statement, in the last sentence, that "the State of origin must reimburse the costs incurred by the affected State".

82. Mr. BARBOZA (Special Rapporteur) said that the statement referred to a provision of article 13 and could be attributed to himself as Special Rapporteur.

83. Mr. EIRIKSSON (Rapporteur) suggested amending the beginning of the first sentence to read: "The Special Rapporteur stated that article 13 was intended . . .", and the last sentence to read: "Under article 13, if the activity in question happened to be one of those covered by article 1, the State of origin must bear the costs incurred by the affected State."

84. Mr. PAWLAK suggested substituting the word "should" for "must" in the last sentence.

85. Mr. BARSEGOV queried the principle involved. Why should the State of origin have to bear costs incurred perhaps through a major accident? He urged the Special Rapporteur to rethink the point.

86. Mr. BARBOZA (Special Rapporteur) pointed out that the costs borne by the State of origin would be those incurred for the technical study, not those resulting from the accident itself. He had no intention of abandoning the principle enunciated in article 13.

87. The CHAIRMAN suggested that the two amendments proposed by the Rapporteur, with the modification proposed by Mr. Pawlak, be adopted.

It was so agreed.

Paragraph 33, as amended, was adopted.

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

88. Mr. AL-QAYSI, referring to the first sentence, "None of these articles was extensively discussed", asked which articles were meant.

89. Mr. BARBOZA (Special Rapporteur) explained that the articles in question were articles 13 to 16.

90. The CHAIRMAN suggested that the first sentence be amended to read: "Articles 13 to 16 were not extensively discussed."

It was so agreed.

Paragraph 35, as amended, was adopted.

Paragraph 36

91. Mr. EIRIKSSON (Rapporteur) said that, in the fifth sentence, the word "real" should be replaced by "truly". In the eighth sentence, the word "permissible" should be replaced by "permissive".

Paragraph 36, as amended, was adopted.

Paragraph 37

Paragraph 37 was adopted.

92. Mr. BARSEGOV, supported by Mr. PELLET and Mr. AL-QAYSI, objected that members had not had sufficient time to study document A/CN.4/L.452, which had been issued only that day, and was not yet available in all the working languages. It was unreasonable to expect the Commission to adopt any part of its draft report in such haste.

93. The CHAIRMAN said that members would have an opportunity to comment further, if they so wished, on the paragraphs of chapter VII which had been adopted at the meeting.

The meeting rose at 6.10 p.m.

2203rd MEETING

Friday, 20 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft report of the Commission on the work of its forty-second session (continued)

CHAPTER VII. *International liability for injurious consequences*

arising out of acts not prohibited by international law (concluded)
(A/CN.4/L.452)

B. Consideration of the topic at the present session (concluded)

Paragraph 38

1. Mr. TOMUSCHAT said that, in the third sentence, it would be preferable to replace the words "to comply with" by "to take".

It was so agreed.

Paragraph 38, as amended, was adopted.

Paragraph 39

2. Mr. BARBOZA (Special Rapporteur) said that the words "under another treaty, for example, or", in the second sentence, should be deleted.

3. Mr. PELLET said that the first sentence was rather weak and proposed that it also be stated that at least one member of the Commission had expressed reservations about the principle on which article 18 was based.

It was so agreed.

Paragraph 39, as amended, was adopted.

Paragraph 40

Paragraph 40 was adopted.

Paragraph 41

4. Mr. EIRIKSSON (Rapporteur) said that the word "regarded", in the third sentence, should be replaced by "considered" and the words "Very few", in the fifth sentence, by "A few".

5. After an exchange of views in which Mr. TOMUSCHAT, Mr. McCAFFREY and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the word "recommended", in the third sentence, by "indicated".

It was so agreed.

6. Mr. PAWLAK, supported by Mr. RAZAFINDRALAMBO, proposed that the words "should be forthcoming", in the fourth sentence, be replaced by "might be forthcoming".

It was so agreed.

Paragraph 41, as amended, was adopted.

Paragraphs 42 and 43

Paragraphs 42 and 43 were adopted.

Paragraph 44

7. After a brief exchange of views in which Mr. AL-QAYSI and Mr. EIRIKSSON (Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the first sentence to read: "The purpose of chapter IV, the Special Rapporteur explained, was to elaborate in specific articles the concept of liability, which as a principle was introduced in article 9 (Reparation)."

It was so agreed.

8. Mr. BARBOZA (Special Rapporteur) said that the word "include", in the sixth sentence, should be replaced by "contemplate".

Paragraph 44, as amended, was adopted.

Paragraph 45

9. Mr. PELLET said that paragraph 45, which was very long, dealt with two different ideas and it would have been better to explain them in two separate paragraphs. He also noted that the reservations which some members of the Commission had expressed about the existence in positive law of an obligation to pay compensation, the principle referred to in the first part of the paragraph, were not mentioned until paragraph 47.

10. He therefore proposed that, in the fifth sentence, the words "on the basis of which parties could negotiate" should be deleted and that the following new text should be added after it: "Some members also questioned the existence in present international law of an obligation to pay compensation in the absence of any breach of international law. Although accepting that such an obligation could be envisaged, they stressed that it would be a considerable innovation."

It was so agreed.

11. Mr. EIRIKSSON (Rapporteur) said that the words "and that approach was compatible", in the seventh sentence, should be replaced by "a proposition that was compatible".

Paragraph 45, as amended, was adopted.

Paragraph 46

Paragraph 46 was adopted.

Paragraphs 47 and 48

12. Mr. EIRIKSSON (Rapporteur) said that the words "Very few members", at the beginning of the penultimate sentence of paragraph 47, should be replaced by "A few members".

13. Mr. McCAFFREY said that it would be better to divide paragraph 47 into two paragraphs, the first containing the first four sentences, summarizing the statement by the Special Rapporteur, and the second summarizing the views of members of the Commission. He also suggested that paragraph 48, which was very short and also reflected the views of members, should be added to the second of those paragraphs.

14. Mr. PELLET said that, as a result of his amendment to paragraph 45, he would like to propose an amendment to the last part of paragraph 47. First, he suggested that the following two sentences be deleted: "Another member did not agree with the principle of full compensation. In his view, such a principle was not supported in State practice." Those two sentences would be replaced by the following text: "Another member of the Commission pointed out that, in practice, the kind of liability being dealt with in the present report was increasingly eclipsed by the implementation of rules normally applicable to responsibility for failure to comply with an obligation, and it might well be asked whether there was any real difference between the two régimes."

15. Mr. BENNOUNA said that, although he shared Mr. Pellet's view, he would prefer to retain the two sentences whose deletion Mr. Pellet had proposed, because they reflected his own attitude towards article 21.

16. Mr. PELLET said that the two sentences in question were not compatible with the sentence he had proposed adding to paragraph 47.

17. Mr. AL-QAYSI suggested that, in the sentence proposed by Mr. Pellet, the words “in the present report” should be replaced by “in the present topic”.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraphs 47 and 48 with the amendments proposed by Mr. McCaffrey and with the addition of the sentence proposed by Mr. Pellet, as modified by Mr. Al-Qaysi.

It was so agreed.

Paragraphs 47 and 48, as amended, were adopted.

Paragraph 49

Paragraph 49 was adopted.

Paragraph 50

19. Mr. EIRIKSSON (Rapporteur) said that the words “Very few” in the first sentence, should be replaced by “A few”.

Paragraph 50, as amended, was adopted.

Paragraphs 51 to 53

Paragraphs 51 to 53 were adopted.

Paragraph 54

20. Mr. PAWLAK proposed that, in the second sentence, the words “or of its people who suffered harm”, or at least the words “who suffered harm” should be deleted.

21. Mr. BARBOZA (Special Rapporteur) said that, instead of deleting that phrase, which reflected his own view, it would be better to replace it by the words “or of the party who suffered harm”.

22. Mr. PELLET said that the deletion of the words “who suffered harm” would meet Mr. Pawlak’s concern without adversely affecting the sentence.

23. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the words “or of its people”, in the second sentence, by “or of the party”.

It was so agreed.

Paragraph 54, as amended, was adopted.

Paragraph 55

24. Mr. MAHIU said that the third sentence was ambiguous. He proposed that it be replaced by the following text: “It was also asked whether *force majeure* belonged in that article.” He further proposed that the following sentence be added to reflect his point of view: “One member also stated that the wording of subparagraphs (a) and (b) of paragraph 1 of article 26 had to be harmonized, because full exemption of the State concerned from liability was justified not only by the fact that the harm was directly due to the events referred to in subparagraph (a), but also and in particular by the fact that the harm was wholly caused by those events.”

25. Mr. BARBOZA (Special Rapporteur) said he agreed that it was important to reflect that idea in paragraph 55.

26. Mr. EIRIKSSON (Rapporteur), noting that the new text proposed by Mr. Mahiou would require some changes in paragraph 55, proposed that the first sentence be deleted and that the second sentence be replaced by the following text: “On article 26, comments were made to the effect that it should also include terrorism as grounds for exoneration”. The two sentences proposed by Mr. Mahiou would come next, followed by the sentence beginning with the words “Article 27 was found rather vague . . .”.

27. Mr. PELLET said that the first sentence proposed by Mr. Mahiou departed substantially from the third sentence which was now contained in paragraph 55 and which should not be amended, in his view.

28. Mr. MAHIU said that he had tried to take account of all the views expressed, and that explained why the first sentence he was proposing was less precise than the original text.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 55 with the addition of the second sentence proposed by Mr. Mahiou, which began with the words “One member also stated . . .”, and with the Rapporteur’s amendments. The third sentence of the original text would remain unchanged.

It was so agreed.

Paragraph 55, as amended, was adopted.

Paragraph 56

30. Mr. KOROMA said that the Commission would have to revise the wording of article 28, paragraph 1 of which could be deleted, since it did not impose any obligation.

Paragraph 56 was adopted.

Paragraph 57

Paragraph 57 was adopted.

Paragraph 58

31. Mr. KOROMA proposed that the expression “subject-matter jurisdiction”, in the second sentence, be replaced by the standard Latin term and that the word “monetary”, in the third sentence, be replaced by “pecuniary”.

It was so agreed.

Paragraph 58, as amended, was adopted.

Paragraphs 59 to 61

Paragraphs 59 to 61 were adopted.

Paragraph 62

32. The CHAIRMAN, replying to a comment by Mr. KOROMA, proposed that, in the last sentence, the words “the topic of” should be inserted between the words “wrongful acts in” and “State responsibility”.

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 65

Paragraphs 63 to 65 were adopted.

Paragraph 66

33. Mr. BEESLEY said that paragraph 66 did not reflect the point of view he had expressed during the discussion and that, in general, it was too slanted towards the Special Rapporteur's opinion. The Special Rapporteur should work together with the Rapporteur to analyse what had actually been said on the question and to report it faithfully. As it now stood, the text gave the impression that members of the Commission had not even bothered to study the question of the "global commons". That was not only untrue, but also gave the wrong idea of the Commission.

34. Mr. TOMUSCHAT said that the end of the chapter was the weakest part of the report.

35. Mr. KOROMA said that he agreed with Mr. Tomuschat. He thought that paragraph 66 did not do justice to the depth of the Special Rapporteur's thinking or to the Commission's discussion, which had been more thorough than the text implied.

36. Mr. PELLET recalled that the statements on the question of areas beyond national jurisdictions had been very brief, and that probably explained why the paragraph relating to them left something to be desired.

37. Mr. BARBOZA (Special Rapporteur) said that the views expressed by members of the Commission on the question of the "global commons" had been more philosophical than legal. That was why the report referred to them only very briefly.

38. The CHAIRMAN suggested that Mr. Beesley should give the Rapporteur a short text which would be added to paragraph 66 to reflect the view he had expressed during the discussion.

39. Mr. TOMUSCHAT said that the words "Only a very few members made brief general comments", at the beginning of paragraph 66, were very negative.

40. After an exchange of views in which Mr. KOROMA, Mr. BARSEGOV and Mr. BARBOZA (Special Rapporteur) took part, the CHAIRMAN suggested that the first sentence should be amended to read: "Several members of the Commission made brief preliminary comments on the question of the 'global commons'."

41. Mr. BENNOUNA criticized the beginning of the last sentence: "It was felt that . . .". In his opinion, it should read: "Several members of the Commission took the view that . . .".

42. Mr. MAHIU and Mr. PELLET proposed that the last sentence should begin with the words "In the general view of those who spoke . . .".

43. Mr. EIRIKSSON (Rapporteur) pointed out that paragraph 8 of chapter VII stated: "The Commission therefore decided to come back to the issues raised in the sixth report at its next session."

44. The CHAIRMAN suggested that the last sentence of paragraph 66 should read: "The Commission decided to continue at its next session with a thorough consideration of the question of harm to the global commons."

45. Mr. BARSEGOV, supported by Mr. PELLET, proposed that the words "One member felt", at the beginning of the penultimate sentence, be replaced by "Some members felt".

46. Mr. PELLET proposed that the following sentence then be added after the penultimate sentence: "One of those members thought that the question could be dealt with in a separate draft."

47. The CHAIRMAN proposed that the Commission should adopt paragraph 66, on the understanding that the Rapporteur would revise it with the assistance of the Special Rapporteur in the light of the texts that would be submitted to him, taking into account the proposals made and the views expressed during the discussion.

Paragraph 66 was adopted on that understanding.

Paragraph 67

48. Mr. TOMUSCHAT said that he was not sure whether it was appropriate to seek the views of the Sixth Committee of the General Assembly on the question set out in subparagraph (b), which was purely a matter of legal technique.

49. Mr. BENNOUNA said that the question set out in subparagraph (c) was not clear enough. The question should be turned around, in order to ask whether it was private individuals who should bear liability for transboundary harm, rather than the State of origin.

50. Mr. PAWLAK said that he, too, was in favour of deleting subparagraph (b). In subparagraph (c), it was the word "whether" that was open to criticism. As he saw it, there was no doubt that liability existed: the only question was "to what extent", it should be borne by the State of origin.

51. Mr. BARSEGOV said that, if subparagraph (b) were retained, it would have to be worded more clearly. Subparagraph (c) would become meaningless if it were turned around as Mr. Bennouna had suggested.

52. Mr. ARANGIO-RUIZ said he agreed with Mr. Tomuschat that subparagraph (b) should be deleted. The idea of seeking the views of the General Assembly was a good one, but the Commission should not ask the Sixth Committee the same questions as the Sixth Committee had asked it. The General Assembly could not be approached in technical terms, but only on matters of legislative policy. The Commission's own discussions had shown that the question at issue was a legal one.

53. Mr. BARBOZA (Special Rapporteur) said that the question set out in subparagraph (b) was not only a legal one. It concerned article 18 (Failure to comply with the foregoing obligations), and, if it was not settled, it could be assumed that a potentially affected State might make representations to the State of origin and even take countermeasures.

54. As to subparagraph (c), international practice was unanimous, except that liability was attributed to the operator, i.e. to the individual. Ever since work had begun on the draft articles, it had been assumed that the State was considered liable. The time had now come, however, to ask the General Assembly whether that was the kind of liability it wanted.

55. Mr. McCAFFREY said that, in general, special rapporteurs had to have enough freedom to formulate the questions they considered necessary, since they were in the best position to narrow them down.

56. With regard to subparagraph (c), he agreed that the word “whether” should be deleted from the present formulation, as suggested by Mr. Pawlak, because it implied that, for the time being, there was no liability, and that was obviously not true. He proposed that the beginning of subparagraph (c) be amended to read: “whether and to what extent the draft articles should provide for liability of the State of origin for transboundary harm . . .”.

57. Mr. BEESLEY said that he supported that amendment. The problem was not whether the State was liable, but to what extent. The conventions in force were designed to limit such liability and the protection of the environment was only a spin-off. The limitation of liability conveyed by the words “to what extent” was a thorny problem that had a bearing on questions such as absolute and strict liability.

58. Mr. PELLET said that it was quite legitimate to turn to political bodies for guidance. He was therefore in favour of retaining subparagraph (b). As to subparagraph (c), Mr. McCaffrey’s amendment would be a good solution. The inversion proposed by Mr. Benouna, which would give pride of place to the individual rather than to the State, was interesting in an academic sense but was not justified in the present context because of the overall structure of the topic.

59. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to delete subparagraph (b) of paragraph 67 and to amend subparagraph (c) as proposed by Mr. McCaffrey (para. 56 above).

It was so agreed.

Paragraph 67, as amended, was adopted.

60. Mr. BENNOUNA said that he had reservations similar to those expressed by Mr. Arangio-Ruiz, since the question was one of principle. Purely legal questions should be settled in the Commission and not be referred to the General Assembly, which was a political body.

61. Mr. PELLET, recalling that the Chairman had indicated at the previous meeting that proposals might still be made on paragraphs already adopted, said that he would like additions to be made to two paragraphs in order better to reflect the discussion which had taken place in the Commission. At the end of paragraph 10, he proposed that the following sentence be added: “It was also suggested that the draft could be divided into two parts, the first part dealing with prevention and the second consisting of one or more model clauses on reparation.” At the end of paragraph 30, he proposed that the following sentence be added: “Several members also pointed out that, in general, the obligations of States under the provisions of chapter III were not very stringent and often less exacting than their obligations under positive law.”

62. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt those two amendments.

Mr. Pellet’s amendments were adopted.

Section B, as amended, was adopted.

Chapter VII of the draft report, as amended, was adopted.

63. Mr. BEESLEY said that he had reservations about chapter VII as a whole, and particularly about the parts of the chapter which were supposed to reflect the discussion that had taken place in the Commission. There was no trace in the summary of the discussion of the points he had raised and the proposals he had made, with the support, in some cases, of other members of the Commission. He gave specific examples and pointed out that the only reason he had not requested any changes or additions during the consideration of chapter VII, so that it would reflect more closely his views and those of other speakers, was that the Commission did not have enough time for such a major redrafting exercise.

CHAPTER VI. Relations between States and international organizations (second part of the topic) (concluded)* (A/CN.4/L.451)

B. Consideration of the topic at the present session (concluded)

Paragraph 11 (concluded)

64. Mr. EIRIKSSON (Rapporteur) submitted the following revised text for paragraph 11:

“There was general support in the Commission for the path charted for the topic by the Special Rapporteur in his fourth report. Some members pointed out that the Commission could now give the topic more attention, since it had completed or almost completed its consideration of other topics. Some members also emphasized the usefulness of the topic, which would put some order in the diversity and disparity of the law governing international organizations.”

65. Mr. BENNOUNA said that, contrary to what was stated in the first sentence of the new text, there had not been any general support and some members of the Commission, including himself, had even questioned whether the topic was worth studying and what the end result would be.

66. Mr. MAHIU said that, even though doubts had been expressed as to whether the topic should be studied, no one had denied the fact that, now that it was being studied, the approach adopted by the Special Rapporteur was the right one.

67. Mr. EIRIKSSON (Rapporteur) said that paragraph 11 should be read in the context of paragraphs 12 and 13, which reflected the objections that had been expressed. He proposed that the revised text of paragraph 11 be adopted, with the words “general support”, in the first sentence, replaced by “broad support”.

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraph 14 (concluded)

68. Mr. EIRIKSSON (Rapporteur) submitted the following revised text for paragraph 14:

* Resumed from the 2199th meeting.

"The Special Rapporteur, referring to views expressed by several members, recalled that the Commission's duty was to comply with the mandate assigned to it by the General Assembly and reaffirmed in annual Assembly resolutions on the report of the Commission. The meaning and orientation of the topic, as well as its content, had been defined by the Commission at its thirty-ninth session, in 1987, when it had approved the outline of the subject-matter which it had requested the Special Rapporteur to submit to it. The Special Rapporteur noted that many other topics on the Commission's agenda also encompassed aspects regulated by existing instruments. Referring to the Commission's role in the codification of international law, he stated that it would be useful to systematize and organize rules on the topic. Indeed, a close look at the international situation showed that there were many gaps to be filled and problems to be solved. For example, he noted, many problems had arisen in recent years between some organizations and host countries in connection with the rights and obligations of officials, experts and persons having official business with the organizations. The Special Rapporteur therefore emphasized the importance of considering the draft articles fully and referring them, following such consideration, to the Drafting Committee."

69. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the revised text of paragraph 14.

It was so agreed.

Paragraph 14, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VI of the draft report, as amended, was adopted.

CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (continued) (A/CN.4/L.447 and Add.1 and 2 and Add.2/Corr.1 and Add.3)

D. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/L.447/Add.2 and Corr.1)

SUBSECTION 1 (Texts of the draft articles provisionally adopted so far by the Commission)

Section D.1 was adopted.

SUBSECTION 2 (Texts of draft articles 16, 18 and X, with commentaries thereto, provisionally adopted by the Commission at its forty-second session)

Commentary to article 16 (International terrorism)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

70. Mr. TOMUSCHAT said that the second sentence was too general and therefore inaccurate. He proposed that the words "as defined in article 16" be added after the words "International terrorism".

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

71. Mr. EIRIKSSON (Rapporteur) submitted the following revised text for the first two subparagraphs of paragraph (4):

"Paragraph 2 concerns the participation of individuals in acts of terrorism by agents or representatives of the State. It does not cover acts of terrorism committed by individuals which have no link with international acts of terrorism as defined in paragraph 1.

"Notwithstanding the proportions which the phenomenon has assumed nowadays, particularly in the framework of certain entities (terrorist organizations or groups, which are usually motivated by the desire for gain), and the danger which it represents for States (certain organizations have financial or military means superior to those of certain States), it has not seemed possible to consider terrorism by individuals as belonging to the category of crimes against peace, to the extent that such activities are not attributable to a State. Certain members of the Commission, however, consider that terrorism by individuals should be covered."

72. Mr. KOROMA proposed that the bracketed phrase "certain organizations have financial or military means superior to those of certain States", in the second subparagraph of that text, be deleted. Care must be taken not to confer any kind of respectability on the organizations in question.

73. Mr. THIAM (Special Rapporteur) said that he did not object to the deletion of that phrase.

Mr. Koroma's amendment was adopted.

74. Mr. TOMUSCHAT, supported by Mr. MAHIU, said that he did not see why a sentence such as the last sentence of the second subparagraph should be included in the commentary to an article.

75. Mr. BENNOUNA said that it was in fact unusual to recall the position taken by members of the Commission in the commentary to an article. He proposed that the sentence in question be deleted.

76. Mr. THIAM (Special Rapporteur) said that he did not object to the deletion of that sentence.

Mr. Bennouna's amendment was adopted.

77. The CHAIRMAN suggested that the consideration of paragraph (4) be continued at the next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

2204th MEETING

Friday, 20 July 1990, at 3.10 p.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Qaysi, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Fran-

cis, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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**Draft report of the Commission on the work of its
forty-second session (concluded)**

CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (concluded) (A/CN.4/L.447 and Add.1 and 2 and Add.2/Corr.1 and Add.3)

D. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind (concluded) (A/CN.4/L.447/Add.2 and Corr.1)

SUBSECTION 2 (Texts of draft articles 16, 18 and X, with commentaries thereto, provisionally adopted by the Commission at its forty-second session) (concluded)

Commentary to article 16 (International terrorism) (concluded)

Paragraph (4) (concluded)

1. Mr. THIAM (Special Rapporteur) proposed that the first sentence of the third subparagraph of paragraph (4) be replaced by the following text: "Paragraph 2 deals with terrorist activities in which individuals acting with the support of the State are involved. But the question arises whether, in such situations, the individuals concerned should not be considered as accomplices."

2. Mr. MAHIOU said that he could accept the Special Rapporteur's amendment.

3. Mr. BENNOUNA was also willing to accept the amendment, but emphasized that it must be clear from the text that the Commission would also be reverting to paragraph 2 of article 16 in connection with crimes against humanity. He proposed that the second, third and fourth sentences of the third subparagraph of paragraph (4) be replaced by the following text: "Consequently, paragraph 2 will have to be re-examined in the light of the future provisions on complicity. Furthermore, the Commission intends to revert to international terrorism by individuals when it examines provisions relating to crimes against humanity."

4. Mr. THIAM (Special Rapporteur) supported Mr. Bennouna's amendment.

5. Mr. PAWLAK supported both the proposed amendments.

The amendments by the Special Rapporteur and Mr. Bennouna were adopted.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve the revised text of the first two subparagraphs of paragraph (4) submitted by the Rapporteur at the previous meeting (para. 71), as amended by Mr. Koroma and Mr. Bennouna at that meeting, and the third subparagraph as amended at the present meeting by the Special Rapporteur and Mr. Bennouna.

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 16, as amended, was approved.

Commentary to article 18 (Recruitment, use, financing and training of mercenaries)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

7. Mr. EIRIKSSON (Rapporteur) referred to the statement in the second subparagraph that "Article 47 of Additional Protocol I is an instrument of humanitarian law intended to grant mercenaries minimum protection". That sounded derogatory, and he would prefer the last part of the sentence to read: "... intended to grant mercenaries the minimum protection to which they are entitled".

8. Mr. THIAM (Special Rapporteur) said he thought that the existing wording was an adequate description of the purpose of Additional Protocol I.

9. Mr. TOMUSCHAT said that he, too, preferred the existing formulation. It was unnecessary to add anything, since the protection afforded to mercenaries by article 47 of Additional Protocol I already constituted an entitlement. However, the second subparagraph should mention the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

10. Furthermore, the 1974 Definition of Aggression¹ did not define mercenarism as a constituent element of aggression. It referred, in article 3 (g), to the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries". That was not the same as defining mercenarism as a constituent element of aggression.

11. Mr. JACOVIDES said he thought that the sending of mercenaries had perhaps become a constituent element of aggression.

12. Mr. THIAM (Special Rapporteur) said that, practically speaking, there was no difference between the use and the sending of mercenaries.

13. Mr. MAHIOU pointed out that the word "mercenarism" did not appear in existing treaty texts. It would be better to keep to the language of the instruments mentioned in the commentary. It was true, as the Special Rapporteur had said, that the scope of those instruments was not the same, but the common element was the attempt to make mercenarism a crime. There seemed to be something missing in paragraph (2).

14. Mr. PELLET said that the commentary should point to the difference between Additional Protocol I to the 1949 Geneva Conventions and the 1989 Convention on mercenarism. The latter was closer to the subject-matter of article 12 of the draft code. In the French text of the commentary to article 18, Protocol I was referred to in the past tense, although it was still in force.

¹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

15. Mr. THIAM (Special Rapporteur) agreed that the present tense should be used. As to the Definition of Aggression, it did in fact define mercenarism as one of the constituent elements of aggression, although it was only with the 1989 Convention that mercenarism had become an independent crime. Instead of using the words "a constituent element of aggression", the third sentence of the second subparagraph of paragraph (2) could speak of "one of the constituent elements of aggression".
16. Mr. AL-QAYSI disagreed. The constituent elements of aggression were set out in article 2 of the Definition of Aggression; the mercenary activities mentioned in article 3 were listed as examples of acts of aggression, subject to the provisions of article 2. To ensure consistency with the Definition of Aggression and with article 12 of the draft code, the third sentence of the second subparagraph of paragraph (2) should read: "The Definition of Aggression treats mercenarism subject to certain qualifications, as an example of an act of aggression."
17. Mr. THIAM (Special Rapporteur) proposed, in the light of Mr. Al-Qaysi's objection, that the sentence in question should read: "The Definition of Aggression makes mercenaries one of the constituent elements of aggression." The list of acts in the Definition of Aggression was intended to be illustrative, not exhaustive. It certainly included the sending or armed bands or mercenaries.
18. Mr. AL-QAYSI said that there was an important nuance which must be brought out. According to the Definition of Aggression, the sending of mercenaries would be an act of aggression if certain conditions—stated in article 2—were fulfilled. To say that mercenarism was a constituent element of aggression was a different matter.
19. Mr. McCAFFREY agreed: a constituent element of a crime was an element which must be present for the crime to exist. According to the Definition of Aggression, the sending of mercenaries was an act of aggression. He could accept Mr. Al-Qaysi's proposal, which included the important rider "subject to certain qualifications".
20. Mr. MAHIOU also supported Mr. Al-Qaysi's proposal. To say that mercenarism was a constituent element of aggression would mean that, if it was not present, there was no aggression. The existing wording of the commentary was ambiguous and could lead to difficulties.
21. Mr. BENNOUNA said he agreed with Mr. Mahiou that there was something missing in the existing wording of paragraph (2). Three international instruments containing provisions on mercenarism were referred to. It should therefore be explained how article 12 of the draft code related to those instruments, and what was new in it. It should also be stated that the 1989 Convention made mercenarism an independent crime.
22. Mr. THIAM (Special Rapporteur) said that he could accept Mr. Al-Qaysi's proposal. A sentence referring to the 1989 Convention, along the lines suggested by Mr. Bennouna, should also be added.
23. The CHAIRMAN suggested that paragraph (2) be approved, on the understanding that the text would be amended in accordance with the proposals made.
- It was so agreed.*
- Paragraph (2), as amended, was approved.*
- Paragraph (3)
24. Mr. TOMUSCHAT said that, in the second subparagraph, beginning "This is what distinguishes mercenarism . . .", it was not clear what the word "This" referred to.
25. Mr. THIAM (Special Rapporteur) said that a State had the right to engage mercenaries, even foreign ones, to fight its wars; but "mercenarism under the present draft article" meant mercenarism directed against a State for the purpose of destabilizing it, or used to undermine the right of a people to self-determination.
26. Mr. BENNOUNA thought that paragraph (3) was ambiguous. Why not refer to "the crime contemplated in the present article"? It would be preferable to avoid the term "mercenarism", which had no precise legal meaning.
27. Mr. EIRIKSSON (Rapporteur) thought that paragraph (3) was a good reflection of the work done so far, but it could be improved. The first subparagraph should make it clear that article 18 did not refer to mercenaries themselves, but to the recruitment, use, financing and training of mercenaries. Secondly, it should state that the persons responsible were agents or representatives of States. Finally, it should specify that the activities of mercenaries were directed against a State or against the exercise of the right of a people to self-determination—a right recognized by international law, as the Commission had stated in articles 14 and 15 of the draft code, adopted at its previous session.
28. The commentary should also make it clear that mercenaries were motivated by gain, whereas the motives of those who hired them were political.
29. Mr. MAHIOU said it should be made absolutely clear that the activity characterized as a crime in article 18 was not mercenarism itself, but the use of mercenaries by agents of a State. The Special Rapporteur would no doubt see to that point in the final wording.
30. The CHAIRMAN suggested that the Commission should suspend consideration of paragraph (3) for the time being and that the Rapporteur should draft a new text in the light of the proposals made.
- It was so agreed.*
31. Mr. BARSEGOV said that, in his view, members should not be raising substantive points at the current stage of proceedings.
- Paragraph (4)
32. Mr. THIAM (Special Rapporteur) drew attention to the following changes. The first sentence would read: "Paragraph 2 defines the mercenary himself, following the definition of a mercenary in article 1 of the 1989 Convention." The rest of the paragraph would be deleted.

33. Mr. EIRIKSSON (Rapporteur) said that it was necessary to insert a reference to armed conflict. He therefore proposed that the first two sentences of paragraph (4) should read: "Paragraph 2 defines the mercenary himself, following the definition of a mercenary in article 1 of the 1989 Convention and article 47 of Additional Protocol I to the 1949 Geneva Conventions. This definition refers to mercenaries recruited to fight in an armed conflict."

34. Mr. TOMUSCHAT said that he doubted the wisdom of making such a rigid distinction between paragraphs 2 and 3 of article 18. An attack designed to undermine the territorial integrity of a State could occur during an armed conflict.

35. Mr. EIRIKSSON (Rapporteur) said that, at the current stage, it would be sufficient to say that paragraph 2 dealt with armed conflicts and, in the commentary to paragraph 3, simply to use the language of paragraph 3 (a) of article 18.

36. Mr. THIAM (Special Rapporteur) expressed agreement with the Rapporteur's views. In reply to Mr. Tomuschat, he suggested that the commentary might state that paragraph 2 dealt with armed conflicts, whereas paragraph 3 dealt with situations independent of any armed conflict.

37. The CHAIRMAN suggested that the Special Rapporteur's proposal be transcribed for members to consider. In the meantime, consideration of paragraph (4) would be suspended.

It was so agreed.

Paragraph (5)

38. Mr. EIRIKSSON (Rapporteur) said that the second sentence was somewhat inelegant and proposed that it be amended to read: "Only his foreign nationality is relevant in this connection." He would like to know why the mercenary's foreign residence was not at issue.

39. Mr. BENNOUNA said that the Rapporteur's question raised complex legal problems. To simplify, it would be sufficient to state that the phrase "recruited locally or abroad" should be read with reference to paragraph 2 (c) of article 18. He thought that Mr. Tomuschat's comment concerning the distinction between paragraphs 2 and 3 (see para. 34 above) had been very pertinent, since there could be situations of undeclared war.

40. After further discussion, the CHAIRMAN suggested that the Rapporteur, the Special Rapporteur and the Chairman of the Drafting Committee should meet in informal consultation to draft new texts for paragraphs (3) to (7) of the commentary, taking into account the proposals made.

It was so agreed.

Commentary to article X (Illicit traffic in narcotic drugs)

Paragraph (1)

41. Mr. THIAM (Special Rapporteur) noted that, in the first sentence of the French text, the word *le* before *crime* should read: *de*.

42. Mr. MAHIOU, supported by Mr. PAWLAK and Mr. EIRIKSSON (Rapporteur), said it should be made absolutely clear that the crime of traffic in narcotic drugs was being introduced into the draft code as a crime against humanity. The necessary clarification might read: "In article X, the Commission is introducing the traffic in narcotic drugs into the code as a crime against humanity." That text might appear as a footnote to article X.

43. Mr. McCAFFREY agreed with that suggestion. In order to help the reader further, he suggested adding the heading "Crimes against peace" before article 16 and the heading "Crimes against humanity" before article X.

44. Mr. MAHIOU said that Mr. McCaffrey's suggestion was an excellent one.

45. He proposed that the following new sentence be added at the beginning of paragraph (1): "In adopting article X, the Commission has provisionally confined itself to illicit drug trafficking as a crime against humanity, even though the Special Rapporteur had also submitted a draft article on illicit drug trafficking as a crime against peace."

46. Mr. THIAM (Special Rapporteur) pointed out that, in his eighth report, draft article Y dealt with illicit traffic in narcotic drugs as a crime against humanity and draft article X dealt with it as a crime against peace (see 2150th meeting, para. 14).

47. Mr. TOMUSCHAT suggested that, at the end of the first sentence, the words "mankind as a whole" be replaced by "the international community".

48. Mr. BENNOUNA said that the third sentence should be recast, bearing in mind, among other things, that article X did not simply reiterate the terms of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. He suggested the following text: "Article X goes one step further by making the crime an international one, subject to certain qualifications."

49. Mr. THIAM (Special Rapporteur) said he could accept that amendment, but must point out that the 1988 Convention did not make illicit traffic in narcotic drugs an international crime. The Convention did not alter the status of the crime as a crime under national law; its purpose was to organize co-operation between States in the search for criminals and the definition of the crime.

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (1) with the amendments proposed by Mr. Mahiou (para. 45 above), Mr. Tomuschat and Mr. Bennouna.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

51. Mr. EIRIKSSON (Rapporteur) suggested that, in the third sentence, the term "individuals" be replaced by the words "private individuals". The sentence drew

a distinction between "agents of the State" and "individuals", and since agents of the State were also individuals, it was necessary to be more precise.

52. Mr. TOMUSCHAT proposed the deletion of the last two sentences, which related to "organizations, associations and other bodies". The Commission had taken no decision concerning collective responsibility. The whole discussion had been confined to the criminal responsibility of individuals.

53. Mr. THIAM (Special Rapporteur) said that the two sentences in question should be retained. They did not establish any collective responsibility; they merely dealt with the acts of private persons acting through organizations or associations such as companies formed under private law. The General Assembly had requested the Commission to deal with the problem of acts committed through entities when it had adopted resolution 44/39 of 4 December 1989, the title of which referred to the "International criminal responsibility of individuals and entities engaged in illicit trafficking". It was accordingly quite correct to suggest that such bodies corporate or legal persons as companies be given the same treatment as individuals under the draft code.

54. Mr. BENNOUNA pointed out that the Commission had not discussed the problem of attaching criminal responsibility to legal persons. Consequently, the last two sentences of paragraph (3) should be either recast or deleted.

55. Mr. JACOVIDES said that the sentences in question should specify that they related to the activities of private individuals acting within or on behalf of such entities as organizations or associations.

56. Mr. MAHIU said that the question of the criminal responsibility of legal persons had been discussed, but no conclusion had been reached. The best course would be to adopt the idea put forward by Mr. Jacovides and amend the penultimate sentence to read: "The term 'individuals' includes persons acting for or on behalf of organizations, associations and other bodies . . .". A similar change would be made in the last sentence, which would then read: "It also covers persons acting in the framework of financial institutions . . .".

57. Mr. THIAM (Special Rapporteur) accepted those proposals.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (3) with the amendments proposed by the Rapporteur and Mr. Mahiou.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

59. Mr. TOMUSCHAT said that the expression "for the purposes of an ethnic, racial or other group", in the last sentence, was difficult to understand. Did it mean that there could be an intent to supply a particular

group with drugs with a view to annihilating that group?

60. Mr. THIAM (Special Rapporteur) said that the expression was intended to cover the quite conceivable case of a particular group that was subject to discrimination in a given country being induced to take drugs. To meet Mr. Tomuschat's point, he suggested that the expression in question be replaced by "for the purpose of impairing the physical integrity of members of an ethnic, racial or other group".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were approved.

Paragraph (9)

61. Mr. MAHIU proposed that, in the second sentence, the words "for example" should be added before the words "for the preparation".

It was so agreed.

62. Mr. PAWLAK proposed that a sentence be added referring to the relevant international instruments on illicit traffic in narcotic drugs.

It was so agreed.

Paragraph (9), as amended, was approved.

The commentary to article X, as amended, was approved.

Commentary to article 18 (Recruitment, use, financing and training of mercenaries) (concluded)

Paragraphs (3) to (7) (concluded)

63. The CHAIRMAN said that the Rapporteur, together with the Special Rapporteur and the Chairman of the Drafting Committee, had prepared a revised text for paragraphs (3) to (6) to replace the original paragraphs (3) to (7). He invited the Rapporteur to present the revised text.

64. Mr. EIRIKSSON (Rapporteur) read out the following revised text:

"(3) Paragraph 1 sets the scope and limits of the crime dealt with in the article. It makes clear, first, that the crime is not constituted by the activities of the mercenaries themselves but rather by the acts of recruiting, using, financing or training of mercenaries. Secondly, the only persons to whom the crime can be attributed are agents or representatives of a State. Thirdly, to fall under the definition, the acts must have one of two objectives: the mercenaries must be recruited, used, financed or trained either for activities directed against another State, or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law. With respect to the phrase 'right of peoples to self-determination as recognized under international law', reference may be made to the terms of paragraph 7 of article 12 (Aggression) and to the use of the phrase 'right of peoples to self-determination as enshrined in the Charter of the United Nations' in article 14 (Inter-

vention) and article 15 (Colonial domination and other forms of alien domination).*

“(4) Paragraph 2 defines the mercenary himself, following the definition in paragraph 1 of article 1 of the 1989 Convention and paragraph 2 of article 47 of Additional Protocol I. The definition refers to a person recruited to fight in an armed conflict.

“(5) Paragraph 3, derived from paragraph 2 of article 1 of the 1989 Convention, defines an additional category of mercenaries, i.e. those recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State or undermining the territorial integrity of a State. The expression ‘in any other situation’ contrasts this category with that referred to in paragraph 2.

“(6) In recent years, the activities of this kind of mercenary have greatly increased in the third world.

* “See section D.1 above and the commentaries to articles 14 and 15 (*Yearbook . . . 1989*, vol. II (Part Two), pp. 69-70).”

65. Mr. TOMUSCHAT said that the revised text would require some drafting changes to improve the style.

66. The CHAIRMAN suggested that the Commission approve the revised text of paragraphs (3) to (6), on the understanding that the Rapporteur would make any necessary drafting changes in consultation with the Secretariat.

It was so agreed.

Paragraphs (3) to (6), as amended, were approved.

The commentary to article 18, as amended, was approved.

Section D.2, as amended, was adopted.

Chapter II of the draft report, as amended, was adopted.

The draft report of the Commission on the work of its forty-second session as a whole, as amended, was adopted.

Closure of the session

67. After an exchange of congratulations and thanks, the CHAIRMAN declared the forty-second session of the International Law Commission closed.

The meeting rose at 5.45 p.m.

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